

(1979) 09 KL CK 0017
In the High Court Of Kerala
Case No : M.F.A. 438 of 1978

E.S.I. Corporation

APPELLANT

Vs

Miecos Ltd.

RESPONDENT

Date of Decision : 20-09-1979

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B
Employees State Insurance Act, 1948 — Section 45B, 84, 85, 85A, 85B

Citation : (1979) 09 KL CK 0017

Hon'ble Judges : P. Subramonian Poti, J;P. Janaki Amma, J

Bench : Division Bench

Advocate : C. Sankaran Nair, for the Appellant; U.K. Ramakrishnan, T.K. Jayaram and P. Vijayamma, for the Respondent

Final Decision : Allowed

Judgement

Subramonian Potti, J.—Section 85B of the Employees' State Insurance Act, 1948 empowers the Employees' State Insurance Corporation to recover from the employer such damages not exceeding the amount of arrears as it may think fit to impose. Is the damages that could be so imposed conceived as compensation for the actual loss caused to the Corporation. That is the question that is posed before us by learned Counsel for the Corporation, Sri Sankaran Nair.

2. Four orders of imposition of damages u/s 45B were challenged by the Respondent before the Insurance Court, Alleppey and the court has chosen to accept the challenge on the only ground that the Corporation "has not adduced an iota of evidence in order to prove that inconvenience was caused either to the Corporation or to the beneficiaries because of the delay committed by the applicant in paying the amounts due to the Corporation." At the moment we are not at the question of quantum. There is no doubt a contention that the question whether quantum has been properly determined calls for consideration. In case we agree with the Appellant's counsel that the court was wrong in holding that damages would be due only on account of actual loss we may have to remit the

matter back to consider whether the quantum fixed is appropriate or it calls for interference by the court.

2. In the Law of Contracts the term "damages" is related to the loss incurred by reason of default of either party to the contract. Loss so occasioned by the conduct of the offending party is relevant in the determination of damages in the law of torts too. If this concept is applied in the context of Section 85B as evidently the Employees' Insurance Court has done proof of loss may be necessary to sustain a claim for damages.

3. The Employees' State Insurance Act is intended to provide certain benefits to employees in case of sickness, maternity and employment injury and to make provision for certain other matters relating to benefit to the employees. The scheme cannot be worked out without making effective provisions for levying contributions under the Act. The employer as well as the employee contributes which contribution is ploughed back for the benefit of the employees by working out various schemes intended to serve the employees covered by the Act. The time within which contributions are to be made is provided by the Act read with the Regulations made thereunder. Section 84 of the Act enables prosecution for false representations or false statements made with a view to avoid payment under the Act. Defaults to pay contribution under the Act or failure to furnish return under the Act and similar matters which would necessarily hamper the proper implementation of the Act are made punishable by Section 85 of the Act. Provision for enhanced punishment in cases of previous conviction is made u/s 85A of the Act. It is in that context that Section 85B appears in the Act and that provides for recovery of "damages" where the employer defaults to pay contribution payable under the Act. But the section provides that the recovery of such "damages" shall not be in excess of the arrears and the amount of such damages is to be such as the Corporation may think fit to impose. Sub-section (2) of Section 85B enables recovery of such damages as an arrear of land revenue. It may also be pertinent to note that despite the provision for imposition of damages, there is an independent provision u/s 97(2)(iii-a) of the Act enabling regulations to be made in regard to levy of interest at a rate not exceeding 6 per cent per annum on contributions due, but not paid. That such Regulations have been made enabling interest to be levied at 6 per cent is admitted. The levy of interest at 6 per cent on the defaulted amount is therefore not as damages but as interest recoverable pursuant to the said Regulation. The power to impose damages is conferred on the Corporation notwithstanding the right to levy interest independently and evidently therefore "damages" for delayed payment cannot be equated with interest on the defaulted payments. The statute contemplates liability for such damages when once failure to pay is established. What such damages should be in any specific case is another matter. The use of the term "imposed" in Section 85B suggests that the "damages" as contemplated in that section is different from the concept envisaged by that term in relation to contracts or torts. "Imposition" is normally associated with the authority to create an obligation. Taxes are imposed, duties are imposed and

penalties are imposed whereas damages in torts and contracts "arise". The damages contemplated in Section 85B is therefore not a compensation for loss on account of the default of a party, but is in the nature of a penalty that could be imposed for non-compliance with the statute to the extent indicated.

