

**HONOURABLE SRI JUSTICE SAMBASIVA RAO NAIDU**

**C.M.A.NO.158 of 2022**

**JUDGMENT :**

The Employees State Insurance Corporation, herein after will be referred as E.S.I. has filed this Civil Miscellaneous Appeal under Section 82 of Employees State Insurance Corporation Act, herein after will be referred as E.S.I. Act, against the Judgment of E.S.I. Court dated 15-11-2021 in E.I.C.No.82 of 2019 where under, the said Court allowed the petition filed by Respondent School and set aside the 85-B order of the appellant herein by holding that the respondent is not liable to pay Rs.98,313/- to the appellant herein. The present appeal is filed on the following grounds.

2. The E.S.I. Court failed to consider that the appellant herein having taken all the factors and having provided a due opportunity of personal hearing to the respondent, passed an order under Section 85-B of E.S.I. Act, thereby the order impugned in the present appeal is liable to be set aside. The E.S.I. Court failed to consider that the respondent herein was given an ample opportunity to present his case and there is no infringement of Principles of Natural Justice. The E.S.I. Court ought to have considered that the respondent herein is covered under E.S.I. Act,

1948, thereby required to pay contribution and submitted returns of contribution under Sections 40/44 of E.S.I. Act r/w E.S.I. (General) Regulations thereunder. The respondent has paid contributions as required under Section 45-A of the E.S.I. Act and the Court below ought to have considered that appellant has got statutory power to levy damages as per Section 85-B of E.S.I. Act.

3. The appellant has claimed that this Court in W.P.No.12283 of 2009 and other batch Writ petitions held that the school establishments were required to pay contributions as on the date of notification of G.O. by bringing all the private educational institutions within the purview of E.S.I. Act and not from the date of Judgment. The appellant further pleaded that the E.S.I. Court ought to have considered that respondents have paid contributions under Sections 45-A of E.S.I. Act, cannot challenge the order under 85-A of E.S.I. Act, thereby failed to consider that E.S.I. Act being a beneficial legislation has to be construed in its correct perspective and the intention of the enactment. The technical or narrow construction, even if permissible, cannot be countenanced, as that would frustrate the legislative intent underlying the social security scheme, thereby sought for setting aside the impugned order.

4. As could be seen from the record, the respondent herein approached the E.S.I. Court and filed E.I.C.No.82 of 2019 with a prayer to set aside the order under Section 85-B issued by the appellant herein and contended that this school does not come under the purview of the Act. According to the petition filed by the E.S.I. Court, it was the case of respondent that it is an educational institution, even though it is covered under the Act, 1948, the appellant herein did not provide any facilities to the staff. The appellant filed a prosecution case bearing No.3 of 2018 and claimed contributions for the period from 01-04-2010 to 31-03-2011 and from 01-10-2011 to 29-02-2016. The respondent has claimed that the school was running with a less number of staff, thereby it is not liable to pay any contribution. It is not covered by the purview of ESI Act, 1948.

5. The appellant herein opposed the said petition, filed written statement stating that the respondent school is covered under E.S.I. Act with effect from 14-10-2008 with a separate code number. Since the petitioner failed to pay the contributions, appellant herein issued Form C-18 notice dated 27-09-2010 to determine the contributions of Rs.1,60,875/- for the period from 14-10-2008 to 31-03-2010. An opportunity was provided to the

respondent for personal hearing by fixing the date on 04-01-2011. The respondent acknowledged the notice but failed to attend the personal hearing, thereby the appellant has determined the contribution for the period from 01-05-2009 to 31-03-2010 as Rs.98,313/- and left the period covered by 14-10-2008 to 30-04-2009 since it is barred by limitation. A notice under Section 45-A dated 20-06-2014 was issued and the same was acknowledged by the respondent but the respondent failed to comply the same and they did not prefer any appeal under Section 45-AA of the Act.

