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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.03.2024

CORAM:

THE HONOURABLE MR. JUSTICE J.SATHYA NARAYANA PRASAD

W.P.No.33729 of 2012
and
M.P.No.1 of 2012

M/s.Sharon Solutions (India) Ltd.,
rep. by its Director and Authorised
Signatory, Mrs.Uma Maheswari,
Having Registered Office at
No.G8-20, 'Regent Plaza'
Habibullah Road,
T.Nager, Chennai – 600 017. ...Petitioner

-Vs-

The Deputy Director,
Employees State Insurance Corporation,
Regional Office,
No.178, 100 Feet Road,
Ansari Duraisamy Nagar,
Puducherry – 605 004. ...Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of a direction in the nature of Writ of Certiorarified Mandamus call for the records of the respondent bearing Order No.55-00-021986-000-1099/3917 dated 21.11.2012 and quash the same with consequential direction to the respondent to furnish a copy of the inspection report to the petitioner company, prepared by the Social Security Officer

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appointed under Section 45 of the 'Act 34 of 1948' in a manner known to law and pass such further orders.

For Petitioner : Mr.A.Irudayam

For Respondent : Mr.C.Ramachandra Murthy

O R D E R

This writ petition is filed for issuance of a Writ of Certiorarified Mandamus to quash the respondent's Order No.55-00-021986-000-1099/3917 dated 21.11.2012 and consequential direction to the respondent to furnish a copy of the inspection report to the petitioner company, prepared by the Social Security Officer appointed under Section 45 of the 'Act 34 of 1948'.

2. The case of the petitioner is that the Petitioner Company having a factory situated at Puducherry is covered under the Employees' State Insurance Act, 1948 (34 of 1948) – for the sake of brevity, it would be called as 'Act 34 of 1948'- which is social security legislation that provides for certain benefits to the employees in case of sickness, maternity, employment injury, and to make provisions for certain other matters in relation thereto.

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3. Learned counsel for the petitioner submitted that the Petitioner Company is aggrieved against the respondent's Order 08.2012055-00 021986-000-1099/C-18 (Ad)/3917 dated 02.08.2012 passed under Section 45A of the 'Act 34 of 1948'. The said notice *inter-alia* states that the Social Security Officer visited the Petitioner Company's Factory on 30.01.2012 and 29.03.2012 and submitted a report on the basis of the records said to have been produced before him and raised a claim to the tune of Rs.14,94,54,264.00 towards contributions on Employees' Insurance and omission of wages for the period from 2006-2007 to 2010-2011. It is not known the reasons warranting the Social Security Officer to arrive at the aforesaid figure without any basis. Admittedly, a copy of the report which determined the above alleged 'default amount', has not been furnished to the Petitioner's Company thereby inviting any objections thereto.

4. Learned counsel further submitted that there is a violation of principle of natural justice for having failed to furnish a copy of the report, which was prepared in a casual and perfunctory manner by the Social Security Officer following an inspection carried on by him on the aforesaid

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dates, thereby without providing any opportunity for the Petitioner Company to address their objections vis-à-vis explanations therefor. It is apprehended that the Social Security Officer has set his report on the basis of available records and the respondent without going into the merits of the report, has simply passed the impugned order without applying his mind. Pursuant to the respondent's letter bearing No.55-00-021986-000-1099 dated 29.08.2012, one Sri.D.Lakshmi Narayanan, Manager (HR), was deputed to attend the hearing slated for 12.09.2012 before the respondent and stated to the effect that the proposed contribution was on the higher side and placed before the authorities all the available records and copies of challans in relation to the payment of contributions collected from the employees, besides payment of the employer's share, which was remitted through the designated bank of the respondent in conformity with Clause 26 of 'The Employees' State Insurance (General) Regulations, 1950. In terms of the aforesaid Clause, as per the amendment made with effect from 01.01.2005, the employer shall send a return of contributions in quadruplicate in (Form 5) along with receipted copies of challans for the amounts deposited in the Bank.

5. Learned counsel further submitted that the Petitioner Company

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has complied with the above requirement, but submitted the returns in Form 6 as was done hithertofore, inadvertently for the following years:-

1. October 2007 to March 2008
2. April 2008 to September 2008
3. October 2008 to March 2009
4. April 2009 to September 2009
5. October 2009 to March 2010
6. April 2010 to September 2010

All the above payments have been made in conformity with Regulation 29 of 'The Employees' State Insurance (General) Regulations, 1950'. While so, it is not known the basis warranting the respondent herein to pass the impugned order determining the calculations based on the report of the Social Security Officer.

