

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 18.10.2019

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.18020 of 2014

&

M.P.No.1 of 2014

M/s.TTK Prestige Ltd.,
Rep by its Vice President-Human Resources,
B.K.Guruprasad,
Plot No.82 & 85,
SIPCOT Industrial Complex,
Hosur - 635 126.

....Petitioner

..Vs..

The Assistant/Deputy Director,
Sub Regional Office (Salem),
Employees' State Insurance Corporation,
39/57, Theerthamalal Vaniga Valagam,
Three Roads, Salem - 636 009.

....Respondent

Petition filed Under Article 226 of the Constitution of India praying to issue a Writ of Certiorari calling for the record of the respondent in respect of the proceedings No.63000450420000607/MEC/SRO/SLM/C-18(Adhoc)/18/14 and quash the show cause notice dated 06.06.2014 claiming contribution from the petitioner for the period from 01.04.2007 to 31.03.2010 and award exemplary costs. सत्यमेव जयते

For Petitioner : Mr.S.Ravindran, Senior counsel
for S.Bazeer Ahmed

For Respondent : Mr.K.Prabhakar

ORDER

The Show Cause Notice dated 06.06.2014 issued by the respondent is sought to be quashed in the present writ petition.

2. The learned Senior counsel appearing on behalf of the writ petitioner made a submission that the impugned show cause

notice is nothing but the review of the award passed under Section 45-A of the ESI Act, 1948 in Order dated 16.11.2011. Such a review cannot be initiated, as the respondent is not empowered under the Act to review the final order passed under Section 45-A of the Act. Thus, the show cause notice impugned is without jurisdiction and without any authority. To substantiate the said contention, the learned Senior counsel reiterated that though Section 75 of the Act provides an adjudication before the ESI Court, the petitioner has chosen to file the writ petition in view of the fact that very issuance of show cause notice is without jurisdiction and therefore the writ petition is to be entertained.

3. The facts in nut shell enumerated in the present writ petition are that the petitioner/establishment is covered under the ESI Act and it has been regularly paying contribution in respect of all eligible employees. Pursuant to certain inspection carried on in petitioner's establishment on 20.07.2011, the respondent issued a show cause notice to the petitioner/establishment claiming that for a period from 2007-2008 to 2009-2010, the petitioner was liable to pay the contribution of Rs.21,38,51,276/-. In terms of the above notice, the respondent held an enquiry under Section 45-A of the ESI Act. The petitioner submitted its reply dated 22.09.2011 establishing that there is a typographical error in the amount claimed in the show cause notice and also on merits. The petitioner pointed out various facts and details regarding the salary reconciliation. Considering the explanation, the Authority competent passed a final order in proceedings dated 16.11.2011 under Section 45-A of the ESI Act. The said order became final and as per the said order, the petitioner also had paid the contributions. Thus, further show notice issued by the same authority reviewing the earlier order passed under Section 45-A of the ESI Act is without any authority under Law.

4. The learned Senior counsel cited the judgment of this Court in the case of Quality Engineering Works Vs. Regional Office (Tamil Nadu), Employees' State Insurance Corporation in W.P.No.18688/1993 dated 11.04.2004, wherein a similar issue was decided, this Court with reference to the order passed under Section 45-A of the ESI Act made the following observations;

"8.From the counter, it is very clear that the petitioner had disclosed all the necessary materials before the Assistant Regional Director of the ESI Corporation. It is admitted that the complete materials and facts were before him. But, it is contended that for reasons best know, the concerned authority had not properly verified those statements, but went ahead on the basis or a casual verification of the general ledger and therefore, the show-cause

notice was issued with reference to the omitted portion. On the fact of his admission that the petitioner had disclosed all the materials including the one given to the Income Tax Department by the contractors in reference to the wages etc., if there is omission on the part of the Assistant Regional Director, the petitioner cannot be blamed for that. There is no provision under the ESI Act to reopen an order of assessment made under such circumstances. A Division Bench of this Court, in *Eastern Stores Vs. Regional Provident Fund Commissioner* 1973 (2) LLN 378 dealing with the Employees' Provident Funds and Miscellaneous Provisions Act, held that it is fundamental that if a statutory authority wants to re-examine a concluded affair or subject-matter, it "assumed the role of a reviewer in law and unless and until the statute under which he functions, authorises him expressly or by necessary implication to review such matters under certain stated circumstances or situations, he cannot assume such power in suo motu and set at naught the earlier concluded affairs. Justice Sri Ramprasada Rao (as he then was), held as follows:

"It is fundamental that powers of appeal and review are creatures of statute and unless there is an express, provision or any other provision from which such a power by necessary implication can be inferred, the authority cannot assume such a power and undertake to re-examine a closed situation..."

