BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.02.2024

CORAM:

THE HONOURABLE MR.JUSTICE P.DHANABAL

C.M.A.(MD)No.1496 of 2012

The Director and Additional Commissioner,
Sub Regional Office (Madurai)
Employees State Insurance Corporation,
2nd West Street, K.K.Nagar,
Madurai – 625 020 ... Appellant/Respondent

-vs-

M/s.Sakthi Sales & Marketing
Represented by its Proprietor,
Shri.M.N. Ramesh Sekaran,
198-A, East Veli Street,
Madurai. ... Respondent /Petitioner

PRAYER: Civil Miscellaneous Appeal filed under Section 82(2) of the E.S.I.Act, 1948, against the decree and judgment of the Employees' State Insurance -cum- Labour Court, Tirunelveli, passed in E.S.I.O.P.No.66 of 2011, dated 22.02.2012.

For Appellant : Mr.C.Karthik

For Respondent : Mr.S.Karthick

JUDGMENT

This Civil Miscellaneous Appeal has been filed by the appellant as against the order passed in E.S.I.O.P.No.66 of 2011, dated 22.02.2012 on the file of the Employees' State Insurance -cum- Labour Court, Tirunelveli, wherein, the respondent herein has filed the petition, challenging the order passed by the E.S.I Authorities under Section 85-B of the E.S.I. Act. The trial Court has allowed the application and directed the petitioner herein, to deposit 20% of the amount as fixed by the authorities. As against the order passed by the trial Court, the present appeal has been filed by the appellant/E.S.I Authorities.

2. The case of the respondent/petitioner before the trial Court are as follows:

The respondent/petitioner is doing feeding bottle business at Koilpapakudi village. They purchase feeding bottles carton and nipples from North India and assemble the feeding bottles. Workers are sufficiently available in the surrounding place of Koilpapakudi. The packed items of feeding bottles are send to petitioner's godown where the despatch number and package number were allotted as per the procedure. The Deputy Director of E.S.I. Authorities passed an order under Section 45-A of the E.S.I.Act on 23.11.2010 determining the contribution for a sum of Rs.2,08,081/- (Rupees Two Lakhs Eight Thousand and Eighty Only only) for the period from April 2006 to July 2009 and the amount was remitted by the respondent. The appellant issued show cause notice dated 04.08.2011 to levy damages of Rs.1,72,443/- (Rupees One Lakh Seventy Two Thousand Four Hundred and Forty Three only) and the personal hearing was fixed on 06.09.2011. On that day, the representative of the respondent appeared and explained the matter. But without considering the representation, the authorities passed an order under Section 85-B of E.S.I.Act, by determining the damages for a sum of Rs.1,64,566/- (Rupees One Lakh Sixty Four Thousand Five Hundred and Sixty Six only). The petitioner has no *malafide* intention to deny the payments. Therefore, the petitioner is not liable to pay any damages.

3. The case of the appellant is that the respondent has no *locus standi* to file this petition. The respondent/petitioner has not come to this Court with clean hands and the material facts have been suppressed. The respondent/ petitioner is covered under the E.S.I. Act and they suppressed the real number

of employees thereby, the authorities have inspected the respondent's establishment and thereby the employer is liable to pay the contribution. Thereafter, a personal hearing was offered to the respondent and then only order was passed by the authorities under Section 45-A of the E.S.I.Act and thereby, the present petition is liable to be dismissed.

4. Before the Labour Court, on the side of the respondent/petitioner, no witness was examined and only documents Ex.P1 to P.3 were marked. On the side of the appellant/respondent, no witness was examined and no document was marked.

5. The Labour Court after analyzing the available records reduced the quantum of the damages from 100% to 20%. As against the order passed by the Labour Court, the appellant/E.S.I Authorities have filed this appeal on various grounds.

6. The learned counsel appearing for the appellant would contend that the respondent establishment was covered under the E.S.I Act and they have to pay the contribution for the employees working under the establishment.

