
(2001) 04 CAL CK 0006
In the Calcutta High Court

Case No : Constitutional Writ Jurisdiction C.R. No. 10713 (W) of 1979

M/s. Sarat Textiles Ltd.

APPELLANT

Vs

Joint Regional Director, E.S.I. and Others

RESPONDENT

Date of Decision : 17-04-2001

Acts Referred:

Constitution of India, 1950 — Article 226

Employees State Insurance Act, 1948 — Section 85, 85(6)

Citation : (2001) 2 CALLT 216 : (2001) 90 FLR 566 : (2001) 2 LLJ 744

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Advocate : Mr. S.N. Dey, for the Appellant; Mr. Subol Moitra, for the Respondent

Judgement

K.J. Sengupta, J.—The Rule has been issued in this matter. No opposition has been filed. Therefore the allegations contained in the writ petition are deemed to have been admitted. Mr. Moitra contends that his client does not wish to file opposition at this stage either.

2. The short fact of the case is that on the allegation of failure to make payment of the contribution within the time an impugned notice was issued calling upon the petitioner as to why the damages on account of failure to make payment within the time should not be quantified and be not imposed. The petitioner was invited to make representation and to give answer to the said show cause notice which was done by the petitioner. However, the cause shown by the petitioner was not accepted and the concerned authority passed the impugned order imposing damages. The petitioner, of course, made an incompetent attempt to get the impugned order set aside by making a representation to the Director which in my view could not be entertainable after the final order was passed and the only remedy would have been in that case to prefer an appeal before the E.S.I. Court. However, admittedly such recourse has not been taken by the petitioner who has come straight way with this writ petition challenging the impugned notice as well as the impugned order. Alternative remedy by way of an

appeal would have been a bar to this case. Furthermore the respondents have not taken any step for getting the interim order vacated or getting the Rule discharged. At this stage theory of alternative remedy would not be any help whatsoever particularly when the question of jurisdiction of the appropriate authority is involved.

3. It is settled position of law that a question of jurisdiction can be canvassed before the writ Court and alternative remedy cannot be bar. It appears the learned counsel appearing in support of the writ petition contends that the impugned order is bad. Invalid and without jurisdiction as in this case admittedly the petitioner has paid all the dues and the same may not be within time but there is no failure to apply section 85(6) of the Act. Moreover he was drawn my attention to a judgment of the Division Bench of this Court reported in 1979 II CHN 187 whereby it has been held amongst others that in case of a delayed payment and/or deposit the authority concerned may not have any jurisdiction to assess and quantify damage or to pass any order pursuant thereto. The learned counsel further contends that the fact of this case is also identical with the fact in the aforesaid case. Mr. Moitra contends otherwise and says that there is no quarrel with the Division Bench judgment but this can be taken care of by the appellate forum which the petitioner can easily avail of today. Since it is a mixed question of fact and law and moreover when the order was passed by the authority concerned rightly or wrongly this can be scrutinised by the appellate forum who can very well decide the question of jurisdiction as well.

4. Having heard the respective contentions of the learned counsel as i have already observed that this matter should not be dismissed on the ground of existence of alternative remedy. The question of jurisdiction is taken in this matter. Upon bare perusal of section 85 of the said Act. It appears to me that jurisdiction or authority to assess and quantify and further impose damages can be exercised only when there would be a failure in payment. In this case admittedly there is no failure to make payment in terms of section 85(b) of the Employees State insurance Act, 1948. It appears going by the allegations made in the show cause notice as well as the impugned order, the petitioner failed to pay within the time stipulated. The Division Bench judgment as cited by the learned counsel for the petitioner has accepted the position that delayed payment cannot be equated with the failure of payment so as to make application of the aforesaid section 85(b). When preconditions for invocation of section 85 is not fulfilled exercise of authority mentioned therein is not called for. Therefore i accept the submission of the learned counsel for the petitioner that the authority concerned did not possess jurisdiction or authority to assess and quantify damages or to issue show cause notice.

5. Therefore the impugned notice as well as the order passed pursuant thereto is set aside. However, this order will not prevent and prejudice the respondents authorities to take any other action other than quantifying and demanding damages on account of alleged failure of payment within due time. The Rule is

made absolute.

There will be no order as to costs.

6. Rule made absolute