(2011) 01 MAD CK 0068

In the Madras High Court

Case No : Writ Petition No. 29016 of 2004 and WPMP No. 35240 of 2004

Empee International Hotel and Resorts Ltd. APPELLANT

Vs

The Joint Director, The Assistant Director Employees State Insurance Corporation Regional Office and The Recovery Officer Employees State Insurance Corporation RESPONDENT

Date of Decision : 12-01-2011

Acts Referred:

Employees State Insurance (General) Regulations, 1950 — Regulation 31
Employees State Insurance Act, 1948 — Section 85B

Citation : (2011) 01 MAD CK 0068

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : V. Kalyanaraman, for the Appellant; K.C. Ramalingam, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—The Petitioner is a hotelier having unit at AnnaSalai, Chennai, which is covered by the provisions of theESI Act. They have

come forward to challenge the order passed u/s 85(B) of the ESI Act levying damages for the delayed payment. In the impugned order, it is stated

that while the Petitioner has paid the contribution, there was an enormous delay and when notice was issued, the Petitioner came up with a plea

that they have paid the amount of contribution in four instalments for the year1995-1996 and they have paid the contribution in teninstalments for

the year 2003-2004. The defence taken by the Petitioner was that as there was severe financial constraint as well as low occupancy in the hotel,

they could not generate required funds and in essence they offered for waiver of damages on the plea of recession made by them. However, the

ESI Corporation found that the delay was not few days or few weeks, but there was enormous delay of 2013 days in making the due contribution,

though the Regulation 31 of the ESI (General) Regulations, 1950obliges the employer to pay the contribution immediately after the completion of

21 days period.

2. The Writ Petition was admitted on 8.10.2004. Pending the Writ Petition, this Court granted an interim stay on condition that the Petitioner

deposits Rs. 75,000/ï¿½as a condition precedent for grant of stay. Mr. V. Kalyanaraman, learned Counsel for the Petitioner stated that the

condition has been complied with.

3. The only question that has to be determined is for the reasons set out in the affidavit whether the Petitioner is entitled for waiver or reduction.

Mr. V. Kalayanaraman, learned Counsel for the Petitioner submitted that the Petitioner has sent a letter setting out the reasons for waiver and the

Respondent Corporation has not considered the same and therefore the impugned order is liable to be set aside.

4. Section 85-B of the ESI Act enables the ESI Corporation to levy damages. The 1st proviso to Section 85-B only prescribes that before levy of

damages, the employer should be given a reasonable opportunity of being heard. In the present case, it is not the case of the Petitioner that they

were not given notice before damages were levied on them. The 2nd proviso to Section 85-B also gives a legislative guideline for the reduction or

waiver of damages. The condition set out therein is the Industry must be a sick Industry for which a Scheme has been sanctioned by BIFR under

the provisions of SIC Act, 1985. Even in such cases, the ESI Corporation alone can decide whether they are qualified for waiver.

5. The Supreme Court vide its judgment in Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another, had stated that Section 85-B of the

Act empowers the Corporation to recover damages in the event of employer fails to make payment of the amount due in respect of contribution.

The only qualification being the amount of levy shall not exceed to total contribution. In paragraph Nos. 25 and 26, it was averred 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 discretion. 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

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

is necessary there under.

26. Existence of mens read or act us reus to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages

and/or the quantum thereof.

6. But, in the present case, as noted already, the delay is not few days or few weeks, but more than five years. Secondly, it is not the case of the

Petitioner that they have not been heard before the levy of damages. The plea for waiver or reduction must be based upon the statutory guideline

provided under the Act. The vague statement that they were suffering due to recession cannot be a ground and the second proviso to Section 85-

B of the Act state so the parameters under which the Corporation can consider the reduction or waiver of damages. Since those ingredients are

missing in the case of the Petitioner, the relief claimed in the Writ Petition is misconceived. The impugned order does not suffer from any illegality or

impropriety. Hence, the writ petition stands dismissed. No costs. The Miscellaneous Petition is closed.