

(2001) 04 MAD CK 0033

In the Madras High Court

Case No : Writ Petition No. 18688 of 1993

Quality Engineering Works

APPELLANT

Vs

Regional Office (Tamil Nadu), Employees' State Insurance Corporation

RESPONDENT

Date of Decision : 11-04-2001

Acts Referred:

Employees State Insurance Act, 1948 — Section 45A

Citation : (2002) 3 LLJ 913

Hon'ble Judges : P. Shanmugam, J

Bench : Single Bench

Advocate : S. Ravindran, for the Appellant; G. Desappan, for the Respondent

Final Decision : Allowed

Judgement

P. Shanmugam, J.—This writ petition has been "filed challenging the show-cause notice for reopening an order passed on May 20, 1987 u/s

45-A of the Employees" State Insurance Act.

2. The brief facts necessary for the disposal of the case are stated below:

The petitioner was issued with a notice by the Regional Director of Employees" State Insurance Corporation, dated January 1, 1987 informing the

petitioner that he had not till that date paid the contributions as per the provisions of law and also not submitted return of contributions and that

therefore it was proposed to determine and recover the amount of contribution payable u/s 45-A of the Act. The column refers to the labour

charges made to C.H. Narayanamoorthy and Venugopal. The petitioner was called upon to explain as to the liability. The petitioner filed

statements giving particulars of the contributions actually due as per their records for the purpose of calculation. Ultimately, the Assistant Regional

Director, in his order, dated May 20, 1987, after calling for the records for verification, at the time of personal hearing on the income tax orders

(statement of profit and loss) in respect of C.H. Narayanamoorthy and Venugopal for the years 1984-85 and 1985-86 and wage list maintained

by the contractors and verifying the statement by the employer in respect of the contractors and wage registers, determined the contribution in

respect to the contractors also and after adjusting the amount already paid towards the contribution, confirmed the same as set out in the order to

be payable by the petitioner.

3. The order that was passed by the Assistant Regional Director in exercise of the powers delegated to him reads as under:

Contributions totalling Rs. 28,545.01 for the periods 8/1984 to 6/1986 are finally determined plus interest amount to Rs. 566.15 up to the date of

this order and directed the petitioner to pay the above amount, failing which the same will be recovered.....

4. The petitioner has complied with the above direction.

5. Nearly after five years of the passing of this order, the impugned order came to be issued for reopening of the earlier order, dated May 20,

1987 u/s 45-A. This writ petition has been filed against the said order.

6. According to the petitioner, the earlier order u/s 45-A, dated May 10, 1987, was passed after hearing the petitioner in detail and perusing all the

documents relating to the petitioner as well as its contracts, and therefore, the respondent is estopped from reopening the very same proceedings

after an inordinate delay of six years. The respondent is not entitled to reopen the concluded issue wherein final orders had already been passed,

especially when the petitioner had accepted the orders and paid the amount determined and complied with the same. In the above circumstances, it

is neither possible nor feasible for the petitioner to go before the respondent and explain about the issue which was concluded long time back. The

very notice of reopening is without jurisdiction, is arbitrary and vindictive in nature.

7. In the counter-affidavit filed on behalf of the respondents, it is stated that the concerned officer did not take into consideration all the records

placed before him, for instance, the income tax statements pertaining to the contractors of the petitioner and, did not go into those statements. The

said authority earlier determined the contribution on hypothetical calculations and therefore, it is not final. According to the respondent, the

Vigilance Officer, in the course of investigation, found that the-amounts of wages paid to the two contractors were not properly verified. They

admit that it is true that the petitioner made these documents available before the concerned authority but for the reasons best known to him, the

concerned authority merely relied upon the figures as given by the petitioner with casual verification of the general ledger. The concerned authority

did not advert to the statement given to the Income Tax. Department and therefore, there was omission on the part of the petitioner to pay the

contribution. In the above circumstances, it was decided to issue fresh show-pause notice with reference to the omitted portion only.

8. From the counter, it is very clear that the petitioner had disclosed all the necessary materials before the Assistant Regional Director of the E.S.I.

