



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 09.08.2018
(Reserved on 22.08.2017)

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THE HONOURABLE MRS.JUSTICE J.NISHA BANUC.M.A. (MD) .No.853 of 2011 and
CROS.OBJ(MD) .No.26 of 2011C.M.A. (MD) .No.853 of 2011The Joint Director,
ESI Corporation Office,
Sub Regional Office,
K.K.Nagar,
Madurai.

... Appellant/Respondent

vs.

Srivilliputhur Co-operative
Spinning Mills Limited,
Madurai Road,
Srivilliputhur,
Virudhunagar District,
rep.by its Administrator

... Respondent/Petitioner

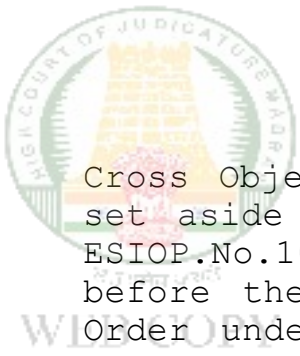
Civil Miscellaneous Appeal filed under Section 82 of
E.S.I.Act, 1948 against the decree and judgment of the ESI Court
(Labour Court) Madurai, passed in E.S.I.O.P.No.101/2008 dated
29.03.2010.For Appellant : Mr.K.C.Ramalingam
For Respondent : Mr.P.ChandraboseCROS.OBJ(MD) .No.26 of 2011Srivilliputhur Co-operative
Spinning Mills Limited,
Madurai Road,
Srivilliputhur,
Virudhunagar District,
rep.by its Administrator(in-charge)

... Cross Objector/Respondent

vs.

The Joint Director,
ESI Corporation Office,
4 Main Road -K.K.Nagar
Madurai-2.

... Respondent//appellant



Cross Objection is filed under Section 82 of E.S.I.Act, 1948 to set aside the decree and judgment of the ESI Court, Madurai in ESIOP.No.101 of 2008 dated 29.03.2010 and allow the appeal filed before the ESI Court, Madurai by way of quash the respondent's Order under Section 85B dated 08.07.2005 and all on the cross-appeal in C.M.A(MD).No.853 of 2011

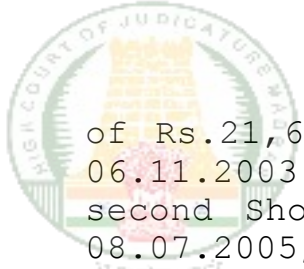
For Cross Objector : Mr.P.Chandrabose
For Respondent : Mr.K.C.Ramalingam

COMMON JUDGMENT

The brief facts of the case is that M/s Srivilliputhur Co-operative Spinning Mills Ltd, (SCSML for brevity), Srivilliputhur, is covered under the Employees State Insurance Corporation Act, 1948 under code No 57-7545-11 and were required to pay the contributions in accordance with Section 40 of the said Act within the time limit prescribed under the Act. Regulation 31 of the ESI (General) Regulations, 1950 framed under the Act stipulates that an employer is liable to pay the contributions in respect of the employee within 21 days of the last day of the calendar month in which the contributions fall due and to file the returns of contribution within the time stipulated under Regulations 26. The employer is liable to pay interest and damages for any failure to pay the contributions in terms of Regulations 31-A and 31-C of the ESI (General) Regulations 1950, read with Section 39, 40, 41 and 85-B of the ESI Act, 1948.

2.M/s SCSML had failed to pay the contributions in time and a show cause notice dated 06.11.2003 was issued proposing to impose damages amounting to Rs.22,80,493/- for the period 04/1992 to 03/1998 pointing out delay ranging from 93 days to 1623 days. Another notice dated 07.06.2005 was issued proposing to impose a penalty of Rs. 2,09,520/- for the period 11/98 to 04/2003 pointing out delay of 2115 days and 645 days for the respective months. In reply, M/s.SCSML had submitted that the Unit is closed and that they were waiting for the money from the State Government to pay the dues.

3.Subsequently, an order dated 08.07.2005 was passed by the Joint Director under Section 85-B of the ESI Act, 1948. The Joint Director had observed substantial delay in payment of contributions for the wage period 11/98 up to 2003 and that the employer had no valid reasons for the delay. Therefore it was concluded in the order that the delay alleged in the notices is established. Thereafter, the Joint Director had invoked the provisions of Regulations 31-C of the ESI (General) Regulations, 1950 read with Section 85-B of the ESI Act, 1948 and proceeded to determine the damages. The Joint Director had determined an amount



of Rs.21,65,278/- in damages against the Show cause Notice dated 06.11.2003 and confirmed the entire amount of Rs.2,09,520/- in second Show cause Notice dated 07-06-2005. By the order dated 08.07.2005, the Joint Director had ordered SCSML to pay an amount of Rs.23,74,798/- within 15 days and directed them to intimate the details of payment failing which, the amount will be recovered under Section 45-C and 45-I of the ESI Act, 1948.

