BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 24.06.2022

Pronounced on : 10.10.2022

CORAM

THE HONOURABLE MRS.JUSTICE **R.THARANI**

C.M.A(MD)No.1037 of 2010
and
Cros.Obj(MD)No.55 of 2010

C.M.A(MD)No.1037 of 2010
The Joint Director,
ESI Corporation,
4th Main Road,
K.K.Nagar, Madurai-20. ... Appellant

Vs

M/s.Muruga Home Industries
No.29, Thaneerkulam street,
Tachanallur, Tirunelveli. ... Respondent

PRAYER :-

This Civil Miscellaneous Appeal is filed under Section 82 of ESI Act, 1948, to set aside the decree and judgment of the E.I. Court (Labour Court, Tirunelveli) passed in E.S.I.O.P.No.2 of 2004 dated 25.01.2010.

For Appellants : Mr.N.Dilipkumar

For Respondent : Mr.P.Chandrabose

Cros.Obj(MD)No.55 of 2010

M/s.Muruga Home Industries
No.29, Thaneerkulam street,
Tachanallur, Tirunelveli. ...Cross objector

Vs

The Joint Director,
ESI Corporation,
4th Main Road,
K.K.Nagar, Madurai-20. ...Respondent

Prayer : This Cross Objection is filed under Order 41 Rule 22 of C.P.C., to set aside the decree and judgment of the E.S.I.Court, Tirunelveli, passed in E.S.I.O.P.No.2 of 2004 dated 25.01.2004.

For Cross Objector : Mr.P.Chandrabose

For Respondent : Mr.N.Dilipkumar

JUDGMENT

This appeal is filed against the order of the Joint Director, ESI Corporation in E.S.I.O.P.No.2 of 2004 dated 25.01.2010. The appellant is the respondent. The respondent is the petitioner in E.S.I.O.P.No.2 of 2004.

2.Brief substance of the petition is as follows:

The petitioner has already filed a petition to declare that Beedi manufacturing business will not come under the purview of ESI Act. Since that petition was dismissed, the petitioner filed an appeal before this Court in C.M.A.No.1 of 2019. That appeal was also dismissed. The respondent sent a notice on the basis of a proceedings dated 24.05.1991, demanding contribution for the period from 01.02.1986 till 31.12.1990. The petitioner was called for an enquiry on 05.03.1991. In the letter dated 12.08.1991, the petitioner has informed the respondent that the matter was stayed by the High Court. The respondent sent a reply that the appeal was dismissed on 21.12.1998. The respondent called for the salary list of the employees from 01.02.1986 till 31.12.1990. On 22.05.2000, the petitioner sent an explanation letter to the respondent, in reply to the letter of the respondent dated 03.04.2000. From 01.01.1990 onwards, the petitioner is paying the ESI contribution. The respondent fixed the contribution at Rs.85,844/- and intimated the same to the petitioner on 08.08.2000. The proceedings for payment was made on 08.11.2000. The petitioner paid the amount and sent the challan through registered post on 30.11.2000. The petitioner is paying Rs.2/- per 1000 pieces of beedi to the Beedi Labour Welfare Board and the petitioner is paying Rs.8 Lakhs to the respondent each year. The labourers do not pay any amount towards Beedi Labours' Welfare Board. The rate of Beedi leaves is expensive. The transport charges also are so high. In Karnataka state, the Beedi manufacturing business was exempted from the ESI Act.

3.The petitioner has already paid a sum of Rs.85,844/- within five days from the date of receipt of the proceedings. But the respondent made another proceedings dated 08.10.2001 and demanded Rs.40,418/- as compensation under Section 85(b) of ESI Act. In fact, there is only 13 days delay in paying the contribution amount as per Section 45(A) of the ESI Act. Hence the order dated 10.12.2001 under Section 85(b), demanding a sum of Rs.44,418/- is to be set aside.

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

The petition is not maintainable. It is wrong to state that the petitioner has paid the contribution for the period from 01.02.1986 till 31.12.1990. Under Section 45(A) of the ESI Act, it is the duty of the petitioner to prove the same. It is wrong to state that the petitioner's business is facing problems due to payment of Rs.2/- per 1000 pieces of beedi to the Beedi Labourers' Welfare fund and due to the raise in the rate of beedi leaf and the transport expenses. Beedi business is not exempted from payment of ESI in Tamil Nadu. Already, the appeal filed by the petitioner before the High Court, Madras, was dismissed on 21.12.1998. Only after the dismissal of the appeal, the respondent passed the proceedings under Section 45A of the Act, demanding the petitioner to pay a sum of Rs.85,844/- towards the contribution for the period from 01.02.1986 till 31.12.1990. The notice was served on the petitioner on 08.11.2000. But the petitioner has paid the amount only on 28.11.2000. The respondent demanded a sum of Rs.40,418/- as damages due to the delay in payment.

