

(2008) 07 MP CK 0015

In the Madhya Pradesh High Court

Case No : Writ Petition No. 10855 of 2005

Harshal Paper and Board Mill Ltd.

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 02-07-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Employees State Insurance Act, 1948 — Section 75(2B)

Citation : (2008) 4 MPLJ 659

Hon'ble Judges : S.C. Sharma, J;Dipak Misra, J

Bench : Division Bench

Advocate : Rajneesh Gupta, for the Appellant; Brian D "Silva with Sajit Akhtar, for the Respondent

Final Decision : Dismissed

Judgement

Dipak Misra, J.

Invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India though the petitioner has prayed for many a relief, the fundamental and seminal relief from which the other reliefs quintessentially flow is that the mandate contained in section 75(2B) of the Employees' State Insurance Act, 1948 (for short "the Act") requiring an applicant to make a deposit of fifty per cent of the amount due from him before raising the dispute before the Employees' Insurance Court (hereinafter referred to as "the Court") should be declared ultra vires Article 14 of the Constitution of India.

Bereft of unnecessary details, the facts which are necessitous to be stated are that the petitioner being grieved by the orders passed by the authorities under the Act raised a dispute before the Court which by the impugned order dated 25-8-2005, Annexure P-1, insisted for deposit of 50% of the amount demanded by the Statutory Authority within a period of a fortnight for the purpose of entertaining the matter for adjudication. The Court by order dated 22-9-2005 dismissed the application for non-compliance with the order dated 25-8-2005. It

is obligatory to state here that most of the pleadings pertain to how the proceeding travelled from one forum to others and how the petitioner was not liable to pay the dues under the Act. Needless to emphasise that they are of no relevance when the constitutional validity of the provisions is required to be adverted only after adjudication of such issue, other aspects would only gain some kind of signification. Hence, brushing aside such assertions, we proceed to deal with the aspect of constitutional validity and pleadings which have nexus with the same.

It is contended that section 75(2B) of the Act was brought on the Statute Book with effect from 20th October, 1989 by the amending Act No. 29 of 1989. The said provisions stipulates a pre-deposit before adjudication by the Court. There is a proviso to the said section which enables the Court, for reasons to be recorded in writing, to waive or reduce the amount to be deposited under the said sub-section. It is contended that such pre-deposit does not stand to reason and in fact is unreasonable and oppressive more so when the demand notices are challenged and they require determination. It is urged that the Court exercises original jurisdiction and not appellate jurisdiction and hence, such pre-deposit as mandated by the statute smacks of arbitrariness when the demand has not yet been determined. The condition as enshrined under the provision is onerous and oppressive. It is set forth that though the proviso has been added empowering the Court to waive or reduce the amount yet it does not cure the inherent infirmity leaning in favour of one party which makes the provision, in a way, arbitrary and unworkable.

A counter affidavit has been filed by the respondent Nos. 2 and 3, the Corporation and its functionaries contending, inter alia, that a recovery certificate was issued to M/s Straw Board Products for the period of 1973-1976 and as the amount was not paid, the Corporation initiated recovery proceeding against the petitioner u/s 93A of the Act. The petitioner raised a dispute before the Court which was registered as Case No. 34/1993. Initially a temporary injunction was granted but later on the Court directed the petitioner to comply with the statutory requirement u/s 75(2B) of the Act by depositing fifty per cent of the dispute amount. The petitioner failed to deposit the same which entailed in dismissal of the case by order dated 22-9-2005. The petitioner after availing the statutory remedy of appeal has preferred the present petition assailing the constitutional validity as an afterthought on the ground that the said provision is cumbersome and an illusory remedy and, therefore, arbitrary, unreasonable and violative of Article 14 of the Constitution of India. It is put forth that the ESI Act is a beneficial piece of legislation intended to provide benefit to the employees in case of sickness, maternity, employment injury and certain other matters in relation thereto. An establishment covered under the provisions of the Act is required to pay its contribution and in the event of default is liable to pay simple interest and recovery may be carried out as arrears of land revenue. In a case where a factory or establishment does not file any returns, particulars, registers or records, the authorities as provided under the Act on the basis of information

