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**(2007) 07 AHC CK 0056**  
**In the Allahabad High Court**

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|----------------------------------------|------------|
| Vijai Cold Storage and Kath Industries | APPELLANT  |
| Vs                                     |            |
| E.S.I. Corporation                     | RESPONDENT |

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**Date of Decision :** 30-07-2007

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 100  
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B, 6  
Employees State Insurance Act, 1948 — Section 82, 85B

**Citation :** (2008) 2 AWC 1785 : (2007) 115 FLR 364 : (2008) 1 LLJ 193

**Hon'ble Judges :** Prakash Krishna, J

**Bench :** Single Bench

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## Judgement

Prakash Krishna, J.—This appeal is u/s 82(2) of Employees State Insurance Act.1948 against the order dated 30th of October, 1981 passed by the Judge, Employees Insurance Court. Bijnore in case No. 61 of 1981.

2. The appellant is indisputably covered by the provisions of Employees State Insurance Act 1948. Under the aforesaid act, the appellant is required to deposit monthly contribution with the the contribution for the period July, 1978 to March, 1979. The contribution was made with delay. Proceedings were initiated u/s 85B by the Regional Director for recover- of "damages". The Regional Director after considering the reply of the appellant held that the appellant is liable to pay damages totalling Rs. 9,255/- for the delayed payment of amount of contribution (both employers and employee) for the a fore stated period i.e. July, 1978 to March, 1979, by the order dated 7th of October, 1980. The said order was challenged before the Judge, Employees insurance Court unsuccessfully. Hence the present appeal.

3. Heard the counsel for the parties and perused the record.

4. Shri Neeraj Agrawal, learned Counsel for the appellant submits that the court below committed illegality in confirming the damages levied by the Regional Director The Regional Director has levied the maximum damages permissible under the aforesaid section. The contention is that neither Regional Director nor

the Judge, E.I. Court considered the mitigating circumstances before imposing the damages. Shri P.K. Asthana, advocate, on the other hand. submits that the appeal u/s 82(2) of the Act lies only on substantial question of law involved in the appeal. He submits that on the facts of the present case no substantial question of law is involved therefore the appeal should not be entertained. He also submits that two authorities below considered and rejected the explanation for delayed contribution and therefore the findings recorded by the court below are basically findings of fact and cannot be interfered with in appeal filed u/s 82(2) of the Act. Also reliance has been placed by him on Hind Art Press, Mangalore Vs. E.S.I. Corporation and Another, and Employees State Insurance Corporation v. Dhanda Engineers Pvt. Ltd. 1981 (48) FLR 282 on the merits of the case.

5. Considered the respective submissions of the learned Counsel for the parties The following substantial questions of law, though not framed initially at the time of admission of appeal but presently involved on which the learned Counsel for the parties advanced their arguments are.

(1) Whether on the facts and circumstances of the case can it be said that in the present appeal which is u/s 82 of Employees State Insurance Act a substantial question of law is involved?

(2) Whether E.I. Judge as well as the Regional Director rightly applied Section 85B of the Act and were justified in levying the maximum damages permissible under law on the appellant for the delayed contribution u/s 85B of Employees State Insurance Act?

6. The phrase "involves substantial question of law " also finds place in Section 100(4) of C.P.C. wherein it has been provided that the appeal shall be heard and decided on a substantial question of law involved in the case. With reference to Section 100 C.P.C, the Apex Court in Hero Vinoth (minor) Vs. Seshammal, has held that misconstruction of document or wrong application of principle of law while interpreting document which materially affects the decision in a case gives rise to substantial question of law. The principle relating to Section 100 C.P.C. (which corresponds to Section 82(2) of Employees State Insurance Act) so far as it relates to interpretation of phrase "it involves substantial question of law" summarised the in which reads as follows:

The principles relating to Section 100 summarised as follows: (i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, It gives rise to a question of law. (ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer

to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law. (iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized are where (a) the courts below have ignored material evidence or acted on no evidence; (b) the Courts have drawn wrong inferences from proved facts by applying the law erroneously; or (c) the Courts have wrongly cast the burden of proof. When refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding. (Para 24)

7. Applying the aforesaid principle to the facts of the present case, I am of the opinion that in the appeal a substantial question of law is involved with regard to applicability and interpretation Section 85B and the word "damages" used therein specifically. Divergent views on the interpretation of "damages" were canvassed by the learned Counsel for the parties. Consideration of mitigating circumstances so far as quantum part of damages is considered as another issue. Here no attempt has been made by the learned Counsel for appellant to challenge findings recorded by the E.I. court.

