
(1993) 03 MAD CK 0075
In the Madras High Court
Case No : A.A.O. No. 239 of 1986

Madras Hotel Ashoka (Pvt.) Ltd.

APPELLANT

Vs

E.S.I.C.

RESPONDENT

Date of Decision : 31-03-1993

Acts Referred:

Employees State Insurance Act, 1948 — Section 85B

Citation : (1994) 68 FLR 208 : (1994) 1 LLJ 495 : (1993) 2 MLJ 399

Hon'ble Judges : Thangamani, J

Bench : Single Bench

Advocate : T.S. Gopalan, for the Appellant; Radha Srinivasan, for the Respondent

Final Decision : Allowed

Judgement

Thangamani, J.—M/s. Madras Hotel Ashoka (P) Limited, Pantheon Road, Egmore, is the appellant herein. The Employees' State Insurance Scheme was extended to hotels in Madras City from January 15, 1977 as per G.O. Ms. No. 287, dated July 3, 1976. There are about 156 workmen in the appellant hotel. On February 14, 1979 Inspector of the E.S.I. Corporation inspected the Hotel and submitted his report for the period from January, 1977 to January, 1978. Pursuant to the same Ex.P-2 communication dated September 25, 1978 was sent by the Regional Office of E.S.I. Corporation to the appellant pointing out that there has been a delay of 76 days and 93 days in submission of contribution cards for the contribution period ending on 7/77 and 9/77 respectively. The appellant has also been requested to pay interest of Rs. 147.60 towards late submission of contribution cards as laid down under Regulation 31-A of E.S.I. (General) Regulations, 1950 at the rate of 6% per annum for each day of default or delay in payment of contributions. The communication has also pointed out some other omissions on the part of the appellant. On October 14, 1978 the appellant sent Ext. P-3 letter to the Corporation stating that the E.S.I. Scheme has been newly introduced in their Hotel. Before starting this scheme, their Office Assistant and

Accountant went to the Mount Road Office of the Corporation and took necessary instructions in this regard. In addition to E.S.I. Scheme, they are implementing schemes like Employees' Provident Fund, Family Pension Scheme, Employees Deposit-linked Insurance Scheme, Salary Savings Life Insurance Scheme and Staff Welfare Fund (Govt.) for the benefit of their workers. There has been some delay in sending the contribution cards. This was mainly due to the fact that while in other schemes they simply remitted into the State Bank of India, the contributions of the Management and the employees in E.S.I. Scheme, they had to purchase 3,000 stamps and affix the same in the cards every week. On many occasions the State Bank had no stock of stamps of their requirement. The appellant, however, assured the E.S.I. Corporation that they would send the contribution cards in time in future. They have also required that instead of proposing to take penal action even from the beginning stage, the Corporation could apprise them of what they should do and cooperate with the Hotel in fully and more thoroughly implementing the scheme for the benefit of their workers.

2. On March 5, 1979 the Insurance Inspector made the second inspection. It does not appear that any communication was sent by the Corporation to the appellant till July 14, 1982. Ex. P-7 is the letter addressed to the appellant by the Corporation on July 14, 1982 regarding this inspection. This letter reads that as per Regulation 26 of E.S.I. (General) Regulations, 1950 cards are required to be submitted to Regional Office within 42 days of the expiry of the relevant contribution period. The appellant has been requested in this communication to submit the contribution cards in time. The communication further recites that he has submitted the contribution cards after the due date for the contribution periods ending on 5/77, 7/77, 9/77, 11/77, 1/78, 3/78, 5/78 and 7/78. Therefore, interest at 6% per annum becomes due as per Regulation 31-A of E.S.I. (General) Regulations, 1950 for which separate communication will follow. He is also liable to pay damage for the above delay for which he will receive a communication separately.

3. The third inspection took place on February 29, 1980. Ex.P-4 is the letter addressed to the appellant by the E.S.I. Corporation on January 8, 1981 in this connection. Significantly enough there is no reference to the defects noticed during the inspection on March 5, 1979. This communication only mentions that the old dues communicated by their office letter of even number dated September 25, 1978 has not been made. Failure to pay the said amount will lead to penal action under the provisions of the Act. This letter mainly emphasises the importance of submitting the contribution cards in time. Ex.P-5 is the reply sent by the appellant stating that in respect of old dues, they have already explained in detail their position in their letter dated October 14, 1978 and that there was no failure on their part to warrant any penal action.

