

(2010) 08 PAT CK 0190

Patna High Court

Case No: M.A. No. 357 of 2008

Regional Director, Employees"

State Insurance Corporation and

Another

APPELLANT

Vs

Gopal Prasad @ Gopal Prasad

Singh

RESPONDENT

Date of Decision: Aug. 25, 2010

Acts Referred:

- Employees State Insurance Act, 1948 - Section 2(12), 44, 45, 45(2), 45A

Citation: (2011) 1 LLJ 825

Hon'ble Judges: Gopal Prasad, J

Bench: Single Bench

Judgement

Gopal Prasad, J.

Heard learned Counsel for the parties.

2. This Miscellaneous Appeal is directed against the order, dated May 22, 2008, passed by the Presiding Officer, Labour Court, authorized as the Employees" State Insurance Court, Patna, in E.S.I. Case No. 11/2003 by which order of Recovery Officer, dated September 18, 2003 P/R/42-11515/531/September 22, 2003, has been set aside holding that the order is not maintainable as there is no participation by the Appellants in the proceeding u/s 45-A of the Employees" State Insurance Act, 1948, (hereinafter called, "the Act") which is a quasi judicial proceeding impinging the right of the parties.

3. From the perusal of the record it appears that the Defendant received a demand notice, dated September 18, 2003 and a remittance letter, dated October 17, 2003, and, hence, challenge the same before Employees" State Insurance Court, Patna, u/s 75(1A) of the Employees" State Insurance Act, 1948, asserting that they have not got any notice, at any stage of enquiry or proceeding u/s 45-A of the Act, in this

regard, and specifically asserted in paragraph 7 that the Respondent Gopal Prasad Singh went to collect the order on the basis of which the Recovery Officer passed the order, but, except what has been annexed (order of Recovery Officer) nothing was provided and it was impressed that no other order has been passed and no other order was given.

4. However, on the said application the Employees" State Insurance Corporation appeared and filed the written statement asserting that Insurance Inspector, Employees" State Insurance visited the work shop of the Petitioner-Respondent at Bahadurpur on March 16,1999 and, thereafter, visited his shop at R.K. Avenue on March 19,1999 and gave a report on April 16, 1999 that 13 persons were working in the work shop at Bahadurpur and 12 persons were found working in the shop at R.K. Avenue and, thereafter, visited thrice, i.e., on March 26, 1999, April 8, 1999 and April 16, 1999 and even orally asked the owner to give the record, but, records were not provided and subsequently a notice was sent in form "C11" by registered post and, thereafter, notice was issued in form "C19" after the order u/s 45-A of the Employees" State Insurance Act and, further, the notice was issued with letter of form "C11" and "C19" sent by registered post, which returned with report of the postal department that always not met and finally the demand notice was issued.

5. The parties adduced evidence in case witnesses were examined from both the sides, two witnesses from the side of the Employees" State Insurance Corporation and one witness on behalf of the Respondent and the documentary evidence adduced there is Exhibit "A", the report of the Inspector, dated April 16, 1999, with the name of 13 and 12 persons with endorsement that except Bishwanath Singh none other signed and the said reported is dated April 16, 1999.

6. However, taking into consideration the evidence, both oral and documentary, the learned Presiding Officer, Labour Court set aside the impugned order, i.e., the order of Recovery Officer, dated September 18, 2003, i.e., the demand notice for payment of (?) 1,50,724/- Being aggrieved the Appellant, Director, ESI, has preferred this Appeal.

7. The grievance of the Appellants is that the demand notice of? 1,50,724/- has been set aside and the Labour Court held that the Appellants are not covered under the Employees" State Insurance Act, 1948. The learned Counsel for the Appellants contends that the learned Labour Court has not ought to have shifted the onus on the Respondents to prove that they are not covered under the Act and 25 employees were not working under him as the Inspector under the Act having been empowered has given the report on the basis of which the order has been passed.

8. The learned Counsel for the Respondent, however, contends that the Respondent can not be fastened with the liability to prove a negative and it was incumbent on Employees" State Insurance Corporation to give notice affording opportunity to be heard and, further, that the impugned order has been passed well considering the

evidence and nothing has been brought in evidence to show that a notice was ever served during the proceeding under Sections 44 and 45-A of the Employees" State Insurance Corporation Act and order passed without giving any reasonable opportunity of being heard and no notice ever served at any stage of the proceeding and, hence, order of Employees" State Insurance Corporation Act passed behind the back is violation of the principle of natural justice.

9. Hence, the question for consideration whether the impugned order is sustainable in law or not and whether any opportunity of being heard was given to the Respondent and impugned order is in violation of principle of natural justice.

