

(1984) 11 BOM CK 0070
In the Bombay High Court
Case No : First Appeal No. 24 of 1983

Standard Drum and Barrel Mfg. Co.

APPELLANT

Vs

Regional Director, E.S.I. Corp.

RESPONDENT

Date of Decision : 19-11-1984

Acts Referred:

Citation : (1984) 11 BOM CK 0070

Hon'ble Judges : V.V. Vaze, J.;C.S. Dharmadhikari, J.

Bench : Division Bench

Final Decision : Dismissed

Judgement

C.S. Dharmadhikari, J.—This is an appeal filed by the Standard Drum and Barrels Manufacturing Co. Bombay against the order passed by the Employees Insurance Court at Bombay in application (ESI) 38 of 1981 decided on 30th July, 1982 rejecting the application filed by the company under section 75 of the Act, i.e. Employees' State Insurance Act, 1948, for setting aside the order passed by the Regional Director, E.S.I. Bombay levying damages under section 85-B of the Act.

2. It is an admitted position that notices were issued to the appellant company under section 85-B of the Act. According to the corporation the appellant employer is a chronic defaulter in payment of contribution as per the provisions of section 40 of the E.S.I. Act read with Regulations Nos. 29, 31, 34 and 26 of the E.S.I. (General) Regulations, 1950. Therefore, the corporation issues 3 notices dated 7th January, 1980, 9th July, 1980 and 1st January, 1981 being notices Nos. 5, 6 and 7 for defaults Nos. 14 to 23 proposing to determine and claim damages of Rs. 74,648.10, Rs. 64, 278/and 72,163.95 respectively for the contribution periods ending on 25th November 1978, 27th January, 1979, 31st March, 1979, 26th May, 1979, 29th September, 1979, 24th November, 1979, 26th January, 1980, 29th March, 1980 31st May, 1981 and 26th July, 1980. The appellant employer was asked to show cause by the said notices and was also afforded reasonable opportunity of being heard. The appellant-company replied to the said notices vide their letters dated 22nd January, 1980, 14th July, 1990

and 9th February, 1981 and also appeared before the Regional Director of the Corporation on 23rd May, 1981, for hearing. The employer admitted the delay in payment of contribution but offered explanation to the effect that so all delays were caused due to pressure of work on the staff concerned and they were also in financial difficulties. The Regional Director of the Corporation found that the alleged reasons given could not be accepted as sufficient for reduction in the amount of damages as these were fifth and sixth show cause notices. However, on merits the Regional Director reduced the claim suitably in respect of the notices. As regards the 3rd notice dated 1-1-1981, the Regional Director found that this was 7th show cause, and, therefore, there were no reasons for reducing the damages claimed. Hence he passed necessary orders on 11th of June, 1981 imposing the damages of Rs. 63,687/- Rs. 50731/- and Rs. 72163.95 respectively. It is this order imposing damages upon the appellant-employer which came to be challenged in application filed under section 75 of the Act. In support of its case the appellant company examined Joseph Nair, Manager of the Company. After appreciating the material placed before him, the Judge of the Employees Insurance Court, Bombay came to the conclusion that there were no reasons for interfering with the order passed by the Regional Director and, therefore, rejected the application. It is this order of the Employees Insurance Court which is challenged in the present appeal.

3. Shri John, the learned Counsel appearing for the appellant-company contended before us that the order passed by the Regional Director E.S.I. is wholly illegal, it being a stereo type order. In no sense it could be described as a speaking order. The company had given two reasons as to why the payment of contribution was delayed, namely financial difficulties and administrative difficulties due to pressure of work on the staff concerned. In none of the orders passed by the Regional Director, he has applied his mind to the reasons given by the company and, therefore, the order passed by the Regional Director is wholly mechanical. In support of his contention he has placed strong reliance upon the decision of the Supreme Court in A.I.R. 1979 S.C. 1803 Organo Chemical Industries and another v. Union of India and others, and a decision of the Single Judge of this Court in 1983(2) Lab Law Jou 436 Jost Engineering Ltd. Bombay v. The Union of India and another.

4. On the other hand, it is contended by Shri Jayakar, the learned Counsel appearing for the respondents-Corporation that it cannot be said that the orders passed by the Regional Director of the E.S.I. are stereo type orders and are not speaking orders. As a matter of fact the explanation offered by the appellant-company was one and the same and could be described as stereo type. Further the penalty imposed qua 3 notices is different and distinct which clearly indicates application of mind on the part of the Regional Director of the E.S.I. The Regional Director has made a reference to the explanation offered by the company and after considering the same has rejected it and that too for good reasons. Shri Jayakar also contended that the law laid down by the Single Judge of this Court in Jost Engineering Ltd.'s case is not applicable to the facts and circumstances of

this case. He also contended that even otherwise Letters Patent Appeal is pending against the said decision of the Single Judge and further in that case the learned Judge was concerned with a case arising out of the Employees Provident Fund Act and not under the Employee's State Insurance Act. The area and field covered by the two enactments is distinct and different, and, therefore, the said decision is not relevant for deciding the controversy raised in this appeal.

