



**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 13.11.2017**

CORAM :

**THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
C.M.A. (MD) No.1141 of 2015**

WEB COPY

1. E.S.I Corporation,
Sub-Regional Office (Tirunelveli),
Salai Street, Vannarpettai,
Tirunelveli - 627 003,
Rep.by its Joint Director.

2. Recovery Officer,
E.S.I Corporation,
Sub-Regional Office (Tirunelveli),
Salai Street, Vannarpettai,
Tirunelveli - 627 003.

... Appellants

Vs.

Hotel Gowri Sankar,
Prop.S.Subburaman,
3-A, Hospital Road,
Ambasamudram

... Respondent

Prayer: Civil Miscellaneous Appeal is filed under Section 82 of the ESI Act, 1948 to set aside the order dated 31.07.2015 passed by the ESI Court (i.e Labour Court), Tirunelveli in ESI OP.No.14 of 2015.

For Appellant : Mr.P.Ganapathisamy
For Respondents : Mr.M.E.Ilango

JUDGMENT

E.S.I Corporation has filed this appeal challenging the order passed by the ESI Court granting substantial relief to the establishment in the matter of levy of damages.

2.The respondent is an Establishment covered by the provisions of ESI Act, 1948. There was huge delay in the matter of remittance of contribution. The contribution was remitted in terms of the Amnesty scheme dated 31.05.2011. Show cause notice dated 10.06.2014 was issued by the appellant corporation. The respondent herein gave explanation. Thereafter, the order dated 05.01.2015 was passed under Section 85 B of the Act levying damages to the tune of Rs.1,56,331/-. The same was questioned by the respondent herein by filing a petition under Section 75(1)(g) of ESI Act before the ESI Court, Tirunelveli. The ESI Court allowed the petition and fixed the damages at 10% of the impugned demand. Contending that the ESI Court ought not to have interfered with the quasi judicial order passed by it, this appeal has been filed.



3.This appeal was admitted by framing the following substantial questions of law :

1.Whether the Trial Court is justified in interfering with a quasi-judicial order even though no witness was produced/examined in the case to prove the document or the contention of the employer that there is absence of mens rea?

2.Whether the passing of the order of damages under the said Section 85-B of the ESI Act, 1948 establishes mens rea on the part of the entity?

3.Whether the employer can advance a new plea for the first time before the Trial Court ?

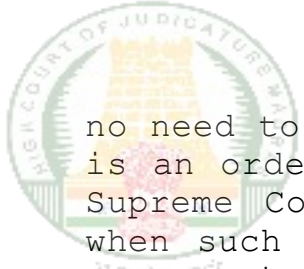
4.Whether the Trial Court is justified in causality interfering with quasi-judicial orders of the ESI Corporation despite the protection available in under Section 114, illustration (e) of the Evidence Act ?

4.Heard the learned counsel on either side.

5.Even though what is under challenge before me is the order of the ESI Court, this Court will have to essentially test the validity of the order made under Section 85 B of the Act. No doubt, there has been a delay on the part of the establishment in remitting the contribution. But, merely because there was a delay in remitting the contribution, damages cannot be levied as a direct consequence. It has been held by the Hon'ble Supreme Court of India in the decision reported in **(2008) 3 SCC 35 (Emp. State Insurance Corporation v. H.M.T. and Another)** that mens rea is an essential ingredient and unless the same is shown to have been present, the question of levying damages would not arise. This is because damages take the character of penalty.

6.I carefully went through the order passed under Section 85 B of the ESI Act, 1948. No where the authority has even indicated that the employer willfully defaulted in making the payment. In other words, there is no reference to the element of mens rea in the impugned order. Therefore, the appellant was not justified in levying damages on the respondent. As the Hon'ble Supreme Court pointed out, the said statutory provision used the expression "may". In fact, in my view the Tribunal ought to have set aside the order in toto. That apart, it is relevant to note here that the contribution was ultimately remitted only in terms of the Amnesty scheme. The respondent was also engaged in a long litigation as disputed the quantum of contribution.

7.It is true that the respondent herein did not examine any witness before the ESI Court nor did the appellant corporation. But, when illegality is starring on the very face of it, there is



no need to establish the same. What is ultimately under challenge is an order passed under Section 85 B of the Act. The Hon'ble Supreme Court has set out the parameters and the circumstances, when such an order levying damages can be passed. The appellant corporation has not even referred to those circumstances in the order passed under Section 85 B of the Act. That is the finding of the ESI Court also. Therefore, there is no substance in the first substantial question of law raised in this appeal.

8. Merely because, the second substantial question of law raised is as to whether mere passing of the order of damages would establish the mens rea on the part of the establishment. In my view, only if there is mens rea on the part of the establishment, then an order of damages can be passed. Therefore, the second question of law is answered against the appellant corporation.

9. The order passed under Section 85 B of the Act came to be challenged by the respondent by filing ESIOP.No.14 of 2015. It is a original proceeding. Therefore, the question of advancing any new plea for the first time does not arise. Hence, the third substantial question of law is also answered against the appellant. The learned counsel for the appellant fairly did not press the last one. Therefore, I do not go into it.

10. This appeal is dismissed accordingly. No costs.

Sd/-

Assistant Registrar (CS-III)

/True Copy/

Sub Assistant Registrar

To

1. The Judge ESI Court (i.e Labour Court), Tirunelveli.

2. The Record Keeper, VR Section,
Madurai Bench of Madras High Court, Madurai.

+2cc to Mr.P.Ganapathisamy, Advocate Sr.No.87102,86626

+1cc to Mr.M.E.Ilango, Advocate Sr.No.87004

SKM

VB/SV/MMS/SAR1/29/11/2017/4P/6C

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