(2010) 08 KL CK 0008

High Court Of Kerala

Case No: Ins. A. No. 36 of 2003

Regional Director, ESI Corporation		APPELLANT
	Vs	
General Manager, Marikkar Engineers Ltd.		RESPONDENT

Date of Decision: Aug. 2, 2010

Acts Referred:

- Employees Provident Funds and Miscellaneous Provisions Act, 1952 - Section 14B
- Employees State Insurance (General) Regulations, 1950 - Regulation 31, 31C
- Employees State Insurance Act, 1948 - Section 39(4), 39(5), 45, 45A(1), 45A(2)
- Sick Industrial Companies (Special Provisions) Act, 1985 - Section 4

Citation: (2011) 2 KLJ 588

Hon'ble Judges: K.T. Sankaran, J

Bench: Single Bench

Advocate: T.V. Ajayakumar, for the Appellant; R.S. Kalkura, for the Respondent

Final Decision: Allowed

Judgement

K.T. Sankaran, J.

In this appeal, the Regional Director of Employees'' State Insurance Corporation challenges the order passed by the Employees'' Insurance Court holding that the Respondent herein is not liable to pay damages. The question of law arising for consideration in this appeal is whether belated payment of employees'' provident fund contribution amounts to failure of payment of contribution within the meaning of Section 85B of the Employees'' State Insurance Act, 1948 (Act 34 of 1948).

The Respondent is a company registered under the Companies Act, 1956 with its head office at Thiruvananthapuram. It had a workshop at Calicut, which was closed down later. The Employees'' State Insurance Corporation demanded arrears of contribution from the Respondent and issued notice. The Respondent claims to

have paid the contribution amount in full, though belatedly. By notice dated 25.11.1994, the Corporation proposed to impose damages for the belated payment of contribution. Respondent contended that the claim is barred by limitation under Clause (b) of Explanation to Section 77(1A) of the Employees'' State Insurance Act and that the proposal to levy damages is arbitrary and against law. The Corporation passed Ext. B6 order dated 7.2.2001 levying damages. That order was challenged by the Respondent before the Employees'' Insurance Court. The E1 Court allowed the application and set aside Ext. B6 order. It was held that the applicant therein (Respondent herein) is not liable to pay damages. The order of the Employees Insurance Court is under challenge in this Appeal.

2. The Respondent contended before the Employees'' Insurance Court that proceedings for levying penalty are barred by limitation under Clause (b) of Explanation to Section 77(1A) of the Act as five years elapsed from the date on which the cause of action arose. Clause (b) of Explanation to Section 77(1A) provides that the cause of action in respect of a claim by the Corporation for recovering contributions (including interest and damages) from the principal employer shall be deemed to have arisen on the date on which such claim is made by the Corporation for the first time. The proviso to Clause (b) of Explanation to Section 77(1A) states that no claim shall be made by the Corporation after five years of the period to which the claim relates. A Division Bench of this Court in Vijayan Pillai v. E.S.I. Corporation, 1998 (80) FLR 118 (Ker.) held that the cause of action arise from the date of claim and not the date when the contribution becomes due and the words "five years of the period to which the claim relates" contained in the proviso shall not be interpreted to mean that five years of the period in relation to which the amount of contribution is due. The decision in Vijayan Pillai v. E.S.I. Corporation (supra) was overruled by the Full Bench in E.S.I. Corporation v. Excel Glasses Ltd. 2003 (99) FLR 1015 (Ker-FB) : 2003 LLR 987 and it was held that the proviso Clause (b) of Explanation to Section 77(1A) places an embargo on the right of the Corporation and lays down that it shall not make a claim after five years of the period to which the claim relates. The decision of the Full Bench was held to be not correct by the Supreme Court in E.S.I.C. Vs. C.C. Santhakumar, It was held by the Supreme Court thus:

...When the Corporation passes an order u/s 45A, the said order is final as far as the Corporation is concerned. u/s 45A(1), the Corporation, by an order, can determine the amount of contributions payable in respect of the employees where the employer prevents the Corporation from exercising its functions or discharging its duties u/s 45, on the basis of the material available to it, after giving reasonable opportunity. But, where the records are produced, the assessment has to be made u/s 75(2)(a) of the Act. Section 45A(2) provides that the order u/s 45A(1) shall be used as sufficient proof of the claim of the Corporation u/s 75 or for recovery of the amount determined by such order as arrears of land revenue u/s 45B. In other words, when there is a failure in production of records and when there is no

co-operation, the Corporation can determine the amount and recover the same as arrears of land revenue u/s 45B. But, on the other hand, if the records are produced and if there is co-operation, the assessment has-to be made and it can be used as a sufficient proof of the claim of the Corporation u/s 75 before the E.S.I. Court. So, the limitation of three years for filing an application before the Court, introduced by Act 44 of 1966, can only relate to the application u/s 75 read with 77(1A). The order u/s 45A need not be executed by the Corporation before the E.S.I. Court u/s 77. As such, the amendment to Section 77(1A)(b) proviso by Act 29 of 1989 providing five year limitation has no relevance so far as orders passed by the Corporation u/s 45A are concerned.

