

(2012) 02 MAD CK 0256
In the Madras High Court
Case No : C.M.A. (MD) No. 38 of 2012

Employees' State Insurance Corporation	APPELLANT
Vs	
M/s. Hafeez Motor Transport	RESPONDENT

Date of Decision : 14-02-2012

Acts Referred:

Employees State Insurance (General) Regulations, 1950 — Regulation 31, 31A, 31C
Employees State Insurance Act, 1948 — Section 18B, 45A, 85B

Citation : (2012) 3 LLJ 819 : (2012) LLR 471

Hon'ble Judges : R. Subbiah, J

Bench : Single Bench

Advocate : K.C. Ramalingam, for the Appellant; M. Ajmal Khan, for the Respondent

Final Decision : Dismissed

Judgement

R. Subbiah, J.—Challenging the order dated 18.5.2011 passed by the E.S.I. Court (Labour Court), Madurai, in E.S.I. O.P. No. 32 of 2010, reducing the quantum of damages awarded u/s 8SB of the Employees' State Insurance Act, the Employees' State Insurance Corporation, has filed the present appeal. The case, in brief, is as follows:

The respondent, viz., M/s. Hafeez Motor Transport is a registered partnership firm and is engaged in the small business of transport operating mofussil and city bus service in and around Pudukottai area. The respondent is having 18 employees under various categories. The respondent has covered all the eligible employees under the provisions of the Employees' State Insurance Act ("ESI Act") and had been remitting both employees and employer ESI contributions to the appellant Corporation regularly. While so, the appellant Corporation issued two C-18 (Adhoc) notices dated 30.6.1999 and 18.7.2003, demanding ESI contributions from the respondent. Subsequently, the said notices were cancelled and the appellant Corporation issued a fresh notice in C-18 (Actual basis) dated 19.12.2003 demanding a sum of Rs. 1,78,798 towards ESI Corporation on

amounts paid during the period from October.1997 to March, 2003, without affording an opportunity of personal hearing. Apart from that, the appellant Corporation had initiated revenue recovery proceedings straightway even without affording a personal hearing and had issued a notice in Form C-19 dated 31.3.2004. The respondent challenged the said notice before the Principal Labour Court, Chennai, in ESI OP No. 312 of 2004. The appellant Corporation entered appearance in the above case and after full-fledged trial, the Labour Court remitted the matter to the ESI Authority to determine the contribution by giving reasonable opportunity of hearing to the respondent, in accordance with law. Pursuant to the said order, the appellant issued a fresh demand notice dated 7.12.2007 and also granted personal hearing. In the meantime, the respondent, even before attending the personal hearing, had remitted a total sum of Rs. 78,798 by way of two demand drafts of Rs. 50,000 and Rs. 28,798 along with a covering letter. Thereafter, the respondent attended the personal hearing and made their submissions.

2. After hearing the parties, the appellant passed an order dated 25.3.2008 u/s 45A of the ESI Act, directing the respondent to pay ESI contribution of Rs. 1,77,500 during the period October, 1997 to March, 2003. In the meantime, the respondent had remitted Rs. 50,000 through a demand draft dated 30.6.2008 along with a covering letter. Thus, the respondent had remitted a total sum of Rs. 1,28,798 towards ESI contributions. Thereafter, the appellant Corporation by its notice in form C-19 dated 27.11.2008, had authorised the recovery officer to recover a sum of Rs. 48,702 towards ESI contribution along with interest. The Recovery Officer of the appellant Corporation by its proceedings dated 3.12.2008 had threatened to initiate distraint proceedings and demanded Rs. 61,134. The respondent by its letter dated 12.3.2009 had remitted the ESI contribution of Rs. 48,702; but the appellant Corporation by its notice of demand dated 20.3.2009 had demanded Rs. 14,530 with interest and accordingly, the respondent by its letter dated 13.4.2009 sent a demand draft for Rs. 14,530 to the appellant. Thus, the respondent had duly paid the contribution determined by the appellant corporation.

3. It is the further case of the respondent that subsequently, the appellant issued a notice in Form D-18 dated 2.6.2010, proposing to levy damages of Rs. 2,75,246. Pursuant to the (sic) (sic), the respondent had also attended a personal hearing and filed the statement of objections on 14.6.2010. Thereafter, the appellant Corporation passed an order dated 24.6.2010 u/s 85-B imposing damages at Rs. 1,77,489 for the delayed payment of contributions for the wage period from October, 1997 to March, 2003.

