

(1998) 04 AHC CK 0019
In the Allahabad High Court
Case No : C.M.P. No. 11553 of 1987

Allahabad Canning Company

APPELLANT

Vs

Regional Director, E.S.I.C. and Others

RESPONDENT

Date of Decision : 15-04-1998

Acts Referred:

Constitution of India, 1950 — Article 226

Employees State Insurance Act, 1948 — Section 45A, 75, 77(1A)

Citation : (1998) 79 FLR 947 : (2000) 3 LLJ 597

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

D.K. Seth, J.—Mr. Tarun Agrawal, learned Advocate has while supporting the writ petition assailed the impugned order contained in Annexure 5 to the writ petition on the ground that the same is not an assessment order u/s 45A of the Employees' State Insurance Act, 1948 (hereinafter referred to as the "Act"). Even if for argument sake the impugned order is said to be an assessment order in that event it was passed in contradiction to the proviso to Section 45A namely without any opportunity of being heard, therefore, the same is invalid. He contends further that no demand could be made in respect of a period of five years prior to the date of the claim as provided in the proviso to Sub-section (1-A) of Section 77 of the Act, therefore, in the present case the claim having been made in the year 1986 for the period between 1971 to 1983 could not be sustained so far as period prior to 1981 which is beyond five years of 1986. His other contention is that respondents did not take into consideration the reply given by him on the basis of show cause notice which is Annexure 1 to the writ petition issued to them on September 18, 1986, therefore, the impugned order suffers from infirmity and perversity. According to him unless a valid assessment u/s 45A is made, no procedure for recovery could be initiated u/s 45B. He contends further that the dues which are claimed have already been paid up by the petitioner which is apparent from the relevant record produced by him

showing deposit of those amounts.

2. Mr. P.K. Asthana holding brief of Mr. B.N. Asthana, learned standing counsel appearing on behalf of Employees' State Insurance Corporation, contends that the claim was made long before in the inquiry report of different dates the particulars of which have been disclosed in para 9 of the counter affidavit and, therefore, the question of limitation of five years as provided in proviso to Sub-section (1-A) of Section 77 cannot be attracted in as much as the claims were made immediately with regard to the respective periods after respective inspections were carried on and the reports were submitted which find mention in para 9 of the counter affidavit. According to him regarding the claim in dispute the petitioner had initiated a proceeding being case No. 23 of 1976 which was decided finally in the first appeal from order against the petitioner whereas he has also filed Civil Misc. Writ Petition No. 5200 of 1974 which was ultimately dismissed on November 10, 1981, therefore, the claim was made before mischief period of five years as mentioned in Sub-section (1-A) of Section 77 of the Act. Therefore, according to him the said contention of Mr. Agrawal cannot be sustained. Mr. Asthana further contends that the assessment order is contained in Annexure 3 which is dated November 13, 1986 which order was passed after considering the petitioner's reply pursuant to the notice dated September 18, 1986 as contained in Annexure 1 to the writ petition. The order dated April 2, 1987 as contained in Annexure 6 was being initiated of recovery proceedings u/s 45B after serving a notice dated March 31, 1987 whereby it was pointed out that despite asking the petitioner to deposit the amount he did not deposit the said amount. It appears from Annexure 5 which is dated April 27, 1987 that the petitioner had been asking for further time for tracing out the documents and records because the matter related to old period and therefore, the recovery should be postponed. This also goes to show that dues were claimed earlier. According to Mr. Asthana there is an order dated November 13, 1986 which is the order of assessment and, therefore, the petitioner cannot contend that there is no order of assessment. The question of hearing according to him was dependent on the facts and circumstances of the case whether the petitioner had submitted his reply as alleged by him but no reply is being shown to have been submitted by the petitioner before November 13, 1986 which is apparent from the reply as contained in Annexure 2 dated October 8, 1987. But Mr. Agrawal submits that it was a typing mistake, it must be October 8, 1986 as it appears that through the said letter the petitioner asked for time and furnishing full details to enable to reply them properly. The other reply which was given by the petitioner is dated April 27, 1987 whereby he had again asked for time. Therefore, there was no reply which is effective for being considered and as such there cannot be any infirmity in the order dated November 13, 1986 for the alleged non-consideration of the reply of the petitioner. Since the petitioner had not put up any effective reply, therefore, there is no question of petitioner being heard. The question of hearing arises only when serious contention is raised. He contends further that in view of Section 75(1)(g) of Act, it was open to the petitioner to raise the dispute

before Employees' Insurance Court within three years when the claim was made. The petitioner has wasted his chance because the demands were made from time to time and the matter was proceeded continuously but the petitioner did not raise such dispute within the time specified and as such it is not open to him to have a relief which he is otherwise precluded from claiming by reason of expressed provision of Section 45A of the Act. The petitioner has not shown anything as to how the order of assessment is not an assessment and that he has submitted his reply and that he has not been afforded any opportunity of being heard.

