BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 27.01.2023

PRONOUNCED ON : 23.03.2023

CORAM

THE HONOURABLE MRS.JUSTICE **N.MALA**

C.M.A(MD)No.861 of 2022

1.The Joint Director,
The Employees State Insurance Corporation,
Sub Regional Office,
4th Main Road, K.K.Nagar,
Madurai-20.

2.The Assistant Director,
The Employees State Insurance Corporation,
Sub Regional Office,
4th Main Road, K.K.Nagar,
Madurai-20. ... Appellants/Respondents

Vs

Sundaram Textiles Limited,
Registered Office: Lakshmi Building,
Usilampatti Road, Kochadai,
Madurai-625016. … Respondent/Petitioner

PRAYER :-

This Civil Miscellaneous Appeal is filed under Section 82 (2) of the E.S.I Act to set aside the fair and decreetal order passed in E.S.I.O.P.No.53 of 2009 on the file of E.S.I. Court (Labour Court), Madurai dated 06.12.2021.

For Appellants : Mr.R.Ravikumar

For Respondent : Mr.C.Karthikeyan

JUDGMENT

The appeal is filed against the order, dated 06.12.2021 in E.S.I.O.P.No. 53 of 2009 declaring the order of the Assistant Director, ESI in No.57-10388-II/INS.II/MEC/SRO/MDU/3/09 to the tune of Rs.4,62,070/- as null and void.

2.The ESI Corporation is the appellant in the appeal. The respondent is a public limited company registered under the Companies Act. According to the respondent company, it has certified standing orders under which the company engages apprentice employees for the purpose of learning any skilled works which do not exceed three years. The respondent is having its main factory at Nambi Nagar, Nagunari Tirunelveli District and open end unit at Therkkutheru, Melur Taluk, Madurai District. The respondent inspected the petitioner's concern on 24.07.2008, 25.07.2008 and on 30.07.2008 and found out the omission of contributions under certain heads. The second respondent on the basis of the inspection report, dated 30.07.2008 sent a notice in Form C-18, dated 12.08.2008 claiming contribution of Rs.4,62,070/- towards stipend paid to the apprentice claiming that the payment was not stipend but wages. The respondent therefore passed the impugned order on 30.04.2009 claiming contribution of Rs.4,62,070/- for the period 4/2002 to 3/2007

towards contribution on wages under Section 2 (22) of the ESI Act.

3.The appellants aggrieved by the order of the Assistant Director, ESI filed petition under Section 77 (I) (g) of the ESI Act to declare the impugned order of the Assistant Director, ESI in his proceedings No.57-10388-II/INS.II/MEC/SRO/MDU/3/09 to the tune of Rs.4,62,070/- as null and void and set aside the same, for a declaration that the apprentice employees engaged by the appellants were not employees as defined under Section 2 (9) of the ESI Act and that the stipend paid to the apprentice employees did not come under the definition of the term wages under Section 2 (22) of the ESI Act and for other reliefs.

4.The labour Court, Madurai vide order dated 06.12.2021 in E.S.I.O.P.No.53 of 2009 allowed the petition by setting aside the order dated 30.04.2009 of the Assistant Director, ESI and also granted the relief of declaration and other reliefs prayed for.

5.Aggrieved by the judgment and decree of the Tribunal, the ESI Corporation has filed the above appeal.

6.The appeal is admitted on the following substantial question of law:

a) Whether the Labour Court in analyzing the definition of Employee in Section 2 (9) of E.S.I. Act had overlooked the fact that those apprentices as covered by the Apprentices Act, 1961 alone are excluded and others are treated as employees?

b) Whether the Labour Court is right in concluding that the so called apprentices not as employees engaged by the establishment, on the basis of standing order of an establishment as the employer is a Factory?

c) Whether the Labour Court is right in concluding that the amendment in the year 2010 to the definition of employer in Section 2 (9) of E.S.I. Act prospective?

7.The short point to be considered in the civil miscellaneous appeal is whether the respondent is liable to pay contribution to the ESI Corporation for stipend paid by it to the apprentice employees engaged by it under the standing orders of the respondent.

