
(1993) 08 MAD CK 0078
In the Madras High Court
Case No : W.A. No. 834 of 1993

Fenner Garments

APPELLANT

Vs

Dy. Regional Director, E.S.I.C.

RESPONDENT

Date of Decision : 12-08-1993

Acts Referred:

Employees State Insurance Act, 1948 — Section 45, 45A, 45A(1)

Citation : (1994) 2 LLJ 754 : (1994) 1 LW 62 : (1994) WritLR 243

Hon'ble Judges : K.A. Swami, C.J.;Somasundaram, J

Bench : Division Bench

Advocate : K.N. Vijayan, for the Appellant; G. Desappan, for the Respondent

Final Decision : Allowed

Judgement

K.A. Swami, C.J.—This writ appeal is preferred against the order dated July 19, 1993, passed by the learned single Judge in W.P.No. 12976 of 1993. At the stage of admission of the writ appeal, the respondent is notified. Accordingly, he is represented through a counsel. Hence, the writ appeal is heard for final disposal.

2. In the writ petition, the petitioner - appellant sought for quashing the order dated June 28, 1993 passed by the respondent in his proceedings bearing No. 51-8718/11 1NETV, directing the petitioner - appellant to pay the contribution in respect of certain employees, as stated in the impugned order. The respondent, in all, demanded a sum of Rs. 21,803.79. The learned single Judge has rejected, the writ petition on the ground that it is open to the petitioner-appellant to approach the Court u/s 75 of the Employees State Insurance Act, 1948 (hereinafter referred to as the Act). Therefore, the learned single Judge has held that no interference is called for in the exercise of jurisdiction under Article 226 of the Constitution of India.

3. It is submitted on behalf of the appellant/petitioner that the impugned order has been issued without following the procedure prescribed u/s 45-A of the Act. As per the report made by the Inspector, the petitioner-appellant had not

included certain employees in its return in the matter of payment of employer's and employees' contribution to the Corporation. Therefore, it amounts to not filing a return. As such, notice u/s 45-A of the Act ought to have been issued to the petitioner-appellant to show cause as to why the report of the Inspector made in this regard should not be accepted and the employer should not be directed to pay the contribution. Employees State Insurance Corporation will hereinafter be referred to as the "Corporation".

4. On the contrary, it is contended on behalf of the respondent that Inspector of the Corporation is empowered u/s 45 of the Act to enter the office, establishment, factory or other premises occupied by the principal or immediate employer and require any person found in charge thereof to produce the records, or examine such account, books or other documents relating to the employment and also ask the principal or immediate employer to produce registers relating to the employment and enquire into the correctness of any of the particulars stated in any return filed u/s 44 of the Act in order to ascertain as to whether the provisions of the Act have been properly complied with, that in exercise of this power, the Inspector of the Corporation entered into the office of the appellant and checked the necessary records and registers in the presence of the employer and made a report dated November 23, 1992, and that on the basis of that report, the demand dated June 28, 1993 has been issued. Therefore, in the event the appellant is aggrieved by the demand, it is open to it to invoke the jurisdiction of the Employees State Insurance Court u/s 75 of the Act; that as the demand has been made on the report made by the Inspector of the Corporation and as the returns are filed by the employer, Section 45 of the Act is not attracted.

5. In the light of these rival contentions, the following point arises for consideration;

"Whether, in the facts and circumstances of the case, Section 45-A of the Act is attracted".

6. Facts necessary for purpose of deciding this question are no more in dispute. The appellant establishment is a covered establishment. It has been filing the return, paying the contribution of the employees' and also of the employers' regularly. However, on November 23, 1992, the Inspector of the Corporation inspected the records of the establishment and made a report u/s 45 of the Act, stating that certain persons who have been employed by the appellant establishment are not included in the return and the contribution payable by the employer in respect of these employees has also not been made. Therefore, the employer may be directed to pay the contribution payable by the employees as well as the employer. On the basis of the report, the impugned demand dated June 28, 1993 was made. It reads thus :-

I have to state that u/s 40 read with Section 39 of the Employees State Insurance Act, 1948 (hereinafter referred to as the Act) the principal employer of

the factory/establishment covered under the Act is required to pay in respect of every employee both the employees' contributions and the employer's contributions at the rates specified in the First Schedule. The contributions are required to be paid in terms of Regulations 29, 31 and 33 of the Employees' State Insurance (General), Regulations, 1950 into a Bank duly authorised by the Corporation, except where otherwise provided, and within the periods laid down for the purpose.

