

(2005) 04 CAL CK 0020
In the Calcutta High Court
Case No : C.O. No. 270 of 2004

Employees" State Insurance Corporation and Another	APPELLANT
Vs	
Birla Corporation Ltd.	RESPONDENT

Date of Decision : 11-04-2005

Acts Referred:

Constitution of India, 1950 — Article 227
Employees State Insurance Act, 1948 — Section 45A, 75, 75(1), 75(2B), 82

Citation : (2005) 2 CALLT 637 : (2005) 3 CHN 547 : 108 CWN 1169 : (2005) 107 FLR 560

Hon'ble Judges : Asit Kumar Bisi, J

Bench : Single Bench

Advocate : Subol Moitra and Keya Bhattacharjee, for the Appellant; Ajit Kumar Panja, Dipak Kr. Roy, Jishnu Choudhury and Anirudha Agarwalla, for the Respondent

Judgement

Asit Kumar Bisi, J.—The instant application under Article 227 of the Constitution of India preferred by the petitioners arises out of order No. 3 dated 22nd September, 2003 and order No. 4 dated 28th October, 2003 passed by the learned Judge, Employees" Insurance Court, West Bengal in Tender Case No. 80 of 2003.

2. The Employees" State Insurance Corporation (hereinafter referred to as the Corporation) and its Recovery Officer being petitioner Nos. 1 and 2 respectively have filed the instant application under Article 227 of the Constitution of India alleging inter alia that the opposite party, Birla Corporation Ltd., is a company registered under the Companies Act, 1956 having inter alia its manufacturing unit, namely Birlapur Service Division situated at Birlapur, Dist. 24-Parganas (South) and is covered under the Employees" State Insurance Act (hereinafter referred to as the Act). The principal employers of the said company were/are liable to comply with the provisions of the Act and the regulations framed thereunder. It is the grievance of the petitioners that the principal employers of the opposite party had failed to pay the E.S.I, contributions towards overtime

amount paid to their employees for the period from September, 1995 to December, 1996 and as such the Corporation by the notice dated 16th January, 2001 required the opposite party to show-cause as to why the arrear contributions for the said period should not be determined as per Section 45A of the Act and recovered from it in accordance with law. After hearing the representative of the opposite party, the Deputy Director of the Corporation by an order dated 10th July, 2003 passed u/s 45A of the Act duly determined arrear contributions totalling Rs. 45,247/- for the period from September, 1995 to December, 1996. The opposite party and/or its employers having failed and neglected to pay the said sum or any portion thereof the Revenue Officer of the Corporation being the petitioner No. 2 directed the opposite party and its General Manager by a notice of demand to defaulter dated 14th August, 2003 to pay a sum of Rs. 62,126/- towards arrear contributions of Rs. 45,247/- for the period from September, 1995 to December, 1996 and towards statutory interest of Rs. 16,828/- for the period upto 1st July, 2003 and towards costs of Rs. 51/- within 15 days from the receipt of the said notice.

3. Being aggrieved, the opposite party made an application u/s 75 of the Act before the Employees' Insurance Court, West Bengal praying inter alia for declaration that the said notice of demand for defaulter dated 14th August, 2003 is misconceived, perverse, illegal and for permanent injunction restraining the Corporation from proceeding any further for realising the demanded sum on the strength of the said notice of demand to defaulter dated 14th August, 2003. On 8th September, 2003 the opposite party made an application u/s 75(2B) of the Act in Tender Case No. 80 of 2003 before the Employees' Insurance Court, West Bengal, praying inter alia for admitting the said application u/s 75 of the Act by waiving the requirement of deposit of 50% of the amount demanded by the Corporation. On the same date i.e., 8th September, 2003, the opposite party made another application for temporary injunction before the learned Judge, Employees' Insurance Court, West Bengal, praying for restraining the Corporation and its men and agents from proceeding any further in realising the demanded sum on the basis of the said notice of demand to defaulters. By the impugned order being order No. 3 dated 22nd September, 2003 the learned Judge, Employees' Insurance Court, West Bengal directed the opposite party to deposit a sum of Rs. 7,000/- by 28th October, 2003 with the Corporation who should hold the same in trust and the ultimate appropriation thereof should abide by final decision of the case. By the said order the learned Judge also restrained the Corporation, its men and agents from realising the demanded sum on the strength of the Certificate Case No. C-7440/03-04 (1062A)/RRC till 28.10.2003. It appears from another impugned order being order No. 4 dated 28th October, 2003 that the present opposite party company filed a petition along with xerox copy of the receipt showing that the amount had been deposited in cheque.

