Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Raja Basu Chowdhury

WPA 5796 of 2023

M/s Swastik Clinic & Seva Sadan Pvt. Ltd. & Anr.
Vs.
The Recovery Officer, Employees' State Insurance Corporation & Ors.

For the petitioner	:	Mr. Ankit Kanodia Ms. Megha Agarwal Mr. Jitesh Sah
For the State	:	Mr. Arjun Ray Mukherjee Ms. Sucharita Paul
For the respondent/ ESIC	:	Mr. Subal Moitra Mr. Arindam Maitra
Heard on	:	5th April, 2023
Judgment on	:	5th April, 2023.

Raja Basu Chowdhury, J:

1. The present writ application has been filed, *inter alia*, challenging not only the initiation of the proceedings under Section 45G of the Employees State Insurance Act, 1948 (hereinafter referred to as the "said Act"), but also the order dated 28th June, 2021 passed under Section 45A of the said Act.

2. The petitioner no.1, claims to be an establishment covered under the provisions of the said Act, having code no. 74000648690001401. It is the petitioners' contention that inadvertently the petitioner no.1 had deposited its contributions in code no. 74000648690001402 instead of code no. 74000648690001401. It is the petitioners' further case that by a communication in writing dated 13th June, 2018, the Employees' State Insurance Corporation (in short, ESIC) had issued a show-cause to the petitioner no.1 alleging short deposit in payment of contributions payable by the petitioner no.1, for the period March, 2017 to January, 2018. The petitioners claim to have responded to the said show-cause and had, by their communication in writing dated 8th August, 2018/11th October, 2018, inter alia, brought to the notice of the ESIC that inadvertently, the petitioner no.1 had made deposit of its contribution in the code no. 74000648690001402 in place and stead of code no. 74000648690001401.
3. Subsequently, the authorities passed an order dated 28th June, 2021 under Section 45A of the said Act. Since, according to the petitioners, the aforesaid order was based on non-application of mind and did not take into consideration the representation made by the petitioners, the petitioners by a further communication in writing dated 7th July, 2021 called upon the respondents to look into the matter. It was, inter alia, further

highlighted that due to pandemic i.e., due to outbreak of Covid-19, the petitioners could not take appropriate steps in the matter. Without considering the petitioners representation a garnishee order under Section 45G of the said Act, was passed whereupon a sum of Rs.4,79,566/- only had been realized from the petitioners' bank account.

4. Challenging the aforesaid proceedings, inter alia, including the recovery of a said sum of Rs.4,79,566/- the present writ application has been filed.

5. Mr. Kanodia learned advocate representing the petitioners by drawing attention of this Court to page 44, of the writ application and by relying on the inspection report submits that the petitioners at the material point of time had engaged 16 number of employees and such fact would corroborate from an inspection report prepared pursuant to an inspection carried out by the inspecting officials of ESIC. Notwithstanding the aforesaid and in ignorance of the said inspection report, the show-cause notice had been issued by the respondents. Despite the petitioners' clarifying its position, the respondents had chosen not to withdraw the show-cause and proceeded to pass the order under Section 45A of the said Act.

6. The petitioners being involved in health services, during the relevant period were busy by reasons of the pandemic. It is for such reason the petitioners could not appropriately take steps in

the matter. The petitioners, however, have a valuable right in the form of appeal under Section 45AA of the said Act. Due to long delay for reasons explained here in above the petitioners could not approach the appellate authority. It is in the factual backdrop as aforesaid that the petitioners have approached this Hon'ble Court. The aforesaid order passed under Section 45A of the said Act, is bad law, the same cannot be sustained and the same should be set aside and the respondents should be directed to refund the entire amount of Rs.4,79,566/- realized from the petitioners' bank account.

7. *Per contra*, Mr. Maitra, learned advocate representing the provident fund authorities submits that there is no irregularity on the part of the respondents in passing the order under Section 45A of the said Act. While referring to the inspection report, he says that the inspection report relied on by the petitioners only demonstrates, the number of employees working on that particular date. By placing reliance on a coverage notice dated 23rd March, 2017, it is submitted that the coverage letter which was duly forwarded to the petitioners in the year 2017 has not been disclosed by the petitioners and the petitioners have suppressed the same. According to Mr. Maitra, the date on which the petitioner no.1 was covered under the provisions of the said Act, the number of employees engaged by the petitioners were 60 in number.

8. Let such notice dated 23rd March, 2017, as produced by Mr Maitra, be retained with the record.

9. Mr Moitra submits that this Hon'ble Court should not exercise jurisdiction in this particular matter. The entire process has long been completed and the respondents have already realized their demands through execution proceedings.

10. Heard the learned advocates appearing for the respective parties and considered the materials on record. I find that an assessment has already been made under Section 45A of the said Act. At the same time, I find that the petitioners have a statutory right in the form of an appeal under Section 45AA of the said Act. As would appear form the provisions of the 45AA of the said Act, a pre-condition for filing of appeal is to deposit 25 per cent of the contribution so ordered or the contribution as per the own calculation, whichever is higher, with the Corporation. The proviso to Section 45AA of the said Act, inter alia, provides that if the employer finally succeeds in the appeal, the Corporation shall refund such deposit to the employer together with such interest as may be specified in the regulation. In this case, I find admittedly, the respondents have already realized the entire amount. However, mere realization of the assessed amount cannot take away the right of the petitioners to file an appeal under Section 45AA of the said Act, especially when the petitioners claim, by relying on an inspection report issued by

the respondents, it would appear that appropriate computation has not been made while passing the order under section 45 A of the said Act.

11. In view thereof, the petitioners shall be at liberty to file an appeal under Section 45AA of the said Act. In the event, such appeal is filed within a period of four weeks from date, the Appellate Authority under Section 45AA of the said Act, shall hear out the petitioners' appeal on merit. In the event, the petitioners succeed, the consequences provided for, in the proviso to Section 45AA of the said Act shall follow. The aforesaid direction is being passed taking into consideration the fact that the order under Section 45A of the said Act, was passed during the pandemic.

12. It is made clear that this Court has not gone into the merits of the case, it shall be open to the parties to raise all points as are available to them, except point of maintainability of the appeal.

13. Since I have not called for any affidavits, allegations made in the writ petition are deemed not to have been admitted by the respondents.

14. There shall be no order as to costs.

15. With the aforesaid directions, the writ petition, being WPA 5796 of 2023 stands disposed of.

16. Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis upon completion of requisite formalities.

(Raja Basu Chowdhury, J.)

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