

(2010) 10 MAD CK 0266

Madras High Court

Case No: Writ Petition No. 23927 of 2009 and MP. No's. 1 of 2009 and 1 of 2010

G.R. Thangamaligai Jewellers
Private Limited

APPELLANT

Vs

Employees' State Insurance
Corporation

RESPONDENT

Date of Decision: Oct. 5, 2010

Acts Referred:

- Employees State Insurance Act, 1948 - Section 45A, 45C, 45G, 45I
- Income Tax Act, 1961 - Section 75

Citation: (2011) 4 LLJ 246 : (2011) LLR 545

Hon'ble Judges: R. Sudhakar, J

Bench: Single Bench

Advocate: Vijay Narayan, SC for R. Parthiban, for the Appellant; S. Jayakumari, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

R. Sudhakar, J.

The writ petition is filed for the issuance of a Writ of Mandamus forbearing the Respondents or their men or agents or subordinates or any persons acting on their behalf, from taking any action to recover any money from the Petitioner M/s.G.R. Thangamaligai Jewellers Private Limited pursuant to the order Nos. TN/Ins-VI/51-19746-102, TN/Ins-VI/51-51465-102 and TN/Ins-VI/51-36983-102 dated 22.10.2009.

2. The brief facts of the case are as follows:

The Respondent Corporation initiated proceedings against M/s.G.R. Thangamaligai Silver Artwares, M/s.G.R. Thangamaligai (P) Ltd., and M/s.G.R. Thangamaligai. On

21.5.2008, a notice was issued to M/s.G.R. Thangamaligai Silver Artware to appear for a personal hearing on 18.6.2008 in Ref. No. TN/Ins-VI/51-36983-102. In the same manner, on 2.7.2008, a notice was issued to M/s.G.R. Thangamaligai (P) Limited to appear for the personal hearing on 7.8.2008 in Ref. No. TN/Ins-VI/51-51465-102. Similarly, on 18.9.2008, a notice was issued to M/s.G.R. Thangamaligai for the hearing fixed on 10.11.2008 in Ref. No. TN/Ins-VI/51-19746-102.

3. The Competent Authority of the Respondent Corporation, thereafter, proceeded to hear the respective parties and three final orders were passed u/s 45A of the Employees' State Insurance Act, 1948 (hereinafter referred to as the ESI Act) on 22.10.2009 against one entity namely M/s.G.R. Thangamaligai (P) Limited, though the determination was made under three file numbers separately.

4. Consequent to the Section 45A order, the Respondent Corporation issued a notice of demand to the defaulter in terms of Rule (2) of Second Schedule to the Income Tax Act, 1961 read with Sections 45C to 45I of the ESI Act. This demand notice was issued on 10.11.2009 in respect of the three orders passed u/s 45A of the ESI Act. By the notice, M/s.G.R. Thangamaligai Private Limited was called upon to pay the amount within seven days from the date of receipt of the notice, failing which, it was specified that recovery will be made in accordance with the provisions of Sections 45C to 45I of the ESI Act.

5. The Petitioner herein, on 13.11.2009, replied to the recovery notice by a common letter stating that the management has decided to contest the matter before the Competent Court and therefore, the amount is not paid and prayed the Authority not to initiate any action for recovery of the amount. In such circumstances, on 18.11.2009, the Respondent Corporation issued another notice u/s 45G of the ESI Act calling upon the bank of the Petitioner to pay the amount due in terms of the order passed u/s 45A of the ESI Act. This notice issued u/s 45G of the ESI Act was honoured by the bank.

6. The Petitioner, realising that the Respondent Corporation is intending to recover the amount lying in bank as deposit, invoking the power u/s 45G of the Act, by the second proceedings as above, rushed to this Court and filed this writ petition. The Petitioner sought for an order of interim injunction restraining the Respondents from recovering the money. This Court, by order dated 19.11.2009, while ordering notice of motion, granted an order of interim injunction for a period of four weeks. Even before the interim order of this Court could be served on the Respondents, the Respondent Corporation had already recovered the money from the bank. Thereafter, the Petitioner filed MP. No. 1 of 2010 for an order in the nature of interim direction to direct the Respondents to refund the amount already recovered.

7. On notice, the Respondents are represented by counsel. A counter affidavit has been filed. By consent, the writ petition itself is taken up for disposal.

