

IN THE HIGH COURT OF SINDH, KARACHI
M.A. No. 40 of 2009

Date	Order with Signature of Judge
Appellants	: M/s. Sindh Employees Social Security Institution (SESSI) & others through Mr. Jawed Sarwana, Advocate
Respondent	: Rajwani Apparel (Pvt) Ltd. None for the respondent.
Date of hearing	: 06.5.2014

J U D G M E N T

NAZAR AKBAR, J-- This appeal under section 64 of the Provincial Employees Social Security Ordinance, 1965 (the Ordinance, 1965) filed by the Sindh Employees' Social Security Institution (the Institution) is directed against the order of Social Security Court No.1 at Karachi in Appeal No.03/2003 whereby the decision of the Commissioner Sindh Employees Social Securities Institution (hereinafter Commissioner SESSI) on the respondent's Complaint No. 26/2001 under section 57 of Ordinance, 1965 has been set-aside.

2. The brief facts of this miscellaneous appeal are that the Institution in terms of section 22 of the Ordinance, 1965 repeatedly requested the respondent company to produce account books and other documents relating to the wages of their employees for the purpose of verification of the contribution made by them. The respondent from 1.8.1993 to

10.2.2001 continued to avoid production of the document for inspection to the appellant. However, on 14.6.2001 the respondent allowed the appellants to examine their record for the period from January 1995 to June 2000. The appellants' inspection team detected underpayment of social security contribution to the tune of Rs.25,73,803.06 for the period from July 1995 to June 2000 and on account of non-production of record for the period from January 1993 to June, 1995, the same inspection team also assessed the contribution in terms of section 22 (3) of the Ordinance, 1965 which comes to Rs.12,86,901.53 and thus aggregating the total short payment of Social Security dues amounting to Rs.38,60,704.50 for the period from January 1993 to June 2000 were assessed. Therefore, the appellants' Director on the basis of the inspection report dated 14.6.2001 raised the demand of Rs.38,60,704.59 towards short payment of Social Security contribution including the statutory increase amounting from the respondent.

3. The respondent on 26.6.2001 filed objections to the aforesaid demand raised by the Director of appellant before the Commissioner SESSI in terms of section 57 of the Ordinance, 1965, which was registered as complaint No.26/2001. The learned Commissioner SESSI after hearing the parties by order dated 10.1.2002 directed the Institution to recheck the record of the respondent for verification of the demand raised by them. Pursuant to the order of the Commissioner, the appellants' inspection team on 17.4.2002 conducted the final rechecking of

the record of the respondent in presence of their advocates and in rechecking again the respondent's company failed to produce record for the period from January 1993 to June 1995. However, in rechecking the actual demand of Rs. 38,60,704.59 earlier raised was reduced to Rs. 32,74,864.52. This rechecking report dated 18.4.2002 was placed before the Commissioner SESSI. On notice from the Commissioner, SESSI the respondent on 8.6.2002 filed objections to the said rechecking report. This time the Commissioner SESSI directed the respondent to produce the record and complete list of employees showing their names, designations, wages earned, number of days and the amount of contribution paid by them for joint verification of the short payment of contribution as shown in the rechecking report. The complaint after the order for joint verification was listed for hearing before the Commissioner SESSI for at least six dates during July to November 2002 but the respondent did not produce the record before the Commissioner for joint verification. The Commissioner SESSI finally after hearing the counsel by order dated 1.3.2003 held that the respondent were liable to pay short/underpayment of Social Security contribution amounting to Rs.32,74,864.52 for the period from January 1993 to June 2000 to the Institution.

4. The respondent company aggrieved by the Commissioner's Order dated 1.3.2003 preferred an appeal No.3/2003 before the Social Security Court No.1 at Karachi which was allowed by order on 6.8.2009 and the entire demand

was set-aside. The appellants have preferred this miscellaneous appeal against the said judgment of the Social Security Court No.1 at Karachi.

5. This miscellaneous appeal was filed on 8.9.2009 and the respondent was served on 17.9.2010 when the Manager of the respondent company was present in person along with Mr. Nadeem Iqbal, Advocate who undertook to file power on behalf of the respondent. But he never turned up and again the matter was listed for service on the respondent. On 24.1.2010 the service on the respondent was again held good but nobody has turn up to contest the appeal on behalf of the respondent. Therefore on 2.4.2014 as a matter of last chance this appeal was adjourned to 6.5.2014 for hearing and its disposal. On 6.5.2014 learned counsel for the appellant was heard and none was present on behalf of the respondent. The perusal of the impugned order shows that even before the Social Security Court at the time of hearing of the appeal the respondent were absent though it was their own appeal . Not only that, the perusal of the decision of Commissioner SESSI shows that the respondent has failed to comply with the order of learned commissioner dated 8.6.2002 whereby the respondent was directed to

“verify / reconcile the objections of the complainant from their record as well as from the list of employees which were prepared by the complainant showing therein against each employee number of day worked, wages earned and amount on

which Social Security contribution is payable.”

