
(2008) 07 MP CK 0024
In the Madhya Pradesh High Court

Employees' State Insurance Corporation	APPELLANT
Vs	
Reliable Carriers Private Ltd.	RESPONDENT

Date of Decision : 31-07-2008

Acts Referred:

Employees State Insurance Act, 1948 — Section 39, 40, 45C, 45I, 75

Citation : (2008) 119 FLR 1133 : (2008) ILR (MP) 2973 : (2009) 2 LLJ 369 :
(2008) 5 MPHT 88 : (2008) 3 MPJR 393 : (2009) 1 MPLJ 265

Hon'ble Judges : U.C Maheshwari, J

Bench : Single Bench

Final Decision : Allowed

Judgement

U.C. Maheshwari, J.

This appeal is directed by the appellant Corporation u/s 82 of Employees State Insurance Act, 1948 (in short "the Act") being aggrieved by the order dated 27-3-2002 passed by the ESI-cum-Labour Court No. 1, Bhopal in Case No. 28/ESI/94 whereby quashing the notice/order bearing No. 1117, dated 16-9-1994 issued by the appellant against the respondent for recovery of damages Rs. 49,607/- imposed on account of failing in depositing the contribution within the prescribed period by the respondent, such 100% amount of damages is reduced to 25% with a direction to deposit the same within one month.

The facts giving rise to this appeal in short are that the respondent being registered Private Ltd. Company is involved in transport business, filed an application u/s 75 of the Act in the Tribunal contending that in accordance the order of the appellant bearing No. 3295, dated 22-7-1987, directing to deposit the contribution Rs. 49623/- for the period of 1-2-1982 to 31-7-1984, the same was deposited on its behalf in seven different installments between 31-7-1987 to 9-4-1991 as described in Para 2 of it. As per further averments due to financial crisis the directed sum of the contribution was not paid lump sum and the prayer permitting it to pay the same in the installments. The same was never refused by the appellant. But on receiving the recovery order of damages issued by

Tehsildar, Bhopal the respondent shocked. As such the damages was imposed 100% equal to the contribution which was already paid to the appellant. Such imposition of damages is illegal and against the rules of natural justice, thus the appellant is not entitled to recover the same. It is also pleaded that the delay in payment the contribution has been caused due to financial crisis and not deliberately or with any malafide intention. Before imposition of such damages the opportunity of hearing in this regard was also not extended to the respondent and without considering the financial crisis of the applicant under the garb of Section 85-B of the Act arbitrarily and illegally the order of imposition 100% damages on contribution was passed. The same was known to the respondent on receiving the aforesaid recovery notice dated 16-9-1994 on 24-9-1994 with these averments the prayer for setting aside the order of imposition the damages is made.

On the other hand the case of the appellant in short is that in spite giving the intimation to the respondent time to time for depositing its contribution the same was not deposited in the prescribed period. It is also denied that due to poor financial condition, the respondent could not deposited it's contribution within prescribed period. In fact taking into consideration the conduct of respondent 100% penalty on such contribution was rightly imposed in accordance with the prescribed procedure and the same is to be legally recovered. In such premises the prayer for dismissal of the petition is made.

In view of the pleading of the parties as many as two issues were framed by the ESI Court. On extending the opportunity to the parties for adducing the evidence one Shafi Mohd. Khan was examined on behalf of the respondent. On appreciation the aforesaid sum of the damages imposed by the appellant is reduced from 100% to 25% on the contribution with a direction to deposit the same within one month. Being dissatisfied with this reduction the appellant's authority has come forward with this appeal with a prayer to restore it's order by setting aside the aforesaid order of ESI Court.

This appeal was admitted vide order dated 26-9-2007 on following substantial question of law, which is to be answered by this Court:

(i) Whether the Labour Court was justified in law while reducing the quantum of damages ignoring the provision of Section 85-B read with Sections 39 and 40 of the Employees State Insurance Act? If so, its effect.

