
(2003) 07 BOM CK 0026
In the Bombay High Court
Case No : First Appeal No. 809 of 1989

Regional Director, Employees" State Insurance Corporation	APPELLANT
Vs	
Kumar Still and General Mills and Another	RESPONDENT

Date of Decision : 17-07-2003

Acts Referred:

Employees State Insurance Act, 1948 — Section 85B

Citation : (2004) 3 ALLMR 887 : (2004) 102 FLR 754 : (2004) 3 LLJ 415 :
(2004) 3 MhLj 102

Hon'ble Judges : S.B. Deshmukh, J

Bench : Single Bench

Advocate : M.V. Jayakar, instructed by M.V. Jayakar and Co, for the Appellant;
Kiran Bangalia, Sonali Kuneka and Swati Chaurasia, instructed by Hareesh Mehta
and Co., for the Respondent

Final Decision : Dismissed

Judgement

S.B. Deshmukh, J.—This appeal is directed against the judgment and order passed by the Judge. Employees State Insurance Court, Bombay (hereinafter referred to as the "Insurance Court" for the sake of brevity), dated 17-12-1988 in Application (E.S.I.) No. 43/1986, filed before the said Insurance Court by the respondent No. 1. The learned Insurance Court, Bombay, by an impugned order, has reduced an amount of damages levied by the Regional Director, Employees" State Insurance Corporation, Bombay to the tune of Rs. 54,000/- as against Rs. 1,07,925.20 Ps.

2. More facts :--

The respondent No. 1 had filed an application (E.S.I.) No. 43/86, u/s 75 of the Employees State Insurance Act, 1948 (hereinafter referred to as the "said Act, 1948" for short), in the Court of learned Insurance Court at Bombay, against the present appellant and the Tahsildar for recovery of E.S.I.C. Dues, Bombay. The said respondent No. 1, has contended that the respondent No. 1 is registered as a small scale Industrial unit. The respondent No. 1 has also stated that the

Government of Maharashtra, Bombay by its letter dated 5-1-1980 informed the present appellant that M/s Kumar Steel and General Mills i.e. the respondent No. 1 were at that time registered with the Sick Unit Cell of the Directorate of Industries as a Sick Unit. According to the respondent No. 1, an amount of Rs. 1,66,257.70 Ps., is an amount of contribution for the period of October, 1975 to June 1979, which has been deposited by the respondent No. 1 at delayed period. The respondent No. 1 has also contended that the show cause notice dated 17-1-1985 was addressed to the respondent No. 1, calling upon the respondent No. 1 to show cause within a period of 15 days as to why the damages at the rate of Rs. 19% p.a. amounting to Rs. 1,07,925.20 Ps. should not be levied for the delayed payment of amount of E.S.I. contribution for the above mentioned period.

3. The respondent No. 1 has replied the said show cause notice by letter dated 4-2-1985 setting out the true facts and seeking sympathetic view in the matter, since the respondent No. 1 were sick unit for a considerable long period. The grounds set out in the said reply by the respondent No. 1 that the factory was totally closed down on account of labour unrest, financial problems, power cuts and various other factors etc. The respondent No. 1 has also stated that the management of the respondent No. 1 changed hands and attempt had been made to revive the unit in the year 1979-80, but they could not succeed. The respondent No. 1 has also contended in the said letter that ultimately, the management abandoned the unit in December 1980, with a liability of E.S.I. Dues amounting to more than a lac of rupees besides many other outstanding statutory dues and ultimately requested to consider the case sympathetically. The Regional Director, Employees State Insurance Corporation on receipt of the said reply, directed the respondent No. 1 to represent their case in person before him on 10-2-1985. The record further shows that despite seeking time, the respondent No. 1 did not remain present before the Regional Director and ultimately the Regional Director, passed an order dated 30-3-1985 levying a sum of Rs. 1,07,925.20 Ps. towards the damages u/s 85-B of the said Act, 1948.

4. The Regional Director while passing the order dated 30-3-1985, referred the grounds and/or mitigating circumstances put forth by the respondent No. 1 in their reply notice. The Regional Director, however, recorded the finding that so far as the letter of the State Government dated 5-1-1980 is concerned, it makes a request of treating the unit sympathetically for payment of dues in suitable installments and the Regional Director held that said recommendation has no relevance for the reason that the matter before him is u/s 85-B of the said Act, 1948 for levying the damages on account of delayed payment of contribution. The learned Regional Director regarding the grounds of labour unrest, financial problems, power cuts and various other factors, has observed that, it has no relevance for non payment of damages when the employees' contribution were already deducted by the respondent No. 1. The learned Regional Director has further observed regarding the change of management too has no bearing as the contribution is a statutory liability and the dues had to be paid by the

management who took over the unit. With these observations and/or findings, the learned Regional Director of E.S.I.C. has made final the show cause notice calling upon the respondent No. 1 to make the payment of Rs. 1,07,925.20 Ps. towards the damages.

