
(2005) 12 KL CK 0036
In the High Court Of Kerala
Case No : Ins. App. No. 21 of 2005

Regional Director, E.S.I. Corporation	APPELLANT
Vs	
Managing Director, Transmatic System Ltd.	RESPONDENT

Date of Decision : 02-12-2005

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B, 6
Employees State Insurance (General) Regulations, 1950 — Regulation 31, 31C
Employees State Insurance Act, 1948 — Section 40, 85, 85B
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 4

Citation : (2006) 111 FLR 953 : (2006) 1 ILR (Ker) 403 : (2006) 2 LLJ 990

Hon'ble Judges : J.M. James, J

Bench : Single Bench

Advocate : T.V. Ajayakumar, for the Appellant; G.S. Reghunath, for the Respondent

Final Decision : Allowed

Judgement

J.M. James, J.—Opposite Party, the Regional Director, E.S.I. Corporation, Thrissur, in short "the Corporation", in Insurance Case No. 2/2003, on the file of the Employees' State Insurance Court, Kollam, in short "the Insurance Court", is the appellant. The Corporation issued Exhibit B1 notice dated October 28, 2002, claiming an amount of Rs. 64,266/-, as damages, on the failure of Transmatic System Ltd., the applicant, in short "the Establishment", in paying the insurance contribution due to the Corporation, for period from October 2000 to March 2001 and from April 2001 to September 2001. The stand of the Establishment was that it could not remit the same, due to financial constraints, as the establishment was faced with loss, during the above period. However, the defaulted amount was paid on June 12, 2002, as well as on June 19, 2002, with interest, as per Exhibit A2 challan. But the Corporation issued Exhibit A1 notice dated July 10, 2002, demanding the insurance contribution and interest, which had already been remitted on June 12, 2002, Exhibit B1, show cause notice also followed. Thereafter, the Establishment challenged the same before the Insurance Court,

which held that, Exhibit B1 show cause notice, and Exhibit B2 order imposing damages, were issued after receiving the entire insurance contribution amount with interest, as per Exhibit A2 challan. Further, following the decision *E.S.I. Corporation v. Sobha Engrs.* 1982 (44) FLR 100, it was also held that no amount was due to the Corporation at the time of issuance of Exhibit B1 notice. The Corporation, has, therefore, come up in appeal challenging the same.

2. The learned Counsel appearing for the appellant, Mr. T.V. Ajayakumar, relied on Section 85-B of the Employees' State Insurance Act, 1948, in short "the Act", and submitted that the object of 1989 amendment, which came into effect in the year 1992, was such that the existing penal provisions were made more stringent, and further made suitable arrangements for withdrawal of the beneficial provisions of the Act applicable to the establishments, if they were found misusing such benefits. The counsel further submitted that under Regulation 31-C of the Employees' State Insurance (General) Regulations, 1950, in short "the Regulations", the realization of the penalty, as specified in the regulation, is mandatory in view of the objects and reasons contained in the Act.

3. The learned Counsel Sri. G.S. Reghunath appearing for the respondent, on the other hand, submitted that in view of Exhibit A2 challan, through which the entire insurance contributions and interest thereon were remitted, even prior to Exhibit A1 notice, and there being no claim of damages in Exhibit A1, issuance of Exhibit B1 notice is an after thought. The Corporation had not applied its mind while imposing such damage, as no damage could be imposed merely for the sake of imposition, where there is no deliberate and willful failure to pay the insurance amount was established.

4. For clarity of discussion, I reproduce below Section 85-B of the Act, after its amendment through Act 29 of 1989, which came into force with effect from January 1,

85-B Power to recover damages - (1) Where an employer fails to pay the amount due to 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.

(2) Any damages recoverable under Sub-section (1) may be recovered as an arrear of land revenue or u/s 45-C to Section 45-I.

