

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.03.2020

CORAM :

The HON'BLE MR.JUSTICE M.DURAIWAMY

C.M.A.No.1203 of 2011
and M.P.No.1 of 2011

M/s.Professional Management Consultants (P) Ltd.,
No.148, 1st Floor, Greams Road,
Chennai - 600 006. Appellant

Vs.

Employees State Insurance Corporation
rep by its Joint Director,
No.143, Sterling Road, Nungambakkam,
Chennai - 600 034. Respondent

Appeal filed under Section 82 of the ESI Act, 1948
against the decree and judgment of Employees Insurance Court
(Principal Labour Court), Chennai passed in E.I.O.P.No.170 of
2004 dated 28.12.2010.

For Appellant : Mr.M.R.Raghavan
For Respondent : Mr.S.Ravindran, Senior Counsel
for Mr.G.Bharadwaj

O R D E R

Challenging the order passed in E.I.O.P.No.170 of 2004 on
the file of the Employees Insurance Court (Principal Labour
Court), Chennai, the principal employer has filed the above
appeal.

2.It is the case of the appellant that they are having a
professional Software Consultancy and other support services
for the back-offices in India. According to the appellant,
they provide expertise services in the field of providing
office management and other services of specialized nature.
Further, it is a Company registered under the Companies Act,
1956. Since the appellant failed to pay the Employees State
Insurance contribution in accordance with Section 40 of the
Employees' State Insurance Act, a notice dated 12.01.2004 was
issued to them by the respondent to show cause as to why
damages to the extent of the percentage indicated at Column-7
of the statement enclosed to the notice, subject to the
maximum amount indicated in Column-3 of the statement should
not be imposed and recovered from them. Pursuant to the said
notice, the representative of the appellant appeared before

the respondent and submitted that the employer was under the impression that the BPO establishments would not attract the provisions of the ESI Act and only when the ESI Inspector visited their establishment, the employer was advised suitably and then they started compliance.

3.Further, according to the appellant, there was no intentional delay on the part of the employer in remitting the dues. The appellant requested the respondent to take a lenient and sympathetic view and waive the damages. The appellant also submitted before the respondent that they had already paid the interest of Rs.1,50,987/- and was also paying the current dues regularly without any delay and requested to drop the damages proceedings. The respondent, by order dated 28.03.2004, imposed damages of Rs.2,06,900/- finding that there was a delay of 1130 days in paying the contribution. Further, the respondent, in its order, observed that the appellant has violated the statutory provisions of the Act and the delay in remittances had been established and the reasons putforth by the employer for the delay was not legally valid and acceptable for waiver of damages.

4.Challenging the order dated 28.03.2004 passed by the respondent, the appellant filed E.I.O.P.No.170 of 2004 before the Labour Court (Employees Insurance Court), Chennai, under Section 75 of the Employees' State Insurance Act, 1948. In the petition, the appellant has stated that the respondent, while imposing the damages of Rs.2,06,900/-, has not given any details as to how the huge amount was arrived and the basis on which the same was levied. The respondent filed their written statement stating that the appellant had paid the dues of the contribution belatedly, therefore, the levy of damages is just and proper. Further, in the written statement, the respondent has stated that the appellant had wantonly made abnormal delay of 1130 days in making payment of the contribution. The Labour Court, by order dated 28.12.2010, dismissed the E.I.O.P.No.170 of 2004. Challenging the same, the principal employer has filed the above appeal.

5.The appellant has raised the following substantial question of law in the appeal:

a) Whether the Lower Court was right in confirming the order passed by the respondent though there was no wilful or intentional delay on the part of appellant in remitting the contributions?

b) Whether the Lower Court was right in confirming the levy of damages though there was no mens rea or actus reus on the part of the appellant?

c) Whether the respondent could impose damages arbitrarily without justifying the quantum in accordance with law?

the appellant and Mr.S.Ravindran, learned Senior Counsel appearing on behalf of Mr.G.Bharadwaj, learned counsel for the respondent.

