(2010) 12 MAD CK 0018

In the Madras High Court

Case No : Writ Petition No''s. 36131 and 39914 of 2005 and WPMP. No''s. 38986 and 42800 of 2005

NEPC India Limited APPELLANT

Vs

Employees' State Insurance Corporation RESPONDENT

Date of Decision : 22-12-2010

Acts Referred:
Constitution of India, 1950 — Article 14, 19, 21
Employees State Insurance (General) Regulations, 1950 — Regulation 31C
Employees State Insurance Act, 1948 — Section 14B, 31C, 85B

Citation : (2010) 12 MAD CK 0018

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : S.R. Rajagopal, for the Appellant; A. Paramasivam, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—The parties in both the writ petitions are one and the same. In the first writ petition, viz., W.P. No. 36131 of 2005, the

Petitioner company challenged the notice issued u/s 85(B) of the ESI Act dated 7.7.2005. The Respondent-ESI Corporation found that the

Petitioner company did not adhere to the time frame fixed for making the contribution. Therefore, for the purpose of levy of damages, notice was

issued to them. The stand of the company was that they were facing financial problems and they have been paying regular contribution together

with interest. At the same time, the question of delay in payment was not willful. Disregarding the stand taken by the Petitioner, the Respondent -

ESI Corporation fixed the damages for the delayed payment amounting to Rs. 51,203/-. The delay was for the contribution for the period from

7/97 to 10/2003.

2. The said writ petition was admitted on 11.11.2005. Pending the writ petition, this Court granted interim stay on condition that the Petitioner

pays 50% of the amount demanded by the Respondent within a time frame. Even when the said writ petition was pending, the same Petitioner filed

another writ petition, viz., W.P. No. 39914 of 2005 challenging the constitutional validity of Regulation 31C of the Employees State Insurance

Corporation (General) Regulation, 1950. Regulation 31C reads as follows:

31-C. Damages or contributions or any other amount due, but not paid in time.- If an employer who fails to pay contribution within the periods

specified under Regulation 31, or any other amount payable under the Act, the corporation may recover damages, not exceeding the rates

mentioned below, by way of penalty:

Period of delay Maximum rate of damages in

percent per annum of the

amount due

(i) Less than 2 months 5.00%

(ii) 2 months and above but 10.00%

less than 4 months

(iii) 4 months and above but 15.00%

less than 6 months

(iv) 6 months and above 25%

Provided that the Corporation, in relation to a factory or establishment which is declared as sick industrial company and in respect of which a

rehabilitation scheme has been sanctioned by the Board for Industrial and Financial Reconstruction, may:

(a) In case of a change of management including transfer of undertaking(s) to worker''s co-operative(s) or in case of merger or amalgamation of

sick industrial company with a healthy company, completely waive the damages levied or leviable;

(b) in other cases, depending on its merits, waive upto 60 percent damages levied or leviable;

(c) in exceptional hard cases, waive either totally or partially the damages levied or leviable.

3. The said regulation came to be introduced by the notification dated 6.12.1991 and was brought into effect from 1.1.1992. The writ petition

challenging the regulation was admitted on 14.12.2005. Pending the said writ petition, this Court directed 50% of the claim amount to be

deposited as a condition precedent for grant of stay.

4. On notice from this Court, the Respondents have filed counter affidavit in the second writ petition, viz., W.P. No. 39914 of 2005, dated

15.9.2009. The stand taken by the Respondent -ESI Corporation was that the payment of damages is independent of payment of interest and the

provisions are legally valid. In the affidavit filed in support of the writ petition, the Petitioner contended that the amendment made to the notification

is illegal and violative of Articles 14, 19 and 21 of the Constitution of India and the question of levy of damages u/s 85-B will arise only if the

employer fails to pay the amount or any other amount payable under the Act. There is no provision for damages under the Act and it cannot be

done by way of substituted regulation, namely, u/s 31C. With reference to any delay in payment, it can only attract interest. Therefore, the levy of

damages by virtue of subordinate legislation was illegal. The ESI Corporation under the guise of framing the regulation cannot travel beyond the

scope of the ESI Act. The question raised herein is no longer res integra.

5. The Supreme Court in Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another, dealt with the scope of levy of damages as well as the

power u/s 31C. The Supreme Court has held that the levy of damages is in the nature of a penalty. In paragraph No. 14 to 17, the Court observed

as follows:

14. Section 85-B of the Act empowers the Corporation to recover damages in the event an employer fails to make the payment of the amount due

in respect of contribution; subject, however, to the condition that the amount thereof would not exceed the amount of arrears as may be specified

in the Regulations. The proviso appended thereto incorporates the principles of ''''natural justice"".