5.No witness was examined and no document was marked on both the sides. The Tribunal has held that the respondent is entitled to 5% of the amount demanded and the ESI Court has passed an order of injunction not to collect more than 5% of Rs.40,418/- from the petitioner. Against the order, the respondent preferred an appeal before this Court.

6.On the side of the appellant it is stated that the Labour Court failed to appreciate that under Section 31 of the ESI Act, general regulations, an employer is liable to pay contribution within 21 days of the last day of the calendar month in which the contribution fall due, failing which the employer is liable to pay simple interest at the rate of twelve percent per annum in respect of each day of default or delay in payment of contribution. The trial Court has held that the delay is only 13 days. The labour Court failed to appreciate that under Sub-Section 39 of the ESI Act, the contribution fall due on the last day of its closure period.

7.The respondent has not made any serious case for reconsidering waiver or reduction of damage. Financial constraints, manufacturing costs, procurement of raw materials from distance places etc., cannot be a ground for waiver. The lower Court ought to have considered that the actual delay for payment of contribution for the period from 01.02.1986. till 31.12.1990. The Trial Court erroneously mentioned that the regulations under Section 31(c) of ESI Act, empowers the Court to waive or reduce damages in proportion to the extend of delay. The trial Court failed to consider that on dismissal of C.M.A.No.1 of 1990, the respondent ought to have remitted the amount in the ESI Corporation on or before 10.01.1999. When there was non compliance of the order, even after the decision of the High Court, Madras, the appellant advised the respondent through his letter dated 28.02.2000 to remit back the amount due. Instead of remitting the amount, the respondent, through his records and statements is questioning the liability.

8.The order under Section 45A was issued on 08.11.2000 and the respondent remitted the amount only on 28.11.2000. There is a delay of 685 days from 10.01.1999. The Lower Court erred in deciding that the delay was only 13 days. The labour Court ought to have accepted the assumption of delay as 685 days. The trial Court failed to note that after the dismissal of the Civil Miscellaneous Appeal No.1 of 1990 for the payment of contribution, a personal hearing was fixed on 08.08.2000 and a speaking order under Section 45A was passed. On the non compliance of the provisions by the employer, an order imposing damages and interest for the delayed payment, is valid. The lower Court failed to give any reason for reducing the damages from 40,418 to 5% of the same. The Tribunal has no power to reduce the damages under Section 31(c) of the ESI Act.

9.The following substantial questions of law were raised in the Appeal:

(i)on the facts and circumstances whether the binding of the Tribunal that, the Tribunal has power to reduce the damages and fixed 5% of Rs. 40,418/- as per 31-C of ESI Regulation(General), 1950.

(ii)whether the interpretation to regulation 31-C of General Regulation of ESI 1950 by the lower Court sustainable in law.

(iii)when the respondent did not produce any records to prove his contentions that he has paid the contribution amount within the time limit prescribed by the E.S.I. Act, was it correct for the lower Court came to a conclusion that, the respondent has paid the contribution amount within the time prescribed by the Act.

10. Brief substance of the grounds of Cross Objection is as follows:

i) The judgment and decree of ESIOP No.2 of 2004 on the file of the ESI Court, Tirunelvel, are contrary to law and liable to be modified.

ii) The impugned decree and judgment of the ESI Court, Tirunelveli, is against the provisions of law and contrary to the facts of the case.

iii)The ESI Court, Tirunelveli has miserably failed to note that there is no *mens rea* for delay in remittance of the contribution.

iv) The ESI Court failed to consider that only after determination of the amount under Section 45A, the petitioner within 13 days remitted the entire ordered due. The ESI Court also not considered that the petitioner has remitted the employees' contribution for the period from 01.12.1986 to 31.12.1990 and also interest amount and there is no guilty of contemptuous dishonest by the appellant but they acted on bonafide to comply the statutory obligation after passing the order.

v)The ESI Court has failed to consider that the respondent has not considered the mitigating circumstances represented by the respondent before him but acted mechanically in applying upper most limit of damages and the order was passed without indicating any reasons for imposing of the damages.

vi) The ESI Court has failed to note that the statute itself does not say that a penalty has to be levied only in the manner prescribed.

vii)The ESI Court has failed to note that the appellant remitted a sum of Rs.2/- for 1000 beedies manufactured as cess to the Beedi Workers'Welfare Fund and remitted Rs.8 Lakhs for this fund in every year.

viii)The ESI Court has erroneously concluded for 5% of damages amount.