4. Challenging the said notice, the respondent had filed ESI OP No. 32 of 2010 before the ESI Court (Labour Court), Madurai, stating that the appellant Corporation, instead of appreciating the attitude of the respondent for duly remitting the determined contribution and the alleged interest for belated remittance, had issued notice determining damages of Rs. 1,77,489; that the

respondent had also attended the personal hearings and explained about the non-liability of the damages; that if the employer had remitted contributions as well as interest, the damages should not be levied; that the appellant Corporation has to prove the existence of mens rea or actus reus to contravene the statutory provisions; that the ESI contributions were paid only in accordance with the determination made by the appellant u/s 45A; and that further order levying damage u/s 85B is arbitrary and unjust.

5. The case of the respondent was countered by the appellant corporation by filing a detailed counter, inter alia, stating that the demand in Form D-18 notice to the tune of Rs. 2.75,246 was reduced to Rs. 1,77,489- The damages are levied as per the statutory provisions of the Act. Since the employer had failed to pay the contribution for the period from 10/97 to 3/2003, there is a clear contravention and hence, the awarding of damages is justified. Under those circumstances, the respondent is not entitled to get any relief. Thus, they prayed for the dismissal of the petition.

6. In order to prove the claim, on the side of the respondent, 13 documents were marked as Ex.A-1 to A-13 and no oral evidence was adduced. Neither oral nor documentary evidence was adduced on the side of the appellant Corporation. The ESI Court, after analysing the entire evidence, has come to the conclusion that the respondent had not voluntarily delayed the payments and though there was a delay in paying the amount, the respondent had bona fide paid the amount; the intention of the respondent is not to evade the payment of contribution; and thus, it has reduced the damages to 16%. Aggrieved over the same, the present appeal has been filed by the ESI Corporation.

7. Learned counsel for the appellant Corporation submitted that awarding of damages is a discretionary jurisdiction conferred on the statutory authority. Section 85-B is an enabling provision to award damages. The authority below, by exercising discretion, awarded damages u/s 85-B for delayed payment of contribution and no reason was assigned by the ESI Court for reducing the damages to 16%. When a statutory authority exercises its discretionary jurisdiction conferred on them under the Act, the interference made by the ESI Court without assigning any valid reason, is not correct. Even if the court comes to the conclusion that the discretion was not properly exercised by the authority below, it ought to have remanded the matter to the statutory authority. Instead of doing so, the ESI Court has reduced the damages to 16%, which is not legally sustainable. In this regard, the learned counsel relied on the decision reported in Regional Director, Est Corporation, Thrissur v. Managing Director, Transmatic Systems Ltd., Trivandrum, 2006-II-LLJ 990 and submitted that the delayed payment would not help the employer to challenge the damages claimed u/s 85-B of the ESI Act.

8. Per contra, the learned counsel for the respondent partnership firm, by inviting the attention of this Court to the Regulation 31C of the Employees' State Insurance (General) Regulations, submitted that awarding of damages for the

amount due not paid within time is not mandatory and it is only discretionary. In the instant case, by its order dated 24.6.2010 passed u/s 85-B, the authority below has come to the conclusion that the delay in payment of amount is not intentional. After having come to that conclusion, there is no justification in awarding of damages. Under such circumstances, the ESI court has ample power to make an interference in the order passed by the authority below. The learned counsel has relied on the decisions reported in *Madras Hotel Ashoka (Pvt) Ltd. v. E.S.I.C.*, 1994 (1) LJ 495, *Regional Director, E.S.I. Corporation v. Sakthi Tiles*, 1994 (3) LLJ 1197 *Emp. State Insurance Corporation Vs. H.M.T. Ltd.* and *Another*, , and prayed for the confirmation of the order passed by the Tribunal.

9. In view of the submissions made by the learned counsel on either side, the short question that has to be decided in this appeal is, whether the interference made by the ESI Court by reducing the damages awarded by the statutory authority, is justifiable when the authority below is having discretionary power to award the damages?

