IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.11.2019

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.M.A.NOS.3098 & 3535 OF 2010
AND
M.P.NO.1 OF 2010

The Joint Director,
Employees State Insurance Corporation,
No.143, Sterling Road,
Nungambakkam, Chennai 34. ... Appellant in both C.M.As.

vs

The Management of Binny
Engineering Limited,
Meenambakkam, Chennai 114.
Represented by its Manager,
Personal Admn Mr.S.Lawrence ... Respondent in both C.M.As.

Common Prayer: Civil Miscellaneous Appeals filed under Section 82(2) of Employees State Insurance Act, to set aside the orders and decreetal orders dated 23.12.2008 made in E.S.I.O.P.No.4 of 2002 & E.S.I.O.P.No.468 of 2001 on the files of the Principal Labour Court, Chennai.

For Appellant : M/s.G.Narmadha for
Mr.G.Bharadwaj in both C.M.As.

For Respondent : Mr.S.Haroon Al Rasheed for
M/s.T.C.Gopalan & Co.
in both C.M.As.

COMMON JUDGMENT

By this common judgment both Civil Miscellaneous Appeals are being disposed.

2.These appeals pertain to the default committed by the respondent company during the periods between December 1997 and September 1998 for and amount of Rs.25,869/- and October 1998 and November 1999 for an amount of Rs.59,078/- in remitting contribution under the ESI Act, 1948.

3.The respondent company had failed to remit the contributions under the ESI Act, 1948. Therefore, two separate show cause notices dated 22.03.1999 and 20.02.2001 were issued to the respondent company.

4.In the first show cause proceeding, the respondent company did not appear though the case was listed for hearing while in the 2nd proceeding, respondent appeared but could not show cause notice as to why the penalty should not be imposed under Section 85(b) of the ESI Act, 1948.

5.By two separate orders dated 28.02.2000 for the period of December 1997 and September 1998 and another order dated 27.08.2001 for the period of October 1998 and November 1999, the penalty was imposed under Section 85(b) of the ESI Act, 1948 by fixing a sum of Rs.25,869/- for the period of December 1997 and September 1998 and a sum of Rs.59,070/- for the period of October 1998 and November 1999.

6.Aggrieved by the same, the respondent filed two petitions under Section 75 of the ESI Act before Principal Labour Court, Chennai vide E.I.O.P.No.4 of 2002 and E.I.O.P.No.468 of 2001.

7.By a common order dated 23.12.2008, the Principal Labour Court has allowed the petitions filed by the respondent and thereby set aside the penalty imposed in the two orders dated 28.02.2000 and 27.08.2001.

8.Aggrieved by the same, the appellant Joint Director, ESIC has filed the present Civil Miscellaneous Appeals under Section 82(2) of the ESI Act, 1948.

9.The learned counsel for the appellant submits that the order dropping the penalty was erroneous as per the decision of the Hon'ble Supreme Court rendered in Employees' State Insurance Corporation vs HMT Ltd and Another, (2008) 3 SCC 35 was no longer a good law in the light of the decision of the Hon'ble Supreme Court in Union of India and Others vs Dharamendra Textile Processors and Others, (2008) 13 SCC 369 wherein the Hon'ble Supreme Court after considering a plethora of the decision concluded that the view taken earlier in the case of Dilip N. Shroff vs CIT, (2007) 6 SCC 329 was longer a good law.

10.The learned counsel for the appellant also relies on the decisions rendered by a full bench of this Court in Gowri Spinning Mills (P) Ltd vs Assistant Provident Fund Commissioner, Sub-Regional Office, Salem, 2006 (5) CTC 1, which was followed by another devision bench of this Court in TTG Industries Ltd., vs Regional Provident Fund Commissioner, 2014 (5) CTC 620.

11.The learned counsel for the appellant submits that the order setting aside the penalty based on the decision of the Hon'ble Supreme Court in Employees' State Insurance Corporation vs HMT Ltd and Another, (2008) 3 SCC 35 referred to supra that existence of mens rea or actus resus to contravene a statutory proviso must also be held to be a necessary ingredient for levy of damages and/or the financial quantum thereon. The learned counsel also submits that the Hon'ble Supreme Court in Employees' State Insurance Corporation vs HMT Ltd and Another, (2008) 3 SCC 35, held that High Court was not entitled to substitute its views in place of statutory authority.

