



C.M.A. No. 2105 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.01.2024

CORAM:

THE HONOURABLE MR. JUSTICE K. RAJASEKAR

C.M.A. No. 2105 of 2021

1. The Deputy Director
Employees State Insurance Corporation,
Regional Office (Tamilnadu)
143, Sterling Road, Chennai-600 034
2. The Recovery Officer,
Employees State Insurance Corporation,
Regional Office (Tamilnadu)
143, Sterling Road,
Chennai-600 034

... Appellants / Respondents 1 & 2

Vs.

Bharat Insulations & Enterprises
41/2, Chetty Street,
Zamin Pallavaram
Chennai-600 043
Represented by its partner

... Respondent /Appellant

Civil Miscellaneous Appeal filed under Section 82(2) of Employees State Insurance Act, against the Order and Decree dated 11.03.2021 passed in E.I.O.P. No.116 of 2007 on the file of the Employees Insurance Court, Principal Labour Court, Chennai.



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For Appellants : Mr.G.Narmadha

For Respondent : No appearance

JUDGMENT

This Civil Miscellaneous Appeal has been filed by the ESI Corporation to set aside the Order passed in E.I.O.P. No.116 of 2007, dated 11.03.2021, by the Principal District Judge, ESI Court, Chennai.

2. For the sake of convenience, the parties are referred to hereunder according to their litigative status and ranking before the Tribunal.

3. The respondent-Bharat Insulations & Enterprises is covered under the provisions of ESI Act and that on 08.03.2006, the Social Security Officer carried out inspection and submitted a report to the ESI Authorities. Based on the Inspection Report, Adhoc Notice with Form C-18 was served on the respondent seeking production of documents and other relevant records for the period from 2000 – 2005 regarding labour charges paid by the Engineering Division. However, the respondent has not participated or submitted any reply to the notice.



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4. Based on the records available with the ESI Corporation, Order under Section 45 A of the ESI Act was passed determining the ESI contribution totally at Rs.1,92,342/- and ordered to be paid within a period of 15 days from the date of receipt of a copy of this Order. Subsequently, on 06.08.2007 the appellant has initiated recovery proceedings and by issuing Form C-19 notice. Thereafter, the respondent herein has approached the ESI Court by invoking Section 75 of the ESI Act for declaration of the Order passed by the appellant as null and void and also stalled the recovery proceedings.

5. Before the ESI Court, the respondent has submitted that he is the Manufacturer of Pharmaceuticals Machinery called as Bhuvaneswari Industries. This establishment is covered under the provisions of the ESI Act and they have been paying contribution regularly. Based on the report of the Social Security Officer inspection, they have been served the Show Cause Notice for the contribution period from 2000 – 2005 in respect of labour charges paid to the third party establishment. However, they were not able to attend the hearing due to unavoidable circumstances and subsequently, the



Order under Section 45-A has been passed. Contributions claimed under various payments were made to the third party establishments wherein, certain lathing work, milling work and fitting jobs were carried out in the third party establishments. These establishments were also covered under the provisions of ESI Act and they have not having any supervising control over the workmen for the third party establishment. Hence they are not liable to pay compensation. The respondents have also produced Ex.P1 to Ex.P21 in support of their claims. They have also examined their Manager as an witness.

6. The ESI Corporation has countered the petition stating that inspite of sufficient opportunity provided, the respondent has not come forward to submit the records. Hence, under Section 45-A of ESI Act, Final Order has been passed and fixing the contribution to be paid by the respondent. They have also disputed various bills and records produced in support of the respondent herein to show that the manufacturing activities were carried out by the third parties and payments were made by the third parties has not been supported by any documents. Further it is contended that Form C-19 dated 06.08.2007 for Rs.2,21,367/- was also valid and the



respondent is liable to pay contribution. Based on the pleadings made, the

ESI Court has framed the following issues:

- 1. Whether the petitioner is not liable to pay ESI contribution in terms of order of the first respondent dated 26.05.2007?*
- 2. Whether the petitioner is entitled for permanent injunction restraining the respondents from claiming contribution in terms of the first respondent's order dated 26.04.2007 and consequential recovery proceedings dated 06.08.2007 issued to the second respondent and the second respondent's attachment order dated 23.08.2007 issued to the bankers of the petitioner?*
- 3. To what relief, if any, the petitioner is entitled?*

7. After appreciating the evidences placed on record, the Principal Labour Court has held that the inspector of police, who conducted the inspection has not examined any of the regular employees and so as to establish that no work was given to the third parties in the manufacturing process. Further the Principal Labour Court has held that the burden of proof the fact that the manufacturing activities were carried out inside the premises or by the employees of the respondent is on the appellant ESI Corporation. But they have not proved the same hence they are not entitled to claim contribution as quantified by them. The E.S.I Court has also



accepted Exs.P6, P7, P9, P10 and P11 which are Delivery Challans, Stock Receipts, Bills raised and copy of statement of contractors who have been outsourced or sufficient to prove that the manufacturing activities were taken place outside the respondent premises. These are the payments made to the contractors and accepted the above bills and account statements to show that there were no manufacturing activities carried on by the respondent herein.

