



WP(MD)Nos.13308, 13309 and 13310 of 2019

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 26.02.2024

CORAM:

THE HONOURABLE MR.JUSTICE MUMMINENI SUDHEER KUMAR

W.P.(MD)Nos.13308, 13309 and 13310 of 2019
and
W.M.P.(MD)Nos.9906, 9907 and 9908 of 2019

R.Indira
W/o. Ravichandran,
Managing Director,
M/s.CP Spinning Mills Pvt. Ltd.,
Puliyampatti,
New Tharapuram Road,
Palani, Dindigul District.

... Petitioner in all WPs

/vs./

The Deputy Director (INSIII)
Sub Regional office (Madurai)
Employees State Insurance Corporation,
2nd West Street, K.K.Nagar,
Madurai-20.

... Respondent in all WPs

PRAYER in W.P.(MD)No.13308 of 2019: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari, calling for records relating to the impugned order passed by the respondent in his



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proceedings in No.57/00/047756/000/0101/INS.III/37/16 dated 06.05.2019 and quash the same.

PRAYER in W.P.(MD)No.13309 of 2019: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari, calling for records relating to the impugned order passed by the respondent in his proceedings in No.57/00/047756/000/0101/INS.III/38/16 dated 06.05.2019 and quash the same.

PRAYER in W.P.(MD)No.13310 of 2019: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari, calling for records relating to the impugned order passed by the respondent in his proceedings in No.57/00/047756/000/0101/INS.III/39/16 dated 06.05.2019 and quash the same.

For Petitioner : Mr.B.Prahalad Ravi

For Respondent : Mr.I.Pinaygash
Standing Counsel

(in all WPs)

COMMON ORDER

These three writ petitions in W.P(MD)Nos.13308, 13309 and 13310 of 2019, have been filed aggrieved by the orders passed by the respondent under



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Section 85(B) of Employees State Insurance Corporation, Act, 1948 dated 06.05.2019, covering different periods.

2. Prior to issuing the impugned orders, the respondent has issued notice proposing to impose the penalty for the damages, from the petitioner by issuing a show cause notice dated 29.12.2016. Through the said notice, the respondent also afforded an opportunity of personal hearing to the petitioner by duly fixing the date and time as 24.01.2017 at 11 a.m. In response to the said notice dated 29.12.2016, the petitioner's company has submitted its explanation dated 16.01.2017, stating that the petitioner has already paid the ESI contribution together with interest and it is only after payment of entire amount, the notice was issued proposing to impose damages on the petitioner. It also stated that the respondent is not entitled to claim damages and there is no *mens rea* on the part of the employer in non payment of the ESI amount in time and also contended that the proposal to recover damages beyond the period of three years, is also illegal and in violation of the law.



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3. It is also further stated in the explanation that the delay in payment of the ESI contribution is due to circumstances beyond the control of the petitioner Company. However, the petitioner has not appeared for personal hearing on the date fixed by the respondent, i.e., on 24.01.2017. Thereafter, the respondent has not taken any action for almost 2 1/2 years and it is only on 06.05.2019, the respondent passed the impugned orders, requiring the petitioner to pay the amount of damages as proposed in the notice. Section 85(B) of the ESI Act, 1948, empowers the respondent to recover from the employer by way of penalty, not exceeding the amount of arrears as may be specified in the Regulations. Regulation 31(C) of State Insurance (General) Regulation, 1950, enables the Corporation to recover the damages not exceeding the rate mentioned under the said Regulations. Thus the outer limit of the damages that can be recovered from the employer is fixed under Regulation 31(c).

4. In the instant case, the question of recovery, damages or penalty which derives only in case, if the Corporation has suffered any damage because of the belated payment of the contribution and in the interest therein



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and also in the case of existence of any deliberate or intentional delay in remitting the contribution by the employer. Imposition of damages / penalty, is not automatic, consequent to the delayed payment of ESI contribution and the interest there on. Further the power conferred under Section 85 (B) of ESI Act, read with Regulations 31 and 31(C) of State Insurance (General) Regulation, 1950, only enables the respondent Corporation to claim for damage / penalty. But it is not a mandatory provision. In the impugned order, the respondent has not spelled out any special circumstances that necessitated the respondent to invoke the power under Regulation 85(B) of ESI Act read with Regulations 31 and 31(C) of the Regulations.

5. Further as contended by the learned counsel for the petitioner, the petitioner has already made a request for fixing another date for personal hearing, that is, other than 24.01.2017. But no such opportunity was afforded. So the respondent has waited for 2 1/2 years after the explanation was submitted by the petitioner. As against the specific averment made in the affidavit filed in support of the writ petition, the respondent has failed to file any counter contradicting the statement regarding the request made by the



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petitioner for fixing another date for personal hearing. The respondent having waited for 2 1/2 years after the explanation of the petitioner, in all fairness, ought to have afforded another opportunity to the petitioner to make his submissions in person as mandated in Proviso to Section 85(B) of the ESI Act, 1948.

6. Learned counsel for the respondent contended that the petitioner has an effective alternative remedy to appeal before the ESI Court and as such writ petition is not maintainable. He also further contended that though the petitioner has submitted his explanation, he did not make any request for fixing another date for personal hearing.

7. Both the contentions of the learned counsel for the respondent are not sustainable. Firstly, the grievance of the petitioner is that inspite of making request for fixing another date, for personal hearing, the respondent has not afforded any such opportunity, though the same is mandatory in view of the Proviso of Section 85(B) of the ESI Act. So far as not making any request for fixing another date for personal hearing is concerned, the petitioner has made



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a specific averment in the affidavit filed in support of the writ petition, the same was failed to be contradicted by the respondent by filing a counter affidavit, even after lapse of four years from the date of filing of the writ petition.

8. In the light of the above, this Court is of the considered view that the impugned orders are not sustainable in law. The impugned orders are accordingly set aside and the matter is remitted to the respondent to afford an opportunity of personal hearing to the petitioner and to pass appropriate orders in accordance with law.

9. Accordingly, these Writ Petitions are allowed. No costs. Consequently, connected miscellaneous petitions stand closed.

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

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MUMMINENI SUDHEER KUMAR, J.

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To

The Deputy Director (INSIII),
Sub Regional office (Madurai)
Employees State Insurance Corporation,
2nd West Street, K.K.Nagar,
Madurai-20.

Order made in
W.P.(MD)Nos.13308, 13309 and 13310 of 2019
and
W.M.P.(MD)No.9906, 9907 and 9908 of 2019

Dated: **26.02.2024**