6. Learned counsel further submitted that the respondent herein without adhering to the formalities relating to the submission of the report of the Social Security Officer following inspection and also without providing an opportunity of being heard by the Petitioner Company, has simply issued a notice inviting objections at the time of hearing of the official of the

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Petitioner Company despite having made a threadbare representation detailing the payments made in relation to the contributions made in conformity with Reg.26 and 29 of 'The ESI (General) Regulations, 1950' through the designated bank. The petitioner Company is advised to state that determination cannot be done in such a manner keeping the report under the fold of the authority concerned and treating the Petitioner Company under the category of 'non-filing of the Returns' as well as 'defaulter in the statutory payment' without verifying the payments effected on the side of the Petitioner Company. Further, any determination invoking Section 45-A of the 'Act 34 of 1948' without providing a copy of the report remaining as the basis for determination is arbitrary, illegal, contrary to law and violative of principles of natural justice.

7. Learned counsel further submitted that the respondent herein has failed to take into consideration, in relevance to the inspection by any Officer of the Corporation authorized to carry out re-inspection or test inspection of the records and returns submitted under Section 44 of the 'Act 34 of 1948' for the purpose of verifying the correctness and quality of the inspection carried out by the Social Security Officer. The impugned order of the respondent is

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erroneous basically on the sole ground in terms of Section 45-A of the 'Act 34 of 1948' where, in respect of a factory or establishment, no returns, particulars, registers, or records are submitted, furnished or maintained in accordance with provisions of Section 44 of the 'Act 34 of 1948' or any one (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 any other person in exercising his functions or discharging his duties under Section 45, only in such circumstances, Section 45-A of the 'Act 34 of 1948' be invoked.

8. Learned counsel further submitted that the petitioner was not able to show the records required by the respondent in view of the CBI case pending against the petitioner and all the documents were taken away by the CBI (Investigating Agency) before the inspection conducted by the respondent Corporation.

9. Learned counsel for the petitioner drew the attention of this Court to the order passed by the learned Principal Special Judge for CBI cases in Crl.M.P.No.5119 of 2013 in RC MA 12012 A 0027 dated

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03.09.2013.

10. Learned counsel further submitted that at the time of admission, this Court by order dated 17.12.2012 has granted interim stay of the order passed by the respondent under Section 45-A of the 'Act 34 of 1948' dated 21.11.2012 and the respondent had neither vacated the said interim stay order dated 17.12.2012 nor had filed any counter for 12 years.

11. Learned counsel for the petitioner further submitted that the respondent has taken the objection that the petitioner has approached this Court under Article 226 without exhausting alternative remedies available under Section 75 of the ESI Act. The petitioner has approached this Court under Article 226 as the respondent has passed order under Section 45A of the Act dated 21.11.2012 without jurisdiction and during the pendency of the proceedings, the office of the respondent provided a copy of the Inspection Report of the SSO, which by itself was one of the prayers in the writ petition. The demand of contribution as Rs.97,14,528/- at 6.5% on Rs.14,94,54,264/- as Grand Total of 13 Head of Accounts during the years 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011 vide an Enclosure to the Spot Letter dated 29.03.2012 by the Social Security Officer. The contribution

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assessed by the Social Security Officer is just the same in the order dated 21.11.2012 under Section 45 A of the Act passed by the respondent, which raises serious question of law as to jurisdiction and application of mind by the respondent.

