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(2022) 04 TEL CK 0019

In the Telangana High Court

Case No : Writ Petition No. 8216 Of 2022

M/S.Guardian Security Services — APPELLANT

Vs

Employees State Insurance Corporation — RESPONDENT

Date of Decision : 04-04-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 19(1)(g), 21
Employees State Insurance Act, 1948 — Section 2(4), 40, 41, 44(1), 45A, 45A(1), 45A(2), 45B, 45G(3)(x), 75, 75(2)(a), 77(1A)

Citation : (2022) 04 TEL CK 0019

Hon'ble Judges : Dr. G. Radha Rani, J

Bench : Single Bench

Advocate : C Vikram Chandra, B G Ravinder Reddy

Final Decision : Dismissed

Judgement

1. This writ petition is filed for the following relief:

"..to issue a Writ Order or direction more particularly one in the nature of Writ of Mandamus declaring the impugned proceedings vide No.52Q/25958-1018 dt.24.08.2021 issued by the Respondent No.2 and Notices of demand vide Ref. No. 52000259580001018/CP/426629, dt.01.06.2021, notice vide Ref. bearing No.52000259580001018/CP/427712, dt.11.08.2021 and Notice vide Ref bearing No.52000259580001018, dated 15.09.2021 issued by the Respondent No.2 against the petitioner, as arbitrary, illegal, improper, unjust and contrary to law and is violation of Article 14, 19 (1) (g) and 21 of the Constitution of India and consequently set aside the impugned proceedings vide No. 52Q/25958-1018 dt.24.08.2021 issued by the Respondent No.2 and Notices of demand vide Ref. No.52000259580001018/CP/426629, dt.01.06.2021, notice vide Ref. bearing No.52000259580001018/CP/427712 dt.11.08.2021 and Notice vide Ref. bearing No.5200025958000-1018 dated 15.09.2021, Notice vide proceedings No.52Q/25958-1018 dated 29.01.2022 issued by the Respondent No.2 and pass…"

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2. Heard the learned counsel for the petitioner and the learned Standing Counsel for the respondents 1 and 2.

3. Learned counsel for the petitioner submitted that the petitioner was a Proprietary concern covered under the provisions of the Employees State Insurance Act, 1948 (for short 'the Act') engaged in providing security services to various organizations. They also render their services to the Agricultural Market Committees (Committees). As per the terms and conditions of the agreement between the petitioner and the Committees with regard to payment of ESI/EPF and wages, it was specified that the petitioner should pay the wages to the Security Guards including EPF and ESI and the Committees should reimburse the same to the petitioner @ 13.61% and 4.75%, respectively. The percentage mentioned in the said agreement was the Principal Employer Contribution in EPF and ESI for the security guards. It means the Committee was the Principal Employer and the Petitioner was a Contractor.

4. The petitioner was providing services to various Committees on yearly contract. Every year, the Committees would call for tenders to all the Agricultural Market Committees under its control and only the successful bidder would provide security services for the said financial year. For the year 2021, the 2nd respondent issued two demand notices under Section 45-G(3)(x) of the Act for realizing arrears for the period from July, 2013 to February, 2019 amounting to Rs.71,67,211/- and interest thereon from July, 2013 to 31.03.2021 amounting to Rs.26,22,774/-. Subsequently, an order was passed by the 2nd respondent under Section 45-G (3)(x) of the Act vide proceedings dated 24.08.2021 for realizing the arrears for the period from September, 2011 to 25.01.2022.

5. The petitioner submitted that the employees supplied by him were temporary contract employees and the requirement of the Committees also would change from time to time, hence, claiming dues along with interest for the period where the petitioner had not supplied services was untenable in law and was in violation of the fundamental rights guaranteed by the Constitution of India. No order was passed under Section 45A of the Act before initiating recovery proceedings by the 2nd respondent under Section 45-G (3)(x) of the Act. The respondents No.1 and 2 also approached the Principal Employer of the petitioner and was insisting them to make the payments to ESI Corporation rather than making payments to the petitioner. The claims made by the respondents No.1 and 2 were also barred under Section 77(1A) of the ESI Act, as the Statute had prescribed a time limit of five years as limitation for recovering the contribution. The claims of the respondent No.1 and 2 were initiated from the year 2011 and they were barred by limitation and relied upon a judgment of the High Court of Patna in M/s. Electronic Net, through its Partner Sanjev Kumar v. The Union of India through Regional Director and others Civil Writ Jurisdiction Case No.6882 of 2014, dated:12.10.2017.

