



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 16.12.2020

Pronounced On : 29.01.2021

CORAM

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THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.M.A(MD)No.250 of 2016

1.E.S.I.Corporation,
Sub Regional Officer (Tirunelveli),
Salai Street, Vannarpettai,
Tirunelveli 627 003.

2.The Recovery Officer,
Sub Regional Office (Tirunelveli),
Salai Street, Vannarpettai,
Tirunelveli 627 003.

: Appellants

Vs.

M/s.Hardev Singh Kalket,
Engineering Contractor,
1/229, V.M.S.Nagar,
Thoothukudi 628 003.

: Respondent

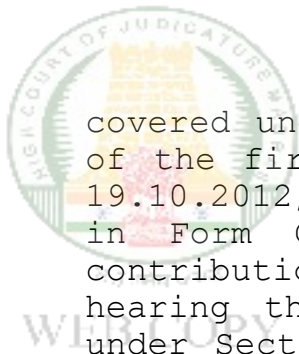
PRAYER:- Civil Miscellaneous Appeal filed under Section 82 of the ESI Act, 1948, to set aside the order dated 04.07.2015 passed by the ESI Court (i.e. Labour Court), Tirunelveli in ESI OP No.11 of 2015 and allow this Civil Miscellaneous Appeal with necessary directions in favour of the appellant.

For Appellants : Mr.P.Ganapathy Samy
For Respondent : Mr.M.E.Ilango

J U D G M E N T

The Civil Miscellaneous Appeal has been preferred under Section 82 of the ESI Act, 1948, challenging the order passed in E.S.I.O.P.No.11 of 2015, dated 04.07.2015 on the file of the Employees State Insurance Court/ Labour Court, Tirunelveli.

2. The respondent is a contractor in respect of Refractory Running Maintenance in Smelter Plant of Sterilite, Tuticorin and is



covered under the ESI Act. It is not in dispute that the Inspector of the first Appellant inspected the respondent's establishment on 19.10.2012, and on that basis, the first Appellant issued a notice in Form C-18, calling upon the respondent to remit the ESI contributions for the period from 10/2007 to 03/2012, that after hearing the respondent, the first Appellant has passed an order under Section 45 (A) of the ESI Act, dated 31.07.2013 under Ex.P1, determining the contribution at Rs.7,71,980/-, that the respondent had remitted the contributions, that the first appellant has thereafter, sent a notice in Form D-18, dated 09.05.2014 under Ex.P.2 proposing to levy damages at Rs.6,31,155/- for the delayed payment of contribution, that the first appellant has then passed the impugned award under Section 85-B of the said Act on 07.07.2014 under Ex.P.3, determining the damages payable at Rs.6,31,155/-, and that subsequently, the Recovery Officer has sent a Certificate in Form ESI-CP-2, dated 23.09.2014 under Ex.P.4 and the same was followed by Garnishee order under Section 45 G of the said Act, dated 16.10.2014 under Ex.P.5. Aggrieved by the order passed under Section 85 B of the ESI Act under Ex.P.3, the respondent has preferred the appeal under Section 75 (1) (g) of the ESI Act before the Labour Court (ESI Court), Tirunelveli.

3.During enquiry before the ESI Court, the respondent has produced and exhibited six documents as Ex.P.1 to Ex.P.6 and adduced no oral evidence. The appellants have adduced neither oral nor documentary evidence.

4.The learned Presiding Officer of the ESI Court, upon considering the evidence, has passed the impugned order dated 04.07.2015, setting aside the order of the first appellant and fixed the damages at 10% of the impugned amount. Not satisfied with that order, the Appellants have come forward with the present appeal.

5.The Appeal is admitted on the following substantial questions of law;

(1) Whether the trial Court is justified in interfering with a quasi-judicial order even though no witness was produced/examined in the case to prove the documents, or the contention of the employer that there is absence of *mens rea*?

