
(2012) 05 GUJ CK 0018
In the Gujarat High Court

Case No : First Appeal No. 556 of 2011 With Civil Application No. 1361 of 2011

Nitro Aromatics A Division of Deepak Nitrite Limited	APPELLANT
Vs	
Regional Director, ESI Corporation and Others	RESPONDENT

Date of Decision : 04-05-2012

Acts Referred:

Constitution of India, 1950 — Article 14
Employees State Insurance Act, 1948 — Section 40, 41, 82, 85B

Citation : (2013) 136 FLR 359 : (2012) 2 GLH 417 : (2012) 4 LLJ 786

Hon'ble Judges : Rajesh H Shukla, J

Bench : Single Bench

Advocate : Kabir A. Hathi 1, for the Appellant; Sachin D. Vasavada for Defendant 1 and Rule Served for Defendants 2 - 3, for the Respondent

Final Decision : Allowed

Judgement

Mr. Rajesh H. Shukla, J.

1 The present First Appeal has been filed by the appellant-original claimant under Sec. 82 of the Employees State Insurance Act, 1948 being

aggrieved with the judgment and order rendered in Application (ESI) No. 5/2001 by the ESI Court, Vadodara dated 16.9.2010 by which the

application of the appellant was rejected. It is contended, inter alia, that the ESI Court erred in holding that there was delay in payment of the

contribution for the period from 1.4.1991 to 31.3.1992 and thereby committed grave error in confirming the damages imposed. It is contended

that since the production started on 3.3.1992, the appellant original claimant immediately intimated the respondent about the start of production

vide letter dated 5.3.92 which has also been acknowledged by the respondent vide letter dated 19.6.92 conveying that the appellant would be

covered by the ESI Act from 3.3.92. It has been therefore contended that the provisions of Sec. 85B of the ESI Act has been wrongly interpreted

or applied. It is contended that Sec. 85B of the Act makes it clear that the Section would be attracted only in case of nonpayment or failure to pay.

It is also contended that the Court below has; failed to consider the material and evidence on record as the show-cause notice demanding the

damages is of 1998 which has been explained and therefore the respondent has used the discretion not to levy the damages. However, thereafter,

only in 2000 fresh notice came to be issued for the same cause of action demanding damages which has led to filing of the present appeal.

2. The substantial questions of law as required under Sec. 82 of the ESI Act has been framed which have been reproduced in para 20 as follows :-

I. Whether the respondent Authority has erred in overlooking and ignoring the relevant facts and circumstances which are necessary to be

considered for levy of damages u/s 85B of the Employees State Insurance Act, 1948?

II. Whether in facts and circumstances of the case the impugned order dated 16.9.2010 and order dated 1.3.2000 reflects total non-application of

mind before confirming/ arriving at the decision to levy damages?

III. Whether in facts and circumstances of the case mens rea and contumacious conduct are relevant facts to be considered before levying

damages u/s 85B?

IV. Whether in facts and circumstances of the case, the respondent Authority was right in law in exercising its discretion to levy damages after an

unreasonable delay which is in violation of Article 14?

3. Heard learned Advocate Mr. Kabir Hathi for the appellant. He referred to the papers and submitted that on 29.4.91 a letter has been

addressed by the appellant inquiring with the respondent as to when the ESI Act would be made applicable so that they may start making

contribution. The said letter is produced at Annexure-B. In response thereto, it is submitted that the letter at Annexure-E dated 1.7.91 has been

addressed by the respondent stating that the exact date of production should be intimated. Learned Advocate Mr. Hathi therefore submitted that

vide letter dated 5.3.92 (Annexure-F) it has been intimated that the production has started with effect from 3.3.92 and it has also been requested

to allot the code No. Learned Advocate Mr. Hathi therefore submitted that there is no question of failure to pay.

4. Learned Advocate Mr. Hathi submitted that Sec. 85B of the ESI Act providing for recovery of damages provides as under :-

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.

5. He submitted that admittedly as there is no arrears or any refusal to make the payment, the occasion had not arisen for levying any such

damages by the impugned show-cause notice. He pointedly referred to the impugned order at Annexure-L dated 1.3.2001. He also submitted that

earlier a petition under Art. 226 of the Constitution of India being Special Civil Application No. 15534 of 2010 was filed by the appellant-

petitioner and this Court (Coram. K.A. Puj, J.), vide order dated 14.12.2010. has observed that it would be proper for the petitioner to invoke

the jurisdiction under Sec. 82 of the ESI Act and therefore the petition was disposed of and the present appeal has been preferred under Sec. 82

of the ESI Act.