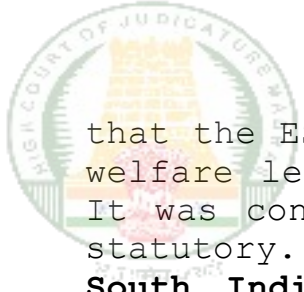
4. Aggrieved by the above Order, SCSML preferred ESIOP.No.101/2008 before the ESI Court, Madurai. It was submitted that the Mill was closed on 30.06.2003 owing to the losses suffered as a result of the general slump in the textile business. It was also submitted that all the employees were settled in full and there was no employee left in the roll as on 30.06.2003. The mill had struggled to pay the electricity dues. It was also submitted that the Government of Tamil Nadu by Notfn. G.O.(MS) 101 dated 16.09.2002 and G.O.(MS) 58 dated 07.04.2005 had accorded relief undertaking status to the Mill till completion of disinvestment process and declared the mill as Sick Mill Relief Undertaking Industry in terms of the Tamil Nadu Relief undertaking (Special Provisions Act), 1969.

5. It was submitted that the delay was not deliberate and that the default occurred for reasons beyond their control. It was also submitted that the Handloom Officer had attended Personal Hearing dated 29.06.2005 and had explained the closure of the Mill and the proceedings under Tamil Nadu Relief undertaking (Special Provisions Act), 1969 vide Government of Tamil Nadu G.O.(MS) 101 dated 16.09.2002 and G.O.(MS) 58 dated 07.04.2005 in that regard.

6. It was contended that the default was not wilful and that the Joint Director had failed to appreciate that there was no punitive circumstances justifying imposing penalties and that no damages under section 85-B is imposable unless the management had acted deliberately and was guilty of contumacious conduct. They also assailed the order on the ground of non application of mind in as much as the power under Section 85-B is discretionary to consider mitigating circumstances and for the failure to consider that the mill was declared a sick mill relief undertaking by the Government of Tamil Nadu. It was also contended that the Mill is a cooperative institution taking monetary assistance from the State Government and a subject of Tamil Nadu Relief undertaking (Special Provisions Act), 1969. It was submitted that the Joint Director had no occasion to assess the damages to the employees in as much as they had all left the company on full settlement at a much anterior date. The decision of the Hon'ble Supreme Court in **ESI Corporation vs HMT Limited reported in 2008 (116) FLR Page 543** was heavily relied by them.

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7. In the reply statement filed by the ESIC, it was contended



that the ESIC is established by the Act of the Parliament and is a welfare legislation obligating certain benefits to the employees. It was contended that the obligation to pay the contributions is statutory. They heavily relied on the decision of this Court in **South India Viscose Co-op Stores Ltd vs ESIC 1986 II LLJ 149 (Mad.DB)**. It was contended that waiver of damages can be considered only in the event the undertaking is declared sick and a rehabilitation scheme in respect of the same have been sanctioned. It was submitted that inadequate finance is not an excuse for discharging statutory obligation and that no concession is warranted simply because the mill falls under the co-operative sector.

8.The learned Labour Court Judge upon hearing both sides, in his Order dated 29.03.2010, arrived at the conclusion that though the delay in payment is established, there was no intention on the part of SCSML not to pay the contributions. Thereafter taking into account the fact that SCSML is a Cooperative Institution and that they become sick industry, the learned Judge had reduced the damages to 10% of damages determined by the Joint Director in Order dated 08.07.2005. (10% of Rs. 23,74,798/- which is equal to Rs.2,37,479/-)

9.Both the parties are aggrieved by the above decision of the ESI Court and had preferred this CMA 853 of 2011. The crux of the submissions made by the rival parties before this Court is not different from the ones made before the ESI Court. Specific grounds arising out of the order were additionally relied. Additional Case laws are submitted by both the parties in support of their respective claims and contentions.

