IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 05.02.2024	PRONOUNCED ON: 16 .02.2024

CORAM

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI,J.

C.M.A.No.1656 of 2021

The Employees State Insurance Corporation,
Rep., by its Deputy Director, Coimbatore. …Appellant

Vs.

M/S.Gopal Ranga Foundry
A firm rep by its,
Partner Mr.G.Jayabalan
Coimbatore-641 028.
…Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 82(2) of ESI Act, against the order dated 07.08.2020 made in E.S.I.O.P.No.14 of 2018 on the file of the Employees State Insurance Court, Coimbatore.

For Appellant : Mr.G.Narmadha
For Respondent : Mr.P.Thangaraj

JUDGMENT

The Appellant/ESI Corporation has come up with this appeal challenging the order dated 7.08.2020 made in E.S.I.O.P.No.14 of 2018 passed by the Employees State Insurance Court, Coimbatore.

2.Heard the learned counsel appearing for the appellant and learned counsel for the respondent and perused the material documents available on record. This matter is taken up for disposal on merits.

For the sake of convenience, the parties are referred to as described before the Employees State Insurance Court, Coimbatore in E.S.I.O.P.No.14 of 2018.

Facts

3.The Petitioner is a Partnership Firm engaged in Foundry business, that manufactures castings, textile machineries, their spare parts etc., on job orders placed by outside parties. The Petitioner does not on its own accord manufacture and sell but manufacturers on job orders only. The business was on even line till October 2013. Gradually there were no job orders and the business came to a standstill. The Petitioner was hoping improvement in the situation, but it did not. No work could be provided to the employees and the Petitioner incurred losses. The employees numbering 7 also left settling their accounts. The Petitioner decided to close down the unit, surrendered the factory license to the Inspectorate of Factories and closed down the Petitioner's unit with effect from 30.11.2013 and sent the closure report also to the Inspectorate of Factories. Certain incidental balance work of job orders already taken was carried out till 31.05.2014. The partners are doing trading, without any single employee in employment. As a result, the Petitioner factory was closed with effect from 30.11.2013. The Respondent issued show cause notice dated 10.11.2016 proposing to levy Rs.5,14,800/- for the contribution period from 01.04.2011 to 10/2012. The Respondent offered personal hearing on 14.12.2016. The partner of the Petitioner attended the personal hearing on 14.12.2016, submitted explanation dated 14.12.2016 and the records namely Muster Roll, Wages Register, Profit and Loss Account Statement, Income Tax Returns etc., and pleaded non-liability on account of closure of the unit from 30.11.2013. Subsequently, on 05.01.2017 and

27.03.2017, but before production used the order dated 08.06.2017, levying contribution of Rs.1,76,858/- for the contribution period 09.06.2012 to 31.07.2016, observing certain aspects against the petitioner, which are factually incorrect. The closure is genuine and hence the question of payment of contribution and submitting the returns after 30.11.2013 does not arise, if at all the petitioner was due in any amount that can be upto 30.11.2013 and not beyond that. The Respondent should not have invoked Section 45-A of the ESI Act. Having verified the records produced by the Petitioner, the Respondent ought not to have assessed contribution on assumed figures/adhoc basis for the period from 9.06.2012 to 31.07.2016. The Petitioners have filed appeal dated 28.08.2017 before the Additional Commissioner/Appellate Authority under Section 45-AA of the Act, but the Appellate Authority dismissed the appeal by order dated 05.09.2017. The order of the Respondent dated 08.06.2017 is the arbitrary, illegal, unjustified and liable to be set-aside.

4. On the side of the respondent/ESI the averments made by the petitioner is stoutly denied, that, the employees numbering 7, left settling their accounts; closed down the Petitioner Unit with effect from 30.11.2013. The

averments of the Petitioner that certain incidental balance work of the job orders already taken was carried out till 31.05.2014 and the Partners are doing trading at present are admissions of the Petitioner that the Petitioner Unit is working continuously much alive and is invariably covered under the Act continuously as per the provisions under Section 1(6) of the Act.