The authorities have inspected the establishment of the respondent/petitioner and they found that the real number of employees were suppressed and thereby they issued Form-C18 and thereafter issued order under Section 45-A of the E.S.I.Act and the same was complied by the respondent/petitioner. However, due to the delay in payment of contribution the appellant authorities have issued the show cause notice and after personal hearing they levied penalty under Section 85-A of the E.S.I Act. As against the order passed by the E.S.I. Authorities, the respondent/petitioner filed E.S.I.O.P.No. 66 of 2011 before the Labour Court and the Labour Court has reduced the damages to 20% and the same is without any reasons. Therefore, the order passed by the Labour Court is liable to be set aside by allowing this appeal.

7. The learned counsel appearing for the respondent would contend that immediately after the order passed by the authorities under Section 45-A of the E.S.I Act, the respondent/petitioner has paid the contribution amount and there is no delay. The respondent has no *malafide* intention in payment of contribution and immediately after the order passed by the authorities, they complied the order of the authorities. In spite of that, the authorities have levied damages and after issuance of notice, the respondent/petitioner

appeared in person and explained the facts. But in spite of that, they passed penalty and the same was challenged through E.S.I.O.P.No.66 of 2011. The trial Court, after elaborate discussion found that there is no *mens rea* and there is no willful default on the side of the respondent/petitioner and thereby, reduced the damages to 20%. Therefore, the order passed by the labour Court is in order and the present Appeal is liable to be set aside.

8. This Court, after hearing the learned counsel appearing on either side and perusing the documents, the point for determination is that whether the substantial question of law is involved in this case.

9. In this case, it is an admitted fact that the respondent/petitioner has defaulted in payment of contribution and the authorities after inspection passed an order under Section 45-A of the E.S.I.Act, determining the contribution amount. Thereafter, the respondent/petitioner also paid the above said contribution. However, the period of contribution is from 01.04.2001 to 31.12.2009, thereby, they issued notice under Section 45-A of the E.S.I.Act and the same was paid by the respondent/petitioner and thereafter, the authorities issued Notice in Form 18, dated 04.08.2011 for proposing to levy

damages of Rs.1,72,443/- (Rupees One Lakh Seventy Two Thousand Four Hundred and Forty Three only) and after personal hearing, order under Section 85-B of the E.S.I.Act, was passed by the E.S.I. Authorities. As against the order passed by the authorities, the respondent/ petitioner has filed E.S.I.O.P. No.66 of 2011 before the Labour Court. Before the trial Court no evidence has been adduced on the side of both the parties, however, the petitioner only filed documents, which were marked as Ex.P.1 to P.3.

10. The trial Court has reduced the damages amount from 100% to 20% and the penalty amount was fixed at Rs.1,64,566/- (Rupees One Lakh Sixty Four Thousand Five Hundred and Sixty Six only). The trial Court, after analyzing the evidences, directed the respondent/petitioner to pay 20% of the damages amount fixed by the E.S.I Authorities. The main contention of the appellant is that the trial Court without any basis reduced the quantum of the damages by stating that there is no *mens rea*. As far as levy of penalty is concerned, the *mens rea* is immaterial and thereby, the amount reduced by the trial Court is liable to be set aside.

11. In this context, the learned counsel for the appellant has relied upon the judgment of the Hon'ble Apex Court in ***(2022) 4 SCC 516 (Horticulture Experiment Station Gonikopal, Coorg vs. Regional Provident Fund Organisation)*** wherein the Hon'ble Supreme Court in Paragraph No.19 held as follows:

> *"19. Taking note of three-Judge Bench judgment of this Court in Union of India and Others v. Dharmendra Textile Processors and others, which is indeed binding on us, we are of the considered view that any default or delay in the payment of EPF contribution by the employer under the Act is a sine qua non for imposition of levy of damages under Section 14-B of the Act 1952 and mens rea or actus reus is not an essential element for imposing penalty/damages for breach of civil obligations/liabilities."*

12. On a careful perusal of the said judgment, it is clear that the default or delay in the payment of EPF contribution by the employer under the Act is a sine qua non for imposition of levy of damages and *mens rea* or *actus reus* is not an essential element for imposing the penalty/damages for breach of civil obligations/liabilities. In the case on hand also, the trial Court has passed

an order holding that there is no *mens rea*.

