



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Reserved On : 22.06.2021

Delivered On : 27.07.2021

WEB COPY

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI
C.M.A. (MD)No.1283 of 2013

The Employees' State Insurance,
Corporation,
Sub Regional Office,
2nd West Street, K.K.Nager,
Madurai 625020.

..Appellant

Vs.

Sree Ayyanar Spinning and Weaving
Mills Ltd.,
Mallanginar - 626 109.
Virudhunagar District.

.. Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 82(2) of the ESI Act, 1948, to set aside the order dated 08.03.2010 passed by the Employees' Insurance Court (I.e. Labour Court), Madurai in E.S.I.O.P.No.39 of 1998, uphold the order dated 05.06.1998 of the said Corporation.

For Appellant : Mr.P.Ganapathisamy
For Respondent : Mr.G.Arunachalam

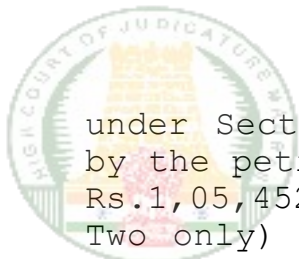
JUDGMENT

This Civil Miscellaneous Appeal has been filed against the judgment and decree passed in E.S.I.O.P.No.39 of 1998 dated 08.03.2010, on the file of the Labour Court, Madurai.

2.The appellant herein is the respondent and the respondent herein is the petitioner in the claim petition. The respondent herein has filed a petition in E.S.I.O.P.No.39 of 1998, to declare the order passed by the Joint Regional Director, ESI Corporation in No.57-7573-11/INS.II/ME/85B/59/97 dated 05.06.1998, as null and void and for permanent injunction.

3.A brief substance of the claim petition in E.S.I.O.P.No.39 of 1998 is as follows:

The Deputy Director has informed the petitioner on 29.05.1997 and that the ESI contribution amount for the period from 01.08.1988 was not paid by the petitioner. The petitioner remitted the amount subsequently. Thereafter, on 01.12.1997, the Joint Director of the respondent has sent a notice as to why damages should not be imposed



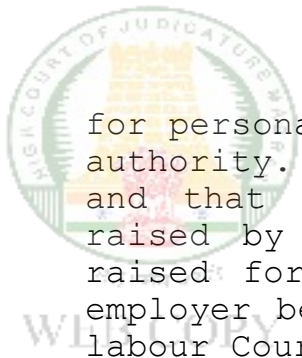
under Section 85(b) of the Act. Without considering the reply sent by the petitioner, the Joint Regional Director has imposed a fine of Rs.1,05,452/- (Rupees One Lakh Five Thousand Four Hundred and Fifty Two only) for delayed payment. The delay is not willful or wanten. There was not punitive circumstances justifying the imposition of damages. The proviso under Section 85(B) also provide for waiving of damages. The authorities failed to consider the same. The claim is relating to the period from 1988 to 1991 and the Department kept mum for long time. Only on 29.05.1997, the arrears were demanded. This aspect was also not considered by the respondent. As per Section 77 (1)(a)(b) of the ESI Act, no claims shall be made by the Corporation, after a lapse of five years, from which the claims relates. The claims itself is barred by limitation. The respondent has imposed 100% damages for delayed payment, which is against law and facts and prayed the order to be set aside.

4.The brief substance of the written statement filed by the respondent is as follows:

The petitioner's firm is covered by the provision of the ESI Act. It is statutory obligation on the part of the petitioner to pay contribution due in accordance with the regulation 31. Section 85(b) provides for recovery of damages upto 100%. The respondent issued show cause notice dated 01.12.1997. After enquiry, the order was passed on 05.06.1998. The order is legal and valid. The contribution due for the year 1998 to 1990 have been paid by the petitioner after several years. The damages can be levied, after the contribution is remitted. There is no time limit for levy of damages and prayed the petition to be dismissed.

5.After the trial, the Labour Court has partly allowed the petition, by directing the factory owner to pay 15% of the damages. Against which, the appellant herein has preferred this Civil Miscellaneous Appeal.

6.On the side of the appellant, it is stated that a notice was issued on 20.06.1991 demanding the appellant to pay a contribution of Rs.54,418/- for the period from 01.06.1988 to 31.03.1989. The said amount was paid by the employer in two installments on 20.09.1991 and on 02.09.1997. After the notice was issued on 20.06.1991, contribution was paid for the period from 01.06.1988 to 31.03.1989. Instead of Rs.68,487/-, the factory owner has paid only Rs.45,977/-. The remaining amount is to be paid. Another notice was sent on 20.06.1997 demanding a contribution of Rs.3,95,349/- for the period from 01.04.1990 to 31.03.1996. Instead of paying Rs.3,95,349/-, only an amount of Rs.2,60,052/- was paid by the employer on 02.09.1997. The remaining amount of Rs.1,35,297/- was not paid. The detailed payment of the said ESI contribution was a conscious Act on the part of the respondent and damages can be claimed under Section 85(b) of the Act. On 01.12.1997, notice was sent for claiming damages of Rs.1,05,452/-. After giving opportunity



for personal hearing, the impugned order was passed by the competent authority. It is wrong to decide that there was no intentional delay and that there was inadvertent omission. These points were not raised by the respondent at the time of enquiry. This plea was raised for the first time alleged in the petition filed by the employer before the trial Court and prayed the order passed by the labour Court to be set aside.

