



W.P.Nos.12728, 12729 & 12730 of 2018 and W.M.P. Nos.14915, 14916 & 14917 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.10.2023

CORAM :

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

W.P.Nos.12728, 12729 & 12730 of 2018 and
W.M.P. Nos.14915, 14916 & 14917 of 2018

M/s. Food Corporation of India
Food Storage Depot,
South Koil Pathu Street,
Karaikal 609 602
Represented by its Area Manager ... Petitioner in W.P.No.12728/2018

M/s. Food Corporation of India
Food Storage Depot,
Thiruvandarkoil
Puducherry 605 102
Represented by its Area Manager ... Petitioner in W.P.No.12729/2018

M/s. Food Corporation of India
Food Storage Depot,
Vannerpet
Puducherry 605 102
Represented by its Area Manager ... Petitioner in W.P.No.12730/2018

Vs.

The Additional Commissioner and Regional Director
Regional Office,
Employees State Insurance Corporation,
No.178 100 feet Road,
Ansari Duraisamy Nagar,
Opp to R.T.O.
Puducherry 605 004 ... Respondent in all the Writ Petitions



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Common Prayer : Writ Petitions filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus calling for the records relating to the respondent in proceedings No.55-11-115194-003-0099/85-B/5566, 55-11-115194-002-0099/85-B/5564 and 55-11-115194-001-0099/85-B/5565 dated 10.04.2018 respectively, quashing the same and directing the respondent to refund the excess amount collected as referred to in clause (ii) of the impugned orders.

In all Writ Petitions

For Petitioner : Mr. SU.Srinivasan, Senior Counsel
for Mr.S.Vijayakumar
For Respondent : Mr.K.Prabhakar
Standing Counsel

COMMON ORDER

The three writ petitions are filed by three different storage depots of M/s. Food Corporation of India in Karaikal, Puducherry, Thiruvandarkoil, Puducherry and Vannerpet, Puducherry. All of them have challenged the respective proceedings of the respondent Employees' State Insurance Corporation dated 10.04.2018 levying damages under Section 85-B of the Employees' State Insurance Act, 1948 (herein after referred to as ESI Act). The petitioner is a statutory Corporation engaged in procurement, movement, storage and public distribution of food grains and also into export/import of food grains as decided by the Government of India from time to time. They have four depots under the jurisdiction



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of Cuddalore District in Puducherry, Thiruvandarkoil, Karaikal and
Chidambaram handling loading and unloading food grains.

2. Briefly the facts and the genesis of their dispute.

2.1 The petitioner Corporation has never been covered under ESI Act and only on 20th July 2009 the Ministry of Labour and Employment, Government of India, vide a notification extended the provisions of the said Act to "the classes of establishment specified in column (1), and situated within the area, specified in column (2) of the schedule to the category of employees specified in column (3) of the said schedule". Thus, all casual and contract employees in the Food Corporation of India were brought under the ambit of ESI Act. However, Food Corporation of India, in its letter dated 27.08.2013 clarified that ESI contribution is statutory in nature and all Direct Payment System (DPS) / No Work No Pay System (NWNP) workers also should be covered under the Act. Subsequently, the deductions were made and paid to ESI along with interest on the delayed payment of contribution. Notwithstanding the remittance of the contribution as well as the interest on the delayed payment, ESI vide its proceedings dated 10.04.2018 levied damages from the petitioner Corporation Storage Depots as follows: This was as per



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Section 85-B of the ESI Act, 1948 read with Ref.31-C.

1. Karaikal depot	-	Rs.8,20,977-00
2. Vandrapet depot	-	Rs.7,54,429-00
3. Thiruvandarkoil depot	-	Rs.30,20,061-00

2.2. These petitioners challenge the damages levied on the Corporation by the respondent Employees' State Insurance Corporation. Prior to this impugned order dated 10.04.2018, there were many notices from the respondent Employees' State Insurance Corporation to the petitioners Corporation seeking them to show cause for the delay in remitting and a number of correspondence emanated from the petitioner Corporation explaining their position. Similarly, a spate of litigations seeking clarity as to whether the petitioner Corporation is covered by ESI Act and if so whether the DPS and NWNP workers come under the category of casual/contract labour to be covered under the ESI Act,etc., were decided differently by different courts.

