

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

+ **FAO No. 231/2017**

% **22nd May, 2017**

RAJEEV OBEROI Appellant

Through: Mr. Shivam Garg, Advocate.

versus

EMPLOYEES STATE INSURANCE CORPORATION & ANR.

..... Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal under Section 82 of the Employees' State Insurance Act, 1948 (hereinafter referred to as the 'ESI Act') is filed by the petitioner before the ESI court, challenging the impugned judgment dated 15.3.2017 which has dismissed the petition filed by the present appellant under Sections 75 and 76 of the ESI Act impugning the assessment order dated 19.1.2012 assessing demand of Rs. 1,68,025/- upon the appellant/petitioner. I may note that in fact the 'order' is not the order dated 19.1.2012 inasmuch as the document dated 19.1.2012 is the show-cause notice and the assessment order which has thereafter been issued against the appellant/petitioner is dated 26.4.2012. The issue is with respect to non-payment of

contribution and non filing of returns from October 2009 to March 2011 by the appellant/petitioner under the ESI Act. The case of the appellant/petitioner was that the appellant/petitioner did not receive the show-cause notice dated 19.1.2012, and therefore, it was contended that the assessment proceedings against the appellant/petitioner are bound to fail.

2. The court below has examined the issue threadbare with respect to non-filing of returns and non-deposit of contribution by the appellant/petitioner for the period from October 2009 to March 2011. The ESI court below has referred to the fact that admittedly the dues for the period in question were not deposited within time but were only deposited on 9.3.2012 i.e after the issuance of the show-cause notice dated 19.1.2012. The ESI court below has also observed that the assessment order was actually passed against the appellant/petitioner much later after the show-cause notice dated 19.1.2012 i.e on 26.4.2012. The assessment order is passed on account of admitted non-filing of returns and not depositing of the requisite contribution by the appellant/petitioner for the period from October 2009 to March 2011. I may reiterate that it is not disputed that the appellant/petitioner, for the period from October 2009 to March 2011, did not deposit the contribution in time and deposited the requisite contribution only on

9.3.2012 i.e after issuing of the show-cause notice dated 19.1.2012.

The ESIC court below notes that when the show-cause notice dated 19.1.2012 was issued there was even no return of contribution for March 2011 on the record. The relevant observations of the ESI court below for dismissing the petition filed by the appellant/petitioner reads as under:-

“The receipt of notice dated 19.1.2012 was denied by PW1. The said receipt is exhibited as ExRW1/2. It is acknowledgment of receipt of notice by petitioner which was sent by the respondent. **Though PW1 denied the receipt of the same but counsel during the course of arguments admitted the receipt of said notice.**

Perusal of receipt would reveal that the date of personal hearing was granted to petitioner for 20.02.2012. The petitioner for the reason best known to him did not appear before the respondent to explain his case. There is no written communication to the respondent by the petitioner even after the factum of said notice came to his knowledge.

During the course of arguments, it was argued on behalf of petitioner that petitioner could not have appeared on 20.02.2012 due to any personal difficulty and he should have been granted at least two or more days for personal appearance.

Admittedly, the petitioner did not visit the office of respondent nor communicated with the respondent for grant of such opportunity in writing. This opportunity of being heard was never availed by the petitioner for the reasons best known to him. Neither the reason for non-appearance is stated in the petition nor the same has come in the evidence of the petitioner.

On account of non-appearance of petitioner, respondent was constrained to pass an assessment order dated 26.04.2012 on the basis of calculation of contribution done on 19.01.2012.

The petitioner deposited the contribution after the date of personal hearing and even the return of contribution was submitted late. The factum of late deposit of return of contribution is admitted by petitioner in his cross examination. Admittedly, on the date of issuance of show cause notice dated 19.01.2012, no return of contribution for March, 2011 was on record. The claim of having been granted more opportunities than one for personal hearing is not supported with either any precedent or through the provision laid down under the ESI Act.

