IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 13.12.2023

CORAM:

MR.JUSTICE N.SESHASAYEE

C.M.A.No.1454 of 2022

Regional Director
Regional Office (Tamilnadu)
Employees' State Insurance Corporation
143, Sterling Road, Nungambakkam
Chennai 600 034 ... Appellant

Vs.

1.M/s.Vasanta Bhavan Hotels India Private Ltd
34, South Phase Developed Plots
Industrial Estate, Guindy, Chennai 600 032
Rep. by its Authorised Signatory M.Ravi

2.R.Venkatesh
Employee ID 762
Vasanta Bhavan Hotels India Private Ltd.
34, South Phase Developed Plots
Industrial Estate, Guindy, Chennai 600 032
Rep. by its Authorised Signatory M.Ravi ... Respondents

PRAYER:This Appeal is filed under Section 82 (2) of the ESI Act against the order of the Employees State Insurance Court (Principal Labour Court) Chennai dated 22.10.2021 made in E.I.O.P.No.60/2015 to set aside the same.

For appellant : Ms.G.Narmadha

for Mr.G.Bharadwaj

For respondents : Mr.S.Haroon AL Rasheed
for M/s.T.S.Gopalan Associates - R1

R2 - D/w vide order dt.05.10.2023

JUDGMENT

The respondent herein is running a chain of Restaurants across the State and it falls within the net of Employees' State Insurance Act, 1948. The Corporation issued a notice for paying contribution for its employees for the period from July, 2013 to October, 2014. Subsequently, the Corporation raised a demand for payment of damages equivalent to the arrears of contribution required to be paid for the aforesaid period. This was challenged by the first respondent before the Employees Insurance Court (the Principal Labour Court), Chennai in ESIOP.No.60 of 2015.

2.Before the Court, the 1st respondent contended that:

(a) the 1st respondent has not been a chronic defaulter, but during the relevant period, it fell into a loss and that the loss continued for subsequent period as well, which resulted in closure of as many as 20 of its branches across the State;

(b) At any rate, demanding damages equivalent to the arrears of contribution is only an outer cap for claiming the damages, and Section 85(B) of the Employees' State Insurance Act, 1948, does not mandate that in all cases it should be realized.

3.1 The learned counsel for the appellant submitted that the E.S.I Court has not averted to any reason that may be fitted within the scheme of Section 85 (B) r/w Regulation 31C of the E.S.I Act to justify partial or total waiver of damages. The employer has placed reliance on Exhibits P3 to P6, which are the balance sheet of the employer for the three assessment years commencing from 2013-2014 to 2015-2016.

3.2. The learned counsel added that the Tribunal below has not placed much reliance for reducing the damages from Rs.13,29,854/- to Rs.3,32,465/- as it has entered a finding that even though some loss is shown in the balance sheet for the assessment year 2014-2015, they are essentially engineered by depreciation given to some luxury cars. Therefore, what the Court may have to look into is not the balance sheet, but the profit and loss account.

4.Per contra, the learned counsel for the respondent / employer would contend that Section 85(B) r/w Regulation 31C operates in the nature of a penalty and hence it is imperative for the Corporation to filter the facts within the scheme of Regulation 31C before embarking on slapping damages at the maximum rate of 25%. So far as the present case is concerned, in its two page order of the appellant, facts are narrated for about 80% of the order, but the entire order is silent as to why the respondent would not fall within any of the circumstances contemplated under Proviso B or C of Regulation 31C of the ESI Act. In other words, the said proceeding is a plain and non speaking order. It is in this circumstances, the matter was taken before the E.S.I. Court by the respondent herein. It is true that the E.S.I. Court has appreciated the evidentiary material placed before it and has arrived at certain conclusion regarding the financial capacity or ability of the employer during the assessment years. However, inasmuch as the damage is in the nature of a penalty, it should not be directly associated with the financial status of the employer during the period of default in payment of contribution, but must be related to issues other than that. It is here, the appellant had failed and very appropriately the E.S.I. Court has intervened to fix the damages.

5.The learned counsel for the appellant would now reply that exemption to 31C will apply only where the employer is either declared a sick enterprises as per the law then was or is before the NCLT facing a proceeding under Insolvency and Bankruptcy Code (IBC).

6.Rival submissions are carefully weighed. The authority to impose damages is provided under Section 85(B) of the Act. It states that the Corporation may recover damages in addition to the arrears of contribution and the interest payable thereon. Therefore, levy of damages is optional and not mandatory. If however, the Corporation chooses to impose damages on a defaulting employer, then Regulation 31C provides an upper cap upto which the damage may extend. The authorities in ***Madras Hotel Ashoka Vs. ESIC [(1995) (1) LLN 553)], Prestolite India Ltd. - Vs. ESI [(1995)***

(1I) LLJ 622 (SC)] and Regional Director, ESIC Vs. N.Dasarathy and Sons and Another [(2001) 3 LLN 690] thus bring to force that damages contemplated under Section 85B is not the same as interest payable under Section 39(5) of the Act and it is discretionary in character. This apart, it is also not directed to the financial status of the employer now. Now, it all depends on the facts of each particular case. While the appellant had imposed damages at 25%, the maximum rate provided under Regulation 31C, the E.S.I Court has brought it down to 4.44%. While the 1st respondent has not produced adequate material for the E.S.I Court to appreciate as to why it can be totally exempted from payment of damages, the E.S.I. Court appears to have found 4.44% as a convenient rate at which damages can be levied but this Court does not find a justification for this. In other words, while the appellant has not disclosed its justification for levy of damages at 25%, the E.S.I. Court has also followed the same technique and brought the damages down to 4.44%. The appeal is all about whether to confine the damages at 4.44% or anywhere between 4.44% and 25%.

7.As earlier stated, both the appellant as well as the E.S.I. Court have not explained the parameters that guided them. However, it is not in dispute that the employer herein runs a chain of restaurants and he is adequately aware that he is under a statutory obligation to pay contribution. Which implies, to start with the employer by his effort to circumvent the act exposes himself to the penal provisions under the E.S.I. Act and undisputedly it does not fall within the exemption provided to 31C either. Ideally the matter can be remanded back, but it may still likely to keep the action pending for few more years. Taking the facts and circumstances for consideration, this Court deems it appropriate to fix a liability to pay damages at 12.5%.

8.This appeal stands partly allowed accordingly. No costs.

13.12.2023

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Index : Yes / No
Neutral Citation

N.SESHASAYEE, J.
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To.

The Employees State Insurance Court
(Principal Labour Court)
Chennai

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