6. The learned counsel for the petitioner further submitted that before approaching the court, the petitioner had also approached the ESI Court,

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Hyderabad, but he was advised that without considering the order passed under Section 45-A of the Act, no application would be considered. The petitioner made an application under Right to Information Act to furnish the order passed under Section 45-A of the Act, but there was no response from the respondents No.1 and 2. The respondents No.1 and 2 approached the 3rd respondent and was pressurizing them to transfer the funds to a tune of Rs.10,00,000/- from the petitioner's current account bearing No.62012292443, but the said current account was a salary account and if the said amounts were attached, the petitioner would suffer irreparable loss and hardship which could not be compensated by any means and prayed to allow the writ petition.

7. The learned Standing Counsel for the respondents No.1 and 2 submitted that the petitioner had filed the returns of contributions month-wise in respect of his employees from July, 2013 to February, 2019, but not paid the contributions in full as declared by him. The respondent Corporation had issued notice in Form C-18 (Actual) dated 17.09.2019 to clear the dues within 15 days. The Authorized Officer had issued notice in Form C-19, dated 19.05.2021 for Rs.71,36,340/- to the Recovery Officer to recover the outstanding dues. On receipt of notice, the petitioner submitted a representation dated 01.07.2021 stating that the reason for late filing of contributions was that he was not getting bills settled form the Principal Employer on time due to which there was delay in filing and in payment of contributions. The recovery officer issued notice of demand to defaulter and as the petitioner failed to comply with the said notice, issued warrant of attachment of immovable property and the same was executed on 24.09.2021. As the petitioner had not complied the same even after attachment of immovable property, the recovery officer issued 45-G order dated 24.08.2021 to the Chairman, Agricultural Market Committee, Kothapet, Gaddiannaram and Bowenpally requesting them to transfer the amount in their possession and likely to become due to the petitioner towards services rendered by the defaulting unit. The recovery officer also issued notices to the Commissioner, Weaver Service Centre, Nampally, Hyderabad and Chairman, TSSTEP, Youth Service Department, Government of Telangana to transfer the amounts due or likely to become due to the petitioner. The petitioner could not challenge the recovery action without challenging the claim of contribution, which is C-18 (Actual). He further contended that earlier the petitioner filed W.P. No.23693 of 2021 and sought permission to withdraw the said writ petition to pursue remedies in accordance with law, but without availing the effective remedy under Section 75 of the Act, approached this Court on the same proceedings and the petition was liable to be dismissed on the said ground and prayed to dismiss the writ petition.

8. Perused the record. The contentions of the learned counsel for the petitioner were on the ground of limitation and on the ground of issuing notices to him under Section 45-G (3) (x) of the Act, without passing any orders under Section 45A of the ESI Act. The contention of the learned Standing Counsel for the respondents No.1 and 2, on the other hand, was that Section 45A of the Act had no application as notice was issued in Form C-18 (Actual) of the Act basing on

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the returns of contributions submitted by the petitioner month-wise and that the petitioner could not challenge the recovery action without challenging the claim of contribution i.e. Form C-18 (Actual) and further contended that the second writ petition on the same ground was not maintainable.

9. With regard to the maintainability of the second writ petition, the petitioner submitted that the earlier writ petition was withdrawn as it was advised to the petitioner that an alternative remedy was available under the provisions of the Act to deal with the disputed facts on questions and law. The petitioner approached the Tribunal, but the Tribunal refused to accept and number the case on the ground that an order of assessment under Section 45A of the Act had not been furnished. The respondents failed to furnish such order of assessment under Section 45A of the Act. The petitioner made several efforts to trace such order of assessment, but to his utter surprise came to know that no such order of assessment under Section 45A of the Act had been passed by the respondents hence, the petitioner was constrained to file this writ petition. Moreover, the respondents had issued subsequent notice to the petitioner seeking recovery of disputed amount and in view of the subsequent development, a fresh cause of action had arisen to the petitioner and relied upon the judgment of the Hon'ble Apex Court in Vinod v. Collector and Chairman and Others Civil Appeal No.3352 of 2015 dated28.03.2018. The Hon'ble Apex Court in the above case observed that in the facts of the said case, the earlier petition was withdrawn on account of the pendency of the appeal and for the said reason only, the High Court had not dismissed the petition, but only disposed it of, and the prayer challenging the subsequent order passed in the appeal was not brought to the notice of the High Court as such, held that the writ petition was maintainable.

