

(1981) 04 KAR CK 0007
In the Karnataka High Court
Case No : W.A. No. 1762 of 1980

Hegde and Golay Limited

APPELLANT

Vs

Esic and Another

RESPONDENT

Date of Decision : 01-04-1981

Acts Referred:

Constitution of India, 1950 — Article 226
Employees State Insurance Act, 1948 — Section 2 (9), 39, 45 A, 75

Citation : (1981) ILR (Kar) 1153 : (1981) 2 KarLJ 83 : (1982) 1 LLJ 48

Hon'ble Judges : D M Chandrashekhar, C.J.;N. Venkatachala, J

Bench : Division Bench

Judgement

D.M. Chandrashekhar, C.J.—Is the Employees' State Insurance Corporation under an obligation to hear an employer before determining the contribution payable by him under the Employee's State Insurance Act, 1948, if there is any dispute as to such liability ? That question arises for decision in this appeal.

2. By consent of learned counsel this appeal was treated as having been posted for hearing and we heard them.

3. This is an appeal from the order of Venkatesh, J., dismissing W.P. No. 3444 of 1980. The petitioners therein have preferred this appeal and they will hereinafter be referred to as the employer.

4. The material facts for the purpose of this appeal, are briefly these : The employer is engaged in the manufacture of watches. It is liable to pay contribution under S. 39 of the Employees' State Insurance Act, 1948 (hereinafter referred to as the Act) in respect of its employees. The Deputy Regional Director of the Employees' State Insurance Corporation (hereinafter referred to as the Corporation) address a letter on 12/21-9-1977 (produced as Annexure E1 in the writ petition) to the employer wherein it was stated inter alia, that the Inspector under the Act who verified the records of the employer's factory had, inter alia made an observation that the apprentices/trainees working in the employer's factory were covered under S. 2(9) of the Act. By that letter

the employer was also asked to pay contribution in respect of them. Another letter dated 20-1-1979 (produced as Annexure E in the writ petition) was sent to the employer wherein the employer was asked to send a copy of the agreement between it and persons whom it claimed to be apprentices in its factory. The employer sent a copy of such agreement and also addressed on 26-9-1979 a letter (produced as annexure F in the writ petition) to the Regional Director in which it referred to the decision of the Supreme Court in V. P. Gopala Rao Vs. Public Prosecutor, Andhra Pradesh, holding that apprentices are mere trainees for a particular period and are not employees and as such their employer is under no liability to cover them under the Act. The employer asserted that no further action was called for with regard to coverage of such persons. On 17-10-1979 the Regional Director sent a letter (produced as Annexure C in the writ petition) in which it was stated, inter alia thus :

"Please show cause as to why any assessment should not be made by order as provided under S. 45A of the Employees" State Insurance Act

Please take notice that unless contributions outstanding upto date is paid immediately on receipt of this letter and in any case not later than 15 days hereof this office will be constrained to determine the amount of contributions payable by order under S. 45A of the Employees" State Insurance Act (a copy of order enclosed) and further cause the same to be recovered through the Collector along with interest as arrears of land revenue under S. 45B of the Act,"

The order enclosed to that letter inter alia reads;

Whereas the principal employer of factory M/s. Hegde and Golay Limited Bangalore, Code No. 53-1651-64 failed to pay arrears of contribution detailed below in accordance with S. 44 of the Employees" State Insurance Act.

Now, therefore, in exercise of the power vested in me under sub-s, (1) of S. 45A of the employees" State Insurance Act, I hereby determine on the basis of the information available the amount of contributions payable in respect of the employees of the above factory as follows :

Period	Amount of Basis Contribution	Basis	From	To	1,	2,	3,			4
Contribution in respect of Apprentice Trainees as per para 14 of this office letter of even number dt. 21/23-9-77 11717-02										

5. The employer filed the writ petition, W.P. No. 3444 of 1980, praying for quashing the order of the Regional Director, dated 16/17-10-1979 (produced as Annexure A in the writ petition). In the writ petition, the employer had contended that apprentices could not be regarded as employer, that hence the employer, was not under any obligation to pay contribution under the Act in respect of them, that the Regional Director had no jurisdiction to demand the contribution under the Act in respect of them and hence his order was liable to be quashed especially when that order was made without holding an enquiry and in violation of principles of natural justice.

6. In the statement of objection filed on behalf of the Corporation it was pleaded inter alia thus : The employer did not have any Scheme or course for training of any person. The so called apprentices were no other than its regular employees. After taking into consideration the method employed by the employer in recruiting them their service conditions and all other relevant factors, the Regional Director came to the conclusion that they were in reality regular employees of the employer. Therefore, the employer was called upon to pay the contribution. Since the employer failed to do so, the Regional Director had no alternative but to proceed under S. 45A of the Act and to determine the liability. If the employer disputed the determination made by the Regional Director, such dispute had to be decided by the Employees Insurance Court under S. 75 of the Act. Since the employer had an alternative and effective remedy in respect of the impugned order of the Regional Director the discretionary jurisdiction of this Court under Art. 226 of the Constitution should not be exercised.