7.Mr.M.R.Raghavan, learned counsel appearing for the appellant submitted that there was no willful or intentional delay on the part of the appellant in remitting the contributions and in the absence of a specific observation with regard to the same, the Labour Court should not have confirmed the order passed by the respondent. Further, the learned counsel submitted that there was no mens rea or actus reus on the part of the appellant, in such case, the order passed by the respondent should have been set aside.

8.In support of his contention, the learned counsel relied upon a judgment reported in 2018-2-Writ L.R. 750 [DCW Employees Co-operative Canteen Ltd., Sahupuram (via) Arumuganeri 628 229, Thoothukudi District, through its Special Officer Vs. The Presiding Officer, Employees Provident Fund Appellate Tribunal, Scope Minor, Core - II - 4th Floor, Lakshmi Nagar - New Delhi - 110 092 & another] wherein the Division Bench of this Court held as follows:

"...

8.The above decision was followed by the another Division Bench of this Court, where one of us (KRCBJ) was a party, in a common Judgment rendered in W.A.Nos.1639 and 1640 of 2011, dated 13.11.2013. In the above said decision, the Division Bench has considered the scope of Section 14-B and found its applicability as follows:

"17.A careful perusal of the above said provision would show that the Central Provident Fund Commissioner or such other Officer as may be authorised by the Central Government, may recover from the employer who makes the default in payment of any contribution to the fund, etc., such damages not exceeding the amount of arrears by way of penalty. Before levying such damages, the employer shall be given a reasonable opportunity of hearing. Thus, what emerges from the reading of Section 14(B) of the said Act is as follows:

(a) There must be a default committed by the employer in making the payment of contribution;

(b) The Authority empowered under the said provision may recover from the employer by way of penalty of such damages not exceeding the amount of such arrears.

To attract Section 14B to levy damages, the liability cannot be fixed automatically without there being a specific finding that failure to pay the contribution was attributable to the 'mens rea' or 'actus reus' on the part of the employer as held by the Hon'ble Division Bench of this Court reported in 2010 (4) LLN 706, Regional

Provident Fund Commissioner II, Employees' Provident Fund Organisation Madurai v. Sree Visalam Chit Funds Ltd....

18.A perusal of the above said decision would show that the same came to be rendered even after discussing the decision relied on by the learned counsel for the respondents herein reported in AIR 1998 SC 688 (cited supra) also. Thus, it is seen that 'mens rea' or 'actus reus' is absolutely necessary and should be proved for levying damages under Section 14B...

19.It is also seen that the Apex Court in the decision reported in (2008) 3 S.C.C. 35, Employees' State Insurance Corporation v. HMT Ltd., has found that such penal provision is discretionary and the existence of mens rea or actus is a necessary ingredient. The relevant paragraphs 21 to 27 are extracted hereunder:

"21.A penal provision should be construed strictly. Only because a provision has been made for levy of penalty, the same 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 the 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.

22.In Prestolite (India) Ltd. v. Regional Director, 1994 Supp (3) SCC 690 : 1995 SCC (L&S) 202, this Court rejected a contention raised by the Regional Director of Employees' Insurance that under the Employees' State Insurance General Regulations guidelines have been indicated showing as to how damages for delayed payment are to be imposed and since such guidelines have been followed, no exception should be taken thereto made to the impugned adjudication, stating:

"5. ... Even if the regulations have prescribed general guidelines and the upper limits at which the imposition of damages can be made, it cannot be contended that in no case, the mitigating circumstances can be taken into consideration by the adjudicating authority in finally deciding the matter and it is bound to act mechanically in applying the uppermost limit of the table. In the instant case, it appears to us that the order has been passed without indicating any reason whatsoever as to why grounds for delayed payment were not to be accepted. There is

no indication as to why the imposition of damages at the rate specified in the order was required to be made. Simply because the appellant did not appear in person and produce materials to support the objections, the employee's case could not be discarded in limine. On the contrary, the objection ought to have been considered on merits."