available, can determine the amount of contribution payable in respect of the employees of that factory or establishment. An employer aggrieved by the determination can assail the same u/s 75 of the Act before the Court. The Legislature in its wisdom in order to meet the object of the Act and keeping in view the interest of the beneficiaries, has imposed the condition that the employer is required to deposit fifty per cent of the disputed amount before raising the dispute before the Court. There is also a postulate that the proviso empowers the Court to waive or reduce the pre-deposit and, therefore, the provision, by no stretch of imagination, can be regarded as unreasonable or arbitrary and further the bald asseveration that the provision is oppressive and illusory is neither correct nor sound.

We have heard Mr. Rajneesh Gupta, learned Counsel for the respondents and Mr. Brian D'Silva, learned Senior Counsel along with Mr. Sajid Akhtar for the respondents.

Mr. Rajneesh Gupta questioning the constitutional validity of the provision, has raised the following contentions:

(i) The pre-deposit as a condition before entertaining the dispute makes the provision illusory as the Court is the Court of first instance for the purpose of adjudication inasmuch as there is no mechanism for prior adjudication under any of the provisions of the Act.

(ii) The provisions contained in sections 44 and 45 of the Act which deal with the some kind of adjudication are basically one-sided determination and cannot be conferred the status of adjudication by any quasi-judicial authority but demand notices are issued in relation to the contribution payable by the employer and when the employer assails the same by raising a dispute, the command of pre-deposit as engrafted u/s 75(2B), makes the provision not only arbitrary but effectively takes away the purpose of the real adjudication.

(iii) The principal employer can agitate his grievance before the Court after a demand is made u/s 45 of the Act but he cannot go to the Court prior to such demand being issued and in the absence of effective adjudication, a provision which has been engaged by Act No. 29 of 1989 with effect from 20th October, 1989 despite the fact that the Act had come into force from 1948 makes it totally arbitrary and unreasonable.

(iv) The provision contained in section 75 of the Act is *pari materia* to section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity "the 2002 Act") the constitutional validity of which was assailed before the Apex Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, wherein the Apex Court has held that a provision enabling the Tribunal to waive or reduce the amount does not cure the inherent infirmity leaning one side in favour of the party and hence, the provision under challenge deserves to be declared as unconstitutional on similar foundation.

(v) The proceeding u/s 45 of the Act is in the nature of best judgment assessment and by no stretch of imagination it can be given the status of adjudication. The decision rendered in *Mardia Chemicals Ltd.* (supra), would be fully applicable to the present enactment and further as the provision affects the rights of the parties seeking adjudication to a major extent, it smacks of total arbitrariness and unreasonability.

(vi) In the name of beneficial legislation a hindrance cannot be caused for filing an appeal by the employer requiring him to deposit a certain percentage of the demand made as that essentially affects the rights of a party to have access to justice which is fundamental to the philosophy of the Constitution and a basic facet of human rights.

Mr. Brian D'Silva, learned Senior Counsel, resisting the aforesaid contentions has canvassed as follows:

(a) The object to the amending provision has to be properly appreciated to understand and appreciate the need for incorporation of such a provision and the scheme of the Act has to be scrutinized before comparing it with the 2002 Act inasmuch as the reasons given by the Apex Court for declaring the provision, namely, sub-section (2) of section 17 of the 2002 Act, as unreasonable, arbitrary and violative of Article 14 are totally different as in the said case a different kind of enactment was under test but here a different piece of legislation is under assail.

(b) If the avowed purpose of the Act is taken into consideration it would be inapposite to hold that the provision relating to pre-deposit is oppressive, onerous and unreasonable.

(c) The statute itself imposes certain obligations on an employer and the determination made u/s 45A though has been treated as a best judgment assessment yet the Corporation can call upon the employer to deposit the amount with the Corporation and the employer cannot be allowed to contend that there is no primary forum of decision and hence, there cannot be compulsion to deposit before getting an adjudication by the Court.