8. Aggrieved over the above finding, the ESI Corporation has approached this Court by way of filing appeal by raising the following substantial question of law.

1. Whether the ESI Court is correct in relying upon the delivery challan/bills produced by the respondent to decide that there was no supervision by the respondent on the employees of the Contractors without knowing the terms of the execution of work?

2. Whether the finding of the ESI Court that the burden to establish that the work was done at the premises of the Contractors alone is not against the principal of onus of proof set out in Sec.102 of Evidence Act?

9. The learned counsel for the appellant - ESI Corporation has



submitted that the burden of proving the documents more particularly, the Account Statements, Bills and Challans as genuine, on the respondent since he has approached the ESI Court seeking quashing the Order passed by the appellant herein. However, the ESI Court has shifted the burden on the appellant herein on the ground that the appellant has to prove the manufacturing activities. The Inspection Report itself is sufficient to show that there was a manufacturing activity which was recorded based on the observation made at the time of inspection in the premises. This has not been properly appreciated. Further the evidence of R.W.1 is only to support the case of ESI Corporation that inspite of opportunity given to the respondent to produce all those documents and exhibits to show that the manufacturing activity were not carried on by him and the manufacturing activity were outsourced to the contractors. Hence, the Order of ESI Court is not sustainable and prays to set aside the same.

10. In spite of notice served on the respondents they have not come forward to contest the appeal herein.

11. The learned counsel for the ESI Court has relied on the



Judgment of the Kerala High Court in ***E.S.I. Corporation vs. Hotel Amred***

[1998 (79) FLR 961 : 1998 II-LLJ 1157 Ker] while deciding the question of burden of proving the case of the factory or establishment by following the Division Bench Judgment of the Kerala High Court in Paragraph No.8 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:*

“In the result, we answer the question referred to us as follows:

Where in cases to which provisions of Section 45-A of the Act are attracted, the Corporation by an order made in accordance with that Section determines the amount of contribution payable and that claim is disputed by the employer, it would not be necessary for the Corporation to seek a resolution of the dispute before the Insurance Court. Such a claim is recoverable as arrears of land revenue. If the employer disputes the claim it is for him to move the Insurance Court for relief. In other cases- other than cases where determination of the amount of contributions under Section 45-A is made – the Corporation if its claim is disputed by the employer should seek an adjudication of the dispute before the Insurance Court before enforcing recovery.”



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“The above ruling was reversed by the Supreme Court in the decision referred to above. The Supreme Court was of the view that the Full Bench of the Karnataka High Court was clearly in error to reach the above conclusion. The Supreme Court held that though Section 75 of the Act does not envisage as to who has to approach the Insurance Court, by necessary implication when the employer denies the liability or applicability of the provisions of the Act or the quantum of the contribution to be deposited by the employer, it is for him to approach the Insurance Court and seek adjudication and it is not for the Corporation in each case, whenever there is a dispute, to go to Insurance Court and have the dispute adjudicated. Otherwise the Act would become unworkable and defeat the object and purpose of the Act. The Supreme Court also held that the Division Bench of Karnataka High Court, having followed the Full Bench Judgment, fell into the same error and set aside that part of the Judgment of the Full Bench and of the Division Bench which was not consistent with the declaration of law by the Supreme Court. The Insurance Court was directed to determine the contribution payable by the respondent before it. We are of the view that the stand taken by the applicants praying the Court to direct the Corporation to lead evidence first in the application filed under Section 75 of the Act for declaration that they will not come under the purview of the Act is fallacious. 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



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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.”

12. The learned counsel also relied on the Judgment of this Court in ***C.M.A. No.300/2021, dated 26.03.2021 [Employees State Insurance Corporation vs. M/s. Broadline Computer Systems]***. In this case, the principal employer of the factory was served with Show Cause Notice, Form C-18, Adhoc Notice, to produce all the documents to support their account which is accounts relating to the year 2000-2001 to 2004-2005 for the five years period, the labour charges paid on the side of the engineering divisions. These entries were made after inspection of the records. But the respondent has not come forward to submit the records to show that he is not liable to pay the contributions. Thereafter, the Order under Section 45-A has been passed by the Authority. After issuance of Form C-19, the respondent herein has approached the ESI Court. According to him, the manufacturing activity were outsourced and he has produced the various bills to show i.e., Exs.P6, P7, P9, P10 and P11.

