

(2007) 02 KL CK 0007

In the High Court Of Kerala

Case No : Ins. Appeal No's. 22, 24 and 25 of 2003 and 70 and 76 of 2006

Employees' State Insurance Corporation

APPELLANT

Vs

Hotel Methanath (Kedaram)

RESPONDENT

Date of Decision : 08-02-2007

Acts Referred:

Employees State Insurance (General) Regulations, 1950 — Regulation 31, 31A, 31C
Employees State Insurance Act, 1948 — Section 39(5), 85(B)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 4

Citation : (2007) 2 KLJ 708

Hon'ble Judges : K.S. Radhakrishnan, C.J.; M.N. Krishnan, J

Bench : Division Bench

Advocate : P. Sankarankutty Nair, for the Appellant; A.V. Xavier and Thushara James, for the Respondent

Final Decision : Allowed

Judgement

K.S. Radhakrishnan, C.J.—Employees State Insurance Corporation is the appellant in all these cases. Common issues arise for consideration in all these cases, hence we are disposing of these cases by a common judgment. Insurance Appeal No. 22 of 2003 arise out of the order passed by the Employees Insurance Court, Palakkad in I.C. No. 19 of 2001, which is being treated as the leading case.

2. Respondent in Ins. Appeal 22 of 2003 filed an application before the Insurance Court assailing Ext. A1 order dated 18-7-2001 claiming the failure of the applicant to comply with the provisions of E.S.I. Act. Applicant stated that the law was uncertain and was finally decided by this Court in MFA No. 557 of 1995 on 2-11-1995 and the amounts due to the Corporation was later determined by the Inspector only in the year 2000 and the applicant had remitted the amount by instalments on 23-9-2000, 9-10-2000, 23-10-2000 and 7-11-2000. Applicant has also stated that there was no delay in remitting the dues and the applicant is therefore not liable to pay Rs. 13,286/- as damages and Rs. 44,348/- by way of interest as demanded vide Ext. A1 and A3 respectively.

3. The Corporation opposed the applicant stating that the applicant should have paid contribution for the period from January 1992 to February 1999 immediately on the pronouncement of the judgment by this Court on 2-11-1999, but remitted the amount only by way of five instalments. Further, it is stated that the claim for damages was demanded excluding the litigation period, but so far as interest is concerned the entire period of delay has to be taken into account. Insurance Court after considering the rival contentions allowed the application in part setting aside Ext. A1 order dated 18-7-2001 and Ext. A3 Form C-I 8 dated 16-2-2001 and directed the Corporation to issue fresh notice for interest from 23-11-1999 after adjusting the sum of Rs. 5000/- which the applicant had remitted in compliance with the direction of the Insurance Court given in IA Nos. 61 & 62 of 2001.

4. Sri. Ajayakumar, counsel appearing for the Corporation submitted that the Insurance Court was not justified in interfering with Annexure -A3 order demanding interest from the date on which it was due. Counsel submitted that there is no relevancy in the date of the Division Bench judgment of this Court for claiming interest. In support of his contention counsel placed reliance on a Division Bench decision of this Court in MFA No. 1024 of 2001 and submitted that the applicant is liable to pay E.S.I. contributions which fell due on the last day of the wage period within 21 days of the last day of the calendar month in which the contributions fell due. Counsel referred to Section 39(5)(a) of the ESI Act read with Regulation 31 A. Regulation 31A states that an employer who fails to pay contribution within the period specified in Regulation 31 shall be liable to pay simple interest at the rate of 12% per annum in respect of each day of default or delay in payment of contribution. Counsel also submitted, the court below was not justified in holding that the damages claimed was unsustainable. Counsel submitted, the Corporation has got legal right to claim damages if there is failure to pay the amount and the finding of the Insurance Court that the damages can be claimed only if the employer had acted either deliberately or in defiance of law, or was guilty of contumacious or dishonest conduct, or acted in conscious disregard of its obligation is to correct. Counsel further submitted that the Insurance Court was not justified in placing reliance on the bench decision of this Court in Regional Director. ESI Corporation v. Sakthi Tiles 1988 (2) KLT 280 since that judgment was rendered interpreting the unamended Section 85(B) of the Employees State Insurance Act, 1948. Counsel submitted when an employer fails to pay amount due in respect of any contribution, the Corporation has got the legal right to recover damages by way of penalty at the rate prescribed in the Regulations.

5. Counsel appearing for the respondent Sri. A.V. Xavier, on the other hand, submitted there is no error in the order of the Insurance Court warranting interference by this Court. Counsel submitted damages cannot ordinarily be imposed unless the party obliged to pay the amount due, acted either deliberately or in defiance of law, or was guilty of contumacious or dishonest conduct, or acted in conscious disregard of its obligation. Counsel submitted, the

amount could not be paid since the matter was under litigation and had attained finality only when this Court disposed of MFA No. 557 of 1995 on 2-11-1999. On receipt of the notices applicant had remitted the amount by way of instalments and under such circumstances counsel submitted there is no justification for demanding damages.