16. Where an order is passed u/s 45A, it is the duty of the employer and not the Corporation to approach the E.S.I. Court. Since no application need be filed by the Corporation after an order is passed u/s 45A, the limitation prescribed u/s 77 does not get attracted. The non-payment of contribution is a continuing cause, which is clear from the fact that the employer is enjoined to pay the interest u/s 39(5)(A), which was introduced by Act 29 of 1989, until the date of its actual payment.

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21. It is clear, therefore, that the right of the Corporation to recover these amounts by coercive process is not restricted by any limitation nor could the Government by recourse to the rule-making power prescribe a period in the teeth of Section 68.

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23. Similarly, no limitation is provided in Chapter VII. It deals with the imposition of penalty or levy of damages upon failure to pay contributions. It consists of Sections 84 to 86A....

In view of the decision of the Supreme Court, the contention raised by the Respondent that the claim is barred by limitation is unsustainable. The Employees'' Insurance Court had rejected the contention of the Respondent in this regard relying on the Division Bench decision in 1998 (1) KLT 373: 1998 (80) FLR 118 (Ker.) and at the time when the order was passed by the Employees'' Insurance Court the Full Bench decision was not rendered.

3. The Employees'' Insurance Court accepted the contention raised by the Respondent herein that belated payment of contribution cannot be equated with failure of payment of contribution u/s 85B of the Act and that Section 85B would be attracted only on failure to pay the contribution. On the ground that the contribution was remitted, though belatedly, the Employees'' Insurance Court held that there is no failure to pay contribution and therefore, Section 85B is not attracted. Section 39(4) of the Act states 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 part of the wage period, or is employed under

two or more employers during the same wage period, the contributions shall fall due on such days as may ''be'' specified in the regulations. Sub-section (5) of Section 39 provides that if any contribution payable under this 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 at the rate of twelve per cent per annum or at such higher rate as may be specified in the regulations till the date of its actual payment. Section 85B reads thus:

85B. 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 (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 45C to Section 45-I.

Relevant part of Regulation 31-C of the Employees'' State Insurance (General) Regulations, 1950 reads as follows:

31-C. Damages or contributions or any other amount due, but not paid in time.-- If an employer fails to pay contributions within the periods specified under Regulation 31, or any other amount payable under the Act, the Corporation may recover damages, not exceeding the rates mentioned below, by way of penalty:

	Period of delay	Maximum rate of damages in percent, per annum of the amount due
(i)	Less than 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%

4. The interpretation made by the Employees Insurance Court that Section 85B would be attracted only on the failure to remit the contribution and that it does not apply when there is a delayed payment, to my mind, is unsustainable. Section 85B provides for recovery of damages by way of penalty, where an employer fails to pay the amount due. If the employer subsequently pays the amount, though belatedly, even then there was a failure to pay the amount on the date on which it was payable. The word "fails" cannot be attributed to a stage at which the adjudication is to be made. The expression "fails" relates to the period when the amount becomes payable. Therefore, if an employer fails to pay the contribution on the date when it becomes payable, there is a failure of payment within the meaning of Section 85B. The expression "fails to pay" is specified with reference to that date. In such a contingency Section 85B operates. Even though the employer pays the amount subsequently, the failure to pay on the due date and the consequent delay and the effect of Section 85B thereof cannot be taken away by an act which is under the control of the employer. In other words, the liability to pay damages by way of penalty u/s 85B arose even on delayed payment and it cannot be got over by the act of an employer by paying it belatedly. Depending on the period of delay, the percentage of damages differs, going by Regulation 31C. To say that on payment of the amount, though after several years of the date on which the amount become payable, the employer is completely absolved of his liability to pay damages, is clearly against the specific provisions of Section 85B of the Act and Regulation 31C. Regulation 31C makes the position further clear. It uses the expression "if an employer fails to pay contributions within the periods specified in Regulation 31."