11.The following questions of law were raised in the Cross objection:

(a) on the facts and circumstances and on the basis of the Supreme Court ruling in HMT Ltd., case whether the ESI Court has power to impose damages inspite of the mitigating circumstances;

(b)whether the ESI Court as well as the Authority under Section 85B of the ESI Act has got discretion to complete waiver of damages if there was no element of existence of mens rea or actus reus to contravene the statutory provision.

(c)when the respondent did not give any speaking order and the respondent has not consider the mitigating circumstances was it correct for the ESI Court came to the conclusion of imposing of 5% of damages.

12.On the side of the appellant, it is stated that for the delay in payment of contribution of ESI amount within the statutory period, there was a default from 01.02.1986 till 31.12.1990. A letter was sent by the employer, stating that an appeal was filed by the employer in C.M.A.No.1 of 1990, questioning, the applicability of the ESI Act for the Beedi manufacturing business. That Civil Miscellaneous Appeal was dismissed on 21.12.1998. Even then, the respondent failed to pay the contribution on 28.02.2000. The appellant sent a notice to the respondent. The respondent sent a reply on 22.05.2000. Only on 22.05.2000, the respondent made the belated payment. The earlier default was from the year 1990. The High Court dismissed the appeal in the year 1998. The intention of the respondent was not pay the contribution. Hence, under Section 85(b) of the Act, damages was claimed and the respondent challenged the same in E.S.O.P.No.2 of 2004. The ESI Court wrongly came to the conclusion that there was a delay of 13 days and reduced the damages to 5% of Rs.40,418/-.

13.On the side of the respondent it is stated that applicability of ESI Act was challenged by the beedi workers association. Already, the respondent paid Rs.8 Lakhs for the Beedi Labourers' Welfare Fund. The High Court dismissed the appeal in the year 1998 and the G.O. came into force only in the year 1998. In the year 2000, another notice was sent by the appellant claiming a sum of Rs.1,28,000/- and calling upon the respondent for enquiry. Later, the amount was re-fixed by the appellant as Rs.85,844/- and that amount was paid. The contribution amount was already paid and already an amount was paid towards Beedi Labours' Welfare Board. No employee has received any amount from the ESI. This amount is almost like an insurance premium. Only contribution amount paid for the current year can be utilized by the employee. Previous year contribution amount cannot be utilized by the employee. The respondent has filed this Cross Objection petition to waive the 5% fixed by the ESI Court.

14.On the side of the appellant, it is stated that from the 21st day of employment, the respondent is liable to pay contribution. The respondents are aware of the litigations. They ought to have been aware of the dismissal of the appeal. Even after the dismissal of the appeal, they failed to pay the contribution and there is *mens rea*.

15.On the side of the respondent it is stated that the amount to be paid was fixed only after the enquiry in the year 2000 and without fixing the amount, the corporation cannot claim non payment and hence there is no *mens rea on the side of* the respondent.

16.This Court in **CMA.No.1203 of 2011 dated 10.03.2020,** has made the following observation:

"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."

17.It is seen that there was a G.O., wherein beedi manufacturing business was included under the ESI Act. Questioning the G.O., an appeal in C.M.A.No.1 of 1990 was filed. The appeal was dismissed on 1998. The appellant has sent a notice demanding a sum of Rs.1,24,219/- and summoned the respondent for enquiry. After enquiry, the amount was re-fixed at Rs.85,844/-. The said amount was paid by the respondent on 30.11.2000.

18.On the side of the appellant, it is stated that under Section 85(c) of the Act, the appellant is entitled to claim damages and that the Labour Court is not having the right to reduce the quantum of the damage and that the tribunal is wrong in its interpretation of Section 31-C of general Regulations of ESI Act.

19.On the side of the respondent it is stated that the Commissioner has no power to impose damages since there are mitigating circumstances and that under Section 85 B of the ESI Act, the Court has the discretion to waive the damages if there was no elements of the existence of *mens rea* or *actus reus*.

20.It is seen that the appellant has issued another notice claiming damages for the delay in payment of the contribution amount and demanded the respondent to pay a sum of Rs.40,418/- under Section 85(b) of the Act. In the order dated 05.10.2001, the appellant has claimed 25% of the contribution amount for the delay of 685 days. The delay was calculated from 10.01.1999 onwards.

