

(1981) 10 DEL CK 0025

In the Delhi High Court

Case No : Letters Patent Appeal No. 99 of 1974

Employees State Insurance Corporation

APPELLANT

Vs

Masco Private Limited

RESPONDENT

Date of Decision : 05-10-1981

Acts Referred:

Citation : (1982) 21 DLT 14(2) : (1982) ILR Delhi 626 : (1982) LabIC 833

Hon'ble Judges : Rajinder Sachar, J;M.L. Jain, J

Bench : Division Bench

Advocate : C.M. Oberoi, D.K. Kapur, Y.K. Kapoor and P.R. Nanda, for the Appellant;

Judgement

Rajinder Sachar, J.

(1) This is a Letters Patent Appeal against the judgment of the learned Single Judge by which he allowed the appeal, set aside the order of the Employees Insurance Court and remanded the matter to determine the true liability of the respondents in accordance with the provisions of law.

(2) Section 38 of the Employees State Insurance Act (hereinafter to be called the Act) provides that all employees in factories or establishments to which this Act applies shall be insured in the manner provided by the Act. Section 39 provides for contribution to be payable under the Act in respect of employees by the employer. Section 44 provides that the principal and immediate employer shall submit to the Corporation such return in such form and containing particulars relating to persons employed by him or to any factory or establishment in respect of which is the principal or immediate employer. Where the Corporation has reason to believe that a return should have been submitted but has not been so submitted it may require any person to furnish such particulars as it may consider necessary turn enabling the Corporation . to decide whether the factory or establishment is a factory or establishment to which this Act applies. Section 45 empowers the Corporation to appoint persons as inspectors who are entitled

to inspect the books in order to enquire into the correctness of any particulars stated in any return referred to in section 44. Section 45A provides that where no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 or any Inspector is obstructed by the principal employer in exercising his function or discharging his duty u/s 45, the Corporation may on the basis of information available to it by order determine the amount of contribution payable in respect of the employees of that factory or establishment.

(3) A demand of Rs. 6950.54 was created by the respondents u/s 45-A of the Act. The respondent being aggrieved by the said demand took the matter before the Employees Insurance Court u/s 77 of the Act. The court found that the Corporation was within its rights to compute the employee's special contribution as no record or register was made available to the Corporation. It, Therefore dismissed the petition filed by the employer. Thereafter, an appeal u/s 82(2) of the Act was filed which has been allowed as mentioned above.

(4) The learned single judge appears to have held that proper opportunity was not given to the employer to meet the case. He was also not satisfied that there was any material justifying the corporation to make an ad hoc determination of the liability on the employer. He. Therefore, set aside the order of the court and remanded the matter back "for further enquiry- We have gone through the judgment ; so far as the ultimate direction of the learned single judge remitting the matter for reconsideration is concerned, we cannot find that he has committed any error of principle of law so as to interfere with that direction in appeal. To be fair to Mr. Oberoi. the learned counsel for the appellant, he fairly stated that if it was only a question of further enquiry the corporation would not have filed this appeal because it is quite strong on the merits and will be able to satisfy the Employees Insurance Court that its demand was justified. The reason for filing the appeal, according to Mr. Oberoi was because of certain interpretation given to section 45A of the Act which according to the counsel would create & very serious problem in the actual working of the Act. This has reference to the finding of the learned judge that the condition for the applicability of section 45A would only be satisfied if the employer neither submitted the return nor furnished the particulars nor maintained the register of record as required by law. Counsel criticizes this approach and save that it means that an employer can with impunity refuse to file a return and still be not liable to have the determination of his liability u/s 45A made by the corporation and says that if this view is to be accepted it will paralyse the work of the corporation because the whole purpose of requiring the returns to be filed u/s 44 of the Act is that on failure to file return, the corporation should be able to determine the amount of contribution payable by the employer on the basis of information available to it. But this course is prohibited on the above interpretation given by the learned single judge .It appears to us that the complaint of Mr. Oberoi has validity.

