

In the High Court of Judicature at Madras

Reserved on

05.04.2018

Pronounced on

20.09.2018

C O R A M

THE HONOURABLE MRS.JUSTICE S.RAMATHILAGAM

C.M.A.Nos.3081 and 3088 of 2011

Regional Director

Employees' State Insurance Corporation

No.143, Sterling Road,

Chennai-34. ...Appellant in both appeals

Vs

Pullicar Mills Ltd.,

107, Sankagiri Road,

Tiruchengode,

represented by Managing

Director K.K.K.Munirajah .. Respondent in

both appeals

PRAYER: Civil Miscellaneous Appeals filed under Section Section 82 of the Employees Insurance Act, 1948 against the order of the Principal District Judge, Namakkal (Employees State Insurance Court constituted under ESI Act) dated 10.2.2010 and made in ESIOP Nos.1 and 2 of 2008 to set aside the same.

For Appellants in both

appeals : Mr. G.Bharadwaj

COMMON JUDGMENT

These Civil Miscellaneous Appeals have been preferred against the common order passed in ESIOP.Nos.1 and 2 of 2008 on the file of Principal District Judge, Namakkal (Employees State Insurance Court constituted under ESI Act) dated 10.2.2010.

2. C.M.A.No.3081 of 2011 arises out of the order made in ESIOP.No.1 of 2008 declaring that the order dated 17.8.1999 and 11.11.1999 passed in TNR/INS-IV/51-5689-II and Recovery notice in TN-RECY-ESI/CPI-51 5689-II dated 3.4.2000 are illegal, thereby restraining the respondent/ESI from recovering Rs.4,16,329/- as interest and interest thereon as per orders dated 17.8.99, 11.11.99 in Ref.No/TNR/INS VI/51-5689-11 as per and attachment notice in TN/RECY/ESI, CPI/51-5689-II dated 3.4.2000.

3. C.M.A.No.3088 of 2011 arises out of the order made in ESIOP No.2 of 2008 declaring the prohibitory order passed in Form CPD in TN/RECY/ESI-FF-3/51-5689-II dated 8.12.2003 as illegal and order passed in Form CP3 in proceedings No.IN/RECY/ESI-CP 3/51-11 attaching the Indian Bank Account of the petitioner.

4. In the above said two ESIOPs. 1/2008 and 2 of 2008, the petitioner in both the ESIOPs are same and the respondent/ESIC herein has filed ESI OP.No.1 of 2008 praying to (i) declare that the order dated 17.8.99 and 11.11.99 passed in TNR/INS-IV / 51-5689-11 and recovery notice in TN-RECY-ESI CPI-51-5689-IIDT.3-4-2000 illegal, arbitrary and unenforceable in law; (ii) to grant permanent stay, restraining the respondent in any way recovering Rs.4,16,329/- as interest and interest thereon, as per orders dated 17.8.99. 11.11.99 in ref.no.TNR/INS VI/51-5689-II as per and attachment notice in TN/RECY/ESI, CPI/51-5689-11 dated 3.4.2000.

5. ESI.OP.No.2 of 2008 is filed praying to (i) declare the prohibitory order passed in form CP3 in TN/RECY/ESI-CP-3/51-5689-11 dated 8.12.2003 as illegal, arbitrary and unenforceable in law (ii) to grant permanent stay of the prohibitory order passed in form CP3 in proceedings no.TN/RECY/ESI-CP-3/51-5689-11, attaching the Indian Bank Account of the petitioner and restraining the respondent from attaching the Indian Bank A/c of the petitioner pending disposal of the case.

6. The brief facts of the petitions are that the respondent Mill is covered under the Employees State Insurance Act and the code number allotted is TM/INS/VI-51/5689-II and all the Employees are covered under the Act and the mills having a spindle of 27,811 workable spindles have been running with an utilisation which has shown steady decline of out put. The daily engagement of labour in the Mills have been 830 workers. During the year 1987 to 1988, the Mills were under closure for a period of 11 months due to financial problems.

