

A EMP. STATE INSURANCE CORPORATION

v.

H.M.T. LTD. AND ANR.

(C.A. No. 340 of 2008)

JANUARY 11, 2008

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[S.B. SINHA AND J.M. PANCHAL, JJ.]

Employees State Insurance Act, 1948 – ss.85B and 2(17) – Deposit of contribution payable under the Act – Delay in deposit by employer – Levy of damages – Held: Is not imperative in all cases – s.85B provides for an enabling provision – It does not envisage mandatory levy of damages – When discretionary jurisdiction is conferred on a statutory authority to levy penal damages by reason of an enabling provision, the same cannot be construed as imperative – Regn. 31C to be construed keeping in view language used in Legislative Act and not de hors the same – Employees State Insurance (General) Regulations, 1950 – Regn.31C.

Interpretation of statutes – Subordinate legislation – Held: Must conform to provisions of the Legislative Act.

Penalty/Damages – Levy of – Necessary ingredients for – Held: Existence of mens rea or actus reus to contravene a statutory provision is a necessary ingredient for levy of damages.

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Respondent-employer failed to deposit the amount due in respect of contribution payable under the Employees State Insurance Act, 1948 within the specified period. Appellant-Corporation raised claim for payment of interest for delayed payment and furthermore levied damages in terms of Section 85B of the Act.

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High Court held that although period of delay was slightly more than two years, some reasonable time should be allowed for deposit of contributions and, thus,

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restricted the period of payment of interest to two years only. It furthermore held that in the facts and circumstances of the case, no damage should be directed to be levied as Section 85B of the Act provides for an enabling provision and does not make it mandatory to levy damages in every case.

In appeal to this Court, it was contended that the High Court while passing the said judgment erred in failing to take into consideration the purported effect of Regulation 31C of the Employees State Insurance (General) Regulations, 1950 which provides for levy of interest as well as damages.

Interpretation and application of Section 85-B of the Act and Regulation 31C of the Regulations was thus in question in the present appeal.

Allowing the appeal and remitting the matter to High Court, the Court

HELD:1.1. Section 85B of the Employees State Insurance Act, 1948 provides for an enabling provision. It does not envisage mandatory levy of damages. It does not also contemplate computation of quantum of damages in the manner prescribed under the regulations. [Para 12] [652-B]

1.2. An employee being required to be compulsorily insured, the employer is bound to make his part of the contribution. An employee is also bound to make his contribution under the Act. But the same does not mean that levy of damages in all situations would be imperative. [Para 13] [652-C, D]

1.3. Section 85B of the Act uses the words 'may recover'. Levy of damages thereunder 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 31C of the Employees State Insurance (General) Regulations, 1950 therefore must be

A construed keeping in view the language used in the Legislative Act and not de hors the same. It is a well known principle of law that a subordinate legislation must conform to the provisions of the Legislative Act. [Paras 12, 14] [652-D, E]

B 1.4. 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
C 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
D made to construe such penal provisions as discretionary, unless the statute is held to be mandatory in character. [Para 17] [653-E, F, G]

E 1.5. 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.
F Ordinarily, even such a provision would not be held to be providing for mandatory imposition of penalty, if the proceeding is an adjudicatory one or compliance of the principles of natural justice is necessary thereunder. [Para 20] [655-B, C]

G 1.6. 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. [Para 21] [655-D]

H *Hindustan Times Ltd. v. Union of India* [(1998) 2 SCC

242] – distinguished.

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Prestolite (India) Ltd. v. Regional Director and Anr. [1994 Supp.(3) SCC 690] and *Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai and Anr.* [(2007) 6 SCC 329]- referred to.

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2. The High Court was not wrong in opining that Section 85-B provides for an enabling provision. What, however, cannot be appreciated is that such a construction itself would lead to the conclusion that the High Court is entitled to substitute its view in place of the statutory authority. Therefore, the matter should be considered afresh for determination of quantum of damages etc.. [Para 22] [655-E, F]

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CIVILAPPELLATE JURISDICTION : Civil Appeal No. 340 of 2008.