10.In the background of the case, I have carefully gone through the submission of rival parties and heard their Counsels. The additional contention on behalf of SCSML was that once the learned ESI Judge had arrived at the finding that there was no intention on the part of them not to pay the contribution, the Order had to be set aside. To drive home this point, they had relied on the decisions of the **Hon'ble Supreme Court in the cases of ESIC vs HMT Ltd & another reported in 2008 (1) LLN 491 and EPFO & another vs RSL Textiles India Private Ltd reported in 2017 (153) FLR (214)** wherein it was held that Mens rea or Actus reus is necessary ingredient for invoking penalty under the Acts . They had also cited the decisions of the Principal Bench of this Court in **WP No 8028/2004 and WMP No 9480 of 2004** in their own case in the context of the pari materia provisions of Section 14-B of ESI Act, the decisions in the case of **ESIC vs Hafeez Motors Transport 2012 (1) CLR P.910 (Madras HC), RPF Commissioner vs Sree Visalam Chit Funds Limited & Tirunelveli Co.op Bank reported in 2012 (1) LLN P.716 (Madras HC)** and **ESI Corporation vs Chitranjandas Agencies reported in 2017-III-LLJ-420 (Mad)** in support of their



contentions.

11. In addition, a second point was contended by SCSML that the proceedings to impose penalties were initiated after a delay ranging from 13 years to 6 years that caused irretrievable prejudice to them. It was argued that if no limitation is prescribed for making a demand, such demand must be made within a reasonable time. In support of this point they relied on the judgement dated 22.07.2015 passed by this Court in **CMA (MD) No 92/2013 in the case of JD, ESIC vs T.M.M.Mathalai Nadar Industries, CMA No 3608/2012 dated 25.03.2013 in the case of Hotel Guru Pvt Ltd vs DD, EPIO, Chennai.**

12. A third additional contention was advanced by SCSML that once the contribution is paid in full, no penalty or damages can be imposed under Section 85-B. They had relied on the decision of this Court in **ESI Corporation vs N.Dasarathy & Sons reported in 1999 FJR P.684** that was confirmed by the Hon'ble Division Bench as reported in **2001 III LLN pg690**. They had also cited the Calcutta HC decision in **Sarat Textiles Limited vs ESI Corporation 2001(3) LLN P555** and the decision of **Delhi HC in Hi Tech Vocational Training Centre vs APF Commissioner reported in 2011(3)LLJp.55** wherein it was observed that what has already been paid cannot be arrears and if there are no arrears there can be no computation of damages not exceeding the arrears in the context of interpreting the pari materia provisions of Sec 14 B of ESI Act.

13. A fourth plea that co-operative societies need to be placed in a special footing in view of the settled policy objective of the government and relied on the decision of the **Hon'ble Supreme Court in AIR 1964 SC P.930 (SC) in Mohammed Ali and others vs UOI** and the decision of the **Division Bench of this Court in W.A(MD) No 262/2009 and MP (MD) No 2/2009** and prayed to dismiss the CMA (MD) No 853/2011 filed by the ESI corporation and allow the cross objection in No 26/11.

14. Per contra, the appellant ESIC were aggrieved by the Order of the ESI Judge reducing the penalty to 10% without ascertaining the delay of as many as 1623 days. It was contended that the learned ESI Judge failed to appreciate the statutory provisions of the Act including Regulations 31 of the ESI (General) Regulations, 1950. They had relied on the decision of this Court in **South India Viscose Co-op Stores Ltd vs ESIC 1986 II LLJ 149 (Mad.DB)**. It was argued that once the learned Judge admitted that the order passed by the Appellant for claiming damages are as per law, for belated contributions waiver of penalty can not be granted. It was argued that SCSML has not made out a serious case deserving waiver of penalty and no mitigating circumstances occur in the case. That the learned ESI Judge ought to have dismissed the ESIOP once he arrived at the conclusion that the reason adduced by SCSML was not



reasonable and raised the following questions for consideration.

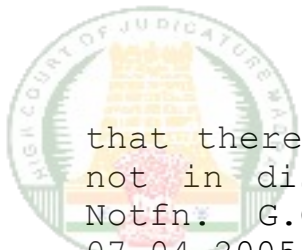
1. Whether the ESI Court had the power to reduce the damages levied under Sec 85-B as per Regulations 31-C of ESI (General) Regulations, 1950.
2. Whether the interpretation to Regulation 31-C is sustainable in Law
3. Whether the conclusion of the ESI Court that SCSML had no intention to avoid paying the contribution or paying belatedly is correct in law.

