(2016) 09 GAU CK 0004

In the Gauhati High Court

Case No : WP(C) No. 3775 of 2010.

Hem Kumar Gogoi - Petitoner @HASH Employees''s State Insurance Corporation and Others

Date of Decision : 01-09-2016

Acts Referred:

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

Citation : (2016) 6 GauLJ 527 : (2017) 1 GauLR 137 : (2016) 4 GauLT 911 : (2016) 5 NEJ 512

Hon'ble Judges : A.K. Goswami, J.

Bench : Single Bench

Advocate : Mr. P. Bora, Mr. D. Senapati, and Ms. S. kalita, Advocates, for the Petitioner; Mr. K.K. Nandi and Ms. P. Borgohain, Advocates, for the Respondents

Final Decision : Allowed

Judgement

Mr. A.K. Goswami, J.(Oral) - Heard Mr. P. Bora, learned counsel for the petitioner. Also heard Mr. K. K. Nandi, learned Standing Counsel, Employees'' State Insurance Corporation (Corporation), appearing for all the respondents.

2. The relevant facts, for the purpose of disposal of the writ petition, are that the petitioner was allotted an industrial Shed at the Industrial Estate, Tinsukia, in the year 1975 and he had established a Printing Press in the name and style of "Assam Paper Industry", which was a Small Scale Industry. It is averred that the industry, having run into rough weather, had been closed down in the year 1992. It is pleaded that the industry, at no point of time, employed 10 numbers of employees or more and, therefore, the provision of the Employees'' State Insurance Act, 1948 (in short, ''the Act) is not applicable. Yet, on the basis of a perfunctory enquiry conducted by the Inspector, without serving notice and without verifying the relevant records, the Corporation came to the conclusion that the petitioner is liable to make contribution under the Act. Aggrieved, the petitioner submitted a representation to the authority. Without disposing of the said representation, demands were raised from time to time, details of which may not engage the attention of the Court.

3. The writ petition came to be filed against an order/summons dated 10.06.2010 issued by the Recovery Officer, N.E.R., Guwahati, directing the petitioner to attend his office on 30.06.2010 in connection with the recovery of statutory ESI dues/balance, amounting to Rs.2,00,813/- only plus further interest, along with the details of personal moveable and immovable property and bank accounts in respective banks, in writing. It was also indicated that failure to appear pursuant to the summons may invite issuance of warrant of arrest, attachment and sale of property, fine not exceeding Rs. 5,000/- and issuance of order to furnish security for his appearance and, in default, committing him to civil prison.

4. Mr. Bora, learned counsel for the petitioner, has submitted that there is no material on record to demonstrate that any final order under Section 45 A (1) of the Act was ever passed determining the contribution amount payable by the petitioner and, in absence of any such final order passed under Section 45 A (1), the Recovery Officer has no jurisdiction to issue summons treating the petitioner to be defaulter. He has further submitted, with reference to paragraph 10 of the affidavit of the respondents, that the alleged dues were for the period from June, 1979 to September, 2001 and in view of the embargo imposed by second proviso to Section 45 A (1), the authorities cannot now pass a final order under Section 45 A (1), the period being beyond 5 years from the date on which the contribution had become payable. In view of the legal position, learned counsel for the petitioner submits that it is not relevant to go into the question as to whether the petitioner had employed 10 or more employees and he will not address his argument in respect of number of employees.

5. Mr. K. K. Nandi, learned counsel for the respondents, has submitted with reference to Annexure-2 dated 11.07.2000 of the writ petition as well as Annexure-7 dated 17.08.1981 of the affidavit, that similar orders had been passed from time to time determining the contribution amount payable by the petitioner, which was not paid, and, therefore, the contention advanced by the petitioner that no order under Section 45 A (1) was passed, is not correct. When the orders under Section 45 A (1) had been passed, second proviso to Section 45 A (1) does not get attracted, he submits. In that view of the matter, learned counsel for the respondents submits that the writ petition is liable to be dismissed. He has also made alternative submission that factual issues are involved in this case regarding the number of employees and the petitioner did not avail the appellate remedy available to him under Section 75 (g) of the Act, and, therefore, the petitioner should be relegated to the Employees'' Insurance Court.

6. I have considered the submissions of the learned counsel for the parties and have perused the materials on record.

7. Section 45 A (1) provides that where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provision of section 44 or any Social Security

Officer 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 under section 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.

8. First proviso to Section 45 A (1) 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.

9. Second proviso to Section 45 A (1) provides that no such order shall be passed by the Corporation in respect of the period beyond five years from the date on which the contributor shall become payable.

10. Section 45 A (1), thus, provides that the Corporation may, on the basis of information available to it, when conditions enumerated therein are satisfied, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment.

11. Section 45 A (2) provides that an order made by the Corporation under Section 45 A (1) shall be sufficient proof of the claim of the Corporation under section 75 or for recovery of the amount determined by such order as an arrear of land revenue under section 45 B or the recovery under section 45 C to section 45-I.