15. Obligation on the part of the employer to deposit the contributions of both the ''''employer"" and the ''''employee"" is not in dispute. What is in

dispute is as to whether the amount of damages specified in Regulation 31-C of the Regulations is imperative in character or not.

16. It is a well known principle of law that a subordinate legislation must conform to the provisions of the legislative Act. Section 85-B of the Act

provides for an enabling provision. It does not envisage mandatory levy of damages. It does not also contemplate computation of quantum of

damages in the manner prescribed under the Regulations.

17. The statutory liability of the employer is not in dispute. An employee being required to be compulsorily insured, the employer is bound to make

his part of the contribution. An employee is also bound to make his contribution under the Act. But the same does not mean that levy of damages

in all situations would be imperative.

6. On the question of levy of damages, the court also dealt with the scope and nature of power to be exercised and also the hearing that is

contemplated as found in paragraphs 18 to 22, which read as under:

18. Section 85-B of the Act uses the words ''''may recover"". Levy of damages thereunder is by way of penalty. The legislature limited the

jurisdiction of the authority to levy penalty, i.e. Not exceeding the amount of arrears. Regulation 31-C of the Regulations, therefore, in our opinion,

must be construed keeping in view the language used in the legislative Act and not dehors the same.

19. Our attention, however, has been drawn to a decision of this Court in M/s. Hindustan Times Limited Vs. Union of India and Others, wherein it

has been laid down: (SCC pp.254-55, para 29):

29. From the aforesaid decisions, the following principles can be summarised:

The authority u/s 14-B has to apply his mind to the facts of the case and the reply to the showcause notice and pass a reasoned order after

following principles of natural justice and giving a reasonable opportunity of being heard; the Regional Provident Fund Commissioner usually takes

into consideration the number of defaults, the period of delay, the frequency of default and the amounts involved; default on the part of the

employer based on plea of power cut, financial problems relating to other indebtedness or the delay in realisation of amounts paid by the cheques

or drafts, cannot be justifiable grounds for the employer to escape liability; there is no period of limitation prescribed by the legislature for initiating action for recovery of damages u/s 14-B"".

20. It was, however, opined that in certain situations, the employer can claim the benefit of ''''irretrievable prejudice"" in case a demand for damages

is made after several years. In that case, this Court was concerned, inter alia, with a question in regard to the effect of levy of damages after a long

time. The question which, inter alia, arose for consideration therein was as to whether suo motu revisional jurisdiction could be exercised by the

revisional authority at any time it desires. The Court made a distinction between the cases involving ""recovery of money"" from an employer who

had withheld the contributions made by the workmen in trust and other cases. It was in that situation the Court opined supra. We are not

concerned with such a situation herein.

21. A penal provision should be construed strictly. Only because a provision has been made for levy of penalty, the same by itself would not lead

to the conclusion that penalty must be levied in all situations. Such an intention on the part of the legislature is not decipherable from Section 85-B

of the Act. When a discretionary jurisdiction has been conferred on a statutory authority to levy penal damages by reason of an enabling provision,

the same cannot be construed as imperative. Even otherwise, an endeavour should be made to construe such penal provisions as discretionary,

unless the statute is held to be mandatory in character.

22. In Dilip N. Shroff Karta of N.D. Shroff Vs. Joint Commissioner of Income Tax, Special Range Mumbai and Another, this Court rejected a

contention raised by the Regional Director of Employees'' Insurance that under the Employees'' State Insurance General Regulations guidelines

have been indicated showing as to how damages for delayed payment are to be imposed and since such guidelines have been followed, no

exception should be taken thereto made to the impugned adjudication, stating (SCC p.693, para 5). ''

5. ...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 n no case, the mitigating circumstance 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. Simple because the Appellant did not appear in person and

produce materials to support the objections, the employee''s case could not be discarded in limine. On the contrary, the objection ought to have

been considered on merits.

7. In the light of the authoritative pronouncement of the Supreme Court, there is no arbitrariness or unconstitutionality of the Regulation 31C of the

ESI (General) Regulations. Hence, the writ petition bearing W.P. No. 39914 of 2005 will stand dismissed.

8. In respect of W.P. No. 36131 of 2005 is concerned, it is now claimed by the Respondent ESI Corporation that the Petitioner has paid the full

amount and hence the second writ petition is dismissed as having become infructuous. No costs. Consequently, the connected miscellaneous

petitions are also dismissed.