8. Rules 2 and 3 of Second Schedule to the Income Tax Act read as follows:

2. When a certificate has been drawn up by the Tax Recovery Officer for the recovery of arrears under this Schedule, the Tax Recovery Officer shall cause to be served upon the defaulter a notice requiring the defaulter to pay the amount specified in the certificate within fifteen days from the date of service of the notice and intimating that in default steps would be taken to realise the amount under this Schedule.

3. No step in execution of a certificate shall be taken until the period of fifteen days has elapsed since the date of service of the notice required by the preceding rule:

Provided that, if the Tax Recovery Officer is satisfied that the defaulter is likely to conceal, remove or dispose of the whole or any part of such of his movable property as would be liable to attachment in execution of a decree of a civil Court and that the realisation of the amount of the certificate would in consequence be delayed or obstructed, he may at any time direct, for reasons to be recorded in writing, an attachment of the whole or any part of such property:

Provided further that if the defaulter whose property has been so attached furnishes security to the satisfaction of the Tax Recovery Officer, such attachment shall be cancelled from the date on which such security is accepted by the Tax Recovery Officer.

9. Referring the above provisions, learned Senior Counsel appearing on behalf of the Petitioner contended that the first notice was issued on 10.11.2009 invoking the above stated provisions. However, the Authority, has scored out the 15 days" time indicated in the notice to read as 7 days from the date of receipt of the notice for recovery of the amount. This is contrary to the above referred rules. The Authority can take action for recovery only after 15 days of service of notice and not before. Therefore, there is a clear violation of the law.

10. Learned Senior Counsel has further contended that even before the Petitioner could take any action against the notice for the breach of the provisions of law, on 18.11.2009, the Respondent Corporation has, in haste, proceeded to invoke Section 45G of the ESI Act and called upon the bank to pay the amount forthwith i.e within eight days of the first notice. Therefore, there is a clear breach of the provisions of the Rules. When the Rules prescribe a particular mode for recovery of the amount, the said method should be followed strictly and the Authority cannot circumvent the provisions of law to recover the amount in any manner they want.

11. The other contention raised by the learned Senior Counsel is that originally, the proceedings were initiated against three individual companies whereas the three orders issued u/s 45A of the ESI Act have been passed against one company M/s. G.R. Thangamaligai Private Limited on 22.10.2009 and the notice u/s 45G of the ESI Act has been issued to M/s.G.R. Thangamaligai Jewellers Private Limited, which is totally a different entity. Therefore, there is total non application of mind by the Authority. The recovery against a company against which no order u/s 45A was

passed is erroneous and without application of mind.

12. Heard Ms. Jayakumari, learned Counsel for the Respondents. She referred to the counter affidavit and stated that the Authority is entitled to recover the amount under any of the modes prescribed under the provisions of Sections 45C to 45I of the ESI Act. She further contended that when the power is given to the Authority to recover the amount under any of the modes, the Petitioner cannot contend that the notice issued under Sections 45G of the ESI Act is arbitrary or bad. It is contended that all the companies have been merged together and therefore, the recovery notices were issued to M/s.G.R. Thangamaligai Jewellers Private Limited. She justified the action taken by the Respondent Authorities.

13. It is not in dispute that as against the order passed u/s 45A of the ESI Act, a remedy by way of appeal is provided under the ESI Act and the Petitioner is willing to pursue that remedy. The plea with regard to issuance of an erroneous order u/s 45A against one company, namely M/s.G.R. Thangamaligai Private Limited towards claims in respect of two other companies can be considered by the Appellate Authority as and when such appeal is filed.

14. In so far as the plea with regard to the recovery, the provisions of Sections 45C to 45I of the Act read with Rule 2 of Second Schedule to the Income Tax Act clearly provide the manner, in which, the recovery should be made. As has been extracted above, the Respondents have to give 15 days" clear notice before seeking to recover the amount invoking the provisions of Sections 45C to 45I of the ESI Act.

15. In this case, the Authority has amended the notice and has directed the Petitioner to pay the amount within seven days from the date of receipt of the notice instead of the 15 days provided in the Rules. The Respondent has proceeded to issue the second notice to recover the amount through the bank invoking the provisions of Section 45G of the ESI Act within 8 days from the date of receipt of the first notice dated 10.11.2009. Therefore, in this case, the Respondents have clearly acted in arbitrary manner to recover the amount without giving the Petitioner sufficient time. In any event, even assuming that the provisions of Section 45G of the ESI Act enables the Authority to recover the amount, it does not empower the Authority to recover the amount without following the procedure in terms of Rule 2 of Second Schedule to the Income Tax Act. Section 45G does not exclude the procedure prescribed. When the Statute prescribes that a thing should be done in a particular manner, such act should be done in that manner and not at all.

