

(2011) 01 MAD CK 0364

In the Madras High Court

Case No : Writ Petition (MD) No. 9267 of 2007 and M.P. (MD) No. 1 of 2007

B. Mohanachandran Nair

APPELLANT

Vs

The Assistant Regional Director, Employees State Insurance Corporation, Sub-Regional Office and The Recovery Officer, Employees State Insurance Corporation, Sub-Regional Office

RESPONDENT

Date of Decision : 22-01-2011

Acts Referred:

Employees State Insurance Act, 1948 — Section 45A, 45A(1), 45B, 68(2), 75

Citation : (2011) 01 MAD CK 0364

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : M. Azeem, for the Appellant; R. Ravindran, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—The Petitioner is a Proprietor of Prashanthi Cashew Company at Kanyakumari District. He has come forward to challenge an order dated 07.06.2007 issued by the second Respondent, Recovery Officer, Employees State Insurance Corporation (ESI) issued in terms of Section 93A of the ESI Act.

2. The said recovery notice informed the Petitioner that one M/s. Paravathi Cashew Company was at default from paying contribution for the period from 4/01 to 8/02 for a total amount of Rs. 4,33,152/-. It was also stated that since the said establishment has been transferred and the Petitioner has taken over the unit, they are liable to pay the said amount. Challenging the said notice issued by the Recovery Officer, the writ Petition came to be filed.

3. Notice of motion was ordered in the writ Petition was admitted on 15.11.2007. Pending the writ Petition, this Court did not grant any interim order. On notice from this Court, the Respondents have filed a counter affidavit dated 19.09.2008.

4. The claim of the Petitioner was that he is not a transferee of the factory from the previous employer one G. Sundaresan. The Petitioner purchased the land and

building from M/s. Parvathy Prasathand Viswanatha Prasath, who were the owners of the property. The closed building was taken over by the Petitioner and he started a new cashew processing factory. Therefore, there was no liability on the part of the Petitioner to pay any ESI dues. The Petitioner's case will not come u/s 93A of the ESI Act. The second Respondent without affording any opportunity to the Petitioner passed the impugned order.

5. However, in paragraph 7 of the affidavit filed in support of the writ Petition, it was stated that the Petitioner was able to collect only the Provident Fund records by M/s. Parvathi Cashew for the period October 2001 to August 2002 and based on the said records, it was found due of Rs. 4,443/- was pending and the same was paid by the Petitioner. The said payment was made only for the purpose of smooth functioning of the factory, but that does not mean the Petitioner has accepted any liability as if he is a transferee. It was also admitted that a show cause notice was issued and a personal hearing was fixed on 03.04.2006. The Petitioner was represented by his clerk S. Krishnankutty. It was contended that the order u/s 45-A dated 12.05.2006 was erroneously passed.

6. In the counter affidavit filed by the Respondents, in paragraph 10 it was averred as follows:

10. For purpose of determining the contribution due for the period from 01.10.2001 to 31.08.2002, the Corporation had to issue the C.18 show cause notice dated 16.08.2005 to M/s. Parvathy Cashew Co. In connection therewith, the Corporation had sent letters for enquiry. The Petitioner's representative appeared for enquiry at Madurai and filed some letters. The Petitioner appears to have arranged to deposit a sum of Rs. 4,443.00 under challan dated 08.11.2005. Later, the Corporation formed a new Sub Regional Office at Tirunelveli under whose jurisdiction Kanyakumari District came. The Sub Regional Office, E.S.I.C., Tirunelveli issued the fresh C.18 show cause notice dated 16.03.2006 to M/s. Parvathy Cashew Co. for which, there was no response. In these circumstances, the Corporation passed the Order dated 12.05.2006 determining the Contribution due for the period from 10/2001 to 8/2002 at Rs. 2,32,608.00 as submitted above. The said order seems to have been received by the Petitioner. Since the Contribution amounts duly determined as stated above for 4/2001 to 8/2002 with interest due thereon were not paid either by M/s. Parvathy Cashew Co or by the Petitioner, the Corporation had to take Recovery proceedings to realise the aforesaid amounts as arrears of land Revenue, as provided by the Act.

7. In the light of the above stand, it was contended by the Respondents that Section 93A squarely applies to the case on hand. It was also stated that if the Petitioner was aggrieved by the said order, the remedy open to him is to move the appropriate ESI court and dispute the liability u/s 75 of the ESI Act.

8. The learned Counsel for the Petitioner relied upon the judgment of the Patna High Court in Patna Offset Press Vs. Employees' State Insurance Corporation and Others, for the purpose of contending that in the absence of affording an

opportunity, the Respondent cannot presume there was a transfer of business u/s 93A.

