
(1983) 09 KAR CK 0006
In the Karnataka High Court
Case No : MFA No. 149 of 1981

Regional Director, ESIC

APPELLANT

Vs

Fibre Bangalore (P) Ltd.

RESPONDENT

Date of Decision : 19-09-1983

Acts Referred:

Employees State Insurance Act, 1948 — Section 2 (22), 45, 45 A, 45 A (1)

Citation : (1985) ILR (Kar) 1692

Hon'ble Judges : Sabhahit, J;Mahendra, J

Bench : Division Bench

Advocate : M. Papanna, for the Appellant; K.R. Rajagopalan, for the Respondent

Final Decision : Dismissed

Judgement

Sabhahit, J.—This appeal by the Regional Director, Employee's State Insurance Corporation (E.S.I.) is directed against the order dated 24-10-1980 passed by the E.S.I. Court, Bangalore in E.S.I. Application No. 25/72, on its file.

2. F. Fibre Bangalore (P) Ltd., approached the E.S.I. Court with an application presented on 6-12-1972 for declaration that their erstwhile establishment was not covered by the E.S.I. Act; that a sum of Rs. 97,819 37 as alleged did not constitute wages within the meaning of E.S.I. Act, 1948 and as such no E.S.I, contribution was payable by the applicant to the Respondent, namely, the Regional Director, E.S.I. Corporation, Bangalore on the said sum. Hence, the applicant prayed that the demand made by the Respondent for payment of E.S.I, contribution on the said sum should be set aside.

3. The E.S.I. Corporation by its letter No. MYS INS.I. 53-1156-19 dated 26-10-1972 called upon the applicant to pay Employer's Special Contribution and Employees' Contribution Rs.97819-37 paise together with interest at 6% per annum alleging that the said sum constituted wages as defined in Section 2(22) of the E.S.I. Act, 1948. The applicant contended in the application that the said sum did not constitute wages. The said sum represented the fabrication charges

paid by the applicant to several persons and firms.

4. E.S.I. Corporation resisted the claim. The E.S.I. Court on 5-2-1973 raised the following issues for its determination:

1. Whether the applicant's factory has been closed since January 1971?
2. Whether the provisions of E.S.I. Act are not applicable to the applicant-factory, even in regard to the claim for E.S.I. contribution for 1967-68?
3. Whether the claims for E.S.I. contribution for 1967-68 are barred by time?
4. Whether the Applicant was a factory within the meaning of Section 2(12) of the E.S.I. Act?
5. Whether the Applicant is liable to pay E.S.I. Contributions for 1967-68 and if so, to what amount?

5. The E.S.I. Court answered Issue-1 in the negative; Under Issue-2 it held that they were applicable; Under Issues 3 and 5 it answered in the negative; Under Issue-4 in the affirmative and in that view it held that the applicant was not liable to pay E.S.I. contribution for 1967-68. Aggrieved by the said order, the Corporation came up in appeal before this Court in M.F.A. No. 147/74 and this Court by its Judgment dated 20-2-1979 allowed the appeal, set aside the order of the E.S.I. Court and remanded the case with a direction that the E.S.I. Court shall dispose of the matter in accordance with law in the light of the observations made in the said judgment as also in the light of the observations made in the decision of the Full Bench reported in Regional Director, Employees State Insurance Corporation Vs. Fibre Bangalore (P) Ltd., . It may also be seen that in remanding the judgment, this Court observed:

"In the pleadings filed before the Insurance Court the parties have not taken a clear stand on the question whether the demand for contribution was determined u/s 45A of the Act or under other provisions of the Act. The Respondent could not have taken up this plea since he has merely challenged a notice of demand dated 26-10-1972 in which a demand for special contribution and also employees' contribution on an amount of Rs. 97819-37 p. was made. There is no evidence or other material produced in the case to determine the question whether the demand by the Corporation falls within the purview of Section 45A or any other Section of the Act. Therefore, it is not possible to decide the question raised on behalf of the parties without further material throwing light upon this question."

After remand, the case was posted for evidence on the issue whether the order of the respondent sought to be enforced amounts to a determination u/s 45A of the E.S.I. Act or not? The applicant has examined AW.I and got marked Ext. A-I and closed his case before the E.S.I. Court. On behalf of the respondent R.W.I. was examined and Exts. R-I to R-3 were got marked in the evidence.

6. At this stage, E.S.I. Court noted that the applicant had already given an

application on 11-10-1975 thus:

"The applicant now submits that it is not pressing other issues except praying that declaration may kindly be given to the effect that the Respondent shall not resort to revenue recovery proceedings to recover its claim without seeking an adjudication of the matter before this Hon"ble Court."

