BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **16.02.2024**

CORAM

THE HON'BLE MRS.JUSTICE S.SRIMATHY

C.M.A(MD)No.802 of 2021

The Employees State Insurance Corporation,
represented by its Additional Commissioner,
Sub-Regional Office,
Salai Street, Vannarapettai,
Tirunelveli-627 003. ... Appellant

Vs.

M/s.Government College of Engineering,
College Hostel,
Trivandrum Road,
Tirunelveli-627 007.
Through its Principal/Warden. ... Respondent

PRAYER: Civil Miscellaneous Appeal is filed under Section 82(2) of the ESI Act, 1948, against the order and decretal order, dated 19.12.2020, passed in E.S.I.O.P.No.56 of 2019 on the file of the Presiding Officer, Labour Court, Tirunelveli.

For Appellant : Mr.C.Karthik

For Respondent : Mr.S.Palanivelayutham

*****

JUDGEMENT

This Civil Miscellaneous Appeal is filed by ESI Corporation against the order passed by the Labour Court.

2.The respondent herein is the petitioner before the Labour Court. The respondent is the Government Engineering College attached with College Hostel along with Mess Establishment. The respondent College had filed a petition under Section 75(1)(g) of Employees State Insurance Act, 1948 to set aside and quash the order dated 28.03.2018 passed under Section 85-B directing the respondent herein to pay damages for a sum of Rs.1,23,007/- for the period 01/2013 to 10/2013.

3.The Government College of Engineering is having mess and the expenses including the salary to the employees of the mess is paid from the mess fess collected from the students. The mess is run based on dividing system. There is no profit motive in the system. The faculty members of the college would monitor the accounts and the establishment of the College hostel.

4.The appellant herein had inspected the hostel and issued visit note intimating that ESI is covered to the College Mess also with effect from 01.11.2013 onwards. The respondent herein sent Form-01 to the appellant on 13.11.2013 where it is stated that 27 male and 6 female employees are employed as on 01.11.2013 who are drawing wages less than Rs.10,000/-. The appellant thereafter allotted code number to the respondent herein.

5.The appellant issued notice directing the College to pay a sum of Rs. 1,24,936/- towards contribution for the period 01/2013 to 10/2013 and issued Form C-18 dated 02.01.2015 in respect of 36 employees employed on casual basis. The respondent staff attended the personal hearing and informed that they have not collected the employees share of contribution, hence requested for waiver of payment of Rs.1,24,937/-. The respondent college was under bonafide impression that the proceedings were dropped, but the appellant had initiated steps to recover the amount towards ESI contribution of Rs.1,24,937/- and interest for Rs.52,536/-. The respondent left with no option, hence the respondent had paid the amount on 12.08.2017.

6.Thereafter the appellant had issued notice, claiming damages of Rs. 1,23,007/- and fixed personal hearing for the same. The respondent being a

Government College expressed the difficulty and inability to pay the same. But the appellant without any reasonable opportunity and without appreciating the respondent contention, hurriedly passed the order directing to pay damages for belatedly payment. The respondent College was not defaulter in remitting the contribution but the respondent College did not deduct the employees contribution and hence could not pay the same in time. Further the respondent College had paid the contribution for the subsequent period without any delay, there is no deliberately default and there is no Mens Rea on the part of the respondent college. Hence the respondent college prayed to waive the damages.

7.The appellant herein had filed counter before the Labour Court stating that the respondent is a chronic defaulter and the respondent cannot escape from the statutory liability by saying that the respondent paid the contribution. In fact, the respondent college had paid the contribution with enormous delay. It is the statutory obligation on the part of the respondent to pay contribution within stipulated time as per provisions of section 39 and 40 of ESI Act and as per provisions of Regulation 31-C. If the respondent college fails to pay the contribution, then the respondent college will be liable for paying damages. Hence the imposition of damages is as per law. Further it is denied that the employees of the respondent college have not availed any benefit from the ESI Corporation for the disputed period. Hence, the appellant prayed before the Labour Court to dismiss the petition of the College.

