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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.22024 of 2022
(Through Hybrid mode)

M/s. Satyasai Engineering College, Balasore .... ***Petitioner***

-versus-

ESIC, BBSR and others .... ***Opposite Parties***

Advocates appeared in this case:

For petitioner : Mr. Somanath Mishra, Advocate

For opposite parties : Mr. A. P. Ray, Advocate

CORAM: JUSTICE ARINDAM SINHA

Date of hearing and judgment: 07.07.2023

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1. Mr. Mishra, learned advocate appears on behalf of petitioner. He submits, his client runs a college. By letter dated 30th March, 2017 (annexure-1) his client was told that the establishment falls within purview of section 1(5) in Employees' State Insurance Act, 1948 with effect from 30th March, 2017. By the letter petitioner was also told, inter alia, number of employees are 13.

2. The corporation issued impugned orders, both dated 6th November, 2018 under section 45-A pursuant to notices issued beginning with notice dated 9th July, 2018. His client though attended two hearings, admittedly did not attend subsequent hearings. He was not aware of the orders passed under section 45-A. The corporation initiated recovery proceedings and issued garnishee order on his banker, to recover in excess of Rs.50 lakhs. It is then petitioner came to know of and was able to obtain impugned determination orders, under challenge.

3. He submits, the corporation has filed counter. In it is disclosed inspection report dated 26th August, 2011 alleging 101 employees. This was purported basis for impugned determination orders, resulting in finding that contribution of Rs.21,12,289/- for period 10/2013 to 12/2016 and Rs.12,13,212 for period 01/2017 to 04/2018, were finally determined. He reiterates, it being an admitted position his client did not attend the hearing on subsequent noticed dates, thereafter, not only has the demand been recovered, the recovery proceeding dropped and the garnishee order lifted. Petitioner also suffered bereavement of losing his only son in COVID-19 pandemic. Hence, his client's prayer that there be direction for fresh

determination on actuals upon setting aside and quashing impugned determination orders.

4. Mr. Ray, learned advocate appears on behalf of the corporation and submits, coverage notice dated 22nd December, 2011, giving number of employees at 101 was duly served on petitioner. He was given sufficient opportunity, not availed. On conclusion of recovery proceedings there has been initiated proceeding under section 85-B, for damages. He refers to paragraph 9 in the counter to submit, dispute stands raised regarding annexure-1 in the writ petition.

5. Mr. Ray, relies on judgment of the Supreme Court in **E.S.I.C. vs. C. C. Santhakumar, 2007 LAB. I. C. 597**. Relied upon passage in paragraph 29, is reproduced below.

> *"29. The Legislature has provided for a special remedy to deal with special cases.* ***The determination of the claim is left to the Corporation, which is based on the information available to it****. It shows* ***whether information is sufficient or not or the Corporation is able to get information from the employer or not, on the available records, the Corporation could determine the arrears****. xxx xxx xxx"*
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> (emphasis supplied)

He submits, the writ petition be dismissed.

6. The corporation disputes letter dated 30th March, 2017 alleged by petitioner to have been issued by it for implementation of registration of employees, giving number of employees at 13. Keeping aside the dispute, it does appear that the determination was initiated by notice dated 9th July, 2018 for period 10/2013 to 4/2018, covered by impugned orders both dated 6th November, 2018. At this stage, Mr. Ray points out from annexures 'C' and 'C'/1 that there stood issued show-cause notice dated 5th November, 2012 covering period 8/2011 to 3/2012. This period could not be included in impugned determination orders as had to be excluded on amendment made to the Act barring claim beyond period of five years.

7. There was gross delay on part of the corporation to have acted in respect of petitioner/the establishment. Nevertheless, the corporation has recovered in excess of Rs.50 lakhs on issuing garnishee order, pursuant to determinations made at aggregate of Rs.33,25,501/-. In the circumstances, equity will be served if petitioner is given an opportunity to present his case for determination on actuals. Court proceeds on this basis because inspection report of year 2011, on number of employees was relied upon by the

corporation in causing determination initiated on notice dated 9th July, 2018 and there is nothing on record to show that there was a subsequent enquiry, considering the corporation was moving ex parte against the establishment. The report pre-dates a period barred! More so, because the corporation has launched proceeding for damages against petitioner. The act of the corporation in proceeding to determine ex parte against petitioner, admittedly on his noticed absence, resulted in determined aggregate of Rs.33,25,501 to be outstanding contribution for aggregate period 10/2013 to 4/2018, the period before excluded by law on gross delay of the corporation. Relied upon material, as has been asserted in the counter, is the initial inspection report dated 26th August, 2011. On this period demand of aggregate Rs.33,25,501/- the corporation has recovered, as aforesaid little over Rs.50 lakhs. In the circumstances, the corporation's justification by reliance on law must be that the law is to be construed strictly against it.