In *Sambandam Spinning Mitts (Private) Ltd., Vs. Regional Provident Fund Commissioner*, a Division Bench of this Court in an unreported decision in W.P.No.9059 of 1982, dated 21.09.1989, has held that there is absolutely no difficulty in holding that the order passed by the respondent under Section 7-A of the Provident Funds Act was final and there was no ground for reopening the same. There is no provision either in the Act or in the rules enabling the authority to reopen the proceedings suo motu,"

5. Relying on the said judgment cited supra, the learned Senior counsel for the writ petitioner reiterated that the impugned order is not in consonance with the established principles and there is no reference about the Vigilance Enquiry. Even, in case of Vigilance Enquiry, as per the judgment cited supra, the impugned order is liable to be scrapped. As per

the counter filed by the respondent, the Vigilance Enquiry was conducted and based on the Vigilance Enquiry, the Show Cause Notice was issued. Thus, such a course of action is impermissible in view of the principles laid down in the judgment cited above.

6. In the case of Deepak Chandnani, NCR Corporation India (Private) Ltd., Pondicherry Vs. Deputy Director, Office of the Regional Officer (Tamil Nadu), Employees' State Insurance Corporation, Chennai in W.P.No.1488 of 2005 dated 23.03.2009, the Court held that when the show cause notice was issued without jurisdiction and in violation of the principles of natural justice, then the writ petition would be maintainable and the High Court can set aside such show cause notice which was issued without any jurisdiction or in violation of the principles of natural justice. In those circumstances, the Courts have granted waiver of appellate remedy provided under the statute and therefore the present writ petition also falls under the same category.

7. At the outset, it is contended that the impugned notice was issued without jurisdiction and the facts on merits were adjudicated by the competent authorities and final order was passed under Section 45-A of the ESI Act, which became final and on these grounds the writ petition is to be considered.

8. The learned counsel appearing on behalf of the respondent disputed the contentions raised on behalf of the writ petitioner by stating that petitioner was paying contribution in respect of eligible employees is wrong and the stand that they have produced all the records for verification cannot be taken on its face value. The assessment was reviewed by the Vigilance Wing, ESIC on doubting about the correctness and genuinity of assessment made in view of the number of discrepancies involved. The vigilance team observed that the action of the Authorized Officer in issuing C18 claim for such a huge amount of Rs.21,38,51,276/- which in itself is found to be incorrect and subsequent reduction of the contribution to only Rs.96,694/- combined with the deficiencies noticed in the order dated 16.11.2011 under Section 45-A of the Act giving petitioner undue benefits towards the rate of statutory contributions and further in-absence of any evidence in records towards cost of materials and overheads warranting adverse inference on the motives of the Branch Officer. It is further contended that the area SSO's who have conducted the ledger verification of the petitioner's establishment have reported that the employer has failed to provide details for arriving at exact amount of omitted wages, even though sufficient amount of time had been given to the petitioner at the time of inspection of the writ petitioner establishment.

9. Section 45-A Order dated 16.11.2011, for payment of Rs.98,694/- as statutory contribution passed by the Authorized Officer/Branch Officer gave the petitioner due benefits as claims are raised under five heads while the Authorized Officer/Branch Officer taken two heads viz., (i) Salary and wages and (ii) Sundry expenses for discussion and determination and left out three heads viz., (iii)freight Inward loading and unloading, (iv) Building, Construction, R & M Building, Labour Wages and (v)R & M; others were not taken into account for determination of contribution. While determining the contribution in respect of the Sundry expenses which included payments made for job works done inside the premises of the factory, the Authorized Officer/Branch Officer taken 30% of the payment made to Contractors as wages and the rebate of 70% towards contractor's statutory liabilities, profit margin and other expenses, calculating 6.5% towards ESI, 25.61% towards EPS contributions whereas the petitioners actually eligibility is 4.75% and the EPF is 13.61%. The computation of 30% of payment made to the Contractor is incorrect and there is shortage in computation of 1.75% towards ESI and 12% towards EPF in arriving at the wages whereas the percentage of wages and the payment of amount should be 43.75% (30+1.75+12). In order to avoid pecuniary losses to the Corporation engaged in providing benefits to their stakeholders, re-determination of statutory contribution under Section 45-A of the ESI Act was required for arriving at the actual liability of the employer/petitioner.

