



C.M.A(MD)No.820 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 20.07.2023

PRONOUNCED ON: 27.09.2023

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

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1. E.S.I. Corporation,
Sub Regional Office (Tirunelveli),
Salai Street,
Vannarpettai,
Tirunelveli 627 003,
represented by its Joint Director.

2. The Recovery Officer,
E.S.I. Corporation,
Sub Regional Office (Tirunelveli),
Salai Street, Vannarpettai,
Tirunelveli 627 003.

: Appellants

Vs.

Poojalakshmi Match Industries,
169, Madurai Road,
Chinthalakarai,
Ettayapuram Road,
Thoothukudi 628 902,
through its Partner.

: Respondent

PRAYER:- Civil Miscellaneous Appeal filed under Section 82 of the ESI Act, 1948, to set aside the order dated 06.01.2017, passed by the ESI Court (ie., Labour Court), Tirunelveli in E.S.I.O.P.No.20 of 2015.



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For Appellant : Mr.R.Ravindran

For Respondent : No Appearance

JUDGMENT

This Civil Miscellaneous Appeal is directed against the order passed in E.S.I.O.P.No.20 of 2015, dated 06.01.2017, on the file of the Employees State Insurance Court (Labour Court), Tirunelveli.

2. The respondent/petitioner has filed a petition under Section 75(1)(g) of the Employees State Insurance Act(hereinafter referred as E.S.I. Act) challenging the orders passed by the first appellant/first respondent under Section 45-A of the E.S.I. Act dated 19.11.2013.

3. The case of the respondent/ petitioner in short is as follows:

(a) The petitioner is manufacturing safety matches. The petitioner was allotted ESI Code Number 66-000-31211-000-0303 and they had been implementing the ESI and EPF schemes to their employees from



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2006 onwards. The petitioner has remitted ESI contribution upto 2/2010 regularly. Subsequently the business of the petitioner went on loss and is not functioning with effect from November 2011. All the employees of the petitioner had left voluntarily and machineries were already sold. The non-functioning of the industry had already been intimated to the first respondent and other statutory authorities.

(b) Meanwhile, the first respondent has issued a notice dated 19.03.2015 for recovery of the alleged contributions for the period from 03/2010 to 11/2011 and 12/2011 to 12/2012 directing the petitioner to remit a sum of Rs.5,77,899/- and Rs.3,69,477/- based on the orders dated 19.11.2013 passed under Section 45-A of the ESI Act. During the relevant period from 03/2010 to 12/2012, the petitioner remitted the EPF amount with great difficulty and they are prepared to remit the ESI contribution for the disputed period based on the wages mentioned in the EPF. The total wages for the period from 03/2010 to 12/2012 comes to Rs.6,11,668/- and as such, the ESI dues payable for the said period comes to Rs.39,758/-.



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(c) The petitioner understands and believe the same be true that the first respondent without providing reasonable opportunity determined the alleged contribution. The petitioner came to know that the first respondent has issued a certificate dated 19.03.2015 to the second respondent – Recovery Officer directing him to initiate steps to recover the alleged amount from the petitioner. Hence, the petitioner is constrained to file the above petition challenging the orders passed under Section 45-A of the ESI Act and the consequent recovery action.

4. The defence of the appellants/respondents in short is as follows:

The petitioner has failed to pay contribution in respect of their employees on the basis of 45-A orders Nos.312/13 and 313/13, dated 19.11.2013 passed by the appellants/respondents and hence, the recovery action has been initiated for the recovery of the contribution for the period from 3/2010 to 11/2011 and 12/2011 to 12/2012. The ESI contribution is determined on the basis of total emoluments (Basic, DA and all other allowances) paid to an employee per month as defined in “Wages” under Section 2(22) of ESI Act. Hence, the contention that the petitioner is willing to pay ESI contribution on the basis of EPF wages cannot be accepted. The respondents are not aware of the non-



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functioning of the petitioner Industry with effect from November 2011.

The petitioner has not informed the above aspect to the respondents. The first respondent – Corporation has passed the orders No.312/13, dated 19.11.2013 under Section 45-A of ESI Act, after giving reasonable opportunity to the petitioner on 05.09.2012, 04.10.2012, 19.03.2013 and 17.10.2013. Similarly the first respondent has passed 45-A Orders No. 313/13, after giving reasonable opportunity to the petitioner on 19.03.2012, 19.03.2013 and 17.10.2013. The petitioner did not attend the personal hearing on the above dates and failed to submit any written statement furnishing the contribution actually due in respect of the wages paid to the employees as per their records. Hence, the first respondent has passed 45-A orders on the basis of the Best Judgment Method and as such the same are fair and reasonable and in accordance with law and hence, the petition is liable to be dismissed.