(d) There is no denial of access to justice but it is hedged with a condition and if the said condition is tested on the anvil and touchstone of proportionality and reasonability regard being had to the scheme of the Act the said condition passes the test and hence, is constitutional.

To appreciate the submissions raised by the learned Counsel for the parties, it is necessary to scan the anatomy and scheme of the Act. The Act was enacted to provide certain benefits to employees in case of sickness, maternity and employment injury and to make provisions for certain other matters in relation thereto. The Act, as the provisions clearly unfold and undrape, is a legislation for self financial social security in which every contributor is a beneficiary. In essence, it is a beneficial legislation and the dictionary clause, in many a facet,

covers a wide spectrum. The definition of "employee" u/s 2(9) has been incorporated to mean part time employees, employees on daily wages, casual workers, employees working in show-rooms and employees engaged by contractors, etc. The definitions of "factory", "immediate employer" and "manufacturing process" have also been incorporated to cover a large canvas. Chapter IV deals with contribution. Section 38 occurring therein provides that all employees in the factory and establishment to which the Act applies shall be insured in the manner provided in the Act. In *Transport Corporation of India Vs. Employees' State Insurance Corpn. and Another*, the Apex Court has ruled that the initial and vital endeavour should be to identify the beneficiaries or the employees for insurance, that being the mandate of the Act.

It is worth noting that section 40 casts an obligation on the employer to pay contribution in the first instance. Section 41 provides for recovery of contribution from the immediate employer. Section 43 deals with the method of payment of contribution. Section 44 stipulates that the employers shall submit to the Corporation or to such officer such return in such form and containing such particulars relating to persons employed by him or any factory or establishment in respect of which he is the principal or immediate employer as may be specific in the regulations framed in that behalf. Section 45 provides for appointment of inspectors for the purposes of the Act and prescribes their functions and duties. Section 45A being relevant for the present purpose is reproduced below:

45-A. Determination of contributions in certain cases. -- (1) Where in respect of a factory or establishment no returns, particulars, registered 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 45 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 such order as an arrear of land revenue u/s 45B or the recovery under sections 45-C to 45-1.

On a perusal of the aforesaid provisions it is clear as crystal that an order is passed by the Corporation on the information available after affording a reasonable opportunity of being heard to the employer. Section 45B provides for recovery of contribution. Chapter V deals with the benefits which are provided to the insured persons. Section 68 confers rights on the Corporation to take action

where the principal employer fails or ignores to pay any contribution. Chapter VI deals with the adjudication of disputes and claims. Section 74 provides for constitution of Employees' Insurance Court. Section 75 provides for matters to be decided by the Employees' Insurance Court. Section 75(2B), the constitutional validity of which has been challenged, is as follows:

75. Matters to be decided by Employees' Insurance Court. -- (2-B) 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 :

Provided that the Court may, for the reasons to be recorded in writing, waive or reduce the amount to be deposited under this sub-section.

Be it noted that section 75(3) bars the jurisdiction of Civil Courts. Section 85, which occurs in Chapter VII provides for punishment for failure to pay contribution, etc. Section 85B empowers the Corporation to recover the damages and damages can be levied for delay in payment of contribution.

The aforesaid provisions have a definite purpose and an obligation has been cast on the employer. There is a mode of computation and the determination is provided. The principles of natural justice have statutorily been incorporated before any determination is made. The Corporation has been given ample power to take action to prosecute and to recover damages.

