IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1611 of 2017
In
Civil Writ Jurisdiction Case No.6882 of 2014

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1. The Union Of India and Ors
2. The Depury Director Authorized Officer, Employees State Insurance Corporation, Regional Office, Bi
3. The Deputy Director Recovery Officer, Employees State Insurance Corporation, Regional Office, Bihar

... ... Appellant/s

Versus

1. M/s Electronic Net Through Its Partner Sanjeev Kumar and Anr Son of Braj Kishore Prasad Sinha Sheikhpura House, Near J.D. Women's College, Sheikhpura, P.S. Shastrinagar, District Patna.
2. The Bihar State Electronic Development Corporation Ltd. BELTRON Bhawan, Bailey Road Shastrinagar Patna

... ... Respondent/s

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Appearance :

For the Appellant/s	:	Mr. S. D. Sanjay, Sr. Advocate Mr. Sheo Narayan Singh, Advocate
For the Respondent/s	:	Mr. Alok Kumar Sinha, Advocate Mr. Girijish Kumar, Advocate Mr. Kumar Aditya Karan, Advocate Mr. Indrajit Bhushan, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE NANI TAGIA

CAV JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 13-09-2024

The short question that arises in the appeal is as to whether determination of amounts due as contributions under the Act, as per Section 45-A of the Employees State Insurance Act, 1948 (hereinafter referred to 'ESI Act'), would be required mandatorily, in circumstances where the Social Security Officer had conducted an inspection in the premises of the assessee/the employer and proceeded on the basis of the admitted records

maintained by the assessee.

2. The learned Single Judge decried the proceedings for recovery taken, without such a determination of contribution under Section 45-A; which admittedly was not preceded by any opportunity of hearing to the appellant.

3. The learned Senior Counsel Sri S. D. Sanjay appearing for the appellants contended that the demand was made specifically on the basis of the details of the personnel supplied to the principal employer; as maintained in the records of the Institution, which was inspected by the Social Security Officer. The demand having been made, as disclosed in the records of the assesee, it is deemed to have been admitted, which requires no separate determination. It is also contended that the appellant-Corporation is statutorily constituted to pursue a welfare measure, and when contributions are demanded from the employer, it inures to the benefit of the employee. The employer cannot be permitted to hold back contributions, which they are statutorily obliged to make over to the appellant-Corporation. Reliance is placed on a Division Bench judgment of the High Court of Judicature at Madras in ***Deputy Director v. The Management of SRTC Tech Solutions*** dated 20.09.2023 (Writ Appeal No. 2171/2023).

4. Sri Alok Kumar Sinha, learned Counsel

appearing for the respondent–employer points out that the petitioner was engaged in the supply of personnel to BELTRON, the second respondent herein. The appellant had paid up the amounts as directed by the BELTRON, in connection with the employment of the personnel supplied by it. There is no question of admitted amounts being recovered under Section 45-A, especially since the notice at Annexure-3 of the writ petition, having alleged non-filing of returns, which clearly makes applicable Section 45-A. In fact, no prejudice is caused to the appellant–Corporation since the appellant–Corporation has merely been directed to issue notice against the writ petitioner; the immediate employer and the principal employer so as to determine the amounts due. Substantial amounts are remaining with the appellant–Corporation. The appeal has been pending before this Court from 2017. Necessarily, the amounts would have to be refunded with interest since any default in payment would result in interest at the rate of 12% per annum under Section 39(5)(a) or at higher rates as may be specified in the Regulations.

5. The learned Single Judge has elaborately considered the issue referring obviously to the provisions of the ESI Act of 1948, which was extracted in the impugned judgment. From the definition of immediate employer and principal

employer, the learned Single Judge has found that the first respondent is the immediate employer while the second respondent is the principal employer. The specific case of the first respondent was that during the period between 01.12.2010 to 31.03.2012, the principal employer; BELTRON, had disbursed an amount of ₹21,00,900 towards ESI contribution for the man-power supplied by the appellant, which was deposited with the Corporation. An inspection was conducted by the Social Security Officer under Section 45-B of the ESI Act. Based on the inspection conducted, Annexure-3 produced in the writ petition was issued. Annexure-3 notices the first respondent and its partner, about the provisions of the ESI ACT, which obliges the principal employer of a factory or establishment to pay both the employer and employee contributions; the latter deducted from the wages of the employee, at the rate specified in the rules and regulations; into the coffers of the Corporation, through a bank duly authorized. A return of contribution also is to be submitted in Form–6 along with challans evidencing the deposit of amounts in the bank as specified under Regulation 26 of the Employees State Insurance (General) Regulations, 1950.

