BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 18.03.2024

CORAM:

THE HON'BLE MR.JUSTICE **P. DHANABAL**

C.M.A(MD)No.1244 of 2012
and
M.P(MD)No.1 of 2012

Tuticorin Thermal Power Station
(A Unit of TNEB),
Tuticorin,
Represented by its Chief Engineer. ... Appellant/Petitioner

Vs.

1.The ESI Corporation,
Sub Regional Office,
Municipal Shopping Complex,
Salai Street, Sinthupunthurai,
Tirunelveli-1,
Represented by its Joint Regional Director.

2.Tamil Nadu Electricity Board,
Welfare Federation,
Tuticorin,
R.No.2970, TTPS Branch,
Tuticorin-4,
Represented by its Secretary.

3.T.T.P.S Contractors Association,
R.No.3297, Harbour Estate,
TTPS, Tuticorin-4,
Represented by its Secretary. ... Respondents/Respondents

Prayer : This Civil Miscellaneous Appeal filed under Section 82 (2) of E.S.I Act, 1948, to set aside the order, dated 26.09.2012 made in E.S.I.O.P.No.34 of 2011 on the file of the Labour Court, Tiruneveli.

For Appellant	: Mr.T.S.Gopalan
For R-1	: Mr.P.Ganapathy Samy
For R-2 & R-3	: No appearance

JUDGMENT

This Civil Miscellaneous Appeal has been preferred as against the order passed by the ESI court, Tirunelveli in E.S.I.O.P.No.34 of 2011, wherein, the appellant herein has filed a petition before the Tribunal to set aside the order passed by the authorities under Section 45 A of the ESI Act. The said petition was dismissed. As against the order passed by the ESI Court, the present Civil Miscellaneous Appeal has been preferred.

2. For the sake of convenience and brevity, the parties herein after will be referred to as per their status / ranking in the Tribunal.

3. According to the appellant, the respondents have issued impugned order, dated 01.11.2011 alleging that the appellant has to pay a contribution of Rs.32,59,647/- for the period from 09.07.1979 to 31.03.1995. In the said notice, already the appellants herein have filed E.S.I.O.P.No.51 of 1996 and the same was dismissed on 14.03.2011. Thereafter, filed review petition in I.A.No.119 of 2011 and the order through the review application, the order passed by the authorities, dated 05.08.1996 and 09.08.1996 were set aside and the matter was remanded back to the ESI authorities. In the said order, there was a direction to give opportunity to the appellant to produce documents. Thereby, the appellant produced the documents for PWD contract wages. Since the contribution are pertaining to the years 1979, no documents available to prove the attendance and other things. Since the contribution in respect of the contract labours, the authorities have to issue notice to the contractor but they have not done so. The contractor also necessary party to decide the contribution. The contractors also have separate code for contribution. As per the amended act, the authorities can pass order only for the period of five years. Therefore, the present order for the period from 09.07.1979 to 31.03.1995 cannot be fixed. Without any basis, the authorities have fixed the salary on assumed wages. The order of the authorities without considering the PWD wages rights fixing the assumed wages is not acceptable. Therefore, the order passed by the ESI authorities is liable to be set aside.

4. According to the respondents, the petitioner has not get exemption for the contract labours for the period from 09.07.1979 to 31.03.1995. The petitioner cannot compel to allot code number for the contractor. The petitioner being the principal employee is liable to pay contribution to the contractor labours and he can recover the same from the contractor later. Already ample chances were given to the petitioner before passing orders under Section 45-A of ESI Act. The petitioner is liable to pay contribution for the contract labours. Already the petitioner filed E.S.I.O.P.No.51 of 1996 and the same was remanded back to the authorities by affording chances to the petitioner to produce documents. But the petitioner has not co-operated and failed to produce any records and only produced the PWD wages list. Therefore, the authorities have proceeded by fixing the assumed wages. Since the matter was remanded back and there is no limitation prior to 01.06.2010, there is no limitation.