In view of that the E.S.I. Court considered the material on record and held that the E.S.I. Corporation did not determine the contribution as contemplated u/s 45A of the E.S.I. Act and in that view the notice issued demanding the contribution was bad in law. On that finding the Court held that the applicant was entitled to a declaration, that the contribution demanded from him on a sum of Rs. 97819-37 p. was not recoverable from the applicant by or at the Instance of respondent Corporation as there was no legal determination of contribution u/s 45A of the E.S.I. Act. Thus the applicant succeeded before the E.S.I. Court and the parties were directed to bear their respective costs of the proceeding. Aggrieved by the said order the E. S. I. Corporation has instituted the present appeal before this Court.

6. The learned Advocate appearing for the Corporation strenuously urged before us that the Court below was not justified in coming to the conclusion that no contribution was determined u/s 45 of the E.S.I. Act and as such the order passed by the E.S.I. Court was not legal and proper.

7. As against that the learned Counsel appearing for the applicant before the E.S.I. Court who is arrayed as respondent before us argued supporting the order of the E.S.I. Court.

8. Therefore, the short question that arises for our consideration in this appeal is : Whether the E.S.I. Court is justified in holding that no determination of contribution was made u/s 45A of the Act?

9. R.W.I who was an Asst. Regional Director, E.S.I. Corporation, Bangalore entered the box and gave his evidence. He has stated before the E.S.I. Court that at the relevant time the applicant M/s F. Fibre Bangalore (P) Ltd., was covered under the provisions of the E.S.I. Act. There was an omission on the part of the employer to submit returns within the specified period and that the same was brought out in the inspection report of the Inspector. The applicant employer had not taken into consideration the wages paid to the workers engaged in the fabrication work and the employer did not furnish returns in that behalf and that report was put up before him for passing orders. He perused the file and passed orders u/s 45A of the E.S.I. Act directing the employer to pay contribution due on the omitted wages as reported by the Inspector. According to him Ext. R-1 a report of the insurance Inspector was submitted to him for orders. In her report she had reported as per the portion marked "A" in Ext.-R1. On the basis of such disclosed omission he passed an order u/s 45A of the E.S.I. Act demanding contribution on the items omitted together with interest from the employer who was already covered under the E.S.I. Act. The original order was passed by him

at Ext.R-2(a) below the office note. He noted "approved as proposed" in approval of the office proposal and in pursuance of that order notice of demand was issued. In answer to the Court questions the witness stated that when omissions came to his notice he did not issue any notice to the employer to furnish his returns in respect of omitted items; that he did not issue any notice to the employer calling upon him to show cause why determination of contribution should not be made u/s 45A of the Act on the basis of the materials reported to him. He further submitted after looking into the order at Ext. R-2(a) that he did not specifically refer to any amount as determined by him u/s 45A of the E.S.I. Act. He also admitted that particulars of the various items making up the aggregate amount were not furnished to him in the Inspector's report. He did not verify whether the report was correct. In fact, it is brought on record that the inspector was requested to furnish split up figures of the wages for the period of 67-68 for calculation of E.S.I. dues and the authority did not receive such split up figures from the Inspector.

10. Thus, it becomes manifest firstly that there is no order fixing the contribution as contemplated u/s 45A(I) of the E.S.I. Act. Secondly, it becomes obvious that the authority R.W. 1-B.K. Ramachandra Rao did not apply his mind in order to determine the contribution payable as contemplated u/s 45A(1) of the E.S.I. Act. Further it becomes clear that R.W. 1-B.K. Ramachandra Rao did not follow the principles of natural justice by calling upon the employer to show cause why such contribution should not be levied after tentatively fixing the contribution. It is for these reasons that the E.S.I. Court has held that there is no legal order passed u/s 45A(1) of the E.S.I. Act and as such the E.S.I. Court gave a declaration in favour of the applicant. It is that order which is challenged before us.

11. Section 45A(I) reads :

"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 Inspector or other official of the Corporation referred to in sub-section (2) of Section 45 is obstructed by the principal or immediate employer or any other person, in exercising his functions or discharging his duties u/s 45, the Corporation, may, on the basis of information available to it, by order, determine the amount of contribution payable in respect of the employees of the factory or establishment."

Thus, it becomes clear that Section 45A(I) enjoins on the Corporation the function of determining the amount of contribution payable in respect of the employees of that factory or establishment. It is needless to point out that it becomes a quasi judicial function and it is settled law that in exercising such authority, the person concerned should apply the principle of natural justice unless it is specifically excluded in the statute.