7. On the side of the appellant, it is stated that there is no question of law involved in this case. There was no discussion regarding intention and that the trial Court wrongly come to a conclusion that the delay was not wanten or willful.

8. The learned counsel for the appellant would rely upon a judgment passed by the Hon'ble Supreme Court in the case of **Employees' State Insurance Corporation v. H.M.T. Ltd., and another** reported in **2008 (1) L.L.N. 491**, wherein it is stated as follows:

"Employees' State Insurance General Regulations, 1950, Regulation 31C - Interpretation and application of - payment of contributions - failure to deposit - corporation is entitled to levy damages by way of penalty not exceeding the amount of arrears - Section does not envisage levy of damages imperative in all cases."

9. In support of his contention, another judgment passed by the Hon'ble Supreme Court in the case of **McLeod Russel India Ltd., v. RPFC, Jalpaigudi & Others** reported in **2014 (3) LLN 1(SC)** is also cited.

10. On the side of the respondent, it is stated that the respondent has remitted the amount. If at all the inspection was done within the time limit, the respondent would have paid the amount in time. But only after a lapse of nine years, the authorities have taken action against the respondent. The factory inspector has made an observation and on such observation, the respondent has paid the entire amount. Only after receiving the entire amount, the appellant has imposed damages. Most of the employers were not permanent. They used to work for one or two days and they used to leave the company. The ESI institution had not given any benefits to those employees. There was no willful default or negligence or *mens rea*.

11. In support of his contention, a judgment passed by the Hon'ble Supreme Court in the case of **Employees State Insurance Corporation v. H.M.T. Ltd., and another** reported in **2008(1) LLN 491** is cited, wherein it is stated as follows:

"Existence of *mens rea* or *actus reus* to contravene a statutory provision is necessary ingredient for levy of damages and/or quantum



thereof."

12. On the side of the respondent, it is stated that there was no mens rea on the part of the respondent to avoid payment of contribution. In support of his contention, a judgment passed by the **Assistant Provident Fund Commissioner, EPFO and another v. The Management of RSL Textiles India Pvt. Ltd., through its Director** reported in **CDJ 2017 SC 35**, wherein it is stated as follows:

"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..... 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."

13. The learned counsel for the respondent would rely upon the Judgment of this Court in the case of **Regional Provident Fund Commissioner II and another v. Sree Visalam Chit Funds Ltd., Palathur and another** reported in **2010 (4) LLN 716** is cited, wherein it is stated as follows:

"Unless it is established that failure to pay the contribution was attributable to the mens rea or actus reus on the part of employer, question of levying damages under section 14B of the Act does not arise"

14. The respondent was not able to remit the amount at that time. The employees did not enjoy any benefits from the appellant and there was no damages to the appellant. The appellant had not explained the delay of eight years in sending the notice. The period of limitation under Section 45(a) and 77 of the Act was only five years. No explanation was ever given by the appellant in the notice or in the grounds of appeal regarding the delay on the part of appellant.

15. It is seen that the appellant sent notice for the period from 01.06.1988 to 31.03.1989 and for the period from 01.04.1989 to 31.03.1990, only on 05.06.1998, that is after a lapse of seven years. A speaking order was passed by the competent authority. This delay was not explained by the appellant in the written statement filed by the appellant before the trial Court. The particulars given by the appellant in the appeal in page no.3 of typed set of paper were not stated in the written statement of the appellant before the trial Court.

16. On the basis of the letter dated 04.11.1997, the employer paid a sum of Rs.83,059/- as interest. The appellant has not explained these points in the written statement filed by the



appellant before the trial Court but the appellant is blaming the respondent for raising the ground of *mens rea* before the trial Court. It is seen that there is clear delay on the part of the appellant also. The respondent also has admitted that there is delay in payment of contribution. It is clear that the delay is in taking action against the employer by the appellant. The appellant is not correct in claiming the entire amount claimed as damages.

17.For the above reasons, it is decided that the Labour Court is correct in awarding 15% of the amount claimed as compensation to be paid by the respondent herein. Hence, there is nothing sufficient enough to interfere in the order passed in E.S.I.O.P.No.39 of 1998 dated 08.03.2010, on the file of the Labour Court, Madurai and thereby, this Civil Miscellaneous Appeal is dismissed.

18.The appellant is entitled to a sum of Rs.15,817/- (Rupees Fifteen Thousand Eight Hundred and Seventeen only) as compensation with interest at the rate of 7.5% from the date of the claim petition till the date of realization.

19.The respondent is directed to deposit Rs.15,817/- (Rupees Fifteen Thousand Eight Hundred and Seventeen only) with 7.5% interest from date of the claim petition till the date of realization and the amount if not deposited earlier, has to be deposited within a period of 8 weeks from the date of receipt of copy of this order. On such deposit, the appellant is permitted to withdraw the award amount with proportionate interest after deducting any amount received by him earlier without filing any formal petition before the Tribunal. Excess amount, if any deposited shall be refunded to the respondent. The appellant is not entitled for interest for the default period, if there is any. No Costs.

Sd/-

Assistant Registrar (CSII)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

MRN

Note : In view of the present lock down owing to COVID - 19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.



To

1.The Employees' Insurance Court (I.e. Labour Court),
Madurai.

Copy to

The Section Officer, (2C)
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.G.ARUNACHALAM, Advocate (SR-24123[F] dated
28/07/2021)

+1 CC to M/s.P.GANAPATHYSAMY, Advocate (SR-24064[F] dated
27/07/2021)

C.M.A. (MD)No.1283 of 2013
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