Therefore, the petitioner is liable to pay the said contribution.

5. According to the third respondent, the petitioner Company insisted the third respondent to obtain separate code under ESI Act and they also applied for that and the ESI authorities have not given any separate code and it is not possible to allot separate code for each contractor. Therefore, they advised to pay the amount in the code allotted for the petitioner, but the petitioner Company not permitted to pay the amount through their code. Now, the ESI authorities have given separate code number for the each contractor. The petitioner issued letter, dated 20.12.2011 to the ESI authorities stating that prior to the period of 01.10.2011, the petitioner is liable to pay contribution.

6. The learned Counsel appearing for the appellant would contend that the claim for contribution of the ESI amount is pertaining to the years 1979 to 1995. Due to efflux of time, the petitioner is unable to produce any documents in respect of the contract labours, attendance and other salary particulars. Therefore, they unable to produce any documents, but the authorities have passed order by fixing the assumed wages. But the petitioner has produced the CPWD wages list and they have not considered that list. Further, the ESI authorities have issued circular, dated 26.05.2003, wherein they instructed the authorities to fix 25% as labour charges in case of capital construction, repair and maintenance etc., or 60% as wage in case of labour supplying contractors, including security contractor, should not normally be extended to the same employer for a second occasion and in all cases, 45-A order should clearly indicate this fact and the requirement of complying with the above referred statutory provisions. In addition to stating this in the 45-A order, the employer should also be separately addressed on these lines with a copy to the inspector concerned. But it is the case without following the above said circular, the educational authorities have fixed assumed charges. Therefore, the order passed by the authorities are liable to be set aside. Further, the learned Counsel appearing for the appellant would contend that the ESI Corporation has not passed order immediately after having knowledge about the non-payment of contributions. The order is pertaining to the years 1979 to 1995. After 01.06.2010, the ESI authorities can pass order only in respect of five years. Though there is no limitation prior to 01.06.2010, the authorities ought to have passed orders within a reasonable time. Thereby, also the order is liable to be set aside. To that effect, he also produced the following judgments:

i) Bharat Heavy Electricals Limited Vs. Employees' State Insurance Corporation reported in 2008 (3) SCC 247,

ii) ESI Corporation Vs. C.C.Santhakumar reported in 2007 (1) SCC 584,

iii) Regional Director, Employees' State Insurance Corporation, Madras Vs. Sundaram Clayton Limited, Moppet Division (Registered Office), Madras reported in 2004 (1) L.L.N 630 and also produced the circular, dated 26.05.2003.

7. The learned Counsel appearing for the respondents would contend that already this Court remanded the case back for giving opportunity to the petitioner but the petitioner has not produced any documents. Thereby, the authorities have passed order on assumed wages. The PWD rates cannot be followed and the assumed wages have been followed by the authorities. The authorities used to pass orders based on assumed wages in the absence of any documents produced by the petitioner. Therefore, they adopted the best method and passed the order. There is no time limit for claiming ESI Contributions prior to 01.06.2010.

8. To support his contention, he relied the following judgments:

i) Employees' State Insurance Corporation Vs. M/s F.Fibre Bangalore Private Limited reported in 1996 INSC 1414,

ii) ESI Corporation Vs. C.C.Santhakumar reported in 2007 (1) SCC 584,

iii) State Bank of India Vs. M.Sundara Money reported in 1976 (1) SCC 822 and

iv) Banerjee Vs. Anita Pan reported in 1975 (1) SCC 166.

9. This Court had heard both sides and perused the records. Upon hearing both sides and perusing the records, the following substantial questions of laws are framed:

> *"i) Whether the ESI Corporation was right in determining the contribution under 45-A, on the basis of assumed wages when the tender conditions described PWD schedule of rates?*
>
> *ii) Whether the Corporation was right in determining the contribution under Section 45-A, on the*

entire payment made to the contractors instead of the wages as prescribed under Section 39 of the ESI Act?

iii) Whether the Corporation was entitled to determine the contribution under Section 45-A, for a period beyond 5 years?"