Second Question. 8. Submission, in substance is that on the findings as recorded by the E.I. Court, the court has committed illegality in sustaining the order of the Regional Director without taking into consideration the mitigating circumstances. Strong reliance has been placed on a judgement of Apex Court on M/s. Prestolite of India Ltd. Vs. The Regional Director and another,

9. Section 85B of the Act as it stood at the relevant point of time, reads as follows:

85B - (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.

10. It is also not out of place to mention here that Section 85B of the Act, 1948 has been amended by Act No. 29 of 1989 and the words "from the employer by way of penalty such damages" have been substituted in place of words "from the employer such damages", by amending Section 85B the words "by way of penalty" which were earlier not there in the statute have been inserted which manifest the intention of the legislature that nature of "damages" u/s 85B besides being compensatory is penal also.

11. On a plain reading of the aforesaid section it is clear that the said section gives power to the Corporation to recover such damages from the employer not exceeding the amount of arrears as it may think fit to impose. The use of word "may" is significant. This shows that the power given to recover damages u/s 85B given to the Corporation is only enabling provision and a discretion vests in the corporation. On a further reading of section it is clear that power has been given to recover "such damages" as it may think fit.

12. The phraseology of Section 85B(1) of the Act is indicative of two facts First, power has been given to the Corporation to recover the damages. Secondly, the outer limit of damages has been prescribed which shall not exceed the amount of arrears. In other words, the terminal point so far as quantum of damages is concerned is the amount of the arrears of contribution. The discretion is left with the Corporation with regard to the quantum of damages up to the maximum limit of the arrears of contribution. It will vary, therefore, with the facts of each case. At this juncture the learned Counsel for the respondent submits on the strength of judgement of Punjab and Haryana High Court in *E.S.I. Corporation v. Dhandha Engineers (P) Ltd.* 1981 (42) FLR 282 and *Hind Art Press, Mangalore Vs. E.S.I. Corporation* and Another, that the nature of damages as mentioned in Section 85B is both compensatory as well as penal in nature and is intended to enforce discipline on the management of the establishment covered by the Act. In *Hind Art Press (supra)* the Karnataka High Court has held that Section 85B is similar to Section 14B of Employees Provident Fund and Miscellaneous Provision Act 1952 and has applied ratio of Apex Court decision in *Organo Chemical Industries v. Union of India* AIR 1979 SC 1803. The Apex Court in the case of *Organo Chemical Industries (supra)* was called upon to decide the constitutional validity of Section 14B of the Employees Provident Fund and Miscellaneous Provision Act, 1952.

13. The Apex Court has upheld the constitutional validity of Section 14B of that Act by two different judgements though concurring. It has noted the traditional view of the word "damages" with reference to Statute like Contract Act and Law of Tort. It has also noted that there is a conflict of opinion between different High Courts as to the meaning of word "damages" in Section 14B of the Employees Provident Fund and Miscellaneous Provision Act is concerned. Held, that the traditional view of damages means actual loss wherein it has not taken into account the social content of a provision like Section 14B of the Act involved therein. The word "damages" has different shades of meaning and the very

object of legislation would be frustrated if the word "damages" appearing in Section 14B of that Act was not construed to mean the penal damages. The relevant portion from the said judgement is reproduced below:

46. The traditional view of damages as meaning actual loss, does not take into account the social content of a provision like Section 14B contained in a socio-economic measure like the Act in question. The word "damages" has different shades of meaning. It must take its colour and content from its context. The very object of the Legislation would be frustrated if the word "damages" appearing in Section 14B of the Act was not construed to mean penal damages. The imposition of damages u/s 14B serves a two-fold purpose. It results in deterrence and also serves as a deterrent. The predominant object is to penalise, so that an employer may be thwarted or deterred from making any further defaults.

47. The expression "damages" occurring in Section 14B is, in substance, a penalty imposed on the employer for the breach of the statutory obligation. The object of imposition of penalty u/s 14B is not merely "to provide compensation for the employees". We are clearly of the opinion that the imposition of damages u/s 14B serves both the purposes. It is meant to penalise 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, the word "damages" in Section 14B is related to the word "default". The words used in Section 14B are "default in the payment of contribution" and, therefore, the word "default" must be construed in the light of Para 38 of the Scheme which provides that the payment of contribution as got to be made by the 15th of the following, month and, therefore, the word "default" in Section 14B must mean "failure in performance" or "failure to act". At the same time, the imposition of damages u/s 14B is to provide reparation for the amount of loss suffered by the employees.

(Emphasis supplied).