6. Learned Advocate Mr. Hathi submitted that before Sec. 85B could be attracted, the existence of mens rea to contravene the statutory provision

must be established as it has been held to be a necessary ingredient. In support of his submission he has referred to and relied upon the judgment

of the Hon''ble Apex Court in the case of Employees State Insurance Corporation v. HMT Ltd. and anr., reported in 2008(2) GLH 412, and

submitted that as observed by the Hon''ble Apex Court, it is a penal provision which should be construed strictly. Learned Advocate Mr. Hathi

submitted that it is an enabling provision and merely because the provision enables to levy penalty, it cannot be said that it has to be levied or it is

imperative to levy such penalty particularly when there is no failure to pay. He therefore submitted that the appeal may be allowed.

7. Learned Advocate Mr. Hathi has also referred to and relied upon the judgment

of the Kerala High Court in the case of Regional Director, ESI Corporation, Thrissur v. General Manager, M/s. Marikkar Engineers Ltd., Trivandrum, reported in 2011 II CLR 623, as well as in the case of

ESI Corporation v. Flemin KM, S/o late K.T. Mathew, (Ins. Application No. 8/2008). He has also referred to and relied upon the judgment of

the Delhi High Court reported in 2011-III-LLJ-554 (Del.) in the case of Hi-Tech Vocational Training Center v. Assistant Provident Fund

Commissioner in support of his submissions. He emphasised the observations made in para 18 of this judgment and submitted that the word

"default" coupled with "arrears" has been considered and interpreted and it has been specifically observed,

There can be no ""arrears"" if the contribution to the Fund has already been paid, even if belatedly. Black's Law Dictionary, 6th Edition defines

arrears"" as money which is overdue and ""unpaid

Learned Advocate Mr. Hathi therefore submitted that it cannot be said that the order has been made considering this aspect and therefore the

present appeal may be allowed.

8. Learned Advocate Mr. Vasavada for respondent-Corporation submitted that Sec. 85B of the ESI Act provides for such payment for the

delayed contribution. He submitted that merely because it is paid along with interest does not absolve the Company from the liability for damages

under Sec. 85 B of the Act. Learned Advocate Mr. Vasavada submitted that the Company was very much aware that the persons were working

with them and therefore contribution ought to have been made. He submitted that as per the provisions of the Factories Act, where there are more

than 20 employees, if such provisions are attracted, the employer has to make the contribution. He submitted that the primary liability is on the

employer to disclose all the facts before the ESI Court which has not been disclosed. Learned Advocate Mr. Vasavada submitted that even at the

initial stage of the project if the Company has engaged the contractor, the employees working with the contractor are covered and the Company as

the principal employer is liable to make the contribution for the ESI in respect of such workers/ employees of the contractor.

9. Learned Advocate Mr. Vasavada therefore submitted that the real dispute is with regard to such employees or workers who have been

engaged by the contractor at the initial stage of the project and merely because at a later stage the Company has paid the contribution after the

notice would not be sufficient to escape from the liability for damages. Learned Advocate Mr. Vasavada has also submitted that as per the

provisions of the ESI Act, when the project is at the initial stage and the contractor is engaged, the Company as the principal employer would be

liable for contribution for the workers engaged by the contractor. He submitted that the Company had deliberately misguided by entering into

correspondence and it cannot be believed that they are not aware about the workers engaged by the contractor.

10. Therefore, learned Advocate Mr. Vasavada submitted that the contentions raised by the Company that the liability of the Company would start

from the date of production cannot be accepted. He submitted that there is no dispute about the date of production that the Company started

production at a later stage, but even before that, at the stage of project the Company would be liable as the principal employer for such

contribution towards the workers engaged by the contractor.

11. Learned Advocate Mr. Vasavada has referred to and relied upon the judgment of the Hon"ble Apex Court in the case of Transport

Corporation of India Vs. Employees" State Insurance Corpn. and Another, (para 24, 25). He has also referred to the judgment reported in 2012

SCW 902 in the case of Regional Provident Fund Commissioner v. Hooghly Mills Co. Ltd. and submitted that the provisions: of the Employees

Provident Fund Act are pari materia with Sec. 85B of the ESI Act and therefore it must receive the same interpretation.