7. Consequent to general recession in the textile industry, as a whole, in the year 1991-92, the mill has incurred huge loss. This mill is having higher efficiency in the lower counts, because of the conditions of machinery, which have never been improved and the ring frames and back process machinery have always been deficient and the mill was continuously incurring huge loss which resulted in under utilisation of the installed capacity of the Mills. Hence ESI dues of the petitioner could not be paid in time. The respondent Mill has given a detailed letter to the ESI Corporation explaining its difficulties and based on that, the ESI Corporation was pleased to sanction payment of contribution in instalments vide letter dated 23.9.1996 and arrears were allowed to be paid in instalments.

8. A revolving bank guarantee was also furnished to the appellant/ESIC as per existing requirements on 23.11.1997 by the Indian Bank and the Mill has been declared as a sick industry in case No.57/94, of the Board for Industrial Finance and Reconstruction, Delhi.

9. While so, on 10.08.1989, a notice was also issued by the appellant/ESIC claiming damages at the rate of 25% for the delayed payment of contributions at Rs.7,09,960/- and subsequently, the respondent Mill has not claimed any damages and it has again sent a notice claiming Rs.4,16,329/- as interest for delayed payment in his proceedings in TNR, INS VI-51/5689-11 dated 17.8.99 for the period 6/93 to 3/95 and on 11.11.1999, C.19 notice for recovery was issued by the ESIC to recover the amounts through coercive methods and has also enclosed a letter dated 11.11.1999 that there is no provision in the Act to waive interest. Again on 3.4.2000, a notice of attachment was sent. The delayed payment was made only with the consent of the respondent Mill and no interest is payable as per law. Hence the demand for payment of interest is illegal, arbitrary, capricious and unsustainable.

10. Because of the illegal prohibitory order, the respondent Mill is unable to operate the bank account and the working capital shortage has arisen. Hence the respondent Mill is unable to purchase raw materials and give work to the entire work force, which will ultimately rendered all the 500 workmen as jobless, putting themselves and their families into undue hardship. Hence, it is prayed to declare the prohibitory order dated 8.12.2003 as illegal, arbitrary and unenforceable in law and also to grant permanent stay of the prohibitory order passed in proceedings No.TN/RECY/ESI-CP-3/51-5689-11, attaching the Indian Bank account of the petitioner and restrain the respondent from attaching the Indian Bank Account of the petitioner, pending disposal of the case.

11. Counter is filed by appellant/ESIC contending that the respondent Mill is covered under the Employees State Insurance Act and code number is also allotted and all the employees are covered under the Act and contribution is paid regularly and the Mill is having spindlage of 27,811 workable spindles, which have been running with an utilisation and the daily engagements of labour in the Mills have been 830 workers and during the year 1987-88, the Mills were under closure for a period of 11 months due to financial problems and consequent to the general recession in the Textile Industry as a whole, in the year 1991-92, the Mill has incurred a huge loss, and the conditions of machinery, which have never been improved and of its process, machinery have always been deficient and hence the mill was continuously incurring huge losses which has resulted in under utilisation of the installed capacity of the mills. So the respondent Mill would not pay ESI dues in time and on a letter by the respondent Mill, which explained the difficulties, appellant/ESIC was pleased to sanction payment of contribution in instalments and the Mill has also been declared as a sick industry by the proceedings of the Board for Industrial Finance and reconstruction, Delhi in Case No.57/1994 vide the orders dated 25.7.1994 and revival scheme was sanctioned at Rs.15,00,000/- was allowed towards payment of statutory liability including ESI and PF and the Mill is under BIFR pattern and the appellant/ESIC, vide their letter dated 14.11.2003 demanded the respondent/Mill to pay Rs.1,48,908/- as interest for the period from February 1997 to May 1997 and the respondent Mill has also stated reasons for the delay in payment and the petitioner also sent out 230 permanent workmen on URS basis after borrowing finance from outside sources to make mills viable. Under these circumstances, the respondent/Mill prayed that the orders of the appellant/ESIC in TN/RECY/ESI CP-3/51 5689 dated 8.12.2003 demanding the respondent/Mill to pay the interest of Rs.1,48,598/- and attachment of bank account by the respondent is illegal, arbitrary and capricious.