10. In the present case, the earlier writ petition i.e. WP No.23693 of 2021 was dismissed as withdrawn on 28.09.2021. However, considering the submissions of the learned counsel for the petitioner that they had withdrawn the earlier writ petition to avail the alternative remedy, but no such order of assessment was made by the respondent under Section 45-A of the Act and as the Tribunal failed to entertain the matter without any order of assessment under Section 45-A of the Act, was constrained to file this writ petition, considered it as maintainable.

11. Section 45-A of the Act prescribes the procedure regarding determination of contributions in certain cases and it reads as under:

"45A. 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 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

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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 of being heard:

Provided further that no such order shall be passed by the Corporation in respect of the period beyond five years from the date on which the contribution shall become payable.

(2) An order made by the Corporation under sub-section (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 45B or the recovery under sections 45C to 45-I.

12. The contention of the learned counsel for the petitioner was that as provided in the proviso under Section 45-A of the Act no reasonable opportunity of being heard was given to the petitioner and no such order should be passed by the Corporation for the period beyond five years from the date on which the contribution should become payable and the respondents had not followed both the said stipulations.

13. But, the contention of the learned Standing Counsel for the respondents No.1 and 2 was that Section 45-A of the Act was applicable to cases where no returns, particulars, registers or records were submitted, but in the present case, the petitioner had filed the returns of contributions, but not paid the contributions in full as declared by him as such, Section 45-A of the Act had no applicability. In the judgment relied on by the learned counsel for the petitioner in M/s. Electronic Net (1 supra) of the Patna High Court, it was held that:

“29. The contribution payable to the Corporation as defined under sub-section (4) of Section 2 of the ESI Act is the sum of money payable by the principal employer in respect of an employee, which includes the amount payable by or on behalf of the employee also. The principal employer is required under Section 40 of the ESI Act to pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer’s contribution and the employee’s contribution. Where the principal employer pays the contribution in respect of an employee employed by him or through immediate employer, he is entitled to recover the amount so paid from the immediate employer in view of the provisions prescribed under Section 41 of the ESI Act. Sub-section (1) of Section 44 of the ESI Act requires every principal employer and immediate employer to submit to the Corporation or to such officer of the Corporation as it may direct such returns in such form and containing such particulars relating to persons employed by him or to any factory or establishment in respect of which he is the principal or immediate employer as may be specified in regulations made in this behalf. Thus, it is well settled position in law that the contribution has to be first remitted to the Corporation by

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the principal employer, which he is entitled to recover from the immediate employer.

30. In the present case, the admitted case of the respondents is that the Social Security Officer visited the establishment of the petitioner on 25/28&29.10.2013 and inspected the records of salary statements of employees with effect from December, 2010 to March, 2012 produced before him by the petitioner and he found Rs.1,18,14,512/- as payable contribution. As the petitioner paid advance contribution of Rs.21,00,900/-, the balance contribution amount, which came to Rs,97,13,612/-, was demanded through notice in Form-C-18 (Actual) on 11.12.2013 and since the petitioner failed to deposit the contribution as demanded by the Authorized Officer within 15 days granted to it, the Authorized Officer had no option but to issue Form-C-19 to the Recovery Officer on 13.01.2014 whereas the case of the petitioner is that the Authorized Officer could not have asked for payment of the balance contribution through demand notice. Its case is that immediately after receiving notice, the petitioner responded vide its reply dated 06.02.2014 highlighting the fact that it is the service provider/contractor of BELTRON, hence, in the interest of justice before deciding the amount of contribution the principal employer BELTRON may be made party and the case be decided under Section 45-A of the ESI Act, as it is not liable to pay the contribution amount. It also reiterated that the notice issued in Form- C-18 (Actual) is patently illegal and against the provisions of law and also without any basis. Hence, in the interest of justice, the assessment of contribution be made only after noticing the principal employer BELTRON.