4. The present petitioners challenged the impugned orders alleging inter alia that the learned Judge acted illegally and with material irregularity in directing the opposite party to deposit Rs. 7,000/- by fixing the said amount arbitrarily and

without any basis and without recording any reason and thereby the learned Judge made the mandatory provision of Section 75(2B) of the Act a nugatory one, that the learned Judge had not exercised the discretion lawfully, judiciously and/or fairly in directing the opposite party to deposit only Rs. 7,000/-out of the demanded sum of Rs. 62,126/- and that the learned Judge failed to exercise his jurisdiction in not directing the opposite party to deposit 50% of the amount due from it as claimed by the Corporation.

5. Appearing in support of the application under Article 227 of the Constitution of India Mr. Subol Moitra, the learned counsel has drawn my attention to Section 75(2B) of the Act which lays down that no matter which is in dispute between a principal employer and the Corporation in respect of any contribution or any other dues shall be raised by the principal employer in the Employees' Insurance Court unless he has deposited with the Court fifty per cent of the amount due from him as claimed by the Corporation. Proviso to Section 75(2B) of the Act no doubt indicates that the Court may, for reasons to be recoded in writing, waive or reduce the amount to be deposited under this Sub-section. As argued by Mr. Moitra on behalf of the petitioners, in the instant case the Employees' Insurance Court by the impugned order reduced the amount of deposit from Rs. 62,126/- as claimed by the Corporation to Rs. 7,000/-arbitrarily, without any basis and also without recording any reason. It has been further urged by him that the words "considering the facts and circumstances of the case and the materials on record I direct the applicant to deposit a sum of Rs. 7,000/-...." as expressed in the impugned order without recording any reason would suggest that such direction had been passed without any application of mind and there is nothing in the impugned order to show that the Employees' Insurance Court considered the relevant facts and circumstances of the case prior to reduction of the amount as demanded by the Corporation. Mr. Moitra referred to an unreported decision of the learned Single Judge passed on 13th August, 2003 in C.O. No. 1511 of 2003, Employees' State Insurance Corporation v. Hooghly Mills Company Ltd., where under similar circumstances the order passed by the Employees' Insurance Court was set aside since no reasons were indicated for exercise of discretion in terms of proviso to Section 75(2B) of the Act for waiver or reduction of the amount claimed by the Corporation in the said case. Mr. Moitra referred to another matter where Steel Authority of India filed an application u/s 75(1)(g) of the Act along with a separate application for temporary injunction in respect of demand made by the Corporation for payment of Rs. 2,26,47,054/- for the period from April, 2001 to March, 2002 and on 19th July, 2002 the matter came up for hearing before the Employees' Insurance Court whereupon the learned Judge of the Court granted temporary injunction till disposal of the said case being Case No. 58 of 2002 without making any order u/s 75(2B) of the Act for mandatory deposit of 50% of the amount due as claimed by the Corporation. It has been pointed out by Mr. Moitra that being aggrieved the Corporation challenged the said order dated 19th July, 2002 by filing an application under Article 227 of the Constitution of India which was registered as C.O. No. 3033 of 2002 and by the

order dated 1st April, 2004 passed in C.O. No. 3033 of 2002, Employees" State Insurance Corporation v. Steel Authority of India Ltd., the learned Single Judge of this Court allowed the application under Article 227 of the Constitution of India preferred by the Corporation and set aside the order dated 19th July, 2002 passed by the Employees" Insurance Court and directed the learned Judge, Employees" Insurance Court, to decide the issue afresh within three months from the date of communication of the said order.