23. In *Dilip N. Shroff v. CIT*, (2007) 6 SCC 329, this Court stated:

"40. Thus, it appears that there is distinct line of authorities which clearly lays down that in considering a question of penalty, mens rea is not a relevant consideration. Even assuming that when the statute says that one is liable for penalty if one furnishes inaccurate particulars it may or may not by itself be held to be enough if the particulars furnished are found to be inaccurate is anything more needed but the question would still be as to whether reliance placed on some valuation of an approved valuer and, therefore, the furnishing of inaccurate particulars was not deliberate, meaning thereby that an element of mens rea is needed before penalty can be imposed, would have received serious consideration in the light of a large number of decisions of this Court."

24. We agree with the said view as also for the additional reason that the subordinate legislation cannot override the principal legislative provisions.

25. The statute itself does not say that a penalty has to be levied only in the manner prescribed. It is also not a case where the authority is left with no discretion. The legislation does not provide that adjudication for the purpose of levy of penalty proceeding would be a mere formality or imposition of penalty as also computation of the quantum thereof became a foregone conclusion. Ordinarily, even such a provision would not be held to providing for mandatory imposition of penalty, if the proceeding is an adjudicatory one or compliance with the principles of natural justice is necessary thereunder.

26. Existence of mens rea or actus to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and/or the quantum thereof.

27. The Division Bench of the High Court, therefore, in our opinion, was not wrong in opining that Section 85-B provides for an enabling provision. What, however, cannot be appreciated is that such a construction itself would lead to the

conclusion that the High Court is entitled to substitute its view in place of the statutory authority. In our considered view, therefore, the matter should be considered afresh for determination of quantum of damages, etc. in the light of the observations made hereinbefore."

20. Thus, from the reading of the above decision of the Apex Court, it is very clear even from the language used under Section 14B that the competent authority "may" recover such damages from the employer. The word used "may" would indicate that the power conferred under Section 14B is only the discretionary power. Even such discretionary power cannot be exercised in the absence of 'mens rea' or 'actus reus' on the part of the employer to contravene the statutory provision.

2. In another unreported decision of the Division Bench of Madurai Bench of this Court made in W.A.(MD).No.441 of 2013 dated 03.06.2013, wherein one of us (N.Paul Nasanthakumar, J.) was a party, it has been held as follows:

"4. ... It is also stated in the order of the learned single Judge that unless there is willful and deliberate withholding of provident fund contribution payable, damages cannot be ordered as there was financial difficulties faced by second respondent. The direction regarding payment of damages is compensatory as well as penal in nature and unlike claim of interest for the belated remittance while ordering damages, facts and circumstances of the case should be considered."

23. 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 crisis cannot be a reason to escape. Therefore, we are of the firm view that in the absence of any finding with regard to mens rea attributable on the part of the employer/appellant herein, we find that the order impugned in the writ petitions are not sustainable and consequently, the same are liable to be set aside."

...

11. Having given such categorical findings, as rightly pointed out by the learned counsel appearing for the appellant, the learned Judge ought to have allowed the writ petition in toto, instead of directing the writ petitioner to pay 25% of the damages. As already pointed out, in the absence of mens rea, there is no question of claiming damages from the writ petitioner. The learned Judge has specifically pointed out that no specific reasons are given for levying damages.

When such being the factual finding, we do not find any justification in directing the petitioner to pay 25% of the damages, as ordered by the learned single Judge."

9. Countering the submissions made by the learned counsel for the appellant, Mr. S. Ravindran, learned senior counsel appearing for the respondent submitted that the Labour Court has confirmed the order passed by the respondent, observing that the contribution was paid belatedly by the appellant (i.e.) after 1130 days, therefore, the levy of damages under Section 85 (b) of the Act is proper. In the judgment cited supra, the Division Bench has categorically held that in the absence of mens rea, there is no question of claiming damages from the employer. The Division Bench has rendered the judgment following the ratio laid down by the Hon'ble Supreme Court reported in (2008) 3 SCC 35 [Employees' State Insurance Corporation Vs. HMT Ltd.,] which held that penal provision is discretionary and the existence of mens rea or actus is a necessary ingredient. Further, in an unreported judgment dated 03.06.2013 made in W.A. (MD). No. 441 of 2013, the Division Bench held that when no finding is rendered by the Original Authority or the Appellate Authority with regard to mens rea or actus reus, the order which is under challenge is not sustainable and the same is liable to be set aside.