The respondent never produced these documents before the Commissioner SESSI and after remaining absent on several date of hearing, the respondent on 1.3.2013 submitted their arguments before the Commissioner without submitting any record in support of their objections to the rechecking report.

6. I have also perused the record and heard the learned counsel for the appellants. His main contention was that the learned Social Security Court had erred in law by holding that the question of limitation was involved in the case and the inspection of the record by the respondents beyond the period of two years was illegal. He has further contended that Social Security Court has failed to appreciate the law laid down by this court reported in **1988 P.L.C. 704** (M/s. Shahab Industries Limited Vs. Sind Employees’ Social Security Institution and another). He has emphasised that since the demand of the Social Security contribution for the period from January 1993 to June 2000 was raised after audit of record of the respondent in presence of their staff, it was lawful and justified as the respondent cannot deny and dispute the figures obtained from their ledgers and account books. Learned counsel for the appellant further argued that during the proceedings before the Commissioner under section 57 of the Ordinance, 1965 the record of respondent was rechecked and verified on the order of the learned Commissioner SESSI. In rechecking again the

record for the period from 1993 to 1995 was not produced. However, after thorough re-audit in presence of respondent's lawyer demand of Rs.38,60,704.50 earlier raised by the Institution was revised and a report dated 18.4.2002 was submitted to the Commissioner showing revised claim of short payment of Social Security Contribution only amounting to Rs.32,74,864.52. This rechecking report was supplied by the Commissioner SESSI to the respondent who filed their objections. But they failed to produce any documentary evidence before the Commissioner SESSI in support of their objections to the audit report dated 18.4.2002 and therefore the claim of short payment of Social Security Contribution has gone un-rebutted.

7. In the light of the above submissions of the counsel for the Appellant, I have perused the record and examined the impugned judgment and found that the findings of the learned Social Security Court rejecting the entire claim of the Institution towards short payment of social security contribution was contrary to the facts as well as the law. The observations of the learned Social Security Court that (1) the Commissioner has not accepted the assertion of respondent regarding the wages of the employees of respondent, (2) the Commissioner has passed the judgment on the evidence recorded by Audit Team without considering the objections of Respondent; and (3) the audit report has not pointed out how the employees were taken in their ambit of consideration for claiming social security

contribution, etc. were all factual assertions of the respondents and as such each of these assertions were required to be supported by evidence. The learned Social Security Court failed to appreciate that the Respondents have not led evidence before the Commissioner SESSI during the hearing of their complaint under Section 57 of the Ordinance, 1965 despite the fact that specific directions were given by the Commissioner to produce the record to negate the audit report after rechecking.

8. The other important fact that seems to have been missed by the Social Security Court is that the claim of short payment of social security contribution was twice subjected to audit of the record of the respondents which obviously was made available to the Institution by the Respondent's company. It was not the case of the respondent before the Commissioner SESSI that the demand of short payment was arbitrary and that there was no checking of record of the respondent even for the period from January 1995 to June 2000 when they impugned the demand letter dated 26.6.2001 before the Commissioner SESSI under Section 57 of the Ordinance 1965. Similarly it was not their case even before the Social Security Court that there was no "rechecking" of the record during the proceedings before the Commissioner SESSI. The very fact that after the rechecking of the record of the respondent during the proceedings of complaint No.26/2001 before the Commissioner SESSI, the claim of the Institution was reduced to the figure of Rs.32,74,864.52 from the earlier demand of Rs.38.60,704.00

was sufficient evidence against the Respondent to accept the claim of the Institution since the Respondent even after rechecking of their record have not rebutted the claim of the Institution by showing their own record to the Commissioner or even placing the same before the learned Ist Appellate Court. In the event of no evidence in rebuttal, the learned Appellate Court ought to have maintained the findings of the learned Commissioner SESSI instead of reversing the entire claim of the Institution regarding the short payment of social security contribution as not justified. In this context the reliance placed by the learned counsel for the Appellant on the case reported in **1991 SCMR 2361** (*M/s.Volkervam (Pakistan) Ltd., ..Vs.. Sindh Employees' Social Security Institution*) fully supports their claim that the burden was on the respondent who has raised the objection to the demand to prove that any amount mentioned in the statement was incorrect or not justified. Admittedly the respondent has failed to discharge their burden before the Commissioner SESSI as well as before Social Security Court since the Respondent has not offered to lead evidence in terms of Section 62 of the Ordinance to rebut the claim of the Institution. Nor the learned Social Security Court exercised its powers of summoning the witnesses or calling record of respondent for the purpose of deciding the appeal in terms of Section 62 of the Ordinance, 1965 and yet accepted the appeal of the respondent without any evidence. Admittedly the assessment of short payment of Social Security Contribution was made after the inspection of ledgers and books of accounts

of the respondent. It was for the respondent who was the appellant before the Social Security Court to prove that the said assessment was incorrect. Mere filing of an appeal under section 64 of the Ordinance, 1965 was not enough to dispute a finding of a forum based on the facts from the record of the aggrieved party and therefore, the demand raised by the Institution at least for the period commencing from January 1995 to June 2000 based on the repeated inspection of the record of the respondent was according to law and unexceptionable.