8. In **Santhakumar** (supra), declaration of law was, the determination is duly made, when on the available records and it cannot be interfered with. The question before the Supreme Court was whether proviso to section 77 (1-A)(b) provides limitation of five

years for claiming contribution and restricts the corporation's right to recover the arrears of the contribution as arrears of land revenue under section 45-B, in pursuance to order made under section 45-A. Two conflicting views, of the Kerala and Madras High Courts, were under consideration. The Kerala High Court had taken view that limitation provided under section 77 (1A) (b) was in relation to period of maintenance of record by the employer. A claim for contribution made beyond that period would render the employer remediless in not being able to produce the record for purposes of the determination. The Madras High Court took view otherwise. The Supreme Court expressed its view in paragraph 26, reproduced below.

> *"26. If the period of limitation, prescribed under proviso (b) of Section 77(1A) is read into the provisions of Section 45A, it would defeat the very purpose of enacting Sections 45A and 45B.* ***The prescription of limitation under Section 77(1A)(b) of the Act has not been made applicable to the adjudication proceedings under Section 45A by the legislature, since such a restriction would restrict the right of the Corporation*** *to determine the claims under Section 45A and the right of recovery under Section 45B* ***and, further, it would give a benefit to an unscrupulous employer****. The period of five years, fixed under Regulation 32(2) of the Regulations, is with regard to maintenance of registers of workmen and the*

> *same cannot take away the right of the Corporation to adjudicate, determine and fix the liability of the employer under Section 45A of the Act, in respect of the claim other than those found in the register of workmen, maintained and filed in terms of the Regulations."*
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> (emphasis supplied)

The judgment in **Santhakumar** (supra) was delivered on 21st November, 2006 and second proviso under section 45-A(1), providing for limitation, was by amendment w.e.f. 1st June, 2010.

9. The law declared in **Santhakumar** (supra) was, inter alia, there could not be limitation prescribed for the purpose of the corporation determining under section 45-A. In that context the Supreme Court went on to say that when a determination is made under section 45-A and the employer fails to challenge the determination under section 75 of the Act, then the determination under section 45-A becomes final against the employer and as such there is no hurdle for recovery of the amount determined under section 45-B of the Act, by invoking the mode of recovery as contemplated under section 45-C to 45-I.

10. This Bench is bound by the declaration of law relied upon, keeping aside the view taken of no prescribed period in section 45-A as has ceased to operate consequent to the amendment. The

declaration of the determination being final is for purpose of recovery. Here recovery has been made on the determination deemed to have become final and the demand recovered. However, facts and circumstances in the case are such that there must be interference to allow an opportunity to petitioner for placing the documents, if he can, for establishing a determination on actuals. The corporation in exercising its power to determine under section 45-A has taken as its basis the inspection report dated prior to the excluded period. The interpretation of section 45-A, by the Supreme Court, in not having the restriction of limitation was said as otherwise it would give benefit to an unscrupulous employer. Petitioner in this case does not appear to be unscrupulous inasmuch as the corporation was able to and has recovered.

11. Reliance by the corporation was on above quoted passage from paragraph 29 in **Santhakumar** (supra). Contention is, the Supreme Court declared that determination of the claim is left to the corporation, which is based on the information available to it. Whether information is sufficient or not or the corporation is able to get information from the employer or not, on the available records, the corporation could determine the arrears. Parliament in enacting

the amendment with effect from 1st June, 2010, providing for limitation by second proviso under section 45-A(1) went with view taken by the Kerala High Court, as was under consideration in **Santhakumar** (supra). In the circumstances, basis for the determinations being inspection report dated 26th August, 2011, as aforesaid, pre-dating the excluded period, said document cannot qualify as providing information available to the corporation or to be available record, for the corporation to have determined as by impugned orders. This goes to root of the controversy and makes the determinations bad. The corporation, pursuant to the determinations went ahead and recovered by issuing order under section 45-G, the garnishee order.

12. It does appear from impugned orders that opportunity of hearing was given. Petitioner admits so. The authority then went on to determine. The provision for determination requiring the authority to give the establishment opportunity of hearing makes the authority to function at determination as a quasi judicial authority. Function of a quasi judicial authority is not simply following mandate of the provision to give notice. It must also act in a manner that is fair and reasonable, especially when it is moving ex parte. By relying on

extraneous material, the authority did not do so in determining the arrears of contribution. It then went ahead and caused recovery by garnishee order, on such determination. Garnishee proceedings are provided for in order XXI of Code of Civil Procedure, 1908. The proceeding is part of obtaining or securing execution, satisfaction and discharge of decree obtained from Court. Under the Act, the corporation raises a claim. Provisions are there for determination by the corporation itself. Thereafter, power for the corporation to execute its determination by recovery, inter alia, on issuing garnishee order. All this makes it absolutely necessary for the corporation to act in such a way that there should not arise allegation of arbitrariness.

13. Impugned orders are set aside and quashed. The determination proceeding is restored.

14. Petitioner will present himself with all documents before the authority on 24th July, 2023 at 3:00 P.M. The authority may deal with the determination on that day itself or proceed to deal with it as per convenience. It is made clear, in event petitioner does not appear as directed on 24th July, 2023, the omission will automatically restore impugned determination orders. It is further made clear, in event petitioner is successful in obtaining a lesser amount on the

determination, there must be restitution of excess recovery. In that event the restitution must be within four weeks of the determination, to the bank account, in respect of which the garnishee order was issued.

15. The writ petition is disposed of.

(Arindam Sinha)
Judge

Prasant