10. It is further contended by the learned counsel appearing on behalf of the respondent that the Order under Section 45-A of the ESI Act dated 16.11.2011 was reviewed pursuant to the serious discrepancies observed by Vigilance wing of ESIC in determination of the contribution already made pursuant to orders for statutory contribution dated 16.11.2011. The 45-A Order dated 16.11.2011 has given the petitioner undue benefits in determining the contribution and in order to determine the actual contribution to be paid a demand notice of C18 adhoc has been issued and no fresh order under Section 45-A has been passed.

11. C18 Adhoc demand notice dated 06.06.2014 was issued following an vigilance investigation for verification of records so as to compute exact liability of the petitioner. The initiation of C18 adhoc demand notice is due to observance of vigilance investigation and overlooking such discrepancies and perpetuating wrong actions.

12. Considering the arguments this Court is of the considered opinion that the Act do not contemplate initiation of any review proceedings against the final order passed under

Section 45-A of the Act. Admittedly, the final order was passed by the competent authority under Section 45-A in proceedings dated 16.11.2011 and the amount demanded was also paid by the writ petitioner. However, the counter affidavit filed by the respondent reveals that the vigilance enquiry was conducted and serious lapses and discrepancies were found which resulted in issuance of 18C Adhoc demand notice dated 06.06.2014 for the purpose of rectification of the serious lapses notified during the vigilance investigations.

13. The learned counsel appearing on behalf of the respondent further brought to the notice of this Court that the Departmental disciplinary proceedings were also initiated against the Officer who issued the order under Section 45-A in proceedings dated 16.11.2011 and his retirement benefits were withheld on account of the pendency of the departmental proceedings. It is contended that the order dated 16.11.2011 is a corrupt order and not in consonance with the provisions of the Act. The original records were not verified properly which resulted in undue advantage to the writ petitioner Company.

14. The ESI Corporation is a welfare legislation. Any financial losses caused on account of any mistake, error or corrupt activities on the side of the officials of the ESI Corporation, then such instances are to be viewed seriously as the same will affect the very integrity of the institution itself. So also, no person or assessee can be allowed to take any undue advantage or unjust enrichment in respect of such erroneous calculations, mistakes committed by the officials or on account of certain corrupt activities in the Corporation. The contributions are to be made with reference to the calculations made strictly in accordance with the provisions of the Act and the Rules and the orders passed by the Department. The very purpose and object of the Act is to ensure that, from and out of the contributions, the welfare schemes are implemented for the benefit of the workers. Thus, no person / assessee shall be allowed to take any undue advantage of the errors or mistakes made in the calculations regarding the contributions to be recovered. The Courts also must be cautious in quashing such Show Cause Notices issued based on the report of the Vigilance Wing regarding the irregularities, illegalities or corrupt activities. The constructive and constitutional approach is required, so as to ensure that the interest of the institution is protected and equally interest of the assessee also is taken care of. Thus, a balancing approach is to be adopted, so as to ensure that the contributions with reference to the correct calculations are recovered and the assessee or any person is prevented to take any undue advantage or unjust enrichment on account of any mistake, error or corrupt activities.

15. As the learned Senior counsel appearing on behalf of the writ petitioner contended that the Authority competent has no jurisdiction to review the final order passed under Section 45-A in proceedings dated 16.11.2011, unless there is an implied provisions of review of such orders. The Authorities of the Corporation are not empowered to review their own orders passed under Section 45-A of the Act. It is contended that "it is fundamental that powers of appeal or review are creatures of statute and unless there is an express provision or any other provision from which such a power by necessary implications can be inferred, the Authority cannot assume such a power and undertake to re-examine a closed situation."

16. The legal principles placed before this Court by the learned Senior counsel is a settled one and this Court cannot have any quarrel on the said legal principles. However, the High Court must ensure that such a legal principle decided based on the provisions of the Statute, should not cause any injustice to the public institution / organization in the matter of recovering the contributions in accordance with the provisions of the Act and Rules. Admittedly, the power of review is not contemplated in the Act as rightly pointed out by the learned Senior counsel appearing on behalf of the writ petitioner. That does not mean that the High Court should close its eyes in respect of any financial loss if any caused to such public institutions, which was created through a welfare legislation, more specifically, for the benefit of the working class. Under these circumstances, the High Courts are bound to adopt a pragmatic approach and to find out the positive solution to solve the mitigating facts and circumstances.