13. On perusal of Ex.P6 - Delivery Challan issued by



Bhuvaneshwari Industries in favour of Sri Kannan Engineering Industries

shows that it is the case of the respondent herein that Easwari Industries is none other than the respondent herein. It is an admitted fact that both Bhuvaneshwari Industries and Bharat Insulations & Enterprises are different factory and units and it is also an admitted case of the respondent that the respondent was having two divisions and one of the division is called Bhuvaneshwari Industries. This shows that Ex.P6-Copy of deliver note was issued by Bhuvaneshwari Industries in favour of Sri Kannan Engineering Industries, dated 13.12.2003 which was relating to delivery of 5 numbers of machineries. Ex.P7 is the delivery challans issued by Sri Kannan Engineering Industries in favour of Bhuvaneshwari Industries. Similarly, Ex.P8 is also a Copy of stock/receipt challan, dated 31.12.2003. Ex.P9 is the Copy of bill issued in favour of Bhuvaneshwari Industries by Sri Kannan Engineering Industries which is dated 31.12.2003.

14. The above documents shows that delivery of machineries taken place in the Month of December 2003, whereas, the Order passed under Section 45-A relating to the five year period starts from 2000-2001 and 2004-2005. No documents relating to the labour charges paid to the



Engineering division during the financial years 2000-2001, 2001-2002, 2003-2004 and 2004-2005 have been produced by the respondent herein.

Since it is the admitted case of the respondent that they are having two divisions, the documents produced which are relating to the division namely Bhuvanewari Industries whereas, the amount claimed after inspection with regard to the division namely Bharat Insulations & Enterprises situated in 41/2, Chetty Street, Zamin Pallavaram, Chennai. Bhuvanewari Industries is situated at Old Trunk Road, Chennai-43. It shows that both the divisions are functioning in different places and the documents issued in favour of Bhuvanewari Industries during the financial year 2003-2004 in the Month of December 2004 has been utilized to support the case of the respondent for the 5 year period which is not at all sustainable. There is no iota of evidence produced before the ESI Corporation to show that any bills or vouchers relating to other periods have been produced. Even bills produced as Ex.P6 to Ex.P9 before this Court also related to Bhuvanewari Industries which is admittedly a separate unit which is functioning at different place/unit, could not be accepted as related to the respondent. Hence this Court is of the view that without any basic evidence connecting the respondent manufacturing activity with Bhuvanewari Industries. The finding of ESI Court that



documents exhibited clearly shows that to prove the outsourcing of work is perverse and it is based on the records which are inadmissible in favour of the respondent herein and based on no evidence and perverse.

15. As far as the question of law relating to burden of proof is concerned as stated by the Full Bench Judgment of the Karnataka High Court followed by the Division Bench Judgment of the Kerala High Court and this Court, it is the burden on the part of the person who has approached the E.S.I. Court seeking Order in his favour. Admittedly, the Respondent has not produced any document in pursuance of Adhoc Notice Form C-18, and not participated in the enquiry. The respondent herein has directly approached the ESI Court by invoking Section 75 of the Act, initiated original proceedings to set aside the Section 45-A Order of the Authorities. Respondent produced new documents and he has to prove the same by producing Corroborative materials. The production of some delivery challans alone is not sufficient to support his case that he has proved his claim that he has carried out the manufacturing activity by way of outsourcing. The important fact to be proved by the Respondent is factum of outsourcing by way of producing outsourcing contract or any other



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documents. But it has failed to prove the outsourcing activity and in the absence of proving the outsourcing activities by probability its case, the burden has not been shifted on the ESI Corporation. Further apart from outsourcing other facts of payments made to contributions also not produced. Thus, the finding of the ESI Court that the ESI Corporation has failed to discharge their burden of proof is against the Principles of Rules of evidence relating to burden of proof, and the same is hereby liable to be rejected.

16. Accordingly, the Civil Miscellaneous Appeal filed by the ESI Corporation is allowed. The Impugned Order passed by the Employees Insurance Court, (Principal Labour Court), Chennai in E.I.O.P.No.116 of 2007, dated 11.03.2021 is hereby set aside. There shall be no order as to costs in the present appeal.

05.01.2024

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Index:Yes
Speaking Order:Yes
Neutral Citation Case: Yes

To:



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1. The Principal Labour Judge,
Employees Insurance Court
Chennai

2. The Section Officer,
V.R.Section,
High Court,
Chennai.

K. RAJASEKAR, J.



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