IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

THURSDAY, THE 15TH DAY OF JANUARY 2015/25TH POUSHA, 1936

Ins.APP.No. 85 of 2010 ( )

IC 44/2007 of EMPLOYEES INSURANCE COURT, ALAPPUZHA

APPELLANTS/RESPONDENTS:

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1. THE REGIONAL DIRECTOR,
   E.S.I. CORPORATION, PANCHADEEP BHAVAN
   THRISSUR - 680 020

2. THE RECOVERY OFFICER,
   E.S.I. CORPORATION, PANCHADEEP BHAVAN, THRISSUR - 20

   BY ADV. SRI.P.SANKARANKUTTY NAIR

RESPONDENT(S)/APPLICANT:

M/S.KREEM DRINKS (P) LTD.
REG.OFFICE NO.XXVIII/2485, CHERUPARAMBATH ROAD
KADAVANTHARA, COCHIN - 20, REP. BY ITS DIRECTOR
FRANCIS J.PALLAN.

BY ADV. SRI.A.V.XAVIER
BY ADV. SRI.K.JOLLY JOHN

THIS INSURANCE APPEAL HAVING COME UP FOR ADMISSION ON 15-01-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.B.SURESH KUMAR, J.

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Ins.Appeal No.85 of 2010

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Dated 15th January, 2015.

J U D G M E N T

The order on I.C No.44 of 2007 on the file of the Employees' Insurance Court, Alappuzha is under challenge in this appeal. The Regional Director of the Employees' State Insurance Corporation ('the Corporation' for short), is the appellant.

2. The respondent is an establishment covered under the Employees' State Insurance Act ('the Act' for short). They failed to pay contributions on certain wages/charges. When the non-payment was detected, the Corporation issued notice to the respondent calling upon them to show cause why contributions under the Act shall not be recovered in respect of the omitted wages/charges. The respondent did not offer any explanation for the non-payment of contributions and consequently the contributions payable in respect of the omitted wages were determined on 6.5.2005 by the Corporation invoking the power under Section 45A of the Act. Exts.P7 and P8 are the orders issued by the Corporation for the said purpose. Since the amounts determined as due as per the

said orders were not paid, the Corporation initiated proceedings for recovery of the same and when recovery proceedings were initiated, the respondent paid the amounts covered by Ext.P8 order on 1.3.2006 and the amounts covered by Ext.P7 order on 22.11.2006, without disputing the correctness of the determination.

3. Thereafter, the Corporation raised demands for payment of interest for delayed payment of the contributions determined as per Exts.P7 and P8 orders from the respective dates on which the contributions fell due. The Corporation also raised a demand for damages for delayed payment of the contributions covered by Ext.P7 order. The proceeding before the Employees Insurance Court was instituted at that point of time seeking a declaration that the respondent is not liable to pay the contributions determined as due as per Exts.P7 and P8 orders as also interest and damages in respect of the same.

4. The Corporation filed a written objection in the proceeding, contending that the respondent is liable to pay the contributions determined as per Exts.P7 and P8 orders as per the provisions of the Act and the Rules and Regulations made thereunder. It was also contended by the Corporation that the

respondent is liable to pay interest for the contributions determined as per Exts.P7 and P8 orders from the respective dates on which the said contributions fell due. It was further contended by the Corporation that the respondent has not offered any explanation for non-payment of the contributions; that the contributions were paid without raising any objection as to the correctness of the determination made and without reserving any right to challenge the correctness of the determination made and that therefore the non-payment of contribution can only be wilful. According to the Corporation, in the said circumstances, the demand raised for damages for non-payment of contribution is lawful and is in accordance with the provisions of the Act.

5. The Insurance Court, on an appraisal of the materials on record, found that the challenge against Exts.P7 and P8 orders is unsustainable. However, the Insurance Court declared the demand raised by the Corporation for interest and damages for delayed payment of contributions as invalid. It is aggrieved by the said decision of the Insurance Court that this appeal is preferred by the Corporation.

6. Heard the learned counsel for the appellant as also the

respondent.

7. The correctness of the decision of the Insurance Court on the sustainability of the claim raised by the Corporation for interest and damages for delayed payment of the contributions is the issue arises for consideration in this appeal.

8. As far as the claim for interest is concerned, the view taken by the Insurance Court is that since the liability of the respondent to pay contributions in respect of the omitted wages was crystallized only by virtue of Exts.P7 and P8 orders, they are not liable to pay interest for the said contributions upto the date of the said orders and 21 days thereafter, as provided for in Regulation 31 of the Employees' State Insurance Corporation (General) Regulations. According to the Insurence Court, the liability of the respondent to pay interest arises only thereafter. The question whether an employer is liable to pay interest for the contributions determined as due in a proceedings under Section 45A of the Act from the respective dates on which it fell due has been considered by this Court in Insurance Appeal No.11 of 2011. In the said case, it was held that once it is found in a proceeding under Section 45A of the Act that certain amounts are due from the employer towards

contributions for a particular period, it has to be presumed that the said contributions fell due as provided for in Section 39(4) of the Act and that therefore, the employer cannot deny the liability to pay the interest in respect the said contributions from the respective dates on which the same fell due. In the light of the said decision, the view taken by the Insurance Court concerning the liability of the respondent to pay interest of the delayed payment of contributions is unsustainable.

9. As far as the claim for damages is concerned, it is settled that the provision in Section 85B of the Act which enables the Corporation to recover damages is penal in nature and therefore, unless it is established that there is contumacious failure on the part of the employer to pay the contributions, the damages cannot be imposed and recovered. In the instant case, it is not disputed that damages are sought to be recovered from the respondent for non-payment of contributions determined as per Ext.P7 order. It is seen that the non-payment the said contributions were detected during the year 2004 and proceedings under section 45A of the Act were initiated against the respondent during 2004 itself. It is not disputed that the respondent has not offered any explanation

for the non-payment of contributions. They have not appeared in the proceedings initiated under section 45A of the Act. Ext.P7 order was passed on 6.5.2005. Exhibit P7 order was not challenged by the respondent. Nevertheless, the contributions determined as due were not paid. Consequently, proceedings were initiated for recovery of the amounts covered by Ext P7 order. It was at that point of time, the respondent paid the contribution covered by Ext P7 order without any objection on 22.11.2006. As rightly contended by the Corporation, the non-payment of the contributions determined as per Ext.P7 order, in the circumstances, can only be wilful. The view of the Insurance Court that the liability of the respondent to pay contributions was crystallized only when Ext.P7 order was issued under Section 45A the Act and therefore, it cannot be said that the non-payment is contumacious cannot be accepted. The materials on record as referred to above indicate beyond doubt that the respondent was delaying the contributions without any cause. The proceedings initiated by the Corporation against the respondent for recovery of damages is, therefore, in accordance with the provisions contained in Section 85B of the Act.

In the result, the appeal is allowed and the impugned order is set aside.

Sd/-

P.B.SURESH KUMAR, JUDGE.

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(true copy)