7. The learned single Judge held inter alia thus :

"The Deputy Regional Director himself is said to have carried on a test inspection of the factory on 25-8-1978 to find out as to whether certain averments made by the company disclaiming its liability to pay contribution in the case of some of these persons were correct or not After such inspection of the returns and verification of the facts the Corporation appears to have come to the conclusion that the Company had evaded making contribution in the case of some of its employees and having come to this tentative opinion, it issued a show cause notice as per Ext. A to the company directing it to show cause as to why assessment should not be made by order as provided under S. 45A of the employees State Insurance Act, and has further determined by its order under S. 45A the amount the company was liable to contribute for the period in question " After observing these formalities, if the Corporation takes a decision under S. 45A, it cannot be said that in the matter of determining the amount and in holding an enquiry in this regard, it had violated the principles of natural justice."

8. The learned single Judge also took the view that since the petitioner had an alternative remedy of approaching the Employees Insurance Court under S. 75 of the Act, it would not be appropriate to quash the order impugned in the writ petition.

9. Sri M. Papanna, learned counsel for the Corporation, did not dispute that in respect of apprentices, the Employer was not liable to pay any contribution under the Act. However, he contended that persons whom the employer claimed to be apprentices, were in reality its employees and that it called them apprentices for evading its liability to pay contribution in respect of them. Sri A. G. Holla, learned counsel for the employer, did not dispute the proposition that if persons styled as apprentices were really employees, the employer was liable to pay contribution under the Act in respect of them.

10. Hence, the two questions that arise for determination in this appeal, are :

(i) Whether the Regional Director should have heard the employer before determining that persons claimed as apprentices by the employer, were employees; and

(ii) Whether the writ petition is not maintainable on account of the availability of an alternative remedy by way of adjudication under S. 75 of the Act by the Employees' Insurance Court.

11. On the first of the above two questions, Sri Papanna submitted that in the return submitted by the employer it had not shown the names of those whom it claimed to be apprentices, that therefore there was a failure on its part to submit the return as required by S. 44 of the Act in respect of them and that hence the Regional Director was competent to make a determination under S. 45A of the Act on the basis of the materials available to him and to call upon the Employer to pay the contribution according to such assessment. Sri Papanna maintained that such determination under S. 45-A being provisional and subject to final adjudication by the Employees' Insurance Court under S. 75, it was not necessary for the Regional Director to hear the Employer before making such determination.

12. Sub-section (1) of S. 45-A of the Act, reads :

"45-A (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 S. 44, if any, Inspector or other official of the Corporation referred to in sub-s. (2) of S. 45 is obstructed by the principal or immediate employer or any other person, in exercising this function or discharging his duties under 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."

The conditions precedent for making a determination under that sub-section are :

(i) failure to maintain registers and records in accordance with the provisions of S. 44 and/or to submit a return and to furnish particulars, or

(ii) obstructing the Inspector or any other official of the Corporation in exercising his functions and discharging his duties under S. 45.

13. Here, it is not the case of the Regional Director that the employer had obstructed the Inspector or any other official of the Corporation in exercising his functions or discharging his duties. Sri Papanna urged that the first of the aforesaid alternative conditions was satisfied in the present case. We shall examine whether that condition was satisfied. The employer had submitted a return in respect of its employee, but had not included therein the names of persons whom it claimed to be apprentices. Sri papanna contended that there was failure on the part of the employer to submit a return since the return did

not include the name of such persons. We are unable to accept this contention of Sri Papanna. If the employer had submitted a return showing the names of only those persons whom it claimed to be its employees, it cannot be said that it was a case of no return, merely said because such return did not include persons about whose nature of employment there was a dispute between the employer and the Corporation. What sub-s. (i) of S. 45-A contemplates is the total omission to submit a return and not a case where the return submitted does not include persons about whose nature of employment there is a dispute.

14. When there is a dispute between an employer and the authorities of the Corporation on any point touching the liability of the former under the Act, the determination of such disputed point by the latter, should be in conformity with principles of natural justice. As observed by the Full Bench of this Court in *Regional Director, E.S.I. Corporation v. Fibre Bangalore (P) Ltd.* AIR 1980 Kar 86, the expression "determine" occurring in S. 45-A is far too strong to permit of its being understood as meaning anything but a decision which, unless set aside by the Insurance Court in exercise of its powers under S. 75, is enforceable under S. 45-B.

