

(2000) 07 DEL CK 0093
In the Delhi High Court
Case No : C.W. No. 2545 of 1998

Desein Privated Limited

APPELLANT

Vs

Deputy Director (Big Cell) and Others

RESPONDENT

Date of Decision : 21-07-2000

Acts Referred:

Constitution of India, 1950 — Article 226
Employees State Insurance Act, 1948 — Section 45A

Citation : (2000) 4 AD 888

Hon'ble Judges : Cyriac Joseph, J

Bench : Single Bench

Advocate : Mr. Samir Prakash, for the Appellant; Mr. N.S. Bawja and r. Anil Grover, for the Respondent

Judgement

Cyriac Joseph, J.—According to the averments in the petition the petitioner is a private limited company engaged in rendering consultancy and ancillary services to its clients in the power sector. Even before the provisions of the Employees' State Insurance Act, 1948 were extended to the establishment of the petitioner, its employees had been given medical, maternity and other benefits which were more generous than those provided under the E.S.I. Act. After the provisions of the E.S.I. Act were held to be applicable to the petitioner, it had no option but to start making contributions in accordance with provisions of the E.S.I. Act. Respondent No. 1 - the Deputy Director, Regional Office, ESI Corporation passed an ex parte assessment order dated 8.8.1997 against the petitioner u/s 45A of the ESI Act. No notice of the said proceedings had been received by the petitioner. Hence, the petitioner submitted an application (Annexure P1 dated 9.4.1998) to respondent No. 1 praying to set aside the ex parte order dated 8.8.97. However, no action was taken by the respondent on the said application for setting aside the ex parte order. The petitioner also submitted an application (Annexure P2 dated 9.4.1998) to respondent No.1 requesting him to withdraw the recovery certificate issued on the basis of the ex parte assessment order dated 8.8.1997 since the petitioner had filed an application for setting aside the

said ex parte order. The petitioner also submitted Annexure P3 application dated 9.4.98 to respondent No. 5 - Lt. Governor, NCT of Delhi - praying for retrospective exemption under the provisions of the E.S.I. Act for the period from 2.10.1988 to 31.7.1996. No order was passed on Annexures P2 and P3 application also. Copies of Annexures P1, P2 and P3 applications were forwarded by the petitioner to respondent No. 3 - Recovery Officer, Regional Office, ESI Corporation - requesting him not to take any coercive action on the basis of the ex parte assessment order till the said applications were disposed of. The petitioner also submitted on 23.4.1998 praying for exemption under the provisions of the ESI Act. However, no action was taken on the said application by the Labour Commissioner. The petitioner again sent letter dated 15.5.1998 to respondent No. 1 seeking action on Annexures P1 and P2 applications. However, respondent No.1 did not take any action or respond to the said letter. In the meanwhile, respondent No. 3 - Recovery Officer - issued two notices dated 6.4.1998 and 15.4.1998 requiring the General Manager (HRD) of the petitioner to show cause as to why he should not be committed to the civil prison in execution of the recovery certificate forwarded to him u/s 45A(2) of the ESI Act. In the above circumstances the petitioner filed this writ petition praying for direction to the respondents to dispose of the petitioner's applications as per law and for restraining respondents 3 and 4 from resorting to coercive process against the petitioner to enforce recovery of the dues on the basis of the ex parte assessment order till the expiry of a reasonable period after the disposal of the petitioner's applications in accordance with law.

2. While issuing notice to the respondents to show cause as to why the writ petition should not be admitted, this Court stayed the recovery proceedings against the petitioner. A counter affidavit has been filed on behalf of respondents No. 1, 3 and 4 opposing the prayers in the writ petition.

3. According to the averments in the counter affidavit filed on behalf of respondents 1, 3 and 4 before passing the ex parte assessment order dated 8.8.1997 u/s 45A of the ESI Act a show cause notice dated 28.7.97 had been issued to the petitioner by respondent No. 4 calling upon the petitioner to show cause as to why ad hoc assessment be not made for its non compliance with the provisions of Sections 39 and 40 of the ESI Act and directing the petitioner to pay the contribution for the period from 2.10.1988 till 31.7.1996. The petitioner was also given an opportunity to represent through its authorised representative for a personal hearing on 8.8.97. The said notice was duly served on the petitioner through registered A.D. post. However, no one appeared for the petitioner on 8.8.1997 and hence the adhoc assessment was made final by the Deputy Regional Director, ESI Corporation. The order passed on 11.9.1997 u/s 45A of the ESI Act calling upon the petitioner to pay a sum of Rs. 36,87,915.40 was sent to the petitioner by Registered post and it was duly received by the petitioner on 19.9.1997 in his office. However, the petitioner did not deposit the amount in terms of the order passed u/s 45A of the ESI Act and Therefore on 17.2.1998 the ESI Corporation sent an application to the Recovery Officer in

terms of Section 45-C to 45-I of the ESI Act. But the petitioner failed to comply with the order passed u/s 45C of the ESI Act.

