

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.3796 OF 2024

SBI General Insurance Company Limited	...Petitioner
<i>Versus</i>	
Employees' State Insurance Corporation & Anr.	...Respondents

Mr. Sudhir Talsania, Senior Advocate a/w. Mr. Vishal Talsania, Mr. Punit Damodar, Ms. Nikita Vardhan and Ms. Vidyashree Perla, Advocates, i/b. Kanga & Company, for the Petitioner.
Mr. Shailesh S. Pathak, Advocate, for the Respondents.

CORAM: MADHAV J. JAMDAR, J.
DATED : 18th SEPTEMBER 2024

JUDGMENT:

1. Heard Mr. Sudhir Talsania, learned Senior Counsel appearing for the Petitioner and Mr. Pathak, learned Counsel appearing for the Respondents.

2. At the outset, Mr. Sudhir Talsania, learned Senior Counsel appearing for the Petitioner seeks leave to amend the cause title. Leave to amend the cause title is granted. Amendment be carried out forthwith. Re-verification is dispensed with.

3. By the present Writ Petition filed under Article 226 of the Constitution of India, the challenge is to the legality and validity of the order dated 29th December 2023/1st January 2024 passed by the Assistant Director, Authorized Officer, Employees' State Insurance Corporation passed under Section 45A of the Employee State Insurance Act, 1948 ("**ESI Act**").

4. Mr. Sudhir Talsania, learned Senior Counsel appearing for the Petitioner raised the following submissions:

(a) The impugned order dated 29th December 2023/1st January 2024 has been served on the Petitioner on 8th January 2024. Thereafter, immediately the Writ Petition has been filed on 28th February 2024.

(b) The impugned order has been passed without following the principles of natural justice. Learned Senior Counsel points out paragraph No.6 and 10 of the impugned order where reference is made to the interim reports dated 2nd June 2021 and 30th November 2021 submitted by the Social Security

Officer and contends that on the basis of these reports, *inter alia* the impugned order has been passed. He submitted that the Petitioner came to know about the said interim reports dated 2nd June 2021 and 30th November 2021 when the impugned order has been served on the Petitioner.

- (c) Before passing of the impugned order, the Assistant Director who passed the order under Section 45A of the ESI Act has not supplied copies of the said interim reports to the Petitioner and Petitioner's say has not been called on the said interim reports.
- (d) In any case, as the copies of the said interim reports have not been supplied to the Petitioner and the same have been *inter alia* taken into consideration while passing the impugned order therefore, there is violation of the principles of natural justice.
- (e) Although the contention is raised in the affidavit-in-reply filed on behalf of the Respondent that the

Petitioner can avail remedy of Appeal under Section 45AA of the ESI Act or can approach the Employees Insurance Court under Sections 75 and 77 of the ESI Act, as the impugned order passed is in violation of the principles of natural justice, in view of the law laid down by the Supreme Court in *Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors.*¹, the Writ Petition is maintainable.

He therefore submits that the impugned order be quashed and set aside and the matter be remitted to the Authority for deciding the same afresh, after giving the copies of the interim reports to the Petitioner and by giving adequate opportunity.

5. On the other hand, it is the contention of Mr. Shailesh Pathak, learned Counsel appearing for the Respondents that the said decision in *Whirlpool Corporation* (supra) will not apply to the present case. He relied on the decision of Supreme Court in the *State of Maharashtra vs. Greatship (India) Limited*². He pointed out paragraph Nos. 7 to 10 of the said decision. He submits that

1 (1998) 8 SCC 1

2 (2022) 105 GSTR 300: (2022) SCC OnLine SC 1262

therefore, the Writ Petition be not entertained and the Petitioner be relegated to the statutory remedy under Sections 75 and 77 of the ESI Act.

6. Before considering the rival submissions, it is necessary to set out paragraph Nos.6 and 10 of the impugned order wherein reference is made to the interim reports dated 2nd June 2021 and 30th November 2021 submitted by the Social Security Officer, which read as under:

“6. An interim dated 02/06/2021 was submitted by the Social Security Officers. They informed that following records are required for document verification:-

- 1. Requisite Bills and vouchers for marked entries in ledger for F.Y. 2015-16 and 2016-17*
- 2. Agreement copy/work order/Contract /Appointment letter for employees employed directly/indirectly for purpose of risk inspection, surveying, tagging, road side assistance and other similar nature of business booked under HOA “Professional and legal expenses (Schedule 4).*
- 3. For F.Y. 2015-16 and F.Y. 2016-17, Ledger for Fixed asset addition (Schedule 10-Leasehold improvements, Furniture & fitting, office equipment)*
- 4. For F.Y. 2015-16 and F.Y. 2016-17, Agreement copy/work order/Contract/Appointment letter for employees employed directly or through broker or agent under the HOA commission (Schedule 3)*

5. For F.Y. 2015-16 and F.Y. 2016-17, List of vendors for which coverage/compliance details are not available is enclosed.

