

**(1999) 07 KL CK 0022**  
**In the High Court Of Kerala**  
**Case No : M.F.A. No. 1649 of 1994**

E.S.I. Corporation

APPELLANT

Vs

Hindustan Tile Works

RESPONDENT

**Date of Decision :** 09-07-1999

**Acts Referred:**

Employees State Insurance Act, 1948 — Section 75(1), 85B

**Citation :** (2000) 1 LLJ 425

**Hon'ble Judges :** P.A. Mohammed, J;M.R. Hariharan Nair, J

**Bench :** Division Bench

**Advocate :** T.P.M. Ibrahim Khan, for the Appellant;

**Final Decision :** Dismissed

## **Judgement**

M.R. Hariharan Nair, J.—The E.S.I. Corporation challenges the order passed by the Employees' State Insurance Court, Kozhikode whereby the penalty imposed u/s 85B of the E.S.I. Act on the respondent herein was reduced from Rs. 62,070/- to Rs. 10,000/-.

The respondent herein committed delay in payment of contribution due to it for various wage periods from October 1991 to July 1993. Ext. P1 show cause notice was hence issued proposing imposition of damages. That was followed by an opportunity for personal hearing on September 27, 1995. Ext P2 representation was submitted by the respondent during the personal hearing, but after considering it, the proposal contained in Ext. P1 was confirmed and the penalty of Rs. 62,070/- was imposed.

2. The E.S.I. Court considered the question of propriety of this penalty in the light of the provisions in Section 85-B of the Act as also of the decision in Regional Director, E. S. I. Corporation v. Sakthi Tiles 1988 (2) KLT 280 and passed the impugned order. According to the learned counsel for the appellant, the reduction of penalty ordered by the E.S.I. Court is totally unjustified and the Court was not invested with the power to grant any such reduction. It was

argued before us that after the amendment of the E.S.I. Act by Act 29/1989 adding the second proviso to Section 85-B, there was justification for reduction or waiver of penalty only in the contingencies mentioned in the said proviso and that after the said amendment the decision in *Regional Director, E. S. I. Corporation v. Sakthi Tiles*, (supra) had no applicability at all.

3. On detailed consideration of the arguments raised by both sides, we are not convinced that there is any merit in the aforesaid contention of the appellant. The first contention that the E.S.I. Court had no jurisdiction to adjudicate the matter has no merit in view of the specific provisions in Section 75(1)(g) of the Act which empowers the Court to adjudicate on any dispute on any matter which is in dispute between a principal employer and the Corporation, in respect of any contribution or benefit or other dues payable or recoverable under the Act or any other matter required to be or which may be decided by the Employees' Insurance Court under the Act. The penalty contemplated in Section 85-B definitely falls under "other dues" contemplated in the aforesaid provision and as such the Employees' State Insurance Court had full jurisdiction to decide the issue.

4. The other contention that the second proviso to Section 85-B introduced under 29/1989 nullifies the decision in *Regional Director E.S.I. Corporation v. Sakthi Tiles* (supra) also has to fail. Section 85-B(1) of the E.S.I. Act, as it originally stood, provided as follows:

"(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."

The question considered by the Division Bench of this Court in the aforesaid decision 1988 (2) KLT 280 was whether u/s 85-B of the Act, the Corporation should invariably impose penalty equal to the amount of arrears or whether a reduction can be allowed by the E.S.I. Court. The contention of the Corporation raised before the Bench which decided that case and raised in the instant case also was that there was no scope for any such reduction and that it was mandatory that an amount equal to the arrears should be recovered as penalty. After considering the question, this Court pronounced as follows:

"A mere look at Section 85-B 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. 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. 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 adduced by a quasi-judicial enquiry, and the levy of damages is quasi-penal in character, we are of the view that 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. We are of the view, that 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, we hold 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, or delete or reduce the quantum of damages levied or afford such other relief, which in its opinion, it deserved in the circumstances."

6. It is true that after pronouncement of the said decision on June 10, 1988, the Act underwent an amendment through Act 29/1989 whereby the following 2nd proviso was added:

"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."

7. The said second proviso, no doubt, provides for reducing or waiving of the damages recoverable under the section in relation to an establishment which is a sick industrial company if it satisfies the other conditions. The question that arises for decision in the case now is whether the said proviso which is in the

form of an explanation, is only clarificatory in nature or whether it mandates that only in the case of a sick industrial company of the above category, the discretion to reduce the penalty is left to the Corporation. A plain reading of the proviso makes it clear that it is clarificatory in nature and that it does not exclude the discretion to pass appropriate orders after getting the explanation of the employer concerned pursuant to the notice issued under the first proviso.

8. It is the significance and impact of the first proviso that was considered in *Regional Director, E.S.I. Corporation v. Sakthi Tiles*, (supra) and that provision has not undergone any substantial change even after the amendment. The necessity to hear the employer and the discretion to pass order for penalty for such amount "not exceeding" the amount of arrears as may be specified in the regulations, still persists. In the circumstances, the need to apply mind on the contentions raised in the reply of the employer pursuant to the notice under the first proviso and discretion to decide the quantum of penalty to be imposed u/s 85-B of the Act still subsists and that power and discretion remain unaffected even after the incorporation of the second proviso. We are, therefore, of the view that the interference made by the E.S.I. Court in the instant case is well justified.

9. As far as the decision to reduce the amount is concerned, the E.S.I. Court has taken into consideration the contention of the employer that there was a change of partnership; that the firm had accumulated loss; that it had financial difficulties and that these were the reasons for the delay in payment. These reasons which found justification with the E.S.I. Court are definitely valid excuses for the non-payment of the contribution in time. In the circumstances, there are certainly every reason to reduce the penalty amount from the maximum. We are of the view, in the circumstances of the case, that the reduction ordered by the E.S.I. Court with regard to the penalty is fully justified. The appeal is hence without merit and it is accordingly dismissed.