15. In *Free India Private Ltd. Vs. Regional Director, Employees' State Insurance Corporation*, there was a controversy between the Regional Director and the employer as to the number of employees in the latter's factory. The Regional Director made an order under S. 45A of the Act determining the contribution payable by the employer and sent a certificate to the Collector for recovering the amount of such contribution as an arrear of land revenue. That order was impugned in the writ petition, inter alia, on the ground that the employer was not heard before such order was made. Upholding that contention, this is what Ramaprasada Rao, J. (as he then was), observed :

"In my view, if there is a dispute which is genuine as between a statutory authority or Government, and a citizen in the matter of payment of dues, then until the dispute is resolved in a manner known to law, processing further of the demand by recourse to the Revenue Recovery Act, is not possible and is not available

An employer is liable to contribute under the Employees State Insurance Act only if he comes within the various yardsticks prescribed and dealt with by the Act The reports of the Inspectors of the Corporation no doubt have great weight. But, those reports cannot be an equation for acceptable proof on which action could be taken against the employer without a further reasonable or fair opportunity being given to the employer to prove to the contrary The determination of liability is not an empty formality. It should also satisfy the essential principle of natural justice. Before a final order is made by the Corporation under S. 45A(2), it is essential that the person to suffer the claim has to be notified and given another opportunity to explain whether the quantum of determination as made by the Corporation is justified or not. The determination under S. 45A(1), which the Corporation has to make is not an

administrative order, but is a quasi-judicial one which will impinge upon the rights of parties. That being so, the principles of natural justice have to be adhered to and the determination of liability being made after due notice and a reasonable enquiry."

16. We are in respectful agreement with the aforesaid observations. Though the question whether a person is an employee within the meaning of the Act, is one of the questions that can be adjudicated by the Employees Insurance Court under S. 75 of the Act, the Regional Director is not absolved of his obligation to follow the rules of natural justice and give an opportunity to the employer before determining that question, because such determination will have civil consequences on the employer. We are unable to accept the contention of Sri Papanna that a determination made by the Regional Director under S. 45A, is only a provisional order subject to final adjudication under S. 75 of the Act and hence can be done without hearing the employer.

17. In the present case after the employer sent to the Regional Director a copy of the agreement between it (the Employer) and persons whom it claimed to be apprentices, no further opportunity was given to the employer to substantiate its claim. Though the letter dated 16/17-10-1979 called upon the employer to show cause why an assessment should not be made by an order as provided under S. 45A of the Act, that letter called upon the employer to pay the amount determined under that order without waiting for the employer showing cause against the proposed order.

18. In these circumstances, we have no hesitation in holding that the impugned order of the Regional Director is violative of principles of natural justice and hence void.

19. We shall now deal with the question whether the employer could invoke the jurisdiction of this Court under Art. 226 of the Constitution when it had an alternative remedy by approaching the E.S.I. Court under S. 75 of the Act.

20. Sri Papanna relied on the decision of a Division Bench (consisting of one of us) of this Court in WA No. 64 of 1974. There, the Regional Director on the strength of the report of the Inspector, called upon the employer to pay contribution under the Act in respect of 21 employees. The employer disputed his liability to pay contribution in respect of them on the ground that two of the persons working in that establishment were his partners, and not employees. The determination made by the Regional Director was impugned in the writ petition out of which that appeal arose. Dismissing that petition, Jaganatha Shetty, J., observed that the question in dispute between the parties was not a pure question of law, that the determination in of that question depended upon several factors and, therefore, it was not possible to decide that question in the writ petition. In the appeal preferred by the employer, the Division Bench held that the learned single Judge was justified in dismissing the writ petition. In the appeal preferred by the employer, the Division Bench held that the learned single

Judge was justified in dismissing the writ petition, because the employer had an alternative remedy of going before the ESI Court. There, no contention appears to have been taken by the employer that the regional Director had made the determination under S. 45A of the Act without hearing the employer and therefore, the order of the Regional director was violative of principles of natural justice. It is well settled that where a Tribunal or quasi-judicial authority makes an order in violation of principles of natural justice, the existence of an alternative remedy like an appeal, would not be a ground for refusing to exercise the jurisdiction of this Court under Art. 226. Hence, we are unable to agree with the view taken by the learned single Judge that the exercise of the jurisdiction under Art. 226 was not called for in the present case, since the employer had an alternative remedy by approaching the E.S.I. Court under S. 75 of the Act.

21. In the result, we allow this appeal reverse the order of the learned single Judge, allow the writ petition and quash the impugned order of the Regional Director and the revenue recovery proceedings pursuant to that order. It will be open to the Regional Director to determine afresh, after giving a reasonable opportunity to the employer, whether or not persons claimed by it (the employer) are apprentices or employees.

22. In this appeal, we direct the parties to bear their own costs.