A return of contributions is to be submitted in Form 6 in quadruplicate along with receipted copies of challans for the amounts deposited in the bank to the Regional Office of the Corporation at the expiry of each contribution period as specified under Regulation 26 of the Employees' State Insurance (General) Regulations, 1950.

2. It is regretted that you have so far not paid the contributions as per the provisions of law for the period given below/ and as pointed out in this office letter of even No. dated June 20, 1993 and have also not submitted the return of contributions for as per statement enclosed Rs. 21,093.79.

3. Please note that any contributions payable under the Act can be recovered as an arrear of land revenue u/s 45-B.

4. It may also please be noted that in case of failure to pay contributions in accordance with Regulation 29, read with Regulation 31 of the Employees' State Insurance (General) Regulations 1950, interest at 6% per annum upto October 19, 1989 and 12% per annum from October 20, 1989 onwards becomes payable under Regulation 31-A as arrears of contributions as for each day of default or delay in payment of contributions. Any interest payable under Regulation 31-A may be recovered as an arrear of land revenue under Regulation 31-A of the E.S.I (General) Regulations, 1950.

5. Please take notice that unless contributions outstanding upto date are paid immediately and in any case within 15 days hereof, under intimation to this office, this office will be constrained to cause the same to be recovered along with interest as an arrear of land revenue under Sections 45-A to 45-1 of the Act.

Yours faithfully, Sd. Deputy Regional Director

"Annexure"

S.No. Head of Account Period Wages Rs. Cost 27.25%

1. Stitching charges 4/91 to 3/92 30462.76

2. Dyeing charges Bleaching & Brushing -do- 260244.00 21706.21

3. Repairs & renewals -do- 150.00 at 5%

7.50

290857.56

21083.79

Contribution to be paid by the employer Rs. 21083.79."

7. According to learned counsel for the respondent, the report made u/s 45 of the Act can be straightway acted upon by the Corporation and a demand can be issued because this is not a case in which the appellant has failed to file the return and has failed to maintain the particulars, registers or records. This is a case in which the establishment has failed to pay the contribution of the employees" as well as the employer's in respect of the employees whom it has employed. Therefore, Section 45-A of the Act is not attracted.

8. It is not possible to accept the contention of the learned counsel for the respondent. It is no doubt true that the establishment of the appellant is covered by the Act. It is also true that it has been filing returns and paying the contributions payable by the employees as well as the employer. However, according to the report made by the Inspector of the Corporation, on the basis of which the impugned demand is issued by the Corporation, there are certain persons who have been employed by the appellant and they are not included in the returns and contributions payable on their behalf as well as by the employer have not been paid. Therefore, the appellant be directed to pay the same. It is in these circumstances, it has to be seen as to whether, if the demand has to be made on the basis of the report made by the Inspector, the provisions of Section 45-A of the Act are to be complied with.

9. Chapter IV of the Act deals with contribution. Section 18 provides, subject to the provisions of the Act, all employees in factories and establishments to which the Act applies shall be insured in the manner provided by the Act. Section 39 deals with the contributions payable under the Act in respect of an employee as well as by the employer at such rates as may be prescribed by the Central Government. The contributions are payable in respect of each wage period which shall ordinarily fall due on the last day of the wage period. In the event the contributions payable under the Act are not paid by the principal employer on the date on which such contributions have become due, he is liable to pay interest at the rate of 12% per annum or such higher rate as may be specified in the Regulations till the date of actual payment. However, such rate shall not exceed the lending rate of interest charged by any scheduled bank. Section 40 makes the principal employer to pay the contributions in the first instance. It also enables the principal employer to recover from the employee, not being an exempted employee, the employee's contribution by deduction from his wages and not other wise, provided that no such deduction shall be made from any wages other than such as relate to the period or part of the period in respect of which the contribution is payable, or in excess of the sum representing the employee's contribution for the period. Such deduction by the principal employer from the wages of the employees is deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it is deducted. The principal employer is made to bear the expenses of remitting the

