IN THE HIGH COURT OF KARNATAKA AT BANGALORE

Dated the 26th day of October 2006

: B E F O R E :

THE HON'BLE MR.JUSTICE : V.JAGANNATHAN

MISCELLANEOUS FIRST APPEAL No. 7882 / 2003 (ESI)

BETWEEN :

Employees State Insurance Corporation,
No.10, Binny Fields, Binnypet,
Bangalore – 560 023, represented by its
Deputy Director.

...Appellant

(By Smt. M.P.Geethadevi, Advocate.)

A N D :

The Management,
The Canara Workshops Ltd.,
Post Box No.912, Maroli,
Mangalore-5, represented by its
Executive Director.

...Respondent

(By Sri Somashekar for M/s S.N.Murthy & Assts., Advocate.)

Miscellaneous First Appeal filed under Section 82(2) of the E.S.I. Act against the order dated 12.9.2003 passed in ESI No. 8/2003 on the file of the District & Sessions Judge, OOD, Presiding Officer, Labour Court, Mangalore, allowing the application for setting aside the order dated 19.3.2003.

This appeal coming on for hearing this day, the court delivered the following :

JUDGMENT

The order passed by the appellant-Corporation under Section 85-B of the Employees State Insurance Act, 1948 ('the Act' for short) demanding damages to the tune of Rs.27,124/- for the wage period from 27.1.1985 to 30.11.1986 prompted the respondent herein to move the E.S.I. Court for setting aside the said order mainly on the ground that the respondent had deposited excess amount with the Corporation and, therefore, the Corporation could not have levied the damages as above. The E.S.I. Court accepted the said argument addressed on behalf of the respondent and allowed the application filed by the respondent and it is the said order of the E.S.I. Court that is questioned in this appeal by the Corporation.

2. I have heard the submissions made by the learned counsel for the parties.

3. The learned counsel for the appellant-Corporation submitted that the order of the E.S.I. Court is erroneous inasmuch as the court below had failed to take note of

the fact that the damages levied on the respondent was after adjusting the excess payment made by the respondent and, therefore, the impugned order is liable to be set aside. In this regard, the learned counsel drew my attention to the order passed by the Corporation under Section 85-B of the Act to contend that as the contribution for the period from January 1985 to November 1986 had not been paid in full by the respondent, there arose a case for levying the damages for the belated payment of the contribution and the excess amount that was paid by the respondent was in the year 1989 and, therefore, taking note of the date of excess payment as 19.6.1989, the damages were calculated and, therefore, the E.S.I. Court did not take note of all these factors and hence, the impugned order requires to be interfered with by this court.

4. The learned counsel for the respondent, on the other hand, referring to the correspondence between the parties, submitted that the respondent had made excess payment to the tune of Rs.26,406.95 ps. and had even

requested the Corporation to adjust the excess payment made towards any amount due by the employer and the Corporation did not reply in positive terms to the request made, but kept the matter hanging for almost ten years and it was only in the year 2000 that the Corporation expressed its stand regarding adjustment of the excess payment, subject to the respondent agreeing to the same. Therefore, all these events would go to show that even though the excess payment was lying with the Corporation for over ten years, yet, the Corporation has imposed damages on the respondent, which, under the facts and circumstances of the case, was not justifiable. The E.S.I. Court, therefore, was right in taking all these mitigating circumstances into account and ~~setting~~ set aside the order passed by the appellant-Corporation demanding penalty to the tune of Rs.27,124/-.

5. In support of his submission, the learned counsel for the respondent placed reliance on the decisions in the cases of PRESTOLITE (INDIA) LTD. Vs. REGIONAL DIRECTOR ESIC (1995(2) LLJ 622), REGIONAL

DIRECTOR, ESI. Vs. T.K.BHASKARAN (1997(1) LLJ 851), M/S EMPLOYEES' STATE INSURANCE CORPORATION Vs. M/S KARNATAKA AGRO INDUSTRIES CORPORATION LTD. (2001 LAB.I.C. 1904), and EMPLOYEES STATE INSURANCE CORPORATION Vs. M/S BALAJI FINISHING UNIT (Unreported judgment of this court in M.F.A.No. 94/2000, disposed of on 24.9.2001). The point that the learned counsel wanted to drive home from these decisions is that the Corporation ought to have taken note of the mitigating circumstances while deciding to impose damages and where the employer had expressed his desire on more than one occasion for the adjustment of the excess payment made by him, the Corporation could not have proceeded to levy damages ignoring the fact that sufficient amount of the employer was lying with the Corporation.