10. It is the case of the appellant Corporation that from 1983 onwards, the respondent has been paying the contribution regularly and there was a default from 10/07 to 03/03 and thereafter, the said contribution was paid belatedly and since there was a delay in payment of the contribution amount, the authority below, by exercising its discretionary power, awarded damages u/s 85B of the ESI Act. But it is the submission of the respondent that awarding of damages cannot be construed as imperative in all circumstances since the award of damages is not a mandatory and it is only a discretionary. In this regard, it would be appropriate to extract the relevant regulation hereunder:

31C. Damages or contributions or any other amount due, but not paid In time:- If an employer fails to pay contributions within the periods specified under Regulation 31, or any other amount payable under the Act, the corporation may recover damages....

11. A reading of the said regulation would show that awarding of damages for the amount not paid within the time is only a discretionary of the authority and not mandatory. Further I find that, only payment of interest on the delayed payment is mandatory, under Regulation-31A. In the instant case, the respondent had paid the contributions with interest as claimed by the appellant Corporation. Thereafter, the Corporation had issued notice u/s D-18 and after affording an opportunity to the respondent, passed an order u/s 85-B of the Act awarding damages by exercising its discretionary jurisdiction. Now, the question that has to be decided is once the discretionary jurisdiction is exercised by the statutory authority whether the interference made by the ESI Court is justifiable. For this question, the judgment relied upon by the learned counsel for the respondent reported in 1994 1 LLJ 495 (supra) (*Madras Hotel Ashoka (Pvt) Ltd.*'s case) gives a fitting answer and the relevant paragraph is extracted hereunder:

9. A Division Bench of this Court in Beama Manufacturers (P) Ltd. Vs. Regional Director, ESI Corporation, has held that in the matter of levy of damages u/s 85B of the Act, which is penal in nature, the authority concerned is duty bound to act in a judicious manner to determine the question after assessment of all the relevant factors and not in a cursory manner. A Division Bench of the Karnataka High Court has also pointed out in Hind Art Press, Mangalore Vs. E.S.I. Corporation and Another, , that Section 85 of the employees' State Insurance Act is both compensatory as well as penal in nature and is intended to enforce discipline on the management of establishments covered by the Act (p. 197), In E.S.I.C. v. Sakthi Tiles, (1988) 2 LLN 468 the question whether the E.S.I. Court has jurisdiction to reduce the damages levied by the E.S.I. Corporation for delay in payment of contribution by employer came up for consideration. A Division Bench of the Kerala High Court has held that a mere look at Section 85B of the Employees' State Insurance Act will show that even where the employer fails to pay the amounts due in respect of any contribution payable under the Act, it is not obligatory on the Corporation to levy or recover damages. The power to levy damages is discretionary. The section has only stated the maximum amount that can be so recovered. The power to levy and recover damages provided in Section 85-B of the Act is in the nature of a quasi-penal provision. The proviso to Section 85-B itself indicates that, before recovering such damages, the employer should be given a reasonable opportunity of being heard. It postulates that there should be an adjudication in the matter. Since the failure to carry out the statutory obligation should be adjudicated by a quasi-judicial enquiry, and the levy of damages is 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. The mere fact that the Corporation is empowered to recover damages, does not mean that the Corporation can act mechanically and without taking into account the facts and circumstances of each case. It is to be noted that the statutory provision does not prescribe any minimum to be recovered as damages. What is provided is the maximum that can be recovered. Since the opportunity that is provided before recovering the damages should be effective and meaningful, the authority empowered to levy damages, should have the discretion either to levy the damages or to dispense with the levy of the damages. The Corporation will not be justified in levying the damages in cases where the employer, or the person who is bound to pay the amount in respect of the contribution payable in this regard, is able to offer sufficient or cogent explanation for non-remittance, or in cases where there is only a technical or venial breach of the provision of the Act, or there exists bona fide, circumstances, which will point out that there was no deliberate omission on the part of the employer. In this perspective, it has to be held that the Insurance Court, which is a proper forum prescribed by the Act to adjudicate as to whether the order or proceeding initiated by the Corporation to recover damages is justified, can evaluate the entire matter, and if it is satisfied that there are extenuating circumstances, it can dispense with the recovery of damages, (sic)

delete or reduce the quantum of damages levied or afford such other relief, which in its opinion, is deserving in the circumstances.