3. I have heard both Mr. Tarun Agrawal and Mr. Asthana at length. From the perusal of records of proceedings before this Court to which my attention has been drawn, by Mr. Agrawal and Mr. Asthana respectively, it appears that a proposal for assessment was issued through notice contained in Annexure-1 on September 18, 1986 asking the petitioner to show cause why the proposed assessment should not be made. As contended by Mr. Agrawal through letter dated October 8, 1986 which is Annexure 2, the petitioner had asked for time for furnishing full details but by no stretch of imagination it can be said to be an effective reply to the notice contained in Annexure 1. The entire records are available to the petitioner himself as to what was the deduction or contribution the petitioner has made from the employees and furnished to the Employees' State Insurance Corporation and from such record it was open to the petitioner to show that what was the amount paid and what amount was liable to be paid from the records maintained by it instead of asking for further information from the Corporation. The information which was asked for was supposed to be maintained by the petitioner himself. It can even be pointed out from his record that this was the number of employees working and this was the period during which the quantum of employer's contribution and employees' contribution have been effected and the dues have been deposited.

4. Mr. Agrawal further contends that the period was not mentioned in Annexure 1 and that the period related to a very old period and according to Regulation 102-A of the Employees State Insurance (General) Regulations, 1950, it is required to maintain the record for a period of five years and on expiry of this time the same were destroyed and those were no more available to him. But the facts remain that there were successive inspections, demand for depositing the dues and the matter was pending for long time. Therefore it was incumbent on the petitioner to maintain the record until it comes to an end. Then again it is apparent from Annexure 1 that periods have been mentioned. Therefore, it was not proper for the petitioner to destroy the record, after five years, relating to the dispute between the petitioner and the Corporation when the matter is still pending in different fora. Now when by the order dated November 13, 1986 the details were furnished pointing out to him that the assessment was done and which can very well be treated to be an order of assessment even in respect thereof the petitioner did not raise the dispute u/s 75 of the Act instead asked for time by his letter dated April 27, 1987 only after the amount was shown to be recoverable u/

s 45B through the notice dated September 18, 1986.

5. Therefore, in the facts and circumstances of the case it cannot be said that there was no assessment in terms of Section 45A after giving an opportunity to the petitioner. Sufficient opportunity appears to have been given through the letter as contained in Annexure 1 but no reply as observed earlier having been given, there was no scope of giving any opportunity of being heard to the petitioner. Even on April 27, 1987 the petitioner was asking for further time to trace out the records, if this is the stand in that event the question of being heard must be an empty formality since petitioner was asking for further time and for furnishing full details of the dues claimed without making out any effective case on which he could expect an opportunity of being heard. Therefore there is no infirmity in preferring the claims for recovery u/s 45B of the Act made in the notice as contained in Annexure 1 to the writ petition and through the letter dated April 2, 1987 as contained in Annexure 6 to the writ petition.

6. So far as the question of five years" bar is concerned, in the writ petition those specific points with regard to Section 77(1-A) proviso has not been taken though one of the grounds taken in the writ petition was that of limitation. Therefore, it may be assumed that the point was raised in the writ petition. But as it appears from Annexure-2 and Annexure-5, this point was not raised in those letters. Be that as it may even if not raised, it is incumbent on the Court itself to look into as to whether the claim has become stale by reason of Section 77(1-A) first proviso. But the said contention of Mr. Agrawal seems to be misconceived for two reasons. First as contended by Mr. Asthana, it was a continuous affair for which claim was raised. The notice of assessment was given after the claim was not complied with by the petitioner, for which successive inspections were carried out and successive inspection reports were submitted for different periods right from 1971 in respect whereof limitation was continuing till 1981 through Writ Petition No. 5200 of 1974 as well as case No. 23 of 1976 and First Appeal From Order which facts are not in dispute. The claim being continuously lodged and raised, it cannot be said that it was raised after five years. There is no provision that no such assessment can be made after expiry of five years even though claim is raised. The second reason is that Section 77 deals with the procedure of making application for raising dispute u/s 75, Section 75 itself does not provide for the procedure or limitation. It is Section 77 which provides the procedure and limitation. The dispute has to be raised within a period of three years from the date on which the cause of action arose. Explanation to Sub-section 1-A has been inserted explaining cause of action which in Sub-clause (b) points out that the cause of action in respect of any claim by the Corporation for recovering contribution shall be deemed to have arisen on the date on which such claim is made by the Corporation for the first time. In the present case the claim was made even long before the assessment order contained in annexure-4 dated November 13, 1986. Namely claims were made regularly on the basis of different inspection reports and records available with the Corporation from time to time asking the petitioner to deposit the