10. The ratio laid down in the above referred judgments squarely applies to the facts of the present case.

11. On a reading of the original order dated 28.03.2004 passed by the respondent, there is no whisper about mens rea or actus reus, which is the main ingredient for levying damages under Section 85 (b) of the Act. Similarly, the Labour Court also has not given any finding with regard to mens rea and actus reus. Merely stating that there was delay in making the payment of contributions is not a ground to impose damages under Section 85 (b) in view of the ratio laid down in the above referred judgments.

12. In these circumstances, following the ratio laid down in the judgment reported in 2018 - 2 - Writ L.R. 750 (cited supra), the order passed by the Principal Labour Court, Chennai as well as the order passed by the respondent dated 28.03.2004 are liable to be set aside. Accordingly, the same are set aside. The Civil Miscellaneous Appeal is allowed. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS I)

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Sub Assistant Registrar

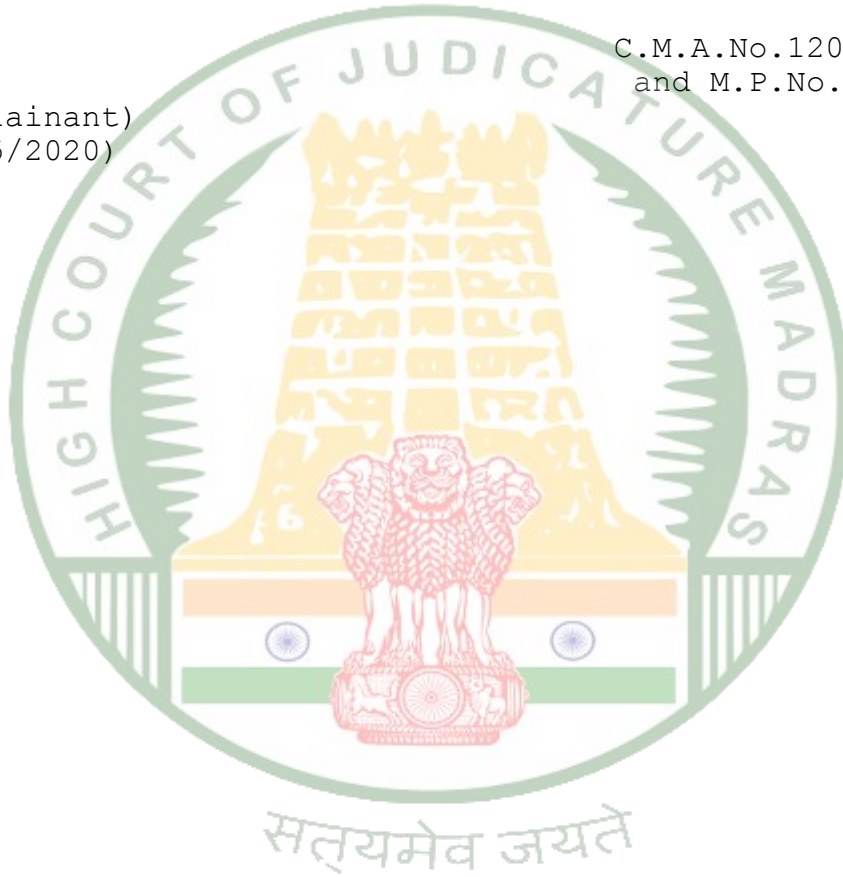
To

1.The Employees Insurance Court
(Principal Labour Court), Chennai.

2.The Section Officer,
VR Section,
High Court of Madras,
Madras.

SPD (Complainant)
jrs (26/05/2020)

C.M.A.No.1203 of 2011
and M.P.No.1 of 2011



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