

(2011) 02 MAD CK 0126

In the Madras High Court

Case No : Writ Petition No's. 14498, 14507 and 14508 of 2005

Cosmopolitan Club

APPELLANT

Vs

The Assistant Director, Employees State Insurance
Corporation and Others

RESPONDENT

Date of Decision : 15-02-2011

Acts Referred:

Constitution of India, 1950 — Article 14
Employees State Insurance (General) Regulations, 1950 — Regulation 31
Employees State Insurance Act, 1948 — Section 39(5), 45A, 85B

Citation : (2011) 02 MAD CK 0126

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : M. Venkatachalapathy, S.C. for Syed Jaffer Ahmed, for the Appellant;
K.C. Ramalingam, for R1 to R4 in W.P. Nos. 14498, 14507 and 14508/2005, for
the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—The Petitioner in all these writ petitions is the Cosmopolitan Club. In the first writ petition(W.P. No. 14498/2005), the

Petitioner challenges a notice dated 08.03.2003 issued by the Respondent ESI claiming contributions for the period from 1/93 to 11/93, 1/94 to

7/95, 7/95 to 11/96, 1/97 to 5/97, 12/97 and 1/98 amounting to a sum of Rs. 11,45,547/-.

2. The writ petition was admitted on 28.04.2005. Pending the writ petition, this Court found that sincethe Petitioner had paid the entire contribution

as demanded by the Respondent, there was no necessity to grant an interim order. The interim application in WPMP. No. 15835 of 2005 was

dismissed.

3. Thereafter, the Petitioner Club filed two writ petitions, being W.P. Nos. 14507 and 14508 of 2005. In W.P. No. 14507 of 2005, the Petitioner

Club challenges the demand for the amount of Rs. 13,61,597/- claimed u/s 39(5) of the ESI Act, 1948 read with Regulation 31 of ESI (General)

Regulation 1950 as interest for the delayed payment of contribution. In W.P. No. 14508 of 2005, the same Club challenges the constitutional

validity of Section 39(5) of the ESI Act, 1948 and contends that the provision is ultra vires of Article 14 of the Constitution of India.

4. These two writ petitions were admitted on 28.04.2005. Pending the writ petitions, this Court in W.P. No. 14507/2005 granted an interim stay

on condition that the Petitioner deposits 30% of the interest demanded within a period of four weeks. Subsequently, when the miscellaneous

petition came up on 29.08.2006, this Court found that the said interim order has been complied with. Therefore, the interim stay was made

absolute.

5. On notice from this Court, the Respondents have filed a counter affidavit dated 29.12.2006 in W.P. No. 14498 of 2005 and a counter affidavit

dated 22.12.2006 in the other two writ petitions.

6. With reference to the liability to pay the contribution challenged in the first writ petition, in paragraph 8 of the counter affidavit, it was averred as

follows:

8. The petitioner also in its reply letter dated 17.05.2003 had admitted the entire liability of Rs. 11,45,547/- for the said period and requested the

first respondent to allow it to pay in instalments at the rate of Rs. 1 lakh per month commencing from May 2003. In this connection the

respondents humbly request to read the letter dated 17.05.2003 of the petitioner as part and parcel of this counter. However in a nutshell the

respondent begs to Quote the contents of the letter dated 17.05.2003 herein, since the matter was pending in the court the club was not able to

pay ESI contribution for the period ...1/93 to 1/98 amounting to Rs. 11,45,547/-. While the fact is so the petitioner has misled that no opportunity

was afforded etc before this Hon"ble Court.

7. In the light of the said assertion, this Court directed the records to be produced. Accordingly, the letter dated 17.05.2003 sent by the Petitioner

Club was produced. In the letter, the Petitioner Club did not dispute the liability,

but wrote to the ESI seeking for payment of amount in instalments. It is necessary to re-produce the said letter which is as follows:

We wish to submit that our Cosmopolitan Club was covered under the provisions of the ESI Act with effect from 16.1.1977. We have filed a

petition in the Court in the year 1988 requesting for exemption under the provisions of the ESI Act. Our petition was dismissed on 9.10.1996.

