# IN THE HIGH COURT OF JUDICATURE AT PATNA

**Civil Writ Jurisdiction Case No. 3496 of 2015**

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Hindustan Coca-Cola Beverages Pvt. Ltd., a Company incorporated under the Companies act, 1956, having its registered office at 13, Abul Fazal Road, Bengali Market, New Delhi-110 001 and having its plant and office at E-1, Industrial Area, Patliputra, Patna-800 013, through its authorized signatory Zonal Head- Legal, Mr. Ranjan Kumar.

... ... Petitioner/s

Versus

1. The Employees State Insurance Corporation, Regional Office, Bihar, Panchdeep Bhawan, Jawahar Lal Nehru Marg, Patna-800 001, through the Regional Director.
2. The Regional Director, Employees State Insurance Corporation, Regional Office, Bihar, Panchdeep Bhawan, Jawahar Lal Nehru Marg, Patna-800 001.

... ... Respondent/s

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**Appearance:**

For the Petitioner/s : Mr. Kumar Manish, Advocate
Ms. Aishwarya Shankar, Advocate

For the Respondent/s : Mr. Rabindra Kr. Choubey, Advocate

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**CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH**

**CAV JUDGMENT**

**Date: 04-10-2024**

1. The present writ petition has been filed for quashing the order dated 22.05.2014, passed by the Regional Director, Employees State Insurance Corporation, Patna i.e. the respondent no.2 whereby and whereunder, in exercise of the power vested under Section 85-B of the Employees State Insurance Corporation Act, 1948 (hereinafter referred to as 'the Act, 1948'), damages have been levied upon the petitioner to the tune of Rs.1,09,620/-, as also to direct the respondent no.2 to

pass a fresh order of assessment of damages by taking into account the period of delay to have commenced from 02.06.2008 upto 24.08.2009.

2. The brief facts of the case, according to the petitioner, are that the petitioner company is having one of its plant and office, situated at Industrial Area, Patliputra, Patna and is covered under the Act, 1948, as also has been regularly depositing the Employees State Insurance contribution of all its employees in the said plant, nonetheless, all of a sudden in the month of February, 2006, the petitioner company was surprised to receive a letter dated 20.02.2006 from the Deputy Regional Director, Employees State Insurance Corporation, Regional Office, Bihar, Patna by which a demand of Rs.1,01,96,368/- was raised on the head of Employees State Insurance contribution, payable by the petitioner on certain escaped amount of wages for the period 2000 to 2003. The petitioner had contested the same leading to the respondents making fresh inspection of the records of the petitioner company on 05.12.2007, whereafter the respondent-authorities had realized their mistake, corrected the demand made earlier and raised a fresh demand for a sum of Rs.1,27,105/-, vide letter dated 02.06.2008, which was deposited by the petitioner on 24.08.2009, nonetheless, by the

impugned order dated 22.05.2014, damages to the tune of Rs.1,09,620/-, has been saddled upon the petitioner company.

3. The learned counsel for the petitioner has submitted that the correct demand of Employees State Insurance contribution on certain escaped amount of wages for the period 2000 to 2003, amounting to a sum of Rs.1,27,105/-, was made for the first time only on 02.06.2008, which was promptly paid by the petitioner on 24.08.2009, hence there has been a delay of only 14 months and 23 days, thus the respondents ought to have calculated damages only for this period, after granting grace period of 21 days but instead the respondent no. 2 has passed the impugned order dated 22.05.2014, levying damages, by calculating the same by taking into account the delay period, after allowing a grace period of 21 days, to have started from 13.03.2006 up to 24.08.2009, which totals up to 3 years, 5 months and 11 days.

3. It is further submitted that no reason has been assigned in the impugned order dated 22.05.2014 for levying damages on the basis of the upper most slab, prescribed in the table provided under Regulation 31C of the Employees State Insurance (General) Regulations, 1950 (hereinafter referred to as ‘the Regulations, 1950’). Moreover, even the respondent no.2 has

stated in the impugned order that as per the instruction issued by the headquarters, damages should be claimed from the date of issuance of the demand letter, after allowing a grace period of 21 days, hence damages should have been levied, by calculating the same by taking into account the delay period, after allowing a grace period of 21 days, to have started from 23.06.2008 up to 24.08.2009, which totals up to 14 months and 2 days.

