Singh Engineering Co. Jabalpur Vs Regional Director, Esic, Indore

Court: Madhya Pradesh High Court

Date of Decision: Feb. 22, 1983

Acts Referred: Constitution of India, 1950 â€" Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 â€" Section 14B
Employees State Insurance Act, 1948 â€" Section 75(g), 85B

Citation: (1983) JLJ 352 : (1983) MPLJ 261

Hon'ble Judges: M.D. Bhatt, J; J.S. Verma, J

Bench: Division Bench

Advocate: Gulab Gupta, for the Appellant; Vinod Mehta, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

J.S. Verma, J.

The petitioner is an industrial establishment to which provisions of the Employees'' State Insurance Act, 1948 are admittedly applicable. For certain

periods, the petitioner was in default in making payment of the contributions under the Act within the time allowed for the purpose.

There is no dispute that the contributions due for all these periods were paid by the petitioner even though there was delay in the payment.

Accordingly, four notices Annexure ''C'' dated 17-9-1979, Annexure ''D'' dated 22-11-1979, Annexure ''E'' dated 4-3-1981 and Annexure ''F''

dated 3-9-1981 were issued to the petitioner by the Regional Director Employees'' State Insurance Corporation (respondent) requiring the

petitioner to show cause why the amounts of Rs. 7454/- Rs. 2631/-, Rs. 11587 and Rs. 3226/- respectively be not recovered as damages from

the petitioner in accordance with section 85B of the Act. These notices related to delay in deposit of contributions for different periods ending on

dates between January, 1976 and November, 1980. The respondent ultimately by order dated 22-12-1981 (Annexure ''G'') levied damages

amounting to Rs. 20,536/- against the aforesaid four notices. It is to quash this order Annexure ''G'' that this petition has been filed.

Learned counsel for the petitioner contends that the impugned order Annexure ''G'' passed by the respondent is liable to be quashed because it

gives no reasons for directing recovery of damages at the rate of 100% which is the maximum prescribed u/s 85B of the Act. It is contended that

the respondent was under an erroneous impression that there was no discretion available u/s 85B of the Act to direct recovery of damages at a

lesser rate and this has led to making of such an arbitrary order. Learned counsel for the respondent in reply contended that reasons have been

given by the respondent in the impugned order to negative the only ground of financial stringency raised by the petitioner in reply to the notices

issued to it and there being no other ground raised by the petitioner, it was unnecessary to give any other reason before directing recovery of of

damages at the maximum rate permissible under the statute. Learned counsel for the respondent also contended that the petitioner had an

alternative remedy of approaching the Employees'' State Insurance Court, this being a matter covered by section 75(g) of the Act, and therefore,

existence of this alternative remedy is sufficient to decline interference under Article 226 of the Constitution of India.

We do not propose to uphold the preliminary objection raised on the basis of existence of alternative remedy, in view of the fact that the petition

having been admitted for hearing and now heard on merits discloses a patent error in the impugned order and it would not be proper to direct the

petitioner to resort to the alternative remedy which may even have become time-barred by now. Moreover, allowing the petition would only result

in the matter being remanded for a fresh decision in accordance with law, and no more. Having formed the opinion that such a course would be

appropriate in the present case, we proceed to consider the petition on merits.

The only reason given in the impugned order to support the conclusion for imposition of the maximum penalty permissible is that financial stringency

of the petitioner is no ground for exonerating the petitioner from the liability to pay damages u/s 85B of the Act. Having said so, the respondent

proceeded on the assumption that the statutory provision left no option with the respondent except to recover damages at the maximum rate

permitted by it. No doubt, the respondent was right in coming to the conclusion that financial stringency of the petitioner was no ground to absolve

it from the liability to pay damages. That, however, does not mean that the logical consequence of incurring the liability for damages is to pay it at

the maximum rate prescribed. Having reached the conclusion that the petitioner had incurred the liability to pay damages the next question to

determine was the rate which it should be recovered. For this purpose all the relevant circumstances which could be treated as mitigating factors

should have been taken into account to determine the quantum of damages considered reasonable. This would be a question of fact depending on

the facts of each case. This has not been done in the present case in impugned order. No reason for levying damages at the maximum rate

permissible has been given obviously under the erroneous assumption that the authority had no such power or discretion in the matter u/s 85B,

once the provision was attracted and the petitioner had incurred the liability for payment of damages. This error is apparent on the face of the

impugned order.

