

(2009) 02 PAT CK 0132
In the Patna High Court

Hazari Sah

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 27-02-2009

Acts Referred:

Employees State Insurance Act, 1948 — Section 45(2), 45A(1), 45B

Citation : (2009) 122 FLR 972 : (2010) 1 LLJ 66 : (2009) 3 PLJR 64

Hon'ble Judges : Ramesh Kumar Datta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Ramesh Kumar Datta, J.—The interlocutory application has been filed for amending the prayer made in the writ application so as to seek quashing of the entire recovery proceedings as also the demand for realization of Rs. 41,845/- and previous demand of Rs. 32,587/-, as contained in Annexures-1 and 2 to the writ application.

It is submitted by learned Counsel for the petitioner that all the facts are already on the record of the writ application but due to inadvertence the proper relief has not been sought.

2. In the facts and circumstances of the case, the prayer for amendment is allowed.

3. I.A. No. 1231/2009 is accordingly disposed of.

4. Heard learned Counsel for the parties.

5. The petitioner seeks quashing of the demand of Rs. 41,845/- and the previous demand of Rs. 32,587/- as respectively raised by order dated September 16, 2008 (Annexure-1) and stated in the requisition dated February 3, 2001 issued by the Revenue Recovery Officer, Employees State Insurance Corporation (Annexure-2) and also for quashing the entire recovery proceedings under the said Act in relation to the contribution for the period from November 20, 1979 to

February 26, 1983.

6. The petitioner claims to have started business of power looms in small scale industry in the year 1979 which was running as a family business with two power looms. It is submitted that 4-5 family members were working in the same. The business lasted for only three years and due to financial crisis it had to be shut down. The petitioner claims to be an old man of 85 years and suddenly he learnt about issuance of a warrant of arrest dated September 16, 2008 for the recovery of arrears under the Employees State Insurance Scheme amounting Rs. 41,845/-. The petitioner claims complete lack of knowledge about such arrears/outstanding since the business had been liquidated from early 1980's itself. On enquiry from the ESI Corporation Office, Patna, he was informed that the arrear Rs. 41,845/- was due on account of contributions payable by him as an employer for the period from November 20, 1979 to February 26, 1983 and a copy of a notice dated January 14, 2002 was also supplied which showed a liability towards contribution of Rs. 10,325/- and rest amount was the interest.

7. The petitioner claims that no notice was ever issued to him before the said liability was created against him and, as a matter of fact, the petitioner is not liable for any contribution as he never employed any one in the said factory. It is stated that everything has been done behind his back without providing him reasonable opportunity of being heard.

8. In the counter affidavit filed on behalf of the respondent-ESI Corporation, the stand taken is that the Insurance Inspector of the Corporation had made a survey report of the petitioner's establishment on November 20, 1979 and found that 11 persons were employed for wages with the use of power in the said unit and thus the unit became liable for coverage under the ESI Act. On the basis of such survey report, ESI Code was issued and the advice in Form C-11 was also served upon the petitioner. For the said reasons, it is submitted that the petitioner is a defaulter under the Act and the ESI Corporation has rightly started the certificate proceedings for recovery of the amount on his failure to pay the contribution.

9. Learned Counsel for the petitioner relies upon the provisions of Section 45-A(1) of the ESI Act, 1948 which is in the following terms:

45-A. 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 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 contributions 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 on being heard.

10. It is submitted that no recovery of contribution can be made u/s 45-B of the Act as an arrear of land revenue or u/s 45-C by issuance of certificate to the Recovery Officer as has been done in the present case unless there has been determination of contribution to be made u/s 45-A of the Act and such determination can only be made after giving reasonable opportunity to the employer of being heard. It is not contended that neither any opportunity of hearing was given by serving notices upon the petitioner nor is there any order in existence which can be called a determination of contribution u/s 45-A of the Act.

11. Learned Counsel for the ESI Corporation, on the other hand, relies upon Annexure-E to the supplementary counter affidavit in which the calculation of the amount of contribution has been shown. He also submits that the proviso to Section 45-A(1) of the Act has been brought into force by the; Amendment Act, 1989 and was not in existence at the relevant time, hence the petitioner cannot claim any prior notice and an opportunity of being heard under the said proviso.

12. From a perusal of Annexure-E it is evident that it is a mere calculation of amount without there being any order determining the liability for contribution by the petitioner and the same cannot at all be considered as a determination u/s 45-A(1) of the ESI Act, which acquires statutory force once it has been made.

13. So far as the submission regarding the proviso to Section 45-A(1) being subsequently, introduced in the Act and therefore no opportunity of hearing was required to be provided is concerned, the same has only to be noticed to be rejected. There can hardly be any doubt that a determination made u/s 45-A(1) of the Act entails adverse financial consequence upon an employer and thus the very nature of such an order implies the application of principles of natural justice by the provision of a reasonable opportunity of being heard. Thus, even in the absence of the proviso prior to 1989 it has to be presumed that the authorities under the ESI Act had a duty to act fairly and in compliance of the principles of natural justice are required to provide necessary opportunity to the concerned employer to be heard before making any determination of contribution under the said provision. The subsequent provision merely clarifies the legal position and does not change the actual ground realities.

14. However, the most important aspect of the matter is that there has to be determination u/s 45-A(1) of the Act before any such liability can be imposed upon an employer under the ESI Act. No such order determining the contribution has been brought on the record and mere calculation cannot take place of such an order.

15. In the aforesaid view of the matter, this Court has no hesitation in holding that the requisition made for instituting recovery proceedings by Annexure-2 is without any basis since there is no preceding order u/s 45-A of the Act. The same, therefore, is illegal and recovery proceedings initiated pursuant to the said

requisition are also equally illegal and contrary to law. The certificate to the Recovery Officer, Annexure-2 and the Recovery Proceedings initiated pursuant thereto are accordingly quashed. Consequently, the warrant of arrest dated September 16, 2008 is also quashed. The writ application is allowed.