6. Relying on the aforesaid two unreported decisions of the learned Single Judge of the Court Mr. Moitra has urged that in identical situation the respective orders passed by the Employees" Insurance Court were ultimately set aside by this Court since no reasons were recorded by the learned Judge, Employees" Insurance Court, for waiver or reduction of the amount claimed by the Corporation.

7. Besides the aforementioned two unreported decisions of the learned Single Judge of this Court in C.O. No. 1511 of 2003 and C.O. No. 3033 of 2002 Mr. Moitra has relied on the respective decisions of the Supreme Court in *Gurdial Singh Fijji Vs. State of Punjab and Others*, , *S. Ganga Saran and Sons (Pvt.) Ltd., Calcutta Vs. Income Tax Officer and Others*, and *S. Narayanappa and Others Vs. Commissioner of Income Tax, Bangalore*, , in support of his contention that where there is a statutory provision for recording reasons, jurisdiction to pass order is not conferred unless reasons are recorded.

8. Mr. Ajit Kumar Panja, learned Senior Advocate for the opposite party, has contended on the other hand that the two unreported judgments cited by the petitioners are not relevant in the context of the instant case since in those two cases no reasons at all was given as noted by the learned Single Judge of this Court in the respective orders. It has been urged by Mr. Panja that the opposite party company made deposit of E.S.I."s contribution in accordance with law as settled by the Division Bench in *Hindustan Motors Ltd. v. E.S.I. Corporation*, reported in 1979 Lab. IC 852 wherein it was declared that overtime allowance did not form part of the wages. Thereafter in view of the decision of the Supreme Court reported in *Indian Drugs and Pharmaceuticals Ltd. and Others Vs. Employees" State Insurance Corporation and Others*, , the overtime allowance was declared to be part of the wages and the opposite party company went on depositing E.S.I."s contribution by including overtime wages as part of the wages since then.

9. Mr. Moitra on behalf of the petitioners has cited the case of *M.A. Murthy v. State of Karnataka and Ors.*, reported in 2003 (99) FLR 215 (SC), wherein it has been held that the law as interpreted and laid down by the Supreme Court is not only the law from the date of the judgment but from ever before unless the Supreme Court specifically says that the decision would operate with applicability of the doctrine of prospective overruling. Citing the decision of *M. A. Murthy (supra)* Mr. Moitra has contended that it is not correct to say that till decision of the Supreme Court in *I.D.P.L."s case (supra)* the judgment in *Hindustan Motor"s*

case (supra) wherein it was held that overtime allowance was not wages was decisive.

10. Mr. Panja, learned Senior Advocate on behalf of the opposite party, has urged that the present application under Article 227 of the Constitution of India is not maintainable since there is clear provision for statutory appeal in Section 82 of the Act. Section 82(2) of the Act provides that an appeal shall lie to the High Court from an order of an Employees' Insurance Court if it involves substantial question of law. As contended by Mr. Panja in the present case, the following substantial questions of law are involved:

(a) Whether a judgment of the Supreme Court is prospective or retrospective.

(b) What is the effect and period of effectiveness of the judgment of Division Bench of this Court in Hindustan Motors Ltd. v. E.S.I. Corporation 1979 (1) CLJ 503, wherein Division Bench of this Court held clearly that overtime allowance paid to an employee is not part of the wages.

(c) Whether it is possible to give retrospective operation of the judgment of the Supreme Court in Indian Drugs and Pharmaceuticals Ltd. and Others Vs. Employees' State Insurance Corporation and Others, , wherein it has been held that overtime allowance is part of the wages, when many of the employees either retired or even died.