12.The learned counsel also referred another decision rendered by Hon'ble Supreme Court in Mcleod Russel India ltd vs Regional Provident Fund Commissioner, Jalpaigur, 2014 (3) LLN 1 (SC) wherein it was held as follows:-

> This decision does not prescribe that damages or penalties cannot or ought not to be imposed. Further, the presence or absence of mens rea and/or actus reus would be a determinative factor in imposing damages under Section 14-B, as also the quantum thereof since it is not inflexible that 100 per cent of the arrears has to be imposed in all the cases. Alternatively stated, if damages have been imposed under Section 14-B, it will be only logical that mens rea and/or actus reus was prevailing at the relevant time. We may also note that this Court had yet again reiterated the well-known but oft ignored principle that High Courts or any Appellate Authority created by a statute should not substitute their perspective of discretion on that of the lower Adjudicatory Authority if the impugned Order does not otherwise manifest perversity in the process of decision taking. HMT Ltd. does not proscribe imposition of damages; that would negate the intent of the legislature. The submission of the Petitioner before us is that the liability was of the erstwhile Management and since the Petitioner was not the Employer at the relevant time, default much less deliberate and wilful default on the part of the Petitioner was absent. However, it seems to us that once these damages have been levied, the quantification and imposition could be recovered from the party which has assumed the Management of the concerned establishment.

13.The learned counsel for the appellant also drew my attention to a division bench of the Kerala High Court in Little Flower Hospital Trust vs State of Kerala, 2019 SCC OnLine Ker

2091 wherein it has been reiterated that the decision rendered by the Hon'ble Supreme Court what it down in Union of India and Others vs Dharamendra Textile Processors and Others, (2008) 13 SCC 369 referred to supra.

14.The learned counsel for the appellant submitted that the scheme of Board For Industrial and Financial Reconstruction (BIFR) has not given time to the respondent to defer the remittance made under the ESI Act. The learned counsel for the appellant also submitted that the respondent had collected the amount but had not remitted to the same to ESI authority and therefore they are liable to be imposed as penalty under Section 85(b) of the ESI Act. Even otherwise, several properties of the respondent company were sold to liquidator its liabilities. Yet amounts were not remitted. The learned counsel for the appellant drew my attention to the order dated 04.08.2005 of Board For Industrial and Financial Reconstruction, it was stated that the BIFR had no jurisdiction to deal with fresh revival scheme at any point of time and it was not eligible for relief as a sick company under the provisions of the ESI Act.

15.Per contra, the learned counsel for the respondent submits that the order of Employees Insurance Court (Principal labour Court) is well reasoned and requires no interference. The learned counsel for the respondent submits that the finding of facts arrived by the Presiding Officer of the Employees Insurance Court cannot be interfered and factual issues cannot be gone into at this stage. He submits that the view that decision of the Hon'ble supreme Court rendered in Dilip N. Shroff vs CIT, (2007) 6 SCC 329 is not correct as held in Union of India and Others vs Dharamendra Textile Processors and Others, (2008) 13 SCC 369 cannot be applied to the facts of the present case in the light of the language in Section 85(b) of the ESI Act. If penalty is to be levied, it has to be in terms of regulations framed under the Act namely ESI Regulation Act, 1950. He submits that the regulation No.31(c) cannot be read with isolation and has to be read harmoniously with Section 85 (b) for which it has been framed. In this connection, he refers to the decision of the Hon'ble Supreme Court in Employees' State Insurance Corporation vs HMT Ltd and Another, (2008) 3 SCC 35 wherein paragraphs 17,18,21 has held as follows:-

> 17.The statutory liability of the employer is not in dispute. An employee being required to be compulsorily insured, the employer is bound to make his part of the contribution. An employee is also bound to make his contribution under the

Act. But the same does not mean that levy of damages in all situations would be imperative.

