

(1998) 06 MAD CK 0043

In the Madras High Court

Case No : Writ Petition No. 4975 of 1989

Management of Simpson and Co.

APPELLANT

Vs

E.S.I.C.

RESPONDENT

Date of Decision : 16-06-1998

Acts Referred:

Constitution of India, 1950 — Article 226
Employees State Insurance (General) Regulations, 1950 — Regulation 31C
Employees State Insurance Act, 1948 — Section 75, 85B

Citation : (1998) 80 FLR 991 : (1999) 2 LLJ 1342 : (1999) 2 LW 353

Hon'ble Judges : P. Sathasivam, J

Bench : Single Bench

Advocate : S. Jayaraman, for the Appellant; G. Desappan, for the Respondent

Judgement

P. Sathasivam, J.—Aggrieved by the order of the respondent dated March 1982 and their subsequent letter dated January 11, 1989, the

petitioner-Management has filed the above writ petition for quashing the same on various grounds. The case of the petitioner is briefly stated

hereunder:

The petitioner is a company registered under the Companies Act. The petitioner company is covered under the Employees' State Insurance Act.

According to them, there was some delay in the submission of contribution cards in respect of the periods from September 1975 to September

1976, January 1977, September 1977, March 1978, September 1978, July 1979, September 1979 and November 1979. The respondent issued

a show cause notice, No. T.N.INS.III.51-3142-74 dated August 18, 1981 stating that they proposed to recover a sum of Rs. 5,710.35 as the

interest under Regulation 31(A) of the E.S.I. (General) Regulations, 1950 read

with Section 97(2)(iii) of the Act. In addition to the above mentioned show cause notice, another notice bearing No. 3142-74 INS-III dated August 18, 1981 was also sent to the petitioner herein by the respondent directing the petitioner to show cause as to why damages could not be levied u/s 85(B)(i) of the Act. The petitioner was afforded a personal hearing on February 24, 1982 during which their representative gave all the reasons and also the details relating to the demand for the period commencing from 1977 till December 1977 and also highlighted that there was general strike by the workmen from July 9, 1979 to September 5, 1979 and hence there was delay in submission of the contribution cards and the remittance during the period under reference. It was also stated that there was no wanton or deliberate delay in the payment of contributions during the relevant period and requested that the explanation of the petitioner may be accepted. However, the respondent herein passed an order dated March 9, 1982 wherein a sum of Rs. 1,07,245 was levied as damages for the alleged delayed remittance of E.S.I. contribution. The petitioner was also directed to remit the money within 30 days from the date of receipt of that order. On receipt of the said order, the petitioner wrote a letter dated April 15, 1982 to the Joint Regional Director, E.S.I. Corporation stating that the order passed by the Joint Regional Director is not justified and none of the reasons given by the management have been properly appreciated by the Joint Regional Director. It is also stated that inspite of further clarification and details furnished by the petitioner, the respondent did not modify the earlier order and sent a communication confirming his earlier conclusion and levied damages of Rs. 1,07,245. In such circumstances, the petitioner has approached this Court by way of the present writ petition.

2. The respondent filed a counter affidavit wherein it is stated that the writ petition is liable to be dismissed in limine on the sole ground that the writ petitioner has got an effective and alternative remedy u/s 75 of the E.S.I. Act. On merits it is stated that there was delay in payment of contribution and the same has not been disputed by the petitioner. It is further stated that as per the provisions of the E.S.I. Act, if there is a delay in payment of contribution, it is open to the respondent to levy interest as well as damages. It is also stated that it is incorrect that the delay was not more than 7

days in any of the months. As a matter of fact, there was a delay of even 10 and 12 days in some cases. It is further stated that the review of the petitioner was considered in detail and an order has been passed quantifying the damages. It is finally submitted that the levy of damages has become final as early as March 9, 1982 and the impugned proceedings are only against the communication addressed to the District Collector to recover the said damages. With these averments, they prayed for dismissal of the writ petition.

3. In the light of the above pleadings, I have heard Mr. S. Jayaraman, learned counsel for the petitioner and Mr. G. Desappan, learned counsel for the respondent.

4. There is no dispute that the petitioner Management is covered under the provisions of the Employees' State Insurance Act (hereinafter referred to as "the Act"). It is the case of the petitioner that they have been regularly remitting the contributions of both employers and employees.