12. On a perusal of petitions and counter, the tribunal has framed the following issues for consideration.

1. Whether the order dated 17.08.99 and 11.11.1999 passed in TNR/INS-IV/51-5689-11 and recovery notice in TN-RECY-ESI-C.P.I-51-5689-II dated 3.4.2000, is to be declared as null and void? (ESIOP.2/2003 or 1/08)

2. Whether the petitioner is entitled to the relief of permanent injunction as prayed for as far as (ESIOP 2/2003 or 1/08) is concerned?

3. Whether the order dated 8.12.2003 passed in Form CPC in TN/RECY/ESI-FP-3/51-5689-11 is to be declared as null and void? (1/04 or 2/08).

4. Whether the petitioner is entitled to the relief of permanent injunction as prayed for as far as (ESIOP 1/2004 is concerned (or 2/08)

5. What are the reliefs, the petitioner is entitled to these petitions?'

Issues framed page No.5

13. In both these petitions, evidence and documents were marked. Since the petitioner and the respondent were same, the issues are clubbed together and tried.

14. On the side of the petitioner, Ex.P.1 to P.12 were marked. On the side of the respondent, Ex.R.1 to R3 were marked and no oral evidence was let in before the Court.

15. It is observed from the order that both the parties have not made any objection for marking the documents on their side respectively.

16. As stated in the petition, evidence was also let in by the respondent/Mill regarding the respondent Mill was covered under ESI and was allotted number code and the daily engagement of labour in the mills have been 830 workers and the mills having a spindle of 27,811 workable spindles have been running and the financial problem that was faced by the Mill in the year 1987 to 1988 and in the year 1991 to 1992 and when there is heavy loss and heavy depletion of funds and the financial problem that was faced by the Mill and further due to the unforeseen circumstances, the Mill could not produce adequate cotton at economic rates and these are all the things which are not denied by the respondent.

17. The major factor arises in this petition is that the Mill was continuously incurring loss and their dues could not be paid in time. No sufficient documents were filed by the respondent/Mill, but the same was not denied by the appellant/ESIC.

18. It is also observed from the documents placed before the ESI Court that Ex.P1-Letter of ESI Corporation reveals that permission was given by the appellant/ESIC to pay the dues in instalment and Ex.P.3- Bank Guarantee dated 28.1.1997 also reveals as per the requisition of the appellant/ESIC, the respondent/Mill executed a Bond in favour of the appellant. These are the facts admitted by both the appellant and respondent. However, it is observed that the respondent Mill has been declared as a sick industry by the proceedings of the Board in Industrial Finance and reconstruction, Delhi in case No.57/94 vide their orders dated 25.7.1994 and the revival schemes were sanctioned, wherein 15 lakhs was allowed towards payment of statutory liabilities including ESI and PV and the Mill is in VIFR. But there was no documents produced by the respondent Mill and no evidence also let in by it.

19. As per Ex.P.4 dated 10.8.1999, a notice was issued by the appellant/ESIC claiming damages at the rate of 25% for the delayed payment of contribution of Rs.7,09,916/- for which Ex.P.5-a reply notice was sent by the respondent/Mill. In the said reply, the Mill has stated the difficulties for the delay in payment. Further, the appellant/ESIC cannot claim any damages for making delayed payments. The argument made by the respondent/Mill is that there is no provision in the Act to waive interest and the attachment notice is void.