Shri Brahmddatt Singh and Anubhav Jain, learned Counsel for the appellant by referring the various provisions of the Act as well as the Employees Regulation, 1950 (in short "the Regulation") argued that the respondent being principal employer was bound to deposit its contribution within the prescribed period from its due date, if the same was not paid during such period then the respondent was liable to pay interest on such sum as prescribed under the law till the date of its actual payment. He further said that where the employer has failed to deposit the contribution payable under the Act then by virtue of Section 85-B of the Act

the authority of the appellant was empowered to impose the damages as per the provision of Regulation 31-C and in such provision before imposition of the damages a notice dated 22-3-1994 was given to the respondent for extending the opportunity of hearing in that regard. The same was served on dated 9-4-1994. But the same was not replied, on which taking into consideration the delay of four years in depositing the contribution the damages @ 25% per annum was imposed under the aforesaid provisions, and in compliance of it the recovery order dated 16-9-1994 by referring the aforesaid notice dated 22-3-1994, in which the description and particulars regarding due dates for depositing the contribution and the actual date on which the payment was made by the respondent are specifically mentioned. According to which it is clear that respondent failed to deposit the requisite contribution as per provision of Regulation 31 and no sufficient explanation has been put forth by the respondent in this regard. Thus, by imposing the damages the recovery notice of the same was rightly issued by the appellant. In such premises there was no occasion before the ESI Court to reduce the amount of damages but contrary to it without passing any speaking order the sum of the damages has been reduced from 100% to 25%, with these submission he prayed to answer the question in it's favour and setting aside the impugned order with restoring the order of the appellant imposing the damages and it's recovery order by allowing this appeal.

The respondent was duly served and represented but no one has appeared on its behalf to respond the aforesaid argument.

Having heard the Counsel after perusing the record and the impugned order, I am of the view that ESI Court has committed grave error in setting aside the order passed by the authority of the appellant imposing the damages on the respondent; under the provision of Section 39 read with Section 85-B of the Act read with its Regulation 31-C because of the following reasons.

As per provision of Sections 39 and 40 of the Act the employer is bound to deposit its contribution within the prescribed period and as directed by the Regulation 31, if the employer is failed to deposit such contribution within such period then he shall be liable to pay the simple interest @ 12% p.a. as per Regulation 31-A. Besides the aforesaid on failing the employer in depositing the contribution or any other amount then by virtue of Section 85-B of the Act read with Regulation 31-C he shall be liable to pay the damages @ prescribed under the aforesaid Regulation 31-C.

Before proceeding further I would like to reproduce the provision of Sections 39 and 85-B of the Act as ready reference. The same are read as under:

39. Contribution.-

(1) The contribution payable under this Act in respect of an employee shall comprise contribution payable by the employer (hereinafter referred to as "the employer's contribution") and contribution payable by the employee (hereinafter referred to as "the employee's contribution") and shall be paid to the

Corporation.

(2) The contributions shall be paid at such rates as may be prescribed by the Central Government:

Provided that the rates so prescribed shall not be more than the rates, which were in force immediately before the commencement of the Employees' State Insurance (Amendment) Act, 1989.

(3) The wage period in relation to an employee shall be the unit in respect of which all contributions shall be payable under this Act.

(4) The contributions payable in respect of each wage period shall ordinarily fall due on the last day of the wage period, and where an employee is employed for part of the wage period, or is employed under two or more employers during the same wage period, the contributions, shall fall due on such days as may be specified in the regulations.

(5)(a) If any contribution payable under this Act is not paid by the principal employer on the date on which such contribution has become due, he shall be liable to pay simple interest at the rate of twelve per cent, per annum or at such higher rate as may be specified in the regulations till the date of its actual payment:

Provided that higher interest specified in the regulations shall not exceed the lending rate of interest charged by any scheduled bank.

(b) Any interest recoverable under Clause (a) may be recovered as an arrear of land revenue or u/s 45-C to Section 45-I.

Explanation: In this sub-section, "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934).

85-B. 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 recovery under Sub-section (1) may be recovered as an arrear of land revenue.

The Regulations 31 and 31-C enacted u/s 97 of the Act are read as under:

31. Time for payment of contribution.-

An employer who is liable to pay contributions in respect of any employee shall pay those contributions within 21 days of the last day of the calendar month in

which contribution falls due:

Provided that where a factory/establishment is permanently closed, the employer shall pay contribution on the last day of its closure.

