OD 1

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

WPO 2807/2022

THE CALCUTTA STOCK EXCHANGE LIMITED
VERSUS
EMPLOYEES' STATE INSURANCE CORPORATION AND ORS.

For the Calcutta Stock Exchange Limited,petitioner	:	Mr. Soumya Majumdar, Adv. Mr. Uttam Kumar Mandal, Adv. Ms. Maitree Roy, Adv.
For respondent nos. 1, 2 & 3	:	Mr. Tarun Kr. Chatterjee, Adv.
Hearing concluded on	:	21.03.2023
Judgment on	:	21.03.2023

RAJA BASU CHOWDHURY, J. :-

1. The present writ petition has been filed, inter alia, challenging orders dated 21st April, 2022 and 16th September, 2022 passed under Section 45A and 45AA of the Employees State Insurance Act, 1948, respectively (hereinafter referred to as the said Act). The petitioner claims to be a company engaged in business of capital markets and is an establishment covered under the provisions of the said Act. It is the petitioner's case

that the petitioner employs presently around 64 number of employees and that the average monthly wages of its employees is much more than Rs. 21,000/-.

2. It is the petitioner's case that its establishment was served with an order dated 21st April, 2022 passed under Section 45A of the said Act, whereby a sum of Rs. 1,86,648/- was determined, as the contributions payable by the petitioner, for the period from March, 2017 to November, 2019.

3. The petitioner says that during the aforesaid period only 4 (four) employees of the establishment were drawing wages below the ceiling limit of eligibility for being insured persons. No show-cause notice was served on the petitioner prior to issuance of the aforesaid order.

4. Being aggrieved with the ex parte order dated 21st April, 2022, the petitioner preferred an appeal under Section 45AA of the said Act, by depositing 25 (twenty-five) per cent of the amount, so determined, in the order passed under Section 45A of the said Act. The petitioner's representative had by an email communication dated 22nd August, 2022 recorded submission of all relevant documents, for purpose of deciding the appeal.

5. Incidentally, despite issuing notice of hearing of appeal, on the days specified for hearing before the Appellate Authority, the designated officer was not present. The personal assistant of the Appellate Authority had instructed the petitioner's representative to meet the inspector, and it

was also suggested that instead of relying on voluminous documents which ran into 400 to 500 pages, the establishment should admit their liability of Rs. 1,85,486/-. Accordingly, by a letter dated 7th September, 2022, the petitioner had accepted its liability of Rs 1,86,648/-.

6. Subsequently, the petitioner was surprised to receive the order dated 16th September, 2022, passed by the Appellate Authority, whereby the contributions payable by the petitioner had been enhanced from Rs. 1,85,648/- to Rs. 25,15,891/-.

7. Being aggrieved the present writ application had been filed challenging the aforesaid orders dated 21st April, 2022 and 16th September, 2022.

8. At the interim stage, by an order dated 12th December, 2022, this Hon'ble Court, taking into consideration the nature of challenge made by the petitioner was, inter alia, pleased to admit the writ application subject to the petitioner depositing a sum of Rs. 15 lakhs with the Registrar, Original Side, High Court at Calcutta, for the same to be invested in an interest-bearing fixed deposit account maintained with any nationalized bank. By the aforesaid interim order, the final orders passed under Sections 45A and 45AA of the said Act, were also stayed. Since the petitioner had complied with the aforesaid direction as regards deposit of Rs. 15 lakhs, the interim order was directed to continue.

9. Mr. Majumdar learned Advocate representing the petitioner by drawing attention of this Court to the order dated 16th September, 2022 passed

under Section 45AA of the said Act, submits that the Appellate Authority, despite setting aside the parent order passed under Section 45A of the said Act, had redetermined the contributions payable by the petitioner and had assessed a sum of Rs. 25,15,891/- for the period from March, 2017 to November, 2019, thereby enhancing determination already made by them.

10. By referring to Section 45AA of the said Act, it is submitted that the right to prefer an appeal arising out of an order passed under Section 45A of the said Act, has only been conferred on the employer. Such right has, however, not been conferred on the ESI Corporation. If the Corporation is aggrieved by the aforesaid determination, the Corporation has remedy before the Employees Insurance Court, under Section 75(2) of the said Act. In this context, he has placed reliance on a judgment delivered by the Hon'ble Supreme Court in the case of ***ESI Corporation vs. Sri Sri Shanta Kumar*** reported in (**2007) 1 SCC 584**.

11. It is also submitted that the Appellate Authority under Section 45AA of the said Act, while considering itself as an original authority had not only reappreciated the evidence but had also collected evidence which is not permissible. No notice of show-cause was issued on the petitioner, indicating that the quantum of contributions payable by the petitioner would be enhanced. The Appellate Authority, under Section 45AA of the said Act, has no power or authority to enhance the

determination already made under Section 45A of said Act. He says that the aforesaid order cannot be sustained, the same should be set aside and the matter be remanded back to the authorities.

