

(1994) 10 MAD CK 0076

In the Madras High Court

Case No : Writ Petition No. 10838 of 1994

E.I.D. Parry (India) Ltd.

APPELLANT

Vs

Regional Director, Tamil Nadu E.S.I. Corpn. Madras

RESPONDENT

Date of Decision : 19-10-1994

Acts Referred:

Constitution of India, 1950 — Article 226

Employees State Insurance Act, 1948 — Section 1, 17, 26, 44, 45

Citation : (1995) 2 LLJ 1173 : (1995) 2 LW 104

Hon'ble Judges : R. Jayasimha Babu, J

Bench : Single Bench

Judgement

Jayasimhababu, J.—The order of the respondent made on 12.10.1984 u/s 45A of the Employees State Insurance Act, 1948 (hereinafter referred to as the Act) determinating the amount of the contributions payable by the petitioner in respect of its employees in the Head, Regional and Branch Offices for the period from 28.1.1968 to 15.1.1977 in the sum of Rs. 5,49,277.11 has been challenged by the employer in this writ petition.

2. It is the case of the petitioner that as the factories owned and run by it for the manufacture of ceramics products, fertilizers, marine products etc., are located at different places outside Madras and the company's Head Office, regional office and branch offices are all located in Madras and in order cities, the petitioner was under the impression that the Act was applicable only to the employees working in factories it was not necessary for the employer to cover its employees working in the head, regional and branch offices under the Act, and that the employer has paid the contributions in respect of such employees also after the State of Tamil Nadu extended the provision of the Act to Shops and Commercial Establishments by a notification issued u/s 1(5) of the Act.

3. The impugned demand is for the period from the date of commencement of the Amended Act 44 of 1966 by which the scope of the definition of "employee" was enlarged, till the date from which the employer commenced paying the

contributions.

4. The petitioner employer had filed a petition in the Employees State Insurance Court, Madras, E.I.O.P. No. 16 of 1976 inter alia for a declaration that the employees in its head office and branch offices do not come within the amended definition of "employee". That petition was filed with reference to the fertilizer factory of the petitioner at Ennore. The E.S.I. Court while granting other reliefs claimed in that petition, negated the petitioner's case that the employees working in the head office and branch office were not employee for the purpose of the Act.

5. Shri N. Balasubramaniam, learned counsel for the petitioner submitted that though the impugned order came to be made after the petitioner was given a show cause notice and an opportunity to reply to the same was given, the order so made is one without jurisdiction, as the precondition for invoking Section 45A were not satisfied in this case. The further submission was that the amounts claimed were not legally recoverable on account of the bar of limitation, and in any event, once the claim is disputed, the Corporation must necessarily have recourse to Section 75 and cannot proceed to recover the amount as arrear of land revenue.

6. It is admitted that the petitioner had not filed any returns or made contributions in respect of its employees in the head, regional and branch offices for the period from 28.1.1968 to 16.1.1977, though it had filed returns and paid contributions in respect of the employees and working in its factories. It is also admitted that in June, 1981, the Insurance Inspector had inspected the records in the office of the petitioner and in the year 1981, the respondent had made a demand on the petitioner for the contribution in respect of the employees working in the head, regional and branch offices for this period and that despite such demand, the petitioner had not made any payment, but merely denied liability for making such payment.

7. The submission for the petitioner is that, the petitioner not having obstructed the inspection of the records by the respondent, there was no occasion for the respondent to invoke Section 45A of the Act.

8. Sec. 45A of the Act reads as follows :

"Determination of Contribution in certain cases : (1) Where in respect of 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 the Section 45 is obstructed 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.

(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 45B". The failure to submit returns, particulars, registers and records in accordance with the provision of Section 44 is, thus, sufficient for invoking the powers u/s 45A of the Act. Section 45A can also be invoked in the event the immediate employer or the principal employer obstructs the inspector or any official of the Corporation from exercising his functions or discharging the duties. These two sets of circumstances need not coincide. There is therefore no substance in this submission for the petitioner.

9. It was further submitted that the power u/s 45A can be invoked only when the liability is not disputed. There is no basis for such an argument. Failure to submit the returns, particulars, etc., or the obstruction of the Corporation inspectors or officials provide the occasion for invoking the power u/s 45A. The very basis for invoking the power is thus the non-co-operation on the part of the employer in providing voluntarily information and data required to be furnished, on the basis of which the employer should have but failed to make the contributions. The object of this section is to enable the Corporation to take expeditious action against the defaulting employer. If the liability is disputed, it is for the employer to seek adjudication u/s 75.

10. The next submission was that no order u/s 45A can be made in respect of an amount not legally recoverable and if a suit for recovery of such amount is barred by limitation Section 45A cannot be invoked for enforcing payment of such amounts. In support of this submission, the learned counsel for the petitioner relied on *The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma*, wherein it was held that Art. 137 of the Limitation Act 1963 will apply to any petition or application filed under any Act in a Civil Court.

11. In the instant case no application or petition has been filed by the respondent in a civil Court. What has been done is not exercise the power conferred by a statutory provision which does not prescribe any period of limitation for its exercise. This decision is of no assistance to the petitioner.