10. In this case, the main contention raised by the appellant is that the contribution period is from the year 1979 to 1995. Therefore, they are unable to produce the documents and thereby, the ESI authorities have to follow the PWD schedule wages. The respondent also admitted that the petitioner have not produced any documents and thereby, they fixed the assumed wages.

11. In this context, the learned Counsel appearing for the appellant drew the attention of this Court that the ESI authorities have issued circular 26.05.2003. As per the circular, the authority have to fix 25% as labour charges in case of capital construction, repair and maintenance etc., or 60% as wages in case of labour supplying contractors, including security contractor, should not normally be extended to the same employer for a second occasion and in all cases the 45-A order should clearly indicate this fact and the requirement of complying with the above referred statutory provisions. But the authorities have not followed their own circular and they fixed the assumed wages. Therefore, the order is liable to be set aside. According to the respondent, since the petitioner failed to produce documents, they followed the assumed wages.

12. In this context, it is relevant to extract the particular portion of the circular issued by the ESI Corporation, New Delhi, dated 26.05.2003, wherein the circular dated 09.08.2002 specifically deals with other kind of labour supplying contractors:

> *"As mentioned in the case of instruction issued under item No.2 above, this facility of taking 25% as labour charges incase of capital construction, repair and maintenance etc., or 60% as wage in case of labour supplying contractors, including security contractor, should not normally be extended to the same employer for a second occasion and in all cases the 45-A order should clearly indicate this fact and the requirement of complying with the above referred statutory provisions. In addition to stating this in the 45-A order the employer should also be separately addressed on these lines with a copy to the inspector concerned."*

13. On careful perusal of the above said circular, it is clear that for other kind of labour supplying contractors, where the principal employer failed to produce full record of the contractor to determine wage component advising that in such situation, 60% of the total payment booked may be taken as wage assuming the balance to be element of profit, other statutory etc.

14. Therefore, in the case on hand, the ESI authorities have not followed their own circular and they have proceeded by fixing assumed wages. There is no records produced by the ESI authorities under what basis they fixed the assumed wages as to whether it is based on any relevant rules in this regards. Though the petitioner produced PWD rates, they have not considered the PWD rates. However, once the ESI Corporation has issued circular to all the authorities, they have to follow their own circular. But in this case, they have not followed their circular. Therefore, determining the contribution on the basis of assumed wages is not in accordance with law.

15. This Court while answering the first substantial question of law decided that, the authorities have not followed their own circular while fixing the contributions and they fixed the contributions based on the assumed wages. Therefore, in view of the answer made to the first substantial question of law, it is appropriate to remand the case for the first respondent to fix the contribution based on the circular, dated 26.05.2003. Therefore, the other substantial question of law cannot be answered.

16. In the result, this Civil Miscellaneous Appeal stands allowed by setting aside the order passed by the authorities, dated 01.11.2011 and the matter is remanded back to the authorities for fresh consideration by following the circular, dated 26.05.2003. The first respondent is directed to complete the process, within three months from the date of receipt of a copy of the judgment. There shall be no order as to costs. Consequently, connected Miscellaneous Petition stands closed.

18.03.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes
BTR

To

1.The Labour Court,
Tiruneveli.

2.The Joint Regional Director,
ESI Corporation,
Sub Regional Office,
Municipal Shopping Complex,
Salai Street, Sinthupunthurai,
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3.The Secretary,
Tamil Nadu Electricity Board,
Welfare Federation,
Tuticorin,
R.No.2970, TTPS Branch,
Tuticorin-4.

4.The Secretary,
T.T.P.S Contractors Association,
R.No.3297, Harbour Estate,
TTPS, Tuticorin-4.

5.The Section Officer,
Vernacular Record Section,
Madurai Bench of Madras High Court,
Madurai.

P. DHANABAL, J.

BTR

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