4. The imposition of damages is a matter for judicial exercise. To put it in other words that damages is not related to actual loss does not mean that it could be arbitrarily imposed. If it be a compensation for loss the question, such as reason for the default and the justification that the defaulter may be able to show for non-compliance, may be not relevant. But where damages does not actually depend on the loss suffered by the defaulting party and it is in the nature of a deterrent imposed to enable proper enforcement made of the Act, the circumstances of the default will have relevance. The justification that a party may be able to urge for failure to pay may have to be taken into account in determining the quantum. To lay down any rule as to determination of quantum would be to add to the provisions of the Act and to circumscribe or limit the discretion of the Corporation in determining the quantum of damages. We need only indicate here that being in the nature of penalty the considerations that may weigh in the determination of the quantum will be different from the considerations that may weigh in the determination of the quantum of damages in the event of a breach of contract or the tortious conduct of a person.

5. The view we have expressed here is consistent with what has been said by a Division Bench of this Court in the decision reported in *Provident Fund Commissioner v. B.P. and T. Products* 1979 KLT 653. No doubt that was a case arising under another statute, Section 14B of the Employees' Provident Fund Act. That section enables the imposition of damages when an employer makes default in the payment of contribution to the Provident Fund under the Act. Though the incident that gives rise to damages is default under that Act, there is no material difference between the provision in Section 14B of the Provident Fund Act and the provision in Section 85B of the Employees' State Insurance Act, which latter provision speaks of imposition of damages where an employer fails to pay. Dealing with the provision in Section 14B of the Provident Fund Act this Court understood the imposition of damages as imposition of a penalty. This Court observed thus in the said decision:

In the case of breach of contract or a tort the court determines the loss and the compensation payable and award damages to the aggrieved party. The court does not "impose" any damage. The situation or the circumstance of the default is not generally taken into account. But as seen from the section a power is given on the authority to "impose" damages. The imposition is something in the nature of a penalty for the breach or violation of any provision of law.... To impose damages it is not necessary to find out the loss suffered by the department or the employee.

6. The Delhi High Court in the decision in *Atlantic Engineering Services v. Union of India* 1979 Lab. I.C. 695 considered a similar argument urged before it. The

learned Chief Justice Deshpande, speaking for the Bench said thus:

The word "imposed" is more akin to the imposition of penalty rather than the determination of damages as is done in a case under the contract or torts. The reason is that in Section 14B the default in payment itself is sufficient to enable the Government to recover damages from the employer without proof of loss since such loss to the fund must have been implied by the legislature when the provision was made.

Again, dealing with the contention, the learned Chief Justice said thus:

There may be two answers to this argument. Firstly, the loss is presumed by the legislature when the employer makes default in payment of contributions. The quantum of the loss only has to be determined by the Government before damages are levied and recovered. Secondly, the word "damages" need not be given the same meaning as it has in the law of contract and torts and no loss need be proved. In fact, since it is presumed in law and therefore, no evidence of loss is necessary before the order of levy of damages is passed, the use of the word "impose" would show that damages u/s 14B are somewhere between the damages in law of torts and contract and a penalty in some of the tax laws such as the Income Tax Act. It is entirely open to the legislature to give a special meaning to the damages as we have observed above.

7. We are in respectful agreement with the views expressed in these decisions that the term "damages" used in Section 14B of the Provident Fund Act is intended to denote something in the nature of penalty and we further hold that it is the same meaning that we would give to the corresponding term in Section 85B of the Employees' State Insurance Act. The Insurance Court was therefore in error in finding that without proof of loss there can be no claim for damages by the Corporation. We set aside the decision of the Insurance Court and remit the matter back to that court for fresh consideration and disposal of the case. Allowed as above. No costs.