In Employees' State Insurance Corporation Vs. M/s. F. Fibre Bangalore (P) Ltd., , a two-Judge Bench of the Apex Court, after referring to section 45A of the Act, has held as under:

4. It would thus be seen that the employer, on making the provisions of the Act applicable to the factory or the establishment, as the case may be, is statutorily under an obligation to register itself with the Corporation and keep depositing the employer's and employee's contribution within the period specified therein. The question is : as to who would approach the Insurance Court for adjudication and determination of a dispute whether the establishment of the employer is attracted by the provisions of the Act and/or what is the number of employees it has employed etc.? It is seen that section 45A is in the nature of best assessment judgment on the basis of the information collected by the Inspector. In the impugned order the High Court holds that it is for the employer to challenge it and seek adjudication. When there was dereliction of duty on the employer to either register itself with the Corporation under the Act or when there is failure to deposit the contribution with the Corporation under the Act or failure to deposit the contribution with the account of the Corporation towards employer's and employee's contribution as envisaged hereinbefore, the Corporation is empowered to make best assessment judgment u/s 45A and call upon the employer to deposit the amount with the Corporation.

The Full Bench of the High Court has held that in a case where the order u/s 45A becomes final, there is no need for the Corporation to seek adjudication before the Insurance Court. In all other cases, the Corporation is required to go to the Insurance Court, have it adjudicated and then make a demand. We are of the view that the Full Bench of the High Court is clearly in error to reach that conclusion. Though section 75 of the Act does not envisage as to who has to approach the Insurance Court, by necessary implication when the employer denies the liability or applicability of the provisions of the Act or the quantum of the contribution to be deposited by the employer, it is for him to approach the Insurance Court and seek adjudication. It is not for the Corporation in each case whenever there is a dispute, to go to the Insurance Court and have the dispute adjudicated. Otherwise; the Act would become unworkable and defeat the object and purpose of the Act.

Submission of Mr. Gupta, learned Counsel for the petitioner, is that it is a best judgment assessment and hence, there is no adjudication. To appreciate the said facet one has to scrutinise the concept of best judgment assessment. The conception of best judgment assessment has a different connotation. In *Commissioner of Income Tax, Central and United Provinces vs. Laxminarain Badridas*, (1937) 5 ITR 170 (PC), it was held by Their Lordships that an officer who makes an assessment to the best of his judgment must not act dishonestly, vindictively or capriciously because he must exercise judgment in the matter.

In *State of Orissa Vs. Maharaja Shri B.P. Singh Deo*, , a two Judge Bench of the Apex Court ruled that the power to levy assessment on the basis of best judgment is not an arbitrary power. It is an assessment on the basis of best judgment. In other words the assessment must be on some relevant material.

In *Commissioner of Income Tax Vs. Ranicherra Tea Co. Ltd.*, , the Division Bench opined that in making a best judgment assessment the Assessing Officer does not possess absolute arbitrary authority to assess any figure he likes and although he is not bound by strict judicial principles, he should be guided by rules of justice, equity and good conscience.

We have referred to the aforesaid decisions to show that best judgment assessment inheres the term judgment and there cannot be any kind of caprice or arbitrariness in the said kind of order. In section 45A of the ESI Act clearly reveals that the amount is determined on perusal of records and after affording opportunity of being heard to the principal employer or immediate employer or a person in-charge of the factor or establishment. The opportunity that is given has to be reasonable.

In view of the aforesaid, it cannot be said that there is no adjudication at all. That apart aforesaid paragraphs would show how Their Lordships have viewed the provision and held about the conferral of such statutory powers on the Corporation.