12. Supplementary affidavit filed by the respondent ESI Corporation is taken on record. Mr. Chatterjee, learned Advocate representing the ESI Corporation submits that the petitioner was aware of the proceedings under Section 45A of the said Act. A notice to show-cause was also issued on the petitioner, prior to passing of the order under Section 45A of the said Act. He says that before the Appellate Authority, all documents had been verified and it was only thereafter that a re-assessment had been made.

13. By referring to a memo dated 4th November, 2010 issued by the Director, (Revenue) Employees State Insurance Corporation, addressed to the Regional Directors/Directors I/c, Joint Directors I/c, ESI Corporation, on the subject of Constitution of Appellate Authority within ESI Corporation under Section 45AA of the said Act, it is submitted that the Appellate Authority has the power and jurisdiction to not only confirm and reduce quantum of contributions but also to enhance or annul the assessment, whenever necessary.

14. Since, in this case reassessment was made, there was no requirement even on the basis of the aforesaid memo dated 4th November, 2010, to issue a show-cause proposing enhancement.

There is no irregularity on the part of the authorities in passing of the order impugned. If the petitioner is so aggrieved, with the order passed under Section 45AA of the said Act, the petitioner can challenge the same before the Employees' Insurance Court and its claim can be adjudicated under Section 75(2) of the said Act. The writ application is not maintainable the same should be dismissed with costs.

15. In reply, Mr. Majumdar by referring to the aforesaid memo dated 4th November, 2010, submits that the said memo cannot override the statutory provisions, nor can it confer the Appellate Authority, with the jurisdiction to enhance the contributions already determined, especially when, the statute does not confer such power or jurisdiction on the Appellate Authority. He further submits that by preferring an appeal, a party cannot be put to a worse position, than having not preferred an appeal. Alternatively, he submits that even going by the aforesaid office memo dated 4th November, 2010, the Appellate Authority ought to have issued a show-cause, proposing to enhance the quantum of contributions. Having not done so, the contribution payable by the petitioner could not have been enhanced. In any event, it is submitted that statute also does not authorize the Appellate Authority to make such re-assessment.

16. Heard learned Advocate appearing for the respective parties and considered the materials on record. I find that at the first instance,

respondent no. 2 had determined contributions payable by the petitioner vide its order dated 21st of April, 2022 for the period from March, 2017 to November, 2019. While preferring the appeal before the Appellate Authority, under Section 45AA of the said Act, the petitioner had deposited a sum of Rs. 46,662/- constituting 25 per cent of the contributions ordered to be paid by the respondent no. 2. A perusal of Section 45AA of the said Act would, inter alia, make it clear that the right to prefer the appeal is, however, restricted to the employer. The proviso to the said Section, inter alia, further makes it clear that if the employer succeeds in an appeal, the Corporation shall refund the deposit to the employer together with such interest as may be specified. There is no such like provision for preferring an appeal by the corporation. To morefully appreciate the aforesaid provision, Section 45AA of the said Act is extracted hereinbelow:

> *"45AA. Appellate Authority – if an employee is not satisfied with the order referred to in Section 45A, he may prefer an appeal to an Appellate Authority as may be provided by regulation, within sixty days of the date of such order after depositing twenty-five per cent of the contribution so ordered or the contribution as per his own quantum, whichever is higher, with the Corporation.*
>
> *Provided that if the employee finally succeeds in the appeal, the Corporation shall refund such deposit to the employee together with such interest as may be specified in the regulation."*

17. As would appear from the above, the said Section does not provide for any scope or authority for enhancing the quantum of contributions as originally determined under Section 45AA of the said Act. In the case at hand, I find that the Appellate Authority while considering the order passed by the authorized officer under Section 45A of the said Act, had not only set aside the same but had also redetermined the contributions payable by the petitioner, by re-examining the records and had fixed the quantum of contributions payable by the petitioner.

18. Admittedly, no notice of show-cause as to why the contributions so determined, shall be enhanced, had been issued. Even on the basis of the memo dated 4th November, 2010 the Appellate Authority was obliged to issue a notice of show-cause, if it intended to enhance the contributions. I find that in page no. 2 of the aforesaid memo, the duties and responsibilities of the Appellate Authority has been set out. The same is extracted hereinbelow:

> *"Any employer, aggrieved by the order of Authorised Officer passed under Section 45A, may prefer an appeal to the Appellate Authority as per the rules and procedure given as under:*
>
> *a) The Appellate Authority shall hear the appeal against the order of the Authorised Officer passed under Section 45A of the Act.*

b) The Appellate Authority may confirm, reduce, enhance or annul the assessment made by the Authorised Officer. He may, however, pass such order in the appeal as he thinks fit in relation to a particular case. However, the Appellate Authority shall not enhance the amount of assessment unless the appellant has been given a reasonable opportunity of showing cause against such enhancement.

c) The Appellate Authority may stay the recovery of proceedings till the appeal is decided.

d) The Appellate Authority shall decide the case within 60 days from the date of filing of appeal as in cases where the Appellate Authority is not the Regional Director, every appeal so decided shall be examined and if it is found that involves a substantial question of law or the decision of the Appellate Authority is prejudiced to the interest of ESIC, the Regional Director, may prefer an appeal u/s 75 of ESI Act, 1948 before E.I. Court or any other court/tribunal to safeguard the interest of ESIC. As in cases where the Appellate Authority is Regional Director, the power and process as enumerated in para (a) shall be exercised by ESIC Hqrs. Office."

