



CM.A.No.3149 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	01.02.2024
Pronounced on	16.02.2024

CORAM

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI,J.

C.M.A.No.3149 of 2021

and C.M.P.No.17816 of 2021

The E.S.I. Corporation,
Represented by its Director,
Coimbatore.

...Appellant

Vs.

Modern Spinning Mills,
Represented by its Managing Partner,
Mr.Saravana Kumar Govindaraj,
S/o.Late R. Govindaraj,
S.F.No.151, Samathur,
Pollachi – 642 123.

...Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 82(2) of ESI Act, against the fair order passed in ESI.O.P.No.02 of 2017 dated 09.08.2021, on the file of the Employees State Insurance Court, Coimbatore.



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For Appellant : Mr.S.P.Srinivasan

For Respondent : No Appearance

JUDGMENT

This Civil Miscellaneous Appeal is directed against the order dated 09.08.2021 passed in ESIOP.No.2 of 2017 on the file of Employees State Insurance Court, Coimbatore.

2. While setting aside the order passed under Section 85 B of the Employee's State Insurance Act, 1948 dated 30.12.2015, it was observed that there was no *mens rea* or malafide intention for the belated remittance of contribution on the part of the respondent and reason for the non remittance of contribution is due to the losses suffered by the factory/establishment is acceptable. Hence, it was concluded by the ESI Court that imposing of damages for Rs.2,80,252/- for belated remittance of contribution is unreasonable in the said order. The present appeal is preferred by the ESI Corporation, Coimbatore.



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Facts:-

3. On 30.12.2015, the Employee's State Insurance Corporation, Coimbatore passed an order under Section 85 B of the ESI Act, 1948 stating that the respondent employer did not remit the contributions for the period from 6/2012 to 12/2013 in time as required under the ESI (General) Regulations, 1950. The delay in remittance ranges from 579 days to 856 days in respect of all wage period. In as much as the employee has admitted the liability to pay the damages and also poor business cannot be considered as valid reason for delay in payment of contribution.

4. Hence, damages to tune of Rs.2,80,252/- was levied as provided under Section 85 B of the ESI Act read with regulations 31(c) of the ESI (General) regulations, 1950 at the rage of 25% per annum commensurate with the extent of delay.

5. Aggrieved by this, the petitioner preferred an application under Section 75 of the ESI Act before the Employee's State Insurance Court,



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Coimbatore. In the said petition, it is submitted that the petitioner is a medium scale establishment covered under the Employee's State Insurance Act, 1948. The petitioner establishment operates a small Spinning Mill, engaged in a manufacture of cotton and synthetic yarn. The petitioner establishment had never defaulted in payment of contributions and dues to the ESIC. The general industrial recession, massive power cuts, escalation of price of raw materials, reduction in prices of yarn and also the frequent price variations led the general down turn in the textile industry and stand alone spinning mills, like that of the respondent were facing severe crisis and suffered continuous financial losses. The accumulated losses eroded the net-worth of the petitioner establishment and already huge loans and debt servicing costs could not be met out of the operations. Further, the Petitioner unit had to be operated despite the huge losses, just to provide the employees with work and to be in business. The loans availed by the establishment from South Indian Bank, could not be repaid and there were regular defaults, resulting in classification of loans as NPA, leading to proceedings being initiated under THE SECURITISATION AND RECONSTRUCTION OF



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FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002, and the bank took over the possession and proceedings thereof were initiated for its liquidation.

6. It is further submitted that the establishment was continuously operated with mounting losses as there is no way to close down or exit the business due to statutory impediments and trade reasons. Further the establishment had to sell finished goods at distress sales, whereby goods were sold at 50% of the cost, to just keep the establishment under operation and to pay wages to workmen. The wages were paid after delay the workers were aware of the crisis and they have cooperated with the employer at the time of crisis.

7. It is further submitted that the Bank had initiated proceedings under the SARFASI Act and had taken possession of the assets of the establishment. Despite these, the establishment had not closed or retrenched or locked out the unit.



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8. It is further submitted that the operation of the Petitioner establishment became impossible and the operations came to standstill on its own due to reasons beyond its control. The employer having filed the statutory returns in time to the respondent, could not pay the contribution in time due to the inability arising out of the aforesaid reasons. The employer was running the unit only to employ the workers and any diversion of funds to even pay ESIC contribution, would have led to violent reactions. All these were done to prevent immediate loss of employment to the workers, putting such workers and their entire families to starve and suffer severe hardship. As such the employer was acting with good will and with good motives. Non-payment of contributions was neither wilful nor wanton and was highly inadvertent. The contributions and interest have been paid with much difficulty.