5. During enquiry, the petitioner and the respondents have not adduced any oral evidence. The petitioner has exhibited six documents as Exs.P.1 to P.6. The respondents have exhibited two documents as Exs.R.1 and R.2. The learned Judge of the ESI Court, upon considering the documentary evidence and on hearing the arguments of both sides,



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has passed the impugned order dated 06.01.2017, setting aside the two 45-A orders dated 19.11.2013 and directed the petitioner to pay ESI contribution at Rs.39,758/- calculated on the basis of EPF norms along with the interest. Aggrieved by the impugned order, the ESI Corporation has come forward with the present appeal.

6. The Substantial Questions of Law arise for consideration in this Civil Miscellaneous Appeal are as follows:

(1) Whether the ESI Court erred in setting aside the orders passed under Section 45-A of the ESI Act, despite showing that the ESI Corporation, after affording sufficient opportunities to take part in the enquiry and since they have failed to attend the enquiry, has passed the impugned order by following the Best Judgment Method, determining the contribution payable by the petitioner?

(2) Whether the ESI Court erred in calculating the ESI contributions on the basis of the “Wages”, as per the EPF Act, when the wages shown in the ESI Act and the EPF Act are entirely different?

(3) Whether the impugned order dated 06.01.2017, passed in ESIOP No.20 of 2015 is liable to be set aside?



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7. The petitioner has challenged the order passed under Section 45-A of the ESI Act, dated 19.11.2013, determining the ESI contribution at Rs.5,77,899/- for the period from 03/2010 to 11/2011 under Ex.R.1 and the second order passed under Section 45-A of the ESI Act dated 19.11.2013 determining the contribution at Rs.3,69,477/- for the period from 12/2011 to 12/2012 under Ex.R.2. It is evident from the records that the first respondent has initially issued notice under Form C-18 (Adhoc), dated 23.02.2012 and 22.02.2012 to show cause as to why the contribution should not be assessed as provided under Section 45-A of the ESI Act. According to the appellants, since the petitioner did not attend the personal hearings and produced the statement of returns, furnishing the particulars with regard to the number of employees and wages paid to them, the ESI Corporation, with no other option, by adopting the Best Judgment Method has determined the ESI contribution and passed orders under Section 45-A of the ESI Act.

8. The main contention of the petitioner is that the reasonable opportunity was not given to the petitioner before determining the ESI contribution and passing of orders under Section 45-A of the ESI Act. As rightly contended by the learned Counsel for the respondents, the



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petitioner in their main petition has stated that they came to understand and believe the same be true that the first respondent without providing reasonable opportunity, determined the contribution and as such, the petitioner themselves were not aware about the opportunities given to them. Even according to the petitioner, they have remitted ESI contribution till 02/2010. According to the petitioner, their match industry was not functioning with effect from November 2011, but the petitioner has not offered any reason or explanation for non-payment of ESI contribution from 02/2010 till their alleged closure of factory.

9. As already pointed out, it is the specific case of the respondents that despite personal hearings were given, the petitioner has not utilised the said opportunities and failed to appear for the hearings. It is not the specific case of the petitioner that they have not received any notice or orders from the ESI Corporation during the relevant point of time. As rightly contended by the learned Counsel for the respondents, since the petitioner factory was already covered under ESI Act and they are remitting the contribution, the contention that the impugned orders were passed without giving any reasonable opportunity is very hard to believe.



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10. The next contention of the petitioner is that they are ready to pay the ESI contribution on the basis of the EPF wages. As rightly contended by the learned Counsel for the ESI Corporation, it is not for the petitioner to decide, the basis on which, the ESI contribution has to be made and is duty bound to pay the ESI contribution, calculated as per the provisions of the said Act. The learned Counsel for the ESI Corporation would submit that the EPF wages calculation has the ceiling limit of Rs.6,500/-p.m., and the same is not in conformity with the ESI wages equivalent which has a ceiling limit of Rs.16,000/-p.m.. More importantly, according to the learned Counsel for the respondents, the wages under the EPF Act consists of Basic ad DA only and whereas the definition of “wages” under Section 2(22) of the ESI Act includes Basic, DA, House Rent Allowance, City compensatory Allowances, Overtime Wages, Night Shift Allowance, Heat, Gas and Dust Allowance, Children Education Allowance, Medical Allowance, Interim Relief, Driver's Allowance etc., and that the wages as per the ESI Act is always on the higher side than under the EPF Act. Considering the above, the willingness of the petitioner to pay the ESI contribution as per the EPF Act cannot be accepted.