5.Section 1(6) "A factory or an establishment to which this Act applies shall continue to be governed by this Act, notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under this Act or the manufacturing process there in ceases to be carried on with the aid of power". In view of the above proviso under Section 1(6) of the Act and the present position and facts of the firm that the Petitioner Unit is continuously covered under the Act and there is no closure in the eyes of law. It is denied that the Petitioner factory was closed with effect from 30.11.2013.

6. The Petitioner Unit is very much coverable continuously under the Act and the Petitioner appeared before the Respondent Authorities on 14.12.2016 and produced records for the period 01.04.2012 to 31.03.2015

which are taken note of and same is reflected in the order under Sec. 45A dated 08.06.2017. The contributions payable under the Act is determined as Rs.48,158/- for the period of default, 01.04.2012 to 31.03.2015 on actual basis as per the records produced and examined by the Respondent during the hearings. For the remaining period of default from 01.04.2015 to 31.07.2016, due to non-production of any records before the Respondent Authorities, and in continuation of the hearings from 14.12.2016, the Respondent Authorities determined the contributions for the said periods 01.04.2015 to 31.07.2016 Rs.1,28,700/- on adhoc basis of the available information with the authorities. The total contribution of Rs.1,76,858/- decided (Rs.48,158/- actual contributions + Rs.1,28,700/- adhoc) are statutorily due and payable for the period 09.06.2012 to 31.07.2016, as per the order under Sec.45A dated 08.06.2017. The Petitioner was given sufficient opportunities to produce all the records on 14.12.2016, 05.01.2017, 25.01.2017 and also on 28.03.2017. Despite four opportunities to the Petitioner failed to produce all the documents to prove their contentions. As the Petitioner's firm was till in business their balance sheet, profit and loss account, books of account for the period from 04/2015 onwards, which are to be maintained and available with them were not produced, resulting in confirmation of the proposed assessment of the period for which the Petitioner failed to produce the records.

7. On 29.06.2006, Report, the Petitioner submitted to the Respondent Authorities Form-01, Registration Form based on which the Petitioner unit was covered under the Act. The Petitioner filed appeal dated 28.08.2017 under Sec.45AA of the Act, but rejected/dismissed the appeal by order dated 05.09.2017 is due to the fact that the petitioner preferred the Appeal, after 60 days of the order and without payment of mandatory deposit of 25% of the claim amount in the order, which is prescribed under the Act and without compliance with the said conditions the appeal is liable to be rejected/dismissed. In view of the above, the order Under Section 45A-order dated 08.06.2017 is not arbitrary, and is legal and justified and not liable to be set aside. The 45A order dated 08.06.2017 for the periods 09.06.2012 to 31.07.2016 for Rs.1,76,858/- is fair, proper and determined after due application of mind on the facts and circumstances of the case and is as per the provisions under the Act. It is not arbitrary and is legal.

8**.** The learned counsel appearing for the appellant would contend that the order dated 08-06-2017 passed under Section 45-A of the Act determining the contribution of Rs.1,28,700/- on adhoc basis for the period from 01-04-2015 to 31-07-2016 on the basis of information available to them is valid in law.

9.The contribution of Rs.48158/- payable for the period from 09-06-2012 to 31-03-2015 was arrived at on the basis of the records produced by the respondent and that there is no necessity to remand the matter to the appellant once again to determine the contribution including the said period. The production of Licence Book (Ex.P2) and mere endorsement of closing date of the firm as 30-11-2013 and that the letter dated 04-12-2017 (Ex.P10) sent by the Deputy Inspector of Factories stating that the respondent firm had been removed from the list of Factories as per order dated 29-07-2016 issued by the Director, Industrial Security and Health are not relevant documents to establish closure of the Factory. The respondent has not placed any document to the appellant as mentioned in the letter dated 14-12-2016 (ExP4). The ESI Court cannot in any manner hold that the factory run by the respondent had been closed w.e.f 30-11-2013 by relying upon Ex.P2 dated 14-03-2016 and Final Order passed by the Deputy Director (IS & H) Coimbatore dated 04-12-2017(Ex.P10) the proceedings under the Factories Act.