12. Learned counsel for the petitioner also relied on the case of *New Delhi Municipal Committee v. Kallu Ram* (1977) 1 SCJ 279. The Court, in that case was not dealing with the liability created for the first time under the special statute, but with an alternate mode of recovery in respect of a liability created by general law. The Court found that merely creating a special mode of recovery would not alter the nature of the liability or the extent to which it could be enforced. Arrears of rent which could not be recovered under the law in an action, could not become recoverable by reason of special mode of recovery provided for in the special enactment of Public Premises (Eviction of Unauthorised Occupants) Act.

13. The ratio of that decision is wholly inapplicable to the facts of the present

case. Liability to pay contribution is not a liability under the general law, but is one created for the first time by this special statute. The amenities and benefits to be provided to workmen have to be paid for from the contributions required to be paid under the Act. Section 45A does not provide an alternate mode of recovery of any liability created under the general law. Section 45A itself does not prescribe any period of limitation. The legislature has chosen not to prescribe any period of limitation for exercising the power u/s 45A of the Act, apparently, because the employers who fail to submit returns or obstruct the respondents from obtaining the necessary information by carrying out inspection through its officials, should not be allowed to avoid contributions required to be paid by them, and thus, benefit themselves from their own wrongful actions. The authorities have therefore, been vested with the jurisdiction and power to determine the liability and enforce recovery so that the object of the enactment could be better effectuated with the aid of the funds so recovered.

14. It was next contended by the learned counsel for the petitioner that the object of the enactment is not merely the collection of funds of the Corporation but also to provide benefits to its employees covered under the Act, and that the employees for whom the employer is now being asked to pay contributions had no opportunity to enjoy the benefits by reason of the employer is not having made the contributions at the relevant time and therefore, it is now open to the Corporation to recover the contributions for past periods. This submission is wholly untenable. Contributions paid by employers are not to be set apart for providing benefits to the individual employee in respect of whom the contribution is paid. The contributions are to be pooled in the common fund established u/s 26 and is to be utilised for the purpose of the Act.

15. While all the employees, included in definition in Clause 2(a) of the Act are required to be covered and contributions paid many of them have no occasion to make use of the contributions payable by them cannot be reduced by reason of the fact that they did not make use of or did not avail of the facilities provided by the Corporation or the benefits conferred under the Act. The object of making contribution is to provide common facilities for the use of the employees who have occasion to utilise the same and to provide benefits to those who suffer sickness, injury etc. The employer cannot be heard to say that because it has omitted to make contribution and thereby deprived its employees from availing the facilities provided under the Act, no demand should be made on such employer for the contribution for the past periods.

16. Learned counsel for the petitioners referred to a decision of this Court in the case of Arul Theatre and Others Vs. Regional Director Employees State Insurance Corporation, Madras, , in which it was held that Art. 120 of the Limitation Act prescribing the period within which legal representatives are to be brought on record, would apply to the proceedings under the E.S.I. Act in view of Rule 47 of the E.S.I. Rules which provides for the applications of the CPC in respect of procedural matters under the Act.

17. In the instant case, the question is one of substantive liability of the employer and the right of the respondents to recover, the amount due to it under the provision of the Act. Moreover, the rules framed under the Act cannot have the effect of restricting the scope of the statutory provisions. No period of limitation can be read into Section 45A of the Act by the circuitous route of the rule framed by the State Government making the provision of the C.P.C. applicable to the proceedings under the Act. Section 45A does not fetter the exercise of the power conferred on the Corporation by prescribing any period of limitation.

18. Learned counsel for the respondent-Corporation Mr. G. Desappan invited my attention to the decision reported in the case *The Pondicherry Co-op. Milk Producers' Union Ltd. represented by the Managing Director, Pondicherry v. The Regional Director of E.S.I. Madras-34*, wherein a Division Bench of this Court has held that the liability to pay contribution should not depend upon the employees deriving a benefit in respect of whom the contribution is paid. The Court also observed that the E.S.I. Act does not provide for a period limitation for recovering the amount due from a defaulting employer, and the only period of limitation prescribed is in Section 77 and that applied only to the filing of an application before the E.S.I. Court u/s 75 of the Act. These observations of the Court reinforce what has been observed by me in the foregoing paragraphs.

19. Mr. N. Balasubramanian, then submitted that even if no period of limitation can be read into Section 45A nevertheless, an order made u/s 45A cannot be enforced by the Corporation without filing an application before the E.S.I. Court u/s 75 of the Act.

20. Sections 45A and 45B were introduced into the Act by Section 17 of the Amending Act of 44 of 1976 with effect from 17.6.1976. The object of introducing these provisions was to enable the Corporation to take speedy action against the defaulting employers without having to resort to adjudication by the E.S.I. Court. Before an order u/s 45A is made a show cause notice is to be served on the employer, so that the employer will have an opportunity to meet the case set out in the show cause notice. Provision is also made for the personal hearing if such personal hearing is sought by the employer.