5. The respondent No. 1 as stated above, has challenged the said order by filing Appeal u/s 75, which is numbered as Application (E.S.I.) No. 43/1986. The record shows that the present appellant, in response to the said application has filed written statement somewhere on 9-12-1987. In the written statement filed by the present appellant, he has admitted the issuance of notice u/s 85-B of the said Act, 1948.

of the said Act, 1948. The appellant in its written statement has also admitted the receipt of reply dated 4-2-1985 but denies the contentions raised in the said letter. The appellant in its written statement, in short, has contended that the contributions comprises of the employees' contributions which is deducted from the wages of the workers and the employer's financial difficulties or the labour unrest has no relevance to non payment itself. The appellant ultimately in its written statement has stated that in the facts and circumstances of the present case there was no alternative left with the appellant but to levy of damages u/s 85-B of the said Act, 1948.

of the said Act, 1948 and accordingly justified the order passed by the learned Regional Director.

6. The learned Judge of the Insurance Court after considering the pleadings of the parties, framed issues on 19-10-1988 and after hearing the parties, has partly allowed the said Application (E.S.I.) No. 43 of 1986, as stated above, and the said order is assailed by filing present First Appeal by the appellant in this High Court.

7. I heard the learned advocates appearing for the appellant as well as the respondent No. 1.

8. The learned advocate Mr. Jayakar, appearing for the appellant in short, submitted that the issue No. 1 in its totality is answered in favour of the appellant-Corporation by the learned Insurance Court from para No. 5 to 11. However, ultimately the Insurance Court reduced the amount of damages to the tune of Rs. 50% which is impermissible and in fact is perverse. The learned advocate for the appellant also submitted that the learned Insurance Court seems to have been prejudiced against the appellant-Corporation and in his submission he has referred two lines from para No. 12 of the judgment of the Insurance Court, which are reproduced below :--

Para No. 12 :-- "At the same time, I am constrained to say that in all such matters, E.S.I.C., should have some sympathetic attitudes towards these erring employers, with all its financial constraints and difficulties."

According to the learned advocate for the appellant, these observations

regarding "such matters" have no concern with the present Application (E.S.I.) No. 43/1986. The learned advocate for the appellant further states that these observations have ultimately resulted in bringing down the amount of damages to the tune of 50%. The learned advocate, therefore, states that the order impugned in this appeal needs to be interfered and order passed by the learned Regional Director is to be restored and maintained.

9. I have also heard the learned advocate appearing for the respondent No. 1 who supported the judgment of the Insurance Court. The learned advocate for the respondent No. 1 has argued that the learned Regional Director has not recorded the judicial findings so far as the mitigating circumstances, which were put forth by the reply letter dated 4-2-1985 by the respondent No. 1. According to the learned advocate for the respondent No. 1, the learned Regional Director has said that these grounds are not relevant and refuse to consider those grounds while imposing and levying the damages. The learned advocate for the respondent No. 1 states that so far as the prejudice is concerned though the observations from para No. 12, it appears that the Insurance Court has made reference to some other matters, it is in its entirety not out of place and/or has not caused any prejudice while bringing down the amount of damages to the tune of 50%. The learned advocate for the respondent No. 1 has further stated that the Insurance Court by way of exercising the powers u/s 75 has reduced the amount of damages legally and properly. The learned advocate for the respondent No. 1 has placed reliance on the judgment in the matter of C. L. Anand v. Regional Director, reported in 1980 LIC 901 as well as the judgment of the Hon'ble Division Bench of Kerala High Court in the matter of Regional Director, E.S.I. Corporation v. Sakhi Tiles, reported in 1994 (III) L.L.J. (Supp.) 1197.

10. This appeal is filed by the appellant u/s 82 of the said Act, 1948. The scheme of Section 82, is reproduced below :--

Under Section 82 of the said Act, it is specifically provided that,

(1) Save as expressly provided in this section, no appeal shall lie from an order of an Employees' Insurance Court.

(2) An appeal shall lie to the High Court from an order of an Employees' Insurance Court if it involves a substantial question of law.

A bare look to this provision do show that, the appeal u/s 82(2) shall lie to the High Court from an order of an Employees Insurance Court, if it involves a substantial question of law, only. In other words, it's a limited jurisdiction, restricted to substantial question of law, if any. Sub-section (1) of Section 82 mandates the filing of appeal as expressly provided u/s 82(2) of the said Act, 1948.