16. In the decision rendered in the case of [State of Uttar Pradesh Vs. Singhara Singh and Others](#), it has been held as follows:

rule adopted in Taylor v. Taylor (1876) 1 Ch D 426 is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has

been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted.

Reliance can be placed on the following decisions also:

1. [State of Gujarat Vs. Shantilal Mangaldas and Others](#), .
2. [Chandra Kishore Jha Vs. Mahavir Prasad and Others](#), .
3. [Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others](#), .
4. [Gujarat Urja Vikash Nigam Ltd. Vs. Essar Power Ltd.](#), .
5. Allied Blenders and Distillers Pvt. Ltd., Mumbai v. Intellectual Property Appellate Board, Chennai and Ors. (reported in (2009)7 MLJ 36 (Division Bench of this Court) para 23).
6. Alphonse v. The Commissioner, Pondicherry Municipality, Pudhucherry-1 and Anr. (reported in 2009(3) CTC 858 (para 19)).
7. [MRF Limited Vs. The Deputy Chief Inspector of Factories and MRF Cycle Tyre Unit Association](#), .

17. In this case, Rule 2 of Second Schedule to the Income Tax Act provides the manner, in which, the recovery should be made. The Authority, while exercising power under the provisions of Section 45C to 45I of the ESI Act, cannot reduce the period arbitrarily. Hence, the recovery is in violation of the provisions of law as above.

18. In the case of [Employees State Insurance Corporation and Others Vs. L.M.L. Ltd. and Another](#), , a Division Bench of the Allahabad High Court had an occasion to consider a similar issue as to whether any amount could be recovered from the bank of the employer for recovery of the amount due towards contribution under the Employees' State Insurance Act 12 before expiry of 15 days" time specified in the notice. The Allahabad High Court considered the provisions of Sections 45C to 45H of the ESI Act and Rule 2 of Second Schedule to the Income Tax Act and held that such recovery is bad.

19. In the present case also, the Respondents have proceeded to recover in great haste. After issuing first notice under Sections 45C to 45I of the ESI Act and that too, restricting the period to seven days contrary to Rule 2 of Second Schedule to the Income Tax Act have issued the second notice u/s 45G of the ESI Act within 8 days thereafter. The Respondents appear to have acted in haste for recovery of the amount. Since the mandatory requirement has been violated, this Court is constrained to hold that the recovery of the amount is contrary to the Rules. The Respondents are not entitled to retain the amount collected without following the due process of law.

20. Learned Senior Counsel submitted that as and when an appeal is filed before the Appellate Authority by all the persons concerned u/s 75 of the ESI Act, unless an order for waiver of pre-deposit is passed, the appeal will not be entertained. He, therefore, pleaded that suitable orders may be passed, so as to enable the Petitioner to pursue the appeal remedy without pre-deposit and so as to set right the irregularity in the order passed u/s 45A of the ESI Act.

21. Learned Counsel for the Respondents, however, contended that for the purpose of entertaining the appeal, some deposit has to be made and the interests of the Respondents should be considered and partially secured if refund of the amount is ordered. She relied on the Allahabad High Court order for such plea.

22. In the decision reported in [Employees State Insurance Corporation and Others Vs. L.M.L. Ltd. and Another](#), the learned Single Judge directed that a portion of the amount should be kept in deposit and the employer should be allowed to pursue the appeal before the appropriate Court. The view taken by the Single Judge was upheld by the Division Bench. In this case, the Respondent Corporation recovered the entire amount payable in terms of the orders passed u/s 45A of the ESI Act from one company. The Senior Counsel for the Petitioner company stated that a portion of the amount can be treated as pre-deposit for the purpose of appeal and the said concession by the Petitioner company will be without prejudice to the Petitioner's claim that no amount is due by the 14 Petitioner. The Petitioner states that an appeal will be filed on or before 30.11.2010.

23. For the aforesaid reasons, the Respondent Corporation is directed to retain Rs. 25,00,000/- (Rupees twenty five lakhs only) as pre-deposit pending the appeals to be filed and refund the balance amount to the Petitioner forthwith. The amount in deposit shall be intimated to the Appellate Authority, so as to enable the Authority to dispose of the appeal as and when filed, on merits and in accordance with law without any further deposit except the amount now ordered to be retained.

24. The writ petition is allowed to the extent indicated above. No costs. Consequently, the above M Ps are closed.