3. Mr. SU.Srinivasan, learned Senior Counsel, assisted by Mr.S.Vijayakumar, learned counsel for the petitioner Corporation would contend that the petitioner Corporation did not come under the ambit of



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the ESI Act and it was only after the issuance of notification dated 20.07.2009 that only a part of the establishment was brought within the provisions of the ESI Act. The provisions of the ESI Act was made applicable only to the casual/contract labourers of the Corporation and that DPS employees were out of the provisions of the ESI Act. It was also confirmed by this Court in CMA(MD) No.534 of 2017. Therefore, according to the learned counsel when this is the legal position and there were other litigations regarding the position of NWNP employees, the petitioner Corporation had taken a final decision to deduct the ESI contribution from the NWNP employees' wages and remit it to the respondent Employees' State Insurance Corporation. He further contended that the petitioner Corporation was in the midst of litigations and various conflicting rulings and therefore there was no intention (mens rea) to delay the remittance of the contribution and that in fact the interest for the belated remittance also was paid and therefore levying damages is unfair and not in accordance with law.

3.1. In order to strengthen his argument he cited the decision of the Apex Court in *ESI Corporation vs. HMT Ltd., and another* reported in *2008 1 LLJ page 814(SC)*. In the said decision it was held



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that "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". The learned counsel further contended that the petitioner Corporation has been regular in remittance of the ESI contribution from December 2015 onwards and it was only from May 2011 to September 2014 there was a delay in remittance which was neither wilful nor in defiance and therefore the levy of damages is totally unwarranted.

4. Per contra the learned counsel for the respondent Employees' State Insurance Corporation contended that a fair opportunity was given to the petitioner Corporation by way of personal hearing on 15.09.2017 and prior to that by letter correspondence. However, the petitioner Corporation never came up with clarity giving different explanation at different times. According to him the petitioner Corporation in its letter dated 12.09.2017 cited IA 4/15 in unnumbered ESI OP/15 in ESI Court, Puducherry as the reason for delay in remitting the contribution. However, as per records this case was withdrawn by the petitioner Corporation. Subsequently, the petitioner Corporation vide its letter dated 14.09.2017 took a plea that the payments already made for the



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period June 2011 to September 2014 was on the assumed wages and not on actual wages and therefore there was excess payment which the Corporation was willing to get adjusted towards the damages levied. The following is the tabular column showing the excess remittance as per the contention of the petitioner Corporation.

<i>S.No.</i>	<i>Depot</i>	<i>Amount remitted</i>	<i>Excess remittance</i>	<i>Period</i>
1.	Karaikal, Pondicherry	Rs.9,65,250/-	Rs.7,95,508/-	January 2011 to September 2014
2.	Thiruvandarkoil, Puducherry	Rs.34,29,855/-	Rs.11,96,984/-	May 2011 to September 2014
3.	Vandrapet, Puducherry	Rs.8,57,464/-	Rs.2,66,120/-	May 2011 to September 2014

Another letter dated 16.09.2017, sought for waiver of the entire damages amount as the delay was due to the filing of case in ESI Court, Puducherry, which was not numbered and subsequently withdrawn by the petitioner Corporation as per the direction of the Head Office in New Delhi. Lastly, a letter dated 01.12.2017 citing the judgment in CMA(MD) No.534 of 2017 which concluded that DPS workers do not come under the purview of ESI Act. According to the learned counsel, this plea also was rejected as the contributions were from NWNP workers and not DPS workers.



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4.1. The learned counsel for the respondent Employees' State Insurance Corporation also pointed out that now the petitioner Corporation has come out with a plea of mens rea which again is not acceptable in the light of the decision of three judge bench of the Apex Court in *Union of India and other vs. Dharmendra Textile Processors and others* reported in (2008) 13 SCC 369 which was relied upon in Civil Appeals in 2136 of 2012, 2121 of 2012, 2135 of 2012 and 2141 of 2012 in *Horticulture Experiment Station, Gonikoppal, Coorg vs. The Regional Provident Fund Organisation*. In the said appeals it was decided that "mens rea or actus reus is not an essential element for imposing penalty/damages for breach of civil obligation/liabilities. Thus the learned counsel for the respondent Employees' State Insurance Corporation would contend that there is no merit in the present writ petitions which need to be dismissed.

