IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

103+232 (03 cases)

1. CWP-15746-2021 (O&M)
Date of Decision : 07.08.2024

BABA BANDA SINGH BAHADUR ENGINEERING COLLEGE, FATEHGARH SAHIB

…. PETITIONER

V/S

THE REGIONAL DIRECTOR, REGIONAL OFFICE, ESI CORPORATION, CHANDIGARH & ORS

…. RESPONDENTS

2. CWP-25645-2016 (O&M)

BABA BANDA SINGH BAHADUR POLYTECHNIC COLLEGE, FATEHGARH SAHIB

…. PETITIONER

V/S

THE REGIONAL DIRECTOR, REGIONAL OFFICE, ESI CORPORATION, CHANDIGARH & ORS

…. RESPONDENTS

3. CWP-25691-2016 (O&M)

BABA BANDA SINGH BAHADUR ENGINEERING COLLEGE, FATEHGARH SAHIB

…. PETITIONER

V/S

THE REGIONAL DIRECTOR, REGIONAL OFFICE, ESI CORPORATION, CHANDIGARH & ORS

…. RESPONDENTS

CORAM : HON'BLE MR. JUSTICE JAGMOHAN BANSAL

Present : Mr.Sachin Bhardwaj, Advocate and
Mr. Divya Suri, Advocate
for the petitioner.

Mr. Gaurav Pathak, Advocate
for the respondent-ESIC in CWP-25645-2016.

Mr. Anil Shukla, Advocate
for respondents No.1 and 2 in CWP-25691-2016 and
CWP-15746-2021.

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JAGMOHAN BANSAL, J. (Oral)

1. By this common order, CWP-15746-2021, CWP-25645-2016 and CWP-25691-2016 and are disposed of as issues involved and prayer sought in all the petitions are common. For the sake of convenience and with the consent of parties, the facts are borrowed CWP-15746-2021.

2. The petitioner through instant petition under Articles 226/227 of the Constitution of India is seeking setting aside of order dated 15.07.2021 (Annexure P-18) whereby respondent has imposed damages amounting to Rs.24,92,477/- under Section 85-B of the Employees State Insurance Act, 1948 (for short, 'ESI Act').

3. The petitioner is a Minority, Self-Financed Private College. It is an unaided institution. It was established in 1993 by Shiromani Gurudwara Prabandhak Committee. The State of Punjab on 02.06.2009 issued a notification whereby provisions of ESI Act were made applicable to educational institutions including public, private, aided or partially aided. The notification dated 02.06.2009 is reproduced as below:

DEPARTMENT OF HEALTH AND FAMILY WELFARE

(HEALTH-IV BRANCHE)

The 2nd June 2009

No. 21/15/04-34HB7 (4HB4)/1040. In exercise of the powers conferred by sub-section (5) of Section 1 of the Employees State Insurance Act, 1948 (Act 34 of 1948) and all other powers enabling him in this behalf, the Governor of Punjab in consultation with the Employees State Insurance Corporation and with the approval of the Central Government and after giving six months notice of its intention to do so, - vide Government of Punjab, Department of Health and Family Welfare, Notification No. 21/15/04-3HB7 (4HB4)/3736 dated the 6th June, 2008 as required under the said sub-section, hereby extend all the provisions of the said Act to the classes of establishments and in areas as specified in the schedule given below from the date of publication of this notification in the Official Gazette.

SCHEDULE

Description of Establishment	Areas in which the establishments are situated
Educational Institutions (private, aided or partially aided) run by individuals, trusts, societies or other organizations, wherein 20 or more persons are employed or were employed on any day of the preceding twelve months.	Areas where the Scheme has already been brought into force under section 1 (3) and 1 (5) of the Employees state Insurance Act, 1948.

4. The aforesaid notification came to be challenged by different educational institutions before this Court. A bunch of writ petitions came up for consideration before a Single Judge Bench of this Court which dismissed all the petitions. A number of intra court appeals came to be filed which came up for consideration before a Division Bench of this Court which vide judgment dated 28.01.2014 upheld judgment of Single Judge. Resultantly, educational institutions became liable to comply with provisions of ESI Act. A number of petitions from this Court as well as other High Courts came up before Supreme Court which vide order dated 19.09.2014 stayed the implementation of the Act for the past period. The order dated 19.09.2014 passed by Supreme Court is reproduced as below:

> "*In the meantime, there will be stay of implementation of the Act for the past period. However, learned counsel for the petitioners undertakes to cover the establishment, without prejudice, to its rights in these special leave petitions from 1.1.2014. Such compliance shall be carried out for the past period i.e. from 1.1.2014 within four weeks from today and continue to cover the establishment pending disposal of these special leave petitions.*"

5. All the petitions filed before Supreme Court came to be dismissed vide order dated 15.03.2016.

6. The petitioner initially avoided to comply with provisions of ESI Act, however, after determination of liability by competent authority under Section 45 A of ESI Act deposited contribution as required under the Act. The petitioner did not prefer an appeal against order determining

liability. It further deposited interest as payable under Section 39 of ESI Act.

