# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
## CIVIL APPELLATE JURISDICTION

## FIRST APPEAL NO.756 OF 2011

1. The Deputy Regional Director,
Employees' State Insurance
Corporation, Panchdeep Bhavan
689/690, Bibevewadi,
Pune – 400 037

2. The Recovery Officer,
Sub-Divisional Office, ESIC
Panchdeep Bhavan
689/690, Bibevewadi,
Pune – 411 037 ...Appellants
(Org. Opponent No.1)

***Versus***

M/s. Aashu Engineering Works
Sr. No.4A, Salunke Vihar Road,
Pune – 411 004 ...Respondent
(Org. Applicant)

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Mr. Mayuresh Nagle for the Appellants.
Mr. Rutwij Bapat for the Respondent.

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**CORAM : JITENDRA JAIN, J.**

**DATE : 17 FEBRUARY 2026**

**JUDGMENT:**

**1.** This appeal was admitted on 23 August 2011 on following substantial question of law :-

> *"Whether, on admitted facts, the learned Judge of the Employees State Insurance Court (ESI Court) could have set aside the order passed under Section 85-B of the Employees' State Insurance Act, 1948 (ESI Act) ?"*

**2.** On 10 January 2006, the appellant passed an order under Section 85-B of the ESI Act, levying damages of Rs.27,849/-. The respondent was given an opportunity of hearing before levying damages. The respondent made submissions for reduction/waiver of damages. The submissions being verbal request made to the recovery officer for payment in installments and that had they known that damages are to be paid they would have paid the entire contribution at one time in lumpsum by taking a loan. The appellant considered the said reply and passed a detailed order levying damages. The said order was challenged before the ESI Court by the respondent.

**3.** On 22 February 2010, the ESI Court quashed the above order to the extent that it levied damages of Rs.27,849/- by observing that the order under Section 85-B has been passed in a mechanical way without application of mind to various factors such as number of defaults, extent of delay, frequency of defaults etc.

**4.** Being aggrieved by the above order of the ESI Court, the appellants have preferred the present appeal which came to be admitted on 23 August 2011.

**5.** I have heard the learned counsel for the appellants and respondent.

**6.** Section 85-B of the ESI Act reads as under :-

> *"**85-B. 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 45-C to section 45-1]."*

7. Section 85-B of the ESI Act provides that, where an employer fails to pay the amount due in respect of any contribution or any other amount payable under the 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. The first proviso to Section 85-B(1) provides for opportunity of hearing to the employer. The second proviso to Section 85-B(1) provides that the Corporation may reduce or waive the damages in relation to an establishment which is a sick industrial company subject to such terms and conditions as may be specified in regulations.

8. The ESI Court in the impugned order in paragraph 9 has observed that there was no *malafide* intention on the part of the respondent in depositing the amount of contribution levied. The ESI Court further observed that the order of damages has been passed mechanically without application of mind and merely because the employer fails to pay the contribution, damages should not be imposed because it is lawful to do so. The ESI Court has further observed that various factors such as number of defaults, extent of delay, frequency of defaults etc. have not been considered.

9. In my view, the observation made by the ESI Court is not correct. In the original order under Section 85-B of the ESI Act, the appellants have given detailed reasons for not accepting the

submissions made by the respondent. The respondent was given a show cause notice by the appellants and on 9 January 2006, they replied to the same by stating that the contribution was paid in installments as per verbal request made to the recovery officer and had they known that they would be liable for damages, they would have paid the entire contribution by taking a loan. Other than these two reasons, no other reason was given by the respondent. Therefore, while passing the order, the appellant ought to have and has considered these very reasons and question of considering other factors does not arise.

**10.** The respondent has not raised in its submissions any of the factors such as number of defaults, extent of delay, frequency of defaults etc., for reducing or waiving the damages. Therefore, it would not be proper for the ESI Court to observe that these factors were not considered by the appellant before levying damages. If the respondent wanted to take the benefit of these factors, they should have pleaded so in their reply to show cause notice. There is nothing on record that appellants gave assurance of non-levy of damages if payment is made in installments.

