

(2008) 03 KAR CK 0017

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 2852 of 2005

The Joint Director and Another

APPELLANT

Vs

Belgaum District Co-operative Milk Producers Societies Union
Limited

RESPONDENT

Date of Decision : 07-03-2008

Acts Referred:

Employees State Insurance Act, 1948 — Section 39, 39 (5), 39 (5) (a)

Citation : (2008) 119 FLR 166 : (2008) 5 KarLJ 172 : (2008) 3 LLJ 875

Hon'ble Judges : K. Ramanna, J

Bench : Single Bench

Advocate : V. Narasimha Holla, for the Appellant; S.V. Shastri, for the Respondent

Judgement

K. Ramanna, J.—This appeal is directed against the order dated 1-1-2005 passed by the Employees' State Insurance Court at Hubli, in ESI Application No. 16 of 2004 with a prayer to dismiss the said application insofar as it affected the appellants.

2. The brief facts of the case are that the respondent establishment is covered under the provisions of Employees' State Insurance Act, 1948 and is paying contribution of all the eligible employees. The respondent establishment failed to make payment of contribution in respect of wages paid to the employees for the work done on holidays and on second Saturday and on that basis recovery proceedings were initiated by the appellants, which has been challenged by the respondent before the ESI Court in ESI Application No. 26 of 2000 which came to be allowed by an order dated 24-2-2001. The appellants being aggrieved challenged the said order before this Court, in M.F.A. No. 2242 of 2001 before this Court, which came to be allowed by an order dated 26-5-2003 and held that the respondent establishment is liable to pay the contribution. It is the further case of the respondent that as per the order passed in M.F.A. No. 2242 of 2001 the respondent has paid the contribution of Rs. 95,412/- on 12-11-2003.

Thereafter, the appellant issued notice to the respondent claiming interest of Rs. 49,891/- for the delay in paying the contribution. The respondent herein challenged the claim made by the appellant in respect of the interest in ESI Application No. 16 of 2004 before the ESI Court at Hubli, which came to be allowed by an order dated 1-1-2005 with a direction to the appellant/Corporation to recalculate the interest on the amount of Rs. 95,142/- excluding the litigation period i.e., 28-8-2000 to 24-2-2001 and 28-5-2001 to 26-5-2003. Aggrieved by the said order, the appellants have come up with this appeal.

3. Heard the arguments of the learned Counsel appearing on both sides and perused the records.

4. During the course of arguments, learned Counsel for the appellants/Corporation submitted that the order of the ESI Court is contrary to the provisions and without any jurisdiction. It has failed to appreciate the fact that the earlier order dated 24-2-2001 passed in ESI No. 26 of 2000 got merged with the Appellate Court order dated 26-5-2003 passed in M.F.A. No. 2242 of 2001. Therefore, the respondent is liable to pay interest due from the date of default till the date of actual payment. It is argued that the respondent herein paid holiday wages of Rs. 14,63,729.15 to its employees during April 1997 to December 1999 and contribution of the same amounting to Rs. 95,148/- was paid on 12-11-2003, which is long after the due date prescribed u/s 39 of the ESI Act. That further u/s 39(5) and Regulations 31 and 31-A of Employees' State Insurance (General) Regulations, 1950, the interest was due from the date of default till the date of actual payment. Therefore, it is argued that by operation of law the interest will be levied from the date of default till the actual date of payment and the ESI Court had no discretion to alter the due date. Hence, it is argued that the appellants have rightly levied the interest on the respondent and are entitled to recover the entire interest amount of Rs. 49,891.51 ps. From the respondent. Hence, this appeal.

5. In support of his contention, learned Counsel for the appellant replied on an unreported decision of this Court in M.F.A. No. 5111 of 2001 connected with M.F.A. No. 5110 of 2001, dated 8-2-2005 wherein, it has been held that "the appellant/ESI Corporation is entitled to recover the interest for the delayed payment and contribution along with simple interest".

6. He has also relied upon another decision of the High Court of Calcutta in C.O./C.R. No. 1878 of 1997 wherein, it has been held that the Corporation is entitled to recover the interest.

7. On the other hand, learned Counsel for the respondent submitted that on the basis of the order passed in the earlier MFA, respondent paid the contribution and the authority has accepted the same. The delay in payment of contribution is only on account of the pendency of the ESI application before the ESI Court and the MFA preferred by the appellant before this Hon'ble Court, therefore there is no willful delay in payment of contribution and that the respondent is not liable

to pay interest during the period of litigation, as there is no willful delay in making the payment, therefore it is argued that the order of the lower Court is in accordance with law. Hence, he prayed for dismissal of the appeal.

8. In support of his contention, learned Counsel for the respondent relied upon a decision rendered by this Court in case of The Joint Director of E.S.I. Corporation and Another Vs. Riddhi Siddhi and Chemicals Limited, wherein it has been held thus:

The question is whether the non-payment of contribution in time is due to the voluntary act on the part of the respondent-Company or on account of its disability suffered due to the judgment of the Division Bench of this Court holding the field until overruled by the Apex Court. Similar such question arose before this Court in the case of HMT Limited, wherein, it is held that non-payment of contribution in time on the facts and circumstances of that case is not such as to warrant levy of interest within the meaning of Section 39(5)(a) of the ESI Act.