According to them, there was some delay in the submission of the contribution cards in respect of the period from September 1975 to September

1976, January 1977, September 1977, March 1978, September 1978, July 1979, September 1979 and November 1979. In view of the delay in

submitting the contribution, the respondent issued a notice dated August 18, 1981 drawing the adjudication, particularly Section 97(2)(iii) of the

E.S.I. (Amendment) Act, 1966 and Regulation 31-A of E.S.I. (General) Regulations, 1950 and directed them to pay a sum of Rs. 5710.35

towards interest. On the very same day, by another notice, the respondent informed that petitioner that they proposed to determine to recover

damages from the petitioner's company as per Section 85(B)(i) of the said Act and directed the petitioner to show cause against such

determination and recovery. For this, the petitioner company by their reply dated March 2, 1982 explained the reason for delay in remittance.

Along with their reply, they also enclosed a detailed chart containing the reasons for the delay in monthly remittance. By the impugned proceedings

dated nil March, 1982 the respondent passed an order and quantified the damages totalling to Rs. 1,07,245. In the same order, the petitioner was

directed to pay the said damages within a period of 30 days. Thereafter, it is seen that on April 15, 1982 the petitioner company informed the Joint

Director stating that the explanation or representations made by them were not considered and requested them to consider the same and also

prayed for one more personal hearing. The respondent herein by another notice dated May 12, 1982 directed the petitioner to comply with their

earlier order. Again on June 2, 1982 the petitioner company furnished further details with regard to the delay in remittance. Meanwhile they also

sent a letter to the Director General, E.S.I. Corporation, New Delhi and requested the Joint Director, E.S.I. Corporation, Madras to keep the

matter in abeyance. On December 31, 1982 the Director General of Employees' State Insurance Corporation, New Delhi has informed that the

position taken by the Regional Director, Tamil Nadu is in order and there is no scope to alter the same and requested the petitioner company to

comply with the order of the Regional Director. Since the petitioner did not comply with the earlier order, the Employees' State Insurance

Corporation, Madras, has directed by their proceedings dated January 11, 1989 for early payment of Rs. 1,07,245 since there was no response

for all the notices, the Regional Director has directed the District Collector, Madras to recover the said amount from the petitioner company by

involving Revenue Recovery Act as per Section 85(B)(2) of the Act which necessitated the petitioner to approach this Court.

5. In the light of the above factual position, now I shall consider the relevant provisions applicable to our case. Chapter IV of the Employees' State

Insurance Act, 1948 deals with contributions. Chapter VI refers to adjudication of disputes and claims. Chapter VII speaks about penalties. We

are concerned with Section 85-B of the Act. The said section enables the Corporation to recover damages from an employer who fails to pay the

amount due in respect of any contribution or any other amount payable under this Act. Section 85-B runs as follows:

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 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.

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(2) Any damages recoverable under Sub-section (1) may be recovered as an arrear of land revenue or u/s 45-C to Section 45-1.

Apart from the above provision, some of the regulations applicable to our case have to be considered in exercise of the powers conferred u/s 97

of the Act, the Employees' State Insurance Corporation made Regulations called the Employees State Insurance (General) Regulations, 1950.

Among the Regulations, we are concerned with Regulations 31 and 31-C. As per Regulation 31, an employer who is liable to pay contributions

within 21 days of the last date of the calendar month in which the contributions fall due. Regulation 31-A speaks about interest on contribution due,

but not paid in time. Regulation 31-B deals with recovery of interest. Regulation 31-C provides particulars and details with regard to payment of

damages. No doubt, both Regulations 31-B and 31-C were introduced by E.S.I. (General) Second Amendment Regulations, 1991 and E.S.I.

(General) Third Amendment Regulations, 1991 respectively. Hence those two Regulations may not be applicable to our case. There is no dispute

that the petitioner company is covered under the provisions of the E.S.I. Act. As per Regulation 31, every employer subject to the provisions of

the Act has to pay contributions referred therein within 21 days of the last date of the calendar month in which the contributions fall due. As per the

second proviso to Regulation 31, it is open to the employer to adopt some other method or manner as prescribed by the Director-General for

payment of those contributions. It is the case of the respondent that since there was delay in payment of contribution, a show cause notice was

issued on August 18, 1981 for determination of damages and also for recovery of the said amount u/s 85-B(B)(i) of the Act. It is seen that the

petitioner company submitted explanation. In the explanation apart from giving reasons for the delay, they also furnished facts and figures in order

to satisfy that the delay is neither wilful nor wanton. Thereafter, by order dated nil March 1982, the Joint Regional Director after holding that there

was delay in submission of contribution cards, levied damages to the tune of Rs. 1,07,245. In the very same order, the said authority directed the

petitioner to pay the damages within a period of 30 days from the date of the

said order. It is further seen that on April 15, 1982 the petitioner company informed the Joint Director drawing his attention that he had not taken into account various facts before him for the delay in remittance.