21.A contribution has to be paid within a period of 21 days from the date of employment. But considering the fact that there was a dispute regarding the applicability of ESI Act to the beedi manufacturing business, the respondent cannot be treated as a defaulter. In view of the same, till the disposal of C.M.A.No.1 of 1990, the respondent's failure to pay the amount is reasonable. Under Section 85 C of the ESI Act, the authorities can waive the damages when the unit is declared as a sick unit.

22. Initially, the appellant has demanded an amount and after enquiry, they fixed another amount to be paid by the respondent. Only after the receipt of the proceedings, the respondent can find out the exact quantum of amount to be paid by him. The proceedings under Section 45A dated 08.11.2000, and the payment was made on 28.11.2000. Within 20 days, from the date of order under Section 45A of the Act, the payment was made by the respondent.

23.Before, fixing the exact amount, to be paid, the respondent cannot make the payment. The exact amount was fixed only on 08.11.2000. The amount has to be paid within 15 days from the date of proceedings under Section 45A dated 08.11.2000. Hence, the calculation of delay from 10.01.1999 is not proper.

24. A judgment of the Hon'ble High Court of Kerala reported in (2015)3 SCC 593 in the case of ESI Corporation Vs Focus Infotech dated 08.11.2017 is referred by this Court, wherein it is held that

"8.In the instant case, the respondent has produced Ext P4 balance-sheet which would sow the bad financial condition of the

establishment for the last so many years and the appellant has not challenged the said balance-sheet. Thus, there is no material to prove that the respondent has willfully defaulted payment of contributions despite the availability of sufficient funds in their hand. On the other hand, the respondent contended that the financial condition of the respondent was so pathetic and they were not even paying wages regularly to their employees during the previous periods. The bad financial condition of the respondent establishment is seen proved by Ext P4 audited balance sheet of several years and the same is not challenged by the appellant. However, the respondent has already remitted the defaulted contributions with interest. In the absence of materials to prove the existence of mens rea or actus reus to Insurance Appeal No.13 of 2017 contravene statutory provision the appellant is not justified in imposing huge amount as damages. It follows that the Insurance Court is justified in reducing the quantum of penalty to Rs.45,000/-, a reasonable amount in view of the bad financial condition of the respondent establishment. We do not find sufficient reason to interfere with the impugned order under challenge. Hence this appeal is dismissed."

25. A judgment of this Court in the case of **Employees State Insurance Corporation Vs Binny Engineering Ltd** dated 06.11.2019, is referred by the Court, wherein it is held that,

" 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."

26.The claim of the respondent is that the order was served on them on 15.11.2000. The respondent has admitted that there was a delay of 13 days in paying the amount. But in the cross objection, the respondent has claimed that there was no delay on the part of the respondent. The respondent has not produced any document to show that the proceedings was served on them only on 15.11.2000. If the delay is calculated from the date of order, ie., 08.11.2000, the respondent ought to have paid the amount within 23.11.2000. The respondent has paid the amount only on 28.11.2000. There was a delay of 5 days.

27.Under Section 31(c) of the Act, If a delay is for a period of 2 months, 25% damage can be claimed. The appellant has fixed the contribution amount as Rs.85,844/- and has claimed damages at 25%. The appellant has calculated the damages as Rs.40,418/-. The calculation at 25% ought to be Rs.21,461/- only. It is clear that the calculation in the order dated 08.11.2001 is an erroneous one.

28.Only if there is a delay of more than two months in making any payment of the amount due towards the contribution, 25% damages can be claimed. There is no delay beyond two months. Imposing 25% as damages is not reasonable.

29.The appellant failed to prove that the respondent is having the mens rea. The calculation of number of days of delay is wrong. The calculation of 25% of Rs.85,844/- is erroneous, the appellant has mechanically claimed the damages. As the appellate authority the Labour Court is having the right to set right the mistakes done by the Labour Commissioner.

30. Hence, the appeal in C.M.A.No.1037 of 2010 is modified and the amount to be paid by the respondent is fixed as Rs.4292/- and the Cross Objection is hereby disposed of. Accordingly, the respondent is directed to deposit the amount within a period of one month from the date of receipt of a copy of this order.

10.10.2022

Index: Yes / No
Internet : Yes / No

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To

1.The Judge, E.S.I.Court, Tirunelveli.

2.The Record Keeper, Vernacular Records,
Madurai Bench of Madras High Court, Madurai.

R.THARANI, J.

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Pre - Delivery Judgment made in
C.M.A(MD)No.1037 of 2010
and
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10.10.2022