11. As argued by Mr. Panja, since these substantial questions of law are involved in the instant case the Corporation has a remedy by filing an appeal in terms of Section 82(2) of the Act and the present application under Article 227 of the Constitution of India is not maintainable. He has cited Sadhana Lodh Vs. National Insurance Company Ltd. and Another, where at page 528 (para 7), the Supreme Court held as follows:-

"The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior Court or Tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an Appellate Court or the Tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior Court or Tribunal purports to have passed the order or to correct errors of law in the decision."

12. Mr. Moitra, on the other hand, has submitted on behalf of the petitioners that in the instant case jurisdictional error has arisen because the Employees' Insurance Court has reduced the amount to be deposited without recording reasons and such failure to record reasons goes to the root of exercising of jurisdiction as contemplated under proviso to Section 75(2B) of the Act. Mr. Moitra has sought to argue that the supervisory jurisdiction conferred on this Court under Article 227 of the Constitution must be exercised in such case since

the Employees" Insurance Court has failed to proceed within its parameters. As argued by him, there has been jurisdictional error on the part of Employees" Insurance Court and in the facts and circumstances of the present case an application under Article 227 of the Constitution of India is the only remedy available to the petitioners for which such application has been filed complaining about the jurisdictional error of the Employees" Insurance Court and so the said application is legally maintainable.

13. Mr. Panja, the learned Senior Advocate on behalf of the opposite party, has contended that the application under Article 227 of the Constitution of India preferred by the petitioners should be dismissed on the sole ground of suppression of material facts by the petitioners. He has drawn my attention to the points taken in this regard in para 15 of the affidavit-in-opposition filed on behalf of the opposite party. From the averments made in para 15 of the affidavit-in-opposition it appears that the opposite party had taken a plea that while obtaining the order dated 6th February, 2004 in this matter the petitioners did not bring to the notice of this Court that in similar applications being C.O. No. 3151 of 1999, C.O. No. 2859 of 2003 and C.O. No. 2860 of 2003 filed by the petitioner/Corporation against the opposite party and/or their various other units on identical issue as to whether payment of overtime charges would form part of the wages within the meaning of the said Act for the period prior to the judgment passed by the Supreme Court in I.D.P.L.'s case (supra), this Court did not pass any interim order and only direction was given to file affidavits in those matters. It has been urged on behalf of the opposite party that while moving this matter the petitioners did not mention those facts of refusal to pass interim order on identical issues by Two Hon'ble Judges of this Court and obtained the interim order in the present matter without serving any notice to the opposite parties. Under such circumstances it has been urged by Mr. Panja on behalf of the opposite party that ex parte interim order was obtained by the petitioners in the present case by suppression of material facts. He has cited *Barbara Taylor Bradford Vs. Sahara Media Entertainment Ltd.*, at page 497 (para 246) wherein it has been laid down by the Division Bench of this Court that suppression is alone a ground for dismissal of the interlocutory motion.

14. Mr. Moitra, on the other hand, has contended on behalf of the petitioners that the allegation of suppression of fact as made on behalf of the opposite party is nothing but preposterous. He has pointed out that in the instant case no caveat was lodged on behalf of the opposite party and on 6th February, 2004 this Court was pleased to pass ex parte interim order in the instant case after being satisfied that such an ex parte interim order sought to be passed in this case. It has further been submitted by Mr. Moitra that suppression was other way round because it would appear from the list of six cases produced before this Court at the time of hearing of the instant case alleging suppression of fact that while stay order was passed in the instant case on 6th February, 2004 (vide item No. 6 of the said list), no stay order was passed on 8th April, 2004 in two cases (vide item Nos. 4 and 5 of the said list), and that though IDPL's case (supra) was

decided on 6th November, 1996 and the case of M.A. Murthy (supra) was decided on 2nd September, 2003 and the said decisions made the position clear regarding the statutory obligation of the employer towards payment of E.S.I.'s contributions on overtime allowance, yet it is apparent that the attention of this Court was not drawn by the opposite party to the said decisions of the Supreme Court in the aforementioned cases. Mr. Moitra has further submitted that the decision of the Division Bench of this Court in Barbara Taylor Bradford (supra) has no manner of application to this case.