5. With the assistance of the learned Counsel appearing for both sides we have gone through the entire material placed on record as well as relevant show cause notices and the orders passed by the Regional Director of the E.S.I. In the show cause notice No. 5 dated 7-1-1980 a reference is made to defaults Nos. 14 to 17. In the show cause Notice No. 6 dated 9th July, 1980 a reference is made to the defaults Nos. 18 to 20 and the notice No. 7 dated 1st January, 1981 is based on the defaults No. 21 to 23. All these notices cover different periods and the delay in payment of contribution is also different. In reply to these notices practically common explanation has been offered by the employer company that the delay in submission of contribution cards was caused owing to the pressure of work and financial difficulty. In his orders the Regional Director of E.S.I. has made a reference to the explanation offered. After considering this explanation the Regional Director, held that he cannot accept either financial difficulty or administrative difficulty as sufficient reason for reduction of the amount of damages. However, in case of notice Nos. 5 and 6 he has reduced the amount suitably. But so far as the last show cause notice No. 7 is concerned, he held that there is no scope for any reduction in the amount of damages claimed. If all those three orders are read together it is quite clear that the Regional Director of the E.S.I. considered the explanation offered by the Employer-company in its proper context. In case of two notices he reduced the claim for damages. So far as the last show cause notice is concerned, in view of the considerable delay in payment of contribution and the fact that it related to the 21st to 23rd defaults, he thought that there is no scope for any reduction in the damages. Therefore, it cannot be said that the orders passed by the Regional Director of E.S.I. are not speaking orders. The orders clearly indicate application of mind to the explanation offered by the appellant-company regarding the delay in payment of contribution and, thereafter, a decision is taken by the Regional Director of the E.S.I. imposing penalty or damages. The order of the Regional Director of E.S.I. under section 85-B cannot be equated with the judgment of the Court containing detailed reasons. If the order passed indicates application of mind to all the relevant circumstances, and is not arbitrary then only because it is not like a judgment of the Court it cannot be held that it is not a speaking order. Therefore, in our view it cannot be said that the orders are vitiated either for non-application of mind or that they are not speaking orders. As already observed the orders passed are speaking orders and give all the necessary particulars. Therefore, we do not find any substance in this contention of Shri John.

6. Shri John then contended that the learned Judge of the Employees Insurance Court should have held that the reasons given for the delay in payment of

contribution were wholly justified. We find it difficult to accept this contention also. From the bare reading of the evidence of the Manager of the company, Shri Nair, it is more than clear that the company had received all the show cause notices. The company was also given an opportunity of being heard. The company had also given its submissions in writing. The company had a contract with Hindustan Petroleum for supply of barrels. One of its plant is completely changed in the manufacture and supply of barrels to Hindustan Petroleum. About 4000 to 5000 barrels are produced in one plant. The company earned labour charges and profit in the manufacture of these barrels. He also admitted that during the relevant period the factory was working normally and there was no strike. He then admitted that prior to this also the company was given notices for the delay in payment of contribution. It was in the year 1977-78. He also admitted that for one plant in which barrels were manufactured for Hindustan Petroleum the company was not required to invest any amount for the steel sheets. He further accepted that during the material period the turnover of the company was one crore and odd and even provident fund contribution was delayed on some occasions. Therefore, if the evidence of the Manager is read between the lines, it is more than clear that there was neither pressure of work nor there was any financial difficulty. In this view of the matter, the learned Judge of the Employees Insurance Court was wholly justified in rejecting the explanation offered by the company.

