

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present :

The Hon'ble Justice Raja Basu Chowdhury

WPA 4457 of 2021

Sri Shyamal Banerjee
v.
The State of West Bengal & Ors.

For the petitioner	:	Mr. Subir Sanyal Mr. Nayan Rakshit
For the State	:	Mr. N. C. Bhattacharya Ms. Sujata Ghosh
For the respondent no.2 :		Mr. Shiv Chandra Prasad
Heard on	:	10 th August, 2023.
Judgment on	:	3 rd October, 2023.

Raja Basu Chowdhury, J:

1. The petitioner claims to be a proprietor of a business run under the name and style of M/s Textile Consumer Society. The aforesaid establishment of the petitioner is registered under the Shop and Establishment Act, 1963. It is the petitioner's case that although, the petitioner had started his business in the year 1995 with 3 employees, by the passage of time the same had doubled. According to the petitioner,

sometimes in January, 2012 the petitioner had received a letter issued by the respondent no.4, whereby, the petitioner's bank accounts maintained with ICICI Bank and Axis Bank were attached on the basis of two several orders of attachment both, dated 18th January, 2012. Challenging the aforesaid orders of attachment, a writ petition was filed before this Hon'ble Court, which was registered as WP 4779 (W) of 2012.

2. By an order dated 19th September, 2012 a Co-ordinate Bench of this Hon'ble Court was, *inter alia*, pleased to grant liberty to the petitioner to file an appeal within the meaning of Section 45AA of the Employees' State Insurance Act, 1948 (hereinafter referred to as the "said Act") against the order dated 20th June, 2011 passed by the Deputy Director of the respondents under section 45 A of the said Act.
3. At the instance of the petitioner and on the basis of an application for modification, which was registered as CAN 1661 of 2013, the Co-ordinate Bench of this Hon'ble Court by an order dated 13th August, 2013 was, *inter alia*, pleased to modify the order dated 19th September, 2012, thereby, granting liberty to the petitioner to agitate all issues before appropriate forum.
4. Pursuant to the aforesaid liberty reserved, the petitioner had moved before the Employees' State Insurance Court (in short

“E.I. Court”) under Section 75(1) of the said Act, which was registered as Tender Case No. 151 of 2012. On contested hearing E.I. Court by an order dated 10th April, 2018 was pleased to disposed of the said tender case, *inter alia*, by directing respondents to make a fresh adjudication on the point of coverage and then to decide on the point of contribution, if situation arises at all. The aforesaid determination was directed to be made by affording opportunity of hearing to the petitioner with a further direction upon the petitioner, to cooperate in such hearing and to produce all relevant documents including attendance register, salary/wages register, balance sheet, bills vouchers etc., before the Hearing Officer. It was further provided therein that the amount recovered by the Corporation shall abide by the decision of the Hearing Officer. Following the aforesaid observation, the E.I. Court was also, *inter alia*, pleased to set aside the order dated 20th June, 2011, passed under Section 45A of the said Act.

5. Consequent thereon, a proceeding was initiated by the Deputy Director of E.S.I. Corporation. By communication in writing dated 10th July, 2018, the petitioner was informed of the hearing to be held on 10th August, 2018. Despite notice, the petitioner did not turn up on the said date, instead submitted

a letter contending that it required some more time for production of relevant records.

6. At the instance of the petitioner, another opportunity of hearing was afforded to him on 29th October, 2018, and the same was also communicated to him by communication in writing dated 28th August, 2018. Although, the petitioner appeared before the authorised officer for personal hearing on 29th October, 2018, he failed to produce any record. To provide him with another opportunity, the hearing was adjourned and the next date for hearing was fixed on 27th November, 2018. On the aforesaid date, the petitioner's representative Anil Sarkar appeared before the authorised officer. Unfortunately, he did not produce any records and requested for another date. A further opportunity was, thus, afforded to the petitioner on 6th February, 2019 and the same was communicated to the petitioner by letter dated 4th January, 2019. Although, the petitioner was represented on 6th February, 2019, before the authorised officer the petitioner did not produce any document.
7. It is, in the facts noted above and on the basis of available records, that the Deputy Director of the E.S.I. Corporation by order dated 5th March 2019, determined assumed wages for 41 persons, for the period from May, 2006 to September, 2006

and assessed the contributions payable by the petitioner to be Rs.7,95,170/- as fair and reasonable, for the period from May, 2006 to September, 2006.

