

(2011) 10 AHC CK 0040

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 9974 of 1992

M/s. Security Printers of India and Another

APPELLANT

Vs

Employees State Insurance Corporation and Another

RESPONDENT

Date of Decision : 19-10-2011

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B
Employees State Insurance Act, 1948 — Section 45A, 45A(1), 45B

Citation : (2012) 2 ADJ 482 : (2012) 132 FLR 860 : (2012) 2 LLJ 790

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hon'ble Sudhir Agarwal, J.—Heard Sri Samiran Chatterjee, learned counsel appearing for petitioner, Sri Rajesh Tiwari, learned counsel appearing for respondent-Corporation and perused the record.

2. Writ petition is directed against the order dated 23.1.1992 (Annexure 10 to the writ petition) purported to have been issued u/s 45B of the Employees' State Insurance Act, 1948 (hereinafter referred to as "Act, 1948") as amended from time to time requiring the petitioner to deposit Rs. 68074/- (Rs. 41464/- towards principle amount and Rs. 16610/- towards interest.

3. Learned counsel for petitioner contended that without passing any order, whatsoever, and without assigning reasons for imposing such liability upon the petitioner, in a wholly illegal and arbitrary manner and with an attitude to harass the petitioner, the said demand has been raised against him.

4. Facts, giving rise to present dispute as borne out from record are as under.

5. Petitioner is engaged in printing work having a factory situate at Kanpur. Application of Act, 1948 to the petitioner is not disputed and according to his own averments, he is regularly depositing contribution under Act, 1948 besides filing regular return and complying various provisions of the said Act. The

Regional Director, Employees' State Insurance 23.1.1992 (Annexure 10 to the writ petition) Corporation (hereinafter referred to as "RDESIC") issued a notice dated 20.1.1987 stating that petitioner's premises was inspected by Insurance Inspector who had checked the accounts and record for the period 6.8.1986, 8.8.1986 and according to his report, petitioner has not deposited adequate contribution for the period of October, 1985 to June, 1986. The total contribution comes to Rs. 53990.60 but thereagainst only Rs. 21608.15 was deposited leaving a balance of Rs. 32382.45 which he should pay alongwith interest at the rate of six per cent. The notice was issued under the signature of Sri G.S. Sethi, RDESIC. Petitioner replied this notice on 4.5.1987 stating that the demand is wholly illegal since no such dues are outstanding and whatever the amount payable was already deposited. Thereafter another notice was issued by RDESIC on 25.9.1987/5.5.1988 stating that petitioner failed to deposit contribution from October 1985 to June 1986 to the tune of Rs. 32383.45 and there was a deficit payment of interest to the tune of Rs. 14.45 for late payment of contribution for the period of January 1985, May 1986 and January, 1987 which he should pay. No order on petitioner's reply appears to have been passed by RDESIC. The notice dated 25.9.1987/5.5.1988 is a cyclostyle proforma claimed to be on Form C-18. Another notice was issued on 24.4.1990 alleging non-payment of contribution from April 1988 to March 1990 to the tune of Rs. 1,38,970.

6. Para 4 of notice shows that basis for calculation of the said amount was ad hoc and the said notice required the petitioner to submit his reply as to why the said ad hoc determination be not made final. Petitioner himself or through authorized representative was also required to appear before RDESIC on 13.6.1990. A simultaneous notice of the same date, i.e. 24.4.1990 was issued demanding a sum of Rs. 1,11,636/- being unpaid contribution from August 1968 to January 1987. These two notices are under the signature of Deputy Regional Director, Sri R.K. Shukla. All these notices were replied by petitioner by letter dated 30.6.1990 stating that the said demand is wholly fictitious since all payments have been made.

7. Sri R.K. Shukla by letter dated 8.10.1990/10.10.1990 informed the petitioner that after re-examination he found that a sum of Rs. 41,464/- was payable by petitioner and therefore he should pay the same within 15 days. In case of any discussion, petitioner may meet Deputy Regional Director Sri Shukla on 30.10.1990 in his chamber failing which action for recovery would be taken.

8. Thereafter a demand notice dated 21/22.8.1991 was issued demanding a total sum of Rs. 41,464/- from petitioner towards unpaid contribution for the period July 1967 to June 1986 and giving details of the said amount as under:

Sl. No.

Amount

Period

Head

Date of Demand

1.

