(2014) 07 KL CK 0293

In the High Court Of Kerala

Case No : Insurance Appeal No. 25 of 2013

Director, Sub-Regional Office, ESI Corporation APPELLANT

Vs

Choice School RESPONDENT

Date of Decision : 07-07-2014

Acts Referred:

Employees State Insurance Act, 1948 — Section 39, 85(B), 85-B

Citation : (2015) 144 FLR 946

Hon'ble Judges : B. Kemal Pasha, J

Bench : Single Bench

Advocate : T.V. Ajaykumar, Advocates for the Appellant; M. Gopikrishnan Nambiar, P. Gopinath, P. Benny Thomas and K. John Mathai, Advocates for the Respondent

Judgement

B. Kemal Pasha, J.—Can the discretionary power to reduce or waive damages imposed by way of penalty under section 85-B of the Employees'' State Insurance Act, 1948 (hereinafter referred to as ''E.S.I. Act'', in short) read with section 31-C(c) of the Employees'' State Insurance (General) Regulations, 1950 be exercised for the mere asking, without the proof of valid grounds?

The Employees'' State Insurance Corporation has come up in appeal challenging judgment dated 28.2.2013 of the Employees'' Insurance Court, Alappuzha, in I.C. No. 69 of 2012.

The applicant before the Court below is a C.B.S.E. School in respect of which the provisions of the E.S.I. Act were extended, through notification No. G.O.(P) No. 135/2007/LBR dated 8.10.2007 by the Government of Kerala. All the managements of such schools have challenged the validity of the notification and finally, the matter was decided by a Division Bench of this Court in C.B.S.E. School Managements'' Association v. State of Kerala 2010 (125) FLR 1103 (Ker.), wherein the notification was found to be valid and the authority of the Government of Kerala to issue that notification was also found in favour of the Government of Kerala. The judgment was pronounced on 3.7.2009. It seems that in this particular case, after the judgment, the establishment has heeded to the notification and the demand forwarded by the Employees'' State Insurance Corporation, and paid the entire arrears of contribution on 15.1.2011.

2. It seems that thereafter, the Corporation has proceeded to impose damages on the delayed payment of contribution under section 85-B of the E.S.I. Act read with section 31-C of the Employees'' State Insurance (General) Regulations, 1950. It seems that 25% of the contribution has been imposed as damages, thereby ordering the payment of an amount of Rs. 71,029/-.

3. The establishment has approached the Court below through I.C. No. 69 of 2012. The Court below has taken the view that there is no contumacious conduct or willful default on the part of the establishment and therefore, they are not liable to pay any damages under section 85-B of the E.S.I. Act. By entering such a finding, the Court below has chosen to set aside Ext.P3 order imposing damages. The Employees'' State Insurance Corporation has come up in appeal.

4. Heard the learned Counsel, Shri. T.V. Ajayakumar, for the Employees'' State Insurance Corporation and the learned Counsel, Shri, Benny Thomas, for the respondent.

5. This Court had occasion to deal with the very same question. It was held that a total waiver of damages can only be made under section 31-C(c) of the Employees State Insurance (General) Regulations, 1950, in exceptional hard cases, when such establishment is declared as a sick industry under the rehabilitation scheme of the BIFR. It was also held that the quantum of damages that can be imposed as stipulated under section 31-C of Employees State Insurance (General) Regulations, 1950 is the maximum amount of damages that can be imposed and it does not reflect the minimum amount. When the maximum rate of damages has been prescribed, it need not be further mentioned that the Employees'' State Insurance Corporation has a corresponding duty to exercise proper discretion in imposing damages. When such a provision has been incorporated in the form of a penal provision, that has to be strictly interpreted and observed by the Employees'' State Insurance Corporation. It is mandatory on the part of Employees'' State Insurance Corporation, to exercise proper discretion in imposing damages in cases like this.

6. The learned Counsel for the respondent has pointed out that in this particular case, the establishment was perfectly justified in delaying the payment of contribution as the matter was sub judice before a Division Bench of this Court in C.B.S.E. School Managements'' Association v. State of Kerala (case supra). It is true that, for a long period, the matter was pending consideration and finally, it was declared that the notification issued by the Government of Kerala extending the provisions of the Employees'' State Insurance Corporation to CBSE Schools, is valid and that the ''appropriate Government'' to issue such a notification is the Government of Kerala. It cannot be said that the act on the part of the establishment in not making the contribution during the pendency of the said

writ petition, is contumacious or wilful neglect or laches. They could have waited till the disposal of the writ petition and they waited so. When the decision has become final, they have chosen to pay the contribution.

7. The learned Counsel for the appellant has pointed out that even though the matter attained finality on 3.7.2009, the payment was made only on 15.1.2011. It is true that there is a delay of almost 1 1/2 years in making the payment of the arrears of contribution. The learned Counsel for the respondent has pointed out that, as contemplated under section 39 of the E.S.I. Act, the Employees'' State Insurance Corporation has levied interest on the delayed payment and the establishment has effected the payment of the contribution with interest charged by the Employees'' State Insurance Corporation and therefore, the Employees'' State Insurance Corporation ought to have waived any damages by way of penalty. As I have found earlier, it is true that in exceptional hard cases, the Employees'' State Insurance Corporation can waive totally or partially the damages under section 31-C(c) of the Employees State Insurance (General) Regulations, 1950 when it relates to a sick industry. In order to have such a total waiver, they will have to show reasons. In this particular case, there is a delay of around 1 1/2 years. True that they have paid the interest also, as charged under section 39 of the E.S.I. Act. At any stretch of imagination, it cannot be said that the Employees'' State Insurance Corporation has exercised the discretion, which is mandatory on their part in imposing damages in this case, when they have chosen to impose the maximum amount of damages. Similarly, it seems that the establishment also cannot explain the reasons for committing a delay of around 1 1/2 years in making payment of arrears of contribution, after the disposal of the writ petition. Therefore, it cannot be taken as a case of a total waiver. The learned Counsel for the appellant has pointed out that the findings entered by the Court below that the Employees'' State Insurance Corporation had no case that there was any contumacious conduct or willful neglect on the part of the establishment in making the payment of contribution, is not correct. The attention of this Court has been invited to Ext. P3, wherein it has been clearly stated by the Employees'' State Insurance Corporation that the conduct on the part of the establishment, in causing the inordinate delay is really contumacious in nature and they have committed willful delay and laches in making the statutory payment. It is true that the aforesaid observation made by the Court below is erroneous, when the Employees'' State Insurance Corporation has specifically mentioned in Ext. P3 that there was contumacious conduct. The impugned judgment by which Ext. P3 stands set aside, has amounted to the total waiver of the damages, which is uncalled for in a case like this and therefore, the impugned order has to be set aside. On considering the matter, this Court does not think that it is feasible again to drive the parties back or to set the clock back, forcing them once again to agitate the matter before the Court below. At the same time, the circumstances narrated by the learned Counsel for the respondent, are also to be considered. On and overall view of the matter, a nominal amount of Rs. 2,500/- can be imposed as damages from the respondent

in this case, which is just and reasonable to the circumstances. The establishment shall pay the amount of Rs. 2,500/- as damages by way of penalty to the Employees'' State Insurance Corporation, forthwith.

In the result, this appeal is allowed and the impugned judgment is set aside. An amount of Rs. 2,500/- is imposed as damages under section 85(B) of the Employees State Insurance Act, 1949 r/w section 31C(c) of the Employees State Insurance (General) Regulations, 1950.