6. The learned counsel for the appellant-Corporation, referring to the calculation part of the damages, submitted that, as there was belated payment for the

wage period from 27.1.1985 to 30.11.1986, the Corporation, taking note of the excess amount made and after giving allowance for the same, finally computed the damages at Rs.27,124/- and, therefore, there is no merit in the submission advanced by the respondent's counsel and furthermore, she also referred to the position obtaining in law so far as levying damages is concerned by submitting that the discretion which was vested with the Corporation prior to the amendment of Section 85-B of the Act no longer was available subsequent to the amendment introduced in the year 1992. Therefore, the rulings referred to by the learned counsel for the respondent pertain to the period prior to the amendment and, as such, they are not applicable to the case on hand.

7. In the light of the submissions made as aforesaid and taking note of the rulings cited, although it may appear at the outset that the Corporation did not take note of the excess payment made by the respondent and went on to levy damages, yet, a careful perusal of the

order passed under Section 85-B would clear any doubt that lingers in one's mind as regards this aspect of the matter is concerned. In the order passed under Section 85-B dated 19.3.2003, the Joint Director of the Corporation has stated thus :

> " xxx xxx xxx
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> 1) The employer has delayed the payment of contribution pertaining to the period from 27.1.1995 to 30.11.1986 and accordingly damages were worked out which came to Rs.27,124/- as shown in the calculation sheet enclosed to the show cause notice.
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> 2) The details of excess payment of contribution paid by the employer for the contribution period ending 3/89 and 3/99 has been explained in detail in our letter No.KAR.MEC.53/4086/66/339 dated 29.9.2000. Out of Rs.56,206/- being refund due to the employer, an amount of Rs.26,407/-, which is a part of contribution on omitted wages of Rs.34,421/-, has been adjusted and the balance amount of Rs.29,799/- was proposed to be adjusted against interest or other dues to the Corporation.

3) The balance amount of Rs.8,014/- was paid on 18.2.1997. While calculating the damages, the date of payment for Rs.26,407/- has been taken as 19.6.1989, the date on which the application for refund of contribution was made by the employer as explained in our letter dated 29.9.2000 referred to above.

xxx xxx xxx "

8. It is thus clear from the above observations made in the order passed under Section 85-B of the Act that the appellant-Corporation did take note of the fact of excess payment being made by the respondent and taking the cut off date as 19.6.1989, it had proceeded to work out the damages to be imposed on the respondent for the belated payment covering the wage period from 27.1.1985 to 30.11.1986.

9. Therefore, I do not find much force in the submission made by the learned counsel for the respondent that the Corporation did not take note of the excess payment made by the respondent. On the other

hand, as rightly contended by the learned counsel for the appellant, a case for levying the damages for the belated payment of the contribution for the period from 27.1.1985 to 30.11.1986 had already accrued prior to the excess deposit made by the respondent and, therefore, while calculating the overall damages to which the respondent is liable, the Corporation did give allowance for the excess payment made and it is only after giving deduction for the excess payment that the damages to the tune of Rs.27,124/- was levied.

10. So far as the argument advanced by the learned counsel for the respondent that the damages was levied only in the year 2003 and, therefore, the excess payment which was with the Corporation for all these years right from 1989 could have been adjusted towards the belated payment of contribution is concerned, the fact is not in dispute that the respondent had become liable for damages for the belated payment of contribution for the wage period from 27.1.1985 to 30.11.1986. No doubt, there has been a lapse on the

part of the Corporation in not making the claim for damages at the earliest point of time, nevertheless, the mere fact that there was delay in initiating the recovery proceedings itself cannot be a ground for claiming waiver of the damages. At the most, the respondent can only plead for adjustment of the excess payment made by him from the overall amount of damages that the respondent was liable to pay. In the instant case, such adjustment has been made by the Corporation as could be seen from the order passed under Section 85-B of the Act and, as such, I do not find any substance in the submission made by the learned counsel for the respondent with regard to the levy of damages to the tune of Rs.27,124/-.

11. The E.S.I. Court, therefore, did not appreciate the entire material in proper perspective and more particularly, it did not bestow its attention to the observations which have been culled out above from the order passed under Section 85-B of the Act and, as such, the order impugned is liable to be set aside.

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

At this stage, the learned counsel for the respondent submitted that the levy of damages by the Corporation exceeds 100% of the arrears due by the employer and this is impermissible in law. In view of this submission, it is further made clear that if the amount of Rs.27,124/- levied as damages is found to be in excess of 100% of the arrears due, the respondent, is entitled to adjustment of the same.

Sd/-
Judge

ckc/-