6. Therefore, the Recovery Officer issued a certificate in Form No.C-19, and claimed contributions with interest and the same was recovered by the Recovery Officer on 13-12-2016. Since there was delay in payment of the contribution, the appellant herein issued Form D-18 dated 03-11-2018 and proposed to levy damages of Rs.98,313/- for the period from May, 2009 to March, 2010. A date was fixed for personal hearing on 04-12-2018. Even though, the respondent received the notice, did not attend the personal hearing. Therefore, the Authorised Officer issued order under Section 85-B

of the Act directing the respondent to pay Rs.98,313/- towards damages for the period from May, 2009 to March, 2010.

7. In view of the above rival contentions, the E.S.I. Court framed the following issues :

1. Whether the 85-B order passed by the respondent dated 05-04-2019 is legal and valid?
2. Whether the petitioner is liable to pay the damages as demanded by the respondent?
3. To what relief?

8. During the enquiry, one Lailju Thomas has been examined as PW.1 on behalf of the respondent herein and J.Sudarshan is examined as RW.1 on behalf of the appellant. The impugned order under Section 85-B was marked as Ex.B1 on behalf of respondent and the appellant herein has marked Exs.R1 to R11.

9. The learned Chairman, E.S.I. Court having considered the oral evidence, documents produced before the Court and arguments of the parties allowed the petition filed by the respondent by holding that he need not pay the damages.

10. Head both parties.

11. Now the point for consideration is :

Whether the order of the learned Chairman, E.S.I. Court suffers from any infirmity and is liable to be set aside?

12. The learned Standing Counsel for the appellant herein has submitted that all the private school institutions are covered by E.S.I. Act. This Court in a batch of writ petitions categorically held that the educational institutions were required to pay contributions from the date of notification of the Government order. Therefore, the respondent herein is required to pay the contribution. In fact the respondent used to pay contributions and he cannot deny the order issued by the appellant under Section 85-B of E.S.I. Act. In support of the contention, the learned Standing Counsel placed reliance on a Judgment between ***“Horticulture Experiment Station Gonikoppal, Coorg Vs. Regional Provident Fund Organization”<sup>1</sup>***, and another Judgment between ***“Union of India and Others vs. Dharmendra Textile Processors and Others”<sup>2</sup>***. The respondent, who was served with the notice did not choose to oppose the application.

13. I have perused the order impugned in the present appeal. The learned Chairman, E.S.I. Court has allowed the petition filed by the respondent herein mainly on the basis of a Judgment between ***“Employees State Insurance Corporation***

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<sup>1</sup> (2022) 4 Supreme Court Cases 516

<sup>2</sup> (2008) 13 Supreme Court Cases 369

***Vs. HMT Limited and another***<sup>3</sup>, and another case between ***“Assistant Provident Fund Commissioner EPFO and another vs. Management of RSL Textiles India Private Limited”***<sup>4</sup>.

In the first case i.e., E.S.I. Corporation, the Hon’ble Apex Court was pleased to observe that :

“The existence of mens rea/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”.

14. In the other case, ***Assistant Provident Fund Commissioner***, referred above, the Hon’ble Apex Court was pleased to observe as follows :

“This issue is now wholly covered against the appellants in the decision rendered by this Court in *McLeod Russell India Limited Vs. Regl Provident Fund Commissioner* reported in (2014) 15 SCC 263, where in it has been held in para 2 that the High Court has taken a view in the absence of a finding regarding mens rea/actus reus on the part of the employer, action under Section 14-B as also the quantum thereof since it is not inflexible that 100% of the arrears have to be imposed in all the cases. Alternatively stated, if damages have been imposed under Section 14-B it will only be logical that mens rea and or actus reus was prevailing at the relevant time”.

15. The learned Chairman found that there was no malafide intention in the delayed payment of contribution, thereby

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<sup>3</sup> Laws(SC)-2008-1-122

<sup>4</sup> (2017) 3 Supreme Court cases page 110

the respondent need not pay any damages and in view of that matter, allowed the petition filed by the respondent. In fact there is no finding nor there is any argument that the respondent paid the damages claimed in the order under Section 85-B of E.S.I. Act.

