IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.12.2023

CORAM :

THE HONOURABLE MR. JUSTICE **M. DHANDAPANI**

C.M.A.Nos.1980 & 1999 of 2020
and
C.M.P.Nos.14608 & 14688 of 2020

The Employees State Insurance Corporation,
Coimbatore.
Represented by its Joint Director. ... Appellant in both appeals

Vs.

M/s.Palani Andavar Cotton & Synthetic Spinners Ltd.,
Represented by its Managing Director Mr.V.Sathyanathan,
Door No.3, Manickam Street,
Udumalpet – 642 126. ... Respondent in both appeals

Prayer in C.M.A.No.1980 of 2020 : Civil Miscellaneous Appeal filed under Section 82(2) of the ESI Act, against the fair order and judgment passed in EIOP No.3 of 2016 dated 14.02.2020 on the file of the Employees State Insurance Court, Coimbatore.

Prayer in C.M.A.No.1999 of 2020 : Civil Miscellaneous Appeal filed under Section 82(2) of the ESI Act, against the fair order and judgment passed in EIOP No.2 of 2016 dated 14.02.2020 on the file of the Employees State Insurance Court, Coimbatore.

For Appellant (in both appeals) : Mr.S.P.Srinivasan

For Respondent (in both appeals) : Mr.G.Anand for M/s.T.S.Gopalan & Co.

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COMMON JUDGMENT

Challenging the fair order and judgment passed in EIOP Nos.3 and 2 of 2016 dated 14.02.2020 on the file of the Employees State Insurance Court, Coimbatore, the appellant has preferred the present appeals.

2. It is the case of the appellant that, the respondent is a Textile Mill, which was incorporated in the year 1982 and covered under the ESI Act and it has been remitting dues to the appellant regularly since the date of coverage. The respondent mill came sick due to several adversities since April 1999 as it started incurring losses in April 1998. Therefore, the contribution could not be paid and the mill was referred to BIFR and declared as sick unit. Due to the respondent mill being termed as sick unit, the respondent could not pay its dues on time and therefore, the same was remitted after a period of delay, which resulted in the

issuance of show cause notice and the appellant initiated proceedings proposing to levy damages on belated payment of contribution to a sum of Rs.61,670/- and Rs.13,39,161/- by issuing the show cause notice dated 08.04.2014 and 09.02.2012 respectively. The respondent submitted its written submission dated 28.04.2014 and also attended the personal hearing along with their advocate on the said date and the explained the position of the respondent. However, the appellant without considering the plight of the respondent and its financial incapacity had confirmed the damages to the tune of Rs.61,670/- and Rs.13,39,161/- respectively for the period 4/2011 to 9/2013 and 10/1982 to 10/1984-10/1984, 10/2009 respectively, vide order dated 07.01.2016 under Section 85B of the ESI Act. Challenging the same, the respondent filed ESI Original Petitions under Section 75 of the ESI Act in ESIOP.Nos.3 and 2 of 2016 and the same was allowed by setting aside the order under Section 85B of the ESI Act. Aggrieved by the same, the present appeals have been preferred by the appellant.

3. The learned counsel appearing for the appellant submitted that, the respondent had not informed the appellant that the respondent mill

was declared as a sick industry and unit on 16.12.2005. It is the further stand of the appellant that the plea of financial hardship pleaded by the respondent has not been established. The respondent had informed about its sick nature only on 28.04.2014 that the respondent is under BIFR. Further, the BIFR in its proceedings dated 02.09.2013 as upon the respondent acceptance held that the stakeholders are at liberty to recover their dues as per law and the contribution to the appellant/Corporation being on a priority basis, the exemption sought for cannot be sustained and the authority had passed the order upon proper application of Section 85B of the ESI Act. However, without appreciating the same, the Court below has interfered with the said order by setting aside the same, which requires to be interfered with by this Court.

