BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 07.06.2023

PRONOUNCED ON : 13.06.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.1339 of 2012
and
Cross Objection No.7 of 2013

Director and Additional Commissioner
Employees' State Insurance Corporation
Sub-Regional Office
K.K.Nagar, Madurai 600 020 .....Appellant in the appeal
/ Respondent in the Cross Objection

Vs.

Silver Spring Spinners India (P) Ltd.,
No.136, 137 Mullikulam-Malli Village
Malli Post 624 141
Srivilliputhur Taluk
Virudhunagar District
Represented through its Director ....Respondent in the appeal
/Cross Objector

PRAYER in CMA(MD).No.1339 of 2012:- Civil Miscellaneous Appeal filed under Section 82 of the E.S.I.Act, 1948, to set aside the order dated 04.07.2012 passed by the E.S.I.Court (ie.Labour Court), Madurai in ESIOP.No.80 of 2011 and allow this Civil Miscellaneous Appeal with necessary directions in the favour of the appellant.

PRAYER in Cross Objection No.7 of 2013: - Cross Objection has been filed under Order 41 Rule 22 of C.P.C. to set aside the decree and judgement of the E.S.I.Court, Madurai in ESIOP.No.80 of 2011 dated 04.07.2012 and allow our appeal filed before the ESI Court, Madurai by way of quash the appellant/respondent's order under Section 85B dated 21.07.2011.

For Appellant : Mr.P.Ganapathisamy
in the appeal
& Respondent in the Cross Objection

For Respondent : Mr.C.Karthikeyan
For Mr.K.Raamanathan
For Respondent in the appeal &
Cross Appellant in Cross Objection

J U D G M E N T

The appeal has been filed by the E.S.I.Corporation challenging the order passed by the Labour Court, Madurai in ESIOP.No.80 of 2011 in which the damages were waived to an extent of 80%.

2.The Cross Objection No.7 of 2013 has been filed by the employer challenging the confirmation of 20% of the damages by the E.S.I.Court in the same order.

3.The employer suffered an order under Section 45-A of the E.S.I.Act on 18.03.2011 wherein a contribution was demanded for a sum of Rs.3,07,887/-. As per the said order, the corporation has pointed out that the demand for contribution arises out of omitted wages of difference in wages relating to the following items.

(a).The salary difference paid as gratuity to the workers from December 2005 to March 2008 for a sum of Rs.23,35,499/-

(b).The leave encashment of Rs.3,74,367/- for a period between April 2006 to March 2008.

(c).The performance incentives of Rs.4,49,828/- for a period between April 2006 to March 2008.

(d).Exgratia paid to the employees to a tune of Rs.97,580/- for the period between April 2007 to March 2008.

(e).Food expenses paid to the temporary employees to a tune of Rs.91,533/- for a period between April 2006 to March 2008.

4.As per the said order, the employer was called upon to pay the said amount within a period of 60 days. It is an admitted fact that the said amount was deposited with the Corporation within the said period. It is also not in dispute that the employer is regularly making his payments towards contribution as on today.

5.After the amount demanded under the order dated 18.03.2011 was paid, proceedings were initiated by the E.S.I.Corporation under

Section 85-B of the E.S.I.Act for recovery of damages towards delayed payment of the above said amount. The employer who had appeared through his Assistant Manager had requested to waive the damages on the ground that the delay in payment of contribution is not intentional and they were under the impression that the gratuity, performance incentives, exgratia and food expenses will not fall within the definition of wages so as to attract contribution. However, rejecting the said contention, an order was passed on 21.07.2011 imposing the damages for a sum of Rs.2,45,530/-

6.The above said order was challenged by the employer in E.S.I.O.P.No.80 of 2011 before the Labour Court, Madurai. The Labour Court arrived at a finding that the corporation has not established the fact that the employer has wantonly not paid the amount. Since there was no intentional delay, the quantum of damages was reduced to 20% and the balance 80% was waived. This order is challenged by the corporation as well by the employer.