13. At this juncture, the learned counsel appearing for the respondent has argued that though there is a provision for levying damages the same is not mandatory and it is only discretion and the Regulations only mentioned the Upper Limit and it does not mean that the authority of the Tribunal will have to mechanically apply it. Further, in support of his contention, he relied upon the judgment of our High Court in ***W.A.No.1382 of 2014 (Assistant Provident Fund Commissioner, Employees' Provident fund Organisation Vs. Employees Provident Funds Appellate Tribunal, New Delhi*** and another) wherein, the Hon'ble Division Bench of this Court in paragraph No.9 held as follows:

> "9. It is pertinent to point out here that as per the provisions of the EPF Act, 1952, the interest on the PF contribution is mandatory. At the same time, in respect of levy of damages, it is left to the discretion of the Authority to decide the percentage of amount payable by the Employer. Of course, such percentage will have to be decided based on the facts and circumstances of each case. The schedule rate mentioned in Regulation 32-A is only the Upper Limit and it does not mean that the Authority or

the Tribunal will have to mechanically apply it."

14. He further relied upon the order in ***W.P(MD) No.2414 of 2010 (the Regional Provident Fund Commissioner, Employees Provident Fund Organisation vs- the Presiding Officer, Employees Provident Fund Appellate Tribunal)*** wherein this Court in Paragraph No.8 held as follows:

> "8.The Tribunal has rightly held that the regulation 32A in which a graded scale for imposition of damages has been provided cannot be regarded as a rigid or inflexible prescription and regulations cannot be a fetter to the exercise of the power that is conferred upon the Provident Fund Commissioner by the provisions of the enactment, but guide and channelise the exercise of discretion. The Tribunal has also rightly held that neither regulation 32A or 32B can be regarded as inflexible. The Tribunal has also rightly held that the words used in Clause 32A that "may recover from the employer by way of penalty damages at the rates given below" would also suggest and the same is intended only as a guideline and is not mandatory. The Tribunal has also followed the Judgment of High Court of Kerala in the case of

> ***Indian Telephone Industries Limited Vs. APFC and others*** reported in ***2006(3) KLJ 698*** and the decision of High Court of Bombay in the case of ***M/s.Cable Corporation of India Ltd. Vs. Union of India*** reported in ***2006 (003) CLR 349 Bombay*** and the decision of Honourable Supreme Court in the case of ***Organo Chemical Industries and another Vs. Union of India and Others*** reported in ***AIR 1979 SC 1803,*** while coming to the conclusion."

15. On a careful perusal of the above said order, it is clear that the schedule mentioned in the regulation is only the Upper Limit and it does not mean that the authority or the Tribunal will have to mechanically apply it and the same has to be decided based on the facts and circumstances of this case.

16. In the case on hand also, the trial Court has reduced the quantum of the damages from 100% to 20% by stating that there is no intentional delay in payment. Therefore, the trial Court has power to reduce the quantum of the damages. Since the respondent/petitioner immediately after order passed under Section 45-A of the E.S.I Act paid the entire amount without any delay damages fixed by the labour Court is reasonable. Therefore, the order passed

by the Labour Court is in order and there is no infirmity or perversity found in the order of the trial Court. Further, in this case, there is no substantial question of law, involved and thereby, there is no merit in this appeal and the same is liable to be dismissed.

17. Accordingly, this Civil Miscellaneous Appeal is dismissed. There shall be no order as to costs.

23.02.2024

NCC : Yes/No
Index : Yes / No
Internet : Yes / No
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To
1. The Employees' State Insurance -cum- Labour Court,
   Tirunelveli,

2. The Section Officer,
   Vernacular Records,
   Madurai Bench of Madras High Court,
   Madurai.

P.DHANABAL,J.

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