20. The contention of the respondent/Mill is that once facility to remit the contribution in instalments is sanctioned, the appellant/ESIC is not justified in demanding the interest on delayed payment because, delayed payment was made only with the consent of the appellant/ESIC and the same cannot be denied by them.

21. The trial court has observed that the appellant/ESIC has not come with a specific defence and of with documents.

22. The ESI Court has also observed that there is no cause or reason for claiming interest or damages and when there are things which are not permissible under the Act, the issuance of notice and passing of the order by the respondent is unsustainable in law and the ESI Court has ordered that the petitioner is entitled for the relief of declaration and permanent injunction.

23. In ESIOP.1 of 2004, the trial court has declared that the prohibitory order passed in Form CP3 in

TN/RECY/ESI-FF/3/51-5689-II, dated 8.12.2003 as illegal, arbitrary and the order passed in Form CP3 in proceedings No.IN/RECY/ESI-CP-3/51-11 attaching the Indian Bank Account of the respondent/Mill.

24. Regarding the other ESIOP No. 2 of 2008, an order is passed by the ESI declaring orders dated 17.08.1999 and 11.11.1999 and recovery notice is illegal and the respondent is restrained in any way from recovering Rs.4,16,329/- as interest as per order dated 17.8.99 and 11.11.1999 and attachment notice dated 3.4.2000.

25. Aggrieved against the said order of the ESI Court, these CMA's have been preferred by the appellant by stating that the charging interest is mandatory, the liability of interest or damages is statutory under the following grounds;

- (i) Any demand under ESI did not depend upon the profit or loss of the company ;
- (ii) the appellant showed considerable indulgence in allowing the respondent to pay in instalment, however, the same is not a ground for waiver of interest on contribution due to the same being mandatory under section 39(5) of the ESI Act.
- (iii) Further the appellant has stated that the ESI Court has no jurisdiction either to raise the damages or reduce the same.

25. On the side of the appellant, it is argued that as per the employees State Insurance Regulations, once it is held that contribution is payable, from a particular date, and if there is a delay, interest is payable from that date as it is a statutory obligation to pay interest.

26. The Supreme Court in its decision reported in (2008) 8 SCC 705 in the case of Goetze (India) Ltd. V. ESI Corpn., has held as follows;
'As there was delay in making the payment of the contribution, the Corporation had issued notice on 29.6.1990 at the first instance and thereafter the order was passed under Section 45-A of the Act on 23-7-1992. During the pendency of the matter there was reverification and the quantum payable by the appellant was worked out. The liability to pay interest is statutory. There is no power of waiver. The question of any compromise or settlement does not really arise. Even otherwise the order of the ESI Court referred to and relied upon by the appellant is of no assistance to the appellant. It is only noted statement of the appellant that he had deposited the contribution payable. The reference to [no further due] is obviously relatable to the contribution payable and nothing beyond that.'

As seen from the judgment cited supra, it is held that liability to pay interest is statutory and there is no power of waiver of interest and further the question of any compromise or settlement does not arise. Thus it is clear that payment of interest on belated payment is statutory and waiver of interest is not permissible.

27. In view of the arguments and based on the evidence and the afore said decision of the Apex Court, there is no waiver of interest. Therefore, the appeals are allowed. No costs.

20.09.2018

Index : Yes/No

Internet : Yes/No

Speaking order/non-speaking order.

msr

To

1. The Principal District Judge,
(Employees State Insurance Court constituted under ESI Act)
Namakkal
2. The Record Keeper,
V.R.Section, High Court, Madras

S.RAMATHILAGAM,J.,
msr

Pre delivery judgments in
C.M.A.Nos.3081 and 3088 of 2011

20.9.2018

Pre delivery judgments in
C.M.A.Nos.3081 and 3088 of 2011

To

THE HONOURABLE MRS.JUSTICE S.RAMATHILAGAM

From
M.Sasirekha,
P.A. to Hon'ble Judges