8.The Labour Court, after considering the rival submissions has held the appellant corporation has power to consider for waiver of damages, either totally or partially. The Labour Court had relied on Regulation 31-C of Employees State Insurance General Regulation, 1950 and held that the ESI had discretionary power to waive the damages. The Labour Court further held in the instant case the ESI had not stated any reason why the grounds stated for delayed payment are not acceptable to the ESI Corporation. The tribunal further held Mens Rea is necessary for levying damages. For these reasons the Labour Court quashed the impugned order which levied damages against the respondent Government Engineering College. Aggrieved over the same, the present CMA is filed by the ESI Corporation.

9.Heard Mr.C.Karthik, the Learned Counsel appearing for appellant and Mr.S. Palani Velayutham, the Learned Counsel appearing for the respondent and perused the available records.

10.The Learned Counsel appearing for the ESI Corporation had submitted that the Tribunal has held that there is no *Mens Rea* and hence the damages cannot be levied. But in several cases the Hon'ble Supreme Court has held *Mens Rea* is not necessary for imposing damages. This Court is of the considered opinion that it is settled proposition both in ESI Act as well as EPF Act that for levying damages, *Mens Rea* is not necessary and *Mens Rea* cannot be criteria for imposing damages. Hence the Tribunal has terribly erred in holding that *Mens Rea* is necessary for levying damages.

11.However, as rightly held the financial status of the establishment can be taken into account while consider for waving the damages either partially or totally from levying damages. In the present case the respondent is Government Engineering College and the ESI contribution is for the workers employed in Mess Establishment. In all colleges, the Main Institute is not paying the salary and other benefits to the employees in Mess Establishment. While admitting the students, all colleges would collect separate amount for Hostel and Mess fees from the students in order to pay the salary of the employees in the Mess Establishment. Hence the government college was under the impression ESI is not applicable to Mess Establishment. If at all it has to be paid, then the College has to collect the said amount from the students. Hence, the college has taken a plea that they have not collected any contribution from the employees. But subsequently paid the entire amount along with interest. However, when the appellant had imposed damages, the College contested the case stating it would be difficult for them to pay the same, because again they cannot collect the said amount from the students.

12.It is an admitted fact, the respondent is a Government Engineering College and the mess catering services are given to the students, for which an amount would be collected from students. The share of each student would depend upon the number of students and it is dividing system. Absolutely there is no profit motive in it. Therefore, for the said period from 01/2013 to 10/2013, the college had not collected any amount to cover the ESI contribution from the students. In fact, the college has not collected the employees' contribution to pay the contribution. In spite of the same, the college took effective steps to pay the amount along with interest.

13.Further the sick industries are granted waiver either partially or totally based on their financial status. The regulation further states waiver may be considered if there are any other circumstances where waiver is required. The present case falls under "any other circumstances". The college is a non-profit organization and the Mess is also a non-profit establishment. If at all any amount ought to be paid then it would be proportionately collected from the students. In such circumstances, they college is entitled to waive of damages.

14.At this juncture, the learned counsel appearing for the appellant opposed for granting total waiver and submitted that a partial waiver may be considered, for which the Learned Counsel had relied on the judgement dated 20.06.2023 rendered in C.M.A.(MD) No.1016 of 2014 in the case of ***ESI Corporation Vs. Bharat Heavy Electricals Limited***, wherein it is held that the 100% damages cannot be sustained and levied 25% damages. This Court is of the considered opinion that levy of damages is discretionary power and it depends on facts and circumstances of each case. If the employees are working in the main institution, then the Government would pay salary and other statutory liabilities. If the employees are working in the Mess Establishment, then ultimately the students have to pay the contribution amount, since the salary is paid from the Mess Fees collected based on dividing system. In such circumstances, the damages may be partially or totally waived. Hence, in the present case, since it is Mess Establishment, the College deserves total waiver. Hence this Court confirms the order of the Labour Court, however, for different reason. Hence, the Civil Miscellaneous Appeal is dismissed. No Costs.

16.02.2024

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

Tmg

To

1.Presiding Officer,
Labour Court, Tirunelveli.

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

S.SRIMATHY, J.

Tmg

C.M.A(MD)No.802 of 2021

16.02.2024