5. In Employees'' State Insurance Corporation and Another Vs. K.N. Premanandan and Another, . the Division Bench considered the scope and ambit of Section 85B, the amendment introduced to Section 85B and the power to impose damages. The Division Bench held thus:

8. Before amendment, the wording used was different in the section. At that time, the words used were "he Corporation may recover from the employer such damages, not exceeding the arrears as it may think fit to impose." This wording was changed as "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.'"' As such, by the amendment, the legislature had made it abundantly clear that the imposition of damages by way of Section 85B is in the nature of penalty. But, even without the word ''penalty'' in that section prior to the amendment, in the decision of Shakti Tile''s case, a Division Bench of this Court came to the conclusion that the imposition of damages u/s 85B is in the nature of penalty which only has been subsequently made clear by the legislature by

amending the section, by expressly stating that the power to recover damages u/s 85B is by way of penalty. If imposition of damages is by way of penalty, then such damages can be imposed only in accordance with the principles applicable for imposing penalty for failure to carry out a statutory obligation.

The Division Bench referred to the decision in Indian Telephone Industries Ltd. v. Assistant Provident Fund Commissioner and Ors.. 2006 KHC 1655 : 2006 (3) KLJ 698. In that case, referring to Section 14B of the Employees Provident Funds and Miscellaneous Provisions Act, which also contains similar provisions, the learned single Judge held that "merely because there is delayed payment of contributions, the liability to pay damages does not automatically arise, but the same shall be decided by applying mind to the merits of each case and not by resorting to mere arithmetic calculation of damages. Even though liability to pay contributions is statutory, to hold that delay automatically attracts damages would be too rigid a way of construing the Section, especially since the imposition of damages is punitive in nature."

6. In E.S.I. Corporation v. Qetcos Ltd. 2008 (3) KHC 111 : 2008 (3) KLT 336 : ILR 2008 Ker. 132 another Division Bench approved the decision in Employees'' State Insurance Corporation and Another Vs. K.N. Premanandan and Another, .

7. In Emp. State Insurance Corporation Vs. H.M.T. Ltd. and Another, . the Supreme Court held thus:

14. Section 85B of the Act uses the words ''may recover''. Levy of damages there under is by way of penalty. The Legislature limited the jurisdiction of the authority to levy penalty, i.e., not exceeding the amount of arrears. Regulation 31-C of the Regulations, therefore, in our opinion, must be construed keeping in view the language used in the Legislative Act and not de hors the same.

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17. A penal provision should be construed strictly. Only because a provision has been made for levy of penalty, the same by itself would not lead to the conclusion that penalty must be levied in all situations. Such an intention on the part of the Legislature is not decipherable from Section 85B of the Act. When a discretionary jurisdiction has been conferred on a statutory authority to levy penal damages by reason of an enabling provision, the same cannot be construed as imperative. Even otherwise, an Endeavour should be made to construe such penal provisions as discretionary, under the statute is held to be mandatory in character,

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The statute itself does not say that a penalty has to be levied only in the manner prescribed. It is also not a case where the authority is left with no discretion. The

legislation does not provide that adjudication for the purpose of levy of penalty proceeding would be a mere formality or imposition of penalty as also computation of the quantum thereof became a foregone conclusion. Ordinarily, even such a provision would not be held to providing for mandatory imposition of penalty, if the proceeding is an adjudicatory one or compliance of the principles of natural justice is necessary there under.

21. Existence of mens rea or actus reus to contravene a statutory provision must also be held to be a necessary ingredient for levy of damages and/or the quantum thereof.

8. The Employees'' Insurance Court, did not consider the question whether there was contumacious conduct on the part of the employer, whether there was justification for the delayed payment and whether any discretion should be exercised by the Court in the matter of interference with the quantum of damages awarded by the E.S.I. Corporation, evidently since the Employees'' Insurance Court held that delayed payment would not attract Section 85B. Since I have held that the view taken by the Employees Insurance Court on the interpretation of Section 85B is not correct, necessarily the Employees Insurance Court has to consider all other relevant aspects as mentioned above. Therefore, I am inclined to set aside the order of the Employees Insurance Court.

9. The order passed by the Employees Insurance Court is set aside and the matter is remanded to the Employees Insurance Court for fresh disposal. All the contentions raised by the parties are left open except the contention regarding the bar of limitation.

10. I hasten to add that the learned Counsel for the Appellant submitted that the contentions now put forward by the Respondent herein were not raised before the Employees Insurance Court. These are all matters to be taken note of by the Employees Insurance Court while disposing of the case on the merits.

The Insurance Appeal is allowed in part as mentioned above. No order as to costs.