10. Interim report dated 30/11/2021 by the Social Security Officers was received in the office of the Authorized Officer on 06/12/2021. They informed that the proceedings against the records requested in their interim report dated 02/06/2021 were as follows:-

a. Against S.N. 6.1- We gave received some bills in soft copy for few vendors of repetitive entries, most of them are bills of unmarked entries in ledger submitted to the office and **still complete records have not been provided to us.**

b. Against S.N. 6.2 – **No record is provided to us till date.**

c. Against S. N. 6.3- **No record is provided to us till date** (Neither ledger nor bills are provided for F.Y. 2015-16 and F.Y. 2016-17.

d. Against S.N. 6.4 – **No record is provided to us till date.**

e. Against S.N. 6.5- **No record is provided to us till date.**

They informed that in the absence of the above-mentioned records, verification of the records could not be done and requested to provide the records.”

(Emphasis Supplied)

7. It is also necessary to see the reasons recorded in the impugned order. The relevant portion of the impugned order recording reasons is as follows:

“FACTS OF THE CASE AND OUTCOME

1. Amount of contribution against revised omitted wages determined by Social Security Officers: Rs.2,20,754/-.

2. Since bills/vouchers for an amount of Rs.1,87,67,961/- were not produced by the employer to the SSOs, I have no option left but to claim contribution on this amount.

Contribution on bills/vouchers not produced = $1,87,67,961 \times 6.5\% = 12,19,918$.

3. Since employer failed to produce any bills/vouchers for leasehold improvements to SSO, I have no option left but to claim contribution on 25% of the booked amount.

Year	Amount booked	25% of booked amount	Contribution payable
08/15 to 03/16	2,18,76,667	54,69,167	3,55,496
4/16 to 03/17	6,59,80,000	1,64,95,000	10,72,175
Total	8,78,56,667	2,19,64,167	14,27,671

4. Since employer failed to produce required document to SSOs to determine whether brokers are coverable or not, I have no option left but to claim contribution on 60% of the booked amount in the balance sheet:-

Year	Amount booked	60% of Booked Amount (A)	Contribution on omitted wages At 6.5%
08/15 to 03/16	17,29,62,920	10,37,77,752	67,45,554
4/16 to 03/17	27,43,71,257	16,46,22,754	1,07,00,479
Total	44,73,34,177	26,84,00,506	1,74,46,033

5. Since employer failed to produce required document to SSOs to determine whether Surveyors are coverable or not, I have no option left but to claim contribution on the booked amount in the balance sheet:-

Year	Amount booked	Contribution Payable
08/15 to 03/16	2,41,64,460	15,70,690
04/16 to 03/17	2,82,33,582	18,35,183
Total		34,05,873

I have applied my mind to all material and facts and facts made available and arrived at the conclusion that employer is liable to pay the following contribution.

i. Contribution of Revised Omitted Wages @6.5% =2,20,754

ii 6.5% of Vouchers/Bills not produced =12,19,918

iii Contribution on leasehold improvements-14,27,671

iv Contribution payable of brokers= 1,74,46,033

v Contribution payable of Surveyors= 34,05,873

Total Amount Payable by the employer =2,37,20,249/-."

Thus, it is clear that the impugned order has been passed mainly relying on the basis of the Interim Reports dated 2nd June 2021 and 30th November 2021 submitted by the Social Security Officer.

8. Mr. Talsania, learned Senior Counsel relied on the decision of the Supreme Court in the case of *T. Takano vs. Securities and Exchange Board of India & Anr.*³ and more particularly, on paragraph Nos. 49 and 50, which read as under:

"49. In Kothari Filaments v. Commr. of Customs [Kothari Filaments v. Commr. of Customs, (2009) 2

3 (2022) 8 SCC 162

SCC 192 : (2009) 1 SCC (Cri) 705] , this Court held that the Commissioner of Customs in the exercise of its quasi-judicial powers cannot pass an order on the basis of material which is only known to the authorities. This Court held : (SCC pp. 195-96, paras 14-15)

“14. The statutory authorities under the Act exercise quasi-judicial function. By reason of the impugned order, the properties could be confiscated, redemption fine and personal fine could be imposed in the event an importer was found guilty of violation of the provisions of the Act. In the event a finding as regards violation of the provisions of the Act is arrived at, several steps resulting in civil or evil consequences may be taken. The principles of natural justice, therefore, were required to be complied with.