The petitioner has also sent another reminder to the Joint Director on May 10, 1982. The Deputy Regional Director, in his letter dated May 12, 1982 sent a reply reiterating their earlier stand and directed the petitioner to pay the amount. Once again the petitioner addressed a letter dated June 2, 1982 to the Joint Director highlighting that they need not pay any amount towards damages as claimed. It is also seen that on June 19, 1982 the petitioner made a representation to the Director General of Employees' State Insurance Corporation, Ministry of Labour, New Delhi by a communication dated December 31, 1982. The Director General, New Delhi, informed the petitioner that there is no scope to alter the earlier order and rejected the claim of the petitioner. Since the petitioner did not pay the amount as claimed in the impugned notice, the Director General directed the petitioner to pay the amount, failing which proceedings under Revenue Recovery Act would be initiated. At that stage the petitioner has approached this Court.

6. The schemes of the Act and the Regulations clearly show that the employer covered under the provisions of the Act has to pay contributions within the time as provided under Regulation 31 of the Employees' State Insurance (General) Regulations, 1950. If there is any default, he is liable to pay interest and it is also open to the competent authority to impose damages. Here, in our case, admittedly there was delay in payment of contributions and accordingly by the impugned order and notice, the respondent initiated proceedings to recover the same. Even though the petitioner has fairly conceded before the authority that there was some delay due to administrative reasons, according to them, they have placed relevant and acceptable materials for the said delay. It is also their case that in spite of furnishing information for the delay the respondent has not considered the same and without giving any reason, quantified the damage at Rs. 1,07,245.

7. Even at the beginning, the learned counsel appearing for the respondent, by drawing my attention to Section 75 of the Act, submitted that the petitioner has to approach only the Insurance Court and not this Court.

According to him, in view of the effective alternative remedy provided u/s 75 of the Act, the present writ petition is liable to be dismissed. Even though the said objection is disputed by the learned counsel for the petitioner, the fact remains that as per Section 75, the petitioner has to approach only the Employees' Insurance Court, if they have any grievance against the order impugned. However, the said writ petition has been entertained by this Court on April 7, 1989 and rule nisi has been issued to the respondent for production of records. The said writ petition is kept pending for nearly 9 years. At this juncture, it is not fair to direct the petitioner to go and approach the appellate authority as per Section 75 of the Act, more particularly when there is a strong contention that the amount has been quantified without any basis and without any particulars. As observed by the Supreme Court in a decision reported in *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, once this Court had entertained the writ petition, the same could not thereafter be rejected on the ground that the statutory remedy had not been availed of. The same view has been expressed in an identical matter by the Division Bench of the Calcutta High Court in *E.S.I. Corporation v. P.G.R. and Investment Company Ltd.* (1996) 2 L.L.N. 616. There also without approaching the Insurance Court the aggrieved person approached the Calcutta High Court. Some objection was raised pointing out Section 75. Their Lordships of the Calcutta High Court in the said decision have observed that once the High Court had entertained a writ petition, the same could not thereafter be rejected on the ground that the statutory remedy had not been availed of. They also observed that the jurisdiction of the writ Court is not excluded by virtue of provisions of Section 75 of the Employees' State Insurance Act. Accordingly, I reject the objection raised by the learned counsel for the respondent with regard to maintainability of the writ petition.

8. Regarding merits of the case learned counsel appearing for the petitioner very much relied on a decision of the Supreme Court reported in *M/s.*

Prestolite of India Ltd. Vs. The Regional Director and another, . In that decision in the light of the regulations with regard to fixation of damages,

Their Lordships have observed thus:

It however, appears to us that the contention of Sri Goswami in the facts of the case, should not be accepted. 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 applicant did not appear in person and produce materials to support the objections, the employer's case could not be discarded in limine. On the contrary, the objection ought to have been considered on merits. We, therefore, allow this appeal and set aside the impugned orders. The Regional Director is directed to dispose of the representation of the appellant by indicating reasons after taking into consideration the grounds for delayed payment.....

I have already referred the Regulations 31 and 31-C of the E.S.I. (General) Regulations. Regulation 31-C provides how damages have to be ascertained or quantified. In our case, it is seen from the explanation furnished to the Regional Director, E.S.I. Corporation, Madras by the petitioner in which they have given more details with facts and figures for the delay in payment of contribution. When the Statute provides method or particulars for quantifying the quantum of damage, the statutory authority is expected to consider the same in detail and arrive at a conclusion on the basis of the materials furnished by the parties, as observed by their Lordships in the above referred decision. It is not open to the authorities to fix the amount mechanically without reference to the explanation offered by the employer, more particularly without reference to Regulation 31-C. The said decision supports the petitioner's contention. Since as stated earlier in spite of details furnished by the petitioner for delay, the same has not been considered by the respondent.

