

CNR-MHIC04-000141/2016

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Decided on : 11.02.2021
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IN THE EMPLOYEES' INSURANCE COURT, MAHARASHTRA AT THANE.

APPLICATION (ESI) NO. 01 OF 2016

M/s. Juliet Industries Ltd.
A-1, 313, Shah & Nahar Indl. Estate,
Sitaram Jadhav Marg,
Dhanraj Mill Compound,
Lower Parel (W),
Mumbai - 400 013.

... Applicant

v/s



1. The Director
Employees State Insurance Corporation,
Sub-Regional Office, Thane,
5th Floor, ESIS Hospital Complex,
Wagle Estate, Thane (W),
Thane - 400604.

2. The Recovery Officer
The Director
Employees State Insurance Corporation,
Sub-Regional Office, Thane,
5th Floor, ESIS Hospital Complex,
Wagle Estate, Thane (W),
Thane - 400604.

... Opponents

Coram : Shri. D.M. Patil, Judge,
Employees' Insurance Court, Thane.

Appearances :-

1. Ld. Advocate Shri. Hanish D. Pithadia for the Applicant.
2. Ld. Advocate Shri. M. K. Tiwari for the Opponents ESI Corporation.

-: J U D G M E N T :-
(Delivered on 11th February, 2021)

This is an application filed under Section 75 read with Section 77 of the Employees State Insurance Act, 1948 (hereinafter referred to as the "ESI Act, 1948") and under Rule - 13 of the Bombay Employee's Insurance Courts Rules, 1959. In this application, the applicant has challenged notice C-18(actual) dated 5.11.2015 and 31.12.2015 and recovery certificate in Form C-19 dated 16.12.2015 issued by Opponent ESI Corporation.

Case of the applicant company :-

2) It is the case of the applicant company that applicant has been registered under the provisions of the Indian Companies Act and covered under the provisions of ESI Act, 1948. According to the applicant, it has been complied with the provisions of ESI Act by paying contribution regularly under the ESI Code bearing No. 34000023290000108 which is allotted to the applicant by the opponent ESI Corporation. The Social Security Officer (SSO) of the opponent ESI Corporation visited the applicant's establishment on 4.06.2015 for verification of records for the period April 2011 to March 2012. In the said visit, relevant record was produced by the applicant before SSO for verification. The



SSO came to a conclusion that there is short fall of Rs. 46,396/- in remittance of contribution and Rs.21,818/- against omitted wages. The SSO accordingly, advised the applicant to make payment of Rs.68,214/-. According to the applicant, there was dispute between applicant establishment and Kamgar Congress Union regarding Charter of Demands dated 05.01.2012. After several meetings and negotiations took place between the parties, they arrived at amicable settlement of dispute and accordingly signed Memorandum of Settlement dated 17.07.2013 under Section 2(p) read with Section 18(1) of the Industrial Disputes Act, 1947. It was decided in the settlement that benefits of the settlement shall be made applicable to the eligible workers with retrospective effect from 01.01.2012. As per settlement, the applicant had paid increased wages to the workers from the period 1.01.2012 onwards. The Applicant has generated the supplementary ECR and challan including incremental wages and they paid the contribution on the payment actually made to the workers. It was in fact made on satisfaction of a query of the applicant from ESI Corporation and it was advised that no contribution was payable on arrears. According to the applicant, due to lack of knowledge about the provisions of the ESI Act, he had generated the ESI challan though, ESI contribution was not payable. However, by ignoring the request of the applicant, the SSO assessed an amount of Rs.46,396/- towards short fall for the period January 2012 to March 2012. The opponent ESI Corporation issued a show cause notice in Form C-18(Actual) dated 5.11.20215 which was received on 29.01.2016. Thereafter, the Opponent ESI Corporation has issued recovery certificate in Form C-19 dated 16.12.2015

claiming total amount of Rs.67,193/- from the applicant. Thereafter, the opponent ESI Corporation has issued C-18(Actual) dated 31.12.2015 claiming contribution amounting to Rs.91,666/- for the period January 2012 to March 2015, covering the same period of 01/2012 to 03/2012. These actions of the opponent ESI Corporation are illegal in as much as no opportunity of hearing was provided to the applicant. No hearing was taken by the opponent ESI Corporation. No legitimate reason was shown for issuance of notice dated 31.12.2015 covering the period of old notice. According to the applicant, as per instructions bearing No. P-12/11/52/84/Insurance IV dated Nil/06/1985 bearing instruction No. 7/85 of 1985 as well as instruction contained in the ESIC Revenue Manual Chapter VIII page 154 "*contribution cannot be claimed on the increment or enhancement of wages for the period, prior to which period in which the wage increase was announced*". According to the applicant, the action of the opponent ESI Corporation is violative of the provisions of the said Circular as well as ESI Revenue Manual. It is stated that no opportunity of personal hearing was granted and reason for Speaking Order of Section 45A of ESI Act was passed. Hence, the applicant prayed to quash and set aside show cause notice in Form C-18(Actual) dated 5.11.2015 and 31.12.2015 as well as recovery certificate in Form C-19 dated 16.12.2015.