4. The Inspector of Corporation again inspected the Hotel on February 26, 1981 and Ex.P-8 is the communication dated July 14, 1982 addressed to the appellant by the Corporation in this connection. This letter reads that payment of

contribution and affixation and cancellation of contribution stamps are not being done properly and in time as per Regulations 31 and 34. The appellant has been warned that he is liable to pay interest and damages for delay in payment of contributions/submissions of contribution cards. It does not appear that the appellant has sent any reply to Ex.P.-8.

5. On April 8, 1982 the Inspector conducted the fifth inspection, Ex.P-6 is the xerox copy of the remarks of the Inspector made in the Inspection Register which reads: "Compliance is satisfactory. Finding of my report will be communicated.....shortly." Neither side has chosen to produce the copy of the said communication. Ex.P-9 is the letter dated August 11, 1982 addressed to the Corporation by the appellant wherein he states that as advised by the Corporation they would send the contribution cards in time. They are also remitting the E.S.I. collections and their contributions every month promptly. The mistakes pointed out by the Corporation in their earlier letters were all due to oversight and pressure of work. They were not deliberate and intentional. The appellant has requested the Corporation to waive all past mistakes as they have already commenced a new chapter complying with the E.S.I. Scheme satisfactorily from 1981. However, on September 4, 1982 the Corporation sent Ex. P-10 communication to the appellant charging them with interest which came to Rs. 421-80 for the delay in payment or submission of contribution cards ranging from 2 days to 6 months and 19 days for the period from July 9, 1977 to July, 1981. This letter discloses that the delay is only marginal from 1980 onwards. While the delay in July, 1977 was 1 month and 6 days, that in March, 1978 was 2 months and 24 days. On the same day, the Corporation has issued Ex.P-11 notice directing the appellant to show cause as to why damages should not be recovered from them for the delayed payment of contributions for the contribution periods 5/77 to 3/78, Rs. 1,605 for the contribution period from May 28, 1977 to November 28, 1981. Ex.P-12 is the explanation sent by the appellant on September 16, 1982. In this they state that they have remitted the amount due to the Government in time. The delay in submission of the contribution cards in the beginning is due to, as pointed out by the Corporation itself in their circular, the cumbersome procedure of purchasing stamps and affixing, weekly closing the cards and typing the statement etc. So they have requested the Corporation to drop the proposal to levy damages. However, as per Ex.P-13, dated February 28, 1983, the Joint Regional Director has passed an order u/s 85(B) of the E.S.I. Act levying damages of Rs. 7,696 for the contribution period from 1/80 to 3/80 and Rs. 590 for the contribution period from 5/81 to 11/81. The total damages levied came to Rs. 9,891. Ex.P-14 is the letter dated April 6, 1984 addressed to Special Tahsildar by the Regional Director to recover the said sum of Rs. 9,891 by proceeding under Revenue Recovery Act. Thereupon the appellant instituted E.S.I.O.P. No. 27 of 1984 before the State Insurance Court (I Additional City Civil Court) Madras u/s 75 of the E.S.I. Act challenging the levy of damages as per Ex.P-13. Since the Insurance Court has dismissed the petition, this civil miscellaneous appeal has been preferred.

6. The main submission of learned counsel for the appellant is that for the alleged delay in payment of contribution for the contribution period from 5/77 to 3/78 action has been initiated only in 1982 and this inordinate delay is against the principles of natural justice. In any event, such delay on the part of the Corporation is a mitigating factor for levy of damages. Even though the period of limitation prescribed u/s 468, CrI. P.C. would not apply to proceedings for levy of damages, certainly the respondent cannot take proceedings at any time after long lapse of time. And having certified after the inspection on April 8, 1982 that compliance with the provision of E.S.I. Act was satisfactory, subsequent initiation of action for levy of damages is beyond the powers of the Corporation. Further, the Corporation does not appear to have the duration of default and frequency as the guidelines in imposing the penalty. The powers exercisable u/s 85-B are quasi judicial in nature. So the E.S.I. Court has every authority to reduce the penalty which it failed to exercise. Whereas learned counsel for the respondent-Corporation submitted that intention has no place in the scheme of the Act and once a delay has occurred, the Corporation is duty bound to impose the penalty and it has no discretion in this matter.