Regulations 31 and 31-C are reproduced below:

31. Time for payment of contribution: An employer who is liable to pay contributions in respect of any employee shall pay those contributions within 21 days of the last day of the calendar month which the contributions fall due;

Provided that where a factory/establishment is permanently closed, the employer shall pay contribution on the last day of its closure;

Provided that an employer may opt, in such manner as may be prescribed by the Director-General, for payment of amount in advance towards contribution to be adjusted against contributions payable by him including employees' contribution for a wage period so that the balance of advance amount continues to be more than the contributions due and payable at the end of the concerned wage period. Such employer shall furnish in the prescribed pro forma (Form 6-A), a six-monthly statement of contributions payable and paid in advance with the balance left at the end of each month along with return of contributions to the appropriate regional office of the Corporation.

31-C. Damages or contributions or any other amount due, but not paid in time - An employer who fails to pay contribution within the periods specified under Regulation 31, or any other amount payable under the Act, shall be liable to pay damages as under:

Period of delay	Rate of damages in percent per annum of the amount due
i) Upto 2 months	5%
ii) 2 months and above but less than 4 months	10%
iii) 4 months and above but less than 6 months	15%
iv) 6 months and above	25%

5. It is conceded by both sides that prior to the amendment, the Corporation was given a wider power to recover from the employer such damages, "not exceeding the amount of arrears as it may think fit to impose" after giving an opportunity to the employer of being heard. However, after the amendment, such unfettered discretion is done away with, and damages are recovered from the employer by way of penalty, the same being, "as may be specified in the regulations".

6. In *Employees' State Insurance Corporation v. Braithwaite & Co. Ltd.* 2004 IV LLJ 675 the Honourable Calcutta High Court had an occasion to consider the failure on the part of the employer to pay the contribution beyond the prescribed period, u/s 40 of the Act, and it was held that in such circumstances, damages could be recovered u/s 85-B of the Act.

7. In *Swastik Pharmaceuticals and Another Vs. Joint Regional Director U.P. Region of Employees State Insurance Corporation and Others*, a learned single Judge of the Honourable Allahabad High Court, rejected the argument that once the employers have paid the contribution amount to the Corporation, they cannot be subjected to damages for the delay, as the said argument is contrary to Regulation 31-C read with Section 85-B of the Act.

8. In *Nipha Exports (P) Ltd. Vs. Employees' State Insurance Corporation*, the

Honourable Punjab and Haryana High Court, while dealing with Section 85-B and Regulation 31-C of the Act, quoted from the judgment of the Apex Court in *Organo Chemical Industries and Another Vs. Union of India (UOI) and Others*, where the constitutionality of Section 14-B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, which is part materia to Section 85-B of the Act was challenged. Explaining the concept of Section 14-B, the Supreme Court held that:

Section 14-B is meant to penalize defaulting employer as also to provide reparation for the amount of loss suffered by the employees. It is not only a warning to employers in general not to commit a breach of the statutory requirements of Section 6, but at the same time it is meant to provide compensation or redress to the beneficiaries i.e. to recompense the employees for the loss sustained by them. There is nothing in the Section to show that the damages must bear relationship to the loss which is caused to the beneficiaries under the Scheme.

Thus, in effect, the application of Section 85-B of the Act has come for scrutiny of the Supreme Court, and the same had been accepted as required, for the purpose of warning the employers not to commit any breach of statutory provisions of the Act.

9. Mr. G.S. Reghunath, submitted relying on *Regional Director, Employees' State Insurance Corporation Vs. N. Dasarathy and Sons and Another*, that a Section 85-B of the Act, as stated in the objects and reasons, is to provide more deterrent penalties for defaults in payment of contributions. The Corporation cannot invoke Section 85-B of the Act, as a matter of course, without application of mind. The appellant Corporation will have to apply its mind to various relevant factors, as the damages u/s 85-B is in substance a penalty imposed on the employer for breach of statutory applications. He also relied on *Regional Director, E.S.I. Corpn. Vs. Sakthi Tiles*, to emphasis the point that while applying Section 85-B of the Act, the authority must exercise the discretion which calls for objective exercise, within the limit pointed out in that Section, and such exercise must be apparent in the order.

