
(1988) 06 KL CK 0023

In the High Court Of Kerala

Case No : M.F.A No's. 191 and 201 of 1988

Regional Director, E.S.I. Corpn.

APPELLANT

Vs

Sakthi Tiles

RESPONDENT

Date of Decision : 10-06-1988

Acts Referred:

Employees State Insurance Act, 1948 — Section 85B

Citation : (1989) 58 FLR 17 : (1994) 3 LLJ 1197

Hon'ble Judges : K.S. Paripoornan, J;K. Balakrishnan Nair, J

Bench : Division Bench

Advocate : C.S. Rajani, for the Appellant;

Final Decision : Dismissed

Judgement

Paripoornan, J.—The Regional Director, E S I Corporation, Trichur, is the appellant in both these appeals. The appeals are preferred against the order passed by the Insurance Case No. 20 of 1986, dated 27-11-1987, and Insurance Case No. 42 of 1986, dated 30-10-1987. It appears that in both these cases, the employer failed to pay the amount due in respect of the contribution payable under the Employees State Insurance Act. The Corporation levied 19 per cent interest as damages on such arrears for the delayed payments. The assessment proceedings were attacked as illegal, unfair and improper before the Insurance Court. The Insurance Court in I.C. 42 of 1986 held that 10 per cent of the contribution may be levied as damages. In I.C. 20 of 1986 the same court held that the employer may be levied damages at the rate of 12 per cent. The Regional Director, E.S.I. Corporation has, in these appeals, questioned the jurisdiction and propriety of the Insurance Court in reducing the damages levied.

2. We heard counsel for the petitioner, Mr. C.S. Rajan. It was argued that, admittedly in both these cases the employer failed to pay the amounts due in respect of contribution payable under the Act. It is for the Corporation to decide what amount will be recovered as damages and the only limitation placed on the Corporation is to be found in Section 85(B) of the Act, to the effect that the

damages shall not exceed the arrears and that before recovering the damages the employer shall be given a reasonable opportunity of being heard. It is not open to the Insurance Court to interfere with the quantum of damages levied on the employer.

3. An appeal from the decision of the Employees Insurance Court lies to this Court only when it involves a substantial question of law. This is so stated in Section 82 of the Act. The Corporation is empowered to recover damages u/s 85B of the Act Section 85B is in the following terms:

"85B. 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 such damages, not exceeding the amount of arrears as it may think fit to impose;

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".

It was not disputed that from any levy of damages it is open to the employee to take up the matter before the Insurance Court u/s 75 read with Section 78 of the Act. The only question focussed was that the Insurance Court cannot interfere with the quantum of damages. A mere look at Section 85B will show that even where the employer fails to pay the amounts due in respect of any contribution payable under the Act, it is not obligatory on the Corporation to levy or recover damages. The power to levy damages is discretionary. The section has only stated, the maximum amount that can be so recovered. The power to levy and recover damages provided in Section 85B of the Act is in the nature of a quasi-penal provision. An order levying damages for failure to pay the amount due in respect of any contribution payable under the Act, is a quasi-judicial proceeding. The proviso to Section 85B itself indicates that before recovering such damages, the employer should be given reasonable opportunity of being heard. It postulates that there should be an adjudication in the matter. Since the failure to carry out the statutory obligation should be adjudicated by a quasi-judicial enquiry, and the levy of damages is quasi-penal in character, we are of the view that such damages will not ordinarily be imposed unless the party obliged to pay the amount due, acted either deliberately or in defiance of law, or was guilty of contumacious or dishonest conduct, or acted in conscious disregard of its obligation. The mere fact, that the Corporation is empowered to recover damages does not mean that the Corporation can act mechanically and without taking into account the facts and circumstances of each case. It is to be noted that the statutory provision does not prescribe any minimum to be recovered as damages. What is provided is the maximum that can be recovered. We are of the view, that since the opportunity, that is provided before recovering the damages, should be effective and meaningful, the authority empowered to levy damages

should have the discretion either to levy the damages or to dispense with the levy of the damages. The Corporation will not be justified in levying the damages in cases where the employer, or the person, who is bound to pay the amount in respect of the contribution payable in this regard, is able to offer sufficient or cogent explanation for non-remittance, or in cases where there is only a technical or venial breach of the provision of the Act, or there exists bona fide circumstances, which will point out that there was no deliberate omission on the part of employer. In this perspective, we hold that the Insurance Court, which is a proper forum prescribed by the Act to adjudicate as to whether the order or proceeding initiated by the Corporation to recover damages is justified, can evaluate the entire matter, and if it is satisfied that there are extenuating circumstances, it can dispense with the recovery of damages, or delete or reduce the quantum of damages levied or afford such other relief, which in its opinion, is deserved in the circumstances. Delivering the judgment of the Bench, Subramonian Poti, J. in C.L. Anand v. Regional Director 1980 KLT 139: 1980 L.I.C. 901 stated thus:-

"Being a provision which confers a power to impose penalty, Section 85B of the Employees' State Insurance Act must be taken to confer a discretion on the Regional Director in the matter of determining the quantum. But, that discretion tails for objective exercise within the limit pointed out in that Section and such exercise must be apparent in the order. We have also indicated that it is necessary to find guilty conduct on the part of a party to justify the imposition of damages and the quantum of guilt or the gravity of misconduct should naturally determine the gravity of the punishment. Therefore while one would not expect the order of the Regional Director to state with precision how exactly the damages have been assessed, it must be possible to see from the order the presence of punitive circumstance justifying the imposition of damages and the gravity of the punitive element. That would be necessary to appreciate whether the damages imposed could not be said to be reasonable.....

If the damages are imposed are merely related to the delay without reference to the punitive element, that may not be justifiable."

We fully concur with the above statement of the law. In I.C. 20 of 1986 the Insurance Court held that the period of delay in remitting the amount varies from 11 days to 473 days and mechanical levy of 19 per cent damages for all the periods is irrational and unfair. So holding, the Insurance Court directed the Corporation to fix damages at the rate of 10 per cent for all periods involved in the case. Similarly, in I.C 42 of 1986 the Insurance Court adverted to the fact that the employer (applicant) is a Cooperative Society registered under the Cooperative Societies Act and the Government has registered it as a sick unit. In this view of the matter, interests of justice require a reduction of damages and directed the Society to pay 10 per cent of the contribution as damages. We are of the view, that the direction given by the Insurance Court to limit the percentage of damages in both the cases at 10 per cent is well justified and do

not call for any interference. The Insurance Court has acted in accordance with law. At any rate, we are of the view, that no substantial question of law is involved in both these appeals.

The appeals are without merit. They are dismissed, in limine.