6. We are of the view, the first point raised in the appeal is already covered by the judgment of this Court in MFA. No. 1024 of 2001. Interpreting Section 39(5) (a) of the ESI Act read with Regulation 31A this Court stated that statutory provisions make it clear that the employer is liable to pay the ESI contributions which fell due on the last day of the wage period within 21 days of the last day of the calendar month in which the contributions fell due. Further, this Court also took the view that merely because the employer had failed to pay contribution under a bona fide impression or belief that the establishment was not covered under the provisions of the ESI Act cannot absolve the employer from the liability of paying interest on the delayed payment of ESI contribution u/s 39(5) read with Regulation 31A. Under such circumstances we are of the view that the Corporation is entitled to claim interest from the date on which it fell due and the date of judgment of this Court has no relevance in claiming interest.

7. We may now examine whether the damages claimed by the Corporation is sustainable in law. In I.C. 19 of 2001 an amount of Rs. 13,286/- was demanded by way of damages from the applicant. Insurance Court took the view that damages can be imposed only when the party has acted either deliberately or in defiance of law, or was guilty of contumacious or dishonest conduct, or acted in conscious disregard of his obligation. Damages are claimed u/s 85(B) of the ESI Act 1948 which is extracted herein for easy reference:

85B. 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 u/s 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 or u/s 45C to Section 451.

Regulation 31C deals with rate of damages to be paid by an employer who fails to pay contributions within the specified period. Regulation 31C is extracted

below for easy reference:

31C. Damages or contributions or any other amount due, but not paid in time :
An employer who fails to pay contributions within the periods specified under:

-----	Period of
delay Rate of damages in % per annum of the amount due.	
-----	(i) Upto 2
months 5%	(ii) 2 months and above but less than 4 months 10%
(iii) 4 months	and above but less than 6 months 15%
(iv) 6 months and above 25%	-----

Provided that the Corporation, in relation to a factory or establishment which is declared as sick industrial company and in respect of which a rehabilitation scheme has been sanctioned by the Board for Industrial and Financial Reconstruction, may:

(a) in case of a change of management including transfer of undertaking(s) to worker(s) Co-operative or in case of merger or amalgamation of sick industrial company with a healthy company, completely waive the damages levied or leviable.

(b) in other cases, depending on its merits, waive upto 50 per cent damages levied or leviable;

(c) in exceptional hard cases, waive either totally or partially the damages levied or leviable.

Section 85B was amended by Act 29 of 1989 and the following words were inserted, "from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the regulations". We may in this connection refer to unamended Section 85B for easy reference:

85B. 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 such damages, not exceeding the amount of arrears as it may think fit to impose;

Provided that before recovering such damages; the employer shall be given a reasonable opportunity of being heard.

(2) Any damages recoverable under Sub-section (1) may be recovered as an arrear of land revenue.

Interpreting the unamended provision, a Division Bench of this Court in 1988 (2) KLT 280 (supra) took the view that since the failure to carry out the statutory obligation should be adjudicated by a quasi judicial enquiry, and the levy of damages is quasi penal in character, such damages will not ordinarily be imposed unless the party obliged to pay the amount due, acted either deliberately or in defiance of law, or was guilty of contumacious or dishonest conduct, or acted in

conscious disregard of its obligation. This Court also noticed that the statutory provision does not prescribe any minimum to be recovered as damages and what is provided is the maximum that can be recovered. Regulation 31C was added by notification dated 6th December, 1991 and therefore an employer who fails to pay contributions within the period specified will have to pay damages as specified in that notification, with the result that the Corporation cannot act arbitrarily and claim any amount by way of damages. Corporation is statutorily bound to comply with Regulation 31C while demanding any amount by way of damages.

7. Section 85B confers discretion on the Corporation either to recover the damages or not to recover the damages by way of penalty. The statute has used the expression "may recover" which is generally discretionary. If a provision is mandatory an act done in breach thereof will be invalid but if it is discretionary the act will be valid although the non-compliance may give rise to some other penalty if provided by the statute. Failure to pay contributions would not automatically attract penalty by way of damages. Nonpayment of statutory contribution amounts to civil wrong which can be claimed by way of damages. Damages are the pecuniary recompense given by due process of law. There cannot be any straight forward formula in what all cases damages could be claimed by way of penalty from an employer who fails to pay ESI contribution. It depends upon facts and circumstances of each case. A provision to impose a penalty does not necessarily convey the penalty be imposed in all cases. It is trite law that a penalty provision is distinguished from a provision creating an offence does not attract the rule of principle of mens rea and it is generally sufficient to prove that a default in complying with the provision of the Act for which the penalty is provided has occurred. As rightly held by the Division Bench of this Court in *ESI Corporation v. Bhaskaran* 1998(1) KLT 28 (case No. 24) that since the failure to carry out the statutory obligation should be adjudicated by a quasi judicial enquiry and the levy of damages is quasi penal in character, such damages will not ordinarily be imposed unless the party obliged to pay the amount due, acted either deliberately or in defiance of law, or was guilty of contumacious or dishonest conduct, or acted in conscious disregard of its obligation. Statute says that damages could be demanded only by way of penalty.

8. Under the above mentioned circumstances we find no error in the order passed by the Insurance Court interfering with the order demanding damages by way of penalty. Appeals are allowed with regard to the claim for interest alone.