



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

FIRST APPEAL NO.1182 OF 2019

Appellant : Employees State Insurance Corporation,
 (Orig. Resp. No.1 on R.A.) through its Assistant Director, Sub-Regional Office,
 Panchdeep Bhawan, Ganesh Peth, Nagpur.

– Versus –

Respondents : M/s. Dwarka Restaurant,
 (Orig. Applicant on R.A.) Through its Proprietor Shri Sunil Wasudeorao
 Dhote,
 Plot No.5, Shikrushna Plaza, Vivekanand Nagar,
 Khamala Road, Nagpur 440015.

 Mrs. B.P. Maldhure, Advocate for the Appellant.
 Mr. S.S. Ghate, Advocate for the Respondent.

CORAM : **M.W. CHANDWANI, J.**
DATE : **10th MARCH, 2025.**

ORAL JUDGMENT :

Heard the learned Counsel appearing for the parties.

02. **Admit.**

03. The appeal challenges the order passed by the learned Member, Industrial Court No.1, Nagpur, whereby the order passed by the appellant has been set aside and the matter has been remanded back to the authority for fresh decision by giving a proper opportunity to the applicant.

04. The appellant is a Corporation established under the provisions of the Employees' State Insurance Act, 1948 (*hereinafter referred to as the "Act" for short*). By order dated 25/09/2009, the authority under the Act determined the amount of contribution of the respondent to the tune of Rs.38,610/- towards Employees' State Insurance under Section 45-A of the Act for the period from October, 2006 to March, 2008. Ultimately, the said amount increased up to Rs.50,447/- by calculating the interest which was eventually paid on 18/03/2010. The authority also initiated proceedings under Section 85-B of the Act for damages for non-payment of the amount within the stipulated time and ultimately passed the order for payment of damages to the tune of Rs.24,618/- for belated payment of the Employees' State Insurance contribution. It is to be noted that the authority by order dated 15/02/2011 also directed the respondent to pay contribution towards six employees to the tune of Rs.25,740/- for the period from April, 2008 to March, 2009. The respondent challenged both the orders before the learned Member, Industrial Court, Nagpur. The Industrial Court allowed the application partly and remanded the matter back for deciding it afresh. Feeling aggrieved with the order of remand, the authority has filed this appeal.

05. Having heard the learned Counsel for the respective parties and having gone through the impugned order and the relevant material available

on record, it transpires that before passing the order under Section 85-B of the Act, a notice came to be issued to the respondent. The respondent stated before the authority that due to financial crunch, the amount could not be paid in time and therefore, requested the authority not to pass any order regarding damages. The authority opined that there is no provision in the Act to waive damages, the authority passed the impugned order directing the respondent to pay damages of Rs.24,618/-.

06. The learned Counsel for the appellant submitted that the notice was duly received by the respondent and after considering it's reply, the impugned order of damages came to be passed. This has not been considered by the Industrial Court and proceeded to pass the impugned order of remand. According to her, while passing the order of damages, the authority has to consider breach of civil obligations or liabilities for imposition of penalty/damages and not *mens rea or actus reus*. To buttress her submission, she seeks to rely upon the decision in the case of Employees' State Insurance Corporation vs. M/s. Vijay Marie Hospital and Educational Society in C.M.A. No.159 of 2022, wherein the Telangana High Court, while decision of the Supreme Court in the case of Horticulture Experiment Station Gonikoppal, Coorg vs. Regional Provident Fund Organization¹, has held that *mens rea or actus reus* is not required for passing the order of damages for non-payment of contribution within time. Decision in the case of Horticulture Experiment

1 (2022) 4 SCC 516

Station (*supra*) is also placed on record, wherein the Supreme Court in paragraph 10 has observed as under :

“10. The question that emerges for our consideration in the instant appeals is that what will be the effect and implementation of Section 14-B of the 1952 Act and as to whether the breach of civil obligations or liabilities committed by the employer is a sine qua non for imposition of penalty/ damages or the element of mens rea or actus reus is one of the essential elements has a role to play and the authority is under an obligation to examine the justification, if any, being tendered while passing the order imposing damages under the provisions of the 1952 Act.”

07. What is deduced from the decision of Horticulture Experiment Station (*supra*) is that *mens rea or actus reus* is not an essential element for imposition of penalty under Section 85-B of the Act. Here, the authority has opined that there is no provision in the Act to waive the damages. Whereas, Section 85-B of the Act prescribed as under:

“85-B : 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 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 (1 of 1986), 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 4or under section 45C to section 45-I.”

08. In Section 85-B of the Act, the word “may” has been used. Not only this, even ‘show cause notice’ is required to be given to the establishment. Thus, it is clear that the authority has a discretion whether to impose the damages or not. The observation found support from the decision of the Kerala High Court in the case of **Regional Director, E.S.I. Corporation and Anr. vs. Managing Director, M/s. Qetcos Ltd.**². Therefore, the finding of the authority that there is no provision to waive the damages is misconceived. To that extent, the Industrial Court was right in remanding back the matter for deciding it afresh.

09. Turning to the order passed on 15/02/2011 under Section 45-A of the Act, it appears that contribution to the tune of Rs.25,740/- has been imposed by the authority for the period from April, 2008 to March, 2009. Subsequent visit of the Inspector at the restaurant goes to show that Mr.

Suresh Arora was handling the restaurant from September, 2009, though it was claimed by the respondent before the Inspector that during his visit, the restaurant was closed from 2006 to 2009. In spite of requests and even after issuance of notice, except bare words, nothing has been produced. It appears from the impugned order under Section 45-A of the Act that notice was served upon the respondent, but no documents have been produced before the authority to show that during the said period, the restaurant was closed. There is a specific averment in the order that in spite of service, respondent did not file any document. No fault can be seen in the order dated 15/02/2011 passed by the authority. When the respondent has come up with a case of closure of his establishment for the period from 2006 to 2009, it was for the respondent to produce the relevant documents, at least correspondence to the different authorities regarding closure of its establishment. However, this aspect has not been considered by the Industrial Court. To that extent, those findings of the Industrial Court are required to be set aside. In the result, the following order is passed :

ORDER

- I. The appeal is partly allowed.
- II. The order of remand in respect of order dated 15/02/2011 under Section 45-A of the Act is set aside.

- III. The order of remand of the Industrial Court with regard to determination of damages under Section 85-B of the Act is maintained.
- IV. In the aforesaid terms, the appeal is disposed of with no order as to costs.

(M.W. Chandwani, J.)

**sandesh*