12. Section 45 A (1) was inserted w.e.f. 17.06.1967 by Act 44 of 1966. First proviso to Section 45 A (1) was inserted by Act 29 of 1989 w.e.f. 20.10.1989 and the second proviso to Section 45 A (1) was inserted by Act 18 of 2010 w.e.f. 01.06.2010. By Act of 18 of 2010, 45 AA is also inserted by which an employer is given a remedy by way of an appeal, to be preferred within 60 days of the date of an order under Section 45 A, after depositing 25% of the contribution, so ordered, or the contribution as per his own calculation, whichever is higher, with the Corporation. The proviso to Section 45 AA stipulates that if the employer succeeds in the appeal, the Corporation shall refund such deposits to the employer together with such interest as specified in the Regulation. Section 45 B, which was inserted vide Act 44 of 1966 w.e.f. 17.06.1967 provides that any contribution payable under the Act may be recovered as an arrear of land revenue. Section 45 C, inserted by Act 29 of 1989 w.e.f. 01.09.1991, provides that where any amount is in arrear under the Act, the authorised officer may issue to the Recovery Officer a certificate under his signature, specifying the amount of arrears and the Recovery Officer, on receipt of such certificate, shall proceed to recover the amount specified from the factory or the establishment, or as the case may be, the Principal or immediate employer by (a) attachment and sale of the movable or immovable property of the factory or establishment or, as the case may be, the principal or immediate employer; (b) arrest of the

employer and his detention in prison; (c) appointing a receiver for the management of the movable or immovable properties of the factory or establishment or, as the case may be, the employer.

13. The proviso to Section 45 C mandates that attachment and sale of any property under this section shall first be effected against the properties of the factory or establishment and where such attachment and sale is insufficient for recovering the whole of the amount of arrears specified in the certificate, the Recovery Officer may take such proceedings against the property of the employer for recovery of the whole or any part of such arrears.

14. Section 45 C (2) provides that the authorised officer may issue a certificate under Section 45 C (1) notwithstanding that proceedings for recovery of the arrears by any other mode have been taken.

15. Having regard to the submissions advanced by Mr. Bora, it will not be necessary in this proceeding to determine as to whether the petitioner employed more than 10 persons. It has to be construed, in absence of any challenge by him to the number of employees as determined by the Corporation, that the petitioner will be covered under the Act. In the above view of the matter, I am of the considered opinion that it will not be necessary to relegate the petitioner to the Appellate Court as argued by Mr. Nandi.

16. Primary question that arises in this case is whether any order or order(s) under Section 45 A (1) was/were passed by the Corporation. Annexure-2 dated 11.07.2000 of the writ petition, at paragraph 5 reads as follows:-

"5. Please take notice that unless your explanation and/or a statement as mentioned in para 4 above giving the actual dues for the periods in question is submitted to this office within the time specified as above, this office shall proceed with the case on merits and an order shall be passed under Section 45 A of the Act determining the amount of contribution due from you under the provision of the ESI Act and further cause of same to be recorded under Section 45 C to 45 1 of the Act along with interest @ 12 % per annum under Section 39 (5) of the ESI Act, payable on arrears of contribution for each day of default of delay in payment of dues."

17. Annexure-7 dated 17.08.1981 of the affidavit-in-opposition at paragraph 6 reads as follows:-

"6. Please, take notice that unless Contribution outstanding upto date is paid immediately by means of submission of Contribution Cards or the statement as mentioned in para 4 above giving the actual dues for the periods in question is submitted, this office will be constrained to determine the amount of Contributions payable by a final order under Section 45-A of the Employees'' State Insurance Act and further cause the same to be recovered through the Collector along with interest as an arrear of land revenue under Section 45-B of the Act without further notice."

18. These are the two documents relied on by the learned counsel for the parties with regard to the order under Section 45 A (1).

19. Perusal of the aforesaid orders go to show that these were in the nature of preliminary orders asking the petitioner to submit his explanation. No final orders under Section 45 A (1) have been placed on record by the Corporation in the affidavit-in-opposition filed. There is also no scope for passing any final order under Section 45 A (1) now in view of the embargo imposed by the second proviso to Section 45 A (1) as paragraph 10 of the affidavit-in-opposition of the respondents go to show that the amount of Rs. 2,00,813/- was on account of contribution amount from June, 1979 to September, 2001.

20. Unless there is an order determining the amount of contribution payable in respect of employees of the factory or establishment under Section 45 A (1), Section 45 A (2), Section 45 B and 45 C, will not come into the play. In absence of any final order passed under Section 45 A (1), as demonstrated by the materials on record, the impugned order dated 10.06.2010 has to be construed as being without jurisdiction in the eye of law.

21. Taking that view, the order/summons dated 10.06.2010 is set aside and quashed. The writ petition is allowed. No costs.