Sub-section (1) of section 85B of the Employees'' State Insurance Act which alone is relevant for our purpose reads as under : -

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 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.

* * *

The expression ''may recover from the employer such damages not exceeding the amount of arrears as it may think fit'' is the significant part of the

provision. A plain construction of this expression indicates that the amount of arrears is the outer limit up to which damages may be recovered, that

is, up to 100%. This, however, does not mean that once the liability for payment of damages arises then the same has invariably to be at the rate of

100%. The words ''damages not exceeding the amount of arrears'' indicate that this is the outer limit fixed by the statute and not a fixed rate

prescribed for recovery of damages. Use of the word ''may'' at the beginning of the expression and ''as it may think fit to impose'' at the end of it,

further indicates that the authority has been given discretion in the matter which is, obviously, to be exercised reasonably on the facts of each case

and not unreasonably or arbitrarily, which is true for the valid exercise of all discretionary powers.

An identical expression occurring in section 14B of the Employees'' Provident Funds and Miscellaneous Provisions Act (1952) came up for

construction before the Supreme Court in Organo Chemical Industries and another v. Union of India and others A I R l979 S C 1803. The

expression used in that provision is ''damages not exceeding the amount of arrears as it may think fit to impose.'' The Supreme Court while

rejecting the challenge to the vires of the provision on the ground that it conferred arbitrary and unfettered power, indicated its true import. It has

been held that the power to impose damages is a quasi-judicial function, the discretion to award damages could be exercised within the limits fixed

by the Statute, and in view of the punitive nature of the power, the order must be a ''speaking order'' containing the reasons in support of it. The

Supreme Court also pointed out that while fixing the amount of damages, the authority takes into consideration all the relevant factors and the word

''damages'' lays down sufficient guidelines for the levy of damages. Referring to an earlier decision of the Supreme Court it was reiterated that the

determination of damages is not ''an inflexible application of a rigid formula'' and the words ''as it may think fit to impose'' show that the authority is

required to apply its mind to the facts of the case. It was for these reasons that challenge to vires of the provision was repelled. This decision of the

Supreme Court construing an identical provision applies to the present case with full force and it must be held that the requirements of an order

made u/s 85B of the Employees'' State Insurance Act are the same.

It is beyond dispute that the aforesaid requirements of section 85B of the Employees'' State Insurance Act were not complied with by the

respondent while making the impugned order Annexure ''G''. There is absolutely no indication why all the defaults were treated alike and attracted

the maximum penalty. In fact there has been no determination of the quantum of damages which is reasonable to recover in the present case. No

recovery can be made without such a determination which has yet to be made. We are informed that the petitioner''s liability to pay interest for the

period of delay in payment of contributions, in addition to the damages, has already been discharged.

The impugned order is, therefore, liable to be quashed for the obvious reason that it gives no reason for levying the maximum penalty prescribed

u/s 85B of the Employees'' State Insurance Act, and no rational basis for reaching the conclusion is discernible from the order. The order does not

satisfy the essential requirements of the provision under which it is made.

Consequently, the petition is allowed. The impugned order Annexure ''G'' dated 22-12-1981 is quashed. The respondent shall now proceed to

decide the matter afresh in accordance with law, on the basis of the notices issued giving reasonable opportunity to the petitioner to show cause

against the same. Parties shall bear their own costs. Security amount be refunded to the petitioner.