Immediately after dismissal of our petition, we have been asked to pay the contribution amount for the period from 1/77 to 12/87 for a sum of Rs.

6,69,255.25 plus interest amount of Rs. 11,88,135.67. With reference to the notice received from the ESI Corporation, the entire amount was

paid by us. Since the matter was pending in the Court, the Club was not able to pay the ESI contribution for the present assessment period

i.e.1/93 to 1/98 amounting to Rs. 11,45,547/-. We therefore, submit that the nonpayment of this amount is not willful nor due to negligence. Since

the payment of the entire contribution amount of Rs. 11,45,547/-at one time will financially cripple the fund position of our Club, we request you to

kindly permit us to pay the dues in instalments at the rate of Rs. 1 lakh per month commencing from May 2003.

(Emphasis added)

8. It is rather unfortunate that the said communication was not even referred to in the affidavit filed in support of the W.P. No. 14498 of 2005.

Only legal contentions were raised regarding non-issuance of notice. This attitude of the Petitioner is regrettable. When they come to Court, they

were bound to inform this Court all the relevant facts which will enable the Court to come to a proper conclusion. Hence, there is no substance in

W.P. No. 14498 of 2005. Further, since they have already paid the amount claimed, nothing survives in that writ petition. Hence, W.P. No.

14498 of 2005 stands dismissed. However, there will be no order as to costs.

9. In W.P. No. 14508 of 2005, the Petitioner had challenged the vires of Section 39(5) of the ESI Act. In the other writ petition, the demand for

payment of interest is challenged.

10. It must be noted that the Supreme Court has held that in the matter of interest, there cannot be any private negotiations and the interest is an

automatic liability on the employer if there were delayed payments. The Supreme Court in Goetze (India) Limited Vs. Employees State Insurance

Corporation, , in paragraph 9 had observed as follows:

9. As there was delay in making the payment of the contribution the Corporation had issued notice on 29.6.1990 at the first instance and thereafter

the order was passed u/s 45A of the Act on 23.7.1992. The same was challenged before the ESI Court in which an interim stay was granted on

9.10.1992. During the pendency of the matter there was revivification and the quantum payable by the Appellant was worked out. The liability to

pay interest is statutory. There is no power of waiver. The question of any compromise or settlement does not really arise. Even otherwise the

order of the ESI Court referred to and relied upon by the Appellant is of no assistance to the Appellant. It only noted statement of the Appellant

that he had deposited the contribution payable. The reference to ""no further dues"" is obviously relatable to the contribution payable and nothing

beyond that.

(Emphasis added)

11. Therefore, when the contribution was not paid as required under the Act, then it erodes the real value of the money. The ESI Corporation has

to meet its own commitment only from the funds created from such contribution. Therefore, the Act had statutorily mandated the defaulters to pay

interest. Hence, there can be no challenge to the said component. It is not in the nature of any penalty but only to off set the erosion of the value of

the money due to the delayed payment. If not charged, the employers are likely to use the said amounts meant for contribution for their own

commercial purposes and allow the ESI to go high and dry.

12. It is only in case of damages levied u/s 85B of the ESI Act, there can be scope for discretion. Even in such cases, there can only be a limited

judicial review as held by the Supreme Court in Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another, . In paragraphs 25 and 26, it

was observed as follows:

25. The statute itself does not say that a penalty has to be levied only in the manner prescribed. It is also not a case where the authority is left with

no direction. The legislation does not provide that adjudication for the purpose of levy of penalty proceeding would be a mere formality or

imposition of penalty as also computation of the quantum thereof became a foregone conclusion. Ordinarily, even such a provision would not be

held to providing for mandatory imposition of penalty, if the proceeding is an adjudicatory one or compliance with the principles of natural justice is

necessary thereunder. 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.

13. Hence, it cannot be held that Section 39(5) is arbitrary and ultra vires. The Act had prescribed a minimum rate of interest. Once it is held that

the provisions are not unconstitutional, then the necessary corollary of payment of interest will automatically arise as held by the Supreme Court in

Goetze's case (cited supra).

14. In the light of the above, both W.P. Nos. 14507 and 14508 of 2005 will stand dismissed. No costs.