Learned Counsel for the petitioner has commended us to the decision rendered in

Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., , to highlight that it is an adjudication in the first instance and, therefore, postulation of any kind of deposit is unconstitutional, being arbitrary, as it makes the adjudication totally illusory. It is urged by him that the Apex Court in the said decision referred to Smt. Ganga Bai Vs. Vijay Kumar and Others, , to bring in a distinction between the right of suit and the right of appeal. There is an inherent right of every person to bring a suit of civil nature and unless the suit is barred by statute, one may, at one's peril, bring a suit of one's choice. A suit for its maintainability does not require authority of law and it is enough that no statute bars the suit but the position in regard to appeals is quite opposite because the right of appeal inheres in no one and, therefore, an appeal for its maintainability must have the clear authority of law and that is why the right of appeal is described as creature of statute. The learned Counsel submitted that the Apex Court has made a distinction between the suit and the appeal and thereby the first adjudication and the adjudication at the appellate stage. It is contended by him that any kind of pre-deposit at the first instance of the proceeding makes the adjudication totally illusory and unreasonable and thereby invites the frown of Article 14 of the Constitution of India. To appreciate the said submission, it is worth noting that Their Lordships were dealing with the provisions contained in sections 17(1) and (2) of the 2002 Act. Under the said Act, section 13 provides for enforcement of security interest which is enforceable by the secured creditors straight away. Under sub-section (4) of the said section, the secured creditor is entitled to take possession of secured asset and may transfer the asset by way of lease. Their Lordships in Paragraph 33 of the decision posed a question whether the remedy available u/s 17 of the Act is illusory for the reason that it is available only after the action is taken u/s 13(4) of the Act and the appeal would be entertainable only on deposit of 75% of the claim raised in the notice of demand. The Apex Court took note of the facts, measures to be taken by the secured creditors, the provisions of the Transfer of Property Act and the fact that a secured creditor may enforce any security interest without the intervention of the Court or Tribunal. Their Lordships addressed to the issue whether the protection to the borrowers and the appeal provided under the Act and eventually dealt with the concept whether the provision of appeal has been made to regulate the power and to stop abuse of the same by a recalcitrant party. In that context Their Lordships observed that the proceedings u/s 17 of the Act are actually not appellate proceedings but constitutes the initial action brought before the forum as prescribed under the Act raising grievance against the action or measures taken by one of the parties. Their Lordships in Paragraph 60 of the judgment have expressed the view as under:

60. The requirement of pre-deposit of any amount at the first instance of proceedings is not to be found in any of the decisions cited on behalf of the respondent. All these cases relate to appeals. The amount of deposit of 75% of the demand, at the initial proceedings itself sounds unreasonable and oppressive more particularly when the secured assets/the management thereof along with

the right to transfer such interest has been taken over by the secured creditor or in some cases property is also sold. Requirement of deposit of such a heavy amount on basis of one sided claim alone, cannot be said to be a reasonable condition at the first instance itself before start of adjudication of the dispute. Merely giving power to the Tribunal to waive or reduce the amount, does not cure the inherent infirmity leaning one-sidedly in favour of the party, who, so far has alone been the party to decide the amount and the fact of default and classifying the dues as NPAs without participation/association of the borrowers in the process. Such an onerous and oppressive condition should not be left operative in expectation of reasonable exercise of discretion by the concerned authority. Placed in a situation as indicated above, where it may not be possible for the borrower to raise any amount to make the deposit, his secured assets having already been taken possession of or sold, such a rider to approach the Tribunal at the first instance of proceedings, captioned as appeal, renders the remedy illusory and nugatory.

Thereafter Their Lordships in Paragraph 64 expressed the view as under:--

64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that (i) it is imposed while approaching the adjudicating authority of the first instance, not in appeal, (ii) there is no determination of the amount due as yet, (iii) the secured assets or its management with transferable interest is already taken over and under control of the secured creditor, (iv) no special reason for double security in respect of an amount yet to be determined and settled, (v) 75% of the amount claimed by no means would be a meagre amount, (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of section 17 of the Act is unreasonable, arbitrary and violative of Art. 14 of the Constitution.

In paragraph 68 of the judgment, Their Lordships opined that the remedy of appeal available under the Act as contained in section 17 can be availed after measures have already been taken by the secured creditor under subsection (4) of section 13 of the Act which includes the sale of the secured assets, taking over its management and all transferable rights thereto.

On a perusal of the aforesaid decision it is luminescent that the Apex Court declared the provisions unconstitutional being arbitrary and unreasonable on the grounds or reasons specified in paragraph 64 of the judgment.