5. In this context, we need to go through the relevant case laws and decisions in the matter. The crux of the issue then was whether the notification dated 20.07.2009 covers the DPS and NWNP employees of the petitioner Corporation. Food Corporation of India's food storage depot



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of Tuticorin was issued with an order Employees' State Insurance

Corporation dated 22.01.2014 under Section 45A of ESI Act directing the

Food Corporation of India to pay Rs.5,37,691/- as contribution for the

period from October 2012 to October 2013 which was challenged by the

Food Corporation of India in ESI OP 2/2015 on the file of the Labour

Court, Tirunelveli. The Labour Court dismissed the petition on

19.08.2016, against which the Food Corporation of India went on an

appeal before the Madurai Bench of Madras High Court in CMA (MD)

No.534 of 2017. In this Writ Petition it was concluded, vide order dated

06.11.2017, that the DPS employees are neither casual or contract

labourers and hence not covered by the notification dated 20.07.2009.

This was confirmed by the Apex Court in SLP (Civil) Nos.7211 to 7213

of 2019. In another related ESIOP No.10/2014, the Employees' State

Insurance Court, Coimbatore, held the petitioner is liable to pay the

contribution due on wages to the NWNP system Labourers vide its order

dated 04.07.2015. An appeal against this order by the Food Corporation

of India after 1563 days was dismissed by this Court on 26.02.2020

while rejecting the condonation of delay petition. The same rejection

order was upheld by the Apex Court in SLP(C) No.15765/2020 on

03.12.2021.



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5.1. Thus, it is clear DPS employees were kept out of the purview of the notification dated 20.07.2009 pursuant to the verdict in CMA(MD) 534 of 2017. NWNP employees' position was not determined as the CMP No.390 of 2020 in CMA S.R. No.157845 of 2019 in this Court was dismissed and the CMA S.R. No.157845 was rejected at SR stage itself by declining the condonation of delay in filing the petition. This was appealed against in the Apex Court in SLP(C) No.15765/2020 and was dismissed vide order of the Apex Court on 03.12.2021. Thus the question whether NWNP employees can be treated as casual/contract labourer and would come under the gambit of the notification dated 20.07.2009 remained inconclusive and unanswered. So now the aspect to be decided in these petitions is only regarding the legal position of levy of damages under Section 14B of the ESI Act 1948.

5.2. According to the learned counsel for the petitioner Corporation, Section 85 B of the ESI Act does not envisage levy of penalty or fine but deals only with power to recover damages which means that only if the beneficiary suffered a loss, levying of damages would occur. Therefore, he argued, that damages cannot be construed as



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a penalty. However, this aspect was already settled in the case of

Organo Chemical Industries Vs. Union of India and others reported in **1979(4) SCC 573** in which it was held that 'damages' in Section 14B of the Employees' Provident Funds and [Miscellaneous Provisions] Act, 1952 (for brevity EPF Act) is related to the word 'default' which must be construed in the light of para 38 of the scheme. In fact an amendment in 1991 to Section 14(B) of EPF Act by introduction of the expression 'by way of penalty' settled the issue there itself. Section 85(B) of ESI Act is in pari materia to Section 14(B) of EPF Act and the Apex Court in ***ESI Corporation vs. HMT Limited*** (cited supra) held that "*A penal provision should be construed strictly. Only because a provision has been made for levy of penalty, the same by itself would not lead to the conclusion that penalty must be levied in all situations. Such an intention on the part of the legislature is not decipherable from Section 85-B of the ESI Act . When a discretionary jurisdiction has been conferred on a statutory authority to levy penal damages by reason of an enabling provision, the same cannot be construed as imperative. Even otherwise, an endeavour shall be made to construe such penal provisions as discretionary unless the Statute is held to be mandatory*



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in character". It was also held in the same case by the Apex Court that

"an element of mens rea is required before penalty can be imposed".

However in C.A. No.2136 of 2012, 2121 of 2012, 2135 of 2012 and 2141 of 2013 in ***Horticulture Experiment Station, Gonikoppal, Coorg vs. The Regional Provident Fund Organisation***, the Apex Court relied on three Bench judgment in ***Union of India and other vs. Dharmendra Textile Processors and others*** (cited supra) and held that "*any default or delay in the payment of EPF contribution by the employer under the Act is Sine quo non for imposition of levy of damages under Section 14 B of the EPF Act 1952 and "mens rea or actus reus is not an essential element for imposing penalty/damages for imposing penalty/damages for breach of civil obligations/liabilities"*.