15. I have carefully considered the rival contentions raised by Mr. Moitra on behalf of the petitioners on one hand and Mr. Panja on behalf of the opposite party on the other hand. So far as the question of suppression of material facts by the petitioners as raised by Mr. Panja is concerned I find that the interim order of stay was passed by this Court (another Bench) in this case on 6th February, 2004. The grievance of the opposite party is that in some other identical matters as referred to in the list of cases produced on behalf of the opposite party no stay order was granted and the said fact was not brought to the notice of this Court at the time when the order dated 6th February, 2004 was passed in the instant case. It is to be borne in mind in this context that the statutory obligation of the employer towards payment of E.S.I.'s contribution on overtime allowance was made clear by the respective decisions of the Supreme Court in the case of I.D.P.L. (supra) and in the case of M.A. Murthy (supra). As rightly pointed out by Mr. Moitra, in the instant case no caveat was lodged on behalf of the opposite party. The fact that no stay order was granted in the earlier cases does not necessarily imply suppression of fact by the petitioners at the time when the stay order was granted in this case. In view of the aforementioned decisions of the Supreme Court I find sufficient force in the contention raised by Mr. Moitra that this Court passed ex parte interim order in the instant case on 6th February, 2004 after being satisfied that such an ex parte interim order ought to be passed in the present case. In the light of the aforesaid context I find that the decision in the case of Barbara Taylor Bradford (supra) relied on by Mr. Panja on behalf of the opposite party has got no manner of application to the facts and circumstances of the present case.

16. It is settled law that mere existence of an alternative remedy by way of an appeal cannot operate as a bar to invoking of jurisdiction under Article 227 of the Constitution if the order impugned is passed without jurisdiction. In Achutananda Baidya v. Prafulla Kumar Gayen and Ors. 1997 (I) CHN (SO 124 (para 10), it was held:

"The power of superintendence of the High Court under Article 227 of the Constitution is not confined to administrative superintendence only but such power includes within its sweep the power of judicial review. The power and duty of the High Court under Article 227 is essentially to ensure that the Courts and Tribunals, inferior to High Court, have done what they were required to do. Law is well-settled by various decisions of this Court that the High Court can interfere

under Article 227 of the Constitution in cases of erroneous assumptions or acting beyond its jurisdiction, refusal to exercise jurisdiction, error of law apparent on record as distinguished from a mere mistake of law, arbitrary or capricious exercise of authority or discretion, a patent error in procedure, arriving a finding which is perverse or based on no material, or resulting in manifest injustice. As regards finding of fact of the inferior Court, the High Court should not quash the judgment of the subordinate Court merely on the ground that its judgment of the subordinate court merely on the ground that its finding of fact was erroneous but it will be open to the High Court in exercise of the powers under Article 227 to interfere with the finding of fact if the subordinate Court came to the conclusion without any evidence or upon manifest misreading of the evidence thereby indulging in improper exercise of jurisdiction or if its conclusions are perverse."

17. So if a subordinate Court or Tribunal does not proceed within its parameters and commits jurisdictional error, the application under Article 227 of the Constitution of India will lie. In the case on hand the grievance of the petitioners is that the Employees' Insurance Court reduced the required 50% of the amount demanded by the Corporation without assigning reasons therefore and thereby committed violation of the mandatory provision contained in the proviso to Section 75(2B) of the Act. If the subordinate Tribunal exceeds its jurisdiction or fails to exercise jurisdiction under the law, the only remedy available to the Corporation is to file an application under Article 227 of the Constitution of India in such case and this is exactly what has been done in the instant case. So the argument raised on behalf of the opposite party challenging maintainability of the application under Article 227 of the Constitution of India preferred by the petitioners has no force at all.