4. The learned counsel for the petitioner has next contended that the respondents are empowered to recover damages under Section 85B of the Act, 1948, however, Section 85B of the Act, 1948 uses the word “may recover”, thus even if the regulations confer jurisdiction upon the adjudicating authority to levy penal damages, it cannot be contended that in no case, the mitigating circumstances can be taken into consideration by the adjudicating authority in finally deciding the matter and it is bound to act mechanically in applying the maximum rate of damages, as is provided for under Regulation, 31C of the Regulation, 1950.

5. Per contra, the learned counsel for the respondents has submitted by referring to the counter affidavit, filed in the present case that the respondents have rightly taken into account the delay date to have commenced from the date of first demand

i.e 20.02.2006. It is further submitted that the petitioner had not deposited the Employees State Insurance contribution, payable on certain escaped amount of wages for the period 2000 to 2003, hence demand of Rs.1,01,96,368/- was raised vide letter dated 20.02.2006, however, the same was protested by the petitioner, leading to the respondents making fresh inspection of the records of the petitioner company, whereafter the corrected demand of Rs.1,27,105/- was made vide letter dated 02.06.2008, which was deposited by the petitioner on 24.08.2009 and then damages to the tune of Rs.1,09,620/-, has been levied upon the petitioner by the impugned order dated 22.05.2014, as per Regulation 31C of the Regulations, 1950. The learned counsel for the petitioner has relied on a judgment rendered by the Hon'ble Apex Court in the case of ***Hindustan Steel Limited Vs. The State of Odissa***, reported in ***AIR 1970 SC 253 :: (1969) 2 SCC 627***, paragraph 8, whereof is reproduced herein below:-

> *"8. Under the Act penalty may be imposed for failure to register as a dealer — Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either*

*acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out."*

6. The learned counsel for the respondents has also referred to the instructions, issued by the headquarters contained in Headquarters Letter No. T-11/11/-10/06-Ins. III, dated 27.3.1986, which is reproduced herein below:-

*"Damages on omitted wages noticed and reported by the Social Security Officer or Test Inspecting Officer where the number of employees and employee-wise details of wages paid was not available is to be*

*claimed after allowing a grace period of 21 days from the date of demand letter/C-18 notice from the Regional/Sub-Regional Office."*

7. I have heard the learned Counsel for the parties and perused the materials on record. The dispute in the present case, lies in a very narrow encompass, inasmuch as though the respondents have levied damages to the tune of Rs.1,09,620/- by taking into account the delay period to have commenced from 13.03.2006 upto the date of payment i.e. 24.08.2009 as also by applying the maximum rate of damages i.e. 25%, however, it is the contention of the petitioner that the correct demand was first raised only on 02.06.2008, hence after allowing a grace period of 21 days, the damages are required to be calculated by taking into account the delay period to have commenced from 23.06.2008 up to 24.08.2009. This Court finds that the respondents had issued the first demand, to the tune of Rs.1,01,96,368/-, vide demand notice dated 20.02.2006, however, upon objection, the respondents re-verified the records of the petitioner company and realized that they had wrongly calculated the said demand, hence revised the same to a sum of Rs. 1,27,105/- and served a fresh demand notice dated 02.06.2008.

8. This Court finds that it is a well settled principle of law that no public

authority can be allowed to take advantage of or derive any benefit from its own wrong. It is equally a well settled law that the Maxim "***Nullus commodum capere potest de injuria sua propria***" (No man can take advantage of his own wrong) is one of the salient tenets of equity. At this juncture, this Court would also refer to a judgment rendered by the Hon'ble Apex Court in the case of Prestolite (India) Limited Vs. Regional Director, reported in 1994, Supplementary (3) SCC 690, paragraph no.5 whereof, being relevant, is being reproduced herein below:-

> *"5. It however appears to us that the contention of Mr Goswami in the facts of the case, should not be accepted. Even if the regulations have prescribed general guidelines and the upper limits at which the imposition of damages can be made, it cannot be contended that in no case, the mitigating circumstances can be taken into consideration by the adjudicating authority in finally deciding the matter and it is bound to act mechanically in applying the uppermost limit of the table. In the instant case, it appears to us that the order has been passed without indicating any reason whatsoever as to why grounds for delayed payment were not to be accepted. There is no indication as to why the imposition of damages at the rate specified in the order was required to be made. Simply because the appellant did not appear in person and produce materials to support the*