10. Therefore, the ESI Court cannot take into account any proceedings taken by the respondent with the authorities under the Factories Act to reach a conclusion that the establishment of the respondent was closed under the Factories Act and that consequently the respondent is not bound to pay any contribution under the ESI Act. The ESI Court could apply only the provisions contained under the ESI Act the Rules if any famed by the Central Government or the Central Regulations relating to all the procedures for the purpose of removing or deleting an establishment already registered with the ESIC but not to any proceedings taken under the Factories Act or under any other Act. The ESI Court failed to see that under Section 1(6) of the Act. it is for the corporation to decide as to whether the factory or an establishment or the manufacturing process therein ceased to be carried on with the aid of the power by itself but not on any proceedings under any other enactment including the proceedings under the Factories Act. The provisions contained under the Factories Act and the ESI Act operate on different fields by taking into account the objects of the respective enactments and so to hold that the factory under the Factories Act was permitted to be closed thereto and so the establishment having been close not liable to make any contribution is

nothing but an act of illegality committed by it. The document Ex.P2 had been issued by the respondent to have the retrospective effect of the closure of the factory from 30-11-2013 when such a provision is not available under the very Factories Act itself. There cannot be any retrospective effect of closure from 30.11.2013 or 31.05.2014 or other date as none of the provisions contained under the Factories Act provide for such retrospective effect even applying under Rule 6 and 7 of the Tamilnadu Factories Rules 1950 framed by the State of Tamilnadu in terms of the provisions contained under Section 6 of the Factories Act and so when there is no such closure of any factory to fall under any of the categories it is rather over reaching on the part of the ESI Court to rely upon the proceedings under the Factories Act as if the respondent factory was closed retrospectively.

11.It is further argued that, the proceedings under the Factories Act cannot be applied to an establishment covered under the ESI Act and that unless and until appropriate application had been made by an establishment with the ESIC for the closure of the establishment under the ESI Act and the Rules any such or other order passed therein are not binding on the ESIC. When the notices are issued by ESIC, the approach of the respondent to the authorities covered under the Factories Act is malafide and the proceedings under Ex.P2 itself is doubtful. In order to sustain the validity and genuineness of the documents produced by the respondent, the respondent himself ought to have examined himself and subjected to cross examination and in the absence of any such oral evidence, the ESI Court ought to have drawn adverse inference under Section 114 of the Act. The appeal filed by the respondent under Section 45AA of the Act was not dismissed on merits on 05-09-2017 but for non compliance of statutory deposit of 25% of the contribution demanded by the Corporation and therefore the petition under Section75 of the Act barred and not maintainable.

12.On the other hand, the learned counsel appearing for the respondent/firm would contend that the contribution period determined by the appellant/ESI for the respondent/firm as from 09.06.2012 to 31.03.2013 and from 01.04.2015 to 31.07.2016 is incorrect and therefore, the ESI Court has rightly set aside the impugned order 08.06.2017 passed by the ESIC and rightly remanded the matter to the ESI Corporation to determine the contribution for the period from 09.06.2012 till 31.05.2014 in accordance with law which calls for any interference.

13.Heard on both sides, records perused.

14. According to the respondent/Firm, the ESI Original Petition in E.S.I.No.14 of 2018 was preferred challenging the order under Section 45 A of the Act dated 08.06.2017. The contention of the respondent/firm in their counter affidavit is that on 30.11.2013 itself the factory was closed and a letter was given to the Inspector of Factories, that the factories were closed on 30.11.2013 and requested them to cancel the factory license. In this circumstances, the Appellant/ESIC issued a show cause notice on 10-11-2016. proposing to levy Rs.5,14,800/- for the contribution period from 01.04.2011 to 10/12. The personal hearing was posted on 14-12-2016 for appearance and to submit necessary documents. The partner of the Respondent/firm appeared before the Appellant/ESCI on 14-12-2016 and submitted the following documents and informed them that the units were closed and manufacturing activity has been stopped from November, 2013.

