BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 30.08.2017
Pronounced on : 06.12.2017

CORAM

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.M.A(MD)No.597 of 2017

The Joint Director,
The Employees' State Insurance Corporation,
Sub-Regional Office(Tirunelveli),
Salai Street,
Vannarpettai,
Tirunelveli. ... Appellant/Respondent

Vs.

Hotel Niyaz
No.2/1, Madurai Road,
Tirunelveli Junction,
through its proprietor,
M.A.Raffeena Beevi ... Respondent/Petitioner

Civil Miscellaneous Appeal is filed under Section 82(2) of the E.S.I Act, 1948, against the judgment and decree of the Employees' State Insurance-cum-Labour Court, Tirunelveli, passed in E.S.I.O.P.No.18 of 2016 dated 24.01.2017 in respect of waiving 80% damages.

For Appellant : Mr.K.C.Ramalingam

For Respondent : No appearance

J U D G M E N T

This Civil Miscellaneous Appeal has been filed by the appellant/the Employees' State Insurance Corporation against the order passed by the Employees' State Insurance-cum-Labour Court, Tirunelveli, in E.S.I.O.P.No.18 of 2016 dated 24.01.2017, in respect of waiving 80% damages.

2.The respondent filed a petition under Section 75(1)(g) of the ESI Act to set aside the order passed by the appellant under Section 85-B of the Act dated 24.08.2016, fixing damages at Rs.92,234/- for the period between 05/78 to 03/09 and to stay the subsequent recovery proceedings.

3.The facts of the case are that the respondent is running a small catering establishment and it was allotted a code number in the year 1978. The appellant also fixed subscription amount against which the respondent preferred E.S.I.O.P.No.4 of 1990 on the file of the Employees State Insurance Court and it was allowed in favour of the respondent, against which, the appellant preferred C.M.A.No.1680 of 1995 before this Court and that was dismissed on 19.11.2003. Thereafter, the appellant passed orders fixing subscription amount on adhoc basis and the respondent paid the same periodically. The appellant also issued Form D-18 Notice claiming damages for the period from 05/78 to 07/81. The appellant also fixed damages at Rs.5,321/- for the delayed payment of subscription that was also remitted by the respondent by challan dated 14.03.2000. While so, on 30.05.2016, the appellant issued Form D-18 Notice claiming a sum of Rs.1,01,300/-. The appellant subsequently issued another notice claiming damages at Rs.92,234/- for the same period from 05/78 to 03/09 and 2002-2004. The respondent appeared in person and pointed out that there is inordinate delay in demanding the dues and it also includes the period of litigation. Though the appellant lost in the litigation, the respondent thereafter paid the amount demanded by the appellant. But, without considering the abovesaid objections, the appellant passed an order dated 24.08.2016 directing the respondent to pay Rs.92,324/- which according to the respondent is invalid. According to the respondent, the appellant claimed damages nearly after 13 years and there was laches on the part of the appellant in initiating proceedings and therefore, the respondent prayed to set aside the recovery proceedings.

4.The appellant through their counter accepted the contention that the respondent filed ESIOP.No.4/90 which allowed in their favour against which, the appellant filed CMA.No.1680/1995 which was also dismissed. The appellant issued Form D-18 notice for the period from 14.05.1978 to 31.07.1981 claiming damages of Rs.5,321/- and it was remitted by the respondent on 14.03.2000. However, as the respondent is a chronic defaulter and he has failed to pay the subscription regularly and paid the same with inordinate delay, he is liable to pay interest as per Section 39 (5) of the ESI Act and liable to pay damages as per Section 31-C of the ESI Regulations. The appellant further contended that order to pay damages was passed in accordance with law and prayed for dismissal of ESIOP.No.18/16.

5.It is an admitted fact that the respondent was running a catering establishment and his establishment is covered under the ESI Act. It is also an admitted fact that the respondent preferred ESIOP.No.4/90 and got an order in his favour which was appealed by the appellant and the same was dismissed. So, a litigation was pending from 1990 to 2003 and the damages which was demanded by the appellant for the period 5/1978 to 7/1981 has been admittedly paid by the respondent and it was also agreed by the appellant that the above amount was paid by challan dated 14.03.2000. Now, the order which was challenged before the ESI

Court was that the damages has been fixed not only for the litigation period but for the further period for which the respondent had already paid damages and after a period of nearly 26 years, the appellant had sought for the present damages.