16. As per the material averments made in the petition and counter placed before the trial Court, it was specifically alleged that the respondent failed to pay the contributions for a particular period and in view of the said failure, a notice was issued to the respondent directing this school to pay damages. The respondent did not deny the receipt of order under Section 85-B. It was not the case of the respondent that the school was not given any opportunity of personal hearing. The appellant had categorically stated in the counter filed before the trial Court that while issuing the order/notices, the school was given opportunity of personal hearing and the said notice was acknowledged by the respondent but he did not avail the opportunity. The entire focus of the respondent as could be seen from the petition filed before the E.S.I. Court is that the school was in a backward area with less staff members. They have been paying salaries to the teachers as per the fixed norms. They were not provided any Government grant. It is not a commercial establishment. The respondent

further claimed in the petition that the order issued by the appellant herein under Section 85-B is contrary to the provisions of E.S.I. Act and violation of the Article 14 of the Constitution of India. The respondent has claimed that the impugned order was passed mechanically and there was failure of Principles of Natural Justice. The entire focus of the respondent is on the aspect of mens rea/actus reus. Therefore, in view of the above averments made in the petition, the respondent did not dispute the receipt of notice but claimed that they have no intention to avoid the payment of contribution and damages. As already stated in the previous paragraphs herein before, the learned Chairman having relied on the Judgments referred in the order found that in view of the absence of mens rea/actus reus, no damages can be levied against the respondent.

17. However, in a recent Judgment i.e., ***Horticulture Experiment Station***, referred above, the Hon'ble Apex Court was pleased to observe that :

"Any default or delay in payment of EPF contribution by employer is sine qua non and sufficient for imposition of damages under Section 14-B – Mens rea or actus is not essential for imposing penalty/damages for breach of civil obligations/liabilities".

18. Section 85-B of E.S.I. Act reads as follows :

85-B : Power to recover damages :

1. Where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the corporation may recover from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the regulations.

Provided that before recovering such damages, the employer shall be given a reasonable opportunity of being heard.

Provided further that the Corporation may reduce or waive the damages recoverable under this Section in relation to an establishment which is a sick industrial company in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under Section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) subject to such terms and conditions as may be specified in regulations :

2. Any damages recoverable under sub-section (1) may be recovered as an arrear of land revenue or under Section 45-C to Section 45-I.

The respondent school is covered by the E.S.I. Act and there is no dispute about it even by the respondent. The record placed by the appellant clearly show that there was failure on the part of respondent in payment of contribution. It was not the case of respondent that no proper opportunity was provided for hearing.

19. In the above referred Judgment, the Hon'ble Apex Court referred Judgment of Apex Court in ***Shriram Mutual Fund case***<sup>5</sup>, wherein it was observed that :

“mens rea is not an essential element for imposing penalty for breach of civil obligations”.

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<sup>5</sup> (2006) 5 SCC 361

20. In Para No.16 of the above referred Judgment i.e., *Horticulture Experiment Station*, the following observations was made :

The Judgment on which the learned counsel for the appellant(s) has placed reliance i.e. *ESI Corpn. V. HMT Ltd.*,<sup>6</sup>, the Division Bench in ignorance of the settled judicial binding precedent of which a detailed reference has been made, while examining the scope and ambit of Section 85-B of the Employees State Insurance Corporation Act, 1948 which is in pari materia with Section 14-B of the 1952 Act placing reliance on the judgment of Division Bench of this Court in *Dilip N.Shroff v. CIT*<sup>7</sup>, held that for the breach of civil obligations/liabilities, existence of mens rea or actus reus to be a necessary ingredient for levy of damages and/or the quantum thereof.

21. The learned Chairman, E.S.I. Court relied on *E.S.I. Corpn vs. HMT Ltd*, Supra, which in fact held, per incuriam and held, impliedly overruled.

22. In the present case, it was not the claim of respondent that there was no delay in payment of contribution when once it is proved that there was delay, the aspect of mens rea cannot be considered. Therefore, the order impugned in this revision is liable to be set aside.

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<sup>6</sup> (2008) 3 SCC 35 : (2008) 1 SCC (L&S) 558

<sup>7</sup> (2007) 6 SCC 329

23. In the result, the appeal is allowed.

Consequently, Miscellaneous applications if any, are closed. No costs.

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**JUSTICE SAMBASIVA RAO NAIDU**

Date: 21.10.2022  
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