(2011) 09 P&H CK 0008

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 7412 of 1992 (O and M)

M/S A.K. Industries APPELLANT

Vs

The Employees State Insurance Corporation and Others RESPONDENT

Date of Decision : 07-09-2011

Acts Referred:

Employees State Insurance Act, 1948 — Section 85B

Citation : (2011) 164 PLR 302

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

K. Kannan, J.—The petition challenges the order of damages assessed by the respondent-ESI Corporation for delay in remittance of Employee''s Contribution. The amount payable was Rs.65,202/-, the default arising between the period from June, 1981 to July, 1983. The amounts had been paid on various dates between 1984 to 1989 and through a notice dated 29.07.1991, the Corporation had demanded Rs. 12,063.85 as interest. To this notice, reply by the petitioner had been given on 26.08.1991 explaining the Corporation that the demand was time barred and after realizing the entire amount, there was no justification for claiming interest. Simultaneously, it appears an order was passed u/s 85-B of the ESI Act raising a demand of Rs.49,102.96 as payable. The petitioner made a representation immediately on 01.09.1991 stating that the demand had been made without any prior notice and the show cause notice was only with reference to interest but there was ho show cause notice demanding damages. There was yet another representation made on 07.10.1991, which had been rejected vide order dated 15.11.1991.

2. The learned counsel appearing on behalf of the petitioner refers to the fact that the order u/s 85-B had been rendered without any notice to show cause against such levy. The order is non-speaking one and it does not set out any reason as to how the amount has been arrived at. The order is also vitiated by

the fact that it does not take into account any other mitigating facts and circumstances such as what was set out even in the representation that the petitioner''s firm had been closed due to financial crises and that it had not been dealt with even at the time when the petitioner''s representation was rejected through the letter issued on 15.11.1991.

3. The learned counsel appearing on behalf of the respondents raised an objection that there was a statutory remedy by way of an appeal u/s 75 but it had not been availed only because there was a requirement of having to deposit 50% of the amount demanded. The notice for interest as well as for damages have been issued. While the petitioner had admitted to have received the notice demanding interest, it is falsely contended that there was no receipt of show cause notice for assessment of damages. The learned counsel for the respondents would contend that it has been stated in the reply that the show cause notice had been issued and the petitioner has hot filed a rejoinder denying the same.

4. As regards the preliminary objection of maintainability of the writ petition on the ground that there was an alternative remedy possible, I would have definitely considered it if, the writ petition had been taken up immediately. The same can not be considered after two decades of the pendency of the case. The case will, therefore, be examined only from the point of view of whether the statutory compliance has been made before the assessment of damages. Section 85-B admits of no doubt that an Officer, who passes an order, performs a quasi judicial function and the precept of principles of natural justice, can never be violated. If the petitioner would contend that the notice had not been issued before an assessment was made and the said fact is affirmed in the two representations as well as in the writ petition, it will be no answer to assert that such a notice had been issued and to point out that yet another notice demanding interest had been received and the show cause notice for assessment of damages must have also been received. A negative aspect cannot be proved any more than a plain statement of denial. If an affirmation is made that a notice had been served, especially when it is stated that it was sent by registered post with acknowledgment, it was essential that the respondents must produce proof of such service of notice, even as regards the service of registered notices. Notices are alleged to have been sent through registered post but no acknowledgment has been produced before the Court. It has come through the decision of Hon''ble the Supreme Court in Puwada Venkateswara Rao Vs. Chidamana Venkata Ramana, " that even a presumption of delivery of registered post, which is available through the General Clauses Act, cannot be extended beyond the initial presumption and if an addressee denies that he received it, the presumption will no longer be available for a person who claims that such a registered notice had been sent. In this case, if the petitioner would challenge the order inter alia on the ground that principle of natural justice had not been followed, it would require more than a mere affirmation in a statement of the respondent that the notice had been served. I would hold, therefore, that the

respondent did not discharge the onus of proof that the show cause notice had been actually served on the petitioner.

5. Apart from the fundamental breach in the requirement of law in taking a decision without serving a notice in the manner that the law requires, I do not even find the manner as to how the amount was arrived at by the respondents. To a query to the counsel as to how the amount has been arrived at, his only response is that such an information could be made available in course of time. The order has to be supported by the reasoning that it must contain. If the impugned order itself does not spell out the manner of assessment, we cannot look for props to find out as to how the amount could have been arrived at. It is also seen that the assessment makes merely a reference to the delay as a justification for the levy of damages. In a decision of Hon''ble Supreme Court in Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another, , it has been held that power u/s 85-B provides for recovery of damages, it should not be understood that the levy of damages would be imperative in all situations. The impecunious condition of the petitioner as pleaded does not appear to have gone into reckoning at all. The impugned order of demand for damages is quashed. Insofar as it relates to the claim for interest, which has been made, it was admitted that amount has been paid by the petitioner. I will maintain the demand for interest. The notices Anneuxres P-5 and P-8 that contained references to assessment of damages against the petitioner are alone quashed.

6. The writ Petition is partly allowed as above.

