(2020) 02 CAL CK 0070

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 22339 (W) Of 2019

Kanknarrah Jute Pvt. Ltd. & Anr APPELLANT

Vs

Employees' State Insurance Corporation Ltd. & Ors RESPONDENT

Date of Decision : 17-02-2020

Acts Referred:

Employees State Insurance Act, 1948 — Section 14B, 45C, 45I, 85B, 93A
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 4

Citation : (2020) 02 CAL CK 0070

Hon'ble Judges : Shekhar B. Saraf, J

Bench : Single Bench

Advocate : Soumya Majumder, Deepak Jain, Kumar Gupta, Tilak Mitra, Anubha Mukherjee

Judgement

Shekhar B. Saraf, J

Mr. Soumya Majumder, learned Counsel for the petitioner has assailed the impugned order dated October 31, 2019 on the following points:-

a) Section 85-B of the ESI Act, 1948 is a penal provision, and accordingly, it is inherent in the same that mens rea is required to be present.

a) Since, the petitioner was not in control of the affairs of the company for the period for which the penalty has been levied, it is his submission that

the penal liability cannot be put on his shoulder.

a) He submits that immediately on coming in the control of the affairs of the company, the payment due was made in the same month.

a) He submits that the order impugned does not examine Section 85-B read with Section 93A of the Act in its proper perspective. His submission that

Section 93A of the Act would only apply to

b) Employeesâ?? State Insurance Corporation Vs. situation where the damages have been quantified. In such a situation, the petitioner is required to

take note of the same by way of due diligence when he takes over the property. However, the present liability cannot be thrashed upon the petitioner

when the petitioner was not in control over the company.

Mr. Majumder relied upon two Apex Court decisions in the cases of HMT Ltd. and Anr., reported in (2008) 3 SCC 35 and Mcleod Russel India Ltd.

Vs. Regional Provident Fund Commissioner, Jalpaiguri & Ors., reported in (2014) 15 SCC 26.3 To buttress his argument he relied on the following

paragraphs of the said decisions:-

Paragraphs 21 and 26 from the case of Employeesâ?? State Insurance Corporation (Supra) :

â??21. A penal provision should be construed strictly. Only because a provision has been made for levy of penalty, the same by itself would not lead

to the conclusion that penalty must be levied in all situation. Such an intention on the part of the legislature is not decipherable from Section 85-B of the

Act. When a discretionary jurisdiction has been conferred on a situation authority to levy penal damages by reason of an enabling provision, the same

cannot be construed as imperative. Even otherwise, an endeavour should be made to construe such penal provisions as discretionary, unless the

statute is held to be mandatory in character.

26. Existence of mens rea or actus reus to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and/or

the quantum thereof.â??

Paragraphs 10 and 11 from the case of Mcleod Russel India Ltd. (Supra) :

â??10. We shall reproduce for facility of reference and comparison, the statutory provision of the ESIC Act, 1948 to spotlight the legal nodus with

which we are presently engrossed:

â??85-B. Power to recover damages.â?"(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 of 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 to 1986), subject to such 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 45-C to Section 45-I.

11. In HMT Ltd., this Court noted the beneficial nature of the ESIC Act; that subordinate legislation must conform to the provisions of the parent Act.

Despite giving due regard to the use of the words â??may recover damages by way of penaltyâ??, and mindful that mens rea actus reus to

contravene a statutory provision are necessary ingredients for levy of damages, this Court set aside the interference of the High Court vis-Ã -vis the

imposition of damages and further held that imposition of damages by way of penalty was not mandated in each and every case. The dispute was

remitted back to the High Court for fresh consideration i.e. to proceed on the premise that the levy of penalty under the Act was not a mere formality,

a forgone conclusion or an inexorable imposition; and that the circumstances surrounding the failure to deposit the contribution of the employees

concerned would also have to be cogitated upon. This decision does not prescribe that damages or penalties cannot or ought not to be imposed.

Further, the presence or absence of mens rea and/or actus reus would be a determinative factor in imposing damages under Section 14-B, as also the

quantum thereof since it is not inflexible that 100 per cent of the arrears have to be imposed in all the cases. Alternatively stated, if damages have

been imposed under Section 14-B it will be only logical that mens rea and/or actus reus was prevailing at the relevant time. We may also note that this

Court had yet again reiterated the well known but it ignored principle that High Courts or any appellate authority created by a statute should not

substitute their perspective of discretion on that of the lower adjudicatory authority if the impugned order does not otherwise manifest perversity in the

process of decision taking. HMT Ltd. does not proscribe imposition of damages; that would negate the intent of the legislature. The submission of the petitioner before us is that the liability was of the erstwhile management and since the petitioner was not the â??employerâ?? at the relevant time,

default much less deliberate and wilful default on the part of the petitioner was absent. However, it seems to us that once these damages have been

levied, the quantification and imposition could be recovered from the party which has assumed the management of the establishment concerned.â??

Mr. Majumder further submits that on January 16, 2020 a notice of demand has been issued against the petitioner for recovery of Rs. 8,52,943/-. He

prays for stay of the said recovery proceedings in the meantime.

Upon consideration of materials placed on record, I am of the prima facie view, the recovery proceeding should be stayed till disposal of the writ

petition.

The petitioner is directed to file a supplementary affidavit annexing the recovery notice by next date of hearing.

The matter is fixed on February 24, 2020 at the top under the heading â??for hearingâ??.

