BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 06.12.2023

PRONOUNCED ON : 24.01.2024

CORAM:

THE HONOURABLE MRS.JUSTICE L.VICTORIA GOWRI

C.M.A.(MD)Nos.883 and 884 of 2014

C.M.A.(MD)No.883 of 2014

The Joint Regional Director,
The Employees State Insurance Corporation,
Sub-Regional Office,
4th Main Road, K.K.Nagar,
Madurai. ... Appellant / Respondent

Vs.

Madurai District C-operative
Milk Producer's Union Ltd.,
Represented through its General Manager,
Madurai. ... Respondent / Petitioner

PRAYER: Civil Miscellaneous Appeal filed under Section 82 of the ESI Act, 1948 to set aside the order dated 10.04.2013 passed by the ESI Court (i.e. Labour Court), Madurai in ESI OP No.47 of 2003.

For Appellant : Mr.P.Ganapathi Samy

For Respondent : Mr.V.O.S.Kalai Selvam

C.M.A.(MD)No.884 of 2014

The Deputy Regional Director,
The Employees State Insurance Corporation,
Sub-Regional Office,
4th Main Road, K.K.Nagar,
Madurai. ... Appellant / Respondent

Vs.

Madurai District C-operative
Milk Producer's Union Ltd.,
Represented through its General Manager,
Madurai. ... Respondent / Petitioner

PRAYER: Civil Miscellaneous Appeal filed under Section 82 of the ESI Act, 1948 to set aside the order dated 10.04.2013 passed by the ESI Court (i.e. Labour Court), Madurai in ESI OP No.37 of 2003.

For Appellant : Mr.P.Ganapathi Samy

For Respondent : Mr.V.O.S.Kalai Selvam

JUDGMENT

These Civil Miscellaneous Appeal has been filed to set aside the order dated 10.04.2013 passed by the ESI Court (i.e. Labour Court), Madurai in ESI OP No.47 of 2003 and ESI OP No.37 of 2003 .

2. The brief facts of the case are as follows:

The respondent / M/s. Madurai District Co-operative Milk Producer's Union Ltd., which was covered under the Employees' State Insurance Act, 1948 (hereinafter referred to as 'ESI Act, 1948') vide code No. 57-5230-07, with effect from 30.06.1968. The Government of Tamil Nadu, in exercise of its powers conferred by Section 88 read with Section 91-A of the ESI Act, issued G.O.(D) No.642 dated 13.07.1994 and G.O.(D) No.359 dated 04.05.2000 exempting only the permanent staff of the aforesaid union employers for the period from 01.04.1991 to 31.03.1992 and 01.04.1992 to 31.03.1997 respectively. However, the other type of workers namely, contract workers, temporary workers, daily wagers, part timers etc., of the factory were coverable under the ESI Act and contributions were payable in respect of them. However, there was no payment of contributions for the said contract workers, temporary workers, daily wagers, part timers etc., of the factory for the period from 01.04.1991 to 31.03.1993, a notice (in Form C-18) dated 27.02.1996 was issued by the appellant proposing to charge contributions of wages paid on repairs and maintenance and coolie charges for the said period. After hearing the employer on 27.02.1996, 13.10.1998, 16.11.1998, 12.01.1999, 17.02.1999, 08.01.2002, 07.02.2002, 25.02.2002, 08.04.2002 and 30.04.2002, a final order dated 24.05.2002 was passed under Section 45A of the ESI Act determining the contribution payable as Rs.56,289/- (Rupees Fifty Six Thousand Two Hundred and Eighty Nine only). The employer accepted the liability and paid the contribution amount on 27.06.2002. Thereafter, on 25.11.2003, the appellant Corporation passed another order under Section 85(B) of the ESI Act, levying damages totalling to Rs.56,289/- (Rupees Fifty Six Thousand Two Hundred and Eighty Nine only) for the belated payment of contribution / wage period from 01.04.1991 to 31.03.1993. As against the orders dated 24.05.2002 and 25.11.2003, the employer filed two cases in ESI OP Nos.37 of 2003 and 47 of 2003 respectively. The ESI Court, vide its order dated 10.04.2013 decided both the cases in favour of the employer and as against the appellant Corporation. The learned ESI Court proceeded to conclude that those cases in favour of the employer on the basis of the fact that there was no indication in the relevant order dated 24.05.2002, passed under Section 45A of the EST Act, determining the contribution payable as Rs.56,289/- (Rupees Fifty Six Thousand Two Hundred and Eighty Nine only) that the same related to workers other than the permanent employees. As the State Government has exempted the permanent employees for the relevant period, no contribution and consequently no damages also, payable. The learned ESI Court finally had set aside the order under Section 45(A) and under Section 85(B) of the ESI Act, 1948. However, the ESI Court has observed that the employer had already remitted the contribution amount of Rs.56,289/- (Rupees Fifty Six Thousand Two Hundred and Eighty Nine only) on 27.06.2002 and as per the GO.(D).No.359 dated 04.05.2000, the contribution for the exempted period, if already paid, shall not be paid. In the said observation, the contribution amount already paid for the period from 01.04.1992 to 31.03.1993 shall not refunded by the ESI Corporation. However, the ESI Court ordered that the contribution collected for the earlier period from 01.04.1991 to 31.03.1992 shall be refunded by the ESI Corporation in ESI OP No.47 of 2003 and ESI OP No.37 of 2003 dated 10.04.2013. Challenging the same, these two appeals came to be filed by the appellant Corporation.