8. The petitioner did not comply with the said order. Instead, filed an application under Section 75(1) of the said Act, before the E.I. Court, including an application for injunction and an application for waiver of mandatory pre-deposit. By an order dated 28th January, 2020, the E.I. Court, was, *inter alia*, pleased to pass a conditional order of stay subject to deposit of the 25 per cent of the claimed amount under Section 75(2B) of the said Act by the next date. It was made clear that in the event the petitioner fails to deposit the said amount within the stipulated time, the case shall stand dismissed.
9. It appears that the petitioner did not comply with such conditional order and on contrary had filed a writ petition before this Court, *inter alia*, challenging the same as also challenging the orders dated 5th March, 2019, 12th July, 2019 30th July, 2019 and 28th January 2020. At the interim stage, by an order dated 2nd March, 2021, a Co-ordinate Bench of this Hon'ble Court had fixed the matter for further consideration on 8th March, 2021 at 02.00 p.m. with a direction upon the respondents to enlighten the Court, whether the particular application which was required to be

heard, on payment of 25 per cent of the amount on 27th February, 2020, was still pending or not. On 8th March, 2021 when the matter was called on since, none appeared on behalf of the E.S.I. Corporation, the Co-ordinate Bench of this Court was, *inter alia*, while being pleased to stay the order dated 5th March, 2019, 12th July, 2019 and 30th July, 2019 for a period of 10 weeks, also issued direction for exchange of affidavits. After exchange of affidavits, the aforesaid matter has come up for consideration.

10. Mr. Sanyal, learned advocate representing the petitioner, by drawing attention of this Court to the order dated 10th April, 2018, submits that by such order E.I. Court has specifically directed the Corporation to first ascertain the issue of coverage of the petitioner and then to assess the contributions payable by the petitioner, if occasions so arise. The respondent no.3 without adhering to such direction and without ascertaining, whether the petitioner is covered by the said Act, has decided the quantum of contributions payable by the petitioner. The aforesaid procedure adopted by the respondent no.3 is irregular to say the least.
11. In any event, the order passed by the respondent no.3 would demonstrate that the same is based on conjecture and surmise and not on the basis of records. According to Mr. Sanyal, no

determination could have been made by the respondent no.3, without identifying the actual number of employees employed at the petitioner's establishment. In any event, no determination could be made by assuming the number of employees employed at the petitioner's establishment. The determination made on the basis of assumption is contrary to the specific directions issued by the E.I. Court. It is submitted that the conduct of the petitioner is irrelevant, if the petitioner has failed to produce the documents, it was for the respondent no.3 to proceed on the basis of the materials available with him, for the purpose of identifying the actual number of persons employed, and not proceed on the basis of an assumption. In support of his contention, Mr. Sanyal placed reliance on a judgment delivered by the Hon'ble Supreme Court in the case of ***E.S.I. Corpn. v. C. C. Santhakumar***, reported in **(2007) 1 SCC 584**. The order passed by the respondent no.3 is bad and this Court in exercise of its jurisdiction under Article 226 of the Constitution is competent to decide such an issue, as the writ petition is not limited to the challenge to the order dated 28th January, 2022 passed by the E.I. Court. In the facts as stated herein, he submits that the order dated 5th March, 2019 should be set aside including the consequential demand made by the Corporation.

12. *Per contra*, Mr. Prasad, learned advocate representing the E.S.I. Corporation, on the other hand, has taken me through the records of this case, *inter alia*, including the affidavit-in-opposition filed by the Corporation. By placing reliance on the report of the preliminary inspection, carried out by the Corporation on 22nd March, 1994, it is submitted that the inspection report reveals that in the year 1994 itself, 23 persons were working at the establishment. Complete inspection of all records was not possible since, the inspectors were obstructed from carrying out their duties. Subsequently further inspection was carried out and the establishment was recommended to be covered under the provisions of the said Act. In terms of the directions passed by the E.I. Court on 10th April, 2018, repeated opportunities were afforded to the petitioner. The petitioner did not avail the same. The petitioner chose not to disclose the records. The petitioner also did not produce the balance-sheet and other records. In such circumstances and in the absence of the actual records, the respondent no.3 had taken into consideration the assumed wages, for the period between May, 2006 to September, 2010 and determined contributions payable by the petitioner amounting to Rs.7,95,170/-. Despite the aforesaid direction, the petitioner chose not to make payment, and on the contrary