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From the final Judgment and Order dated 12.9.2005 of the High Court of Karnataka at Bangalore in Writ Appeal No. 2587 of 2004 (L-ESI).

C.S. Rajan, V.J. Francis and Anupam Mishra for the Appellant.

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C.V. Francis, G. Prakash and Sanjay R. Hegde for the Respondent.

The Judgment of the Court was delivered by

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S.B. SINHA, J. Leave granted.

1. Interpretation and application of Section 85-B of the Employees State Insurance Act (The Act) and Regulation 31C of the Employees State Insurance (General) Regulations, 1950 (The Regulations) is in question in this appeal which arises out of a judgment and order dated 12.9.2005 passed by a Division Bench of the Karnataka High Court in Writ Appeal No.2587 of 2004 allowing the appeal in part preferred from the judgment and order dated 25.3.2000 passed by a learned Single Judge

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A of the said Court in Writ Petition No.38753 of 1998.

B 2. Respondent is an 'employer' within the meaning of the provisions of Section 2(17) of the Act. Indisputably, prior to issuance of the notification dated 27.3.1992, the wage ceiling of the employees was restricted to Rs.1,600/- per month. The same was increased to Rs.3000/- per month with a view to bring them within the purview of the Act.

C 3. Validity of the said notification was challenged in a large number of writ petitions by the employees. By an interim order passed by the High Court, the operation of the notification was directed to be stayed. The said writ petitions were dismissed by an order dated 5.8.1992.

D 4. Writ appeals were filed by the 'employees' through their respective Trade Unions. While admitting the said appeals, the interim order operating during the pendency of the writ petition was allowed to continue.

E The said writ appeals were also dismissed by the Division Bench of the High Court by reason of a judgment and order dated 11.7.1995, inter alia, on the premise that there was no impediment for the respondent herein to deposit the contributions of the employees concerned.

F 5. On and from the said date interest was claimed till the date of actual payment. Appellant thereafter also raised a claim for payment of interest for delayed payment and furthermore levied damages in terms of Section 85B of the Act.

G 6. A writ petition filed by the respondent herein questioning the validity of the said notice dated 9.6.1998 was dismissed by an order dated 25.3.2000. A review petition was filed by the appellant herein which was also dismissed on merits.

An intra court appeal was preferred thereagainst and by reason of the impugned judgment, it was allowed in part opining:

H 1. that although period of delay is slightly more than two years, some reasonable time should be allowed for

deposit of contributions and, thus, restricting the period of payment of interest to two years only. A

2. No damage should be directed to be levied in the facts and circumstances of the case as Section 85B of the Act provides for an enabling provision and does not make it mandatory to levy damages in every case. B

7. Mr. C.S. Rajan, learned Senior Counsel appearing for the appellant, submitted that the High Court committed a serious error in passing the impugned judgment in so far as it failed to take into consideration the purported effect of Regulation 31C of the Regulations which provides for levy of interest as also damages. C

8. Mr. C.V. Francis, learned counsel appearing on behalf of the respondent, on the other hand, would support the impugned judgment. D

9. The said Act was enacted to provide for certain benefits to the employees of an establishment in case of sickness, maternity and employment injury and to make provisions for certain other matters in relation thereto. E

10. Chapter IV of the Act provides for payment of contributions. Section 39 of the Act postulates payment of contributions thereunder both by the 'employer' as also the 'employee'. F

11. Section 85B of the Act empowers the Corporation to recover damages in the event an employer fails to make the payment of the amount due in respect of contribution; subject, however, to the condition that the amount thereof would not exceed the amount of arrears as may be specified in the Regulations. Proviso appended thereto incorporates the principles of 'Natural Justice'. G

12. Obligation on the part of the employer to deposit the contributions of both the 'employer' and the 'employee' is not in H

A dispute.

What is in dispute is as to whether the amount of damages specified in Regulation 31C of the Regulation is imperative in character or not.

B It is a well known principle of law that a subordinate legislation must conform to the provisions of the Legislative Act. Section 85B of the Act provides for an enabling provision. It does not envisage mandatory levy of damages. It does not also contemplate computation of quantum of damages in the manner prescribed under the regulations.