1. Written Submission dated 14-12-2016
2. Muster Roll from 04/2011 to 05/2014
3. Wages Register from 04/2011 to 05/2014

4. Profit and Loss account statement for the year 2011- 12 to 2014- 15.
5. Income Tax Returns for the Assessment Year 2011- 12 to 2015- 16.

15. However, the Appellant/ESIC directed them to submit the evidences for such closure of unit and the hearing was adjourned to 05-01-2017. On the next date of hearing the Respondent/firm filed the Factory Closure Form which has been filed under Rule 108 of the Tamil Nadu factories Rules, 1950 before the Inspector of Factories on 14-03-2016. But, the Appellant/ ESIC declined to accept the said form as evidence of closure of factory and passed the order dated 08.06.2017 and determined the amount of Rs. 1,76,858/- as ESI Contribution under section 45-A of the ESI Act, 1948. The said order was challenged by the Respondent/firm under section 45-AA of the ESI Act before the Appellate Authority which has been dismissed on 05- 09-2017.

16. Aggrieved by this order, the Respondent/firm filed the ESIOP No.14 of 2018 before the Employees Insurance Court, Coimbatore and the said court passed its final order on 07-08- 2020 which is impugned herein. In the said final order, the learned Presiding Officer remitted the matter back to

the Appellant/ESIC and directed them to determine the contribution again based on the new documents produced by the Respondent/firm. However, the Appellant/ESIC was not ready to conduct the enquiry afresh and filed this civil miscellaneous appeal before this Hon'ble High Court to set aside the order passed by the Employee's Insurance Court, Coimbatore in ESI.OP No.14 of 2018.

17.At the outset, it has to be seen whether the respondent/firm was closed on 30.11.2013 as contented by the respondent/firm. The respondent/firm has filed Ex.P.2 dated 14.03.2016 before the ESI Court which is a closure form submitted to the concerned authorities under the Tamil Nadu Factories Act, in which the respondent/firm has mentioned the closure date of the firm as 31.12.2013. In Ex.P.2, the concerned authorities have also endorsed the closing date of the firm as 31.12.2013. In pursuant of surrendering the factory license by the respondent/firm, the Deputy Inspector of Factories has forwarded a letter under Ex.P.10 dated 04.12.2017 stating that the firm is removed from the factories list as per order dated 29.07.016 by the Director, Industrial Security and Health. From the averments in the petition in ESI.O.P.No.14/2018 the respondent/firm it is understood that certain incidental balance work of job orders already taken was carried out till 31.05.2014. Whereas, the appellant/ESI would contend that, no proof was produced before the appellant/ESIC to prove that the establishment was closed on 31.05.2014. It is further contended that as per the guidelines of ESIC Revenue Manual , the factum of closure can be accepted only when the unit has submitted proof of the Sale of Machinery, Full and Final Settlement to the workers including evidence of acquaintance of all the discharged employees in token of having received the payment towards full & final Settlement, Surrender of Electricity Connection filling of Income Tax return up to date of closure, filing of sales tax return up to date of closure, surrender of telephone connection, closing down of bank account, dissolution of partnership deed in case of partner ship firm and intimation sent to registrar of companies, surrender of trading license and dissolution of rent deeds.

18.To support the above contention, the learned counsel appearing for the appellant/ESIC has relied upon the judgement in C.M.A.No.285 of 2020 rendered by this Court in which, it is held as follows:

> *"However, no proof was produced before the respondent/ESI Corporation to show that, the license was*

surrendered and electrical service was disconnected. Hence, the Recovery Officer proceed to recover the contribution and issued Recovery Certificate in Form C19, dated 13.03.2006."