796.00

1/68 to 6/69

ESC/EC

17.1.70

2.

663.55

"

"

"

3.

837.00

"

"

"

4.

1746.00

7/69 to 6/70

ESC

26.3.71

5.

1285.97

"

EC

"

6.

411.80

7/67 to 12/67

EC

"

7.

676.00

8.

1640.00

III/70 to II/71

ESC

10.1.72

9.

1024.85

"

EC

"

10.

32382.45

10/85 to 6/86

EC/ESC

20.1.07

9. Petitioner replied by letter dated 14.9.1991 that demand beyond five years is barred by time and demand of Rs. 32383.45 for the period October 1985 to June 1986 shows that every time period and demand is being changed without disclosing any basis thereof and therefore the same is not payable. Thereafter, the impugned order dated 23/22.1.1992 has been issued by Deputy Regional Director ESIC for recovering a sum of Rs. 68074/- from the petitioner.

10. It is evident that impugned recovery has been issued to execute the demand from petitioner initiated vide notice dated 21/22.8.1991. It is contended by learned counsel for petitioner that RDESIC did not pass any order whatsoever giving reasons disclosing how he could arrive at a certain figure sought to be recovered from the petitioner and in a mechanical manner, without application of mind, has proceeded to issue impugned recovery which was wholly illegal and with an intention to harass the petitioner. He also contended that u/s 45-A Deputy Regional Director has no authority whatsoever to pass any order and even otherwise the impugned orders are patently illegal and void ab-initio.

11. Respondent-Corporation has filed a counter-affidavit sworn by one S.S.L. Srivastava, Insurance Inspector, ESIC, Allahabad. It shows that there is an inspection made by Insurance Inspector who submitted report on 18.8.1986 reporting that petitioner has not deposited contribution for casual and temporary employees and pursuant thereto the demand letter was issued on 20.1.1987. It is also contended that since demand was issued with respect to the actual amount payable by petitioner, it was not necessary to afford any opportunity of hearing to petitioner before passing order u/s 45-A of Act, 1948. The issuance of notice demanding Rs. 1,38,970/- and 1,11,636/- is not disputed but in para 10 of the counter-affidavit, it is said that pursuant to petitioner's request made vide letter dated 30.6.1990, the matter was re-examined and thereafter petitioner was informed by letter dated 10.10.1990 that a sum of Rs. 41,464.00 is payable by him. With respect to plea of certain amount claimed from petitioner being barred by limitation, it is said in para 23 of counter-affidavit that notices and informations were given to petitioner from time to time, hence, no claim was barred by limitation.

12. From rival pleadings and arguments advanced by learned counsels for parties, the questions up for consideration in this case are:

(1) Whether the order impugned in this writ petition satisfy requirement of "determination of amount of contribution "contemplated by Section 45-A (1) of Act, 1948?

(2) Whether respondent were obliged to afford adequate opportunity to the petitioner before passing impugned orders?

(3) Whether the order determining amount of contribution u/s 45-A (1) of Act, 1948 must be speaking and reasoned?;

(4) And lastly, whether pleading of the case demonstrate any harassing approach on the part of respondents amounting to gross misuse of process of law?

13. Proviso to Sub-section 1 of Section 45-A was inserted vide Section 15 of Act No. 29 of 1989 with effect from 20.10.1989. It talks of providing a "reasonable opportunity of being heard" to the employer or establishment or the factory concerned before an order under Sub-Section (1) is passed.

14. Learned counsel for respondents though feebly, contended that in the present case the proceedings were initiated much before 20.10.1989 when the aforesaid proviso was not in existence, hence, petitioner was not entitled for any reasonable opportunity and the principle of natural justice would not apply to the proceedings in question.

15. To my mind, the submission is thoroughly misconceived. Section 45A as such was inserted by Section 17 of Act 44 of 1966 with effect from 17.6.1967. It talks of an order to be passed by Corporation in certain circumstances "determining" the amount of contribution payable in respect of the employees of the factory or the establishment, as the case may be. Such an order could be passed if the

factory or the establishment concerned has failed to submit returns, particulars, registered, records as the case may be or where the Corporation's official(s) prevented from discharging functions/duties u/s 45-A of Act, 1948. The basic intention underlying Section 45-A is where the establishment etc. fails to satisfy the Corporation that correct amount of insurance has been paid by it, the Corporation would be entitled to "determine" such amount on the basis of information available to it. However, for the purpose of "determining" the amount of contribution it has to pass an order. The word "determination" itself contemplates an objective consideration on the part of Corporation which cannot be arrived at ex parte and without opportunity. Though it is true that Section 45-A(1) of Act, 1948 talks of information available to Corporation, but such information may be available to the Corporation on its own or as produced before it by the employer concerned on a notice or information received from the Corporation. The word "determination" has been defined in various dictionaries as under:

The New Lexicon Webster's Dictionary.--Firmness of purposes or character, resolution, the act of determining, fixing, deciding, the act of finding out exactly, the determination of a quantity by measurement, the settling of a controversy by a judicial decision, a coming to a decision, the defining of terms or concepts by the addition of attributes

Black's Law Dictionary (Fifth Edition).--The decision of a Court or administrative agency. It implies an ending or finality of a controversy or suit. The ending or expiration of an estate or interest in property, or of a right, power, or authority. The coming to an end in any way whatever.

Legal Glossary (1992) Government of India.--1. the action of determining or deciding; a judicial or authoritative decision, 2. ending, termination.

(emphasis added)

16. Further the word "determination" is prefixed by the words "by order" and this also demonstrate the intention of legislature that Corporation shall pass an order determining amount of contribution. Since the order necessarily would have some civil consequences to the employer imposing certain liability upon him, obviously such an order must be a speaking order so as to demonstrate the manner in which mind has been applied by Corporation and methodology of arriving at the amount of contribution. The proviso inserted with effect from 20.10.1989 is, in effect, clarificatory and would not make much difference.

17. In any case, in this particular case before issuing notice requiring petitioner to show-cause and thereafter passing impugned order for recovery u/s 45-B, no order as contemplated by Section 45-A (1) as such appears to have been passed by respondent-Corporation. Hence, to my mind proviso to Section 45(A)(1) of Act, 1948 would apply to the case in hand with full force. Despite repeated query, Sri Rajesh Tiwari, learned counsel for respondent-Corporation could not tell as to when after the notice, an order determining amount of contribution was

passed by respondent-Corporation. This is fortified from the fact that different notices were issued giving different amounts and the periods, hence, respondent-Corporation itself was not certain about the amount of contribution payable. The contention therefore that proceedings attained finality before 20.10.1989 lacks substance and this submission on behalf of respondents cannot be accepted.

18. There is one more aspect. Impugned demand included certain amount which was in respect to the period of 1967 to 1971. The demand was raised for the first time in 1987. Though in the counter-affidavit, respondents have said that several notices were issued from time to time but no details have been given. I have no hesitation in holding that prior to first notice dated 20.1.1987, no other notice has been referred to in the counter-affidavit and none was given. Petitioner categorically pleaded that any demand in respect to the period prior to five years is barred by limitation. On this aspect, respondents have not averred anything apparently for the reason that no order giving reasons has been passed by the Corporation. Though learned counsel for petitioner could not show any period of limitation prescribed on this aspect in the Statute, however, the Apex Court in *E.S.I.C. Vs. C.C. Santhakumar*, , while considering a similar question with respect to Section 45-A and 45-B has observed that statute though as such does not prescribe any bar of limitation, but such determination obviously must be made "within a reasonable time". The Court in taking the aforesaid view relied on the judgments involving similar question with reference to other Statutes, namely, power to recover damage under Sections 14B of the Employees Provident Fund and Misc. Provisions Act, 1952 considered in *M/s. Hindustan Times Limited Vs. Union of India and Others*, ; a similar point involved under Andhra Pradesh Assigned Lands (Prohibition of Transfers) Act, 1977 considered in *The State of Gujarat Vs. Patil Raghav Natha and Others*, . Whether in the particular case, the demand can be said to have been raised within a reasonable time or not would depend on the facts and circumstances of the case but here since it has not at all been considered by respondent-Corporation, though the issue of limitation was raised by petitioner, I am not expressing any final opinion on this aspect and suffice is to mention that whenever a point is raised by employer which has legal consequences, the Corporation is obliged to consider the same and pass order giving appropriate reasons for its conclusion. The first three issues formulated above, therefore, in the light of the discussion above I am answering in favour of petitioner.