12. Sri Papanna, Learned Counsel appearing for the appellant invited our

attention to the decision of the Supreme Court in *Swadeshi Cotton Mills Vs. Union of India (UOI)*, It is laid down by the Supreme Court in that decision, *inter alia*, in para 42 thus :

"In short, the general principle as distinguished from an absolute rule of uniform application seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the *audi alteram partem* rule at the pre-decisional stage. Conversely, if the statute conferring the power is silent with regard to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short, this rule of fairplay must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The court must take every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. But, to recall the words of Bhagawati J., the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise."

13. There can be no quarrel with the salutary and authentic observations of the Supreme Court so made. The Supreme Court has made it very clear, in telling words, that the fairplay must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The moot point therefore is whether the compulsive necessity demands in the context of the present case that rules of fair-play should be jettisoned.

14. The Learned Counsel Sri Papanna submitted that since the applicant if aggrieved by the demand for contribution, can institute an application u/s 75 of the Act to the E.S.I. Court where he would get hearing, it is not contemplated u/s 45A, before passing an order fixing the contribution payable, that the affected person shall be heard. It is in that view that he submitted that the rule "*audi alteram partem*" is not attracted and is by necessary implication excluded by the wordings of Section 45A of the E.S.I. Act. Section 45A of the Act as quoted above, *inter alia*, states that the Corporation may on the basis of an information available to it, by order, determine the amount of contributions payable. It states that the amount of contribution shall be "determined" by "an order" on the basis of the information available and by no stretch of inference can it be said that these words exclude the application of principles of natural justice. Simply because, the aggrieved party has a remedy to approach the E.S.I. Court, u/s 75 of E.S.I. Act, questioning the order of the Corporation, it would not mean that the Corporation need not perform its function in a fair and upright way, by giving

opportunity of hearing to the person affected, before, passing the order determining the contribution payable by him u/s 45A of the E.S.I. Act. The wordings of the Section are merely silent as to the application of principles of natural justice; in such a case, as pointed out by the Supreme Court, it is the duty of the authority while deciding any question in a quasi-judicial manner to hear the otherside. Hence, the decision of the Supreme Court persuades us to hold that while determining the contribution u/s 45A of the E.S.I. Act, the concerned employer shall be heard by issuing him a show cause notice. Fairplay must not be jettisoned as there is no compulsive necessity so to do in the words of the Section. In fact, this Court in *Hegde and Golay Limited Vs. Esic and Another*, speaking through Chief Justice Chandrashekhar, approving the following observations of the Madras High Court in *Free India Private Ltd. Vs. Regional Director, Employees' State Insurance Corporation*, has ruled thus :

"The determination of liability is not an empty formality. It should also satisfy the essential principles 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."

Thereafter, his Lordship Shri Chandrashekhar, C.J. proceeded to observe thus:

"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 2. *Hegde and Golay Limited Vs. Esic and Another*, 3. *Free India Private Ltd. Vs. Regional Director, Employees' State Insurance Corporation*, made by the Regional Director under S. 45A of the Act, is only a provisional order subject to final adjudication under S 75 of the Act and hence can be done without hearing the employer."

Thus it is settled that the order determining the contribution u/s 45A(1) of the Act by the Corporation shall be made by following the principles of natural justice as indicated above. This view finds further support in the ruling of the Supreme Court in *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation*, . In para 22 of the judgment in the aforesaid case the Supreme Court has observed :

"Learned Counsel for the appellants finally submitted that, in this event of our negating his legal contention, he should be given the benefit of natural justice. We agree. The assessment of the quantum of the employers' contribution has now been made on an ad hoc basis because they merely pleaded non-liability and made no returns. In the strength of Section 45A the contribution was determined without hearing. In the circumstances of the case, - and the learned Attorney General has no objection - we think it right to direct the relevant Corporation authorities to give a fresh hearing to the principal employers concerned, if sought within 2 months from today, to prove any errors or infirmities in the physical determination of the contribution. Such a hearing, in tune with the ruling, of this Court in the The Employees State Insurance Corporation, Bhopal Vs. The Central Press and Another, is fair and so we order that the assessment shall be reconsidered in the light of a de novo hearing to the appellants and the quantum of contribution affirmed or modified by fresh orders."

The facts of the present case are similar.

14. On the facts of the present case, moreover, there is no order at all determining the contribution as contemplated u/s 45A(I) of the Act. As pointed out above, a clarification was called for, from the Inspector as to what amount constituted wages from out of the aggregate amount; that report was not before the authority and the authority did not pass any order determining the contribution payable. That being so, it becomes obvious that this appeal is devoid of merits and is liable to be dismissed and we dismiss the same.