(2) Can a reduced amount determined under Section 45-A of the EST Act be a justified reason for non-payment of contributions on due dates?

(3) Whether the passing of the order of damages under the said Section 85-B of the ESI Act, 1948 establishes *mens rea* on the part of the entity?

(4) Whether the employer can advance a new plea for the first time before the trial Court?

(5) Whether the ESI Court has power to impose semblance of damages only "as a preventive measure"?

(6) Whether the trial Court is justified in casually



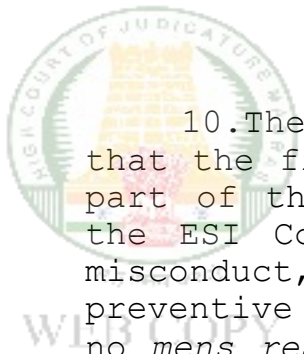
interfering with quasi-judicial orders of the ESI Corporation despite the protection available in under Section 114, Illustration (e) of the Evidence Act?

6.The respondent's main contention is that most of his employees had left and they are unidentifiable and he never deducted any employees' share of contribution and that the employees of the first respondent/petitioner had not availed any benefit from ESI. The respondent's further case is that after determination of the contribution payable, he had immediately remitted the contribution and that there was no wilful default or delay on the part of the respondent in paying the contribution amount, that there was neither wilfulness nor wantonness in remitting the contribution and that the order claiming damages under Ex.P.2 is invalid and illegal.

7.The learned Presiding Officer, in the impugned order, has observed that the Appellant/Corporation itself was initially not sure about the correct subscription amount payable by the respondent and therefore, there was a cloud cast upon the respondent's mind in paying the correct subscription and that after determination of the contribution payable, the respondent had remitted the same immediately. The ESI Court has further observed that the first Appellant has not given any specific finding with regard to the *mens rea* of the respondent and that the power under Section 85 B of the Act is not unlimited or unfettered power. Thereafter, learned Presiding Officer has proceeded to comment upon the conduct of the respondent and since there was a failure on the part of the respondent to pay the contribution without delay and as a preventive measure, for such delayed payment, some amount has to be fixed towards damages and by holding so, he fixed the damages payable at 10% of the amount determined by the Appellant.

8.The learned counsel for the Appellant would contend that the order of the trial Court is based on 'no evidence', and that though six documents were produced and exhibited, no witness was produced by the employer to prove the contents of the said documents. I find absolutely no merit in the said line of argument. The respondent has only produced the notices issued and the orders passed by the Appellants and hence, the question of proving the contents of the said documents through witnesses, does not arise at all.

9.The next contention of the Appellants is that the ESI Inspector found out that there were huge omissions in payment of contributions and only after unearthing the omissions and raising of claims, the employer had remitted the contribution and that the same would go to prove the *mala fide* intention on the part of the employer in not making the correct ESI contributions every month.



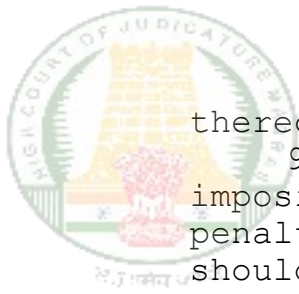
10.The learned counsel for the Appellants would further contend that the finding of the ESI Court that there is no *mens rea* on the part of the employer is capricious and without any evidence, that the ESI Court, instead of punishing the employer for the actual misconduct, it has imposed the semblance of damages just as a preventive measure, that the employer had not pleaded that there was no *mens rea* on his part at the personal hearing and that the trial Court has also not given any reason as to why 10% is payable as damages.