19. Now I come to last question. The facts discussed above clearly show that respondent-Corporation, one after another issued notices covering a period of initially one year just preceding date of notice and thereafter more than two decades in order to raise a demand from the petitioner. The amount in all the notices vary without giving any justification or clarification therefor. The manner as to how the said amount has been arrived at is also not discussed or disclosed anywhere. Petitioner represented repeatedly that the demand raised is not supported by record, but nothing was said to contradict him. In the counter-affidavit respondents have admitted that they raised demand of lacs of rupees by

different notices but ultimately got satisfied in confining demand to Rs. 41,464.00. Even this amount has not been demonstrated how it could be determined and arrived at by respondents. The officials of respondent-Corporation though required petitioner's representative to meet them in their Office, but reason for such call is not evident. The things are conspicuously silent. It reflects for something which cannot be said to be bona fide or honest approach on the part of respondent-Corporation. The administrative authorities indulged in activities having extraneous consideration normally adopts this kind of tactics. Sometimes to satisfy their unlawful demand, this kind of exorbitant demand, unfounded and unjustified, are raised so as to cause undue pressure on the person concerned. This is what appears to have been done in this case. If not patent it is latent kind of activity involving corrupt practices on the part of statutory executive authorities. This Court has commented various facets of corruption in a recent judgment, namely Smt. Mithilesh Kumari Vs. State of U.P. and Others, , wherein this Court held as under:

52. In general the well accepted meaning of corruption is the act of corrupting or of impairing integrity, virtue, or moral principle; the state of being corrupted or debased; lost of purity or integrity; depravity; wickedness; impurity; bribery. It farther says, "the act of changing or of being changed, for the worse; departure from what is pure, simple, or correct; use of a position of trust for dishonest gain."

53. Though in a civilised society, corruption has always been viewed with particular distaste to be condemned and criticised by everybody but still one loves to engage himself in it if finds opportunity, ordinarily, since it is difficult to resist temptation. It is often, a kind, parallel to the word "bribery", meaning whereof in the context of the politicians or bureaucrats, induced to become corrupt. The Greek Philosopher Plato, in 4th Century BC said, "in the Republic that only politicians who gain no personal advantage from the policies they pursued would be fit to govern. This is recognised also in the aphorism that those who want to hold power are most likely those least fit to do so." While giving speech before the House of Lords William Pitt in the later half of 18th Century said, "Unlimited power is apt to corrupt the minds of those who possess it." Lord Acton in his letter addressed to Bishop Creighton is now one of the famous quotation, "Power tends to corrupt and absolute power corrupts absolutely."

54. Corruption is a term known to all of us. Precise meaning is illegal, immoral or unauthorized act done in due course of employment but literally it means "inducement (as of a public official) by improper means (as bribery) to violate duty (as by committing a felony)." It is an specially pernicious form of discrimination. Apparently its purpose is to seek favourable, privileged treatment from those who are in authority. No one would indulge in corruption at all if those who are in authority, discharge their service by treating all equally.

55. We can look into it from another angle. Corruption also violates human

rights. It discriminates against the poor by denying them access to public services and preventing from exercising their political rights on account of their incapability of indulging in corruption, of course on account of poverty and other similar related factors. Corruption is, therefore, divisive and makes a significant contribution to social inequality and conflict. It undermines respect for authority and increases cynicism. It discourages participation of individuals in civilised society and elevates self interest as a guide to conduct. In social terms we can say that corruption develops a range bound field of behaviour, attitude and beliefs. Corruption is antithesis of good governance and democratic politics. It is said, that when corruption is pervasive, it permeates every aspect of people's lives. It can affect the air they breathe, the water they drink and the food they eat. If we go further, we can give some terminology also to different shades of corruption like, financial corruption, cultural corruption, moral corruption, ideological corruption etc. The fact remains that from whatever angle we look into it, the ultimate result borne out is that, and the real impact of corruption is, the poor suffers most, the poverty groves darker, and rich become richer.

20. Looking into the facts and circumstances of this case in the light of the above discussion, I am constrained to observe that manner in which respondents have functioned in this case and issued various order/notices to petitioner, show a kind of harassment to petitioner than an honest approach in raising a just and legal demand under the Statute. Such approach has to be condemned and deprecated so that in future it may not encourage others for such kind of attempts.

21. In the result, writ petition is allowed. Impugned order dated 23.1.1992 (Annexure 10 to the writ petition) is hereby quashed.

22. Petitioner shall be entitled to exemplary cost which I quantify to Rs. 75,000.