15. The Act does not prohibit application of the principles of natural justice. The Commissioner of Customs either could not have passed the order on the basis of the materials which were known only to them, copies whereof were not supplied or inspection thereto had not been given. He, thus, could not have adverted to the report of the overseas enquiries. A person charged with misdeclaration is entitled to know the ground on the basis whereof he would be penalised. He may have an answer to the charges or may not have. But there cannot be any doubt whatsoever that in law he is entitled to a proper hearing which would include supply of the documents. Only on knowing the contents of the documents, he could furnish an effective reply.”

50. The following principles emerge from the above discussion:

50.1. A quasi-judicial authority has a duty to disclose the material that has been relied upon at the stage of adjudication.

50.2. An ipse dixit of the authority that it has not relied on certain material would not exempt it of its liability to disclose such material if it is relevant to and has a nexus to the action that is taken by the authority. In all reasonable probability, such material would have influenced the decision reached by the authority.

50.3. Thus, the actual test is whether the material that is required to be disclosed is relevant for purpose of adjudication. If it is, then the principles of natural justice require its due disclosure.”

(Emphasis Supplied)

9. In the said decision of *T. Takano* (supra), the Supreme Court has recorded following as one of the conclusion:

“62.3. The disclosure of material serves a threefold purpose of decreasing the error in the verdict, protecting the fairness of the proceedings, and enhancing the transparency of the investigatory bodies and judicial institutions.”

(Emphasis Supplied)

10. The factual position in this case is required to be examined on the touchstone of the above legal position.

10.1 The Petitioner in paragraph No.18 of the Writ Petition has specifically raised the contention that the copies of interim reports submitted by the Social Security Officer have not been supplied to

them. The said paragraph No.18 in the Writ Petition reads as under:

“18. Thereafter, it appears that the Respondent No.1 appointed two Social Security Officers for perusal and consideration of the documents submitted by the Petitioner. The said Social Security Officers appear to have prepared interim reports from time to time, copies of which were never supplied to the Petitioner. The Petitioner has learnt of the same due to them having been referred in the Impugned Order.”

10.2 In the affidavit-in-reply dated 3rd May 2024 of Mr. Sameer M. Dhuri, working as SSO with the Employees’ State Insurance Corporation, the contention raised in paragraph No.18 is answered in paragraph 5(n) as follows:

*“n) With reference to para 18 of the petition, I say that Deputy Director (Incharge) had appointed 2 Social Security Officers for verification of the voluminous records on the request of A.O. so that the process can be completed in due time and the same may be intimated to Bombay HC. **The interim reports submitted by SSO’s are internal matters of the office and does not concern with the employer. However, the details of these interim reports are provided in 45A order dated 29/12/2023.**”*

(Emphasis Supplied)

10.3 Thus, what is sought to be contended by the Respondent No.1 in the said affidavit-in-reply that the said interim reports are

internal matters of the office of the Employees' State Insurance Corporation and does not concern with the employer. It is further stated that the details of these interim reports are provided in Section 45A order dated 29th December 2023.

10.4 Thus, it is an admitted position that copies of said reports submitted by the Social Security Officer were not supplied to the Petitioner and say of the Petitioner was not called on these reports before passing the impugned order.

10.5 As noted hereinabove, in the impugned order the said reports of the Social Security Officer have been extensively relied on and *inter alia* impugned order has been passed on the basis of said reports.

Thus, it is very clear that the impugned order has been passed without following the principles of natural justice.

11. In view of above finding that the impugned order passed violates the principles of natural justice, it is required to be examined whether the Writ Petition filed under Article 226 of the Constitution of India is required to be entertained.

12. The Supreme Court in the decision of ***Whirlpool Corporation*** (supra) in paragraph Nos.14 and 15 has observed as follows:

“14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for “any other purpose”. ”

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.”

(Emphasis Supplied)

Thus, Mr. Sudhir Talsania, learned Senior Counsel is right in contending that as copies of said interim reports have not been furnished to the Petitioner and Petitioner's say has not been called and as the impugned order has been passed on the basis of these reports, there is violation of the principles of natural justice and therefore, the Writ Petition can be entertained.

13. Mr. Shailesh Pathak, learned Counsel appearing for the Respondents has relied on the decision of Supreme Court in *Greatship (India) Limited* (supra) and more particularly on paragraph Nos. 7 to 10. The said paragraphs read as under:

“7. Applying the law laid down by this court in the aforesaid decision, the High Court has seriously erred in entertaining the writ petition under article 226 of the Constitution of India against the assessment order, bypassing the statutory remedies.