12. In 1994 3.LLJ 1197, the Kerala High Court has held as follows:

2....., The only question focused was that the Insurance Court cannot interfere with the quantum of damages. A mere look at Section 85B will show that even where the employer fails to pay the amounts due in respect of any contribution payable under the Act, it is not obligatory on the Corporation to levy or recover damages. The power to levy damages is discretionary. The section has only stated, the maximum amount that can be so recovered. The power to levy and recover damages provided in Section 85B of the Act is in the nature of a quasi-penal provision. An order levying damages for failure to pay the amount due in respect of any contribution payable under the Act, is a quasi-judicial proceeding.....

13. In *Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another*, , the Hon"ble Apex Court has held as follows:

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 situations. Such an intention on the part of the legislature is not decipherable from Section 85B of the Act. When a discretionary jurisdiction has been conferred on a statutory 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, under the statute is held to be mandatory in character.

22. In *M/s. Prestolite of India Ltd. Vs. The Regional Director and another*, this Court rejected a contention raised by the Regional Director of Employees' Insurance that under the Employee's State Insurance General Regulations guidelines have been indicated showing as to how damages for delayed payment are to be imposed and since such guidelines have been followed, no exception should be taken thereto made to the impugned adjudication, stating:

"Even if the regulations have prescribed general guidelines and the upper limits at which the imposition of damages can be made, it cannot be contended that in no case, the mitigating circumstances can be taken into consideration by the adjudicating authority in finally deciding the matter and it is bound to act mechanically in applying the uppermost limit of the table. In the instant case, it appears to us that the order has been passed without indicating any reason whatsoever as to why grounds for delayed payment were not to be accepted. There is no indication as to why the imposition of damages at the rate specified in the order was required to be made. Simply because the appellant did not appear in person and produce materials to support the objections, the employee's case could not be discarded in limine. On the contrary, the objection ought to have been considered on merits.

23. In *Dilip N. Shroff Karta of N.D. Shroff Vs. Joint Commissioner of Income Tax, Special Range Mumbai and Another*, , this Court stated:

40. Thus, it appears that there is distinct line of authorities which clearly lays down that in considering a question of penalty, mens rea is not a relevant consideration. Even assuming that when the statute says that one is liable for penalty if one furnishes inaccurate particulars, it may or may not by itself be held to be enough if the particulars furnished are found to be inaccurate is anything more needed but the question would still be as to whether reliance placed on some valuation of an approved valuer and, therefore, the furnishing of inaccurate particulars was not deliberate, meaning thereby that an element of mens rea is needed before penalty can be imposed, should have received serious consideration in the (light of a large number of decisions of this Court.

24. We agree with the said view as also for the additional reason that the subordinate legislation cannot override the principal legislative provisions.

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 be held to providing for mandatory imposition of penalty, if the proceeding is an adjudicatory one or compliance of 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.

27. The Division Bench of the High Court, therefore, in our opinion, was not wrong in opining that Section 85B provides for an enabling provision. What, however, cannot be appreciated that is such a construction itself would lead to the conclusion that the High Court is entitled to substitute its view in place of the statutory authority. In our considered view, therefore, the matter should be considered afresh for determination of quantum of damages etc. in the light of the observations made hereinbefore

A reading of the above judgments would show that ESI Court as an appellate authority is a proper forum to look into the correctness of the discretionary jurisdiction exercised by the statutory authority. The discretionary jurisdiction has to be exercised by the statutory authority as to whether there is any existence of mens rea or actus reus to contravene the statutory provision on the part of the employer or not? In the Instant case, the statutory authority itself observed in its order that there was no intention on the part of the respondent to evade the contribution. Further, I find that a litigation is also pending between the respondent and the appellant Corporation for a long time. Under such circumstances, I do not find any infirmity in the interference made by the ESI

court in the discretionary jurisdiction exercised by the statutory authority on a finding that the delay in payment of contribution is not intentional. When exercising of discretionary jurisdiction is not imperative on the part of the appellant Corporation in all cases, I am unable to see any illegality in the interference made by the ESI Court. For the foregoing reasons, the appeal fails and, accordingly, the same is dismissed. No costs.