IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.18338 of 2022

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M/s Kumar Infratrade Enterprises Pvt. Ltd. C/o Lemon Tree Premier, Plot No. 876, Near Ram Gulam Chowk, Exhibition Road, Patna - 800001 (through its Managing Director Manish Kumar) ... Petitioner

Versus

1. The Union of India through Secretary, Ministry of Labour and Employment, Government of India, Shram Shakti Bhavan, Rafi Ahmad Kidwai Marg, New Delhi - 110001.
2. Director General, Employees State Insurance Corporation, Headquarters Office, CIG Marg, New Delhi - 110002.
3. Regional Director, Employees State Insurance Corporation, Regional Office, Bailey Road, Patna – 800001. ... Respondents

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Appearance :
For the Petitioner : Mr.Binod Kumar Singh, Adv.
For the Respondents : Mr.Dr. K.N. Singh, ASG

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CORAM: HONOURABLE MR. JUSTICE A. ABHISHEK REDDY
CAV JUDGMENT

Date : 26-09-2023

Heard learned counsel for the parties.

2. The present Writ Petition is filed challenging the order, dated 29.12.2021, vide Letter No. P/42001570830001101/7120221245/518 and order, dated 15.07.2022, vide Ref. No. P/42001570830001101/CP/537.

3. Learned counsel for the petitioner has stated that the authority concerned without passing any orders under Section 45-A of the Employees' State Insurance Act, 1948, (hereinafter referred to as, 'the Act') or without giving an opportunity to the petitioner has straightaway passed the order directing the petitioner to pay an amount of Rs.8,96,946/- and, thereafter, the notice under (C-19) was issued directing the petitioner to pay an amount of Rs.13,71,940/-. Learned counsel has stated that the authorities contrary to the provisions of the Employees' State Insurance

Act, 1948, have straightaway computed the liability of the petitioner without adverting to the fact that the petitioner was not liable to pay any contribution in respect of some of the employees. Learned counsel has stated that after the issuance of C18 (Actual) notice, the petitioner has not being given an opportunity of being heard or giving his explanation. That after the issuance of the C18 (Actual) no orders as contemplated under Section 45-A of the Act has been passed by the authority concerned. That the petitioner has produced the relevant documents to substantiate its claim, that some of the employees were not covered under the Act and, therefore, no contribution was needed to be paid for the said employees under the Act, the same has not being dealt with. That the determination done by the authority is without putting the petitioner on notice nor the documents submitted by the petitioner were considered. Learned counsel has stated that the authority concerned based on the inspection-cum-observation report, dated 14.09.2020, has straightaway issued the impugned order determining the contribution payable. That even the Social Security Officer who has inspected the premises of the petitioner on 03.09.2020, 07.09.2020, 11.09.2020 and 14.09.2020 has not taken into consideration the documents filed by the petitioner, therefore, prayed this Hon’ble Court to set aside the impugned order and remand the matter back to the authority concerned to pass a reasoned order under Section 45-A of the Act duly putting the petitioner on notice and giving him opportunity of hearing.

4. Per contra, the learned counsel appearing on behalf of the respondents has vehemently opposed the very maintainability of the Writ Petition. Learned counsel has stated that the writ petitioner has alternative and efficacious remedy of approaching the Employees' Insurance Court under Section 75 of the Act if he is aggrieved by the order of the authority. Further, it is stated by the counsel that once the determination has been made by the authority concerned there is no need to pass a separate order under Section 45-A of the Act. Counsel has, further, stated that in case the petitioner is aggrieved by the determination of the contribution by the authority concerned the petitioner has a remedy of approaching the Employees' Insurance Court under Section 75 of the Act. Learned counsel has relied on a judgment of the Hon'ble Supreme Court reported in the case of **E.S.I.C vs C.C. Santhakumar** reported in **(2007) 1 SCC, 584** to buttress his contention.

5. A perusal of the record reveals that the Social Security Officer has inspected the premises of the petitioner and came to the conclusion that the petitioner was due an amount of Rs.8,96,946/- vide inspection-cum-observation report, dated 14.09.2020. Based on the report of the Social Security Officer the petitioner was issued notice under Form C18(Actual) and, thereafter, Form under C19 was issued.