17. The learned Senior counsel for the petitioner is of the opinion that the order passed under Section 45A of the Act in the present writ petition dated 16.11.2011, is the correct order and the same cannot be construed as an erroneous order. The said order was passed, based on the explanations and the documents submitted by the writ petitioner and even in case of any such errors or Vigilance Enquiry, resulted in financial loss to the Corporation, the ESI authorities ought to have approached the ESI Court under Section 75 of the ESI Act and they cannot Suo-Motu review their own order passed under Section 45A of the Act.

18. Admittedly, the respondent has not preferred any petition before the ESI Court under Section 75 of the Act. Thus, the impugned notice is untenable as the respondent Authority has no power to review the final order passed in proceedings dated 16.11.2011.

19. This Court is of the considered opinion that even in case, a wrong order under Section 45A of the Act is passed or

the Vigilance Wing of the Corporation identified mistakes, errors or corrupt activities during the inspection or investigation, then the Corporation is empowered to file a petition under Section 75 of the ESI Act before the ESI Court in order to recover the contributions due from the assessee. Contrarily, the authorities cannot commit any jurisdictional error by issuing a Suo-Motu review order, in the absence of any specific provisions in the Statute. When avenues are provided in the Act itself to redress the grievances of the Department, the Corporation must approach the competent ESI Court for the redressal of their grievances by filing a petition under Section 75 of the Act. Contrarily, they cannot usurp the powers of review in the absence of any specific provision in the Act. Such an action is without jurisdiction and cannot be upheld by this Court. The ESI Court is empowered to adjudicate the issues on merits, ascertain the errors in the calculations or the financial loss to the organization and regarding the dues to be recovered and only by way of adjudication, the Corporation has to redress their grievances in respect of certain erroneous calculations or financial loss on account of the corrupt activities or otherwise. Undoubtedly, all such corrupt activities, mistakes or errors are also to be viewed seriously. If certain clerical errors are committed without any intention, then the Department may view such mistakes leniently. However, in case of Vigilance Enquiry, if certain intentional mistakes, errors or corrupt activities are identified, then the ESI Corporation must take all necessary steps to prosecute the persons by filing a criminal complaint and also by initiating the departmental disciplinary proceedings.

20. The mistake of the Authorities in not filing a petition under Section 75 of the Act for the purpose of correcting the erroneous orders passed under Section 45A of the Act cannot be condoned. Even, in this regard, the ignorance of the provisions of the Act is also to be construed as lapse, negligence and dereliction of duty on the part of the officials, who all are responsible and accountable under the Act. The genuinity of the order passed under Section 45A of the Act is now questioned by the respondents in their counter affidavit. The genuinity was questioned on account of the Vigilance Enquiry conducted in this regard and consequent to the departmental disciplinary proceedings initiated against the officials, who passed such order. Thus, the order cannot be a conclusive order and at one point of time, the errors, mistakes or such orders passed on extraneous considerations are to be reviewed and the mistakes are to be corrected and the correct contributions are to be recovered from the persons / assesses. Though the respondent has issued a Show Cause Notice by way of reviewing the final order passed under Section 45A of the Act, this Court is of an opinion that the procedures adopted by the respondent may not be in

consonance with the provisions of the Act. However, the intention of the authorities to correct the mistakes on account of certain extraneous considerations, cannot be found fault with. Thus, actions initiated are proper and the procedures adopted are not in accordance with the provisions of the Act and Rules. This being the factual situation, the Courts have to find out a way for rectifying of such mistakes and to ensure that the Public revenues are collected from the persons / assesseees in accordance with law. Admittedly, there is no provision for review and in respect of the legal principles that in the absence of provision, no review can be taken, cannot be brushed aside. This Court is bound by the legal principles settled. However, the said legal principles should not cause financial loss to the Corporation or unjust enrichment to the assessee / person.