18. The remaining point to be considered is whether the learned Judge, Employees' Insurance Court, passed the impugned order without recording reasons for reduction of the amount required to be deposited by the principal employer. It is the mandatory requirement of Section 75(2B) of the Act that an employer has to deposit with the Employees' Insurance Court 50% of the amount due from him as claimed by the Corporation in case where the dispute between a principal employer and a Corporation in respect of any contribution or any other dues is raised. Proviso to Section 75(2B) of the Act as quoted hereinbefore authorises the Court to waive or reduce the amount to be deposited for reasons to be recorded in writing. The expression "for reasons to be recorded in writing" as employed in the said proviso is required to be emphasised in this context. Absence of reasons required to be recorded in writing by the Court at the time of waiver or reduction of the amount to be deposited, as the case may be, leads to jurisdictional error causing grave injustice. In the present case I find that no reasons for reduction of the amount required to be deposited by the principal employer with the Employees' Insurance Court in terms of Section 75(2B) of the Act were recorded by the learned Judge, Employees' Insurance Court in the impugned order. It has been rightly argued by Mr. Moitra, on behalf of the petitioners, that in the instant case no reasons were recorded by the

learned Judge, Employees" Insurance Court for reduction of 50% of the amount due. He has drawn my pointed attention to the impugned order itself wherefrom it appears that the learned Judge, Employees" Insurance Court, did not record reasons for reduction of the amount due. It appears from the impugned order that the learned Judge, Employees" Insurance Court, has noted that he considered the facts and circumstances of the case and the materials on record. But there is nothing in the order to indicate what are the facts and circumstances of the case nor there is anything in the order to indicate what are the materials on record on the basis of which the impugned order for reduction of the amount due was passed.

18. In *Gurdial Singh Fijji* (supra) at page 377 (para 18) the Supreme Court has pointed out that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. As held by the Supreme Court in *Raj Kishore Jha Vs. State of Bihar and Others*, , "Reason is the heartbeat of every conclusion. Without the same, it becomes lifeless".

19. Having regard to the abovenoted principles of law and the circumstances emerging from the materials on record I find that the learned Judge, Employees" Insurance Court, passed the impugned order relating to reduction of the amount due without recording reasons and thereby has committed gross jurisdictional error necessitating exercise of power of this Court under Article 227 of the Constitution of India.

20. Mr. Panja, on behalf of the opposite party, has cited the decision of the learned Single Judge of this Court in *Allied Resins & Chemical Ltd. v. Employees" Insurance Corporation and Ors.*, reported in 2004(2) CLJ (Cal) 236 where in the circumstances of the said case the learned Single Judge has held that there was no error in exercise of discretionary power. In the said case I find that the learned Judge, Employees" Insurance Court, recorded the reasons for reduction of the amount due and that being so, the decision of the aforesaid case cited by Mr. Panja has got no manner of application to the facts and circumstances of the present case where evidently no reasons were recorded by the learned Judge, Employees" Insurance Court for reduction of the amount due.

21. From all that has been stated above I find that in the instant case the learned Judge, Employees" Insurance Court, has failed to record a reasoned order in violation of the statutory requirement of the provisions of the Act. The impugned order cannot be sustained and the matter will be remitted to the learned Judge, Employees" Insurance Court, to record a reasoned order after hearing both sides and thereupon pass direction either to deposit 50% of the amount claimed by the Corporation or to reduce the amount after recording reasons.

22. The instant application under Article 227 of the Constitution of India is allowed and the impugned order passed by the learned Judge, Employees" Insurance Court, is set aside with direction upon the learned Judge, Employees"

Insurance Court, to decide the matter in the light of my above observations and according to law within 3 (three) months from the date of communication of this order and till that date the temporary injunction shall remain in force. If the opposite party fails to participate in the proceeding within the time mentioned above the temporary injunction shall stand vacated.

23. There will be no order as to costs.

24. Prayer for stay of operation of this order made on behalf of the opposite party is considered and refused.

25. Let a copy of this order be sent down to the learned Court below forthwith.

26. Urgent xerox certified copy of this order, if applied for, be given to the parties as expeditiously as possible.