7. A close scrutiny of the communications which were exchanged between the parties referred to above would indicate that subsequent to 1981 there was practically no lapse on the part of the appellant in complying with the provisions of the E.S.I. Act. After the first inspection on February 14, 1978 covering the period from January, 1977 to January, 1978 when the E.S.I. Corporation sent Ex.P-2 letter dated September 25, 1978, the appellant was asked to pay only interest for the delay under Regulation 31-A. This communication nowhere referred to the liability to pay damages for the delay in payment of contribution. The appellant has also asked for guidance from the Corporation in implementing the Insurance Scheme since the same was extended to Hotel Industry only in 1977. The appellant has also brought to the notice of the E.S.I. Corporation that the delay in sending the contribution cards was mainly on account of the difficulty in securing 3,000 stamps from the State Bank of India and affixing them on the cards every week. They encountered the further handicap that on many occasions the State Bank was unable to supply the necessary stamps required. Though the second inspection took place on March 5, 1979, the E.S.I. Corporation did not think of taking steps to levy damages for the delay in payment of contribution. Even after the third inspection on February 29, 1980 and fourth inspection on February 26, 1981 the Corporation did not take any steps. The Inspector found that there was proper compliance when he made the fifth inspection on April 8, 1982. Curiously enough, only in Ex.P-7 and P-8, the communications dated July 14, 1982 the Corporation sought to levy damages on the appellant for the late payment of contributions in the year 1977. The request of the appellant in Ex.P-9 letter dated August 11, 1982 to waive all past mistakes as they have already commenced a new chapter complying with the E.S.I. Scheme satisfactorily from 1981 did not find favour with the Corporation, though from the communication referred to above it is clearly discernible that the

appellant was always anxious to comply with the provisions of the E.S.I. Act and what he desired was only proper guidance from E.S.I. Corporation since the Act was extended to Hotel industry only recently.

8. In *Employees' State Insurance Corporation v. Meecos Limited*, 1980 K.L.T. 179, the Kerala High Court has recapitulated the principles to govern the levy of damages u/s 85-B of the Act in these terms:

"The imposition of damages is a matter for judicial exercise. To put it in other words, that damage 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 a reason for the default and the justification that the defaulter may be able to show for non-compliance, may not be relevant. But where damage does not actually depend on the loss suffered by the defaulting party and it is in the nature of the 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.

So the determination of quantum of damages is not to be a subjective determination. There must be an objective approach taking into account all the matters which are relevant therein. Such objective exercise must be reflected in the order. It is not possible to lay down any hard and fast rule as to what are the matters that would have relevance in fixing the quantum of damages u/s 85-B. To lay down any formula in regard to such quantum would be to trespass upon the powers of the Corporation, which is to make its independent exercise in determining the quantum u/s 85B. However, the quantum must necessarily be related to the gravity of the penal element in the default on the part of a party. That in turn must depend upon the validity of the explanation the party may give for default. Other matters which may have relevance in determining how far the party has been indifferent or callous in meeting the obligations under the Act may also call for consideration. If a party is able to satisfy the Regional Director that though default has been committed by him it was due to circumstances beyond his control or that despite his best efforts he could not make the contribution in time that would certainly be a mitigating circumstance which would serve to soften the rigour of the penalty that may be imposed under the section.

9. A Division Bench of this Court in *Beema Manufacturers (P) Limited v. E.S.I.C.*, (1991)-II-LLJ-29 has held that in the matter of levy of damages u/s 85-B 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 v. E.S.I.C.* (1990)-II-LLJ-195 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 L.L.N. 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 85-B 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 exist 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, or delete or reduce the quantum of damages levied or afford such other relief, which in its opinion, is deserving in the circumstances.

10. In this case, we have already seen that the appellant has offered a valid explanation for the noncompliance of the provisions of the Act in the initial period. He cannot be held responsible if the required stamps are not provided by the State Bank of India. The levy is only a penalty and not damages for loss suffered. So the validity of the reason offered for delay has an important role to play in arriving at the quantum. It cannot be said that there was any guilty conduct on the part of the appellant herein to justify the imposition of damages for the earlier period from 5/77 to 3/78. We have already seen that though the inspection took place on February 14, 1978, penalty was sought to be imposed only about five years later by issuing one show cause notice combining three periods. And the appellant was making every endeavour to comply with the provisions of the Act with the assistance of the E.S.I. Corporation. After all, the purpose of any inspection is only to get the defects rectified. The levy of damages without reference to punitive element may not be justifiable in the exercise of powers which are quasi-judicial in character. So there is absolutely no justification to invoke the provisions of Section 85-B after such a lengthy interval and that too after the Inspector of E.S.I.C. has certified that there was satisfactory compliance of the Act during the year 1980. In fact, the E.S.I. Court also observes that it will always be proper for the department to levy damages on any employer within a reasonable time.

11. In the circumstances, the appeal is allowed in part and the levy of Rs. 7,696 as damages for the period from 5/77 to 3/78 is set aside. And the E.S.I.C. is directed to collect the damages for the remaining period only. No cost.