C 13. The statutory liability of the employer is not in dispute. An employee being required to be compulsorily insured, the employer is bound to make his part of the contribution. An employee is also bound to make his contribution under the Act.

D But the same does not mean that levy of damages in all situations would be imperative.

E 14. Section 85B of the Act uses the words 'may recover'. Levy of damages thereunder 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 31C 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.

F 15. Our attention, however, has been drawn to a decision of this Court in *Hindustan Times Ltd. v. Union of India* [(1998) 2 SCC 242] wherein it has been laid down :

G "From the aforesaid decisions, the following principles can be summarized :

H The authority under Section 14-B has to apply his mind to the facts of the case and the reply to the show-cause notice and pass a reasoned order after following principles of natural justice and giving a reasonable opportunity of being heard; the Regional Provident Fund Commissioner

usually takes into consideration the number of defaults, the period of delay, the frequency of default and the amounts involved; default on the part of the employer based on plea of power-cut, financial problems relating to other indebtedness or the delay in realization of amounts paid by the cheques or drafts, cannot be justifiable grounds for the employer to escape liability; there is no period of limitation prescribed by the legislature for initiating action for recovery of damages under Section 14-B.”

16. It was, however, opined that in certain situations, the employer can claim the benefit of ‘irretrievable prejudice’ in case a demand for damages is made after several years. In that case, this Court was concerned, inter alia, with a question in regard to the effect of levy of damages after a long time. The question which, inter alia, arose for consideration therein was as to whether suo moto revisional jurisdiction could be exercised by the revisional authority at any time it desires. The Court made a distinction between the cases involving ‘recovery of money’ from an employer who had withheld the contributions made by the workmen in trust and other cases. It was in that situation opined supra. We are not concerned with such a situation herein.

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, unless the statute is held to be mandatory in character.

18. In *Prestolite (India) Ltd. v. Regional Director & Anr.* [1994 Supp.(3) SCC 690], this Court rejected a contention raised by the Regional Director of Employees Insurance that

A under the Employee's State Insurance General Regulations guidelines have been indicated showing as to how damages for delayed payment are to be imposed and since such guidelines have been followed, no exception should be taken thereto made to the impugned adjudication, stating :

B "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
C by the adjudicating authority in finally deciding the matter
and it is bound to act mechanically in applying the
uppermost limit of the table. In the instant case, it appears
to us that the order has been passed without indicating
any reason whatsoever as to why grounds for delayed
D payment were 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
materials to support the objections, the employee's case
could not be discarded in limine. On the contrary, the
E objection ought to have been considered on merits."

19. In *Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai & Arr.* [(2007) 6 SCC 329], this Court stated :

F "40. Thus, it appears that there is distinct line of authorities
which clearly lays down that in considering a question of
penalty, mens rea is not a relevant consideration. Even
assuming that when the statute says that one is liable for
penalty if one furnishes inaccurate particulars, it may or
may not by itself be held to be enough if the particulars
G furnished are found to be inaccurate is anything more
needed but the question would still be as to whether
reliance placed on some valuation of an approved valuer
and, therefore, the furnishing of inaccurate particulars was
not deliberate, meaning thereby that an element of mens
H rea is needed before penalty can be imposed, should

have received serious consideration in the light of a large number of decisions of this Court." A

20. We agree with the said view as also for the additional reason that the subordinate legislation cannot override the principal legislative provisions. B

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 thereunder. C D

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.

22. The Division Bench of the High Court, therefore, in our opinion, was not wrong in opining that Section 85-B provides for an enabling provision. What, however, cannot be appreciated that is such a construction itself would lead to the conclusion that the High Court is entitled to substitute its view in place of the statutory authority. In our considered view, therefore, the matter should be considered afresh for determination of quantum of damages etc. in the light of the observations made hereinbefore. E F

23. We are, therefore, of the opinion that the impugned judgments cannot be sustained. It is set aside accordingly and the matter is remitted to the High Court for consideration of the matter afresh in the light of the observations made herein. The appeal is allowed to the aforementioned extent. In the facts and circumstances of this case, there shall be no order as to costs. G