3. The learned Counsel for the appellant vehemently submitted that the order of the Trial Court is based on no evidence and the observation of the Court that there is no indication under Section 45(A) order as to whether it relates to the temporary or casual employees is incorrect. He further contended that the employer had never disputed that the contribution is in connection with the permanent employees. The contention of the employer before the ESI Court was that the relevant workers was not the contract employees. Having accepted the liability to pay the contribution and an amount of contribution being paid by the employer on 27.06.2002, the ESI Court ought not have interfered with the order passed by the appellant Corporation under Section 45(A) and 85(B). The order of the Trial Court is contrary to law. There is always a presumption under Section 114, illustration (e) of the Evidence Act, that an administrative action by Government is reasonable and in public interest. The person challenging the same has to prove that it is not reasonable and in public interest. In the absence of any oral evidence and in the absence of any witness on behalf of the petitioner, the Trial Court had no iota of evidence to support the case of the employer. On that basis, the learned Counsel for the appellant pressed for allowing the appeal.

4. Per contra, the learned Counsel appearing for the respondent / employer submitted that the learned Trial Court has properly appreciated the pros and cons of the various facts and circumstances of the case and on the basis of G.O.(D) No.642 dated 13.07.1994 and G.O.(D) No.359 dated 04.05.2000 has rightly concluded in favour of the employer. Hence, the same has to be confirmed. Therefore, this Civil Miscellaneous Appeal is liable to be dismissed.

5. Heard the learned Counsel appearing for the appellant and the learned Counsel appearing for the respondent and carefully perused the materials available on record.

6. A careful perusal of the materials available on record would reveal that in ESI OP No.37 of 2003, the learned Trial court has framed three issues and Ex.P-1 to Ex.P-7 were marked on the side of the petitioner. However, no witness was examined either side of the petitioner or on the side of the respondent. Similarly, in ESI OP No.47 of 2003, the learned Trial Court has framed three issues and Ex.P-1 to Ex.P-6 were marked on

