



C.M.A(MD)No.1245 of 2012

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Dated: 18.03.2024

CORAM:

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

C.M.A(MD)No.1245 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.

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

... Respondent/Respondent

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.35 of 2011 on the file of the Labour Court, Tirunelveli.

For Appellant : Mr.T.S.Gopalan

For Respondent : Mr.P.Ganapathy Samy



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JUDGMENT

This Civil Miscellaneous Appeal has been preferred as against the order passed in E.S.I.O.P.No.35 of 2011 on the file of the ESI Labour Court, Tirunelveli, dated 26.09.2012, wherein, the appellant herein has filed a petition before the ESI Court by challenging the order passed by the respondent under Section 45-A of the ESI Act, dated 02.08.2007 and 08.08.2007. The ESI Court has dismissed the petition. As against the dismissal order, the present Civil Miscellaneous Appeal has been filed by the petitioner.

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 petitioner, the respondent passed the impugned order by claiming a contribution of Rs.37,41,521/- for the period from April 1995 to June 1996 and Rs.3,94,63,781/- for the period from May 1995 to December 1998 stating that, for the contractual labours, contribution has not been paid and the petitioner being the principal



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employer is liable to pay the said contribution amount. The authorities at the time of passing order, they taken the entire contract amount for fixing the assumed wages and failed to deduct the cost of things, transport charges and for the cranes and further failed to consider the PWD schedule of wages, instead calculation fixed to the assumed wages. Further, it is not possible to verify the particulars of employees for the period from 1995 to 1998 in the year 2007 after a lapse of 9 years. Already the contractors were allotted separate ESI accounts and they promptly remitted the ESI contributions to their respective periods. Form No.C-18 was issued after 10 years and no opportunity was given to the petitioner for producing the documents and the Corporation while determining the contribution, entire payment made to the contractors was taken into account instead of wages. Therefore, the order passed by the authorities is liable to be set aside.

4. The learned Counsel appearing for the respondent would contend that the petitioner has not produced any documents at the time of personal hearing and already opportunity was given to them, but they have not produced any documents. Thereby, they adopted best judgment method of assumed wages. However, he fairly conceded that, at the time of



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calculating the amount, the entire contract amount was taken into account for the contribution.

5. 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?"

Substantial question of law No.1:

6. In this case, the main contention raised by the appellant is that the contribution period is from the year 1995 to 1998, 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



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assumed wages.

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7. 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.

8. 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:



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"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."

9. 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.

10. Therefore, in the case on hand, the ESI authorities have not followed their own circular and they have proceeded by fixing assumed



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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. Thus the substantial question of law is answered.

11. 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.

12. In view of the above said submissions made by both sides Counsels and considering that the authorities while determining the



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contribution have taken entire contract amount without deducting the expenses and without calculating the wages passed order. Therefore, it is appropriate to remand back the case by setting aside the order of the authorities for fresh consideration.

13. In the result, this Civil Miscellaneous Appeal stands allowed by setting aside the order passed by the Labour Court in E.S.I.O.P.No.35 of 2011 on the file of the Labour Court, Tirunelveli and the matter was remanded back to the respondent for fresh consideration in accordance with law. 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.



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- 2.The Joint Regional Director,
ESI Corporation,
Sub Regional Office,
Municipal Shopping Complex,
Salai Street, Sinthupunthurai,
Tirunelveli-1.
- 3.The Section Officer,
Vernacular Record Section,
Madurai Bench of Madras High Court,
Madurai.



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P. DHANABAL, J.

BTR

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