had challenged the said decision by filing an application before the E.I. Court which was registered as Tender Case No. 57 of 2019. The E.I. Court, while hearing out the petitioner's application for temporary injunction and for waiver of pre-deposit, had directed the petitioner to make a deposit of 25 per cent of the claimed amount under Section 75(2B) of the said Act, on or before the next date. There is no irregularity in the aforesaid order, the petitioner did not comply with the said direction instead has filed the present writ petition. The present writ petition is but an abuse of process of Court and the same should be dismissed.

13. Heard the learned advocates appearing for the respective parties and considered the materials on record. It is noted that since, the year 1994, inspection had been carried out at the petitioner's establishment. Despite directions from time to time, the petitioner has chosen not to comply with the directions, for making payment of contributions. After nearly two decades from the date of first inspection when orders of attachment were attempted to be enforced by attaching the petitioner's bank accounts maintained with ICICI Bank and Axis Bank, the petitioner had filed a writ petition challenging the same, which was registered as WP 4779 (W) of 2012. Although, by an order dated 19th September, 2012, a liberty

was afforded to the petitioner by the Coordinate Bench of this Court to file an appeal within the meaning of Section 45AA of the said Act, however, at the instance of the petitioner the said order was modified, thereby, deleting the specific provisions of the said Act, however, by reserving the liberty to the petitioner to agitate all issues, which were incorporated in the writ petition, before Appropriate Authority, in accordance with the provisions of the said Act.

14. Pursuant to the liberty so reserved, the petitioner had moved the E.I. Court under Section 75(1) of the said Act. On contest, by an order dated 10th April, 2018, the E.I. Court was, *inter alia*, pleased to dispose of the said tender case by directing the Corporation to make fresh adjudication on the point of coverage and then to decide on the point of contribution. The E.I. Court by the aforesaid order had also set aside the determination made under Section 45AA of the said Act on 20th June, 2011.
15. Following the aforesaid a fresh proceeding was initiated by the respondent no.3 and the proceeding was heard on the following dates as under.

10 th August, 2018	Petitioner did not turn up instead submitted a letter that it required more time for production of
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	relevant records.
29 th October, 2018	The petitioner appeared before the authorised officer but failed to produce any records. To provide him with another opportunity, the hearing was adjourned.
27 th November, 2018	Petitioner appeared through his representatives, however, did not produce any records and requested for another date.
6 th February, 2019	The petitioner was represented before the respondents, however, did not produce any documents.

16. It is in the fact as noted hereinabove, the respondent no.3 on the basis of the available records was compelled to determine assumed wages at the rate of Rs.4,125/- per month for 41 employees for the period from May, 2006 to September, 2006 totaling to Rs.8,45,625/- and assumed wages at the rate of Rs.5,500/- per month for 41 persons from October, 2006 to April, 2010 totaling to Rs. 96,96,500/- and at the rate of Rs.8,250/- per month per employee for 41 persons for the period May, 2010 to September, 2010 aggregating to

Rs.16,91,250. As such, the total aggregating assumed wages work out to Rs. 1,22,33,375/- and the contributions thereon at the rate of 6.5 per cent, works out to be Rs.7,95,170/-. It is, on the basis of the aforesaid determination that the petitioner was called upon to deposit the aforesaid amount. The petitioner did not comply with the said order, instead filed a case under Section 75(1) of the said Act, before the E.I. Court. An application for injunction, as also waiver of pre deposit was also filed. By an order dated 28th January, 2022, the E.I. Court was, *inter alia*, pleased to pass a conditional order of stay, subject to deposit of 25 per cent of claimed amount under Section 75(2B) of the said Act by the next date. The petitioner did not comply with such direction instead filed the present writ petition on 10th February, 2021.

17. I find that Mr. Sanyal has strenuously argued by placing reliance on a judgment delivered by the Hon'ble Supreme Court in the case of **C. C. Santhakumar (supra)**, that the respondent no.3 ought not to have determined assumed wages, in absence of the actual records and without identifying the actual number of employees. Even if the petitioner had failed to produce the documents, it was for the respondent no.3 to proceed on the basis of materials available with him, for the purpose of identifying the actual number of persons

employed at the establishment and not to proceed on the basis of assumption. I must, however, note that the provisions of the said Act, in particular Section 44, casts an obligation on the employer to furnish returns and maintain registers. Section 45A of the said Act, authorises the Corporation to determine the contributions. To appropriately appreciate the aforesaid, Section 45A of the said Act, is reproduced herein below.