> *objections, the employee's case could not be discarded in limine. On the contrary, the objection ought to have been considered on merits. We, therefore, allow this appeal and set aside the impugned orders. The Regional Director is directed to dispose of the representation of the appellant by indicating reasons after taking into consideration the grounds for delayed payment. Since the matter is going to be reheard, the appellant is permitted to make personal representation at the hearing of the show-cause proceeding. As the matter is pending for a long time, the representation should be considered and disposed of within three months from the date of the receipt of the order by giving notice of the date of hearing in advance to the appellant. In the facts and circumstances of the case, there shall be no order as to costs. By way of abundant caution it is made clear that we have not considered the case of the appellant on merits."*

9. A bare perusal of the aforesaid judgment rendered by the Hon'ble Apex Court as also considering the law laid down therein would show that levy of penalty for failure to perform a statutory obligation is a matter of discretion of the adjudicating authority to be exercised judiciously and upon consideration of all the relevant circumstances, especially in view of the language of Section 85B of the Act, 1948, which shows that a discretionary jurisdiction has been conferred on the statutory

authority to levy damages, apart from the fact that mitigating circumstances are required to be taken into consideration by the adjudicating authority in finally deciding the matter. However, in the present case, the respondent no.2 has failed to furnish any reason whatsoever, in the impugned order dated 22.05.2014, for not accepting the objections/grounds raised by the petitioner, hence on this score alone the impugned order dated 22.05.2014 is fit to be set aside. Nonetheless, this Court is of the view that a pragmatic view of the matter is required to be taken, hence considering the fact that though the petitioner was admittedly liable to pay a sum of Rs.1,27,105/- on the head of ESI contribution on certain escaped amount of wages for the period 2000 to 2003, however, since the aforesaid circular dated 27.03.1986, issued by the respondents, provides that damages on omitted wages, noticed and reported by the Social Security Officer or Testing Inspecting Officer, is to be claimed after allowing a grace period of 21 days from the date of demand letter/ notice issued by the respondents, the damages, in the present case, are required to be calculated by taking into account the delay period to have commenced from 23.06.2008 (i.e the date arrived at after allowing a grace period of 21 days qua the correct demand letter, which is dated 02.06.2008) up to

24.08.2009, especially in view of the fact that though the respondents had issued the first demand, to the tune of Rs.1,01,96,368/-, vide demand notice dated 20.02.2006, however, upon objection, the respondents re-verified the records of the petitioner company and realized that they had wrongly calculated the said demand, hence revised the same to a sum of Rs. 1,27,105/- and served a fresh demand notice dated 02.06.2008, which is required to be taken to be the only valid demand letter for the purposes of calculation of damages.

10. This Court is of the view that since erroneous demand was raised to the tune of Rs.1 crore an odd by the first demand notice dated 20.02.2006, which was rectified only vide demand notice dated 02.06.2008, the period in between the two demand notices dated 20.02.2006 and 02.06.2008, which had admittedly been consumed/ spent by the respondents in correcting the erroneous demand, raised earlier vide notice dated 20.02.2006, for which neither the petitioner can be blamed nor faulted, is required to be omitted and the notice dated 02.06.2008 has to be considered as the only valid demand letter in existence, thus for the purposes of claiming damages, after allowing a grace period of 21 days, the respondents are required to calculate damages for the period starting from 23.06.2008 up to the date of

payment i.e. 24.08.2009.

11. Having regard to the facts and circumstances of the case and for the forgoing reasons, I deem it fit and proper to quash the order dated 22.05.2014, passed by the respondent no.2 under Section 85B of the Act, 1948 and direct the respondent no.2 to recalculate the amount of damages, in terms of Regulation 31C of the Regulations, 1950 and the aforesaid circular dated 27.03.1986 (annexed as annexure B to the counter affidavit, filed by the respondents) as also in consonance with the observations made by this court in the preceding paragraphs and raise a demand accordingly within a period of four weeks from today, which shall be paid by the petitioner within a period of four weeks, thereafter.

12. The writ petition stands allowed to the aforesaid extent.

**(Mohit Kumar Shah, J)**

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| **AFR/NAFR** | AFR |
| **CAV DATE** | 12.09.2024 |
| **Uploading Date** | 05.10.2024 |
| **Transmission Date** | NA |