8.The learned counsel for the appellants submitted that the labour Court failed to note that the stipend paid to the apprentice was covered under the definition of wages under Section 2 (22) of the ESI Act and therefore, the

authority under the ESI Act namely, Assistant Director, ESI, Madurai was justified in passing the order dated 30.04.2009 under Section 45 A of the ESI Act claiming contribution to the tune of Rs.4,62,070/- for the period from 4/2002 to 3/2007. The learned counsel further submitted that the labour Court failed to note that the apprentice are covered under the definition of employees under Section 2 (9) of the ESI Act. The learned counsel further submitted that the ratio of employees to that of the trainees/apprentice would clearly show that the respondent was camouflaging the employees engaged by it as apprentice.

9.The learned counsel for the respondent on the other hand submitted that the respondents had marked the standing orders as Exhibit P.1 to P.12. The modification of the standing order shows that the apprentice engaged by the respondent were not employees and therefore, the claim for contribution by the appellant corporation was untenable. The learned counsel further submitted that the definition of employee under Section 2 (9) of the Act makes it clear that apprentice appointed under Apprentice Act, 1961 and apprentices appointed under the standing order of the establishment were exempted. The learned counsel further submitted that the labour Court had given a categorical finding on facts by appreciating the entire evidence on record and rightly concluded that the respondent was not liable for

contribution towards the stipend paid by it to the apprentice. The learned counsel therefore submitted that the appeal deserved to be dismissed.

10. I have heard both the learned counsels and perused the materials on record.

11.The first point that is agitated before me is whether the apprentice appointed under the standing orders of the establishment are excluded from the definition of employee under Section 2 (9) of the ESI Act. To substantiate that the standing orders provided for appointment of apprentice, the respondent company filed Exhibit P.2 which defines apprentice as under:

> *"An apprentice is one who is engaged for the purpose of learning any skilled work provided that the period of such learning shall not exceed three years for those with prescribed technical qualification and five years for others. An apprentice on completion of his period of apprenticeship shall not be entitled to claim as a matter of right, any appointment in the Mill/Company."*

12.The respondent company further examined its production manager, as PW1, to speak about the training project scheme and the stipend paid to the trainee/apprentice. PW1 stated that the respondent company framed standing

orders for appointment of trainee/apprentice. P.W.1 further spoke about the various payments made toward stipend for the period 2002-2003 till 2007.

13.From the above extract of the standing orders of the respondent it is clear that the apprentice who were appointed by the respondent were not entitled to claim employment as a matter of right. The evidence of P.W.1 shows that they work only to learn the work and that there is no contract of employment. In the absence of a contract of employment, the remuneration paid to the apprentice as stipend would not qualify as wages and if a person was not receiving wages he could not be called an employee and if he was not an employee he would not be covered by the Act. In this regard the Judgment of the Hon'ble Supreme Court in the case of ***The Employees' State Insurance Corporation and Another Vs. The Tata Engineering & Locomotive Co. Ltd. and Another*** reported in ***(1975) 2 Supreme Court Cases 835*** is referred. The Hon'ble Supreme Court held as follows at paragraph No.11:

> *"From the terms of the agreement it is clear that apprentices are mere trainees for a particular period or a distinct purpose and the employer is not bound to employ them in their works after the period of training is over. During the apprenticeship they cannot be said to be employed in the work of the company or in connection*

with the work of the company. That would have been so if they were employed in a regular way by the company. On the other hand the purpose of the engagement under the particular scheme is only to offer training under certain terms and conditions. Besides, the apprentices are not given wages within the meaning of that term under the Act. If they were regular employees under the Act, they would have been entitled to additional remuneration such as daily allowance and other allowances which are available to the regular employees. We are, therefore, unable to hold that the apprentice is an employee within the meaning of Section 2(9) of the Act."

14.Further reference is also made to the judgment of the Hon'ble Court in the case of ***Employees' State Insurance Corporation Vs. Kwality Spinning Mills (Private) Ltd., Coimbatore*** reported in ***1975 (2) LLN 468***. It is stated as follows in the said Judgment:

"11.The learned counsel for the Mills contended that 'stipend' paid to the apprentices is only a gratuitous payment and that therefore, in any event, the apprentices cannot be called employees as defined under the Act.