and sought to dismiss the order dated 29.03.2010 in ESIOP No 101/2008

15. I have carefully perused the additional grounds and each of the case laws submitted by the parties. On a careful reading of the case laws cited in the case, I have no hesitation to conclude that the issues raised by the parties regarding the applicability of Section 85-B of the ESI Act, 1948 is no more res integra. The questions raised in the instant case are settled in view of the decisions of the Hon'ble Supreme Court in the HMT case and RSL Textiles case cited supra. The principles that flow from the above decisions is

1. Section 85-B of the ESI Act, 1948 is discretionary in nature and not mandatory and the wordings of Regulations 31-C cannot override the Parent legislation to make the levy of damages imperative.
2. Mens Rea or Actus Reus is a necessary ingredient for imposing penalty under Section 85-B of the ESI Act, 1948.
3. Once Section 85-B of the ESI Act, 1948 is held as discretionary in nature, the principles of natural justice have to be scrupulously followed and the order should be reasoned and speaking.
4. The delay in initiating action under Section 85-B should be reasonable. No prejudice shall be caused to the Employer by the delay, is the test of reasonability. And the onus to prove that prejudice is caused rests with the employer. In other words, No time limit means reasonable time limit and it does not give a blanket power to the authority to exercise at Whim. The above principles answers the question of law raised by the appellant in the CMA. The decision of this Court in **South India Viscose Co-op Stores Ltd vs ESIC 1986 II LLJ 149 (Mad.DB)** that paucity of resources or no resources is not a valid ground for not paying the ESI contribution, is issued in the context of Section 45A of the Act which is **statutory** in character unlike damages under Section 85-B that is held to be discretionary and therefore it has no relevance to the present case on hand.

16. The fact that there is no mens rea of actus reus in the case to not pay the contribution is not in dispute. The fact that the Mill is closed and the employees are fully settled and



that there are no employees in the roll as on 31.06.2003 is also not in dispute. The fact that the Government of Tamil Nadu by Notfn. G.O.(MS) 101 dated 16.09.2002 and G.O.(MS) 58 dated 07.04.2005 had accorded relief undertaking status to the Mill till completion of disinvestment process and declared the mill as Sick Mill Relief Undertaking Industry in terms of the Tamil Nadu Relief undertaking (Special Provisions Act), 1969 is also not in dispute. And there is no disagreement that the employer is a co-operative institution. What stands is the allegation that there is inordinate delay in paying the contributions as required under the statutes and that there is no valid reason adduced for the delay in paying the contributions.

17. In view of the above settled position of law regarding the applicability of Section 85-B of the ESI Act, 1948 I have no hesitation to hold that the penalty imposed in the instant case is bad in law and liable to be set aside. It goes without saying that mere allegation that there is inordinate delay in paying the contributions as required under the statutes and that there is no valid reason adduced for the delay in paying the contributions, is not sufficient reason to impose penalty under Section 85-B.

18. In the instance case, the absence of mens rea or actus reus in itself is a ground to set aside the penalty imposed under Sec 85-B. Initiation of penalty proceedings after substantial delay and after the closure of the mill after full settlement of employees cause serious prejudice that it failed the test of reasonability for delay and on this count alone again the penalty is liable to be set aside. Even in cases attracting penalty, waiver of the same is contemplated under Regulations 31-C of the ESI (General) Regulations, 1950 to sick units. Therefore, the levy of penalty on a unit accorded relief undertaking status under the Tamil Nadu Relief undertaking (Special Provisions Act), 1969 is also a case of over reaching authority. The fact that the Mill is a co-operative institution relying on the monetary support from the state and carry a co-operative objective and faced closure is itself a ground to desist imposing penalty under Sec 85-B of the ESI Act, 1948.

19. In view of the above, the CMA (MD) No 853/2011 filed by the ESI corporation is dismissed and the cross objection filed by SCSML in No 26/11 is allowed. In the result, the penalty imposed under Section 85-B of the ESI Act, 1948 against SCSML is set aside. No costs.

Sd/-

Assistant Registrar (AS)

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Sub Assistant Registrar (CS-II)



To

1.The Presiding Officer,
ESI Court (Labour Court),
Madurai.

2.The Joint Director,
ESI Corporation Office,
Sub Regional Office,
K.K.Nagar,
Madurai.

3.The Administrator
Srivilliputhur Co-operative
Spinning Mills Limited,
Madurai Road,
Srivilliputhur,
Virudhunagar District.

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+1cc to Mr.P.Chandrabose, Advocate SR.No.77767

Bala

MK/SKN/SAR 2/29.08.2018/8P/8C

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Cross.Obj (MD) .No.26 of 2011
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