6. The total amount of contributions, is stated to be Rs. 1,18,14,512/- and the deposit of Rs.21,00,900/- is also specified. The balance of Rs.97,13,612 is sought to be recovered.

The notice issued peremptorily directs the contributions outstanding up to date, to be paid within 15 days, failing which recovery was threatened under section 45-C to 45-I of the ESI Act.

7. The appellant–Corporation before the learned Single Judge & before us, took two contentions; one of an alternative effective remedy being available, and the other of no opportunity of hearing having been provided in the Act, as against admitted dues. Insofar as the first contention is concerned, if the recovery is not in accordance with the statute, then it is a clear abuse of process of law, in which circumstance, the discretionary remedy under Article 226 of the Constitution of India can be invoked, as has been held by the Hon'ble Supreme Court in ***Gujarat Ambuja Exports v. State of Uttarakhand & Others; (2016) 3 SCC 601***.

8. The statutory imprimatur which has been deviated from, as alleged by the employer, is a determination of contribution under Section 45-A. The learned Single Judge had relied on a decision of the Hon'ble Supreme Court Court in ***ESI Corporation v. CC Shantakumar; (2007) 1 SCC 584,*** which decision found that the incorporation of Section 45-A in the ESI Act was to get over the practical difficulty involved in invoking Section 75, for recovery of contributions through the Court;

which was sought to be replaced by a proper adjudication to be made by the Corporation, of the actual amount payable through contributions. Hence, by Section 45-A, it became possible for the Corporation to determine the contributions payable to the Corporation without resorting to the ESI Court. The recovery, insofar as a determination made under Section 45-A, could also be made under section 45-B, as an arrears of land revenue. The recovery effected on the strength of Section 45-A and Section 45-B was a more speedy remedy and distinct from the recovery as per Section 75 (4) of the Act, which empowered the ESI Court to make the recovery as is possible by a Civil Court.

9. Section 45-A is a provision introduced for determination of contributions in certain cases. It is specified that where in respect of a factory or establishment, no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of Section 44 or a Social Security Officer is prevented in any manner, by the principal or immediate employer or any person, in exercising, functioning or discharging his duties under Section 45, then the Corporation may on the basis of information available to them, by order determine the amount of contributions payable in respect of the employees or factory or establishment.

10. As has been rightly pointed out by the first

respondent, the contention is of no returns having been filed, in which circumstance, necessarily Section 45A comes into play. However, we also have to notice that the returns filed or particulars, registers or records being submitted, furnished or maintained as per Section 45-A, has to be in accordance with the provisions of Section 44. Even if the argument of the learned Senior Counsel is accepted, that contributions were remitted as per returns and on inspection of the premises of the assessee, the records revealed short fall of contributions paid; then necessarily the particulars in the returns filed relating to persons employed by the employer is not in accordance with Section 44, in which event Section 45-A would be applicable. Section 44 (3) also requires the principal and immediate employer to maintain such registers or records in respect of his factory or establishment, as may be required by regulations made in this behalf. Hence, the mere filing of returns or the maintenance of records would not take the case away from Section 45-A; when an inspection is conducted. The returns should contain all particulars relating to the employees and the records maintained should be in accordance with the regulations; the failure in either of which would lead to Section 45-A being invoked on an inspection.

11. We cannot, but notice that the first proviso to Section 45-A specifically speaks of no order under Section 45-A

being passed by the Corporation unless the principal or immediate employer or person in charge of the factory or establishment has been given a reasonable opportunity of being heard. We remind ourselves that even a specific provision for hearing is not necessary since the principles of natural justice is a mandatory requirement in all matters where prejudicial orders are passed; as in this case, where demands are made with respect to contributions under the ESI Act; as has been held in ***Mohinder Singh Gill & Another v. The Chief Election Commissioner; (1978) 1 SCC 405***. Hence, for violation of principles of natural justice and for reason of no determination of contributions having been made under Section 45-A, there is clear illegality in the Corporation having raised a demand for contributions without following the procedure delineated in the statute.

12. The alternate remedy, hence, is not a bar in invoking the jurisdiction under Article 226. The above reasoning also answers the issue of an admission; merely based on the statement of the Social Security Officer that a specified amount is payable as per the records maintained by the assessee. In fact, determination as required under Section 45-A would require the Social Security Officer acting on behalf of the Corporation to specifically put forth the facts and figures, as revealed from the records inspected by the officer, from which the returns will have

to be shown to differ substantially and considerably. Neither has there been an opportunity given to the petitioner to explain nor has been a determination made in accordance with Section 45-A.