10. In the case under discussion, the employer of the respondent establishment had remitted the amount as seen from Exhibit A2. Hence, even before the issuance of Exhibit B1 the whole amount was paid. The contention, therefore, is that there was no deliberate or wilful failure in paying the contribution and, on the other hand, there was delay in issuing Exhibit B1. Therefore, the application of Section 85 of the Act is against the very object of the Act. In *M/s. Hindustan Times Limited Vs. Union of India and Others*, the Apex Court considered a similar argument and held, accepting the legal principle laid down in *Divisional Engineer A.P. SEB v. R.P.F. Commissioner 1979 LIC 187 (AP)* *Inter State Transport Agency v. R.P.F. Commissioner 1983 LIC 940* and *State of Punjab v. Amin Chand 1970 (37) FJR 92 (P&H)*, that, mere delay on the part of the Department could not be treated as amounting to waiver.

11. In view of the above authoritative pronouncements, I hold that even though there was no demand of damages in Exhibit A1 notice, and the employer of the establishment had remitted the insurance contribution, together with interest, as per Exhibit A2 challan prior to Exhibit B1 notice, the payment of damages to an amount of Rs. 64, 266/-, is only in accordance with Section 85 of the Act, as regulated by Regulation 31-C. Hence, the above arguments of the counsel for the Establishment, cannot be accepted.

12. While claiming damages through Exhibit B2 order dated December 5, 2002, the Regional Director of the Corporation, had relied on Hindustan Times Ltd. (supra), and also gave details therein, narrating the facts, which led to the demand of Rs. 64, 266/- as damages. In such situation, I cannot accept the argument advanced by the learned Counsel relying on Regional Director, Employees' State Insurance Corporation, Chennai v. N. Dasarathy and Sons and Anr. case, (supra). Moreover, the principles discussed in this case, is against the legal principle laid down by the Apex Court in Hindustan Times Ltd's case, (supra). Therefore, Dasarathy case is inapplicable with the facts of the case under discussion.

13. The employer of the establishment has contended before the Insurance Court that he could not pay the insurance contribution in time, due to financial stringency and loss of business. But the same is not a ground, as held by the Supreme Court, in Hindustan Times Ltd. (supra), wherein while interpreting Section 14-B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, the Court relying from Organo Chemical Industries case, (supra), held that power-cut, financial problems, disputes between partners, were not relevant explanations and the same cannot be accepted for interfering with the imposition of damages by the Corporation. However, if the Corporation initiate action after long years of delay, the employer may take up the defence of "irretrievable" prejudice, whereby he may claim loss of relevant records, non-availability of the personnel in charge of payments, and also establish that there is no other way he can reconstruct record or produce evidence. The employer should give reply to the show cause notice and satisfy the authority concerned with acceptable material. If those pleas are rejected, he cannot raise them in the High Court, unless there is a clear pleading in the writ petition to that effect. But such pleas are not taken as defence by the establishment in the case at hand.

14. In view of the above discussions on facts and the principles of law, I hold that the remittance of an amount of Rs. 2,41,555/- , towards insurance contribution with interest, with the delay of 241 to 575 days on June 12, 2002 and June 19, 2002, will not help the employer of the establishment to challenge the claim of damages made u/s 85-B of the Act, as regulated by Regulation 31 -C of the Regulations. The Insurance Court did not consider the above legal principles and only came to the conclusion that as the amount had already been remitted prior to the issuance of Exhibit B1 notice, there was no need to impose any damages applying Section 85 of the Act. Such conclusion of the Insurance

Court is against the objects and reasons, as contained in the Preamble of the Act, when it was introduced before the Parliament, in 1989. Section 85 of the Act is filled with more strength to impose stringent conditions on the erring employers of the establishments, companies and factories. When an employer who received contributions from the employees, had used it for this own purposes, cannot escape from the payment of damages claimed by the Corporation.

15. Hence, I uphold Exhibit B1 notice claiming the amounts stated in Exhibit B2. The 5 same is to be recovered from the respondent, the employer of the establishment. The order of the Insurance Court in IC. No. 2/2003, is, therefore, set aside.

16. The Appeal is allowed as above.