Corporation. It is admitted that the complete materials and facts were before him. But, it is contended that for reasons best known, the concerned

authority had not properly verified those statements, but went ahead on the basis of a casual verification of the general ledger and therefore, the

show-cause notice was issued with reference to the omitted portion. On the face of this admission that the petitioner had disclosed all the materials

including the one given to the Income Tax Department by the contractors in reference to the wages, etc., if there is omission on the part of the

Assistant Regional Director, the petitioner cannot be blamed for that. There is no provision under the E.S.I. Act to reopen an order of assessment

made under such circumstances. A Division Bench of this Court, in *Eastern Stores v. Regional Provident Fund Commissioner* 1973 (2) L.L.N 378

dealing with the Employees' Provident Funds and Miscellaneous Provisions Act, held that it is fundamental that if a statutory authority wants to re-

examine a concluded affair or subject-matter, it "assumed the role of a reviewer in law and unless and until the statute under which he functions,

authorises him expressly or by necessary implication to review such matters under certain stated circumstances or situations, he cannot assume

such power in him suo motu and set at naught the earlier concluded affairs. Justice Sri RAMPRASADA RAO (as he then was), held as follows:

It is fundamental that powers of appeal and review are creatures of statute and unless there is an express, provision or any other provision from

which such a power by necessary implication can be inferred, the authority cannot assume such a power and undertake to re-examine a closed situation.....

In *Sambandam Spinning Mitts (Private), Ltd. v. Regional Provident Fund Commissioner*, a Division Bench of this Court in an unreported decision

in [W.P. No. 9059 of 1982, dated September 21, 1989], has held that there is absolutely no difficulty in holding that the order passed by the

respondent u/s 7-A of the Provident Funds Act was final and there was no ground for reopening the same. There is no provision either in the Act

or in the rules enabling the authority to reopen the proceedings suo motu,

9. Learned counsel for the respondent wants to take advantage of a decision in *Fenner Garments Vs. Dy. Regional Director, E.S.I.C.*, wherein a

Division Bench of this Court held that the procedure prescribed u/s 45-A of the Act has not been followed by the Corporation in straightaway

issuing the demand to the appellant establishment and held that the impugned demand could not be sustained as it was issued without affording any

opportunity of showing the cause to or without hearing the appellant established and it was quashed. The learned Judges have given the liberty to

the E.S.I. Corporation to issue a fresh show-cause notice and proceed with the matter. In the course of this judgment, their Lordships held that the

returns furnished by the petitioner in that case did not contain the particulars of all the persons employed and therefore, it was not a complete

return. To that extent, those persons whose particulars were not included in the returns, it was not possible to hold that the returns filed in respect

of other persons. Hence, the argument on behalf of the Corporation that the case cannot be taken out of the purview of Section 45-A of the Act

and consequently in such cases, no determination can be made by the Corporation was not accepted. It was held that there was no determination

by the Corporation without issuing any notice to the appellant and without affording an opportunity of hearing as provided for by the proviso to

Sub-section (1) of Section 45-A of the Act. It was pointed out that it is a case in which according to the Corporation, the appellant had failed to

include the returns filed by some of the persons employed by it and has not paid the contribution on their behalf and also on behalf of the employer.

The impugned order created an additional financial liability upon the appellant.

Therefore, it was necessary for the Corporation to issue notice and afford him the opportunity of hearing. In this case, factually the appellant had disclosed all the particulars of wage remittance and therefore, it cannot be treated as an omission on the part of the appellant in not furnishing the particulars. The question of revising or reopening the earlier order did not arise for consideration. The respondent has no answer for the legal question on the scope of reopening or revising the concluded order under law. The attempt on the part of the respondent that they are only trying to reopen in reference to the matters which were omitted cannot be sustained. The petitioner has not at any state, omitted to bring the facts before the authority. Any omission on the part of the respondent officer cannot be taken advantage of against the petitioner without any authority of law.

10. Hence, I have no hesitation in holding that the respondent's notice is without jurisdiction and authority is liable to be quashed and accordingly quashed. The writ petition is allowed. No costs. Consequently, W.M.P. No. 29199 of 1993 is closed.