12. Learned Advocate Mr. Vasavada has also referred to and relied upon the judgment of the Madras High Court in the case of Regional Director

Employees" State Insurance Corporation Ltd. Vs. Ambika Offset, , in support of his submission. He submitted that merely because there are two

units functioning in one premises, it would not be sufficient as observed in this judgment. He submitted that the contentions raised by the appellant

Company that there was diversification and it is a separate unit cannot be accepted. Such contention has been raised only to avoid the liability.

13. Learned Advocate Mr. Vasavada has also referred to and relied upon the judgment of the Hon"ble Apex Court in the case of Employees"

State Insurance Corporation v. HMT Ltd., and anr., reported in 2008 (2) GLH 412, and submitted that the penal provision has to be construed

strictly. He submitted that this judgment, which has been referred to by the appellant, has to be considered in context of the facts of the case.

Learned Advocate Mr. Vasavada submitted that in the facts of the present case, the appellant Company has deliberately misguided and has

contended that it is a separate unit though the two units in the same premises would be liable. He submitted that in the guise of such

correspondence and the contentions raised the liability was postponed.

14. Learned Advocate Mr. Vasavada has also referred to the scope of the ESI Act and the judgment and submitted that a misstatement has been

made and the Court below has discussed on this aspect. Learned Advocate Mr. Vasavada has also submitted that whether it is a division of the

same Company or a separate unit is a matter which is required to be considered based on the material and statutory provisions of the ESI Act

including Sections 40, 41 and 82 of the Act. He submitted that suppression of such facts would disentitle the Company from any such discretionary

relief. In support of his submission he has referred to and relied upon the judgment of the Hon'ble Apex Court in the case of Amar Singh Vs.

Union of India (UOI) and Others, .

15. In view of the rival submissions, it is required to be considered whether the present appeal can be entertained or not.

16. From the facts and the rival submissions which have been discussed hereinabove, it clearly suggests that the payment towards contribution of

ESI has been made and the issue is only with regard to damages as per Sec. 85B of the ESI Act.

17. Thus, as can be seen from the provisions of Sec. 85B of the ESI Act quoted hereinabove, when the; employer fails to pay the amount due in

respect of contribution, the corporation may recover. From the facts which have been stated hereinabove, the appellant had addressed a letter

dated. 29.4.1991 produced at Annexure-B and had asked with regard to applicability of the Act stating that commercial production has not been

started. The reply has been given by the corporation vide communication dated 1.7.91 that the appellant may intimate the exact date of production

for further action in the matter. Thereafter, vide letter dated 5.3.92 at Annexure

F, the appellant has intimated that they have started production from 3.3.92. There is another letter by the corporation dated 19.6.92 stating that vide notification dated 20.6.89 the Act is made applicable to all factories/ establishments covered under the Act and the appellant was asked to take steps for registration of the employees and fill the declaration forms for payment of contribution and ultimately. in spite of this correspondence, the impugned order dated 1.3.2001 came to be passed as to why damages should not be levied for the delayed payment.

18. It is in this background the rival submissions are required to be appreciated with the statutory provisions of the ESI Act. The first aspect which is required to be focused is whether the appellant can be said to have committed any default in payment of the contribution, and even if it is assumed that there was any lapse whether it was a deliberate act. Admittedly, the amount has been paid as a delayed payment with interest.

Therefore, the moot question is whether there was any deliberate attempt for contravening the provisions of law or avoidance of payment of contribution.

19. The judgment of the Hon"ble Apex Court in the case of Employees State Insurance Corporation v. HMT Ltd. And anr. (supra) clearly provides for ""existence of mens rea or actus reus to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and/or the quantum thereof."" The Hon"ble Apex Court has, referring to its earlier judgment addressing similar issue regarding damages when there is delayed payment, has observed and quoted.

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...

Further, in this judgment, considering the penal nature of the provision, the

Hon"ble Apex Court has also observed that the penal provision should be construed strictly. It has been specifically observed that merely because the provisions enable levy of penalty, the penalty should not be levied in all situations. The Hon"ble Apex Court has observed and quoted, "Section 85B 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. Proviso appended thereto incorporates the principles of "Natural Justice".

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 31C of the Regulation is imperative in character or not. It is a well known principle of law that a subordinate legislation must conform to the provisions of the Legislative Act. Section 85B 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.

20. If this aspect has been considered in background of the facts discussed hereinabove, it cannot be said that necessary ingredients for imposition of damages have been fulfilled. In fact, as discussed above and observed by the Hon"ble apex Court, merely because there is an enabling provision, it does not necessarily justify exercise of such discretion in every matter irrespective of the explanation or the fact-situation in a given case.