9. In a decision reported in Madras Hotel Ashoka (Pvt.) Ltd. Vs. E.S.I.C., THANGAMANI, J., in an identical circumstances construing Section 85-B of the Employees' State Insurance Act, 1948 has concluded thus:

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 consideration that may weigh in the determination of the quantum of damages in the event of

a breach of contract of 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 85-

B. 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.

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

The learned Judge in the said decision, considered similar decision rendered by the Kerala High Court as well as the earlier decision of this Court.

With respect the reasoning of the learned Judge are directly applicable to our case and by applying the same, the impugned order cannot be sustained. As stated earlier, the reading of Section 85-B shows that the power to levy damages is only discretionary. The said provision has only stated the maximum amount that can be recovered. The power to levy and recover damages in the light of Section 85-B is in the nature of quasi penal provisions. Proviso to Section 85-B mandates the authority to give reasonable opportunity to the employer before recovering such damages,

In other words, it contemplates not only reasonable opportunity, but proper adjudication. It is clear that in the Explanation offered on March 2, 1982 the petitioner had provided not only reason for the delay, but also how the delay had occasioned. Those particulars have been included in the typed-Set of papers-vide pages 5 to 10. If we test the impugned order in the light of statutory provisions referred to above, it is not possible to

accept the order of the Joint Regional Director dated nil March 1982 since the said authority has not furnished any particulars to arrive at a figure of Rs. 1,07,245 as damages. I have already pointed out General Regulation 31-C provides method and rate of fix the damages for the belated contribution. The said procedure has not been followed by the Joint Regional Director. It is also clear from the provisions that in deserving cases it is open to the authority to waive the damages. When such provision is there and machinery is also there, how the damages have to be quantified the statutory authority is expected to follow the same strictly. As stated earlier, this has not been complied with by the Joint Regional Director, No doubt, at this stage the learned counsel appearing for the respondent has brought to my notice that the said order has been passed in the year 1982 and only at the recovery stage, namely, after the notice dated January 11 1989, the petitioner has approached this Court. Accordingly, according to him, no relief could be granted in their favour. However, immediately after receipt of the order of the Joint Regional Director, since their representation in the form of facts and figures have not been considered by the said authority, the petitioner-management sent a letter on April 15, 1982 pointing out the defect in the order. In that letter they prayed for fixing a date for personal hearing. Subsequently, again the petitioner has made another letter on May 10, 1982. Thereafter, on June 2, 1982 the petitioner sent another letter to the Joint Director highlighting their earlier stand. Again on June 19, 1982 the petitioner- company sent a representation to the Director General, E.S.I., Corporation, New Delhi highlighting their reasons for the delay in payment of subscription. The copy of the said representation has been communicated to the Joint Regional Director, E.S.I. Corporation, Madras, by their letter dated June 29, 1982. No doubt, after keeping quiet for some time, the respondent by his latest Notice dated January 11, 1989, directed the petitioner to pay the amount of Rs. 1,07,245 as called for in their earlier order and directed them to pay the same immediately, failing which they are constrained to resort to Revenue Recovery proceedings. All those representations, letters, correspondences have been included in the typed-set of papers. The particulars furnished clearly show that though there was some delay in approaching this Court. All along the petitioner was pursuing the matter with the authority, who passed the first impugned order and before the

higher authorities; hence on the ground of delay, the claim of the petitioner cannot be rejected. From April 7, 1989 the petitioner has secured a

stay order before this Court and the same is in force even to-day.

10. Taking note of all the above aspects, in the light of the particulars, furnished by the petitioner before the concerned authority and the said

authority having failed to consider the same in the light of the provisions referred to above, it is but proper the matter has to be remitted to the

Regional Director, Employees' State Insurance Corporation, Madras-34 for fresh disposal. I hereby direct the said Regional Director to

adjudicate as to whether the explanation or details furnished by the petitioner are justifiable, evaluate the entire matter and evidence, and if he is

satisfied that there are extenuating circumstances, it can dispense with the recovery of damages or delete or reduce or confirm the quantum of

damages levied or grant such other reliefs which in his opinion is justified in the circumstances of the case. Accordingly, the writ petition is allowed

as stated above, the order passed by the Regional Director is quashed and the matter is remitted, and the Regional Director is directed to consider

and pass fresh orders after giving adequate opportunity to the petitioner, within a period of six months from the date of receipt of a copy of this

order. There will be no order as to costs.