5.3. The one important aspect which can be deciphered from all these rulings is that the damages cannot be levied as a matter of routine and need to take into consideration the mitigating circumstances instead of mechanically applying the damages.

5.4. In the instant case let us go into the impugned order to find out



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whether the adjudicating authority applied his mind before concluding on the damages. All the three orders dated 10.04.2018 under Section 85-B of ESI Act mention various letters from the petitioner Corporation. A personal hearing was also afforded to the petitioner. The four letters mentioned in the order are common except for the contents of the second letter. The dates are also same. In the first letter and the third letter the reasons cited for the delay was filing of a case in ESI Court, Puducherry in 2015 which was unnumbered and was withdrawn subsequently by them. The second letter was about the possibility of adjusting the excess already paid to the respondent Employees' State Insurance Corporation, against the demand for the damages. This shows that the present petitioners were at one point of time willing to pay the damages which they dispute now. The last letter was about the verdict in Madurai Bench of Madras High Court in CMA(MD) No.534/2017 which was upheld by the Apex Court later bringing DPS employees out of the purview of ESI Act.

5.5. In my considered opinion the petitioner Corporation has been speaking in different voices at different points of time. Having issued a circular No.14/2011 even as early as 02.09.2011 extending the medical



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healthcare benefits to DPS and NWNP employees under ESI Act, it is ridiculous for the Food Corporation of India to claim that they were not sure about who are all covered under Employees' State Insurance scheme. But in the same aspect, the petitioner Food Corporation of India disputed in ESIOP 10/2014 in the Employees' State Insurance Court, Coimbatore, the status of NWNP labourers as regards the coverage under Employees' State Insurance. The Employees' State Insurance Court, Coimbatore had dismissed the petition of the Food Corporation of India stating that they are liable to pay the ESI contribution due on wages to the NWNP system Labourers. However, the petitioner Food Corporation of India chose to challenge this verdict 1563 days later and the condonation of delay petition itself was dismissed by this Court. Such an inordinate delay exposes the uncertainty and casual approach of the petitioner Corporation. The verdict in CMA(MD) No.534 of 2017 was only about the DPS employees and the fate of NWNP hung in balance. On one hand the petitioner Corporation wanted to bring them (DPS & NWNP) under the gambit of ESI even as early as 2011 but on the other disputed their status in all the litigations. Such indecisiveness on the part of the petitioner Corporation and the casual approach in such matter had cost them dearly.



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5.6. The observation of this Court in CMA(MD) No.534 of 2017

tells the entire state of affairs in one go. This case was actually against the orders in Labour Court, Thirunelveli in ESI OP No.2/2015. The Labour Court, Thirunelveli had dismissed the petition filed by the Food Corporation of India against the order under Section 45A of the ESI Act whereby the Food Corporation of India was directed to make contribution of Rs.5,37,691/- for the period October 2012 to October 2013 to be deducted from the wages of DPS labourers. In this context, this Court had categorically concluded that DPS labourers are neither casual nor contract employees and therefore were out of the purview of the notification dated 20.07.2009. But most importantly the observation by the Single Judge of this Court reads as "interestingly the establishment chose not to assail the said order of dismissal. Instead the workers' Union has come before this Court questioning the order of ESI Court". This again exposes the indecisiveness and reluctance on the part of the petitioner Corporation.

5.7. The petitioner Corporation took a plea of absence of mens rea in the act of belated remittance. I do not agree with this argument placed by the learned counsel for the petitioner. The question whether mens rea is



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an essential element or not for contravening the statutory obligation, takes a back seat in the light of such reluctance on the part of the petitioner Corporation in deciding on the contribution to the Employees State Insurance Corporation. Thus it appears that the petitioner Corporation handled the sensitive matter in a impractical manner and now are pushed to a tight corner pleading for waiver of the damages claimed by the respondent. As such on the face of it, I do not find any valid reason to allow these petitions. In the result, all the Writ Petitions are dismissed. No costs. Consequently, connected Writ Miscellaneous Petitions are closed.

18.10.2023

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Index : yes/no
Speaking /Non speaking Order

To

The Additional Commissioner and Regional Dierctor
Regional Office,
Employees State Insurance Corporation,
No.178 100 feet Road,
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Opp to R.T.O.
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