Case of the Opponent ESI Corporation :-

3) The Opponent ESI Corporation has appeared in the matter and filed written statement at **Exh.R-5**. It is stated therein that by letter in Form C-18(Actual) dated 5.11.2015 in sum of

Rs.46,396/- for the period January 2012 to March 2012 has been claimed. Since it was not complied, recovery certificate dated 16.12.2015 claiming contribution of Rs.46,396/- was issued. The statutory interest at the rate of 12% per annum of Rs.20,797/- has been claimed. The SSO has visited the applicant. He verified the relevant record. He prepared visit note and filed report wherein he has stated that the applicant has made short payment of contribution of Rs.46,396/- for the period January 2012 to March 2012 and contribution amounting to Rs.21,818/- was not paid against omitted wages. The opponent ESI Corporation then issued notice C-18(Actual) dated 5.11.2015 the applicant has maintained online register in Form - 6. The applicant do not bother to response to the said notice, hence recovery certificate in Form C-19 was issued. It is stated that C-18(Actual) was issued as per law does not permit the opponent ESI Corporation to invoke Section 45A of the ESI Act. Hence, personal hearing was not required to be given to the applicant. The amount which was pointed out by the opponent ESI Corporation was derived on the basis of registers of the employees maintained online by the applicant. In short, the opponent ESI Corporation support their action by claiming it to be legal and valid.

4) Considering rival pleadings of the parties, I have framed following issues at **Exh. O-2**. My answers to them with reasoning thereon are as under :-

| NO. | <u>ISSUES</u> | <u>FINDINGS</u> |
|------------|---|------------------------|
| 1. | Whether the applicant proves that the show cause notices in Form C-18 dated 5.11.2015 and dated 31.12.2015 as well as recovery certificate C-19 dated 16.12.2016 is illegal, arbitrary and bad in law ? | Yes. |
| 2. | Whether the opponents prove that the application is not maintainable ? | No. |
| 3. | Whether the applicant is entitled to reliefs claimed ? | Yes. |
| 4. | What order ? | As per final order. |

-: REASONS :-

As to issues no. 1 to 3 :-

5) Heard Ld. Advocate Shri. H. Pithadia for the applicant, Ld. Advocate Shri. M. K. Tiwari for the Opponent ESI Corporation. It is the submission of Ld. Advocate for the applicant that though, the opponent ESI Corporation have issued notice C-18(Actual) basis, but still the opponents are duty bound to grant opportunity of hearing to the applicant and to pass order u/s.45A of ESI Act. Form C-18(Actual) dated 31.12.2015 has been issued for further period. It is pointed out that C-18(Actual) dated 5.11.2015 was issued for the period January 2012 to March 2012. Whereas C-18(Actual) dated 31.12.2015 has been issued for the period January 2012 to July 2012 and for the month of July 2013, March 2015. It is pointed out that C-18(Actual) dated 31.12.2015 also



covered the period mentioned in earlier C-18(Actual) dated 5.11.2015. It is submitted that three months that is January 2012, February 2012 and March 2012 has also been covered in earlier C-18(Actual) notice and therefore, factually the opponents are claiming double contribution. It is submitted that as per Form C-6, the applicant has made payment of March 2015 which is not in dispute. Dispute is about the period January 2012 to July 2013 and the opponent ESI Corporation directed to remit the said amount instead of granting opportunity of hearing. He has invited my attention towards Circular dated 14.03.2006 issued by ESI Corporation, in which it is mentioned that "*while determining the contribution on adhoc / actual basis, a well reasoned Speaking Order under Section 45-A of the Act, preceded by a mandatory requirement of affording the employer a reasonable opportunity of being heard, should be issued*". It is submitted that reply was submitted on 18.02.2016 for C-18(Actual) dated 5.11.2015. However, the said reply was not considered. It is submitted that there is settlement dated 17.07.2013, by which the workers were granted enhancement in wages / increment in basic wages. It is provided in the settlement that the said increase in wages shall take effect from January 2012. While uploading online challan, the employer uploaded salary and arrears, but factual payment was made from prospective effect on the salary paid to the workers. Though, the salary was uploaded, but the said payment was not made to the workers and therefore, ESI contribution cannot be claimed on the same. He also referred to ESI Revenue Manual, in which it is provided that there is no need to pay contribution prior to the announcement of enhanced of wages.