9. He has also relied upon another decision of the Supreme Court in the case of Employees State Insurance Corporation Vs. Distilleries and Chemical Mazdoor Union and Others, , wherein it has been held thus:

There has been no postponement of the enforcement of the notification in view of the peculiar circumstances of the case, namely, the non-availability of the facilities, non-deduction of contribution from the members of the Union for 18 long years, provision of medical relief by the Management. The High Court had directed deduction of contribution with effect from the date of the judgment justified.

10. He has also relied on another decision of this Court in case of H.M.T. Limited, Watch Factory IV Vs. Employees" State Insurance Corporation and Another, wherein, it has been held thus:

Employees" State Insurance Act, 1948, Section 39 (4) and (5) - If failure to pay in time contributions on part of employer is on account of circumstances beyond his control, interest cannot be levied.

11. Having heard the arguments of the learned Counsel appearing on both sides, now I proceed to see whether the order under challenge passed by the ESI Court is incorrect or illegal?

12. Admittedly during the year 2000 when the ESI Inspector inspected the establishment of the respondent. The respondent was in due of contribution of Rs. 95,148/- payable to the appellant towards the holiday wages of Rs. 14,63,729.15 paid by it to its employees during April 1997 to December 1999 to that effect a notice has been issued by the appellants to respondent the same has been challenged by him in ESI Application No. 26 of 2000 the said application came to be allowed as per order dated 24-4-2001, being aggrieved the appellants filed M.F.A. No. 2242 of 2001 before this Court and this Court allowed the said miscellaneous first appeal and directed the respondent herein to

pay the contribution of Rs. 95,148/- as per order dated 26-5-2003. Accordingly, the respondent herein deposited the said amount on 12-11-2003. Thereafter respondent issued notice dated 27-1-2004 claiming interest on the said amount of Rs. 95,148/- calculated from the date when it became due and till the date of order passed by this Court in M.F.A. No. 2242 of 2001 amounting to Rs. 46,607/-. The respondent challenged the said order of demanding interest on the contribution amount and prayed for excluding the litigation period spent by him in ESI Application No. 26 of 2000 and in M.F.A. No. 2242 of 2001 i.e., from 28-8-2000 to 24-2-2001 and 28-5-2001 to 26-5-2003 after hearing the parties the ESI Court allowed the application filed by the respondent excluding the above said period from computing the interest payable by the respondent. Aggrieved by the same the appellants have come up with this appeal.

Under Section 39(5)(a) of the ESI Act read with Regulations 31 and 31-A of the Act, if any the contribution payable under the ESI Act is not paid by the Principal employer on the date, on which such contribution has become due, he shall be liable to pay simple interest as prescribed under the ESI Regulations till the date of its actual payment. As per ESI Regulation 31 which deals with regard to time for payment of contribution, the employer who is liable to pay contribution in respect of any employee shall pay those contributions within 21 days of the last date of calendar of month in which contributions fell due. Regulation 31-A deals with regard to interest on contribution due, but not paid in time - says that employer who fails to pay contribution within the period specified in Regulation 31, shall be liable to pay simple interest as specified in respect of each day of default or delay in payment of contribution.

13. From the aforesaid mandatory provisions of the Act, it is thus clear that it is the duty of the respondent/employer to deposit the contribution to the appellant within the stipulated period and he need not wait till the appellants/corporation demands the contribution and on failure to make payment within the stipulated period, the mandatory provisions of the Act provides that the employer shall be made liable to pay simple interest as specified for each day of delay in payment of contribution. Therefore, the delay caused in the instant case is not due to the act of the appellants but because of the respondent's own default in making payment. Therefore, when the initial fault is on the respondent in making default of payment of contribution, he cannot blame the authorities or the Court for the subsequent delay caused in prosecuting the litigation. When the question as to whether "overtime wages" constitutes wages within the meaning of Section 2(22) was already answered positively by the Supreme Court in the year 1996 in the decision rendered by it in case of Indian Drugs and Pharmaceuticals Ltd. and Others Vs. Employees' State Insurance Corporation and Others, . Therefore, when the dispute arises between the parties as on that day, the law in that regard was very much clear and hence, the delay in making the said payment and the unnecessary litigation fought for by the respondent cannot be said to be bona fide one, as such the respondent is not entitled to any relaxation in respect of interest payable by him towards the said delayed payment of contribution. The

decisions referred and relied on by the Counsel for the respondent is not at all applicable to the case on hand, as in those cases when the default in making payment was made. The law was not settled on the particular point but the case on hand is different from the one referred to by the respondent. Therefore, the ESI Court committed an error in allowing the application filed by the respondent directing the ESI Corporation to claim the interest on delayed payment of Rs. 95,148/- excluding the litigation period i.e., 28-8-2000 to 24-2-2001 and 28-5-2001 to 26-5-2003 and the same requires to be set aside.

14. For the foregoing reasons, the appeal is allowed. The order dated 1-1-2005 passed by the ESI Court at Hubli, in ESI Application No. 16 of 2004 is hereby set aside and the ESI Corporation is entitled to recover entire interest on delayed payment of Rs. 95,142/- as claimed for by it.