

Nipha Exports (P) Ltd. Vs Employees' State Insurance Corporation

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: March 31, 2003

Acts Referred: Employees State Insurance (General) Regulations, 1950 " Regulation 31C
Employees State Insurance Act, 1948 " Section 85B

Citation: (2003) 2 ILR (P&H) 520 : (2003) 3 LLJ 789 : (2003) 3 RCR(Civil) 331

Hon'ble Judges: S.S. Grewal, J; G.S. Singhvi, J

Bench: Division Bench

Advocate: A.P. Bhandari, for the Appellant;

Final Decision: Dismissed

Judgement

G.S. Singhvi, J.

This is a petition for quashing order dated December 18, 2002 passed by the Regional Director of the Employees" State Insurance Corporation (for short, the Corporation) for levy of damages u/s 85-B the Employees" State Insurance Act, 1948 (for short, the Act).

2. The petitioner is engaged in the manufacturing of machinery, it is covered under the provisions of the Act. Vide notice dated September 4, 2002

(Annexure P-I), the Regional Director of the Corporation called upon it to show cause against the proposed levy of damages on account of its

failure to pay contribution on due dates. He directed the petitioner to appear on October 8, 2002. A statement showing delay in the payment of

contribution amount and proposed damages was annexed with the show cause notice. Shri R.C. Sharma, authorised representative of the

petitioner appeared before the Regional Director on October 8, 2002. He contended that damages cannot be imposed u/s 85-B for delay in the

payment of contribution because the said provision can be invoked only in the case of failure to pay the contribution. In support of his contention,

Shri Sharma relied on the decision of single Bench of Calcutta High Court in M/s. Sarat Textiles Ltd. Vs. Joint Regional Director, E.S.I. and

Others, .

3. The Regional Director rejected the plea put forward on behalf of the petitioner and held that delay in the payment of contribution amounts to

failure to pay the same. He observed that the judgment of the learned single Judge of Calcutta High Court was not binding because appeal filed

against it was pending. He then proceeded to impose damages to the tune of Rs. 41,7487- for delayed payment of contribution for the period from

April, 2000 to November, 2001 and January, 2002 to March, 2002.

4. Shri A.P. Bhandari argued that Section 85-B of the Act postulates recovery of damages only if the employer fails to pay the amount due in

respect of any contribution or any other amount payable under the Act and the Regional Director committed a serious illegality by imposing

damages on the premise that there was delay in the payment of contribution. He further argued that the judgment of the Single Bench of Calcutta

High Court in the case of Sarat Textiles Ltd. (supra) was binding on the Regional Director and, therefore, the order passed by him for levy of

damages ignoring the law laid down by the High Court should be declared illegal and quashed.

5. We have given serious thought to the arguments of the learned counsel, but have not felt persuaded to agree with him. The Act was enacted by

the Parliament to provide certain benefits to the employees in case of sickness, maternity and employment injury. Chapter II thereof contains

provisions for establishment of Employees' State Insurance Corporation, its constitution, constitution of Standing Committee of the Corporation

and Medical Benefit Council and their powers and functions etc. Chapter III contains provisions relating to finance and audit. Chapter IV deals

with contributions. Section 39(1) and (2) which find place in that chapter lays down that the contributions payable under the Act in respect of an

employee shall comprise contributions payable by the employer and the employee to the Corporation at such rates as may be prescribed by the

Central Government. Sub-section (3) declares that the wage period in relation to an employee shall be the unit in respect of which all contributions

shall be payable under the Act. Sub-section (4) of Section 39 lays down that the contributions payable in respect of each wage period shall

ordinarily fall due on the last day of the wage period and where an employee is employed for a part of the wage period or is employed under two

or more employers during the same wage period, the contribution shall fall due on such dates as may be specified in the Employees' State

Insurance (General) Regulations, 1950 (for short, the Regulations), Sub-section (5)(a) which was inserted by Amending Act No. 29 of 1989 lays

down that if any contribution payable under the Act is not paid by the principal employer on the date on which such contribution has become due,

then he shall be liable to pay simple interest at the rate of 12% per annum or at such higher rate, as may be specified in the Regulations till the date

of its actual payment, Clause (b) of Sub-section (5) lays down that interest under Clause (a) may be recovered as an arrear of land revenue u/s

45-C to Section 45-I. Section 40 imposes a duty on the principal employer to pay contributions in the first instance. Section 41 provides for the

mode of recovery of the contributions from the immediate employer. Section 42 contains general provisions as to payment of contributions.

Section 43 lays down the method of payment of contributions. Section 44 imposes a duty on the employer to furnish returns and maintain registers

in certain cases. Section 45 provides for appointment of inspectors, their functions and duties. Section 45-A provides for determination of the

contributions in certain cases. Section 45-B lays down that any contribution payable under the Act may be recovered as an arrear of land revenue.