4. It is also stated in the counter affidavit that on 29.1.1998 the petitioner falsely represented that as its employees were working at sites and as medical facilities were not available at sites, the petitioner was not liable to pay any contribution and that if the petitioner did not hear from the ESI Corporation, the petitioner shall cease to be covered by the provisions of the ESI. In response to the said letter dated 29.1.1998 the respondent Corporation wrote a letter dated 20.3.1998 saying that the misconception of the petitioner was not sustainable in the eyes of law and that the petitioner was liable to pay contribution. It is also pointed out in the counter affidavit that the petitioner has concealed the fact the petitioner had filed a case before the Employees Insurance Court and had also filed an exemption application after the recovery notice was sent to the petitioner. The case before the EI Court was dismissed and a further application exemption was also rejected by the ESI Corporation. The respondents have also pointed out that exemption can be granted in terms of Section 87 of the ESI Act only when the benefits being provided by the employer are similar or higher to those provided by the ESI Corporation. It is also pointed out that exemption can be granted only for one year and that application for exemption has to be submitted in respect of each year. According to the respondents, the petitioner's application for retrospective exemption was not maintainable in the eyes of law.

5. In the counter affidavit filed on behalf of respondents No. 1,3 and 4 the respondents have admitted receipt of the applications stated to have been submitted by the petitioner. But the respondents have denied that no action was taken on those applications. According to the respondents the petitioner's applications were duly considered and disposed of by passing appropriate orders. But the respondents have not stated that the disposal of the petitioner's applications and the orders passed thereon were communicated to the petitioner at any time. The respondents have not placed on record any of the said orders stated to have been passed on the petitioner's applications. The respondents did not offer to place the relevant files before the Court to satisfy that the petitioner's applications had been disposed of.

6. When the case came up for hearing, learned counsel for the petitioner confined his submissions to the question of validity of the recovery proceedings pursuant to the ex parte assessment order passed u/s 45A of the ESI Act while the petitioner's application for setting aside the ex parte assessment order was still pending. According to the petitioner, no notice of the proceedings relating to the said assessment had been served on the petitioner. According to the respondents a show cause notice dated 28.7.1997 (Annexure D to the counter affidavit) was served on the petitioner through registered AD post. A photocopy of the acknowledgement card has been placed on record. Learned counsel for the petitioner contended that the said notice was not received by the addressee or by any competent employee of the petitioner. He also contended that even the

signature on the acknowledgement card could not be identified. In paragraph 3 of Annexure P1 application for setting aside the ex parte assessment order, the petitioner had stated that the signature on the acknowledgement card was not that of any principal officer of the company and that the employees in the petitioner's office were not able to identify the signature or the person who put the said signature. It was also stated that the said notice was not passed on to any authorised or competent person by the person who acknowledged receipt of the notice. However, I do not propose to consider or decide whether the said notice was duly served on the petitioner, because, the said question was raised by the petitioner before respondent No. 1 through Annexure P-1 application and respondent No. 1 is expected to consider that question. According to the respondents appropriate orders were passed on the petitioner's applications including Annexure P1. But it is not stated by the respondents that the said orders were communicated to the petitioner. The petitioner has asserted that he has not received any order passed by the respondents on his applications including Annexure P1. If the applications were actually disposed of by passing appropriate orders, I fail to understand why the respondents could not communicate the orders to the petitioner. What is the use if the order is passed on the file and is not communicated to the party concerned ? Even after the filing of this writ petition, the respondents did not choose to produce the orders stated to have been passed by them.

7. Section 45-A of the E.S.I. Act reads thus :

45-A. Determination of contributions in certain cases. (1) 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 any Inspector or other official of the Corporation referred to in sub-section (2) of Section 45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties u/s 45, the Corporation may, on the basis of information available to it, by order determine the amount of contributions payable in respect of the employees of that factory or establishment:

Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard.

(2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation u/s 75 or for recovery of the amount determined by such order as an arrear of land revenue u/s 45-A or the recovery u/s 45-C to Section 45-I

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An order under sub-section (1) of Section 45-A cannot be passed unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard. Hence, if

the aggrieved party shows that he did not receive any notice issued under the Proviso to sub-section (1) of Section 45-A, the authority who passed the order under sub-section (1) is bound to recall or cancel the order already passed and to pass a fresh order after giving the party a reasonable opportunity of being heard. The refusal to recall the order and to pass a fresh order in such circumstances will amount to denial of valuable right conferred by the Statute and violation of the principles of natural justice. But according to the learned counsel for the E.S.I. Corporation, the E.S.I. Act does not contain any provision which confers on an employer the right to make an application for setting aside the assessment/determination under sub-section (1) of Section 45-A and hence the respondents had no obligation to consider such an application. I am not inclined to accept this contention. If the said contention is accepted the proviso to sub-section (1) of Section 45-A will become redundant and useless. The power under sub-section (1) of 45-A of the ESI Act is coupled with a duty to consider and dispose of an application for setting aside the assessment/determination on the ground that the employer did not receive the notice issued under the proviso to sub-section (1) and hence he could not respond to the notice. By virtue of the nature of the right to be heard under the Proviso to sub-section (1) of Section 45-A and in view of the scheme of the E.S.I. Act, the right to make such an application is only ancillary and incidental to the right conferred under the Proviso to sub-Section (1) of Section 45-A. No special provision is required to confer such a right. Hence, Annexure P-1 application was liable to be considered by the respondents. It is not sufficient that the statutory authority passes an order on his file disposing of an application like Annexure P-1. He should communicate his decision or order to the employer concerned. Only if the decision on his application for setting aside the ex parte assessment/determination is known, the employer can take further action either to challenge the assessment or to pay the contribution. Therefore, the respondent ESI Corporation was bound to communicate to the petitioner the order stated to have been passed on the petitioner's application for setting aside the ex parte assessment. Since there is no averment in the counter affidavit that the order stated to have been passed on Annexure P1 application of the petitioner was communicated to the petitioner, the respondent Corporation is liable to be directed by this Court to communicate to the petitioner the order, if any, passed by the statutory authority on the petitioner's application for setting aside the ex parte assessment/determination.