11.Before entering into further discussion, it is necessary to refer the decision of our High Court passed in C.M.A.Nos.2630 and 2643 of 2018, dated 28.02.2019, **Employees State Insurance Corporation, Chennai Vs. M/s.Hyundai Motor India Limited**, wherein it is held as follows:

"7.It is an admitted fact that the payment as demanded by the appellant was made in time along with interest, but there is no evidence that there was deliberate delay on the part of the respondent unit in making the payment of contribution. When the delay is non deliberate, it cannot be said the discretionary power under the regulation can be used without application of mind. It is well settled for invoking the discretionary power the authority shall record reasons. In similar circumstances, this Court in judgment reported in (2001) 1 MLJ 739 [Regional Director, Employees' State Insurance Corporation Vs. N.Dasarathy and sons and another has held us under:-

"7. Under such a situation, whether the appellant-Corporation can invoke Section 85-B of the Act is a moot point. The object of insertion of Section 85-B of the Act as stated in the objects and reasons is to provide for more deterrent penalties for defaults in payment of contributions. It is, in fact, a penalty by way of damages. It is not as if the appellant- Corporation can invoke Section 85-B of the Act as a matter of course without application of mind. Before invoking Section 85-B of the Act, the appellant-Corporation will have to apply its mind to various relevant factors. Since the damages under Section 85-B of the Act is in substance a penalty imposed on the employer for breach of statutory obligation, it should not be imposed merely because it is lawful to do so. The authority concerned will have to apply its mind to the various relevant factors such as the number of defaults, the extent of delay, the frequency of default and the amount involved.

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



thereof."

9.Only because there exists the position for imposition of penalty, the Corporation shall not impose penalty mechanically and without application of mind. It should see as to whether there exists mens rea or deliberate intention to make the payment. When such delay is not deliberate the discretionary jurisdiction shall not be exercised.

12.Considering the above, it is very much clear that the ESI Corporation has to satisfy with the existence of *mens rea* or *actus reus* to contravene a statutory provision.

13.In the case on hand, admittedly, the respondent had remitted the contribution only after passing of the order under Section 45(A) of ESI Act for the period between 10/2007 and 03/2012. The only stand of the respondent that most of the employees had left and that he never deducted any employee's share of contribution and no employee had availed any benefit from ESI, cannot be construed as a reason or ground to avoid payment of contribution. It is for the employer to have records about the employees engaged by him and he cannot blame somebody for not deducting the employee's share of contribution. As per the statutory provisions, the employer has to pay the contribution within 21 days of the end of the relevant to age period. Considering the above, there cannot be any doubt in saying that there was a delay in remitting the contribution.

14.As rightly contended by the learned counsel for the Appellant, the respondent has not shown sufficient reason or explanation for the delay. Considering the above, the finding of the first Appellant that the respondent is liable to pay damages under Section 85 B of the ESI Act, cannot be found fault with. The appellants have claimed damages at Rs.6,31,155/-. Admittedly, the respondent has remitted the entire contribution as claimed by the Appellants. As rightly contended by the respondent's side, the Appellants did not indicate any valid reason as to why damages were claimed at the upper side and they have also not shown any reason or ground for claiming damages at Rs.6,31,155/-.

15.Considering the entire facts and circumstances, the learned Presiding Officer has fixed the damages at 10% of the amount claimed and I do not find any infirmity in the order passed by the ESI Court. Hence, this Court decides that the appeal is devoid of merits and the same is liable to be dismissed. Considering the other facts and circumstances, this Court further decides that the parties are to be directed to bear their own costs.

16.In the result, this Civil Miscellaneous Appeal is dismissed and the order dated 04.07.2015, passed in E.S.I.O.P.No.11 of 2015, on the file of the ESI Court (Labour Court), Tirunelveli, is



confirmed. Parties are directed to bear their own costs.
Consequently connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS I)

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Sub Assistant Registrar(CS)

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To

1.The Presiding Officer,
The ESI Court (i.e. Labour Court),
Tirunelveli.

2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai. (2c)

+1 CC to M/s.M.E.ILANGO, Advocate (SR-2755[F] dated 02/02/2021)

C.M.A (MD) No.250 of 2016
29.01.2021

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