

(2000) 11 MAD CK 0107

In the Madras High Court

Case No : Writ Petition No. 17628 of 1994 and W.M.P. No 26802 of 1994

Hafeez Motor Transport

APPELLANT

Vs

Deputy Regional Director, Employees' State Insurance
Corporation

RESPONDENT

Date of Decision : 02-11-2000

Acts Referred:

Employees State Insurance Act, 1948 — Section 45A, 45A(1), 75, 75(1)

Citation : (2001) 1 LLJ 1454 : (2001) 1 MLJ 577 : (2001) WritLR 239

Hon'ble Judges : P. Sathasivam, J

Bench : Single Bench

Advocate : Karthick, for T.S. Gopalan, for the Appellant; G. Desappan, for the Respondent

Final Decision : Allowed

Judgement

P. Sathasivam, J.—Aggrieved by the proceedings of the respondent dated July 8, 1994, directing the petitioner to pay E.S.I. contributions totalling Rs. 1,33,420 for the period from 1983-84 to 1990-91 together with interest at 12 per cent for each day of further default from the date of the said order, the petitioner has filed the above writ petition.

2. According to the petitioner, it is a partnership firm and is running Public Transport in Pudukottai. The petitioner who had initially about 4 to 5 employees on its rolls engaged a maximum of 18 persons when it had the four route permits. While so, the respondent herein called upon the petitioner before him for a personal hearing on May 27, 1991 for the purpose of determining the contribution payable by the petitioner for the period from 1983-84 to 1990-91. On May 27, 1991, the petitioner filed its representation contending that the number of employees employed by it in its establishment was far below the minimum strength required for the purpose of coverage under the Employees' State Insurance Act. Further, on June 28, 1991 the petitioner filed a detailed statement explaining as to how the Act was not applicable to its establishment

and also produced the relevant Attendance Registers and Wages Registers for the period from January, 1986 to November, 1990. The hearing was then adjourned to July 22, 1991, August 12, 1991, September 6, 1991, October 7, 1991 and November 1, 1991. Even on November 1, 1991 the hearing did not take place. Thereafter, the hearing was again adjourned to May 6, 1993 at 10 a.m. As the counsel has some cases listed in the High Court, he could not attend the hearing at 10 a.m. on May 6, 1993. Subsequently, when the counsel approached the respondent and sought for a further date of hearing, the respondent informed the petitioner's counsel that the future date of hearing will be fixed and the intimation will be sent to the petitioner. However, after a lapse of more than a year, the respondent by an order dated July 8, 1994, without referring to the representation of the petitioner made in its statement dated June 28, 1991, by a non-speaking order, determined the contributions payable by the petitioner at a sum of Rs. 1,33,420 for the period 1983-84 to 1990-91. Since the action of the respondent is highly arbitrary and unjustified and gross violation of the principles of natural justice, the petitioner is obliged to approach this Court under Article 226 of the Constitution of India, even though the petitioner should move the Employees' State Insurance Court.

3. The respondent filed a counter affidavit disputing various averments made by the petitioner. It is stated that pursuant to the inspection in September, 1990 it is found that the establishment had a strength of 20 and more in 1984 and 85, while it was shown less subsequently; accordingly the establishment was asked to attend the personal hearing on May 27, 1991. On the said day the petitioner submitted a written representation to the effect that the establishment did not employ more than 18 persons at any time. Several adjournments were granted at the request of the advocate for the management. However, the petitioner did not attend the personal hearing either on February 14, 1992 or May 6, 1993. In the circumstances, the respondent had no alternative but to pass final orders on July 8, 1994 based on the materials furnished by the representative of the petitioner at the time of inspection by the Vigilance Inspector on September 22, 1992. The impugned order had been passed only on the basis of the materials supplied by the petitioner's representation; hence there is no question of violation of the principles of natural justice. Further, the present writ petition is not the proper remedy since the petitioner can very well challenge before the E.I. Court.

4. In the light of the above pleadings, I have heard Mr. Karthick, learned counsel for the petitioner and Mr. G. Desappan for the respondent.

5. There is no dispute that for the purpose of determining the contribution payable by the petitioner for the period from 1983-84 to 1990-91, the respondent herein called upon the petitioner to appear before him for a personal hearing on May 27, 1991. On May 27, 1991, the petitioner filed its representation highlighting that the employees employed by them in their establishment were below the minimum strength required for the purpose of

coverage under the Employees' State Insurance Act and the Act itself was not applicable to their establishment. In the same representation, the petitioner had stated that they need sufficient time to gather particulars and requested the respondent to post the hearing after sometime. It is the further case of the petitioner that on June 28, 1991 the petitioner filed a statement explaining as to how the Act itself was not applicable to its establishment and also produced the relevant Attendance Registers and Wages Registers for the period from January, 1986 to November, 1990. No doubt, the hearing was adjourned to several dates viz., July 22, 1991, August 12, 1991, September 6, 1991, October 7, 1991 and November 1, 1991. When the case was taken up for hearing on May 6, 1993 at 10 a.m., since the counsel appearing for the petitioner had some listed matters in the High Court, he could not attend the hearing. However, it is specifically stated that subsequently the counsel approached the respondent and sought for a further date of hearing and according to the petitioner, the respondent informed the petitioner's counsel that future date of hearing will be fixed and intimation will be sent to them. However, the respondent had passed the impugned order on July 8, 1994 without referring to the representation and objection of the petitioner, even though the same were filed by them at the earliest point of time. After taking me through the order of the respondent in passing the order dated July 8, 1994, Mr. Karthick, learned counsel for the petitioner, would contend that the action of the respondent in passing the order dated July 8, 1994 was in gross violation of principles of natural justice, highly arbitrary and unjustified. He also contended that in view of the fact that the impugned order of the respondent is liable to be quashed on the ground of violation (sic) of principles of natural justice and in total lack of jurisdiction, there is no need to go before the E.I. Court. In the light of the said contention, I have carefully perused the order of the respondent impugned in this writ petition. After reading the order of the respondent, it is clear that though the management had filed representation highlighting their case even on May 27, 1991 and the subsequent statement on June 28, 1991 explaining as to how Act itself was not applicable to their establishment, the respondent did not consider any of the aspects raised therein, and passed a non-speaking order with a direction to contribute a sum of Rs. 1,33,420. After referring an earlier show cause notice and the representation as well as the request made by the petitioner for several adjournments, the respondent in the middle of his order has stated that:

"I have applied my mind to all the relevant facts and have gone into the objections raised by the employer and my findings on the objection of the employer are as under."

After saying so, it is unfortunate that instead of giving his findings on the objection, he has stated thus:

"The next personal hearing was fixed on May 6, 1993. But the employer neither replied nor appeared in person for the personal hearing and even after a lapse of

a year the employer has not paid the contribution..."

By saying so, in the next line, he has directed the petitioner to contribute a sum of Rs. 1,33,420 for the period from 1983-84 to 1990-91. After going through the show-cause notice of the respondent, the representation of the petitioner dated May 27, 1991 and June 28, 1991 and the impugned order dated July 8, 1994, I am of the view that the respondent has not applied his mind and failed to consider those representations made by the petitioner, hence the impugned order is liable to be set aside on the ground of non-application of mind.

6. Apart from this, though the respondent is empowered to determine the contributions u/s 45-A of the Employees' State Insurance Act, 1948 (in short "the Act"), he cannot pass any order without giving reasonable opportunity of being heard. Proviso to Sub-section (1) of Section 45-A of the Act enables the concerned authority to afford a reasonable opportunity of being heard to the principal or immediate employer or the person in charge of the factory or establishment. I am not saying that petitioner-management was not given adequate opportunity. However, when a request was made on May 6, 1993 on the ground that their counsel was actually engaged in the High Court and prayed for further date of hearing, it is not clear what made the respondent from reserving orders without granting time. Even though the respondent refused to accede to the request of the petitioner's counsel on May 6, 1993, the fact remains that he had passed the impugned order only on July 8, 1994 that is after one year and two months. In such a circumstance, I am of the view that before passing the impugned order, the respondent could have given one more opportunity to the petitioner as claimed. I have already referred to the order passed by the respondent, wherein he had not considered the representations of the petitioner dated May 27, 1991 and June 28, 1991 when both the representations were available in their file. In this regard, the learned counsel for the petitioner has very much relied on a decision of mine in *Management of Simpson and Co. Vs. E.S.I.C.*, . In similar circumstances, particularly with reference to similar objection raised by the counsel for E. S. I. Corporation regarding the availability of Insurance Court, after considering the relevant provisions as well as various decisions of this Court and other Courts, I have directed the authority who had passed the impugned order therein to adjudicate as to whether the explanation or the details furnished by the petitioner are justifiable, evaluate the entire matter and pass a speaking order one way or other. The judgment of mine is directly applicable to the claim of the petitioner herein.

7. In *Power Tools and Appliances Co. Ltd. Vs. Union of India (UOI)*, a Division Bench of Calcutta High Court with regard to the availability of alternative remedy as per Section 75, has held that, "the doctrine of natural justice has a deep rooted foundation in the concept of fair-play and justice and that this concept of fairness or fair-play, however, cannot by any stretch be said to be inflexible in nature and its flexibility is its real virtue. It is further held that it is

not possible to lay down rigid rules as to when the principles of natural justice ought to be made applicable but the same depends upon the facts and circumstances of the matter in issue. According to them, this concept of natural justice and fair play has come for- increasing judicial scrutiny in recent years and the law Courts have been in the past and still are expanding its frontiers depending upon the situations. It is further held that in a matter like this, particularly when the representation/ objection raised, the question of Section 75 of the Act does not and cannot arise. With respect, the said decision also supports the claim of the petitioner. No doubt, Mr. Desappan, learned counsel for the respondent, by relying on decisions of the Supreme Court in *The Employees State Insurance Corporation, Bhopal Vs. The Central Press and Another*, and *Employees' State Insurance Corporation Vs. M/s. F. Fibre Bangalore (P) Ltd.*, would contend that it is for the employer to approach the Insurance Court for their redressal. After going through the said decisions and in the light of the reasons mentioned above, I am of the view that both the decisions are not applicable to the facts of our case. I have already stated that in our case, even though the petitioner did not appear on the last hearing date that is on May 6, 1993, admittedly their representations dated May 27, 1991 and June 28, 1991 were with the respondent at the time of passing of the impugned order. Nothing has been considered, nor any finding was arrived at on the basis of the objection of the employer. In such a circumstance and in view of the opportunity provided in Section 45-A of the Act, I hold that the impugned order cannot be sustained and the same is liable to be quashed on the ground of violation of statutory provisions as well as principles of natural justice. I have already stated that the respondent has not applied his mind before passing the impugned order. On these grounds, I am of the view that petitioner cannot be directed to go before the Insurance Court.

8. In the light of what is stated above, the impugned proceedings of the respondent dated July 8, 1994 is quashed and the matter is remitted to the respondent for passing fresh orders. The respondent herein is directed to issue Notice to the petitioner, consider the representations made and pass fresh orders after affording adequate opportunity to the petitioner. Net result, the writ petition is allowed as stated above. No costs. Consequently, W.M.P. No. 26802 of 1994 is closed.