contributions to the Corporation. As per Section 41 of the Act, it is open to the principal employer to recover the contribution in respect of an employee employed by or through an immediate employer; the amount of contribution so paid is employer's contribution as well as the employees' contribution. The immediate employer is liable to maintain a register of employees employed by or through him as provided under the Regulations and submit the same to the principal employer before the settlement of any amount payable u/s 41. Section 42 deals with general provisions regarding payment of contribution. Section 43 deals with the method of payment of contribution. Section 44 makes it incumbent upon every principal and immediate employer to submit to the Corporation or such officer of the Corporation as the Corporation may direct, returns in such form and containing such particulars relating to persons employed by him or to any factory or establishment in respect of which he is the principal or immediate employer as may be specified in the regulations in this behalf. Where in respect of any factory or establishment the Corporation has reason to believe that a return should have been submitted as per Sub-section (1) of Section 44 of the Act but has not been so submitted, the Corporation may require any person in charge of the factory or establishment to furnish such particulars as it may consider necessary for the purpose of enabling it to decide whether the factory or establishment to which the Act applies. Section 44 further provides that every principal or immediate employer shall maintain such registers and records in respect of his factory or establishment as may be required by the Regulations made in this behalf. Section 45 of the Act empowers the Corporation to appoint Inspectors or authorize any official of the Corporation, for the purpose of inquiring into the correctness of any of the particulars stated in any return referred to in Section 44 or for the purpose of ascertaining whether any of the provisions of the Act has been complied with. Such Inspector or other official authorised in this behalf by the Corporation is entitled to require the principal or the immediate employer to furnish to him such information as may be necessary for the purpose of the Act or to enter into the office, establishment, factory or other premises occupied by the principal or immediate employer and require him or any person who is in charge thereof to allow him to examine every such accounts, books or other documents relating to the employment of persons and payment of wages or examine with respect to any matter relevant to the purposes of the Act, make copies of or take extracts from any register, accounts, books or other documents in such factory, establishment, office or other premises, or exercise such powers as may be prescribed. Section 45-A of the Act, which is material for our purpose, reads thus:-

"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 43 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 contribution 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 the order as an arrear of land revenue u/s 458 of the Revenue Recovery Act under Sections 45-C to Section 45-I".

10. An analysis of Section 45-A shows that in a case (1) where no returns, particulars, registers or records are furnished or (2) where no particulars, registers or records are maintained in accordance with the provisions of Section 44; or (3) any Inspector or official of the Corporation referred to in Sub-section (2) of Section 45 of the Act 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 contribution payable in respect of the employees of that factory or establishment. The Proviso thereto provides 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. Sub-section (2) thereof further provides that the order made under Sub-section-(1) shall be sufficient proof of the claim of the Corporation u/s 45, or for recovery of the amount determined by such order as an arrear of land revenue u/s 45-B or the recovery u/s 45-C to Section 45-I. It is relevant to notice that the return to be filed under the Act by the principal and the immediate employer shall be as per Section 44 of the Act, containing the particulars relating to persons employed by him. It means, the return must contain particulars relating to all the persons employed. Section 38 as already pointed out states all the employees are to be insured if the Act applies. In the instant case the return furnished does not contain the particulars of all the persons employed, it cannot be considered to be a complete return. Therefore, to the extent the return fails to include certain persons who are employed, it does not amount to filing of the return in respect of the employees who are left out even though, in fact, a return is filed 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 persons. If that be so, the case cannot be taken out of the purview of Section 45-A of the Act and consequently, in such cases no determination can be made by the Corporation on the basis of the report made by the Inspector or the official of the Corporation authorised in this behalf regarding the amount of contribution payable in respect of the employees who are left out, without issuing a show-

cause notice and affording an opportunity of hearing, as required by the Proviso to Sub-section (1) of Section 45-A of the Act. In the instant case, there is a determination made by the Corporation without issuing any notice to the appellant and without affording an opportunity of hearing, as required by the proviso to Sub-section (1) of Section 45-A of the Act. As already pointed out, it is a case in which, according to the Corporation, the appellant has failed to include in the returns filed some of the persons employed by it and has not paid the contributions payable on their behalf and also on behalf of the employer. The impugned order creates an additional financial liability upon the appellant. In addition to this, as already pointed out, it falls under Sub-section (1) of Section 45-A of the Act. Therefore, it was necessary for the Corporation to issue notice and afford a reasonable opportunity of hearing to the appellant, as per the Proviso to Sub-section (1) of Section 45-A of the Act. In fact, the Corporation, in similar cases, has been applying the Proviso to Sub-section (1) of Section 45-A of the Act. In the case of M/s. P.S. Apparels, 586, Mount Road, Madras-600 006 an Inspector of the Corporation made a report on inspecting the factory. On the basis of the report, a show-cause notice was issued u/s 45-A of the Act, giving 15 days time to show-cause as to why the factory should not be called upon to pay the contribution and thereafter a determination was made. The order dated April 1, 1993 made in No. TZ/Ins.IV/51-19063/under Section 45-A of the Act is as follows:-