31. At this stage, it would be relevant to notice certain of the case in Bharat Heavy Electricals Ltd Vs. The Employees State Insurance Corporation (Supra). In that case, the appellant Bharat Heavy Electricals Limited had received a notice on 3. 09.1992 under Section 45-A of the ESI Act on the premise that it had not deposited the ESI contribution for the period 19.07.1981 to 30.09.1991. In response to the notice issued by the respondents, a prayer was made by the appellant before the Corporation to implead the contractors as parties in the proceedings under Section 45-A of the ESI Act as “immediate employers”. The said prayer was rejected. When the matter was challenged before the High Court, it held that in accordance with the provisions of Section 44 of the ESI Act the Corporation is within its powers to determine the contribution payable in respect of contract employees against the principal employer without looking for the immediate employer. The appellant challenged the order passed by the High Court in appeal before the Supreme Court. The Supreme Court while allowing the appeal and remitting the matter to the Corporation, held that the determination of the exact liability on the part of the contractors is necessary keeping in view the fact that they or some of them may not be under the control of the principal employer having regard to the fact that the contract has come to an end. It further held that the principal employer has a statutory right to recover the dues from the contractors/immediate employers. It held that in a proceeding

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under Section 45-A of the ESI Act, not only the applicability of the ESI Act but also the quantum thereof which may be held to be payable may be the subject matter of determination.

32. In ESI Corporation Vs. C.C.Santhakumar (Supra), the Supreme Court observed:

"Section 45-A provides for determination of contributions in certain cases. When the records are not produced by the establishment before the Corporation and when there is no cooperation, the Corporation has got the power to make assessment and determine the amount under Section 45-A and recover the said amount as arrears of land revenue under Section 45-B of 'the Act'. This is in the nature of a best judgment assessment as is known in taxing statutes. When the Corporation passes an order under Section 45-A, the said order is final as far as the Corporation is concerned. Under Section 45-A(1), the Corporation, by an order, can determine the amount of contributions payable in respect of the employees where the employer prevents the Corporation from exercising its functions or discharging its duties under Section 45, on the basis of the material available to it, after giving reasonable opportunity. But, where the records are produced, the assessment has to be made under Section 75(2)(a) of 'the Act'. Section 45-A (2) provides that the order under Section 45-A(1) shall be used as sufficient proof of the claim of the Corporation under Section 75 or for recovery of the amount determined by such order as arrears of land revenue under Section 45-B. In other words, when there is a failure in production of records and when there is no cooperation, the Corporation can determine the amount and recover the same as arrears of land revenue under Section 45B. But, on the other hand, if the records are produced and if there is cooperation, the assessment has to be made and it can be used as a sufficient proof of the claim of the Corporation under Section 75 before the E.S.I. Court."

(emphasis mine)

35. Having seen the provisions of the ESI Act, in the opinion of this Court, the stand of the respondent Corporation is not justified. The petitioner had disputed its liability as the principal employer. It had requested that the principal employer BELTRON be added as a party and a notice be also issued to it and only after hearing all concerned, the liability of contribution should be determined. As the petitioner has disputed its liability as principal employer, the dispute ought to have been decided under Section 45-A of the ESI Act after impleading BELTRON as party in the said proceeding in the light of the ratio laid down by the Supreme Court in Bharat Heavy Electricals Ltd Vs. The Employees State Insurance Corporation (Supra) or in the alternative the dispute ought to have been decided under Section 75 of the ESI Act and assessment could have been made thereafter by the EI Court in the light of the ratio laid down by the Supreme Court in ESI Corporation Vs. C.C.Santhakumar (Supra).

14. But, in the present case, the petitioner had not disputed its liability or had

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not contended that the principal employer i.e. the Agricultural Market Committees had not paid the contribution to be made to the ESI. As rightly contended by the learned Standing Counsel for the respondents No.1 and 2, the petitioner, if had any grievance against the claim of contributions, had to challenge the C-18 (Actuals). But, without challenging the same, he could not challenge the recovery action which was in the nature of execution. Hence, I do not find any merits in the contention of the learned counsel for the petitioner to set aside the impugned proceedings as illegal.

15. In the result, the Writ Petition is dismissed. No order as to costs.

Miscellaneous Petitions pending, if any, shall stand closed.

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