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11. No doubt, the petitioner has furnished the particulars of the wages paid for the period between 03/2010 and 12/2012 and according to them, the same would come to Rs.6,11,668/- and the ESI due to be payable is Rs.39,758/-. The ESI Court, without taking note of the differences shown in wages in both the ESI and EPF Act, has observed that the respondents have not stated that as to how and in what way they would receive more contribution and that since the respondents have not dispute the wage particulars given by the petitioner, has come to a decision that ESI contribution has to be calculated as per the wages shown by the petitioner. The very approach of the ESI court in calculating the ESI contribution on the basis of the wages defined under EPF Act and fixing the ESI contribution at Rs.39,758/- is not only improper, but unwarranted and not in accordance with law.

12. Now turning to the application of Best Justment Method, the ESI Court itself has relied on the decision in ***AP.Handloom Waivers Co-operative Society, Hyderabad Vs. E.S.I. Corporation, Hyderabad*** reported in ***1988 II LLJ 515***, wherein it was held that if an employer has not complied with the provisions of the Act for filing necessary returns and produce the relevant registers, the ESI Corporation can very well



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initiate the proceedings under Section 45-A of the Act, by way of best judgment assessment.

13. At this juncture, it is necessary to refer the decision of the Hon'ble Division Bench of the Kerala High Court in ***the Regional Director, ESI Corporation, Thrissur Vs. Hotel Amma and others*** reported in ***1998 LAB I.C., 2442***, wherein the Division Bench has specifically observed that if the employer filed an application under Section 75 of the ESI Act to get a declaration that the applicant establishment is not covered by the Act, the burden is on the applicant to prove their case by leading evidence and the relevant passage is extracted hereunder:

“ 8. The answer to the question of law now formulated by us is available in the very recent decision of the Supreme Court reported in [E.S.I. Corporation v. F. Fibre Bangalore \(P\) Ltd.](#) (1997-II-LLJ- 739). The said appeal was filed before the Supreme Court by special leave against the judgment of the Division Bench of the Karnataka High Court, which in turn followed the ratio of the judgment of the Full Bench in MFA 147/74 dated April 19, 1978. The Full Bench of the Karnataka High Court held thus:



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The person who comes to the Court with a grievance has a duty to establish his case by leading evidence, oral and documentary and substantiate his claim. The basic principle has been set out in [Section 102](#) of the Evidence Act which reads as follows:

"102. On whom burden of proof lies-The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

The respondents have no case that they are entitled to succeed if no evidence at all is let in by either side. So necessarily the onus lies on the respondents herein to let in evidence first and establish their case."

14. As rightly contended by the learned Counsel for the respondents, the petitioner who has filed the main petition challenging the orders of the ESI Corporation by alleging some grounds, but they have not adduced any evidence to substantiate the same. Admittedly, the petitioner has produced the order and notices issued by the ESI Corporation as Exs.P.1 to P.4 and the licence granted to the petitioner factory under Ex.P.5 and the challans for the payment of the EPF amount under Ex.P.6. Except the above, the petitioner has not produced any iota



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of materials or evidence to prove the grounds upon which the impugned orders came to be challenged.

15. Now turning to the petitioner's half- hearted defence that they have already closed their factory from November 2011 and as such, they are not liable to pay ESI contribution, it is not their case that they have already produced necessary records before the ESI Corporation that they have already closed their factory, that the employees had already left their factory and that therefore, the question of paying ESI contribution for the subsequent disputed period does not arise at all. Though the petitioner in the main petition alleged that they have already informed the same to the respondents, they have not produced any material or evidence to show that the factum of closure was intimated to the ESI Corporation. Moreover, as rightly contended by the learned Counsel for the respondents, the petitioner has not produced any materials or documents before the ESI Corporation to show that the petitioner industry is not functioning from November 2011. They have not even chosen to produce the said records before this Court in the present appeal.



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16. Considering the above, this Court has no hesitation to hold that the impugned order of the ESI Court setting aside the orders passed under Section 45-A of the ESI Act is not valid and legal and as such, the same is liable to be set aside. Considering the other facts and circumstances, this Court further decides that the parties are to be directed to bear their own costs and the above Substantial Questions of Law are answered accordingly.

17. In the result, the Civil Miscellaneous Appeal is allowed and the impugned order dated 06.01.2017, made in E.S.I.O.P.No.20 of 2015, on the file of the E.S.I. Court (Labour Court), Tirunelveli is set aside. The parties are directed to bear their own costs.

27.09.2023

NCC : Yes : No

Index : Yes : No

Internet : Yes : No

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- To
1. The E.S.I. Court (Labour Court), Tirunelveli.
 2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court, Madurai.



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K.MURALI SHANKAR,J.

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PRE-DELIVERY JUDGMENT MADE IN

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