Whether such a contention is correct or not, or, in other words, whether the stipend paid to the apprentices is a gratuitous payment or not for the reasons mentioned earlier, I am of the view that the apprentices are not employees as defined under the Act. Assuming stipend paid is remuneration for work done by the apprentices, that is not enough to bring them under the definition of the word 'employee' under the Act. Unless the remuneration for work is under a contract of employment, such remuneration would not be "wages" as defined under the Act. If a person is not receiving 'wages', he would not be an 'employee'.

12.In Halsbury's Laws of England, 3rd Edn. (Simonds Edn.) Volume 25, p. 451, under the heading 'Apprenticeship' the following passage occurs:

"By a contract of apprenticeship, a person is bound to another for the purpose of learning a trade of calling, the apprentice undertaking to serve the master for the purpose of being taught; and the master undertaking to teach the apprentice, Where teaching on

the part of the master or learning on the part of the other person is not the primary but only an incidental object, the contract is one of service rather than of apprenticeship; but, if the right of receiving instruction exists, a contract does not become one of service because, to some extent, the person to whom it refers does the kind of work that is done by a servant, or because he receives pecuniary remuneration for work. The payment of a premium is strong, though not conclusive evidence that a contract of apprenticeship rather than of service was contemplated."

13.I have already indicated that in the present case the terms of contract under which the apprentices were working go to show that there was no contract of service between the Mills and the apprentices. The primary object of the apprentices joining the Mills is one of learning. Inc dentally, they no doubt do work in the Mills but that is for the purpose of learning work."

15.The above said Judgment was followed in the case of ***Gnanambigai Mills, Ltd., Coimbatore Vs. Employees' State Insurance Corporation***

reported in ***1998 (3) L.L.N. 402***, the relevant paragraph No.7 is extracted below:

7.First let me consider whether the first item in question, i.e., the payments made to apprentices will attract ESI Act or not. In this regard, it is the contention of the respondent that these apprentices are also the workmen since they are performing regular duties and therefore they are employees under S.2(9) of the ESI Act and that therefore whatever payments made to them come within the purview of the ESI Act and hence the claim made by the respondent in this regard is justified and also the petitioner-company is liable to pay for the same. Whereas the contention of the petitioner – company is that the apprentices are not employees under the ESI Act. According to the petitioner, they are having a regular apprentice scheme under which a group of trainees are taken training. A proper scheme is prepared and the programme of practical and theoratical training is being imparted. It was also stated that a regular contract is obtained for such apprentice so selected. Further the trainees are not eligible for bonus and other incentives

and that there is no necessity to utilise the service of the apprentices against permanent work base. According to the petitioner, the apprentices engaged by the petitioner are mere trainees for a particular period and for distinct purpose and that the petitioner is not bound to employ them in their work after the training period is over. Further it is stated by the petitioner that these trainees have no guarantee for absorption into permanent service and they are not eligible for bonus, overtime and other incentives and there is no necessity to utilise their service of apprentices against permanent work force. Further it is significant to note that the apprentices selected does not exceed 50 at a time and according to the Standing Orders of the petitioner, the petitioner is eligible to give training to these apprentices. Therefore, it is contended by the petitioner that the respondent has erred in holding that these apprentices are employees of the petitioner-company. There is every force in the said contention of the petitioner herein. Further more, in support of their above contention the petitioner-company relies on the decision reported in Employees' State Insurance

Corporation V. Tata Engineering and Locomotive Company, Ltd., and another [1975 (2) L.L.N. 498], wherein the Supreme Court has held as follows, in Para 8, at page 501 :

"It is, therefore, inherent in the word 'apprentice' that there is no element of employment as such in a trade or industry but only an adequate well-guarded provision for training to enable the trainee after completion of his course to be suitably absorbed in earning employment as a regular worker...."

and also that :

"There is no scope for holding that the apprentices are employed in the work of the company or in connection with it for wages within the meaning of S.2(9) of the Act."

16.The learned counsel for the appellants relied on the following Judgments:

*"1.**M/s. Sri Ramnarayan Mills Ltd., Periyanaickenpalayam, Coimbatore - 641 020** reported in **2013 SCC Online Mad 867 : (2013) 3 Mad LJ 652 : (2013) 138 FLR 1067**; and*

*2.**Premier Polytronics, Ltd. And Assistant***

Regional Director, Employees' State Insurance Corporation *reported in* ***2001 (1) L.L.N.954***”

I am of the view that the above citations relied on by the appellants counsel are not relevant as the facts of the case differ.