amount which he had failed to do so and had been litigating since 1974 in respect of claims till 1974, and even thereafter several successive inspections were carried out particulars whereof are disclosed in paragraph 9 of the counter-affidavit. While dealing with the said paragraph, the petitioner in paragraph 11 of the rejoinder affidavit has said that the notice issued after various letters of demand and on the basis of inspection reports as mentioned were wholly erroneous. But he has not denied that no inspection was carried on or that no inspection report was furnished to him. On the other hand, it is pointed out that inspection reports were recorded in the inspection register kept with the petitioner where nothing has been indicated. Mr. Agrawal had produced the inspection register. He has led me through various pages of the said register. It appears from paragraphs 9 and 11, there were inspections on December 27, 1976, April 13, 1978, July 13, 1978, September 15, 1979, September 23, 1980, February 6, 1982, December 6, 1983, September 27, 1984 and July 12, 1985. In the inspection register on December 27, 1976, it was recorded "Visited and checked records of the period February, 1975 till November, 1976." On July 13, 1978, it was recorded that "Inspection note dated November 24, 1977 was recorded on the stamp book" but the same is not being produced by Mr. Agrawal neither it has been explained as to how the said record speaks about the report. Whereas the inspection register records on July 13, 1978 to the extent that "visited the factory on July 10 and 13, 1978 and inspected the records from November 1, 1977 till May 31, 1978 without ledgers. Detailed inspection report will follow in due course through our Regional Office at Kanpur." Similarly, on November 24, 1977, it was recorded that "visited the factory on November 23 and 24, 1977 and inspected the records for the period December, 1976 till October 30, 1977 with ledgers upto June 30, 1977. Detailed report will follow from Regional Office at Kanpur in due course." Similar note is appended on June 15, 1978 that the records were inspected without ledgers and report will follow in due course. On September 25, 1980 it was noted that ledgers were in the Head Office and therefore could not be examined and report will follow in due course. On October 4, 1980 ledgers were inspected. Then on February 6, 1982 it was noted that report will follow in due course. Similar note is appearing on December 6, 1983. Therefore the statement made in paragraph 9 of the counter affidavit has not been denied in paragraph 11 of the rejoinder affidavit. Thus, it cannot be said that these claims were lodged or raised by the Corporation. Nowhere it has been alleged that the Corporation had never raised the claim before issuing the letter contained in annexure-1 either in the writ petition or in the rejoinder affidavit.

7. Now in view of Section 77(1-A) limitation was for raising the claim for the purpose of calculation of limitation of initiation of dispute u/s 75 of the Act. This five years" bar in raising the claim does not prevent the assessment u/s 45A even after expiry of five years of the period to which the claim relates when the claim has already been raised earlier.

8. Thus, the said proviso to Sub-section 1-A of Section 77 cannot stand in the

way of determining the assessment as has been sought to be done through Annexure-4 dated November 13, 1978.

9. So far as the merits of the case are concerned, though Mr. Agrawal contends that the relevant documents have been produced to show that all dues have been paid but no particulars are being disclosed as to what were the dues. It was open to the petitioner to disclose the same as soon the notice contained in annexure-1 was issued. If the petitioner is able to produce or annexe the documents in the writ petition in support of his contention or defence, in that event it could very well contend in reply to annexure-1 which from the record does not appear to have been done. Then again, it is not a case that entire dues are sought to be recovered. It is a case that some amount out of the dues were not deposited, therefore, the said amount was claimed which was ultimately assessed through annexure-4 dated November 13, 1986. Therefore, even on merits no case has been made out.

10. Since the cause of action deemed to have arisen on the claim being raised by the Corporation and admittedly three years had already elapsed in as much as the writ petition was moved on 1987 whereas the claim related to 1983, it is no more open to the petitioner to resort to Section 75. Therefore, the alternative remedy as contended by Mr. Asthana is no more available to the petitioner.

11. In that view of the matter, this writ petition though appears to be maintainable even in this situation but on merits of the case, as I have discussed above, the writ petition cannot succeed and accordingly fails. The writ petition is therefore, dismissed.

However, no order as to costs.