



WEB COPY

C.M.A.(MD)No.975 of 2013

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Reserved On : 29.06.2021
Delivered On : 12.07.2021
CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

C.M.A. (MD) No. 975 of 2013

ESI Corporation (SRO),
4th Main Road,
K.K.Nagar, Madurai - 20.
Rep. By its Director.

..Appellant/Respondent

Vs.

Sri Shanmuga Polypacks,
rep by its Personal Manager,
Door No.4-D/1, SIPCOT Complex,
Trichy Road,
Pudukottai - 622 002.
Pudukottai District.

.. Respondent/Petitioner

Prayer: This Civil Miscellaneous Appeal is filed under Section 82(2) of the E.S.I. Act, 1948, to set aside the order of the Labour Court, Madurai passed in E.S.I.O.P.No.10 of 2011 dated 11.05.2011.

For Appellant : Mr.N.Dilip kumar
For Respondent : Mr.Jerin Mathew
For Mr.M.E.Ilango

JUDGMENT

This Civil Miscellaneous Appeal has been filed against the judgment and decree passed in E.S.I.O.P.No.10 of 2011 dated 11.05.2011, on the file of the Presiding Officer, 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.10 of 2011, praying to set aside the order dated 16.12.2010 under Section 85(B) of the ESI Act and also for granting permanent stay.

3.Brief substance of the claim petition in E.S.I.O.P.No.10 of 2011 is as follows:

The petitioner company is a partnership firm situated at Pudukottai. The petitioner company is manufacturing and selling of HDPE/PP circular woven fabrics/socks. The petitioner company is

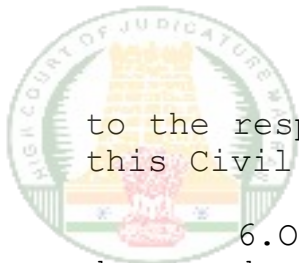


covered by ESI Act scheme and code number was allotted to the petitioner company. The petitioner company has been remitting ESI without any default. The Inspector of the ESI corporation visited the factory on 07.04.2010 and on 20.04.2010 he gave a report stating that the petitioner company has failed to pay ESI contribution for loading and unloading and for machinery maintenance, for office maintenance, for building maintenance, for erection expenses, for miscellaneous expenses, for training expenses and for salary wages and for difference in examination charges and issued a notice in form C 18 dated 13.05.2010 demanding a sum of Rs.2,33,568/- (Rupees Two Lakhs Thirty Three Thousand Five Hundred and Sixty Eight only) for the period from 04/2007 to 03/2009. Personal hearing was fixed on 31.05.2010 and an exparte order was passed. The petitioner company was not given an opportunity to defend. The respondent issued C19 notices authorizing the recovery officer to recover the amount with interest. The Recovery Officer issued form No.ESI CP II dated 03.09.2010. The petitioner sent a letter to the Recovery Officer explaining the facts. The Recovery Officer issued a notice dated 27.01.2011 stating that the amount was adjusted and there was no balance. The respondent issued notice in form D 18 dated 07.10.2010 proposing to levy damages on the ground that the amount was remitted belatedly. The personal hearing was given and the petitioner company attended the hearing. Without applying the mind, the respondent has passed an order under Section 85(b) dated 16.12.2010. The damages levied is excessive and is against the law and the order is to be set aside.

4.Brief substance of the counter filed by the respondent therein is as follows:

The petitioner company has no locus standi to file the case. The petitioner company has suppressed the real facts. The respondent is entitled to claim contribution from the employer. The Inspector of the Corporation inspected the petitioner's concern on 07.04.2010 and on 20.04.2010 and found out that the employer has not paid contribution for the period from 04/2007 till 03/2009. Notice under Section 18 was issued on 13.05.2010. There was no response from the employer. The order under Section 45A of the Act was passed. The payment of contribution to the tune of Rs.2,33,568/- cannot be taken as inadvertent omission. Notice in form D 18 was issued on 07.10.2010. After hearing the employer, the order was passed by the respondent on 16.12.2010. There was a delay in paying the contribution. There is no illegality on the part of the respondent in levying damages under Section 85(B) of the Act.