7. The parties are ad-idem that principal amount as well as substantial amount of interest stands deposited. The dispute is now confined to damages determined under Section 85 B of ESI Act.

8. Mr.Sachin Bhardwaj, Advocate submits that the petitioner during the pendency of petition has already deposited principal as well as interest amount. The delay in depositing the principal amount took place on account of litigation between the parties. It was not sole case of petitioner whereas it was issue of multiple educational institutions across the country. The matter reached up to Supreme Court and ultimately, it was held that educational institutions are liable to make contribution under ESI Act. The delay on the part of petitioner was unintentional. The respondent has no authority to charge damages under Section 85 B of ESI Act.

9. Per contra, counsel for respondents submit that the petitioner was duty bound to deposit principal amount within time. Interest is statutory nature and no authority can waive it. If there is calculation error, the authority would re-calculate amount of interest, however, it cannot be waived. With respect to damages, they submit that there was lapse on the part of the petitioner, thus, it is liable to pay damages.

10. I have heard the arguments of counsel for the parties and perused the record with their able assistance.

11. The conceded position emerging from record is that the State Government issued notification in 2009 whereby ESI Act was made applicable to educational institutions. The petitioner is an educational institution, thus, it came within the ambit of ESI Act from the date of notification. A dispute erupted between the parties on the question of legality of notification whereby ESI Act was made applicable to educational institutions. The matter came up before different High Courts and all the petitions were dismissed. The matter travelled upto Supreme Court. The question of applicability of ESI Act was finally adjudicated against the educational institutions, thus, they are covered by notification of 2009 and liable to contribute in terms of provisions of the ESI Act.

12. The petitioners are not disputing their liability qua principal amount. Interest is statutory in nature, thus, it cannot be waived. However, respondent is duty bound to calculate correct amount of interest.

13. This Court is sanguine of the fact that respondent would calculate correct amount of interest and petitioner would pay differential amount, if any. In case of excess payment already made, the respondent would refund the said amount.

14. The dispute survives qua damages which respondent has imposed under Section 85B of ESI Act. The said Section is reproduced as below :

> "***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 under section 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 under section 45C to section 45-I."*

15. From the perusal of above quoted Section, it is evident that damages can be charged if there is failure on the part of employer to pay due amount of contribution. The Corporation is not bound to levy damages. It is discretion of the Corporation. Meaning thereby Section 85B of ESI Act is not a mandatory provision whereas it is a discretionary provision. The damages are imposed by way of penalty. It is a settled proposition of law that penalty cannot be imposed unless and until there is an intentional lapse on the part of the employer. The authorities are

bound to levy penalty if provision is mandatory. In case, provision is not mandatory, the authorities may or may not levy penalty. Section 85B of ESI Act provides that Corporation may recover by way of penalty such damages not exceeding the amount of arrears as may be specified in the regulations. The language of Section makes it clear that it is not a mandatory provision. The penalty cannot be imposed mechanically. It can be imposed if there is failure on the part of the employer to make contribution. Every delayed payment of contribution cannot be considered as failure to invoke rigour Section 85B of ESI Act.

16. In the case in hand, the notification was issued in 2009 and the matter by way of petitions came up before this Court as well as other High Courts and ultimately travelled upto Supreme Court. The Corporation itself issued notice raising demand in 2015 and demand was raised from the year 2011 though notification had come into force from June' 2009. The petitioner has deposited entire amount of principal as well as interest. The petitioner is claiming that Corporation had never provided medical facilities during the period in question. They had not collected contribution from their employees, thus, entire contribution was paid from their own pocket. They cannot recover contribution from employees at this stage because it would create financial burden on the employees and may develop inimicable relations between employees and employer.

17. Considering the facts and circumstances of the case, this Court is of the considered opinion that the petitioner should not be made liable to pay damages by way of penalty in terms of Section 85B of ESI

Act. The impugned order dated 15.07.2021 imposing damages is hereby set aside.

18. Disposed of in above terms.

19. Pending miscellaneous application, if any, shall also stand disposed of.

(JAGMOHAN BANSAL)
JUDGE

07.08.2024
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Whether speaking/reasoned : Yes/No
Whether Reportable : Yes/No