7. However, it was contended by Shri John, relying upon the decision of the Supreme Court in *Organ Chemical Industries* and another's case and the decision of the Single Judge of this Court in *Jost Engineering Ltd's* case, that this was not a case where damages could have been imposed. It is not possible for us to accept this contention also. In our view both these decisions are of little assistance while appreciating the controversy involved in this appeal. Ultimately what should be the extent of damage, must obviously depend upon the facts and circumstances of each case. Section 85-B in terms provides that where an employer fails to pay the amount due in respect of any contribution or any other amount payable under the Act, the Corporation may recover from the employer such damages not exceeding the amount of arrears as it may think fit to impose. Therefore, it cannot be said that the orders passed as to the damages are beyond the scope of the section. Further it cannot be forgotten that the E.S.I. scheme is a piece of social security scheme. Social security is one of the fundamental needs of the day. It is a security which a Welfare State or Society furnishes through appropriate organisation or legislation against certain risks which an individual of small means cannot effectively provide by his own ability or foresight such a social insurance scheme provides benefits to the persons with small earnings as of right and not by way of charity. The fund for the social security scheme is raised from the combined contributory efforts of Insurer, Employer and the State. There is basic difference in the nature of benefits received under the Employees State Insurance Act and the Employees Provident Fund Act. Provident Fund is paid to the Industrial Worker after he retires or to his

dependents in case of his early death. In case of contributory provident fund, both worker and employer are to contribute but the amount is paid to the workman concerned after his retirement or to his dependents in case of his premature death. It has a co-relation with the contribution made by the worker. Such is not the case, with the Insurance scheme. Contribution raised under the Act goes to the common pool for providing benefits to the workmen in case of sickness, maternity and employment injury etc. It is not necessary to deal with the object of the legislation in any further details in view of the decision of the Supreme Court in *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation*, through its Regional Director, Hill Fort, Road Hyderabad. This is what the Supreme Court has observed in para 9 of the said judgment.

"9. A conspectus of the statute, to the extent relevant, is necessary to appreciate the controversy at the Bar. The statutory personality and the social mission of the Act once projected, the resolution of the conflict of interpretation raised in this case is simple. Although, technically the Act is a pre-constitution one, it is a post-independence measure and shares the passion of the Constitution for social justice. Articles 38, 39, 41, 42, 43 and 43-A of the Constitution show concern for workers and their welfare. Since independence, this legislative motivation has found expression in many enactments. We are concerned with one such law designed to confer benefits on this weaker segment in situations of distress as is apparent from the preamble. The machinery for State Insurance is set up in the shape of a Corporation and subsidiary agencies. All employees in factories or establishments are sought to be insured against sickness and allied disabilities, but the funding, to implement the policy of insurance, is by contributions from the employer and the employee. In view of the complexities of modern business organisation the principal employer is made primarily liable for payment of contribution "in respect of every employee, whether directly employed by him or by or through an immediate employer". Of course, where the employee is not directly employed by him but through another "immediate employer", the principal employer is empowered to recoup the contribution paid by him on behalf of the immediate employer (section 41). There is an inspectorate to supervise the determination and levy of the contributions. There is a chapter prescribing penalties; there is an adjudicating machinery and there are other policing processes for the smooth working of the beginning project envisaged by the Act. The benefits belong to the employees and are intended to embrace as extensive a circle as is feasible. In short, the social orientation, protective purpose and human coverage of the Act are important considerations in the statutory construction, more weighty than more legality or grammatical nicety.

8. It cannot also be forgotten that the regulations framed under the Act make specific provisions for the contribution of amount by the employer as well as the workmen. It prescribes time for payment of the amount and also prescribed procedure as to how the amount is to be paid. In the present case the employees contribution was already deducted. Therefore, in substance the said amount was entrusted to the employer by the employees for the purpose of paying

contribution. This is clear from section 40(4) of the Act. By newly added Explanation II, to section 405 of the Indian Penal Code, this position is further clarified. Said Explanation reads as under:

"A person, being an employer, who deducts the employees contribution from the wages payable to the employee for credit to the Employees State Insurance Fund held and administered by the Employee's State Insurance Corporation established under the Employees' State Insurance Act, (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid." It was rightly contended by Shri Jayakar, that in the present case the appellant-company is not only an habitual defaulter but is practically treating the E.S.I. scheme, as self-financing scheme for its business. We find much substance in this contention of Shri Jayakar. In the present case it is practically an admitted position that in all 23 defaults were committed by the appellant company and it is in the case of last show cause notice that the maximum penalty is imposed. There is Corporation was quite justified in described that the appellant-company was a chronic or a habitual defaulter and hence the maximum penalty prescribed by law was called for. Therefore, we do not find this is a case wherein any interference is called for with the discretion exercised by the Regional Director of E.S.I.

9. In the result, therefore, there is no substance in this appeal. Appeal fails and is dismissed with costs.

10. At this stage an oral request for leave to appeal to the Supreme Court is made by Shri John, the learned Counsel for appellants. In view of the findings of fact recorded, we do not find that this is a fit case wherein such a leave should be granted. Hence leave refused. Shri John wants two months time to pay the amount for which bank guarantee is also furnished. Time granted on the condition that the period of bank guarantee shall be suitably extended by the appellant-company.