Therefore, action of ESI Corporation in claiming contribution on increment of wages is illegal and he prayed to set aside the action of the opponent ESI Corporation

6) *Per contra*, Ld. Advocate Shri. Tiwari for the Opponent ESI Corporation has submitted that for the disputed period there is short payment made by the applicant and hence the ESI Corporation has claimed difference of amount payable and actually paid to ESI Corporation. He chronologically taken the dates and submitted that date of settlement is 17.07.2013, the record of the employer was inspected on 4.06.2015 whereas challans were uploaded in the year 2012. It is his submission that since challans were uploaded in the year 2012 they are generated on the basis of salary actually paid in 2012, hence there is no question of considering date of settlement which has taken place later on 17.07.2013. It is submitted that Insurance Inspector visited the applicant and made a report. The said visit of the Inspector has not been denied by the applicant. There is short payment of contribution amounting to Rs.46,396/- and contribution of Rs.21,818/- was not paid against omitted wages of Rs.3,35,628/-. The SSO submitted inspection report on 4.06.2015 Hence, on the basis of report of Inspector, C-18 was issued on actual basis. Therefore, no hearing was required. While uploading challans in 2012, how the employer is anticipated about settlement to be taken place in the next year.

7) After hearing the parties, I have gone through pleading of the parties as well as documents and oral evidence submitted



on record. The applicant has filed affidavit in lieu of examination-in-chief at Exh.CW-1. It appears that he has reiterated the contents of application in his affidavit. In short, the applicant has deposed that it was brought to the knowledge of Social Security Officer (SSO) of the Corporation that there was dispute between applicant establishment and the Kamgar Congress Union. The said union served COD dated 5.01.2012, several meetings were held, negotiations took place and lastly, Memorandum Of Settlement dated 17.07.2013 - Section 2(p) read with 18(1) of Industrial Disputes Act was executed with mutual sanction of the parties. It was decided therein to grant wage increase to the workers and it was also decided that the said settlement shall be effective w.e.f. 1.01.2012. According to the witness, he is not at all liable to pay any single rupee as demanded by ESI Corporation in the C-18 notices dated 5.11.2015 and 31.12.2015. He has also averred that opportunity of hearing was not granted to him.

8) In the cross examination the witness admits about visit of SSO and inspection of the record for the period of April 2011 to March 2012. It is stated by him that no objection was taken at the time of visit. The witness denied that less amount has been shown as disputed amount for the purpose of exemption. He has stated that the applicant has only generated challan, but the same has not been paid. He volunteers that it was not paid because the payment on arrears paid and that he do not have knowledge that ESI should be paid on arrears of the workers.

9) In so far as, C-18(Actual) are concerned, it is not

disputed that the Opponent ESI Corporation has initiated the recovery as per C-18(Actual). After issuing C-18 notice, there is no opportunity of hearing provided by the ESI Corporation nor order u/s.45A of ESI Act has been passed. It is the submission of the Opponent ESI Corporation that no opportunity of hearing is required for issuing C-18(Actual). The applicant, however, relied upon Circular dated 14.03.2006 which is issued by Divisional Office ESIC, Thane. The said Circular came to be passed on the basis of judgments of Hon'ble Madras High Court in the cases of M/s. Fenner Garments v/s ESIC (W.A. No. 823 of 1993 and M/s. Ganapathy Motors Service v/s ESIC (C.M.A. No. 117 of 1996. The direction issued in the said Circular are as under :

"The matter has been examined in the light of the aforesaid Judgments of the Hon'ble High Court and on the basis of legal opinion given by the senior Advocate, Supreme Court, Accordingly, in supersession of all existing instructions so far as the matter under concerned, it has been decided that henceforth while determining the contribution on adhoc / actual basis, a well reasoned Speaking Order under Section 45-A of the Act, preceded by a mandatory requirement of affording the employer a reasonable opportunity of being heard, should be issued"

The opponent ESI Corporation has not shown that the aforesaid Circular has been superseded by any other Circular and hence the said Circular is required to be taken into consideration.



It is clearly provided in this Circular that while determining contribution on adhoc or actual basis, an opportunity is required to be given to the employer and order u/s.45A of ESI Act is required to be passed. The language in the said Circular is clear and unambiguous, hence, I have no manner of doubt to hold that action of Opponent ESI Corporation in proceeding with recovery against the applicant on the basis of C-18(Actual) dated 5.11.2015 and 31.12.2015 are illegal.