19. Mr. Chatterjee, learned Advocate representing ESI Corporation has candidly submitted that prior to passing of the order dated 16th

September, 2022, no notice of show-cause was issued proposing enhancement, since according to Mr. Chatterjee, the Appellate Authority had made re-assessment.

20. I have carefully perused the provisions of Section 45AA of the said Act. I am, however, not impressed with such submissions made by Mr. Chatterjee. I find that the Appellate Authority while disagreeing with the order passed by the authorized officer under Section 45A of the said Act had not only set aside the same but made re-assessment of contributions payable by the petitioner, by re-examining the records and had enhanced the quantum of contributions payable by the petitioner. While doing so the Appellate Authority had, however, returned a finding that the employer could not produce relevant records

21. In my view, the Appellate Authority under Section 45AA of the said Act, has usurped the jurisdiction of the Insurance Court constituted under Section 75 of the said Act. In this context, it would be relevant to refer to the judgment of the ESI Corporation(supra), where the Hon'ble Supreme Court, in paragraphs 26 to 28 of the judgment, while considering the scope and jurisdiction of sections 45A and 45B of the said Act, has been, inter alia, pleased to observe as follows:

> *"26. On a plain reading of Sections 45-A and 45-B in Chapter IV and Sections 45 and 77 in Chapter VI of the Act, as indicated above, there cannot be any doubt that the area and*

the scope and ambit of Sections 45-A and 75 are quite different.

27. If the period of limitation, prescribed under proviso (b) of Section 77(1-A) is read into the provisions of Section 45-A, it would defeat the very purpose of enacting Sections 45-A and 45-B. The prescription of limitation under Section 77(1-A)(b) of the Act has not been made applicable to the adjudication proceedings under 4 Section 45-A by the legislature, since such a restriction would restrict the right of the Corporation to determine the claims under Section 45-A and the right of recovery under Section 45-B and, further, it would give benefit to an unscrupulous employer. the period of five years, fixed under Regulation 32(2) of the Regulations, is with regard to maintenance of registers of workmen and the same cannot take away the right of the Corporation to adjudicate, determine and fix the liability of the employer under Section 45-A of the Act, in respect of the claim other than those found in the register of workmen, maintained and filed in terms of the Regulations.

28. What Section 75(2) empowers is not only the recovery of the amounts due to the Corporation from the employer by recourse to the ESI Court, but also the settlement of the

> *dispute of a claim by the corporation against the employer. While this is so, there is no impediment for the Corporation also to apply to the ESI Court to determine a dispute against an employer where it is satisfied that such a dispute exists. If there is no dispute in the determination either under Section 45-A(1) or under Section 68, the Corporation can straightaway go for recovery of the arrears."*

22. Admittedly, the ESI Corporation has not applied before the Employees' Insurance Court.

23. Admittedly, in this case, no notice of show-cause has been issued. It is therefore abundantly clear that there has been violation of principles of natural justice as well. It is well settled that where there is a jurisdictional error committed by the tribunal or a quasi-judicial body, such an error is amenable to writ jurisdiction and can be corrected by this court by issuing a writ of certiorari. A jurisdictional error may be from failure to observe the limits of its jurisdiction or may arise from procedural irregularity adopted by the tribunal or a quasi-judicial body after validly assuming jurisdiction. It may also be on account of violation of principles of natural justice. There may be other instances where a writ of certiorari can be issued. I find, in the instant case, that although the Appellate Authority at the first instance had the jurisdiction to determine the appeal, yet while passing of the final order, it had

exceeded its jurisdiction when the Appellate Authority had enhanced the contributions payable by the petitioner, that too without any show-cause.

24. The aforesaid, in my view, is an error of jurisdiction committed by the respondent no. 3. The aforesaid order, thus, cannot be sustained. The same is, accordingly, set aside. The matter is remanded back to the respondent no. 3 for a fresh decision in the matter. The respondent no. 3 is directed to hear out and decide the appeal, filed by the petitioner under Section 45AA of the said Act, within a period of 60 days from the date of communication of this order, upon affording opportunity of hearing to the petitioner and/or to its representative. Till such time the appeal is not disposed of, no coercive steps shall be taken against the petitioner. Since the writ application succeeds, the learned Registrar, Original Side, High Court at Calcutta is directed to refund the deposit of Rs. 15 lakhs made by the petitioner along with accrued interest thereon, by prematurely encashing the fixed deposit, if required, after deducting the commission.

25. With the aforesaid direction, the writ application is allowed.

26. Urgent photostat, certified copy of this order, if applied for, be made over to the parties upon compliance of all formalities.

(RAJA BASU CHOWDHURY, J.)

s.chandra