21. Another facet of the argument which has been emphasised by learned Advocate Mr. Vasavada to support his submission on mens rea is that the appellant had engaged the persons/ workers through the contractor and has deliberately not stated the facts and thereby it suggests mens rea for non-disclosure of complete or full facts. This submission, again, has to be analyzed and considered in background of the correspondence which is exchanged between the parties and a clear communication from the corporation itself that when the appellant starts commercial production intimation may be given to it. According to the provision, the corporation is also

required to verify when the details are given in the prescribed forms and based on that if it cannot be said that there is any misrepresentation, the submission regarding suppression of facts cannot be accepted.

The impugned judgment, though has passed an order with regard to damages, it has mainly focused on Sec. 85B and the liability for damages. At the same time, it has also recorded that the contribution has been paid with interest. However, though it is stated by the appellant that it was at the initial stage of the project and employees of the contractor were engaged by the appellant, the evidence has not been produced. The ESI Court has made the observation that the dispute or payment is with regard to the employees engaged by the contractor and the liability is in respect of such employees engaged by the contractor at the initial stage of project. There is no dispute that the Company has accepted that liability and the contributions have been paid even with regard to such employees engaged through the contractor initially at the stage of project. The appellant has paid the contribution with interest when the notice has been reserved.

22. It is in this background when their own correspondence is considered, and when the corporation itself had stated that the intimation regarding commercial production may be given so as to apply the provisions of the ESI Act, it cannot be now argued that at the initial stage of project also the liability was sought to be evaded. In fact, when the liability is attracted, even at that stage it has been accepted by the appellant for which the contribution with interest has been paid. Therefore, the submission made by learned Advocate Mr. Vasavada referring to the judgment reported in the case of Amar Singh (supra) with regard to suppression of facts or non-disclosure of the facts about the contractual workers cannot be readily accepted.

23. Another facet of the argument is that the ESI Act which is a benevolent Act and a social welfare legislation requires a liberal construction so as to advance the object of the Act. At the same time, it has a penal provision which is also required to be construed strictly as observed in the judgment in the case of Employees State Insurance Corporation v. HMT Ltd. and anr. (supra).

24. One more submission made by learned Advocate Mr. Vasavada referring to the judgment in the case of Regional Provident Fund

Commissioner v. Hooghly Mills Co. Ltd. (supra) contending that the provisions of the Employees Provident Fund Act are *pari materia* with the

provisions of ESI Act and in the judgment rendered in the Employees Provident Fund Act, where the provisions are made applicable, would

mutatis mutandis apply to the facts of the present case, is misconceived. In this judgment, what has been observed is that the damages can be

levied only, meaning thereby, in a given set of facts the Hon"ble apex Court has made observations that the power could be exercised for levy of

damages.

25. The Constitution Bench of the Hon"ble Apex Court in the judgment in the case of Supreme Court Advocates-on-Record Association and

another Vs. Union of India, , referring to Prof. Bodmer has observed, ""a word is not a crystal, transparent and unchanged; it is the skin of a living

thought and may vary greatly in colour and content according to the circumstances and the time in which it is used.

26. It is also required to be mentioned that the reliance placed by learned Advocate Mr. Vasavada on the judgment in the case of RPFC v.

Hooghly Mills Co. Ltd., reported in 2012 AIR SCW 902. is required to be considered in background of the fact that in that case the default was

made towards the contribution of employees provident fund, whereas in the facts of the present case, it is a matter of delayed payment with interest

and therefore whether it would amount to any deliberate attempt requiring *mens rea* has to be seen.

27. The submissions which have been made at length by learned Advocate Mr. Vasavada that it is not relevant to have separate sales tax No. or

income tax assessment No. referring to the judgment reported in Regional Director Employees" State Insurance Corporation Ltd. Vs. Ambika

Offset, , also would not be much relevant in light of the specific observations of the Hon"ble Apex Court with regard to exercise of power under

Sec. 85B of the Act.

28. In light of the aforesaid discussion, it cannot be said that the provisions of Sec. 85B of the Act and necessary ingredient like *mens rea* have

been established for invoking any such discretion for levy of damages. In the result, the present appeal deserves to be allowed and accordingly

stands allowed. The impugned judgment and order passed in Application (ESI)

No. 5/2001 by the ESI Court, Vadodara dated 16.9.2010 is

hereby quashed and set aside. There shall be no order as to costs.

Since the appeal is allowed, no order is required to be passed in the civil application and the same is accordingly disposed of.