12. A counter was filed by the respondent Corporation on 20.10.2023 and the relevant paragraphs are extracted hereunder for better appreciation and understanding:

> "*6. It is humbly submitted that the petitioner company was covered under ESI Act w.e.f 3/8/1992. The social security officer of the respondent corporation conducted for the period from 4/06 to 1/12 and books of Accounts verification for the period from 4/06 to 3/11. He also stated that as many as 78 employees were found working on the date of inspection and all the 78 coverable employees were found covered. No coverable employees had been found left not covered. The petitioner has not produced the records as called for. Hence the social Security officer based on the balance sheet issued spot letter dt 29/3/12 claiming a sum of Rs. 97,14,525/- as contribution due on the total omitted wages of Rs. 14,94,54,264/-*
>
> *7. It is further submitted that the authorized officer of the Respondent Corporation issued a show cause notice dated 02/08/2012 based on the report submitted by the Social Security officer with giving opportunities of personal hearing op 27/8/12 to represent his case in person with relevant records and raise objections, if any. The notice issued to the principal employer, "shri. Kamaraj Johnson", was returned undelivered with remarks "left" by the postal authority while the notice sent to the factory address "M/s. Sharon Solutions Ltd" has been duly delivered as per record. But neither the principal employer nor any authorized representative attended the personal hearing on 27/8/2012 And as such one more opportunity of personal hearing was given for 12/9/2012 vide letter dated*

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29/8/2012. On 12/9/2012 D. Lakshmi narayanan Manager(HR) appeared before the authorized officer for personal hearing. But he failed to produce authorization letter. In the absence of any authorization to represent personal hearing was postponed to the day next i.e 13-9-2012 on the request of Shri. Lakshmi Narayan Manager (HR). But Shri. Lakshmi Narayan Manager (HR) appeared for personal hearing on 18/9/2012 with authorization letter.

The said authorized representative contended that the contribution claimed were on higher side and requested further time to submit statement of contribution due as per their records along with relevant records such as Attendance Register, wage Register, general ledger, cash book, Subsidiary books of accounts, bills, vouchers, work order, audited balance sheets, profit and loss accounts and all other records for the period in question to prove his case on the next personal hearing on 5/10/12. In spite of granting personal hearing for 27/8/12, 12/9/2012, 5/10/2012 and a final hearing was fixed for 22/10/2012. The petitioner failed to utilize all the opportunities to prove his case with records, the authorized officer had no other alternative except to proceed further for determination of contribution due under Section 45A. Accordingly the authorized officer issued speaking order dated 21/11/12 under Section 45-A with an opportunity to prefer appeal under Section 45AA of the ESI Act to the Regional Director (Appellate Authority) as provided in Registration 31 D of the ESI (General) Regulations 1950.

Instead of exhausting the speedy and efficacious remedy as provided under the Act to appeal before the Appellate Authority under Section 45AA of the ESI Act5 1948 read with regulations 31(D) of the ESI (General) Regulations, 1950, the petitioner at his own volition has approached this Hon'ble court hurriedly. And as such the petitioner has not only abandoned the utilization of personal hearing and making appeal before appellate authority directly instead of filing an application under Section 75 of the ESI Act before this El Court, Puducherry which is not tenable. Instead of producing the records before the authorized officer the petitioner has approached this Hon'ble Court which clearly depicts the petitioner's malafide intention to avoid the production of records and to delay the process of law.

13. The contents of para 7 are wrong and denied. It is submitted that the beads of accounts mentioned in the notice

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dt. 02/08/12 do not fall outside the purview of ESI Act. All the heads of accounts includes the wage elements as defined under Section 2(22) and labor charges paid to different categories of employees as defined under Section 2(9) of the Act. The petitioner has also been given opportunities of personal hearings. But the petitioner declined to produce all the records and as such the petitioner cannot allege that the amount mentioned in the 45-A order is an imaginary, arbitrary, illegal and contrary to law."

13. Learned counsel for the respondent submitted that the inspection was carried out by the respondent on the petitioner Company between the period from April 2011 to October 2011 and the show cause notice was issued on 02.08.2012 but no reply was given by the petitioner. The date of the personal hearing was fixed on 27.08.2012, 13.09.2012 and 18.09.2012, but none appeared on behalf of the petitioner Company.

14. A reply affidavit was filed by the petitioner on 20.11.2023 and the relevant paragraphs are extracted hereunder for better appreciation and understanding:

"*13. I submit that the demand of contribution as Rs.97,14,528/- at 6.5% on Rs.14,94,54,264/- as Grand Total of 13 Head of Accounts during the years 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-20011 comprising of thirteen Account Heads namely, (i) Differences in Salary (ii) Establishment Expenses (iii) Staff Welfare Expenses (iv) Allowances and Settlements (v) Professional Charges (vi) Repairs and Maintenance (vii) Sales Promotion (viii) General Expenses (ix) Security Charges (x) Carriage Outwards (xi) Overheads (xii) Carriage Inwards and (xiii) Other Manufacturing Expenses. as 'determination' / assessment vide*

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an Enclosure to the Spot Letter dated 29-03-2012 by the Social Security Officer, is patently is in violation of the provision under Sec. 45 of EST Act, 1948, titled as, " Social Security Officers (previously called as Inspectors), their functions and duties.