17.The learned counsel for the appellant referring to the Amendment to Section 2(9) of the ESI Act with effect from 01.06.2010 contended that the apprentice are covered by the definition.

Section 2 (9) of the ESI Act reads as follows:

“*(9) employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and-*

(i)....

(ii)....

(iii)....

or any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing order of the establishment”

18.Under the said definition, apprentice engaged under the Apprentice Act, 1961 and under the standing orders of the establishment are exempted. It is pertinent to note that before the amendment act 29/1989 which came into force on 20.10.1989, there was no reference to apprentice in the said Section. It is also relevant to note that further amendments were made to the said

section with effect from 01.06.2010 and according to the said amendment, all the apprentices were to be considered as employees for the purpose of ESI Act. Prior to 01.06.2010, apprentice engaged under certified standing orders were not employees for the purpose of contribution under ESI Act. In the present case, the claim is made for the period 4/2002 to 3/2007, so the stipend paid to the apprentice by the respondent company for the period 4/2002 to 3/2007 is beyond the purview of the Amended Act. My view is fortified by the order of this Court in the case of ***M/s.Anna Cooperative Spinning Mills Ltd., Andipatti – 625 512, Theni District Vs. Employees State Insurance Corporation, Sub Regional Office, 4th Main Road, K.K.Nagar, Madurai – 625 020*** reported in ***2017 SCC Online Madras 33804*** it was held as follows:

> *"4.It is seen that the definition of "Employee" is set out in Section 2(9) of the ESI Act, 1948. An amendment was made with effect from 01.06.2010, whereby any person engaged as apprentice whose training period is extended to any length of time was also brought within the scope of the term "employee". In other words, an apprentice engaged in certified standing orders was not an employee for the purpose of contribution prior to 01.06.2010. In the present case, the period of contribution payable is between the year 1996*

and 2006. Similarly, tiffin allowances will have to be construed as a sum paid to the employee to defray the special expenses. Therefore tiffin expenses cannot be construed as part of wages. This issue is no longer res integra. In a catena of decisions, this Court has held that the term "special expenses" occurring in Section 2(22) of the Act would not include payment given to the employee to defray tiffin and the meals expenses.

5.The learned counsel appearing for the appellant placed reliance on the decision reported in 2001 1 LLJ - Employees State Insurance Corporation v. Mount Mettur Pharmaceutical Limited, Madras. It has been followed consistently ever since. Answering the substantial questions of law in favour of the appellant, this Civil Miscellaneous Appeal is allowed. The respondent corporation is directed to exclude the stipend paid to the apprentices engaged in the standing orders and the tiffin allowances paid to the employees while calculating the contribution payable for the aforesaid period. No costs. Consequently, connected miscellaneous petition is closed."

19.Confronted with both the factual as well as the legal position, the learned counsel submitted that the respondent company was camouflaging the regular empolyers as apprentice and therefore, the claim is unsustainable. According to the learned counsel, the payment shown as stipend to the apprentice were salaries paid to the employees which is evident from total wages paid by the employee to all categories of workers during the assessment period of Rs.2,87,84,848/- and stipend of Rs.85,95,592/-. This high ratio of payments made to the apprentice vis a vis the payments made to the requlars employees would show that the respondent company was engaging apprentice to discharge the work of regular employees.

20.I am afraid that the contention of the appellants is untenable and is squarely covered by the judgment of the Division Bench of this Court in the case of ***Regional Provident Fund Commissioner, Employees Provident Fund Organisation, Madurai Vs Employees Provident Funds Appellante Tribunal, New Delhi*** reported in ***2015 LLR 1253***, wherein, the Division Bench held that the number of apprentice being more than the regular employee would not be a ground to accept the apprentice as regular employees.

21.In the light of the categorical finding on facts given by the labour Court and in view of the settled legal position that apprentice appointed under the standing orders are not covered by the Act. I find no illegality or improprietory in the order of the Labour Court and hence the same is confirmed. The appeal is therefore dismissed. There shall be no order as to costs.

23.03.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
sn/ah

To

1. E.S.I. Court (Labour Court), Madurai.

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

N.MALA, J

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C.M.A(MD)No.861 of 2022

23.03.2023