6. In the counter affidavit filed by the respondents it is categorically stated that no separate order needs to be passed under Section 45A of the Act and, further, it is stated that after issuance of C18 (Actual) notice the petitioner was given 30 days time to pay the amounts and when the petitioner has failed to do so, C19 Form was issued. The perusal of C18 (Actual) notice does not reveal that the petitioner was given an opportunity to submit his explanation or was given an opportunity of hearing nor any of the objections raised by the petitioner dealt with before issuance of the Form C18 (Actual). It is important to extract Section 45-A of the Act, which reads as under :

> *"45-A. 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 4[Social Security Officer] or other official of the Corporation referred to in sub-section (2) of section 45 is 5 [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."*

7. Admittedly, in this case the Social Security Officer has found that the petitioner has not made contributions in respect of some of the employees and came to the conclusion that the petitioner was due some amounts, the report of the Social Security Officer can only be recommendatory in nature, the authorities are obligated to pass an order

under Section 45-A of the Act after receipt of the said inspection report. Section 45-A of the Act under which the Social Security Officer are empowered to inspect the premises of the petitioner cannot pass any orders determining the contributions to be made by the employer. They can only recommend for passing of an order which duty is cast upon the authorized person under Section 45 of the Act.

8. A plain reading of Section 45A of the Act makes it abundantly clear that before passing any order under Section 45A of the Act, the employer should be put on notice and should be given a reasonable opportunity of being heard. The judgment of the Hon'ble Supreme Court in **(2007) 1 SCC, 584** (supra) relied by the respondents does not favour the respondents, but, as a matter of fact it supports the contention made by the petitioner. The Hon'ble Supreme Court at paragraphs 6 and 15 has held as follows :

> *"6: Section 45-A provides that in a case where a factory or establishment fails to furnish the returns or maintain or furnish the registers etc., the Corporation can determine the amount of contributions payable in respect of the employees of that factory or establishment. Such an order can be passed only after giving reasonable opportunity of hearing to the employer or the person in-charge of the factory or establishment. The order passed by the Corporation shall be sufficient proof of the claim of the Corporation under Section 75 or for recovery of the amount determined by such an order as an arrear of land revenue under Section 45-B or under Section 45-C to 45-I."*

> *"15 Section 45-A provides for determination of contributions in certain cases. When the records are not produced by the establishment before the Corporation and*

when there is no cooperation, the Corporation has got the power to make assessment and determine the amount under Section 45A and recover the said amount as arrears of land revenue under Section 45B of the Act. This is in the nature of a best judgment assessment as is known in taxing statutes. When the Corporation passes an order under Section 45A, the said order is final as far as the Corporation is concerned. Under Section 45A(1), the Corporation, by an order, can determine the amount of contributions payable in respect of the employees where the employer prevents the Corporation from exercising its functions or discharging its duties under Section 45, on the basis of the material available to it, after giving reasonable opportunity. But, where the records are produced, the assessment has to be made under Section 75(2)(a) of the Act. Section 45A (2) provides that the order under Section 45A(1) shall be used as sufficient proof of the claim of the Corporation under Section 75 or for recovery of the amount determined by such order as arrears of land revenue under Section 45B. In other words, when there is a failure in production of records and when there is no cooperation, the Corporation can determine the amount and recover the same as arrears of land revenue under Section 45B. But, on the other hand, if the records are produced and if there is cooperation, the assessment has to be made and it can be used as a sufficient proof of the claim of the Corporation under Section 75 before the E.S.I. Court. So, the limitation of three years for filing an application before the Court, introduced by Act 44 of 1966, can only relate to the application under Section 75 read with 77(1A). The order under Section 45A need not be executed by the Corporation before the E.S.I. Court under Section 77. As such, the amendment to Section 77(1A)(b) proviso by Act 29 of 1989 providing five year limitation has no relevance so far as orders passed by the Corporation under Section 45A are concerned."

9. But in this particular case, as seen from the records, no orders have passed under Section 45A of the Act. The contention of the learned counsel for the respondents that no separate order needs to be

passed under Section 45A of the Act cannot be countenanced as the same is against the provisions of the Act itself.

10. Having regard to the same, the writ petition is **allowed**. The impugned order, dated dated 29.12.2021, vide Letter No. P/42001570830001101/7120221245/518 is set aside. Consequentially the orders, dated dated 15.07.2022, vide Ref. No. P/42001570830001101/CP/537 is also set aside. The matter is remanded back to the authority concerned for passing orders afresh duly putting the petitioner on notice and giving him opportunity of submitting his explanation and hearing. The authorities concerned shall pass a reasoned order duly taking into consideration the objections raised by the petitioner and also the material submitted by the petitioner. The entire exercise shall be completed as expeditiously as possible preferably within a period of eight weeks from the date of receipt of a copy of this order. Till such time, an order is passed under Section 45A of the Act, the authorities shall not take any coercive step against the petitioner.

(A. Abhishek Reddy , J)

Shamshad/-

AFR/NAFR	NAFR
CAV DATE	04.09.2023
Uploading Date	03.10.2023
Transmission Date	NA