9. But in the present case even as per the admission of the Petitioner they have paid the liability for the period from 10/2001 to 8/2002 for a sum of Rs. 4,443/-. Though it is now claimed it was without prejudice to their legal right in as much as an order u/s 45A has been passed, it can be executed by the Respondent ESI as a final order until it is challenged in a proceeding u/s 75 of the ESI Act.

10. The Supreme Court in *E.S.I.C. Vs. C.C. Santhakumar*, has held that in respect of a notice u/s 45-A of the ESI Act, which is not challenged u/s 75 of the Act, the authorities can deem it a final order and proceed to recover the amount. It is necessary to refer to the following passages found in paragraphs 17, 25, 28, 30 and 31 of the said judgment, which are as follows:

17. Prior to the incorporation of Section 45-A under Act 44 of 1966, the only resort available to the Corporation was Section 75, for recovery of contribution through the court. Since this procedure was found to be impracticable and delayed process involved, a special provision was contemplated where under adjudication is to be made by the Corporation itself. By reason of incorporation of Section 45-A with effect from 17-6-1967, it became possible for the Corporation to have determination of the question, binding on the principal employer, without resorting to the ESI Court. In regard to the order u/s 45-A, the same is enforced, as envisaged u/s 45-B, which was similarly brought into the Act, by which the contribution may be recovered as arrears of land revenue. With regard to the decision reached by the ESI Court in the application u/s 75, the said decision is enforced, as envisaged in Sub-section (4) of Section 75 as if it is a civil court. The mode of recovery u/s 45-B of the Corporation and the mode of recovery as per Section 75(4) by the ESI Court as the civil court are entirely different as both Sections 45 and 75 operate in different spheres."

25. Section 45-A of the Act contemplates a summary method to determine contribution in case of deliberate default on the part of the employer. By Amendment Act 29 of 1989, Sections 45-C to 45-I were inserted in the Principal Act, for the purpose of effecting recovery of arrears by attachment and sale of movable and immovable properties or establishment of the principal or immediate employer, without having recourse to law or the ESI Court. Therefore, it cannot be said that a proceeding for recovery as arrears of land revenue by issuing a certificate could be equated to either a suit, appeal or application in the court. u/s 68(2) and Sections 45-C to 45-I, after determination of contribution, recovery can be made straight away. If the employer disputes the correctness of the order u/s 45-A, he could challenge the same u/s 75 of the Act before the ESI Court.

28. What Section 75(2) empowers is not only the recovery of the amounts due to the Corporation from the employer by recourse to the ESI Court, but also the settlement of the dispute of a claim by the corporation against the employer.

While this is so, there is no impediment for the Corporation also to apply to the ESI Court to determine a dispute against an employer where it is satisfied that such a dispute exists. If there is no dispute in the determination either u/s 45-A(1) or u/s 68, the Corporation can straightaway go for recovery of the arrears.

30. The legislature has provided for a special remedy to deal with special cases. The determination of the claim is left to the Corporation, which is based on the information available to it. It shows whether information is sufficient or not or the Corporation is able to get information from the employer or not, on the available records, the Corporation could determine the arrears. So, the non-availability of the records after five years, as per the Regulations, would not debar the Corporation to determine the amount of arrears. Therefore, if the provisions of Section 45-A are read with Section 45-B of the Act, then, the determination made by the Corporation is concerned. It may not be final so far as the employer is concerned, if he chooses to challenge it by filing an application u/s 75 of the Act. If the employer fails to challenge the said determination u/s 75 of the Act before the Court, then the determination u/s 45-A becomes final against the employer as well. As such, there is no hurdle for recovery of the amount determined u/s 45-B of the Act, by invoking the mode of recovery, as contemplated in Sections 45-C to 45-I.

31. In *ESI Corpn. v. F. Fibre Bangalore (P) Ltd.* it was observed that it is not necessary for the Corporation to seek a solution of the dispute before the ESI Court, while the order was passed u/s 45-A. Such a claim is recoverable as arrears of land revenue. If the employer disputes the claim, it is for him to move the ESI Court for relief. In other cases, other than cases where determination of the amount of contributions u/s 45-A is made by the Corporation, if the claim is disputed by the employer, then, it may seek an adjudication of the dispute before the ESI Court, before enforcing recovery.

11. In the light of the above, the writ Petition stands dismissed. No costs. It is open to the Petitioner to move the appropriate ESI Court and contend that when they took over the premises, there was no actual transfer in terms of Section 93A of the Act. Connected miscellaneous Petition is also dismissed.