10) Now coming to next question as to whether the Opponents are justified in proceeding with the recovery on the basis of these 2 impugned C-18(Actual) notices. From the oral evidence led by the applicant which is not disputed that SSO has visited the applicant and prepared visit note and submitted the inspection report to the office. The said inspection report is at **Exh.R-8**. It appears that contribution has been claimed on the basis of Form C-6 which is 'online register' maintained by the employer. According to the ESI Corporation, the challans were generated in the year 2012 and hence the contribution is payable from the year 2012 as the said Challans depict the wages paid to the employees. The applicant relied upon Memorandum of ESI Corporation New Delhi dated Nil/06/1985, in which it is provided as under :

"In all the above contingencies, the liability towards payment of contribution accrues only from the month in which the increment is sanctioned, agreement is entered in to, increase is announced, judgment is pronounced, or decision is taken as the case may be. There is no need to pay any contribution on arrears

pertaining to the period prior to the month of declaration / announcement / agreement as the case may be”.

On perusal of aforesaid provisions in the Memorandum and ESI Revenue Manual of Opponent Corporation itself, it is clear that contribution if any, is payable from the wage period in which the wage increase is announce. The Revenue Manual clearly provides that there is no need to pay any contribution on the arrears pertaining to the period prior to the month of declaration / announcement / agreement as the case may be. Therefore, there is no question of payment of arrears from the year 2012. The action of employer in generating challan thereon is immaterial. It is crystal clear that date of wage increase is the basis and it is relevant date for making contribution on increased wages as per circular of Revenue Manual of ESIC. It is not disputed that the applicant has paid the contribution on wages paid to the employees prior to 17th July 2013. The settlement arrived at between the union and the employer on 17th July 2013. Therefore, as per Memorandum of 1985 and ESI Revenue Manual, contribution is payable prospectively as month of July is the month in which *“declaration /announcement has been made”* within the meaning of ESI Revenue Manual.

11) So far as, contribution on omitted wages is concerned, it can be seen that neither C-18 dated 5.11.2015 nor C-18 dated 31.12.2015 have covered the aspect of contribution on omitted wages. In C-18 dated 5.11.2015, only short payment was demanded and in C-18 dated 31.12.2015 defaulting amount for the



period January 2012 to July 2012 and July 2013 and March 2015 was demanded. In both these notices since there is no demand of contribution on omitted wages was included without granting opportunity of hearing on the same the ESI Corporation is not able to recover the same. It may not be out of place to refer the judgment of Hon'ble Kerala High Court in the case of **Kishore Kumar K. Director, M/s. Intimate Machines P. Ltd. v/s Regional Director, ESI Corporation, Thrissur., reported in 2014- III CLR- 800,** (Ker.High Court) in which it is held that *"though technically the case does not fall under Section 45A to attract the proviso thereto, yet the observation slip could not be unilateral for inspring the liability of omitted wages, but the employer should have been heard before such demand"*. In the light of observation of the Hon'ble Kerala High Court even in the case of omitted wages, the opportunity of being heard is required to be granted. In the case in hand, since both the notices C-18 do not cover the aspect of omitted wages, the opponent ESI Corporation is not legally entitled to recover the same without granting opportunity of hearing.

12) In the light of discussion made herein above, the action of recovery initiated against the applicant in respect of C-18 (Actual) dated 5.11.2015 and 31.12.2015 will how to be declared as illegal. Hence, the issue No.1 and 3 are required to be answered in the affirmative. The opponent ESI Corporation has failed to prove that application is not maintainable. Section 75 of the ESI Act gives remedy to the employer to challenge any action of ESI Corporation. The Employees' Insurance Court is

empowered to decide any dispute as to claim for the recovery of contribution from the principal employer. Hence, it is immaterial as to whether the said claim is arising out of order u/s.45A of the ESI Act or notice C-18 (Actual). Hence, the application of the applicant is maintainable before this Court. In the result, the application of the applicant is required to be allowed. Therefore, I answer Issues No.1 and 3 in the affirmative and Issue No.2 in the negative and in answer to issue no.4, I proceed to pass the following order :-

-: ORDER :-

1. The application of the applicant stands allowed.
2. The show cause notices in Form C-18(Actual) dated 5.11.2015 and 31.12.2015 issued by the Opponent ESI Corporation are declared as illegal as well as Recovery Certificate in Form C-19 dated 16.12.2015 is also declared as illegal and they are hereby quashed and set aside.
3. No order as to costs.

Digitally signed by
Digambar Marutirao
Patil

Date: 2021.02.17
15:31:41 +0530

Date :- 11.02.2021
Place :- Thane



(D.M. Patil)
Judge,

Employees' Insurance Court, Thane.

Argued on : 04.02.2021
Judgment dictated on : 11.02.2021
Judgment transcribed on : 15.02.2021
Judgment checked & signed on : 16.02.2021

YAM/15.02.2021

Assistant Registrar,
Industrial Court, Thane

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