Counsel for respondent has relied upon judgments reported as **1975 (1) LLJ; 29 1982 (21) DLT 14** and **2001 LLR 477** in support of his arguments. As per which in order to avoid section 45A being used, an employer will have to show that he has filed the return as required by

section 44 of the ESI Act. And if no return is filed, it immediately attracts section 45A of the ESI Act.

The assessment order dated 26.04.2012 has attained finality after quasi-judicial proceedings under section 45-A of the ESI Act, as no closure returns within time filed for period ending March, 2012.

Further judgment reported as **207 (2014) DLT 519** of which para 7 would be relevant wherein it has been held that “ESI fully justified under section 45-A to arrive at a conclusion on its own because respondent cannot take advantage of its own wrong by failing to file necessary employment records. Self-serving statements given in replies with respect to number of employees or their salaries could be rightly disbelieved by appellant. Therefore, there is no liability in order passed under section 45-A determining contribution of respondent @ Rs.2,05,643/- for period in question. Adverse consequence must flow to respondent in view of failing to file record.

The petitioner in my considered view has failed to prove that the assessment order dated 19.01.2012 is illegal or arbitrary. The petitioner has not been able to explain his non-appearance on 20.2.2012. Once the receipt of show cause notice dated 19.01.2012 is admitted by counsel for petitioner during the arguments then the question of not being aware of date of personal hearing does not arise. Even otherwise the petitioner has never communicated with the respondent for grant of such opportunity. Order passed on 26.04.2012 is as per the provision laid down under the ESI Act and thus legal. This issue is accordingly decided against the petitioner.” (emphasis added)

3. A reading of the aforesaid paras of the impugned judgment show that during the course of arguments, the appellant/petitioner did not take up a case of non-service of notice dated 19.1.2012 but in fact pleaded that the appellant/petitioner could not appear on 20.2.2012, the date of hearing fixed by show-cause notice dated 19.1.2012, due to personal difficulty. Therefore, the appellant/petitioner was served the notice dated 19.1.2012 for appearance on 20.2.2012 but yet the appellant/petitioner failed to appear before the authorities. The show-cause notice dated 19.1.2012 was proved by respondent as Ex.RW1/2 as duly served on the

appellant/petitioner. In fact realizing his non-deposit of the contribution, the appellant/petitioner got the same done on 9.3.2012. Since there was admittedly a default in compliance of the provisions of the ESI Act and there was non-filing of returns and non-deposit of contribution, and that it is only after 20.2.2012 that the assessment order was passed against the appellant/petitioner on 26.4.2012, accordingly, I cannot agree with the arguments urged on behalf of the appellant/petitioner that the appellant/petitioner was not noticed by the authorities under the ESI Act before passing of the assessment order dated 26.4.2012 or that on merits the assessment order could not have been passed against the appellant/petitioner.

4. Learned counsel for the appellant/petitioner sought to draw attention of this Court to a notice dated 19.1.2012 at page 48 of the paper book of this appeal to argue that by this notice 15 days time was given to the appellant/petitioner, and therefore a hearing could not be fixed before the expiry of 15 days. It is however seen that there are two notices dated 19.1.2012, one notice dated 19.1.2012, and which is at page 48 of the paper book, is for prosecution of the appellant/petitioner under the provisions of the ESI Act which provides for criminal prosecution, whereas the second notice which is the subject show-cause notice dated 19.1.2012 is a separate notice for

assessment fixing a date of hearing on 20.2.2012. Appellant/petitioner is therefore unfortunately causing to mix-up two separate notices for two separate purposes. This argument of the appellant/petitioner is therefore rejected. In any case the date of 20.2.2012 is well after the expiry of 15 days period mentioned in the other notice dated 19.1.2012 and therefore there was sufficient time for the appellant/petitioner to reply within 15 days of service of notice dated 19.1.2012 and thereafter to appear on 20.2.2012.

5. In view of the above, I do not find any merit in the appeal.

6. Dismissed.

MAY 22, 2017

VALMIKI J. MEHTA, J

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