The provisions of the Employees' State Insurance Act are quite different. We have referred to sections 40, 45, 45-A and 45-B to show the obligation cast on the principal employer and the process of computation. The Apex Court in *Fibre Bangalore (P) Ltd.* (supra), has expressed the opinion that the Corporation is empowered to best assessment judgment u/s 45A and call upon the employer to deposit the amount with the Corporation. Their Lordships have opined that it

is not for the Corporation to go in each case to the Employees' Insurance Court and have the dispute adjudicated. We have dealt with the concept of best judgment assessment to show it has a different connotation. That apart in contradistinction to the 2002 Act the principal employer is not put in such a position as is the case of borrowers under the 2002 Act. The reasons which have been mentioned in paragraph 64 of *Mardia Chemicals Ltd. (supra)* are not applicable in the case of deposit u/s 75(2B) of the Act. The said provision has a purpose. The principal employer cannot deny the liability for the sake of it. When there is a best assessment judgment upon hearing, the employer cannot approach the Court and obtain an interim order as the said forum has power to grant stay.

The controversy can be looked from another angle. As we indicated earlier, the provisions of the 1948 Act are beneficial in nature. While testing the constitutional validity of a beneficial legislation on the anvil of Article 14 of the Constitution, a doctrinaire approach cannot be taken recourse to as it might choke all beneficial legislation. It was so stated by the Constitution Bench in *Harman Singh and Others Vs. Regional Transport Authority, Calcutta and Others*, . True it is, it was stated in a different context but the beneficial legislation was given a different kind of connotative expanse in the context of constitutional validity.

In *V.C. Shukla and Others Vs. State (Delhi Administration)*, , it has been opined that Article 14 of the Constitution should not be applied with mathematical precision or nicety. It was also held therein that a beneficial legislation should not be frustrated by taking a pedantic approach to Article 14. We are absolutely conscious that the said decision was rendered with regard to the classification facet but in the present case we are concerned with the unreasonableness and arbitrariness.

When we have stated so it may not be understood that this Court has expressed an opinion that a beneficial legislation cannot be struck down as unconstitutional even if it offends Article 14 of the Constitution. Needless to emphasise it has to pass the test of reasonability. What is to be perceived is whether the sum required to be deposited by an employer under the Scheme of the Act is so onerous that it makes the provision arbitrary. The condition has to be scrutinised on the parameters of the scheme of the Act. The Corporation has been conferred with certain responsibility to insure the employees. If the money is not collected the scheme of the Act cannot be worked out. If we apply the principles of proportionality or to put it differently whether the provision is weighed on the scale of proportionality, there can be no scintilla of doubt, it satisfies the same because the benefit to the collective is protected. The submission of Mr. Gupta that access to justice is a human right and the same is totally curbed by incorporation of such a pre-deposit, is neither sound nor correct as there is no denial of access to justice but is hedged with a condition and the condition as we perceive is a reasonable one. Therefore, we are disposed to think that the

provision pertaining to pre-deposit as engrafted u/s 75(2B) does not offend Article 14 of the Constitution of India and accordingly, the said provision is treated as intra vires the Constitution. As we have indicated earlier, that there is an adjudication u/s 45A of the Act and the principles of natural justice are expressly provided therein. The adjudication has its own character and contour. The same is distinct from the provisions of the 2002 Act. It does not put the principal employer in such a situation as the 2002 Act put the borrowers. True it is, the principal employer can dispute the claim put forth by the Insurance Corporation but the deposit as stipulated in section 75(2B) cannot be said to be harsh, unreasonable and arbitrary or it cannot be said that it is an adjudication at the first instance as if it is a suit. The Parliament in its wisdom has provided many measures to curb and control the principal employer and to make them comply with the provisions of the Act. The determination is not made at the whims and fancies of the Corporation. The Regional Director is authorised to adjudicate, determine and compute before the same is called in question before the Employees' Insurance Court. The pre-deposit in our considered view, cannot be held to be unreasonable and arbitrary. The parity that is sought to be drawn by Mr. Gupta between the provisions of the 1948 Act and that of the 2002 Act, in our considered opinion, is misconceived.

Resultantly, we perceive no merit in the writ petition and accordingly, the same stands dismissed without any order as to costs.