

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.M.A.No.2561 of 2014

Employees' State Insurance Corporation
Rep.by its Regional Director,
143, Sterling Road,
Nungambakkam,
Chennai-600 034. Appellant/Respondent

Vs.

M/s. Cosmopolitan Club,
Rep.by its Hon.Secretary,
Mr.K.Gajapathy,
No.63, Anna Salai,
Chennai-600 002. Respondent/Petitioner

Prayer : Civil Miscellaneous Appeal filed under Section 82 of the Employees State Insurance Act 1948 against the order passed in EIOP. No.22 of 2002, dated 12.04.2013, by the Employees State Insurance Court [Principal Labour Court, Chennai], Chennai-104 and the same is liable to be set aside.

For Appellant : M/s. SP. Srinivasan

For Respondent : Ms.R.Abirami

J U D G M E N T

The Employees' State Insurance Corporation has filed this appeal challenging the order passed in EIOP.No.22 of 2002 by the Employees State Insurance Court [Principal Labour Court, Chennai] dated 12.04.2013.

2 The respondent club was covered under Employees State Insurance Act with effect from 1980. In view of coverage, the appellant Corporation issued notice of demand to the respondent. The respondent challenged the action of the appellant-Corporation stating that it not is covered under the Provisions

of Employees State Insurance Act. The respondent has filed a petition in EIOP.No.43 of 1988 before the Employees State Insurance Court challenging the implementation. The same was dismissed on 09.10.1996 with a direction to submit all the relevant records before the appellant Corporation.

3 The respondent club has submitted that the appellant Corporation passed an order under Section 45(A) determining the contribution by its order dated 25.01.2001. Thereafter, the appellant Corporation issued recovery certificate on 30.03.2001. After issuance of recovery certificate, on 14.05.2001 the respondent had paid the contribution amount along with interest. The respondent has also made an appeal to the Central Government for waiver of interest. It was negatived by the Central Government on 07.06.2001 as there is no provision in the Act for waiver. After that, the appellant Corporation issued a notice dated 30.10.2001 calling upon the respondent to show cause as to why damages shall not be imposed. On 19.02.2002 under Section 85(B) of the Act, damages were imposed by the appellant Corporation. This was challenged before the Employees' State Insurance Court in EIOP. No.22 of 2002.

4 The Employees' State Insurance Court by its order dated 12.04.2013 has held that there is no mens rea or actus rea on the part of the respondent, that is why imposition of damages should not have been made, against which the appellant Corporation has preferred the present appeal.

5 The learned counsel for the appellant stated that in spite of repeated notices and demands made by the Corporation from 1986 onwards, the respondent has failed to remit the contribution and therefore, the respondent is liable to pay damages. The learned counsel would also rely on the judgment of Employees State Insurance Corporation Vs. Braithwaite and Company Ltd. [2004 (2) LLN 618] wherein it is observed as :-

"25 That apart in the instant case the Employees' State Insurance Corporation is a welfare legislation for the benefit of the employees of different establishments who are insured under the said Act. Under the provision of the said Act an employer is statutorily bound to pay the contribution within time. Such provision has been made by the Legislature in its wisdom for ensuring creation of fund for providing various medical facilities to the insured out of such funds.

26 Failure to pay by the employer or even delayed payment of such contribution therefore causes serious prejudice to such aims and objectives of the Act.

27 It is not therefore a case where the Employees' State Insurance Corporation and public authority taking a plea of the limitation for the purpose of defeating the legitimate claim of a citizen. Such defence of limitations is taken by the Corporation, which has been provided for in the Act, which has been enacted to extend the benefit of the insurance to such employees and protect the interest of such insured in exercise of such statutory function; the same was therefore for public interest."

6 Per contra, the learned counsel appearing for the respondent would contend that the respondent is a social club and they had bonafidely pleaded that the Employees' State Insurance Act would not cover the respondent club. Therefore, they filed a suit/EIOP before the Court and as directed by the Court, presented the record of documents. Once the amount was determined, it was also paid without delay by the respondent.