4. Per contra, the learned counsel appearing on behalf of the respondent submitted that, the appellant failed to appreciate the loss suffered by the respondent over the consecutive years and the non-availability of funds even to pay the salary of the staffs had resulted in the delay in remittance of the contribution. It is the further submission that without the salary being paid, there does not arise any case of

deduction of the contribution, which is calculated based on the salary of the individual. Further, the delay in remittance of contribution was neither wilful nor wanton. Without properly appreciating the procedure contemplated under Section 85B of the ESI Act has gone upon to confirm the order of levy of recovery, which is wholly erroneous. Further, the respondent company being the sick industry and establishment, the proviso to Section 85B would stand attracted. The order of the authority without appreciating the same is perverse. The Court below has not properly appreciated all the relevant materials including the provisions under the ESI Act and therefore, the same requires to be set aside.

5. Heard the learned counsel appearing for the appellant and the learned counsel appearing on behalf of the respondent and perused the materials available on record.

6. Section 85B of the ESI Act gives power on the authority to recover damages. Proviso to Section 85B of the ESI Act provides the corporation with power to reduce or waive the damages recoverable

under the Section in relation to an establishment which is a sick industrial company, inrespect of which, the scheme for rehabilitation has been sanctioned by the Board for Financial and Financial Reconstruction (BIFR). In the case on hand, the respondent mill was declared as a sick industry undertaking in case No.253 of 2003 on 16.12.2005 itself. However, the said fact was brought to the notice of the appellant on 28.04.2014. It is only in this back drop, the appellant claims that, since it was put on notice about the sick nature of the company only on 28.04.2014, the benefit would enure to the respondent only from the said date and not prior to that. However, Section 85B of the ESI Act more particularly, the proviso attached thereto speaks about the power of the appellant to reduce or waive the damages, in respect of an establishment, which has been declared as a sick industrial company, in respect of which, a scheme has been framed. In the case on hand, it is not disputed by the appellant that BIFR proceedings have been taken up, in which, an order has come to be passed that the stakeholders are at liberty to recover their dues as per law and against which, the appeals have been preferred. The notice with regard to recovery of damages had been issued on 21.03.2014 and the respondent has been afforded an opportunity of personal hearing on 28.04.2014, at which point of time, the respondent had sought for exemption from levy of damages. The respondent has made a categorical assertion that the delay in remittance of contribution was not wilful and not in disregard to the statutory obligations, but it is due to the sick nature of the establishment that it was not be able to honour its commitment. In support of the same, Ex.P.2, the proceedings of BIFR was also placed, wherein BIFR has recorded that the possession and assets of the company had been taken over under Section 13(4) of SARFESI Act and therefore, the reference before BIFR stood abated. Since 2013, the company was proceeded under the SURFAESI Act with liberty granted to the stakeholders to recover the dues as per law. Ex.P.4 dated 14.09.2015, is the notice relating to electricity disconnection in and by which, the factory stood closed on 22.08.2015. The order for recovery of damages had come to be passed on 07.01.2016/08.01.2016, at which point of time, not only was the matter ceazed off under the SARFESI Act, but the factory was also closed. The above said sequences of events clearly show that during the impugned period 4/2011 to 9/2013, the respondent was under huge financial strain and even the establishment was closed. Such being the case, the respondent is entitled for consideration of reduction/waiver of damages by invoking proviso to Section 85B as the imposition of damages is not automatic, but it has to be appreciated on the basis of materials and only wilful and wanton the neglect would result in recovery of damages. In the case on hand, the respondent having established its case that the act was neither wilful nor wanted and was entitled for consideration under proviso to Section 85B, appreciating all the materials, the Court below has set aside the order passed under Section 85B, which is based on sound reasoning and does not warrant any interference.

7. Accordingly, the Civil Miscellaneous Appeals are dismissed. No costs. Consequently, the connected miscellaneous petitions are also dismissed.

20.12.2023

Index : Yes / No
Speaking order / Non-speaking order
Neutral Citation Case : Yes / No
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To

1.The Employees State Insurance Court,
Coimbatore.

2.The Section Officer,
V.R.Section,
High Court, Madras.

M.DHANDAPANI, J.,

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C.M.A.Nos.1980 & 1999 of 2020

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