**11.** In Form C-18 issued by the appellants, it was brought to the notice of the respondent that failure to pay contribution in time would attract provisions of Section 85-B rendering the respondent liable for payment of damages. Therefore, it cannot be said that the respondent was not aware of the consequences of non-payment within time. Therefore, contention of the respondent that they were not aware about consequences of non-payment in time is to be rejected.

**12.** In paragraph 3 of the order under Section 85-B, it is specifically observed that on inspection it was revealed that the

attendance and wage records of the employer did not reflect the actual position of employment and, therefore, the employer was advised to pay Rs.96,705/- towards arrears of contribution. The fact that wage records did not tally with the actual position clearly shows that the employer deliberately misled the Corporation by not reflecting correct employment position in the statutory records. In my view, this is clear case of *malafide* intention.

**13.** Penal provisions have dual effect namely to penalise the offender/defaulter and also to act as deterrent to not only the offender/defaulter but also to others who would think twice before violating the law. The reasons for more violations of law in our country is low deterrent effect or fear of law which is against the principles of arranging affairs and staying in society within the boundaries of law. Therefore, penal provisions in a given case should be enforced with more fervour. In the instant case, had it not been for field visit by the appellants the manipulation between actual entries and those recorded in the records could never have been surfaced and old records were destroyed. The appellants carried out an investigation and found that the wage register for the year 1997 was prepared in the year 2001 by printing on forms which borne a 7 digit phone number which was introduced only in the year 1999.

**14.** Benjamin Franklin said that "laws too gentle are seldom obeyed; too severe, seldom executed". Thus, when a low penalty is prescribed it creates a perception that one can get away with anything and everything. Fear of law can be deterrent for immoral behaviour but true virtue involves obeying in law out of principle rather than just fear of punishment of law. A law is valuable not just because it is law, but because there is right in it.

**15.** The appellants took a liberal view by taking due date of contribution from the date of issue of visit notice and not from due date for payment. As against arrears of Rs.96,705/-, the damages levied is only Rs.27,849/- whereas the provision prescribes for maximum upto the arrears. Therefore, looking at the amount levied as damages as against arrears, it cannot be said that discretion has not been exercised judiciously by the appellants.

**16.** The impugned order under Section 85-B also narrates the reason how delay in payment causes serious prejudice to the aims and objectives for which the Act is enacted.

**17.** In my view and on a reading of the order passed under Section 85-B it cannot be said that the order was mechanical and without application of mind. The order has considered the submissions made by the respondent. It is not the case of the respondent that the submissions made were not considered. Unless the respondent makes its submissions with respect to the factors enumerated by the ESI Court i.e. number of defaults, extent of delay, frequency of defaults etc., it cannot be expected for the appellant to consider the same. The respondent ought to have raised these points in reply to the show cause notice before making the grievance that these factors have not been considered.

**18.** The learned counsel for the respondent has relied on the decision of this Court in the case of ***Regional Director, Employees' State Insurance Corporation, Bombay vs. Kumar Still and General Mills & Anr.***[1] and more particularly paragraphs 13 and 14. The interpretation given by this Court is not disputed. There is no dispute that the power to impose damages is discretionary. It is also not disputed that the

1 2004 (3) Mh.L.J.

section provides for only maximum amount and not the minimum amount of damages. It is also not disputed that recovery of damage is penal and the order passed under Section 85-B is adjudicated. This decision records that if circumstances are beyond the control of the defaulting employer then it shall have to be given due consideration by the authority. In the instant case, no such reasons beyond the control of the respondent has been given. The order has given relief by considering the date of visit as the starting point for calculating the damages. The respondent was heard before passing the order and the submissions made have been considered by the appellants. There is also no dispute that the Court can interfere with the quantum of damages and reduce or delete damages. However, such discretion has to be exercised based on the facts of each case and based on the reasons advanced by the employer. I do not find any compelling reason to exercise this discretion in the facts of the present case for the reasons stated above. Therefore, the decision in the case of ***Kumar Still and General Mills & Anr. (supra)*** cannot come to the rescue of the respondent.

**19.** In view of above, the question of law is answered in favour of the appellants and against the respondent and the impugned order of the ESI Court dated 22 February 2010 to the extent it quashes the order of damages of Rs.27,849/- is reversed and the original order under Section 85-B of the ESI Act is restored.

**20.** The First Appeal is disposed of in above terms.

**[ JITENDRA JAIN, J. ]**