7.According to the learned counsel appearing for the appellant/corporation, the contribution has to be paid on the due date. In case of delayed payment, the corporation is entitled to impose damages as contemplated under Section 85-B of the Act. When there is a statutory obligation on the part of the employer to pay the contribution and he had not paid the amount on the due date, mens rea has to be presumed. He had further contended that in case if the employer pleads any mitigating circumstances, it is for him to prove the same. The mitigating circumstances are within the special knowledge of the employer and the corporation cannot be called upon to prove the same. In the present case, the employer has not pointed out any mitigating circumstances for not making payment on the due date and therefore, the imposition of damages as per statutory provisions are legally sustainable. When the order under Section 85-B of the Act is as per the statutory provisions, the Labour Court has no discretion or power whatsoever to reduce/waive the said damages. Hence, he prayed for allowing the appeal and to restore the order dated 21.07.2011.

8.Per contra, the learned counsel appearing for the respondent/cross objector had contended that the definition of wages as per Section 2(22) of the E.S.I.Act clearly exempts the gratuity, food expenses which are special expenses. It also exempts all the remuneration paid at the interval of exceeding 2 months. Therefore, according to the learned counsel appearing for the employer, the order under Section 45-A of the E.S.I.Act demanding contribution for gratuity and other amounts will not fall under the definition of wages. However, in order to maintain the cordiality, they have chosen to pay the said amount. When these items would not fall within the definition of wages, the employer cannot have any intention to evade the same and therefore, the employer has clearly established that he never had any mens rea. Hence, the Corporation ought not to have imposed damages to an extent of Rs.2,45,530/-, when the payment of contribution itself is not warranted. Hence, he prayed for dismissal of the appeal and to allow the cross objection.

9.I have considered the submissions made on either side.

10.The employer has suffered an order under Section 45-A of the E.S.I.Act on 18.03.2011. A perusal of the said order clearly indicates that the omitted wages referred to gratuity, leave encashment salary, performance incentives, exgratia and food expenses. Out of these five items, gratuity covers 80% of the omitted wages which is clearly exempted under Section 2(22)(d) of the E.S.I.Act 1948. A perusal of the definition of wages clearly indicate that it includes all the additional remuneration paid at intervals not exceeding 2 months. Therefore, it is clear that where any additional remuneration is paid to an employee at an interval of exceeding 2 months, it would not fall within definition of wages.

11.As rightly pointed out by the learned counsel appearing for the employer, the leave encashment, performance incentives and exgratia are paid once in a year and they do not fall within the definition of wages. As far as the food expenses paid to the temporary employees are concerned, it clearly falls under Section 2(22)(c) of the E.S.I.Act as a special expense. Therefore, none of the items which are mentioned as omitted wages could ever fall within the definition of wages under E.S.I.Act. However, the employer has not chosen to challenge the said order and he has paid the same within the time specified in the said order.

12.In view of the above said discussions, it is clear that the employer should not have been called upon to pay the amount as per the order passed under Section 45-A of the Act dated 18.03.2011, in view of the statutory definition under Section 2(22) of the E.S.I.Act. The employer is very well within his jurisdiction not to treat any one of the five items mentioned in the order under Section 45-A of the Act as wages. Hence, the non-payment of any contribution for the said items could never be considered to be intentional. When the employer has chosen to pay the contribution determined under Section 45-A of the E.S.I.Act, though he is not liable to pay the same, this Court is of the considered opinion that the imposition of penalty for the belated payment of the said amount would be a harsh treatment to the employer and the corporation ought not to have initiated proceedings under Section 85-B of the E.S.I.Act.

13.In view of the above said deliberations, C.M.A(MD).No.1339 of 2012 stands dismissed. The Cross Objection No.7 of 2013 stands allowed. No costs.

13.06.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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To

1. The E.S.I.Court
(Labour Court), Madurai

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

R.VIJAYAKUMAR,J.

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Pre-delivery Judgement made in
C.M.A(MD)No.1339 of 2012
and
Cross Objection No.7 of 2013

13.06.2023