13. The learned Senior Counsel relied on a decision of the Division Bench of the High Court of Judicature at Madras dated 20.09.2023; ***Management of SRTC Tech. Solutions Pvt. Ltd.,****(sic),* Writ Appeal No.2171 of 2023, to argue that when a notice is issued based on the facts disclosed on inspection after a verification of the books and registers maintained by the employer, then, there is no question of determination under Section 45-A. The decision cited speaks of two methods of recovery adopted by the ESI Corporation, one by issuing Form CA-18(adhoc) and the other by Form CA-18(actuals). It has been declared that Section 45-A of the ESI Act deals with the situation of a claim made in Form CA-18 (adhoc) and not with regard to Form CA-18(actuals). Differing from another judgment of the same High Court; which held that determination even in such circumstances is required, the Division Bench found that application of Section 45-A when actuals are demanded, has not been considered.

14. We specifically queried the learned Counsel as to from where, such a procedure is delineated since, we saw no such form appended to the Act or the Rules framed thereunder.

The learned Counsel for both the parties sought time and the matter was adjourned. Today, when the matter came up as part heard, the learned Counsel for the respondent-employer asserted that there is no such form spoken of in the Act or Rules, which was not disputed by the learned Senior Counsel appearing for the appellant-Corporation. The learned Counsel for the respondent also produced a Revenue Manual issued strictly for official use by the Headquarters of the Employees State Insurance Corporation. He specifically referred to Paragraph L.12.5 of Chapter 12 which is extracted hereunder:-

> *L.12.5 Contribution on wages on which contribution is due but not paid: As and when the wages on which contribution has not been paid although legally due are detected by the SSO during inspection or test inspection of records of the employer, he may issue an observation slip indicating the details of such omitted wages noticed by him, with an advice to the employer for immediate compliance. Copy of the spot observation slip duly acknowledged by the employer is to be enclosed to the inspection report. If the amounts of such omitted wages furnished are the actual and absolute amounts on which contributions are payable, a notice in form C-18 (actual) may be issued to the employer under registered post acknowledgement due. If the amount reported by the SSO/TIO includes any other non-wage components together with the wages like material costs freight charges etc, the employer may be given an opportunity for segregating the wages for payment of contributions. For this purpose, a show-cause notice in Form C-18 (adhoc) providing an opportunity for a personal hearing (by fixing a date) and to produce the required documents to establish his stand and also to file a detailed statement of contributions due is to be issued. <u>While determining the contribution on adhoc/actual basis, a well reasoned speaking order u/s 45-A of the Act, preceded by a mandatory requirement of affording the employer a reasonable opportunity of being heard, should be issued as per Hqrs. Instructions P-11/14/57/Misc./03-Rev.II dated 7-3-2006.</u>*

15. The notice in Form CA-18(adhoc) and the Form CA-18 (actual) is provided in the Manual; which cannot be termed as statutory in nature. In fact, the underlined portion; made by us for emphasis in the above extract, clearly indicates that whether the notice is on an adhoc or actual basis, there should be a well reasoned speaking order under Section 45-A of the Act preceded by the mandatory requirement of affording the employer a reasonable opportunity of being heard, as per the Manual itself. The caveat, in the above underlined portion is apposite, insofar as it is the statutory requirement. Admittedly, the statutory requirement has not been complied with in the aforesaid case which, persuaded the learned Single Judge to remand the matter for consideration.

16. We see that the learned Single Judge had directed refund of the amount of Rs.27,51,118/-. We make it clear that the refund would not be pressed, if appropriate proceedings are taken within a month from the date of uploading of this judgment. A notice has to be issued within one month from the date of uploading of this judgment and the respondent Nos. 1 and 2, the principal employer and the immediate employer, shall file detailed objections within a month thereafter. On receipt of the objections; a notice shall be issued for affording an opportunity of hearing within a period of 2 weeks from the

date of filing of objections. The respondent Nos. 1 and 2 shall also co-operate and shall not seek more than one adjournment. An order shall be passed within a period of 3 months from the date of hearing which shall be, in any event, within 1 month from the date of posting of first hearing. If an order is passed within the time stipulated by us, there need not be any refund. However, if no order is passed within the time provided, there shall be a refund of Rs.27,51,118/-; the further recovery from the employer & the interest liability depending upon the final orders passed.

17. The appeal stands dismissed with the above directions/observations.

(K. Vinod Chandran, CJ)

I agree
Nani Tagia, J:

(Nani Tagia, J)

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AFR/NAFR	AFR
CAV DATE	06.09.2024
Uploading Date	13.09.2024
Transmission Date	