AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

M.A. No. 13 of 2019

M/s. Siddhu Construction Company, through Proprietor Smt. Harbansh Kaur Siddhu, W/o. Mohan Singh Siddhu, Aged about 64 years, resident of Mangal Vihar, Plot No. 36, Kosabadi, Tahsil and District Korba (C.G.)

---- Appellant

Versus

Employees State Insurance Corporation through Deputy Director, address at Regional Office 107, Ramnagar Road, Kota, Raipur District Raipur (C.G.)

---- Respondent

For the Appellant	:-	Mr. S.P. Kale, Advocate
For the Respondent	:-	Mr. Pradeep Saxena, Advocate

Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Vimla Singh Kapoor,

Judgement on Board By

Manindra Mohan Shrivastava, J.

26.08.2019

1. This appeal under Section 82 of the Employees State Insurance Act, 1948 (for short 'the ESI Act 1948') was admitted on the following substantial question of law.

   " Whether the learned ESI Court was justified in law in dismissing the application of the appellant and holding that it has not fulfilled the legal requirement of pre-deposit?"

2. Present is a case arising out of proceedings drawn under Section 45 A of the ESI Act, under which the corporation had issued notice to the immediate employer, the appellant in respect of certain contributions relating to workers engaged by it to discharge contractual engagement of the appellant with SEPCO company which has entered into works contract with BALCO.

3. The corporation having found that the principal employer and the immediate employer have failed to furnish necessary return to satisfy the authority regarding payment of contribution towards insurance of the employees working with the appellant, as are liable to be paid under the Act 1948, proceedings under Section 48 A were drawn, which culminated in passing of an order against the appellant. The appellant challenged the said order by filing a petition under Section 75 of the Act 1948, before the Insurance Court. The Insurance Court after having examined the material on record found that the immediate employer, the appellant, had failed to produce any material to satisfy the corporation that it had complied with the requirement with regard to contribution towards insurance of the employees engaged by it and further that he had failed to comply with mandatory requirement of pre-deposit as contained under Section 75 (2-B) of the Act, the application was rejected.

4. Learned counsel for the appellant has not only argued on the substantial question of law as framed by this Court but also

prayed for framing of additional substantial question of law, realizing that the Insurance Court has not only dismissed the application on the ground of violation of section 75 (2-B) but also on merit of the case.

5. It is contended that as far as the requirement of pre-deposit as contained under Section 75 (2-B) is concerned, it is applicable only when the principal employer chooses to file petition before the Insurance Court. According to him, there is no warrant for extending the meaning the of the word “principal employer” to include an immediate employer also. Learned counsel for the appellant argued that in the entire act, a clear distinction has been drawn between the principal employer and the immediate employer and they have not only been separately defined but different obligations have also been imposed on them in the matter of compliance of the provision of the Act 1948.

6. Learned counsel for the appellant also argued that an additional question of law also arises for consideration as to whether the corporation could have initiated the proceedings only against the immediate employer, under Section 45-A of the Act. His argument is that since the statutory liability at the first instance, towards payment of contribution is fastened upon the principal employer, as provided under Section 40 of the Act, whenever occasion arises for the corporation to determine and to order recovery, it has to be only against the principal employer and not against the immediate employer. He submits that under the scheme of the Act, section 41 of the Act,

empowers principal employer to recover the contribution amount from the immediate employer. In support of his argument, he has placed reliance upon **Employees' State Insurance Corporation, Bangalore** vs. **Dharwad Co-op. Producers Societies Union ltd., Dharwad 2000(1) LLJ 355, Employees State Insurance Corpn. Vs. M/s. Harrisons Malayalam Pvt. Ltd., 1994(1) LLJ 12 and Bharat Heavy Electricals Ltd. vs. Employees' State Insurance Corporation 2008(3) SC 427.**

7. On the other hand, learned counsel for the respondent would argue that looking the nature of legislation that it is a beneficent one, the provision contained section 2(2-B) of Section 75, needs to be giving liberal and inclusive interpretation. He would argue that keeping in view the purpose an object of making provisions regarding pre-deposit, there is no reason why the immediate employer should be excluded from the rigor of the said provisions and the requirement of pre-deposit be confined only in those cases where the principal employer challenge the order passed by the Corporation.