(5) Now regulation 32 requires the employer to main a register showing the various particulars in respect of each wage period in respect of every employee in his factory or establishment. The said information relates to the name, occupation. department, wage group, number of contribution and employee's share of contribution. The gravamen of the complaint by the corporation was that when the Inspectors asked for the ledger of the employees from the employer none was produced before them and in its absence the corporation could not. work out the respective contribution because no amount was" paid by the employer as the register did not contain requisite information. The employer had also pleaded inability to give the number of employees and though he had mentioned that they may be 24/25 but in the wage register only 11 employees were shown. It was thus obvious that the register did not comply With the requirement of regulation 32. Notwithstanding this the learned judge seems to imply that this is not a case of no return, because according to him. A once a return has been filed howsoever incomplete and even if it does not comply with the Rules and Regulations it cannot be a case of no return and section 45A could not be invoked by the corporation. We find this interpretation unacceptable. We feel that the learned judge has given a very strict and a limited meaning to the requirement of filing a return. When section 44 requires a principal employer to submit returns in such form and containing such particulars relating to persons employed by him as may be specified in the regulations in this behalf it evidently means that if a return does not comply with the requirements specified in Regulations including Regulation 32 it will be a case of no return having been submitted. If that was not so then all that the employer could do would be to file up some of the names of the employees as required by one of the requirements of regulation 32 and not give their wage period, the salary due or the contribution and still claims that he had submitted the return. The argument proceeds on the erroneous assumption of law that a form of return submitted even in total violation of the requirements of Regulations is a good return. That is, however, not correct.

(6) "THAT a return which completely ignores the provisions and the Rules of the Income Tax Act which lay down how a return is to be filed under the Income Tax Act cannot be considered as any return".. Vide Commissioner of Income Tax Vs. A.R.A.N. Chettiyar (AIR 1928 Rang 10B FB) (1). In (1934) 2 ITR 358 (Lahore) , it was held that where the return under the Income Tax Act did not mention the period to which the income declared related nor whether the accounts were kept on mercantile accountancy system the return did not comply with the requirement and the Income Tax Officer was held entitled to make an assessment u/s 23(4) of the Act treating the return as no return. "A return which is not verified by the assesses was held to be no return by the Supreme Court" in Commissioner of Agricultural Income Tax, Bengal Vs. Sri Keshab Chandra Mandal, . The effect of no return having been filed is to permit the Income Tax Officer to make assessment of total income or loss to the best of his judgment and determine the sum payable by the assessed. This power is analogous to the

power u/s 45A of the Act.

(7) The view, Therefore, that the return filed howsoever defective and grossly in non-compliance, the requirement would still be treated as a return cannot be accepted. To the extent, Therefore, that the learned judge laid down that once a return has been filed even if it did not comply with the provisions of the Act and Regulations it is not a case of no return and section 45A is not applicable cannot be said to be laying down correct law.

(8) The learned Judge on facts held that the mere fact that some of the registers or records did not contain full information did not mean that resort to section 45A was permissible. If by that the learned judge meant that circumstances were not such that it showed that no particulars or registers were submitted or furnished to the Corporation and. hence section 45A could not be invoked, the finding does not need to be disturbed. But if the finding of the learned Judge is meant to lay down that even if no returns are filed in accordance with the provisions of section 44 read with the Regulations resort to section 45A cannot be made unless there is a further default by the employer in not submitting the record or the register or -furnishing particulars in pursuance of a requirement u/s 44, we cannot agree because this would mean that notwithstanding the employer does not file a return the corporation would be unable to resort to section 45A. This would emasculate section 45A of its efficacy because the whole thrust of section 45A is that if a person does not file a return the corporation should be able to make its own determination on the amount of contri. button payable on the basis of its own information. The learned Judge, we say so with respect, was not right in holding that if such an interpretation was given this would be converting section 45A into a penal provision which is separately provided in Section 85(e) which makes punishable a failure to submit any return required by the regulation or making a false return. We cannot appreciate how the mere fact that the failure to file . return is made punishable u/s 85(e) of the Act has any relevance to the scope of section 45A which is turn the purpose of making assessment and determining the contribution payable by the employer. Section 45A is really analogous to provision like section 23(4) of the Income Tax Act or section 144 of the Income Tax Act 1961 which provides for a best judgment assessment in case return is not filed. We must, Therefore, disagree with the finding of the learned Judge that the first condition of section 45A of the Act would be satisfied only if the employer neither submitted the return nor furnished the particulars nor maintained the registers or records required by law. We can appreciate that a mere discrepancy in the records or even some inaccuracies in the record may not be sufficient to allow the invocation of section 45A. Of course, in such a case if the corporation finds that the records or the particulars supplied are not in accordance with the requirements or totally omit to give information required by the Act it may treat the case of no return or no record having been submitted which would empower it to invoke section 45A of the Act. Thus, in order to avoid section 45A being used, an employer will have to show that he has filed the return as required by section 44 of .the Act. And if no