14. That the demand of contribution as Rs. 97,14,528/- at 6.5% on Rs. 1,49,454,264/- as Grand Total of 13 Head of Accounts during the years 2006- 2007, 2007-2008, 2008-2009, 2009-2010, 2010-20011 comprising of thirteen Account Heads by the Social Security Officer himself tantamount to assuming quasi judicial powers u/s 45 A of the Act only by the Deputy Director and above.

16. I submit that whereas Sec. 45 (2) of the Act specified duties and powers of SSOs, namely: (1) under Sec. 45 (2)(a) of the Act require furnishing of information from the employer (ii) under Sec. 45 (2)(b) of the Act, right to examine such accounts, books and other documents relating to the employment and payment of wages (iii) right to to the purpose aforesaid (iv) right to examine, with respect to any matter relevant register, accounts books or other documents maintained in the office and o make copies of or take extracts from any premises, thus containing no statutory provision whatsoever to determination /assessment of contribution, which is available only to the respondent under Sec. 45 A of the Act.

17. I submit that in other words, the Social Security Officer has got limited powers to visit the premises of the employer for inspection is only entitled to (i) make copies of or take extracts from any register, accounts books or other documents maintained in the office and premises of the employer and his comments / outcomes of demand for production of records (ii) attempt to identify the element of employee and wages wherever records other than wages paid and contribution paid of coverable employees are produced and make a report and (iii) check compliance under the Act verifying RCC and employment and wage records and satisfy himself are coverable employees are covered and the Act and definitely not make any assessment on the Balance Sheet / P & L Accounts on various Heads of Accounts as in the instant case but only submit the figures to the higher authorities to make assessment u/s 45 A of the Act.

18. I submit that whereas only the respondent in exercise of his quasi- judicial powers vested under Sec. 45 A, of

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the Act is authorised to 'determine' / assess adhoc contribution on the omitted wages component in all the 13 Account Heads in case of non-production of records, in the instant case, the Social Security Officer, with no independent or even delegated powers having determined / assessed the contribution as Rs. 97,14,528/- is illegal, encroaching upon statutory powers of the respondents and hence and without jurisdiction and ultra vires of the Act.

*20. I submit that the respondent clothed with statutory powers under Sec. 45A of the Act, the 'determination' / assessment of the respondent by concluding the wages as Rs. 12,92,56,705/- for the period from October 2007 to March, 2011 and 'determining'/assessing the contribution due at 6.5% on this amount at Rs. 84,01,686/- and after adjusting the contribution of Rs. 7,62,101/- already paid by the petitioner and hence the resultant contribution due to be at Rs. 76,39,585/- vide Sec. 45 A Order dated 21-11-2-12 is the exact reproduction of determination/ assessment of Rs.97,14,528/- at 6.5% on Rs. 14,94,54,264/- as Grand Total of 13 Head of Accounts during the years 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011 without adjustments as determined / assessed by the Social Security Officer on the stated principle of "Best Judgment", is not only without application of mind but also arbitrary, without jurisdiction since the respondent, who is the only competent Officer to determine / assess such adhoc contribution under sec. 45 A of the Act, instead of exercising his quasi judicial functions to independently enquire and pass Speaking Order on every component of the 13 different heads of accounts has abdicated his quasi judicial powers and instead had verbatim adopted the illegal determination / assessment of the Social Security Officer, who is only an information collecting and reporting officer and thus the respondent had acted without jurisdiction by way of failing to discharge his quasi judicial powers and duties by simply reproducing the illegal determination of the Social Security Officer and thus had himself had violated the provisions of the Act.***"**

15. Heard both sides and perused the materials available on record.

16. It is an admitted fact by the petitioner that they have not

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produced the document as required by the respondent Corporation at the time of inspection of the petitioner Company since all the documents were taken away by the CBI (Investigating Agency) and it is also evident from the order passed by the learned Principal Special Judge for CBI cases in Crl.M.P.No.5119 of 2013 in RC MA 12012 A 0027 dated 03.09.2013 and the relevant portion is extracted hereunder:

> "*5.The reasons stated in the closure of final report are convincing. Hence, the closure report is accepted and the RC MA 1 2012 A 0027 is ordered to be closed as Mistake of Fact.*
>
> *6.The Investigating Agency is permitted to return all the documents/records to the respective persons/authority/department from whom the same was seized/collected during the investigation.*"

In the closure report dated 03.09.2013 passed by the learned Principal Special Judge for CBI cases it is clear that the documents were seized/collected by the CBI and the Investigating Agency was permitted to return all the documents to the respective persons.

17. The contention of the petitioner is that the order under Section 45-A of the Employee State Insurance Act, 1948, must be passed only by the Deputy Director i.e., the respondent herein and not by the Social Security

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Officer and the relevant portion of the impugned order is extracted hereunder:

> ***"****As per the provision to section 45-A of the ESI Act, 1948, contributions under section 45-A cannot be determined upto September, 2007 Hence, I decide to determine the contribution on the wages for the period from October, 2007 to March, 2011 as recommended by the said Social Security Officer based on which the C-18 (Adhoc) notice was issued.*
>
> *The wages for the period from October, 2007 to March, 2011 works out to 12,92,56,705.50 as per the details mentioned in the notice. Contribution due @ 6.5% on this amount of wages works out to 84,01,686/-. The contribution of?7,62,101/- paid already is adjusted and the resultant contribution due works out to 76,39,585/-.*
>
> *Accordingly, I determine contributions on the principle of best judgement and the amount of contributions so determined works out to 76,39,585/- is fair, reasonable and according to law.****"***

18. In the counter affidavit it is also admitted that the petitioner has not produced the records as submitted by the petitioner themselves. Since the same was taken away by the CBI (Investigating Agency) before the investigation was conducted by the respondent Corporation.

19. It is also pertinent to note from the counter affidavit filed by the respondent that notice was sent to the Principal Employer and was returned undelivered with the remarks "Left" by the postal department authorities. Hence, it is clear and evident that the representative of the petitioner

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Company did not attend the personal hearing fixed on 27.08.2012 by the respondent Corporation. In the next personal hearing date on 12.09.2012, one D.Lakshmi Narayanan appeared before the Authorised Officer. Since he did not produce the authorization letter, he was asked to produce it and in the next hearing, he appeared on 13.09.2012 before the respondent officers. The records which were required by the respondent at the time of inspection were not available since the same was seized by the CBI (Investigating Agency) from the petitioner Company. Hence, the petitioner was unable to produce the records to substantiate and defend the case by producing them before the respondent Authority.

20. **In view of the above factual matrix of the case, this Court is inclined to give one more opportunity to the petitioner Company to produce all the records to the respondent Corporation for proper inspection and verification since the records would have been returned by the CBI (Investigating Agency) as per the closure report, order passed by the learned Principal Special Judge for CBI cases in Crl.M.P.No.5119 of 2013 in RC MA 12012 A 0027 dated 03.09.2013. Hence, there is no impediment for the petitioner Company to produce all**

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the records which are required by the Authorities of the respondent Corporation for arriving at the contribution to be paid by the petitioner Company and the order passed by the respondent is liable to be quashed and the same is hereby quashed.

21. In the light of the above, the order passed by the respondent Corporation vide Order No.55-00-021986-000-1099/3917 dated 21.11.2012 is hereby quashed and the matter is remitted back to the respondent Corporation for fresh consideration on merits in accordance with law and as per the rules and provisions of the Employee State Insurance Act, 1948. The respondent Corporation is directed to complete the said exercise within a period of four months from the date of receipt of a copy of the order.

In the result, **the writ petition stands allowed with the above observations and directions.** No costs. Consequently, connected miscellaneous petition is closed.

04.03.2024

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Index : Yes/No
Speaking/Non Speaking Order

J.SATHYA NARAYANA PRASAD, J.

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To

The Deputy Director,
Employees State Insurance Corporation,
Regional Office,
No.178, 100 Feet Road,
Ansari Duraisamy Nagar,
Puducherry – 605 004.

W.P.No.33729 of 2012