The other submission is that the second question of law proposed by the appellant does not arise in view of plain language of Section 45-A, which permits proceedings under that section to be drawn not only against the principal employer but also against the immediate employer and other establishment also.

8. Even if, for the sake of argument, we have to accept the submission of learned counsel for the appellant that under Section 75 (2-B) of the Act, the legal requirement of pre-deposit is applicable only in a case where petition is filed before the Insurance Court by the principal employer, unless there is any other substantial question of law arising for our consideration, that would not amount to substantial question of law as it does not have material bearing on the result of the case. After going through the impugned order, we find that the learned Insurance Court has examined the case of the appellant on merit first and even after having recorded a finding on the merits of the case against the appellant, it has further recorded a finding that even otherwise, on account of non- compliance of pre-deposit provision, the appeal is liable to be dismissed.

9. The argument of learned counsel for the appellant that in the matter of determination of contribution, proceedings under Section 45-A of the Act, could not be drawn against the immediate employer but only against the principal employer, does not appeal to us in view of plain language of section 45-A, which 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 [2] [Social Security Officer] or other official of the Corporation referred to in sub section (2) of section 45 is [3][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 45 B [6][or the recovery under section 45 C to section 45-I] ."

It is thus clear that the proceedings under Section 45-A of the Act could be drawn by the corporation by giving opportunity of hearing to principal employer or immediate employer or the person in- charge of the factory or establishment.

True, it is that under the scheme of section 40, the primary statutory liability of making contribution rests on principal employer and section 41 entitles the principal employer to recover that amount from the immediate employer. However, that does not mean that where the corporation finds that contribution have not been made, its hands are tide or restricted to draw proceedings only against the principal employer and not against the immediate employer or any other person named in aforesaid provision.

10. The argument of learned counsel for the appellant is contrary to the plain language and scheme of section 45-A of the Act. All the decisions which have been cited by the learned counsel for the appellant are with regard to the scheme of liability under Section 40 and 41 of the Act. In none of those decisions it has been propounded that in view of section 40 and 41 of the Act, determination under Section 45-A of the act has to be only against the principal employer and not immediate employer. The argument is misconceived in law because section 45-A clearly confers power of determination, with a proviso that before such determination is made, the principal employer or immediate employer or other such persons as specified therein will have to be heard. Once that order is passed, the immediate employer cannot raise grievance that such order is bad because proceedings were not drawn against the principal employer but only against the immediate employer.

11. In Bharat Heavy Electricals Ltd. vs. Employees' State Insurance Corporation 2008(3) SC 427, cited before us, the Supreme Court has clearly stated in para-22 that section 45-A enables the appropriate authority to recover such dues both from the principal employer as also the immediate employer. Present is not a case where the principal employer feeling aggrieved by an adverse order sought opportunity of hearing before the

corporation which had issued notices to the present appellant. Therefore, except the question of law which was framed by us, no other question of law arises for consideration. That being so, the question of law framed by us does not amount to a substantial question of law because irrespective of decision on this question, the result in the case will not change. On account of adjudication on merit as well, no case is made out therefore, the appeal is dismissed.

12. Lastly, learned counsel for the appellant argued that he has deposited entire amount before the corporation. Learned counsel for the respondent submits that if the appellant has deposited the entire amount, this fact may be brought to the notice of the Recovery Officer. The appellant would be at liberty to satisfy the Recovery Officer that amount determined under Section 45 A of the Act has already been deposited by him and it will be open for the recovery officer to take its own decision in accordance with law.

Sd/-	Sd/-
Manindra Mohan Shrivastava	**Vimla Singh Kapoor**
Judge	**Judge**

Santosh