19.But in the present case, through Ex,P.2 and P.10 the respondent/firm has established that the firm was removed from the factories list as per the order of Director, Industrial Security and Health dated 29.07.2016. Moreover under Ex.P.4 dated 14.12.2016 the factum of closure on 5/14 was informed to the appellant/ESIC. Admittedly, till 31.05.2014 work has been carried out by the respondent/firm. Even in the show cause notice issued by the appellant/ESIC dated 10.11.2016 the contribution for the period from 4/2011 till 10/2012 is alone mentioned. The contribution period from 09.06.2012 to 31.07.2016 is not mentioned in the above show cause notice. Though under Ex.P.7 dated 08.06.2017, the order passed by the ESIC, the default period is mentioned from 01.04.2011 to 31.07.2016 and the assessment was made for only 5 years in accordance with 2010 ESI Amendment Act, the appellant/ESIC failed to establish that the firm was functioning during the period from 05.12.2012 till 31.07.2016. According to the respondent/firm, in the first appearance i.e., on 14.12.2016 though failed to produce the closure report before the concerned authority and produced the same on 14.03.2016, which was not accepted by the appellant/ESIC. No explanation was submitted by the appellant/ESIC for not considering the above mentioned document. The survey report is not produced. On perusal of Ex.P7 order passed by the Corporation it is made clear that the respondent/firm has submitted all necessary document at the time of enquiry, except the closure report. Considering the above facts, the ESI Court has rightly held that the contribution period from 09.06.2012 to 31.07.2016 is incorrect and it is only from 09.06.2012 till 31.05.2014, which date is the complete closure of the unit.

20.The further contention of the appellant/ESIC is that the petition under Section 75 of the Act before the ESI Court is not maintainable. In this context, the respondent/firm has relied upon the judgement In ***M/s. Super Spinning Mills Vs. ESI Corporation*** reported in ***(2020 LLR 381)*** in which it is held that; "all the ESI Courts across the State of Tamil Nadu and Union Territory of Pudcherry, are bound to entertain the petitions filed under Section 75 of the Act, without exhausting the appeal remedy contemplated under

Section 45AA of the Act. In other words, the appeal contemplated under Section 45AA of the Act is an optional one and all petitions filed under Section 785 of the Act is to be entertained, numbered, and adjudicated on merits and in accordance with law, without directing the parties to exhaust the appeal remedy provided under Section 45AA of the Act." Therefore, the appeal filed under Section 45AA of the ESI Act, 1948 and the outcome of the said appeal does not serve as a hindrance to the authority of the Labour Court to issue orders Section 75 of the ESI Act, 1948.

21.Hence, the appeal filed under Section 45 AA of the ESI Act, 1948 and the outcome of the said appeal does not serve as a hindrance to the authority of the labour Court to issue orders under Section 75 of the ESI Act, 1948.

22.Hence, the finding of ESI Court that the contribution period is only from 09.06.2012 to 31.05.2014 and remanding the matter to determine the contribution for the said period to the concerned authority is found to be correct and sustainable. No substantial question of law arises in the order passed by the ESI Court, Coimbatore in E.S.I.O.P.No.14 of 2018. Accordingly, the order passed by the said Court is confirmed.

23. This civil miscellaneous appeal is dismissed. The appellant/Corporation is directed to have a fresh assessment of ESI dues for the period between 09.06.2012 to 31.05.2014 within a period of 3 months from the date of receipt of a copy of this order. No cost.

16.02.2024

vsn

Internet:Yes/No
Index:Yes/No
Speaking/Non-speaking order

To

1. The Employees State Insurance Court, Coimbatore.
2. The Section Officer,
   VR Section,
   High Court, Madras.

K.GOVINDARAJAN THILAKAVADI, J.

vsn

C.M.A.No.1656 of 2021

16.02.2024