"M/s. P.S.Apparels, a factory situated at 586, Mount Road, Madras-6, Code No. 51-19063 a factory covered under the Act, 1948, is required to pay the contributions in accordance with Section 48 of the said Act, read with Sections 29 and 30 of the ESI (General) Regulations 1950, framed under the Act. As the employer in relation to this factory failed to pay the contribution as required by law, a notice was issued to the principal employer by this office letter of even No. dated December 13, 1991 to show cause within 15 days why contribution as per statement enclosed/particulars furnished in para - be not recovered from the employer. The Inspector who verified the records of the factory on December 23, 1991 had reported about the non-payment of contributions on certain items of wages based on which the above demand notice was issued. The employer's representative M/s. Shri P.Mohan and P. Mariappan appeared for personal hearing on July 3, 1992 and personal hearings are as under.

The expenditure involved in the claim which pertain to the period from April 1990 to September 1991 are found to have been incurred for getting garments stitched, the made garment embroidered and for getting patch work done on clothes, all by outside parties. These items of work are done by the parties concerned according to the specification given by the principal employer for the purpose of export. The employer also retains the ultimate power of rejection. The job is thus to be carried out by the outside parties as per the specification as and to the satisfaction of the principal employer which implies an element of control. Thus, provision by the employer, possibly direct or implied, is inherent in the execution of work on hand, therefore, the persons employed for the purpose can

only be treated as employees as defined in Section 2(9) of the Act and the payments made for the purpose can only be treated as wages. Hence, the employer is liable to pay contributions on the wages thus incurred.

However, I find that the following amounts have been paid to the parties mentioned below who were covered separately under the Act and have complied with the provisions of it during the period of the claim:

ESI Code No. Amount Paid.

1. R.M.T. Garments 51-19320-19 79,799.35

2. Goyal Dresses 51-3429 14,464.10

3. Gupta & Co. 51-19187-18 23.799,35

1.18,062.80

The employer has also made the plea that M/s. Abushan Industries, Ahmedabad are covered under the Act. But no evidence in support of the coverage and compliance by this party has been produced and hence this plea cannot be entertained. In respect of another party M/s. Rabak Industries, Madras, who are also stated to be covered separately, there is no proof of compliance for the period of claim. Accordingly, out of the total wages of Rs. 4,85,908.49 paid by the employer, the employer is liable to pay contribution on Rs. 3,67,845.69 after deducting the amounts paid to the 3 immediate employers M/s. B.N.T. Industries, Goyal Dresses and Gupta and Co. The contribution as payable calculated at 7.25% is Rs. 26,668.61.

I have thus applied my mind to all the relevant facts of the case and determine that the employer is liable to pay Rs. 26,668.61 as contribution.

For the above reasons, I, F.A.Percy, Deputy Regional Director, in exercise of the powers delegated to me by the ESI Corporation resolution dated December 14, 1980, I think fit and accordingly order that contributions totaling Rs. 26,668.61 for the period from April 1990 to September 1991 are finally determined and you as one of the principal employer is hereby ordered to pay the above amount together with interest payable at the rate of 12%. Failing which this shall be caused to be recovered as per 45-C to 45-I of the ESI Act.

Sd/- P.A. Percy Deputy Regional Director"

11. The case on hand cannot be distinguished from the above case. Even otherwise, on an interpretation of the provisions contained in Sections 38, 39, 45 and 45-A of the Act, we come to the conclusion that even in the case of non-inclusion of certain persons employed by the establishment in the return filed, the determination of the amount payable by the establishment on the basis of the report made by the Inspector of the Corporation, Section 45-A of the Act is attracted and the procedure prescribed therein has to be followed before making the demand from the establishment. Accordingly, the point raised for

determination is answered in favour of the appellant. In the instant case, admittedly the procedure prescribed u/s 45 of the Act has not been followed and the Corporation has straightway issued the demand to the appellant establishment. Therefore, the impugned demand cannot at all be sustained as the same is issued without following the procedure prescribed u/s 45-A of the Act as it is issued without affording any opportunities of showing cause to and without hearing, the appellant - establishment. Hence, the impugned demand is liable to be quashed.

12. For the reasons stated above the impugned order dated July 19, 1993 passed in W.P.No.12976/1993, is set aside. The writ appeal is allowed and the impugned demand dated June 26, 1992 in Re.51-8910/11-TN/IV is quashed. It is now open to the E.S.I. Corporation to issue a show cause notice u/s 45-A of the Act to the petitioner-appellant and proceed in the matter in accordance with law. No costs.