6.It is seen from the notice issued by the appellant which is marked as Ex.P2, the respondent has paid the subscription for the period of May 1978 in the year 1999 and the subscription for the period of November 2001 to August 2004, was paid in the year 2008. But, admittedly, the appellant has issued only two form D-18 notices one was issued on 30.05.2016 and another was issued on 17.06.2016 which were also marked as Ex.P1 and Ex.P2. Ex.P1 was sent claiming Rs.1,01,300/- and Ex.P2 was sent claiming Rs.92,234/- towards damages and admittedly the damages was calculated for a very long period of nearly 26 years. The respondent has clearly pleaded that there was laches on the part of the appellant, for which, he marked Ex.P4 where the appellant periodically claimed interest from 1996 till 2009 for the delayed payment and it is the contention of the respondent that when the appellant has got knowledge about the delayed payment of subscription and claimed interest for the delayed payment, they failed to take any action or to recover damages for such inordinate delayed payment and pleaded that as there was laches on the part of the appellant in initiating the proceedings, the appellant cannot at this point of time claim damages.

7.The respondent admitted payment of subscription with delay and payment of interest therefor. What was left is only fixation of damages and it would arise only if there is mala fide attitude and mens rea on the part of the respondent and therefore, before fixing damages, it has to be mandatarily found by the Court that whether there was any mala fide intention and mens rea on the part of the respondent in making the delayed payment. In the order passed by the appellant marked as Ex.P3, nowhere the appellant has stated that there was any mala fide intention on the part of the respondent in making the delayed payment. There is no finding even with regard to mens rea on the part of the respondent in making the delayed payment. Under Section 85-B, the appellant is entitled to fix damages, if the subscription is paid with delay, but this power is not unlimited or unfettered power. The appellant before fixing the damages should consider the circumstances and the reasons for such delay.

8.The Court below relied on the judgments reported in ESI Corporation vs. HMT Limited reported in 2008 (1) LLN 491, ESI Corporation vs. M/s.Hafeez Motor Transport and Beema Manufacturers Private Limited reported in (1991)-II-LLJ 29 where it was found that existence of mens rea or actus rea to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and or the quantum thereof. The learned Judge considered the above judgments in elaborate and found that the appellant fixed the damages for the period during which litigation was pending and the appellant also fixed damages for the period for which the respondent already paid subscription. The appellant who claimed interest periodically for the delayed payment, failed to claim damages then and there, but claimed damages after a period of nearly 26 years. There was laches on the part of the appellant to recover the damages and the order under Ex.P3 does not mention anything about the mala fide intention on the part of the respondent. But, the learned Judge though found all the points in favour of the respondent came to the conclusion that it is the bounden duty of the respondent to pay subscription periodically and when there is a failure on his part and when he paid the subscription amount in installments after due determination by the appellant, he is liable to pay atleast some amount towards damages so that such delay will not happen in future and accordingly fixed 20% of the damages arrived at by the appellant.

9.Regulation 31C of the Employees' State Insurance (General) Regulations, 1950, deals with damages or contributions or any other amount due, but not paid in time whcih reads as follows:-

> If an employer who fails to pay contribution within the periods specified under regulation 31, or any other amount payable under the Actm the Corporation may recover damages, not exceeding the rates mentioned below by way of penalty.

Period of delay	Maximum rate of damages in per cent per annum of the amount due
(i) Less than 2 months	5%
(ii) 2 months and above but less than 4 months	10%
(iii) 4 months and above but less than 6 months	15%
(iv) 6 months and above	25%

> Provided that the Corporation, in relation to a factory or establishment which is declared as sick industrial company and in respect of which a rehabilitation scheme has been sanctioned by the Board for Industrial and Financial Reconstruction, may:-

> (a) in case of a change of management including transfer

of undertaking(s) to worker's Co-operative(s) or in case of merger or amalgamation of sick industrial company with a healthy company, completely waive the damages levied or leviable;

(b) in other cases, depending on its merits, waive upto 60 per cent damages levied or leviable;

(c) in exceptional hard cases, waive either totally or partially the damages levied or leviable.''

10.By exercising power under Section 31-C(c) of the Act in the above circumstances of the case, the Court below thought it fit to fix 20% of the damages arrived at by the appellant which in my considered opinion does not need interference in the hands of this Court.

Accordingly, this Civil Miscellaneous Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(Crl side)

/True Copy/

Sub Assistant Registrar

To

The Judge,
Employees' State Insurance-cum-Labour Court,
Tirunelveli.

+ 1 cc TO Mr.K.C.Ramalingam , Advocate in SR No. 91358

bala/pm
AE/SKN RSK/SAR1/15.12.2017/5P/3C

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