9. However, the claim of the Institution amounting to Rs.12,86,901.53 towards short payment of social security contribution for the period from January 1993 to June 1995 was not supported by any evidence to justify the said assessment. It was the admitted position of the Institution before the Commissioner SESSI and the Social Security Court that this assessment was not based on the audit of the accounts of the respondent for the said period rather it has been assessed on the basis of the record for the succeeding years from 1995 to 2000.

10. The appellants in para 6 of their appeal have mentioned that from 01.8.1993 to 10.2.2001 as many as 12 letters were sent to the respondent to produce their record for verification but the appellants have annexed with the appeal only one letter dated 10.2.2001. The said letter refers to only two earlier letters dated 8.7.2000 and 31.8.2000 on the subject of inspection of

the record of respondent under Section 22 of the Ordinance, 1965. I have examined the record and I was unable to find any of the letters from Sr. 1 to 10 mentioned in para-6 of the appeal to appreciate that the respondents were directed to produce their record for the period from January 1993 to June 1995. The perusal of demand notice dated 26.6.2001 by the Institution after the inspection of the record for the period from July 1995 to June 2000 does not reflect that any office letter except the letter dated 10.2.2001 was also sent to the Respondent. Similarly even in their comments to the complaint before the Commissioner under Section 57 of the Ordinance, 1965, the appellants have not even mentioned any of the letters they claimed to have sent to the respondent in para 6 of their memo of appeal, same was the position of the appellant in their parawise comments before the Social Security Court.

11. The Respondent in terms of Section 22 of the Ordinance, 1965 was not required to maintain and keep the record of their ledgers, cash book and accounts for the year 1993, 1994 & 1995 until June 2001. The Respondent's failure to produce record from January 1993 to June 1995 was not breach of any of their statutory duties under the Ordinance, 1965 to justify the Institution to claim any short payment for the said period without any evidence. The Respondent who was not obliged to maintain / keep the record for more than two years cannot be subjected to hypothetical calculation of any short payment of Social Security contribution on the basis of assessment of

contribution for succeeding years. In case law reported in **1988 PLC 704** (M/s. Shahab Industries Limited Vs. Sind Employees' Social Security Institution and another), this Court after referring to the section 22(3) of the Ordinance, 1965 has been pleased to hold as follows:

It is, therefore, quite clear that the assessment under section 22(3) of the Ordinance by the Institution has to be based on some evidence which may either be produced by the employer or failing which may be available with the institution for assessment of contribution payable by the employer for a particular period. This however, does not mean that such assessment can be made by the Institution arbitrarily without reference to any basis or evidence in the event of failure on the part of employer's to produce the relevant record on demand by the Institution.

A similar view was taken by the Hon'ble Supreme Court in the case of **1991 SCMR 2361** that the assessment for the specific year on the basis of books relating to succeeding years was not justified as the figure of one year could not be made basis for assessment of liability for another year. The relevant observation from the judgment of Supreme Court is as under:-

“There was no basis to create excess demand for the years 1979 to 1981 on the basis of findings for the year 1982 because for each year the number of employees might be different and the amount of wages paid might also vary. Therefore, the figures of one year could not be made basis for assessment of liabilities for another year, specially when there is no grievance that any demand for production of ledgers, cash books and other relevant documents for inspection was made and the appellants had failed to produce or show the same.”

12. Since the appellants have not annexed any of the letters mentioned in para 6 except one dated 10-02-2001 showing that

the specific demand had been made by the appellant to the respondents to produce their record for the period from January 1993 onwards I am not inclined to accept that the appellant were justified in making their calculation of short payment for the period from January 1993 to June 1995 on the basis of succeeding years from July 1995 to June 2000 was in accordance with law.

13. In view of the above discussion and the case law this appeal is partly allowed and I hold that the demand raised by the Institution for the period from January 1993 to June 1995 Rs.12,86,901.53 was not in accordance with law.

14. Consequently the order of learned Social Security Court in appeal No.3/2003 is set aside and the order of the learned Commissioner on the complaint No.26/2001 is modified to the extent that assessment and demand raised by the Institution for period from January 1993 to June 1995 is to be excluded from the liability of respondent to pay Social Security Contribution awarded by the Commissioner SESSI. The parties are left to bear their own cost.

JUDGE

Karachi
Dated:- _____.