the side of the petitioner. However, no witness was examined either side of the petitioner or on the side of the respondent. In both the cases, the employer is the Madurai District Co-operative Milk Producer's Union Ltd., code No. 57-5230-07 and the same was covered under the ESI Act, 1948. However, there was no payment of contributions for the contract workers, temporary workers, daily wagers, part timers etc., of the factory for the period from 01.04.1991 to 31.03.1993, a notice (in Form C-18) dated 27.02.1996 was sent by registered post by the appellant Corporation to employer Madurai District Co-operative Milk Producer's Union Ltd., to show cause why the contribution worked out could not be recovered from the employer. The appellant Corporation offered several personal hearings to the employer i.e. on 27.02.1996, 13.10.1998, 16.11.1998, 12.01.1999, 17.02.1999, 08.01.2002, 07.02.2002, 25.02.2002, 08.04.2002 and 30.04.2002. Despite being offered with 10 opportunities of personal hearings, the employer failed to produce any relevant records in respect of the labour charges involved. Since there was no compliance for the period from April 1991 to March 1993, the notice dated 27.02.1996 came to be issued by the appellant Corporation to the employer. The non -compliance by the employer by making payment of contribution towards the employee is an offence as it amount to violation of the statutory duty under the ESI

Act, 1948. Since the employer failed to respond to the appellant notice given to him by means of 10 personal hearings, the appellant Corporation left with no other option, proceeded to determine the contribution and passed an order under Section 45 (A) of the ESI Act, 1948. The contributions were determined on Adhoc basis at 7.25% on assumed average arrears and maintenance charges and 5.5% on the coolie charges respectively in respect of 25 employees as per the inspection report. A total contribution to an amount of Rs.56,289/- (Rupees Fifty Six Thousand Two Hundred and Eighty Nine only) was calculated. The said amount and the order under Section 45(A) of the ESI Act exempted by the appellant Corporation on 25.04.2002 following the damages on the delay of payment of contribution was also levied under Section 85(B) of the ESI Act, vide impugned order dated 25.11.2003. The said contribution was paid by the employer on 27.06.2002 to the appellant Corporation. It is needless to state that the Government of Tamil Nadu issued G.O.No.642 dated 13.07.1994 and G.O.NO.359 dated 04.05.2000 exempting the permanent employees of the employer Milk Producer Union for the period from 01.04.1991 to 31.03.1992 and 01.04.1992 to 31.03.1997 respectively. The learned ESI Court proceeded to conclude that since the impugned order did not clearly indicate as to the facts, if the said orders were passed with respect to permanent employees or temporary employees, the same are not sustainable. It was also observed by the learned ESI Court that the appellant Corporation failed to produce any material to show that the impugned order dated 24.05.2002 was passed with respect to temporary or casual employees of the employer union. As far as the impugned order passed under Section 85(B) of the Act dated 25.11.2003, the learned ESI Court proceeded to adopt the same and concluded that no distinction has been made between the permanent employee and temporary employee of the employer in both the impugned orders. Since the appellant Corporation failed to produce any materials to show that said orders were with respect to temporary or casual employee, both the orders were liable to be set aside and accordingly, the learned ESI Court had set aside both the impugned orders of the appellant Corporation.

7. However, a careful perusal of the said orders would reveal that those orders were with respect to the contribution and the arrears and maintenance of coolie charges. For better clarification, the relevant portion of the impugned order passed under Section 45(A) of the Act dated 24.05.2002, is extracted as follows:

M/s. MADURAI DIST. CO.OP.MILK PRODUCERS UNION, situated at Madurai, code no:57-5230, were covered under ESI Act '48 and were required to pay the contribution, in accordance with Sec.40 of the said Act, read with regulation 29 and 31 of the Genl. Regulation framed under the act. As this employer failed to pay the dues, within the schedule time limit, a demand notice, in form C-18, dt: 27.02.1996 was sent by regd.AD to this employer, to show cause within 15 days, why the contribution as worked out in it, be not revered from him.

The employer, in this connection, was offered umpteen no. of personal hearings viz: 27.3.96, 13.x.98, 16.11.98, 12.1.99, 17.2.99, 8.1.02, 7.2.02, 25.2.02, 8.4.02 and finally on 30.4.02, but could not produce any relevant records in r/o the labour charges involved.