18.Section 85-B of the Act uses the words “may recover”. Levy of damages thereunder is by way of penalty. The legislature limited the jurisdiction of the authority to levy penalty i.e. not exceeding the amount of arrears. Regulation 31-C of the Regulations, therefore, in our opinion, must be construed keeping in view the language used in the legislative Act and not dehors the same.

21 [Ed.: Para 21 corrected vide Official Corrigendum No. F.3/Ed.B.J./19/2008 dated 4-3-2008.] . 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.

16.The learned counsel further submitted that since the discretion is vested authorities acting under the Act, existence of mens rea or actus reus to contravene a statutory a provision is a must before imposing penalty. The learned counsel also referred to the another decision rendered in the context of Section 14(b) of the Employee's Provident Fund and Miscellaneous Provisions Act, 1953 by the Hon'ble Supreme Court in Assistant Provident Fund Commissioner, EPFO an Another vs The Management of RSL Textiles India Private Ltd., (2017) 3 SCC 110, wherein the Hon'ble Supreme Court held as follows:-

3. This issue is now wholly covered against the appellants in the decision rendered by this Court in McLeod Russel India Ltd. v. Regl. Provident Fund Commr. [McLeod Russel India Ltd. v. Regl. Provident Fund Commr., (2014) 15 SCC 263 : (2015) 3 SCC (L&S) 593] , wherein it has been held in para 11 that: (SCC p. 272)
“11.… the presence or absence of mens rea and/or actus reus would be a determinative factor in imposing damages under Section 14-B, as also the

quantum thereof since it is not inflexible that 100% of the arrears have to be imposed in all the cases. Alternatively stated, if damages have been imposed under Section 14-B it will be only logical that mens rea and/or actus reus was prevailing at the relevant time.”

4.In the impugned judgment [RSL Textiles (India) (P) Ltd. v. Presiding Officer, Writ Appeals Nos. 1639-40 of 2011, decided on 13-11-2013 (Mad)] , at para 23, it has been specifically held by the High Court that

> “In this case, there is no finding rendered by the original authority or the appellate authority with regard to mens rea or actus reus, except saying financial crises cannot be a reason to escape.”

17.The learned counsel also submits that the view of the Hon'ble Supreme Court rendered in Employees' State Insurance Corporation vs HMT Ltd and Another, (2008) 3 SCC 35 referred to supra was followed by a division bench of this Court at Madurai in the Regional Provident Fund Commissioner – II vs Sree Visalam Chit Funds Ltd and another, in W.A.(MD).No.501 & 502 of 2008. There the Hon'ble division bench of this Court reproduced the relevant passages from Employees' State Insurance Corporation vs HMT Ltd and Another, (2008) 3 SCC 35 and Dilip N. Shroff vs CIT, (2007) 6 SCC 329 cases and ultimately held as follows:-

> 30. In our considered opinion, as we have already concluded, unless it is established that such failure to pay the contribution was attributable to the mens rea or actus reus on the part of the employer, question of levying damages under Section 14(B) of the Act does not arise. It has been repeatedly held by the Hon'ble Supreme Court that simply because the statutory provision enables an authority to impose penalty, it does not mean that such penalty should be imposed in a mechanical manner without looking into the attending circumstances and the facts as to whether there was any mens rea or actus reus on the part of the employer.
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> 31. Now, coming to the question of compensation by way of damages, the contention of the learned counsel is that the contribution payable by the

respondent to the fund has been utilized by the employer, whereas under the ESI Act, the amount is utilized for giving medical aid to the employees, and therefore, both the provisions are not in pari materia cannot be countenanced. As we have already noticed, the purpose of levying damages is to compensate the employees only for default of the employer. But, in this case, the employer could not pay the enhanced amount of contribution as per the Pension Scheme of the year 1995, because of the act of the employees in approaching the High Court and getting the order of interim stay. Thus, the loss, if any, sustained by the employees, is attributable to their own act and so, they are not entitled for damages.