9. It is further submitted that the Lending Bank, after assessing the factual position of the establishment and the bonafides of the borrowers, had appreciated that the NPA was not wilful and it was purely trade related and beyond the control of the promoters. The lending bank had extended the



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concession to the establishment and offered an "one time settlement" opportunity, waiving off a portion of the amounts due. The Petitioner further submits that the non-payment of contributions in time, was due to the inabilities explained above. The reasons for non-payment of dues in time are real, genuine and condonable.

10. It is further submitted that the respondent had fully paid the Contributions and Interest thereon as levied by the Corporation. The respondent Corporation had issued notice dated 01.12.2015, proposing to determine and recover from the Petitioner establishment a sum of Rs.2,80,252/- as damages under Regulation 31 (c) of the ESI (General) Regulations, 1950, read with section 85 B (1) of The ESI Act, 1948. The demand for damages was for the delayed payment of contribution arising during the period of crisis as detailed above. The interest amount on such delayed contribution running into Rs.1,34,521/- had been paid by the petitioner Establishment. The respondent Corporation, during the period of non-payment of contribution in time had not extended any medical or other benefits to the employees and as such there is no loss, damages or any



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hardship sustained by the Corporation. Further, there had been a gain of contribution without any extension of benefits to the employees during that period.

11. It is further submitted that the petitioner establishment appeared before the respondent Authority in response to the notice dated 01.12.2015, and had submitted the difficulties sustained by the employer and also expressed that the delay is neither wilful nor wanton and due to the afore mentioned reasons. It is further submitted that authority had arbitrarily, without considering the relevant factors and also wrongly assuming that the petitioner establishment had admitted its liability to pay damages, had levied damages of Rs. 2,80,252/- and directed the same to be paid within a period of 15 days. It is the order of the respondent Corporation in No. 56-00-062595-000-0101, dated 30.12.2015, that is impugned vide this petition. The impugned order is liable to set-aside.

12. The above pleadings were resisted by the respondent/ESI Corporation, Coimbatore. In the Counter affidavit, it is stated that even the



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company is facing crisis they cannot evade statutory liability and the petitioner does not hold the legal rights to obtain stay order. The respondent denies the aforementioned contentions that the industrial recession, massive power cuts and reduction in price, etc., does not exclude the petitioner from paying statutory amount to this respondent. The respondent states merely by depositing amount of Rs.1,40,847/- itself is a proof that the petitioner is liable to pay damages to the tune of Rs.2,80,252/- and petitioner did not come with clean hands. Hence, the petition ought to be dismissed.

13. The respondent also states that the order passed under No.56-00-062595-000-0101 dated 30.12.2015 is legal valid and enforceable by law. The petitioner should pay entire damages of Rs.2,80,252/- and respondent is entitled to recover the same from the petitioner.

14. However, the ESI Court allowed the petition and the order of the No.56-00-062595-000-0101 dated 30.12.2015, passed by the Director of the respondent under Section 85-B of the ESI Act, 1948, levying damages of Rs.2,80,252/- is set aside.



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15. In spite of notice served on the respondent, the respondent remained absent.

16. The learned counsel appearing for the appellant/ESI Corporation would submit that the contention of the respondent before the ESI Court that due to industrial recession, power cuts, escalation of price of raw materials, reduction in prices of yarn resulted in their accounts being classified as NPA by the bank and the SARFASI proceedings were being initiated and the wages were paid belatedly and ESI contribution and interest on delayed payments were on sale of assets is untenable. It is submitted that only from 12.10.2015, the respondent establishment was completely locked down. The provisions under Section 85 B of the Act read with regulation 31 (c) of the ESI Act (General) Regulation, 1950 contemplates power to recover damages, when an employer fails to pay the amount due in respect of any contribution or any other amount payable under the 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. Such damages are recoverable

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under sub Section 1 may be recovered as arrears of land revenue. Therefore, as per the ESI (General) Regulation 31 (c), if an employer fails to pay contribution within the specified period under Regulations 31, or any other amount payable under the Act, the Corporation may require damages. Unless the factory/establishment declared as sick industrial company and in respect of which, a rehabilitation scheme has been sanctioned by the board of industrial and financial reconstruction.

17. Hence, the respondent cannot claim any waiver or discretion as they are exempted under the Act and Regulations. The learned counsel would further submit that the P.W.1 in his cross examination admitted the belated payment of contribution and about the due opportunity offered to him before leaving damages. Therefore, the order passed by the ESI Court is liable to be set aside.

18. Heard both sides. Records Perused.

19. At the time of admitting the above appeal, this Court has formulated the following substantial question of law:-

"Whether the court is justified in considering



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financial loss, SARFAESI proceedings by the Bank for waiver of damages, which is contrary to Section 85 B of ESI Act and Regulation 31 (c) of ESIC General Regulations?