21. This provision clearly indicates that the order made u/s 45A of the Act after affording sufficient opportunity to the employer, is meant to be an enforceable order and is made enforceable u/s 45B of the Act. It is therefore, clear that the Section does not contemplate and the scheme of the Act does not also require the Corporation to resort to an application u/s 75 of the Act to the E.S.I. Court even after an order has been made u/s 45A of the Act.

22. It is however open to the employer even after an order is made u/s 45A of the Act to approach the E.S.I. Court by way of an application u/s 75 of the Act. The period of limitation for approaching the E.S.I. Court is prescribed u/s 77(1) of the Act, and the employer may approach the Court within three years from the

date of the order u/s 45A of the Act. Therefore, it is not the Corporation but the employer who has to invoke the provisions of the Section 75 of the Act. When the jurisdiction of the E.S.I. Court u/s 75 of the Act is not invoked by the employer against the order passed u/s 45A of the Act, the said order becomes final.

23. In the case of Regional Director, E.S.I. Vs. Fibre Bangalore (Pvt.) Limited, , it was held that where, in cases to which provisions of Section 45A of the Act are attracted, the Corporation by an order made in accordance with that section determines the amount of contributions payable and that claim is disputed by the employer, it would not be necessary for the Corporation to seek a resolution of that dispute before the Insurance Court. Such a claim is recoverable as arrears of land revenue. If the employer disputes the claim, it is for him to move the Insurance Court for relief. In other cases, other than cases where determination of the amount of contributions u/s 45A is made, the Corporation if its claim is disputed by the employer, should seek adjudication of the dispute before the Insurance Court before enforcing recovery. I am entirely in agreement with this statement of the law.

24. Shri G. Desappan, learned counsel for the respondent invited my attention to the decision of a Division Bench of Kerala High Court reported in the case of E.S.I.C. v. Ramdas Reddiar (1981) 1 LLJ 166, wherein it was held that the law of limitation being confined to actions in Courts, could have no applications where a statute creates a right and does not envisage an action in Court for enforcing the right.

25. Learned counsel for the respondent also referred to M/s. Fenner Garments v. Deputy Regional Director, E.S.I. Madras-34, (1994) 1 LW 62, wherein it was held by a Division Bench of this Court that to the extent the returns filed by an employer fails to include certain persons who are employees, "it does not amount to filing of the returns in respect of the employees who are left out even though in fact a return is file containing the particulars of only some persons and not all the persons who are employed. Therefore, to the extent of those persons whose particulars are not included in the return, it is not possible to hold that the return is filed in respect of all these person". The returns filed by the petitioner for the relevant period, therefore, cannot be said to be complete as the employees in the head, regional and branch offices were left out even though they were employees for the purpose of the Act."

26. The petitioner itself had taken proceedings before the E.S.I. Court even before the notification was issued by the State in the year 1977 extending the applicability of the Act to shops. But the E.S.I. Court had negated the claim of the employer (petitioner) that the employees working in his head, regional and branch offices were not required to be covered under the Act. The employer could have voluntarily paid the contributions immediately after the adjudication by the E.S.I. Court but did not do so. The fact that there was delay on the part of the Corporation in making an order u/s 45A of the Act cannot enure to the

benefit of the employer who was required to but has failed to pay the contributions.

27. Shri G. Desappan learned counsel for the Corporation has contended that the Corporation has a right to make an order u/s 45A irrespective of the periods for which the contributions were to be recovered from the employer and the only remedy available to the employer against such order is to file an application to the E.S.I. Court u/s 75 of the Act which provides for full and effective adjudication and thus writ petition is therefore, not maintainable. The present petitioner instead of invoking the jurisdiction of the E.S.I. Court u/s 75 of the Act, has invoked the discretionary jurisdiction of this Court under Art. 226 of the Constitution. It is only in extraordinary cases where authorities act without jurisdiction this Court can interfere in exercise of the powers conferred under Art. 226 of the Constitution. However, as this case has been pending in this Court for more than 10 years, I have considered the submissions made on behalf of the petitioner to the legality of the order made u/s 45A of the Act.

28. It has also to be observed that the Corporation ought to have been more vigilant and acted with greater expedition in the matter of recovery of contributions payable by the employers. The fact that no period of limitation is prescribed in Section 45A of the Act does not imply that the Corporation (respondent) can sleep over its duty to collect the contributions for years together.

29. Learned counsel for the petitioner submitted that the determination made in the impugned order in respect of some of the employees is made on an ad hoc basis and such ad hoc determination is impermissible. Reliance was placed on the decision of the Delhi High Court in the case of Hindustan Times Ltd. v. E.S.I. (1988) 73 FJR 327. But the petitioner had not taken any such objection in the reply sent to the show cause notice even though the manner in which the amount payable by the employer had been determined, was fully set out in the show cause notice. The said ad hoc determination is made only in respect of a small number of employees. The employer had no grievance against the quantum of the amount claimed when it was served with show cause notice. There is thus no merit in this writ petition and the same is dismissed with costs. Counsel's fee Rs. 1,500/-.

30. Petition dismissed.