By this time, there are judgments of this Court saying that the appeal filed u/s 82, can be entertained by the High Court only if it involves the substantial

question of law. The Division Bench of this Court, in the matter of *Dainik Deshdoot v. Employees' State Insurance Corporation and Ors.*, reported in 1995(7) Mh.L.J. 853 ;1995 (1) C.L.R. 446, has held that the appeal u/s 82 of the said Act, 1948 has to be only on substantial questions of law involved in the matter and not otherwise. In this regard, reference also can be made to the judgment of the learned Single Judge of this Court in the matter of *Employees' State Insurance, Bombay v. Western India Theaters Ltd., Bombay*, reported in 1995 (2) C.L.R. 459 as well as *Bhatri Udyog v. Regional Director Employees State Insurance Corporation*, reported in 1982 LIC 1644. The latest judgment of learned Single Judge of this Court, is in the matter of *Deputy Regional Director Vs. Mr. Virgilio Velho*, .

11. I have examined the record of this proceeding which is styled as First Appeal and I found that when this Appeal was listed for admission before this Court, this Court by an order dated 22-9-1989 "Admitted" this appeal. I do not find that any substantial question of law was pointed out and/or this Court was persuaded to admit the appeal on a specific substantial question(s) of law incorporated in the memo of appeal on the date of the admission of the said appeal. This Court had neither formulated any substantial question of law in the appeal nor had clarified whether the appeal was being admitted on the ground(s) enumerated by the appellant involving the substantial questions of law in the Appeal Memo. However, during the course of hearing of this appeal, I have made query to the learned advocate appearing for the appellant as to which ground of the appeal memo, according to him, involves substantial question of law. The learned advocate appearing for the appellant replying the query, stated that the ground No. (d) involves the substantial question of law and ground No. (e)(xii) is also the ground involving the substantial question of law. For the sake of convenience, I am reproducing these two grounds which according to the learned advocate for the appellant are involved substantial questions of law.

(d) The learned Judge having upheld the said order, dated 30th March, 1985 as valid, factually and legally and having precisely upheld the very said grounds, as valid, as appears from paras 7 to 11 of the judgment, the learned Judge ought to have upheld the quantum of damages in toto.

(e)(xii) The said order, dated 30th March, 1985 has been passed in proper exercise of the powers u/s 85-B after due notice and offer of being heard and also been upheld by the learned Judge and therefore it cannot be called in question much less varied in the manner done and no mala fide have been alleged.

12. Apart from these two grounds which are incorporated in the memo of appeal, the learned advocate for the appellant, during the course of hearing of this appeal, placed on record substantial questions of law. The copy of this substantial questions of law is given to the learned advocate appearing for the respondent No. 1 and is taken on record and marked as Exh. "X" for the purpose of identification. In this Exh. X there are 4 substantial questions of law and/or

ground/grounds involving the substantial questions of law, according to the learned advocate for the appellant. However, while arguing the matter the learned advocate for the appellant restricted to ground No. 4 only in this Exh. X since the ground No. 4 was raised by the learned advocate for the appellant with contention that it involves the substantial questions of law. Liberty is given and the said ground is accepted to be a ground involving the substantial questions of law. The learned advocate for the appellant is accordingly permitted to amend the memo of appeal and the separate order is also passed on the said Exh. "X". The said ground is reproduced hereinbelow :--

Ground No. 4:-- Whether the Trial Court can vary admittedly well considered and properly reasoned finding of E.S.I.C. pursuant to unsubstantiated prejudice of the Trial Judge against E.S.I.C.

13. I heard the learned advocate for the respondent No. 1 regarding the ground (d) and (e)(xii) and additional ground raised in Exh.X according to the learned advocate for the respondent No. 1 none of this ground is a ground involving the substantial question of law. Having heard the learned advocate on the ground and/or of any grounds involving the substantial questions of law. In my view, the following two grounds are involving the substantial questions of law, considering the fact situation that this appeal is already admitted by this Court.

(d) The learned Judge having upheld the said order, dated 30th March, 1985 as valid, factually and legally and having precisely upheld the very said grounds, as valid, as appeal's from paras 7 to 11 of the judgment, the learned Judge ought to have upheld the quantum of damages in toto.

Ground No. 4 :-- whether the Trial Court can vary admittedly well considered and properly reasoned finding of E.S.I.C. pursuant to unsubstantiated prejudice of the Trial Judge against E.S.I.C.