8. Now so far as the reliance placed upon the decisions of this court by the learned senior advocate appearing on behalf of the respondent, referred to hereinabove, are concerned, the question is not about the maintainability of the writ petition under article 226 of the Constitution, but the question is about the entertainability of the writ petition against the order of assessment by-passing the statutory remedy of appeal. There are serious disputes on facts as to whether the assessment order was passed on March 20, 2020 or July 14, 2020 (as alleged by the assessee). No valid reasons have been

shown by the assessee to by-pass the statutory remedy of appeal. This court has consistently taken the view that when there is an alternate remedy available, judicial prudence demands that the court refrains from exercising its jurisdiction under constitutional provisions.

9. In view of the above and in the facts and circumstances of the case, the High Court has seriously erred in entertaining the writ petition against the assessment order. The High Court ought to have relegated the writ petitioner-assessee to avail the statutory remedy of appeal and thereafter to avail other remedies provided under the statute.

10. Under the circumstances, the impugned judgment and order passed by the High Court is hereby quashed and set aside. The writ petition filed before the High Court challenging the assessment order and consequential notice of demand of tax is hereby dismissed. The respondent-assessee is relegated to avail the statutory remedy of appeal and other remedies available under the MVAT Act and CST Act. It is directed that if such a remedy is availed within a period of four weeks from today, the appellate authority shall decide and dispose of the same on its own merits in accordance with law without raising any question of limitation, however, subject to fulfilling the other conditions, if any, under the statute. It is made clear that we have not expressed any opinion on the merits of the case in favour of either of the parties and it is for the appellate authority and/or appropriate authority to consider the appeal/proceedings on its/their own merits and without being influenced in any way by any of the observations made by the High Court which otherwise have been set aside by the present order. The present appeal is allowed in the aforesaid terms. However, in the facts and circumstances of the case, there shall be no order as to costs.”

(Emphasis Supplied)

Perusal of the said paragraphs shows that the Supreme Court has held that as far as assessment orders, parties are required to be relegated to the statutory remedies and that when there is an alternate remedy available, judicial prudence demands that the court refrains from exercising its jurisdiction under constitutional provisions. The factual position as discussed in paragraph No.8 in case of ***Greatship (India) Limited*** (supra) shows that there was serious dispute on facts in that case. In that case, no valid reasons have been shown by the assessee to bypass the statutory remedy of Appeal.

14. In the present case, the impugned order itself is passed *inter alia* on the basis of the said interim reports dated 2nd June 2021 and 30th November 2021 submitted by the Social Security Officer. The conclusions are arrived at in the impugned order by taking into consideration the said interim reports. The factual position on record shows that the said reports have been submitted during the pendency of the matter before the Respondent No.2. Admittedly, copies of the said reports have not been supplied to the Petitioner. In the affidavit-in-reply which has been filed on behalf of the

Respondents, contention is raised that the said interim reports are internal matters of the office of the ESIC and they do not concern with the employer i.e. the Petitioner. Thus, it is clear that the impugned order has been passed *inter alia* by taking into consideration the said interim reports, copies of which have not been supplied to the Petitioner and Petitioner's say has not been called. Thus, it is clear that the principles of natural justice have been clearly violated. In view of the factual position on record, the decision in ***Greatship (India) Limited*** (supra) will not apply to the present case. Thus, the Writ Petition can be entertained in view of the law laid down by the Supreme Court in ***Whirlpool Corporation*** (supra).

15. Accordingly, the Writ Petition is disposed of by passing the following order:

ORDER

- (a)** The impugned order dated 29th December 2023/1st January 2024 passed by the Respondent No.2 under Section 45A of the ESI Act is hereby quashed and set

aside and the matter is remitted to the Respondent No.2 for fresh disposal.

- (b) The Respondent No.2 to supply copies of the interim reports dated 2nd June 2021 and 30th November 2021 of the Social Security Officer to the Petitioner and give them opportunity to file their say with respect to these interim reports.
- (c) The Respondent No.2 to pass a fresh order after giving opportunity of hearing to the Petitioner.
- (d) The Petitioner to appear before the Respondent No.2 on 14th October 2024.
- (e) The Respondent No.2 to decide the proceedings filed under Section 45A of the ESI Act expeditiously by 31st December 2024.
- (f) It is clarified that this Court has not considered the merits and all contentions on merits are expressly kept open.

16. The Writ Petition is disposed of in above terms with no order as to costs.

[MADHAV J. JAMDAR, J.]

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