31-A. *** ** 31-B. *** ** 31-C. 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 Regulation 31 or any other amount payable under the Act, shall be liable to pay damages as under:

Period of delay Rate of damages in % per annum of the amount due

(i) Upto two months 5%

(ii) two months and above but less than 4 months 10%

(iii) four months, and above but less than six months 15%

(iv) six 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 up to 50 per cent damages levied or leviable;

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

In view of the aforesaid on examining the case at hand, it is apparent that before imposition of the damages for extending the opportunity of hearing a show-cause notice dated 22-3-1994 was issued by the authority of the appellant to the respondent, on the back side of such notice the due dates for payment of contribution and the actual date of the payment were mentioned. According to such statement the requisite amount contributions was deposited by the respondent after four to seven years delay from the due dates of such payment. As per acknowledgment receipt available on record such notice was served on 9-4-1994, in spite it the same was not replied on behalf of the respondent. Thus, considering the circumstance by virtue of the aforesaid provisions the authority of the appellant imposed the damages Rs. 49,607, vide order dated 25-5-1984 against the respondents, such damages was imposed in respect of the non-depositing the contribution between the period 2/82 to 7/84. In such premises it

could not be said that such damages was imposed contrary to any provision or without extending the opportunity of hearing to the respondent. On the contrary it is apparent that aforesaid order imposing the damages was passed in consonance of above mentioned Section 85-B of the Act read with Regulations 31 and 31-C enacted u/s 97 of the Act.

The Tribunal ought to have taken into consideration the aforesaid show-cause notice dated 22-3-1994 and particulars mentioned on it's back side regarding due date of the payment of contribution and actual dates of such deposit but on perusing the impugned order I have not found the facts showing that averments of such notice are taken into consideration by the ESI cum Labour Court. In last paragraph of the impugned order without any foundation it is stated that damages have been imposed without extending any opportunity of hearing to the respondent and also without taking into consideration the poor financial condition of the respondent Company. The same are apparently contrary to the aforesaid available record and the aforesaid provision of Section 85-B of the Act read with Regulations 31 and 31-C. In fact the case of the respondent was also not covered under any of the proviso or exception of aforesaid provisions. So apparently the Tribunal has committed grave error in setting aside the order passed by the appellant's authority for imposing the 100% damages. In such premises it is established that the impugned order is passed not only without taking into consideration the record but also without application of mind in other words it could not be termed to be speaking order. In such premises the same is not sustainable under the law.

As per provision of Section 85-B of the Act if the employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, and his case is not covered by any proviso or exception of the provisions then the Corporation may recover from the employer, such damages not exceeding the amount of arrears as it think fit to impose. But the same shall be recovered after giving the reasonable opportunity of being heard to the employer.

As per provision of the Regulation 31-C if the employer fails to pay the contribution under Regulation 31 or any other amount payable under the Act shall be liable to the damages as mentioned in such regulation. According to Regulation 31-C if period of delay up to two months then 5% p.a. damages shall be payable and if such delay is more than two months but less than four months then damages shall be payable @ 10% p.a., if such delay is more than four months and less than six months then same shall be @ 15% p.a. and if such delay is more than six months then employer shall be liable to pay the damages @ 25% p.a. on the contribution and such other sum. In such premises it appears that taking into consideration the delay of four years in depositing the contribution the appellant has not committed any error in imposing the damages @ 25% p.a. Thus the order of the appellant could not be interfered by the ESI Court. In such premises such Court has committed error and perversity in allowing the appeal and reducing the sum of damages mentioned in the recovery

order from 100% to 25%. Hence, the order of ESI Court is not sustainable and deserves to be set aside. Accordingly the substantial question of law is answered in favour of the appellant and against the respondent.

Therefore, by allowing this appeal the impugned order is hereby set aside and the order of Appellate Authority for imposing the damages and in pursuance of it issued recovery notice dated 16-9-1994, served on 29-4-1994 are hereby restored and respondent is directed to deposit such sum within thirty days otherwise the same shall be recovered as per prescribed procedure of law. In the facts and circumstances of the case, there shall be no order as to the costs.

Appeal is allowed as indicated above.