

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.11.2017

CORAM

THE HON'BLE MR. JUSTICE M.DURAISWAMY

C.M.A.No.1837 of 2015

The Joint Director,
Employees' State Insurance Corporation,
Sub Regional Office, Coimbatore.

... Appellant

Vs.

Sri Ramakrishna Mills (Coimbatore) Ltd.,
A Public Limited Company,
represented by its Vice President (Finance),
Mr.N.Narasimhalu,
Administrative Office,
1493, Sathyamangalam Road,
P.B.No.2007, Ganapathy, Coimbatore - 641 006.

... Respondent

Appeal filed under Section 82 of Employees' State Insurance Act, 1948 against the order dated 30.06.2011 made by the Employees' State Insurance Court, Coimbatore in E.S.I.O.P.No.69 of 2005.

For Appellant : Mr.G.Bharadwaj

For Respondent : Mr.A.S.Balaji

J U D G M E N T

Challenging the order passed in E.S.I.O.P.No.69 of 2005 on the file of the Employees' State Insurance Court, Coimbatore, the Employees' State Insurance Corporation has filed the above appeal.

2.The respondent filed the E.S.I.O.P., to declare the orders dated 28.09.2005 and 09.08.2005 as invalid and to set aside the same.

3.It is the case of the respondent that it has been regularly remitting its contributions for more than 50 years and on account of crisis prevailing in the textile industrial

circle, the respondent Company had incurred losses since 1999 and the entire net worth of the Company was eroded due to the losses, therefore, the Auditors of the Company reported that the Company had become a Sick Industrial Company as on 30.09.2003 under Section 3(1)(O) of the Sick Industrial Companies (Special Provisions) Act, 1985. The entire net worth has also been reported by the respondent Company to the Board for Industrial and Financial Reconstruction, New Delhi as required under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. The reference has been registered by the BIFR as Case No.125/2004. Thus, the respondent Company has become a Sick Unit. As a consequence of acute financial crunch faced by the respondent Company, they were unable to meet the day-to-day financial commitments. Even payments to E.S.I. dues also became difficult on account of mis-match of the cash flow prevailing in the textile market. The respondent also contended that with great difficulty, they managed to remit all the dues under the E.S.I. Act. However, there was a delay and the delay, according to them, was neither wanton nor willful. The appellant passed an order of recovery of damages for the delayed payment of contributions for the period 04/2003 to 06/2004. The appellant also passed orders for recovery of interest for the contributions for the said period.

4. According to the respondent, at the time of calculating the damages, in the damages calculation sheet, it has been wrongly mentioned as 375 days instead of 9 days. The damages for the delay levied was Rs.84,815/- and the interest was levied at Rs.83,283/-. Subsequently, the levy towards interest was reduced to Rs.61,628/-, which pertains to the interest for the contributions for the period 04/2003 to 06/2004. According to the respondent, the appellant has passed the orders without any application of mind and therefore, they sought to set aside the orders before the E.S.I. Court, Coimbatore. The Employees' State Insurance Court, Coimbatore, by its order dated 30.06.2011, considered the judgments relied upon by the learned counsel for the respondent reported in (2008) 1 Supreme Court Cases (L & S) 558 [Employees' State Insurance Corporation Vs. HMT Ltd., and another] wherein the Hon'ble Supreme Court held as follows:

“...
21. A penal provision should be construed strictly. Only because a provision has been made for levy of penalty, the same by itself would not lead to the conclusion that penalty must be levied in all situations. Such an intention on the part of the legislature is not decipherable from Section 85-B of the Act. When a discretionary jurisdiction has been conferred on a statutory authority to levy penal damages by reason of an enabling provision, the same cannot be construed as imperative. Even otherwise, an

endeavour should be made to construe such penal provisions as discretionary, unless the statute is held to be mandatory in character.