14. Having set out the legal provision above, coming to the undisputed facts of the present case the following things are clear:

A. The appellant committed default in making contribution for the period July, 1978 to March, 1979.

B. It deposited the amount of contribution with interest before issuance of proceedings u/s 85B.

C. Earlier, no such default was ever committed.

15. An explanation was offered for not making the contribution within time on

the ground that the factory was closed w.e.f. 14th of September, 1978 to 25th of September, 1978, irregular power supply, lock out and strike etc. which were considered and rejected. It was also contended that there is no correlation of imposing 100 per cent damage on the loss suffered, if any, to the Corporation as the appellant has deposited the interest for the delay of 3-4 months. This aspect of the case though finds mention in the statement of the facts of the case have not been adverted to either by the Regional Director or by E.I. court presumingly on the footing that the explanation furnished by the appellants insufficient. The Regional Director has not found as a fact that the appellant is a habitual defaulter or committed any default in making the contribution earlier. The Apex Court in the case of Prestolite of India Limited (supra) has held that an adjudicating authority finally deciding the matter should not act mechanically in applying upper most limit of the table. The relevant portion is reproduced below:

...Even if the regulations have prescribed general guidelines and the upper limits at which the imposition of damages can be made, it cannot be contended that in no case, the mitigating circumstances can be taken into consideration by the adjudicating authority in finally deciding the matter and it is bound to act mechanically in applying the upper most limit of the table. In the instant case, it appears to use that the order has been passed without indicating any reason whatsoever as to why grounds for delayed payment was not to be accepted. There is no indication as to why the imposition of damages at the rate specified in the order was required to be made. Simply because the appellant did not appear in person and produce material to support the objections, the employee's case could not be discarded in limine. On the contrary, the objection ought to have been considered on merits....

16. Applying the above principle and taking into consideration the observation of the Apex Court in the case of Organo Chemical Industries (supra) with reference to Section 14B of Employees Provident Fund and Miscellaneous Provision Act that the imposition of damages is to provide reparation for the loss of amount suffered by the employees. There is justifiable reason to impose outer limit of the arrears as damages in the given case. The appeal has been pending in this Court for the last two and half decades and it would not be appropriate at this distance of time to remand the matter to the E.I. court for determination of the damages. As such, I am of the view that a token amount of Rs. 1,000/- for the default committed for the period of July, 1978 to March 1979 will serve the interest of justice. The dispute relates to the period of July, 1978 to March, 1979. It is not out of place to mention here that in the case of Organo Chemical Industries (supra) it was found therein that the employer was habitual defaulter in the matter of making contribution to the Employees Provident Fund and Family Pension Scheme and payment of administrative charges from the very inception and they deliberately concealed the facts pertaining to earlier defaults. Such is not the case here.

17. Coming to the facts and circumstances of the case, I find that it is not in

dispute that the present appellant deposited the contribution even prior to the issuance of any notice by the Regional Director. Further, it is not in dispute that the employer not only deposited the contribution but has also deposited interest accrued thereon. In view of these facts, it is difficult to say as to how the Corporation has suffered any pecuniary damages for the late deposit of contribution employer appellant.

18. On a fair reading of the orders of E.I. Court as well as of the Regional Director, it is clear that they have proceeded to levy the damages under the aforesaid section simply on the presumption that there was some delay on the part of the employer. The delay on the part of the employer is one aspect of the matter and by such delay any damages has been caused in the Corporation is another aspect. Neither the Regional Director nor the E.I. Court has recorded any finding that due to late deposit of contribution, the Corporation has suffered any substantial damages. The deposit of interest by the employer on the outstanding contribution set off the damages, if any, in monetary term which has been suffered by the Corporation and the Corporation has been compensated by the employer.

19. In *Hind Art Press v. Employees State Insurance Corporation* (supra) the Karnatka High Court has held that Section 85B is both compensatory as well as pena<sup>1</sup> in nature and is intended to enforce discipline on the management of establishments covered by the Act and is similar to Section 14B of Employees' Provident Funds and Miscellaneous Provision Act, 1952.

20. The learned Counsel for the respondent could not point out any thing either in the Act or in the Rules or Regulation which may provide a guideline for determining the "damage" in a given case.

21. In view of the above discussion, it is held that a substantial question of the law is involved in the present appeal and the question No. 1 is answered accordingly. Under the question No. 2 it is held that the Regional Director and the E.I. Court acted arbitrarily in imposing 100 per cent damages for the delayed contribution and committed illegality in not taking into consideration the mitigation circumstances into account.

22. In the result, the appeal is allowed in part and it is held that only a sum of rupees one thousand is recoverable/payable by the appellant towards damages and the impugned orders stand modified accordingly. In view of the divided success no order as to costs.