21. The present writ petition on hand is filed challenging the C18 Adhoc demand notice dated 06.06.2014, which is a show cause notice. In normal circumstances, the person concerned, on receipt of such notice has to submit their explanations/objections or prefer a petition under Section 75 of the Act. Entertaining the writ petition against notice is an exception and exhausting the statutory remedy is a rule. Thus, the High Court under Article 226 of the Constitution of India can entertain a writ petition against show cause notice only on exceptional circumstances and not in a routine manner. In the present writ petition, the facts presented are undoubtedly complex. On account of the complex facts and circumstances, this Court is unable to set aside the show cause notice merely on the ground that there is no power of review contemplated under the provisions of the ESI Act so as to review the order passed by the competent Authority under Section 45-A of the Act. It is submitted that the order is without jurisdiction and therefore, it has to be quashed. It may be easy for the Court to quash the Order on that ground. However, in the event of quashing the impugned notice, on the ground that the authorities have no power to review, then the consequences would be, that the Corporation may not be in a position to collect the contributions as per the provisions of the Act and rules. In this regard, the quantum of contributions are to be ascertained in a definite manner, which had not been done. There is a dispute regarding the quantum of contributions to be collected. Under these circumstances, this Court has no option but to direct the writ petitioner to approach ESI Court for effective adjudication by filing their documents and adducing evidences. So also, the respondent is duty bound to submit their documents or evidences to establish their case for the purpose of arriving at a definite conclusion regarding the contributions to be collected from the writ petitioner.

22. Though the respondents in their counter enumerates that the order of assessment issued under Section 45-A in proceedings dated 16.11.2011 is tainted with certain corrupt activities, this Court found that mere disciplinary action initiated against one Official is insufficient in respect of such corrupt activities and such approach of the Authorities are to be dealt with iron heart and iron hand. Frequent inspections and raids are to be conducted by the vigilance wing of the Department, so as to ensure the maintenance of integrity in respect of actions of these Officials. Thus, serious actions are to be initiated apart from initiating departmental proceedings. If there is a prima facie case of demand or acceptance of bribe or any other corrupt activities as contemplated under the Indian Penal Code or under the provisions of the Prevention of Corruption Act, then a criminal case is to be registered against on all those Officials. Mere initiation of departmental proceedings are undoubtedly insufficient and the Authorities competent are directed to ensure that the criminal cases are also filed, wherever the facts reveal that the offences or misconduct are falling under the Penal Law.

23. In order to mitigate the circumstances arouse on account of the vigilance enquiry and on account of the subsequent developments and taking note of the fact that the interest of the public institutions are to be protected, as the ESI Corporation was constituted through the welfare legislation, the following orders are passed;

(i) The writ petitioner is at liberty to prefer a petition before the ESI Court under Section 75 of the ESI Act challenging the impugned notice dated 06.06.2014 within a period of eight weeks from the date of receipt of a copy of this Order.

(ii) The respondent is directed to file a petition under Section 75 of the Act challenging the order passed by the Authority under Section 45-A of the ESI Act in proceedings dated 16.11.2011 within a period of eight weeks from the date of receipt of copy of this Order.

(iii) The ESI Court, having jurisdiction, is directed to entertain the petition to be filed by the respondent under Section 75 of the Act by condoning the delay in filing as the respondents were continuing their actions to recover the contributions. Thus, the petition under Section 75 of the Act to be filed by the respondent, is to be decided on merits and in accordance with law.

(iv) The ESI Court, having jurisdiction, is directed to number the appeals, if otherwise those appeals are in order and adjudicate the issues on merits by affording opportunity to all the parties and accordingly, pass orders on merits and in accordance with law as expeditiously as possible, preferably within a period of one(1) year from the date of receipt of copy of the appeals from the respective parties.

(v) The writ petitioner as well as the respondents are directed not to seek any unnecessary adjournments before the ESI Court and the ESI Court is directed to ensure that no such unnecessary adjournments are granted and even in case of granting adjournments on certain genuine grounds, the reasons must be recorded for such adjournment.

24. With the above directions, the writ petition stands disposed of. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

1.The Assistant/Deputy Director,
Sub Regional Office (Salem),
Employees' State Insurance Corporation,
39/57, Theerthamalai Vaniga Valagam,
Three Roads, Salem - 636 009.

2.The Director General,
ESIC,
Panchdeep Bhawan,
CIG Marg, New Delhi - 110 002.

+1cc to Mr.Bazeer Ahmed, Advocate Sr.87222
+1cc to Mr.Prabakar, Advocate Sr.87482

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