Section 45-C to 45-I contain other provisions relating to recovery of contributions. Chapter V contains provisions relating to various benefits

admissible to the employees like, sickness benefit, maternity benefit, disablement benefit, medical benefit, mode of their determination and

payment. Chapter V-A contains transitory provisions and Chapter VI deals with adjudication of disputes and claims. Chapter VII which consists

of Section 84 to 86-A provides punishment for false statement (Section 84), punishment for failure to pay contributions (Section 85), enhanced

punishment in certain cases after previous conviction (Section 85-A), the power to recover damages (Section 85-B), power of the Court to make

orders (Section 85-C), prosecutions (Section 86) and offences by companies (Section 86-A). Section 97 which finds place in Chapter VIII

empowers the Corporation to make regulations for administration of its affairs and for carrying into effect the provisions of the 1948 Act.

6. In exercise of the power vested in it u/s 97, the Corporation framed the Regulations. Regulation 31 of the Regulations specifies the time for

payment of the contributions. Regulation 31-A provides for levy of interest. Regulation 31-B provides for mode of recovery. Regulation 31-C

prescribes the rate of damages on contributions or any other amount due, but not paid in time. Section 85-B of the Act and Regulations 31, 31-A,

31-B and 31-C of the Regulations, which have bearing on the petitioner's prayer for quashing the impugned order, are reproduced below:

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, subject to such terms and conditions as may be

specified in regulations.

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

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Regulations 31, 31-A, 31-B and 31-C of the Regulations.

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 in which the contribution falls due.

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

31-A. Interest on contribution due, but not paid in time.

An employer who fails to pay contribution within the periods specified in Regulation 31, shall be liable to pay interest at the rate of 12 percent per

annum in respect of each day of default or delay in payment of contribution.

31-B. Recovery of Interest.

Any interest payable under Regulation 31-A may be recovered as an arrear of land revenue or u/s 45-C to Section 45-I of the Act.

31-C. Damages or contributions or any other amount due, but not paid in time.

An employer who fails to pay contributions 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 %

per annum of

the amount due

i) Up to 2 months 5%

ii) 2 months and above but 10%

less than 4 months

iii) 4 months, and above but 15%

less than 6 months

iv) 6 months and above 25%

Provided that the Corporation, in relation to a factory or establishment which is declared as sick industrial company and in respect of which a

rehabilitation scheme has been sanctioned by the Board for Industrial and Financial Reconstruction, may-

(a) in case of a change of management including transfer of undertaking(s) to worker(s) co-operative or in case of merger or amalgamation of sick

industrial company with a healthy company, completely waive the damages levied or leviable:

(b) in other cases, depending on its merits, waive up to 50 per cent damages levied or leviable;

(c) in exceptional hard cases, waive either totally or partially the damages levied or leviable.

7. A conspectus of the provisions referred to and reproduced above shows that the employer is under a statutory obligation to pay contributions

under the Act at the rates prescribed by the Central Government and as per the time schedule specified in the Act and the Regulations and that

Corporation can recover damages by way of penalty if the employer fails to pay the amount due in respect of any contribution or any other amount

payable under the Act. Section 85-B as it stood up to December 31, 1991 did not expressly provide for recovery of damages by way of penalty,

but various High Courts took the view that it was both compensatory as well as penal in nature and was intended to enforce discipline on the

management of the establishments covered under the Act - Hind Art Press, Mangalore Vs. E.S.I. Corporation and Another, ; Beama

Manufacturers (P) Ltd. Vs. Regional Director, ESI Corporation, ; National Jute Manufacturers Corpn. Vs. E.S.I.C. and Another, and Madras

Hotel Ashoka (Pvt.) Ltd. Vs. E.S.I.C., What the Courts had treated implicit in Section 85-B was made explicit by substitution of the expression

from the employer such damages not exceeding the amount of arrears as it may think fit to impose"" with the expression ""from the employer by

way of penalty, such damages not exceeding the amount of arrears as may be specified in the regulations"" by Act No. 29 of 1989 w.e.f. January 1,

1992.

8. In our opinion, the object of Section 85-B of the Act and Regulation 31-C of the Regulations is to penalise the employer by levy of damages for

breach of its statutory duty to pay contribution and other amounts payable under the Act. These provisions empower the Corporation to recover

damages at the specified rate by way of penalty if an employer fails to pay the amount in respect of any contribution or any other amount payable

under the Act and it is not necessary that the Corporation or the employees must have actually suffered loss on account of the default committed

by the employer. In this context, we may usefully refer to the decision of the" Supreme Court to Organo Chemical Industries and Another Vs.