5.On the side of the appellant, no witness was examined and no document was marked. On the side of the respondent, no witness was examined and nine documents were marked. After perusing the documents, Ex.P1 to P9, the Labour Court passed the order directing the petitioner company to pay 17 % of the total claim of the damages



to the respondent. Against which, the appellant herein has preferred this Civil Miscellaneous Appeal.

6. On the side of the appellant, it is stated that levy of damage has been made after due consideration and evaluation of relevant factors. The trial Court failed to consider that under Section 85(B) of the ESI Act, the appellant is entitled to levy damages. The respondent is not a sick industrial unit. Without recording any reason, the trial Court reduced the damages. The delayed payment of contribution itself is a proof that there was deliberate intention. The Act itself is a Social Welfare Legislation. Unless the factory is a sick unit, the respondent is not entitled for any waiver of damages.

7. The points for consideration are as follows :-

"On the facts and circumstance, whether levy of damages by the appellant Corporation for payment of damages after passing speaking orders deserve interference ?"

8. On the side of the appellant, it is stated that the trial Court has not come to a conclusion that there was no willful default. But the ESI Court has only reduced the quantum and hence, that order is to be set aside.

9. It is further stated that the establishment was functioning from the year 2007 and they are familiar with the provisions of the ESI Act. The omission to pay contribution is only deliberate. There was a delay in payment. No reason was ever given by the respondent for the cause of delay. There was no discussion regarding the order of the ESI Corporation and prayed the order to be set aside.

10. On the side of the respondent, it is stated that to file an appeal, there should be a question of law under Section 82 of ESI Act. No such question was raised by the appellant in the grounds of appeal. The ESI authorities must prove that there was a *mens rea* for committing default. The trial Court has clearly discussed that there was no *mens rea* and has reduced the quantum. In support of his contention, the 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**, 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."

11. The learned counsel for the respondent would rely upon the judgment passed by the Hon'ble Supreme Court in the case of **Employees' State Insurance Corporation and another v. Hotel Gowri Sankar** reported in **C.M.A. (MD) No.1141 of 2015**, wherein it is stated



as follows:

"Merely because, the second substantial question of law raised is as to whether mere passing of the order of damage would establish the mens rea on the part of the establishment. In my view, only if there is mens rea on the part of the establishment, then an order of damages can be passed. Therefore, the second question of law is answered against the appellant corporation."

12.On the side of the appellant, it is stated that when a decision was made without any evidence, a question of law can be formulated. A perverse finding without an evidence is a question of law. The learned counsel for the respondent would rely upon the judgment passed by this Court in the case of **M.P.Natesan and others v. Palanisamy** reported in **2015 (6) CTC 359**, wherein it is stated as follows:

"The question of possession being a question of fact, the concurrent findings of the Courts below cannot be interfered with by the High Court, unless such findings are proved to be perverse."

13.A perusal of the records reveals that both the appellant and the respondent herein have not examined any witness before the ESI Court. The respondent herein/petitioner company has produced documents, Ex.P1 to Ex.P9. The appellant herein/respondent has not filed any document. The appellant has not raised any question of law. No question was raised on the ground of perverse decision. There is absolutely no question of law to be decided in this matter.

14.In the above circumstances, there is nothing sufficient enough to interfere in the order passed in E.S.I.O.P.No.10 of 2011 dated 11.05.2011, on the file of the Presiding Officer, Labour Court, Madurai and thereby, this Civil Miscellaneous Appeal is dismissed.

Sd/-

Assistant Registrar ()

// 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 Presiding Officer,
Labour Court,
Madurai.

Copy to

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

+1 CC to M/s.N.DILIP KUMAR, Advocate (SR-22016[F] dated
12/07/2021)

+1 CC to M/s.M.E.ILANGO, Advocate (SR-22454[F] dated 14/07/2021)

C.M.A. (MD) No.975 of 2013
12.07.2021

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