return is filed as. required by section 44(I) it will immediately attract section 45A without the necessity of further showing that no particulars are furnished in response to the notice from the Corporation. In either case of return not having been submitted or particulars having not been furnished or registers not having been maintained in accordance with the provisions of section 44, it would attract section 45A. In short the failure of either of these requirements would bring in section 45A of the Act. Each default is enough to attract section 45A reading the requirement of cumulative-ness of all the three defaults at the same time is to misinterpret the meaning of section 45A.

(9) The next contention urged before the learned Single Judge was that as the registers and records were not produced before the Inspector it amounted to an obstruction by the employer to the officials of the Corporation in exercising their functions discharging their duties u/s 45. The learned Judge negated this contention and held that obstruction must mean a physical obstruction, use of force or threatened use of force and not a mere "failure to comply with any direction. We are in agreement with the view and the reasoning given by the learned Judge on this point.

(10) The learned Judge has further held that there was no order determining the amount by the Corporation as none was placed before him. We were told that there is apparently some mix up because the amount of determination which was done by the Corporation was in fact the order. Whether that order is correct or not is a different matter but when the corporation in exercising its power u/s 45A of the Act and makes" a demand it is in fact an order u/s 45A and no separate order would be deemed to be necessary. The next infirmity found by the learned Judge was that an order u/s 45A can be made on the basis of information available but that the same was done on the basis of some criteria or formula laid down by the Central Government in cases which are decided u/s 45A of the Act and that this was not in compliance with the Act. To the extent that this criticism is meant to emphasise that there could not be any ad hoc determination on any set formula by the Corporation and that determination must be on the basis of information available with it conceding each individual employer no fault can be found with that reasoning. Evidently, amount claimed from each employer has to be found on the facts of each case. There cannot be a universal formula applicable mechanically in each case. Whether and to what extent the formula or criteria laid down by the Central Government is helpful in determining the amount in each case need not detain us because we are not considering any particular case on merits. It will have to be seen by the authorities and the court concerned" in each case.

(11) The next finding, of the learned Single Judge, which is objected to by Mr. Oberoi is that where he holds that even though conditions of 45A are satisfied and the Corporation is competent to pass order under that section, yet it cannot do so without first giving an opportunity to the employer of being heard on the ground that this is the requirement of principles of natural justice. The learned

Judge notices that the section 45A does not provide for such an opportunity. The learned Judge accepts that section 45A would only be invoked because of the failure on the part of the employer to submit, furnish or maintain any returns, particulars, registers, record as required by section 44 of the Act. He also accepts that determination u/s 45A of the Act may be necessitated by the no cooperative attitude of the employer. But he nevertheless holds that no order should be passed u/s 45A without first giving a hearing to the employer concerned. With respect we feel that this view of the requirement of hearing is destructive of the very purpose of section 45A. A full-fledged and detailed procedure for determination of contribution is provided in Chapter IV from Section 38 onwards. Section 44 requires that employer to file returns; on his failure the corporation may require a person to furnish particulars as it may consider necessary. It is only when no return or particulars or registers are submitted, furnished or maintained as required by section 44 that a determination can be made u/s 45A of the Act. Once that stage is reached and stubborn non-cooperativeness of the employer is writ large, there is no basis for invoking the principles of natural justice and requiring a hearing to be given for the purpose of deciding whether to act u/s 45A. Hearing was already given prior to reaching the stage of section 45A. It is only when the offer of hearing has been turned down by not filing returns or furnishing particulars and thus a stage has reached where it is not possible for the corporation to discharge its functions u/s 45, that resort is made to section 45A of the Act. It would be nullifying the purpose of section 45A if a fresh enquiry was to start again by seeking to associate a defaulter employer at that stage. It must be appreciated that the Act is a beneficial piece of legislation for the benefit of the employees. Employers must not be permitted to stall and delay the benefits which accrued to the employees under the Act by resorting to various dilatory and delaying tactics. If having "already been given a full opportunity and the employer having deliberately refused to participate in the enquiry a very heavy and unjustifiable burden would be placed on the corporation if it were again to go through the frustrating experience of asking the employer to join the enquiry with the certainty that he will further obstruct the enquiry. There is no doubt that the horizons of natural justice are expanding. But the aim of natural justice is to secure justice and to prevent miscarriage of justice. What particular rule of natural justice should apply to a given case must depend to a great extent on, the facts and circumstances of the case. the framework of law under which the enquiry is held..... vide A.K. Kraipak and Others Vs. Union of India (UOI) and Others, .