I applied my mind to the concerned facts and my findings are as under:-

As there was no compliance for the period 4/91 to 3/93, the said notice was issued to the employer, to show cause why the dues, as worked out in it, be not assessed u/s 45-A of the Act. But the employer failed to give valid evidence against the said notice.

I finalise the issue as below:

The employer, though was given umpteen chances of hearings, failed to produce any evidence regarding labour charges involved. The non-compliance of the employer is an offence, as it amounts to violation of the statutory duties under the Act. The attitude of the employer implies that he is deliberately avoiding the *production of records.*

Since nothing is forthcoming from him, ***I confirm the contributions, on the repairs and maintenance and coolie charges viz:***

*Rs. 22,64,683.10 *25% * 7.25% = 41,048/-*

*Rs. 11,08,402.66 * 25% * 5.5% = 15,241/-*

Total = 56,289/-

The contribution so calculated, amounts to Rs.56,289/- which is fair and according to law.

For the above reason, I, S.VASUDEVAN, Dy. director of ESIC, in exercise of the powers delegated to me levy of contribution, deem fit and accordingly order that the contribution, totalling to Rs.56,289/- is payable, with an interest at 15% p.a. for the period 4/91 to 3/93, within 15 days from the date of this order failing which, it shall be recovered as an arrear of land revenue, u/s 45-C to 45-I of the ESI Act, through recovery proceedings.

8. Further, the learned ESI Court failed to record the specific distinction made in this regard by the appellant Corporation in the impugned order and on that basis these two appeals are liable to be allowed. The learned ESI Court ought to have appreciated the admission of

the employer in its affidavit, it is pleaded that the appellant Corporation had issued a show cause notice to the employer to the payment of contribution to the employee under the contractor. It is pertinent to place the admission made by the employer on record, in page 6 of the ESI O.P.No.37 of 2003 that, in view of the total exemption granted by the Government of Tamil Nadu from the view of ESI Act, with the genuine impression that the employer need not remit any contribution to the employees who worked under the contractor, the payment was not done and later on the issuance of show cause notice by the Corporation, the employer remitted the contribution payable to the employees who worked under the contractor under protest. Such an admission made by the employer went unnoticed by the ESI Court. That apart, the petition in E.S.I OP.No.37 of 2003 in pages 7 to 9, the employer has admitted that the contribution claimed by the appellant Corporation related to the heads of account namely,

a) Repairs to the Building,

b) Repair to plant

c) The Freight and Handling Charges

d) Factory Maintanence

e) Packing Expenses

f) Sales Promotion Expenses

9. Hence, a careful perusal of the order passed under Section 45(A) of the ESI Act dated 24.05.2002 would reveal that, the same was with respect to the levy of damages for the delayed payment of contribution for the contribution which wage period from 01.04.1992 to 31.03.1993. Though the employer had submitted that their organisation being a statutory Government organisation incurring continuous loss and that the service undertaken by them is by way of supply of milk in and around the city of Madurai, despite requesting for waiver, considering the facts that payment of ESI contribution is a statutory responsibility, the ESI Corporation passed the impugned order dated 25.11.2003 observing that, the delay in payment of contribution under ESI Act would attract levy of damages from the due date to the date of payment. However, the extent of delay involved in the case in hand is a fact on record on the basis of which the appellant Corporation proceeded to pass an order that the employer

union is liable to pay damages under Section 85(B) of the ESI Act 1948, vide impugned order dated 25.11.2003. In view of the same, I have no hesitation to conclude that the learned ESI Court had miserably failed to notice that the impugned orders dated 24.05.2002 and 25.11.2003 are with respect to the contribution on repairs, maintenance and coolie charges with respect to the various units of the employer milk union ltd.

10. Accordingly, these Civil Miscellaneous Appeals are allowed. There shall be no order as to costs.

24.01.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes
Sml

To

The ESI Court,
(Labour Court)
Madurai.

Copy to

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

L.VICTORIA GOWRI, J.,

Sml

C.M.A.(MD)Nos.883 and 884 of 2014

24.01.2024