Since the only question in the matter relates to the levying of damages u/s 85B of the said Act, 1948 the scheme of the said section needs to be considered. The facts regarding delayed payment of contribution and payment of interest are not in dispute. Section 85-B of the said Act, 1948.

as then was reads thus :--

85-B of the said Act, 1948.

. 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 :

(2) Any damages recoverable under Sub-section (1) may be recovered as an

arrear of land revenue.

A plain reading of Section 85-B of the said Act, 1948.

will show that in case of failure of employer to pay the amount due in respect of any contribution payable under the Act, or any other amount payable under this Act, it is not obligatory on the part of the Corporation to impose levy or recover damages. The power to impose damages is discretionary. The section has provided the maximum amount that can be recovered from erring employer. The section does not empower the authority to recover minimum amount of damages from the defaulting employer. The intention of the legislature seems to have been that in deserving cases considering the plea set up by the defaulting employers, authority can dispense with in its totality, the amount of damages or scale it down considering the fact-situation of the case. The power to levy and recover the damages provided u/s 85-B of the said Act, 1948.

of the Act is in the nature of penal provision. The proviso of Section 85-B of the said Act, 1948.

do indicate that before recovering such damages the employer should be given reasonable opportunity of being heard and the adjudication in the matter is contemplated. Since the failure to carry out this statutory obligation is provided with the adjudicatory forum and the levy of damages is penal in character, I am of the view that such damages shall not ordinarily be imposed unless the defaulting employer acted intentionally or in defiance of law or guilty of dishonest conduct or acted in conscious disregard of its obligation. The circumstances, if are beyond the control of defaulting employer it shall have to be given due consideration by the authority. In my view, mere failure of the defaulting employer, Corporation is not empowered to recover damages mechanically without taking into account the facts and circumstances of each case. While levying the damages by resorting to Section 85-B of the said Act, 1948.

, the authority has to record the finding, that the due opportunity was given to the defaulting employer and after considering mitigating circumstances put forth by the defaulting employer the order is passed. The deduction of the contribution from the wages of the employees, cannot be a sole ground to punish the employers with maximum levy of damages.

14. In this background, the question regarding levy of damages, which is embodied u/s 85-B of the said Act, 1948.

is an important. The proviso which is appended to Section 85-B of the said Act, 1948.

, mandates an opportunity of hearing to the erring employer's. If the scheme of Section 85-B of the said Act, 1948.

in its entirety is taken into consideration, the damages seems to be in penal nature. Section contemplates levy of damages by the authority under the

provisions of the said Act, 1948 after hearing the employer. The employer in response to the show cause notice may come up with the mitigating circumstances and the authority has to apply its mind to the mitigating circumstances and/or grounds raised by the employer. It is important to note, that the question of payment of contribution as well as payment of interest in accordance with the scheme of the said Act, 1948 and the Employees' State Insurance (General) Regulations, 1950 has no relevance so far as to levy of damages is concerned. However, equally it is important that the authority i.e. Regional Director has to apply his mind while dealing with the alleged mitigating circumstances and/or ground raised by the erring employer. The nature of damages being penal, the authority is armed with the powers to levy the damages and/or waive the damages. While interpreting the provisions laid down u/s 85-B of the said Act, 1948.

the judgment cited by the learned advocate for the respondent No. 1 reported in 1994 III L.L.J. (Supp.) 1197, in my view is important. The relevant Head note of this judgment is reproduced hereinbelow :--

"Employees State Insurance Act, 34 of 1948 -- Section 85-B of the said Act, 1948.

--Jurisdiction of the E.S.I. Court -- It can interfere with the quantum of damages and reduce or delete damages levied by the Corporation for failure to pay contributions."

I am in respectful agreement with the view taken by the Hon'ble the Division of the Kerala High Court in this matter of Regional Director, E.S.I.C. and Sakhi Tiles. At the cost of repetition, I am constrained to observe that the mandate of Section 85-B of the said Act, 1948.

of the said Act, 1948, is empowering the Regional Director to levy appropriate lesser amount of damages which is permissible u/s 85-B of the said Act, 1948.

of the said Act of 1948. Mechanical levy of damages to the maximum ceiling u/s 85-B of the said Act, 1948.

shall not be every time justifiable. Mitigating circumstances brought forward by the erring employer had to be considered by the Regional Director, in such quasi-judicial proceedings. If the Regional Director fails, the Insurance Court; in my view is competent enough to being a proper forum prescribed by the said Act, 1948 to adjudicate as to whether Corporation is justified in levying the damages. If the Insurance Court is satisfied that there are justifiable reasons, it can pass appropriate order in the appeal.

