(2008) 05 KL CK 0031

In the High Court Of Kerala

Case No : I.A. No. 11 of 2004

Regional Director, E.S.I. Corporation and Another — APPELLANT

Vs

Managing Director, Qetcos Ltd. — RESPONDENT

Date of Decision : 22-05-2008

Acts Referred:

Employees State Insurance (General) Regulations, 1950 — Regulation 31C
Employees State Insurance Act, 1948 — Section 85B
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 4

Citation : (2008) 118 FLR 715 : (2008) 3 ILR (Ker) 132 : (2009) 1 LLJ 56

Hon'ble Judges : P.N. Ravindran, J;J.B. Koshy, J

Bench : Division Bench

Advocate : T.V. Ajayakumar, for the Appellant; Pirappancode V. Sreedharan Nair and Pirappancode V.S. Sudhir, for the Respondent

Final Decision : Dismissed

Judgement

J.B. Koshy, J.—This appeal is filed by the Employees State Insurance Corporation. The first respondent in the appeal is a Co-operative Society organised by the Government of Kerala for providing employment opportunities to unemployed Engineers and Technicians. Since the unit was facing acute financial crisis due to erosion of working capital from 1992 onwards it was closed finally in March, 1996 and therefore the contributions to the Corporation were not remitted from August, 1994 onwards. During these periods, even the salary of the employees was not paid due to non-availability of funds. The Government took initiative to revive the Society and agreed to contribute Rs. 105 lakhs to the share capital of the Society for which the members of the Society who are employees have to take shares worth Rs. 27 lakhs forgoing certain amount of their salary arrears. The ESI contribution arrears were paid with interest. The Corporation imposed damages on the delayed payment of contribution. The nonpayment of contribution in time was not deliberate and there is no mala fide intention: and it was beyond the control of the Society and therefore, the imposition of damages was set aside by the Employees Insurance Court and the appeal was filed by the

Corporation.

When the appeal came up before the learned single Judge, the respondent cited the decisions of this Court in Employees'' State Insurance Corporation and Another Vs. K.N. Premanandan and Another, wherein it was held that imposition of damages is by way of; penalty and such damages can be imposed only in accordance with the principles applicable for imposing penalty for failure to carry out a statutory obligation and damages cannot be imposed unless the party acted either deliberately or in defiance of law or they were guilty of contumacious or dishonest conduct. It was also held that Regulation 31-C of the Employees State Insurance (General) Regulations, 1950 is only a guideline in the matter of imposition of damages and percentage wise damages fixed is not absolute. It is the maxim amount of damages that can be imposed for the delay in payment of contribution apart from statutory interest. The above decision is in consonance with the Supreme Court decision in M/s. Prestolite of India Ltd. Vs. The Regional Director and another, . In the above case it was held by the Apex Court that damages can be imposed after issuance of show-cause notice and after giving an opportunity of personal hearing. Order imposing damages shall be a speaking order. Authority imposing damages shall give reasons for imposing damages at flat rate prescribed as well as for not accepting the grounds stated by the defaulter. But the learned Judge noticed that quoting the decisions of the Apex Court in Sovrin Knit Works etc. Vs. Employees'' State Insurance Corpn. and another etc., and in M/s. Hindustan Times Limited Vs. Union of India and Others, in Chandrasenan Vs. Regional Director, E.S.I.C., a Division Bench of this Court held that merely because the employer was allowed to pay contribution in instalments, imposition of damages cannot be faulted. Therefore, considering the conflict of view in the decision of ESI Corporation v. Premanandan (supra) case and Chandrasenan v. Regional Director, ESI Corporation (supra) case this appeal was referred to a Division Bench.

2. If there is delay in the payment of contribution, the contribution is to be paid with statutory interest and interest cannot be waived in view of financial difficulties. The financial difficulty is not a ground for not paying the defaulted instalment with interest. But as far as the question of imposition of damage is concerned, since it is penal in nature, the factual situation has to be considered by the authorities. The facts of case clearly show that the Society was unable to pay even the wages to the employees. But the salary arrears were paid by converting it into shares. The Society was once closed due to financial difficulties and lack of funds. The contribution was paid with interest after the Government provided further working capital.

3. Considering the facts of this case, we are of the view that the waiver of damages was correctly done by the Employees Insurance Court. In this connection, counsel for the respondent also referred to a recent decision of the Supreme Court in Emp. State Insurance Corporation v. H.M.T. Ltd. and Anr. 2008 (116) FLR 543 wherein, the Supreme Court held as follows:

It is 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 contemplate computation of quantum of damages in the manner prescribed under the regulations.

13. 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.

14. 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 de hors the same.

It was further observed as follows:

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, under the statute is held to be mandatory in character.

Relying on an earlier decisions finally, the Apex Court held as follows:

21. 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.

4. A reading of Chandrasenan v. Regional Director, ESI Corporation (supra) case would show that it was decided on the facts of that case. Mere financial difficulties alone or an order of the Court granting instalment facility to pay the amount of contribution as such is not a ground for totally waiving the damages for delay in payment of contribution. In such circumstances, discretion has to be exercised by the authority concerned while imposing damages as the regulations only prescribe the maximum damages that can be imposed. But if there is no mens rea and the employer was unable to pay the amount due to circumstances beyond his control to pay the contribution in time, damages can be totally waived. The word used in Section 85-B of the ESI Act is the Corporation "may" recover damages and not "shall" recover. Therefore, it is not mandatory that in all cases, damages shall be recovered as per the regulations. If in all cases of

delayed payment of contribution damages shall be recovered at the flat rate prescribed by the regulations, there is no purpose for issuance of a show-cause notice and grant of personal hearing. The language used in Section 85-B itself is clear that what is provided in the regulation is only the maximum amount of damages that can be imposed. It also provides that if the establishment is a sick industrial company and is under the rehabilitation scheme by the Board for Industrial and Financial Reconstruction, no damages need be imposed. Section 85-B of the ESI Act reads as follows:

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:

Provided further that the Corporation may reduce or waive the damages recoverable under this Section in relation to an establishment which is a sick industrial company in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established u/s 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in regulations." The mandate of Section 85-B and the rulings of the Apex Court clearly show that there is no reason to differ from the law laid down in ESI Corporation v. Premanandan (supra), Chandrasenan v. Regional Director, ESI Corporation (supra) case was decided on the facts of this case and there is no conflict of views. We fully agree with the impugned order of the E.I. Court on the facts of this case.

The appeal is dismissed.