22. In *Prestolite (India) Ltd., Vs. Regional Director* this Court rejected a contention raised by the Regional Director of Employees' Insurance that under the Employees' State Insurance General Regulations guidelines have been indicated showing as to how damages for delayed payment are to be imposed and since such guidelines have been followed, no exception should be taken thereto made to the impugned adjudication, stating: (SCC p.693, para 5)

"5. ... Even if the regulations have prescribed general guidelines and the upper limits at which the imposition of damages can be made, it cannot be contended that in no case, the mitigating circumstances can be taken into consideration by the adjudicating authority in finally deciding the matter and it is bound to act mechanically in applying the uppermost limit of the table. In the instant case, it appears to us that the order has been passed without indicating any reason whatsoever as to why grounds for delayed payment were not to be accepted. There is no indication as to why the imposition of damages at the rate specified in the order was required to be made. Simply because the appellant did not appear in person and produce materials to support the objections, the employee's case could not be discarded in limine. On the contrary, the objections ought to have been considered on merits."

23. In *Dilip N. Shroff Vs. CIT*, this Court stated: (SC p.353, para 40)

"40. Thus, it appears that there is distinct line of authorities which clearly lays down that in considering a question of penalty, mens rea is not a relevant consideration. Even assuming that when the statute says that one is liable for penalty if one furnishes inaccurate particulars, it may or may not by itself be held to be enough if the particulars furnished are found to be inaccurate is anything more needed but the question would still be as to whether reliance placed on some valuation of an approved valuer and, therefore, the furnishing of inaccurate particulars was not deliberate, meaning thereby that an element of mens rea is needed before penalty can be imposed, would have received serious consideration in the light of a large number of decisions of this Court."

24.We agree with the said view as also for the additional reason that the subordinate legislation cannot override the principal legislative provisions.

25.The statute itself does not say that a penalty has to be levied only in the manner prescribed. It is also not a case where the authority is left with no discretion. The legislation does not provide that adjudication for the purpose of levy of penalty proceeding would be a mere formality or imposition of penalty as also computation of the quantum thereof became a foregone conclusion. Ordinarily, even such a provision would not be held to providing for mandatory imposition of penalty, if the proceeding is an adjudicatory one or compliance with the principles of natural justice is necessary thereunder.

26.Existence of mens rea or actus reus to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and/or the quantum thereof."

5.Before the E.S.I. Court, the respondent also produced Ex.P10, the order passed by the Board for Industrial and Financial Reconstruction, New Delhi dated 16.12.2005, wherein the respondent unit has been declared as a Sick Unit and a preparation of rehabilitation scheme under Section 17(3) of the Act was also enclosed. From the said documents, it could be seen that the respondent Company has been declared as a Sick Unit. Further, in the said order, it has been observed that the respondent Company has been facing the financial crunch for more than 5 years prior to the passing of the order on 16.12.2005. However, the E.S.I. Court partly allowed the petition by setting aside the order dated 09.08.2005 claiming a sum of Rs.61,978/- towards damages and directing the respondent to pay a sum of Rs.61,803/- deposited by them to the credit of the case with accrued interest to be paid to the appellant in Full Quit to the interest amount claimed under Ex.P7 revised notice dated 28.09.2005.

6.The ratio laid down in the judgment reported in (2008) 1 Supreme Court Cases (L & S) 558 [Employees' State Insurance Corporation Vs. HMT Ltd., and another] squarely applies to the facts and circumstances of the present case. When the unit has been declared as a Sick Unit by order dated 16.12.2005 and when the Board had clearly observed that the respondent Company was facing financial crunch for more than 5 years prior to the passing of the order on 16.12.2005, the E.S.I. Court should have allowed the E.S.I.O.P. in favour of the respondent Company. That apart, the levy of penalty under Section 85 -B of the Act is not mandatory and the appellant has got powers to waive the damages recoverable under the Section in relation to a establishment,

which is a sick industrial Company. When the respondent Company was declared as a sick industrial Company and was facing financial crunch for more than 5 years prior to the passing of the order on 16.12.2005, the E.S.I. Court should have allowed the E.S.I.O.P. in toto.

7.In these circumstances, I am of the considered view that the order passed by the Employees' State Insurance Court in E.S.I.O.P.No.69 of 2005 is liable to be set aside. Accordingly, the same is set aside. The Civil Miscellaneous Appeal is allowed. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1. The Joint Registrar,
Employee's State Insurance Corporation,
Sub Regional Office, Coimbatore.
2. The Employees' State Insurance Court,
Coimbatore.

+lcc to Mr.A.S.Balaji, Advocate, S.R.No.79203
+lcc to Mr.G.Bharadwaj, Advocate, S.R.No.78878

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