15. The learned advocate for the appellant as stated above, has submitted that from para Nos. 5 to 11 of the judgment of the Insurance Court, the Court upheld the finding recorded by the Regional Director, and therefore, there is no reason for Insurance Court to reduce the amount of damages especially once accepted the reasoning and finding of the Regional Director in this regard. The learned

advocate for the appellant has stated and specifically pointed out all these observations of the learned Insurance Court from para Nos. 5 to 11 to substantiate his contentions. While examining the submission of the learned advocate for the appellant, I have also read para No. 8 of the judgment of the Insurance Court. The learned Insurance Court while considering the finding recorded by the Regional Director has observed that the order passed by the Regional Director cannot be said to be a non speaking order. However, in the next line the learned Insurance Court has recorded the observations that though it is a speaking order it has to be examined on its own merit. The exact wording of the learned Insurance Court in this regard is reproduced hereinbelow :--

"In short, it is a speaking order and it has to be examined on its own merit."

16. In my opinion, the contentions raised by the respondent No. 1 in application (E.S.I.) No. 43/1986 are regarding non application of mind by the Regional Director and non speaking order passed by the said authority along with the other contentions. It seems that therefore, the learned Insurance Court while dealing with these contentions recorded observations that the order passed by the Regional Director is a speaking order. However, the learned Insurance Court has made it clear from that para No. 8 last line that the said speaking order has to be examined on its own merits. It seems from the judgment of the learned Insurance Court that the learned Insurance Court has dealt with the provisions laid down u/s 31(A) of the E.S.I. (General) Regulations in para No. 9. The learned Insurance Court seems to have considered the argument of the learned advocate Mr. S. P. Singh who was appearing for present respondent No. 1 before him regarding the proviso to Regulation to 31(A) in para No. 10. It also seems from the said para No. 10 that the learned Insurance Court has also recorded some observations regarding the payment of interest of Rs. 34,080.70 Ps. which is made by the respondent to the Corporation on 23-1-1986. In para No. 11, the learned Insurance Court has dealt with the payment of Rs. 20,000.00 deposited by the respondent No. 1 on 1-4-1986 and thereafter, in para No. 12 the learned Insurance Court has extensively dealt with the mitigating circumstances put forth by the respondent No. 1 in its reply dated 4-2-1986. The learned Insurance Court while dealing with the mitigating circumstances seems to have applied its mind for the circumstances like labour unrest and financial problems and the fact that the Government of Maharashtra had declared the applicant as a Sick Unit way back in January, 1988. The learned Insurance Court, at the cost of repetition observed that the Regional Director, E.S.I.C. ought to have slashed the amount of damages to the tune of 1/2 of the amounts, as of the amount as proposed in the show cause Notice dated 17-1-1985. At this juncture, I have also seen the show cause notice dated 17-1-1985, it was addressed by the Regional Director to the respondent No. 1 calling upon him to show cause as to why an amount of Rs. 1,07,925.20 Ps. should not be levied towards the damages u/s 85-B of the said Act, 1948.

of the said Act, 1948 and it appears that the learned Insurance Court has after

taking an assessment of the mitigating circumstances, noting the fact of closure of the respondent No. 1 company long back in January, 1988, brought down the amount of damages to the tune of Rs. 54,000/- and after considering subsequent payment of Rs. 20,000/- has directed the respondent No. 1 to make the payment of Rs. 34,000/- only. Therefore, considering this aspect, the learned Insurance Court in its entirety, in my view, has not committed any perversity so as to interfere with the said judgment. The order passed by the Insurance Court, is therefore, within the frame-work of Section 85-B of the said Act, 1948.

of the said Act. In these circumstances two substantial questions of law, which are mentioned above, shall have to be answered in favour of the respondent. In my view, therefore, in the fact situation of the present case the judgment and order passed by the learned Insurance Court is well within the power and ambit of the said Court under Dictions 75 and 85-B of the said Act. The order passed by the learned Insurance Court, therefore, cannot be said to be perverse and/or arbitrary and the interference in this order while exercising the powers u/s 82, in my view, is unwarranted. Hence, I pass the following order:--

"The First Appeal filed by the appellant stands dismissed. The judgment and order passed by the learned Judge of Insurance Court, Bombay in Application (E.S.I.) No. 43/1986 dated 17-12-1988 is upheld and confirmed. However, there is no order as to costs."

17. During the course of argument, the learned advocate appearing for the appellant sought leave and liberty to incorporate the ground No. 4 in the memo of appeal No. 809/1989, as a ground involving the substantial questions of law. On hearing the advocate appearing for the respondent, leave granted. The learned advocate for the appellant is permitted to amend the appeal memo accordingly within a period of one week from today.

Appeal is dismissed accordingly.