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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO 371/2015**

EMPLOYEE STATE INSURANCE CORPORATION Appellant

Through: Mr. K.P. Mavi, Advocate

versus

SKYLARK CAGERS INTERNATIONAL Respondent

Through

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER

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28.10.2015

CM No.24659/2015 (Exemption) and CM No.24658/2015 (Exemption)

1. Allowed subject to just exceptions.

FAO 371/2015 and CM No.24657/2015 (condonation of delay of 557 days in filing the appeal)

2. The captioned application has been moved by the appellant to seek condonation of delay of 557 days in filing the accompanying appeal.

2.1 A perusal of the application would show that the appellant claims that it became aware of the impugned judgment dated 28.01.2014, only on, 13.07.2015.

2.2 There are also averments to the effect that thereafter the process of obtaining certified copies and legal opinion of the concerned advocate was triggered. It is averred that the certified copy of the

impugned order was obtained on 28.08.2015.

2.3 It is further submitted that on 02.09.2015, the competent authority directed that the legal opinion be obtained from the concerned advocate for instituting the appeal.

2.4 An averment has also been made to the affect that the explanation was sought for from the Social Security Officer and the dealing assistant concerning the delay in obtaining the certified copy of the judgment.

2.5 Apparently, on 23.09.2015, the opinion of the concerned advocate was obtained. Resultantly, a decision was taken on 28.09.2015 by the competent authority to file an appeal in the matter.

2.6 It is in this background that the record was made available to the concerned advocate on 06.10.2015 which led to the institution of the present appeal. The instant appeal was finally instituted on 08.10.2015.

3. I must record here that according to the Registry, the delay in filing the appeal amounts to 528 days and not 557 days as calculated by the appellant.

3.1 Notwithstanding the above, what has clearly come through, is that, the entire process of obtaining the certified copy began only after 13.07.2015. The learned counsel for the appellant submits that the delay was on account of the Social Security Officer and the dealing assistant not attending to their duties as required of them. For this purpose, the learned counsel adverted to the averments made in paragraph 6 of the captioned application.

3.2 As noted hereinabove by me, the only averment made is that an

explanation was sought for the delay. The nature of explanation sought or the response of the officers concerned has not been set out in the application. This averment by itself, to my mind, is too broad for this court to condone the delay between 28.01.2014 and 13.07.2015 which comprises of a substantial part of the total period of delay, that has occurred, in the institution of the appeal. This delay is of nearly 18 months.

4. That apart, on merits, the trial court has primarily allowed the petition of the respondent / plaintiff on the ground that after 01.06.2010, there has been an amendment to the provisions of Section 45A of the Employees State Insurance Act, 1948 (in short the Act). For the sake of convenience the said Section, as amended, is extracted hereinbelow :-

“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 Inspector or other official of the Corporation referred to in sub-section 45 is ⁸⁰[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 the amount of contributions payable in respect of the employees of that factory or establishment:

⁴[**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.]

⁵[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 ⁴[or the recovery under section 45C to section 45-I]...”

4.1 This provision is required to be read with Section 77(1-A) and Explanation (b) alongwith the proviso appended thereto. For the sake of convenience, the relevant part of Section 77(1-A) is, adverted to herein below :

77. Commencement of proceedings. — (1) The proceeding before an Employees’ Insurance Court shall be commenced by application.

[(1-A) Every such application shall be made within a period of three years from the date on which the cause of action arose.

Explanation. — For the purpose of this sub-section, —

(a) the cause of action in respect of a claim for benefit shall not be deemed to arise unless the insured person or in the case of dependants’ benefit, the dependants of the insured person claims or claim that benefit in accordance with the regulations made in that behalf within a period of twelve months after the claim became due or within such further period as the Employees’ Insurance Court may allow on grounds which appear to it to be reasonable ;

1 [(b) the cause of action in respect of a claim by the Corporation for recovering contributions (including interest and damages) from the principal employer shall be deemed to have arisen on the date on which such claim is made by the Corporation for the first time :

Provided that no claim shall be made by the Corporation after five years of the period to which the claim relates ; (c) the cause of action in respect

- (c). x x x x x
(2). x x x x x”

4.2 The learned counsel for the appellant has submitted that in so far as Section 77(1-A) of the Act is concerned, same has been interpreted by the Supreme Court in its judgment passed in ***ESI Corporation Vs. C.C. Santh Kumar, (2007) 1 SCC 584.***

4.3 It is therefore the submission of the learned counsel for the appellant, based on the ratio of the aforementioned judgment that for carrying out proceedings under Section 45A, no period of limitation is applicable, especially in the circumstance that in the instant case the period for which contribution is sought precedes the date of amendment (i.e. 01.06.2010) made qua said Section.

4.3 Mr. Mavi, at this juncture, indicated that the period involved is 31.03.2006 till 01.04.2007. It is, therefore, Mr. Mavi’s contention that the aforementioned judgment of the Supreme Court would be applicable to the facts of the present case.

4.4 In my view, this submission cannot be accepted for the reason that the amendment to Section 45A clearly stipulates that no order under the said provision can be passed by the appellant (i.e. the corporation) in respect of the period beyond 5 years from the date on which contribution became payable. Even according to the appellant, contribution became payable only when the notice of demand was issued which, admittedly, in this case was issued on 21.01.2013. If one were to calculate the period of demand, it cannot by any stretch cover the period involved, which is, 01.04.2006 to 31.03.2007.

4.5 I may only indicate here that according to the appellant, it had

carried out inspection of the respondent's / plaintiff's record, apparently, on 09.10.2011. In this connection, the appellant had also stated before the trial court that a letter dated 29.08.2012 was issued to the respondent /plaintiff. The trial court has noted in the impugned judgment that both these aspects were not proved. In fact, admittedly, the appellant did not lead any evidence in the matter. Therefore, the only marker which was available to the trial court was the date of the demand notice which , as indicated above, is admittedly, 21.01.2013.

4.6 Having regard to the aforesaid, it is quite clear that the judgment of the Supreme Court is not applicable in the facts of the case as, an amendment to Section 45A of the Act, has interceded, in the meanwhile.

5. For the aforesaid reasons, I find no merit in the appeal. The application for condonation of delay is also bereft of any substance. Accordingly, both the application for condonation of delay as well as the appeal are dismissed.

RAJIV SHAKDHER, J

OCTOBER 28, 2015

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