“[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 [Social Security Officer] or other official of the Corporation referred to in sub-section (2) of section 45 is [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.:

[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.]

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

18. As would appear from the above, Section 45A of the said Act in no uncertain terms authorises the Corporation to determine the amount of contribution payable in respect of employees of a factory or establishment, on the basis of information available with it. Section 45AA of the said Act, provides for an opportunity to appeal before an Appellate Authority, while Section 75 (1) of the said Act, provides for the matters to be decided by the E.I. Court.
19. Admittedly, by an order dated 10th April, 2018, the E.I. Court in order to afford an opportunity to the petitioner to present its case had remanded the matter back to the respondent no.3 for fresh adjudication on the point of coverage and then on the point of contribution. Such decision was directed to be taken after affording opportunity of hearing to the petitioner, with a further direction upon the petitioner to cooperate in such hearing and to produce relevant documents including

attendance register, salary/wages register, balance sheet, bills, vouchers etc., before the Hearing Officer or as directed by the Officer. The order of attachment including the order passed under Section 45A of the said Act dated 20th June, 2011 were also set aside. The petitioner was, thereafter, afforded reasonable opportunity to produce documents. The petitioner not only failed to produce documents despite taking repeated adjournment but when an order was passed for determining the contributions payable, based on assumed wages, for failure on the part of the petitioner to disclose documents, the petitioner had once again challenged such order dated 5th March, 2019 before the E.I. Court, which was registered as Tender Case No. 57 of 2019. Simultaneously, while challenging the aforesaid determination, on 5th March, 2019, the petitioner had also filed an application for injunction, as also an application for waiver of pre-deposit.

20. It is, in connection with such application that by an order dated 28th January, 2020 that the E.I. Court had directed the petitioner to make payment of 25 per cent of the claimed amount. It was further made clear that in the event, the petitioner failed to make such deposit, the aforesaid case shall stand dismissed. I, however, notice that Section 75(2B) of the said Act, *inter alia*, provides as follows:

Section 75 (2B) : -

“[(2-B) No matter which is in dispute between a principal employer and the Corporation in respect of any contribution or any other dues shall be raised by the principal employer in the Employees’ Insurance Court unless he has deposited with the Court fifty per cent of the amount due from him as claimed by the Corporation:

Provided that the Court may, for reasons to be recorded in writing waive or reduce the amount to be deposited under this sub-section.]”

21. Having regard to the aforesaid, I am of the view that there was no irregularity on the part of the E.I. Court in issuing the aforesaid direction for deposit of 25 per cent of the claimed amount. Since, the aforesaid order had been passed in the year 2020 and since, the petitioner was enjoying the stay, I am of the view that the petitioner should be afforded with a further opportunity to produce the records before the E.I. Court, in accordance with the judgement delivered by the Hon’ble Supreme Court in the case of **C. C. Santhakumar (supra)**, provided the petitioner complies with the direction to secure 25 percent of the claimed amount. At the same time, the fact that the petitioner had not deposited the 25 per cent of the claimed amount cannot be lost sight of. The petitioner, thus, cannot be permitted to take advantage of its own wrong. In any event in

terms of section 75(2B) of the said Act, the petitioner is required to deposit 50 percent of the amount claimed by the Corporation, unless waived or reduced. In view thereof, I direct E.I. Court to hear out the case, subject to the petitioner making deposit of 25 per cent of the claimed amount, within a period of four weeks from date of the communication of this order. In the event, the petitioner complies with the direction for pre-deposit, as indicated and in the manner as directed hereinabove, the E.I. Court shall hear out the case, by registering the same as a regular case, in accordance with law. In the alternative, if no such deposit is made by the petitioner within the time specified above, it shall be open to the Corporation to take such steps as may be available in law, for enforcement of its claim.

22. The writ petition is accordingly, disposed of.
23. There shall, however, be no order as to costs.
24. Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of necessary formalities.

(Raja Basu Chowdhury, J.)