(12) In the present case it is not as if a determination u/s 45A is final. It is no doubt true that this liability can be recovered under the Act as arrears of land revenue u/s 45B. But then section 75 provides that if any question or dispute arises as to whether any person is an employer or the rate of contribution payable by the employer or the right of any person to a benefit and as to amount and duration or any other dispute between a principal employer and the corporation such questions of "dispute shall be decided by the court in

accordance with the provisions of the Act. Thus the Act gives a full protection and opportunity to an employer so that even after determination under 45A he can invoke the jurisdiction of the court by moving u/s 77 of the Act. It is not, Therefore, as if once a determination has been made u/s 45A the employer is left without any remedy and, Therefore, would be seriously prejudiced by having no opportunity to contest the determination. We feel that to read the requirement of an opportunity in the case of a person who has deliberately and of his own choosing non-cooperated and obstructed the corporation in making the determination as required by the Act, would be putting a premium on such unsocial acts. We cannot, Therefore, find any justification to hold that the requirement of a hearing before an order is passed u/s 45A should be read into the statute. More so when there is -no such provision. We feel that the legislature has advisedly made no provision for hearing for the simple reason that it has provided a perfectly good and detailed remedy to an employer by section 77 of the Act. There is thus no prejudice caused. It is relevant to note that an order passed under sub-section (1) of section 45A is made by sub-section (2) a sufficient proof of the claim of corporation u/s 75. But then section 72(2)(a) specifically provides that subject to the provisions of sub-section 2(A) (which is not relevant) the claim for recovery of contribution from the principal employer shall be decided by the Court. Thus the determination u/s 45A(1) is only relative and is subject to the decision by Court u/s 75(2). Thus it is not as if the determination u/s 45A closes the matter. No prejudice is thus caused at all. Rather, on the other hand, a serious prejudice would be caused to the employees if the employer was held entitled to delay the determination u/s 45A which situation had been brought by his own non-cooperation. We may in this connection note that in *Free India (P) Ltd. Vs. Regl. Director, E.S.I.C. (1973)* If, L.L.J. page 584(5) some observations, which were obiter, were made by the learned Judge that even if in a case where the factory obstructs the officers in the discharge of his duty the corporations expected to make an order under sub-section (1) of section 45A but before such an order is made, it is essential that the employer should be given another opportunity to explain whether the quantum determined by the corporation is justified or not. For the reason which we have already given above we feel that these observations, which are "in any case obiter, are not laying down correct law. As a matter of fact the learned Judge himself notes that the employer has a right to move the court for deciding the question of dispute but as the proceedings before him were initiated against recovery of contribution is arrears of land revenue and as the learned Judge felt that proper opportunity had not been given, he quashed the same only to the extent of permitting the employer to move the Court and secure a decision there from. It will thus be seen that the Court there also recognised that the remedy by moving the Court is a full-fledged and satisfactory remedy. This conclusion reiterates our finding that in such a case of non-cooperation of the employer there is no necessity of giving a hearing to the employer before passing an order u/s 45A because he has already misused the first opportunity which was made available to him earlier of filing the return or submitting the record. We must,

Therefore, dissent from the view that even in these circumstances the employer is entitled to opportunity of hearing. As we said before; the direction by the learned Single Judge is not to be interfered with by us. We have only clarified the question of law. But so far as the other direction by the learned Judge is concerned, that is upheld.