18.The learned counsel for the respondent submits that the decision of the Hon'ble Supreme Court and that of division bench of this in Regional Provident Fund Commissioner - II vs Sree Visalam Chit Funds Ltd and another, in W.A.(MD).No.501 & 502 of 2008 followed in a plethora of cases is squarely covered against the appellant. He also refers to the decision of the Court rendered in Employees' State Insurance Corporation and Others vs Chithranjandas Agencies, 2018 LLR 65.

19.I have considered arguments advanced by the learned counsel for the appellant and the respondent. The issue that arise for consideration is whether the order passed the lower Court while dropping the levy penalty imposed was under Section 85(b) of the Employees State Insurance Act can be sustained or not. The learned counsel for the appellant submits that the authorities has no discretion to drop levy penalty under Section 85(b) of the Act and strict liability is to be inferred under Section 85 (b) of the ESI Act, 1949. Section 85(b) of the ESI Act read as under:-

> 85 B. Power to recover damages.?
> (1) Where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the Corporation may recover from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the regulations.

Provided that before recovering such damages, the employer shall be given a reasonable opportunity of being heard:

Provided further that the Corporation may reduce or waive the damages recoverable under this section in relation to an establishment which is a sick industrial company in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in regulations.
(2) Any damages recoverable under sub-section (1) may be recovered as an arrear of land revenue

or under section 45C to section 45-I.

20.From the reading of the above provision, it is clear that the expression, “corporation may recover” makes it clear that there is discretion vested with the authority while imposing or dropping the penalty. Once it is decided the penalty is to be imposed, it should not exceed amount in arrear as may be specified in the Regulation. Again, in the case of a sick company, penalty can be imposed as per the Regulation. However, to invoke the provision of the Regulation, the authority must be of the view that penalty is to be imposed. In case, the authority comes to a conclusion, the penalty is to be levied, it has been imposed as per the provision.

21.The decision in Union of India and Others vs Dharamendra Textile Processors and Others, (2008) 13 SCC 369, was the provision of in the context of Section 11 -AC of the Central Excise Act, 1944 read with of Rules 96 ZO and 96 ZQ of the Central Excise Act, 1944. Though it was held that both Section of 11-AC and Rule 96 ZO and Rule 96 ZQ did not give any discretion to the Central Excise Officer to drop the penalty, it has to be borne in mind that penalty in Rule 96 ZO and Rule 96 ZQ have been held to be ultravires the Act in Shree Bhagwati Steel Rolling Mills vs Commissioner of Central Excise and Another, (2016) 3 SCC 643.

22.The view in Union of India and Others vs Dharamendra Textile Processors and Others, (2008) 13 SCC 369, which concluded that the decision rendered in Dilip N. Shroff vs CIT, (2007) 6 SCC 329 may not be correct is no longer relevant in the light of Shree Bhagwati Steel Rolling Mills vs Commissioner of Central Excise and Another, (2016) 3 SCC 643. There the Hon'ble Supreme Court referred to yet another decision rendered by the Hon'ble Supreme Court in SEBI vs Cabot International Capital Corporation, (2005) 123 Comp Cas 841 (Bom) as re-affirmed the SEBI vs Shriram Mutual Fund, (2006) 5 SCC 361.

23.Therefore, these decisions cannot be straight away imported to disputes under the ESI Act, 1948, particularly, in the light of the fact that the issue is still governed by the decision of Hon'ble Supreme Court in Employees' State Insurance Corporation vs HMT Ltd and Another, (2008) 3 SCC 35.

24.In the light of the above facts, I am of the view, the present Civil Miscellaneous Appeals filed by the appellant cannot be sustained. The orders passed by the Principal Labour Court, Chennai are upheld.

25.Therefore, the present Civil Miscellaneous Appeals are dismissed. No cost. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

jen

To

1. The Commissioner for Workmen's Compensation -1,
   The Deputy Commissioner of Labour – 1, Chennai -1.

Copy To

The Section Officer, V.R. Section,
Madras High Court.

+1cc to M/s.T.C.Gopalan & Co., Advocate, S.R.No.92223

C.M.A.Nos.3098 & 3535 of 2010
and
M.P.No.1 of 2010

PPA(CO)
CS/21/01/2020