8. Learned counsel for the ESI Corporation contended that if the employer was aggrieved by an assessment or determination under sub-section (1) of Section 45-A of the ESI Act, he had a statutory remedy of approaching the EI Court u/s 75 of the ESI Act and Therefore an application for setting aside the ex parte order u/s 45-A was not maintainable. I am not inclined to accept this contention also. Notwithstanding any remedy available u/s 75 of the E.S.I. Act, a party aggrieved by an ex parte assessment/determination u/s 45-A of the ESI Act, has every right to approach the authority which made such assessment/

determination to show that he could not respond to the notice issued under the Proviso to sub-section (1) of Section 45-A as it was not received by him and also to request to recall the ex parte order and to pass fresh orders after giving to the said party a further opportunity of being heard. There is nothing in the provisions of the ESI Act to deny such a right to a party who is aggrieved by the assessment/determination under sub-section (1) of Section 45-A of the ESI Act. There is also no provision which prohibits the statutory authority from entertaining any such application. Hence, Section 75 of the ESI Act does not stand in the way of entertaining an application for setting aside the ex parte assessment order u/s 45A of the ESI Act.

9. The next question is whether the recovery proceedings pursuant to an assessment/determination passed under sub-section (1) of Section 45-A of the ESI Act should be kept in abeyance on account of an application for recalling or setting aside the order passed under sub-section (1) of Section 45-A. It is not mandatory to do so. It is left to the discretion of the authority concerned. However, it is only just and reasonable that the recovery proceedings are kept in abeyance, if the application for setting aside the assessment order is filed immediately after coming to know of the assessment order and the application appears to be bona fide. In this case the assessment order under sub-section (1) of Section 45A was passed on 11.9.1997. It was sent to the petitioner by registered AD post and it was received in the office of the petitioner on 19.9.1997. But according to the petitioner it was not received by the petitioner or any competent employee of the petitioner. The petitioner filed the application dated 9.4.1988 for setting aside the assessment order when recovery proceedings were initiated against the petitioner on the basis of the assessment order. Though there was delay on the part of the petitioner in filing the application for setting aside the assessment order passed u/s 45-A the said delay was allegedly due to the non receipt of the assessment order by the petitioner. In the facts and circumstances of this case it is not necessary to decide whether the assessment order was actually served on the petitioner on 19.9.97 as alleged in the counter affidavit. Since the recovery proceedings stood stayed during the pendency of this writ petition, no serious prejudice or injustice will be caused if the recovery proceeding are kept in abeyance till the respondents disposed of Annexure P1 application of the petitioner.

10. Admittedly no order disposing of Annexure P-1 application has been communicated to the petitioner so far. It is also not disputed that the petitioner was not given any opportunity to personally appear before the authority concerned to explain with reference to the relevant files and to satisfy such authority that the notice issued under the Proviso to sub-section (1) of Section 45-A was not received by the petitioner. Hence, in the peculiar facts and circumstances of this case it is just and proper to direct the respondent to take a final decision on Annexure P-1 application after giving an opportunity of personal hearing to the petitioner and to communicate such decision to the petitioner.

11. In the light of the discussion above, the writ petition is disposed of with the following directions:

(i) The respondent ESI Corporation is directed to consider and dispose of the petitioner's application (Annexure P.1) for setting aside the assessment order passed u/s 45A of the ESI Act, after giving a personal hearing to the petitioner and to communicate such decision to the petitioner in accordance with law.

(ii) The recovery proceedings pursuant to the assessment already made u/s 45A of the ESI Act shall be kept in abeyance till the expiry of a period of one week from the date of communication of the order on Annexure P-1 to the petitioner.

(iii) If the assessment made u/s 45A is recalled or set aside by the respondent no recovery shall be effected from the petitioner without making a fresh assessment/determination in accordance with law.

(iv) If the application Annexure P.1 is rejected by the respondent it will be open to the respondent to enforce the recovery of the amounts due under the assessment already made u/s 45A of the ESI Act, after the expiry of a period of one week from the date of communication of the order rejecting the said application.

The writ petition stands allowed to the above extent. The parties are left to bear their own costs.