7 According to the learned counsel for the respondent, the payment falls due only on the date of determination. Once the demand was made by the appellant Corporation, they immediately paid the money and also paid interest as mentioned under the Act. Once the money is paid in time without any delay, it should be accepted by the authority. The authority ought not to have issued an order calling upon the respondent to pay damages. The order was passed after a delay of five years, assigning no reason and therefore, the delay was on the part the appellant and not on the part of the respondent Club. Hence, the Court has rightly set aside the recovery notice issued by the appellant.

8 Heard both sides.

9 It is well settled that the Employees' State Insurance Act will be beneficial and the payment of contribution shall be made within the time specified in the Act. The delay or failure to pay contribution would cause civil consequences on the implementation of Public Service Act. Employees' State Insurance Corporation is also empowered to make the demand and recover of the dues as if it is arrears of land revenue. Once the power is vested, it is expected from the authorities to comply with the Act simply and recover the dues.

10 The ESIOP Court has considered all these points and that the Corporation has not taken any action and only at the instance of order dated 09.10.1996, the respondent was given personal hearing and an order under 45(A) was passed on 25.01.2001 determining contribution of payment. For the intervening period from 1977 to 1987, the appellant Corporation has not taken any steps to determine the contribution. In this regard, it would be appropriate to refer the judgment of this Court in CMA (MD).No.38 of 2012 dated 14.02.2012, Employees State Insurance Corporation Vs. M/s. Hafeez Motor Transport, Pudukottai.

"The power to levy and recover damages provided in Section 85-B of the Act is in the nature of a quasi-penal provision. The proviso to Section 85-B itself indicates that, before recovering such damages, the employer should be given a reasonable opportunity of being heard. It postulates that there should be an adjudication in the matter. Since the failure to carry out the statutory obligation should be adjudicated by a quasi-judicial enquiry, and the levy of damages is penal in character, such damages will not ordinarily be imposed unless the party obliged to pay the amount due, acted either deliberately or in defiance of law, or was guilty of contumacious or dishonest conduct, or acted in conscious disregard of its obligation. The mere fact that the Corporation is empowered to recover damages, does not mean that the Corporation can act mechanically and without taking into account the facts and circumstances of each case."

11 From the above decision, it is clear that when the delay in payment of contribution is not intentional, the requisition of damages will not arise. The power under 45(A) is only discretionary power and it is not mandatory.

12 In instant case, the Court below has found that from 1991 to 2001 the appellant Corporation has not taken any steps for determining the contribution nor it is the case of the appellant Corporation that the respondent acted either deliberately or in defiance of law, or was guilty of contumacious or dishonest conduct, or acted in conscious disregard in evading the payment of contribution.

13 It is submitted by the appellant Corporation that there was an original petition challenging the applicability of the Act by the social club as well as the liability to pay contribution.

14 This conduct of the respondent, in my view, would not amount to deliberate act in violation of statutory provisions, dishonest or contumacious. In the absence of finding by the authorities as to deliberate intention, they ought not to have imposed damages. While exercising quasi judicial power, the authority is expected to give reasons. More so, while it is exercising the discretionary jurisdiction, the authority has to consider the consequence or grievances. The order of the authority does not speak about the conduct of non-payment as attributable to mens rea and actus rea on the part of the employer. When such being the case, the question of levying damages does not arise. This view has been held by the Division Bench of this Hon'ble Court in a batch of writ appeals in W.A. (MD).No.501 of 2001 dated 11.01.2010. Therefore, I do not find any infirmity in the order passed by the Insurance Court in EIOP dated 12.02.2013.

15 In view of the observations, this Civil Miscellaneous Appeal stands dismissed. No costs.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To

The Presiding Officer,
The Employees State Insurance Court
[Principal Labour Court, Chennai],
Chennai-104.

+lcc to Mr. S.P.Srinivasan, Advocate Sr.14717

+lcc to Mr.A.Madhumathi, Advocate Sr.14682

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srg 16/05/2018