Union of India (UOI) and Others, . In that case, the petitioner had challenged the constitutionality of Section 14-B of the Employees' Provident

Funds and Miscellaneous Provisions Act, 1952 which is pari materia to Section 85-B of the Act. While upholding the vires of Section 14-B, their

Lordships explained the concept of damages in the following words:

The traditional view of damages as meaning actual loss does not take into account the social content of a provision like Section 14-B 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, and it cannot be read in isolation, nor can Section 14-B be read out of context. The very object of the legislation would be frustrated if the

word damages appearing in Section 14-B of the Act was not construed to mean penal damages. The imposition of damages u/s 14-B serves a

two-fold purpose. It results in damnification 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 default.

The expression damages occurring in Section 14-B is, in substance, a penalty imposed on the employer for the breach of the statutory obligation.

The object of imposition of penalty u/s 14-B 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 14-B is related to the word default. The words used in Section 14-B 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 has got to be made by the 15th of the following month and, therefore, the word default in Section 14-B must mean failure in

performance or failure to act. At the same time, the imposition of damages u/s 14-B is to provide reparation for the amount of loss suffered by the

employees.

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There appears to be a misconception that the object of imposition of penalty u/s 14-B is not to provide compensation for the employees whose

interest may be injured, by loss of interest and the like. There is also a misconception that the damages imposed u/s 14-B are not transferred to the

Employees" Provident Fund and the Family Pension Fund, of the employees who may be adversely affected, but the amount is transferred to the

General Revenues of the appropriate Government. We find that this assumption is wholly unwarranted, in assessing the damages, the Regional

Provident Fund Commissioner is not only bound to take into account the loss to the beneficiaries but also the default by the employer in making his

contributions, which occasions the infliction of damages. (Italicising is ours).

9. By applying the ratio of the above noted judgment, we hold that the Corporation can recover damages if the employer fails to pay contributions

within the time specified in the Act and the Regulations.

10. The argument of Shri A.P. Bhandari that damages can be recovered u/s 85-B only if the employer omits to pay the amount and not in the case

of delay simpliciter is meritless and deserves to be rejected. The expression "'fails to pay'" has not been defined in the 1948 Act or the Regulations.

However, keeping in view the fact that the Act is a social legislation intended to benefit the persons employed in the establishments covered

thereunder, the said expression has to be given a very wide and purposeful meaning and if so interpreted, it will necessarily include the cases of

delayed payment of the amount due in respect of any contribution or any other amount payable under the Act. The scheme of the Act and the

Regulations postulates payment of various contributions within a particular time schedule. Regulation 31 of the Regulations lays down that 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 in which the contributions fall due. Where a factory establishment is permanently closed, the employer has to pay contribution on the last

day of its closure. Section 39(5) of the Act and Regulations 31-A and 31-B of the Regulations provide for levy of interest and recovery thereof.

Regulation 31-C lays down that the employer, who fails to pay contributions within the period specified under Regulation 31 or any other amount

payable under the Act shall be liable to pay damages at the specified rates. Therefore, omission on the part of the employer to pay contributions

within the prescribed time would amount to failure to pay the contributions payable under the Act and the employer is liable to pay interest and/or

damages and the Corporation can recover damages u/s 85-B read with Regulation 31-C.

11. We are further of the view that for each day's default or delay in payment of contributions, the employer is liable to pay interest in terms of

Section 39(5)(a) of the 1948 Act read with Regulation 31-A of the Regulations and he is also liable to pay damages in terms of Section 85-B read

with Regulation 31-C.

12. The facts of the present case show that the petitioner had repeatedly failed to pay contributions on the due dates. On receipt of information

regarding delayed payment of the contributions, the Regional Director issued notice for recovery of damages. The petitioner contested the notice

on the solitary ground that delay in the payment of contributions does not attract Section 85-B of the Act. However, it did not controvert the

allegation that it had defaulted in paying the contributions on the due dates. Therefore, we do not find any illegality in the order passed by the

Regional Director for levy of damages by way of penalty.

13. We are further of the view that the quantum of damages (5% to 25% for different defaults) imposed by the Regional Director is not

unreasonable or excessive warranting interference by this Court. A look at the statement sent by the Regional Director along with notice Annexure

P-1 shows that the petitioner had delayed the payment of contributions etc. on 42 different occasions between April, 2000 and March, 2002. On

most of the occasions, the delay was for more than two months. Therefore, the Regional Director was justified in imposing damages at the rates

specified in Regulation 31-C of the Regulations.

14. Before concluding, we may refer to the judgment of learned single Judge of Calcutta High Court in Sarat Textiles Ltd. 's case (supra). The

learned single Judge took the view that Section 85-B is attracted only in the case of failure to pay the contributions etc. and not in the case of

default. With great respect, we are unable to approve the ratio of that decision because it runs contrary to the scheme of the Act and the concept

of damages embodied in Chapter VII thereof and also the judgment of the Supreme Court in Organo Chemical Industries v. Union of India,

(supra) to which attention of the learned Single Judge does not appear to have been invited.

15. In the result, the writ petition is dismissed.