20. The provisions for imposing of damages is section 85 B read with regulations 31 (c) of the ESIC (General) Regulations, 1950 is extracted hereunder:-

Section 85 B of ESI Act, contemplates 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



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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, 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 450 to 45-1).

21. As per the Regulation 31 (c) of the ESI General Regulation, 1950, damages on contributions or any other amount due, but not paid in time. If an employer fails to pay contribution within the periods specified under Regulations 31, or any other amount payable under the Act, the Corporation may recover damages, not exceeding the rates mentioned below, by way of penalty:



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Period of delay

Maximum rate of damages in % per annum of the amount due

(i) less than 2 months	5%
(ii) 2 months and above but less than 4 months	10%
(iii) 4 months and above but less than 6 months	15%
(iv) 6 months and above	25%

22. Provided that the Corporation, in relation to a factory or establishment which is declared as sick industrial company and in respect of which a rehabilitation scheme has been sanctioned by the Board for Industrial and Financial Reconstruction, may (a) in case of a change of management including transfer of undertakings to workers' co-operative's or in case of merger or amalgamation of sick industrial company with a healthy company, completely waive the damages levied or leviabale ; (b) in other cases, depending on its merits, waive upto 50%. damages levied or leviabale ; (c) in exceptional hard cases, waive either totally or partially the damages levied or leviabale



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23. The undisputed fact is that the respondent/establishment is a medium scale establishment covered under Employers State Insurance Company, 1948. The petitioner was issued with distinct employers code No.56-00-0625-595-000-0101.

24. The respondent/establishment operates a small Spinning Mill, engaged in manufacture of cotton and synthetic yarn. Since there was delay in payment of contributions for the period from 6/2012 to 12/2013, the appellant/ESI issued a order under Section 85 B of the ESI Act, 1948 dated 30.12.2015 stating that the delay in remittance ranges from 579 days to 856 days and therefore, the proceedings to levy damages to the tune of Rs.2,80,252/- as provided under Section 85 (b) of the ESI Act read with Regulation 31 (c) of the ESI (General) Regulations, 1950 against the respondent was initiated and ordered to pay the above damages.

25. Challenging the same, respondent/establishment preferred an application before the ESI Court, Coimbatore stating that the authority



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without considering the relevant factors put forth by the respondent/establishment directed the respondent to pay a sum of Rs.2,80,252/- as damages within a period of 15 days. Hence, prayed for setting aside the order passed by the authority dated 30.12.2015. The claim of the respondent/establishment was resisted by the appellant stating that the appellant/ESI has followed the due procedure and accordingly issued notice on 01.12.2015 offering opportunity to the respondent/establishment for the explanation and thereafter, the impugned order was passed by the Authority. It is further submitted that the reason attributed by the respondent/establishment for the delay in paying the remittance to the contribution cannot be accepted and therefore, the petition filed by the respondent is liable to be dismissed. However, the ESI Court allowed the application filed by the respondent/establishment. Assailing the same, the present appeal is filed. It is not in dispute that there is a delay in payment of contribution to the ESIC by the respondent/establishment for the period from 6/12 to 12/13. It is also admitted that the respondent/establishment paid the entire contribution amount with interest belatedly. Under Section 85(B) of the



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ESI Act the Corporation has the power to recover the damages for delay in payment of contribution. Accordingly, they passed an order under Section 85(B) of the ESI Act on 30.12.2015 for damages for the delayed period, in a sum of Rs.2,80,252/-.

26.The specific contention of the respondent/establishment is that it has some financial stringency which is also established by documentary evidence. Admittedly, the respondent/establishment is not declared as 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, for the Corporation to waive the damages. Moreover, there is no further requirement on authority concerned to examine existence of element of actus reus/mens rea or to examine issue of justification, for imposing damages *[Ref (2022) 4 SCC 516]* However, taking into consideration the merits of the case the respondent/establishment was suffering from financial stringency there shall be waiver of 50% of damages levied.



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27. In the result, the civil miscellaneous appeal is partly allowed. It is declared that the petitioner is liable to pay one half of the amount claimed by the appellant by way of damages. The respondent shall pay the aforesaid amount without any further delay, at any rate, within a period of three months from today. If the amount is not paid within the time prescribed by this Court, the amount shall carry interest at 9% per annum from the date of default. No cost. Consequently, connected miscellaneous petition is closed.

16 .02.2024

mac/vsn

Internet:Yes/No

Index:Yes/No

Speaking/Non-speaking order

To:-

The Employees State Insurance Court, Coimbatore



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K.GOVINDARAJAN THILAKAVADI, J.

mac/vsn

Pre-Delivery Judgment made in

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and C.M.P.No.17816 of 2021

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