10. However, in this connection Sections, 44, 45 and 45-A of the Employees" State Insurance Act, 1948, are required to be considered. Employees" State Insurance Act, 1948, is applicable to all factories or establishment as defined in Section 2(12) of the, Act having more than ten persons employed for wage on any date of the preceding twelve months and any part of which a manufacturing process is being carried on with aid of power or inordinately so carried. Section 44 of the Employees" State Insurance Act, 1948, provides the employer of such an establishment to furnish return and maintain register. Section 45 of the Employees" State Insurance Act, 1948, provides the duties and functions of Inspectors. The duty of the Inspector is to enquire into correctness of any particular stated in any report referred to in Section 44 of (sic the Act) for the purpose of ascertaining whether any of the provisions of this Act has been complied with and, in this regard, the Inspector may require any principal or immediate employer to furnish such information to the Inspector and the Inspector may enter in any office/establishment and examine accounts/books and other documents made copy of the extract and will do such function and perform such duty as may be authorized by the Corporation. Section 45-A of the Employees" State Insurance Act, 1948, provides that the authority shall determine of the contribution of any establishment if it comes under the factory or establishment as per Act. However, it is relevant to quote Section 45-A of the Employees" State Insurance Act, 1948, herein below:

45-A: Determination of contributions in certain cases - (1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of Section 44 or any inspector or other official of the, Corporation referred to in Sub-section (2) of Section 45 is (prevented in any manner) by the principal or immediate employer or any other person, in exercising his functions or discharging his duties u/s 45, the Corporation may, on the basis of information available to it, by order determine the amount of contributions payable in respect of the employees of that factory or establishment:

Provided that no such order shall be passed by the Corporation unless the principal or immediate employer, or the person in-charge of the factory or establishment has been given reasonable opportunity of being heard

(2) An order made by the Corporation, under Sub-section (1) shall be sufficient proof of the claim of the Corporation; u/s 75 or for recovery of the amount determined by such order as an arrear of land revenue u/s 45-B.

11. However, Section 45-A of the Employees" State Insurance Act, 1948, has got proviso and the proviso provides that no order of such contribution u/s 45-A of the Act shall be passed by the Corporation unless the principal or immediate employer or the person in-charge of the factory or establishment has been given a reasonable opportunity of being heard, hence, the authority under the Employees" State Insurance Act, 1948, under Sections 44, 45 and 45-A has power to realize the contribution with regard to establishment which comes under the definition of factory or establishment to compel the employer to contribution regarding the employees for their benefit and bring it in the fold, but, subject to condition as provided in the proviso that during the proceeding for an action by the Inspector the opportunity must be afforded to the employer of the factory or the establishment of being heard. Hence, the question for consideration whether such opportunity has been afforded to the Respondent by the Inspector or Officer of Employees" State Insurance Corporation.

12. However, the case of the Respondent is that he got the demand notice, but, has got no notice at any earlier stage of the proceeding and even did not get or served with the order passed u/s 45-A of the Act no notice till such order passed against them whereas the case of the Appellants is that the Inspector visited the place and recorded the name of the 13 persons, who were working in the work shop at Bahadurpur and 12 persons found working at R.K.. Avenue and a report was prepared this followed with a notice by registered post in form "C11" and "C19", was sent to the employer Respondent, but, no assertion and evidence that notice was ever served on the Respondent.

13. But, during evidence so far the documentary evidence is concerned, Exhibit "A" is the report which bears the name of 13 persons, but, the name of those 13 persons are neither mentions with their parentage nor their addresses nor their signature and, hence, identity of those persons are quite impossible to identify. Further, it is stated that the notice by registered post in form "C11" and "C19" was sent. However, in the evidences neither the notice in form "C1 1" has been proved nor the service report by registered post has been proved. This is no evidence that notice, if any, sent was ever received by the Respondent.

14. In the written statement by the Corporation it is said that notice Exhibit "A" was sent along with the letter of form "C11" and C19" with order u/s 45-A of the Employees" State Insurance Act, but, the same has not been proved and, further, even the order passed u/s 45-A is neither proved nor brought on record. Hence, no evidence at all that any notice about the Inspector"s report ever served on employer till passing order u/s 45-A of the Act or any notice whatsoever had been ever served upon the employer of the factory or establishment to call upon him or affording him

any opportunity of being heard till the passing of order u/s 45-A of the Employees" State Insurance Act, 1948, was ever served to afford an opportunity of being heard.

15. Having regard to the fact that when the notice regarding the report of the Inspector having not been received, the other notice in form "C11" and "19" have not been received, there is no notice at all to the Respondents and, hence, the mere evidence of the Inspector, O.P.W. 1 that he went and found 13 or 12 persons including Exhibit "A" or the report of O.P.W. 2 that he along with O.P.W. 1 has made joint inspection and prepared the report and proved Exhibit "A" is of no consequence to fasten the liability on employer.

16. However, the question is not that Inspector visited the premises, but, question is that whether any notice or report was served or made available to employer to give him opportunity of being heard is the mute question for consideration and Corporation has not been able to prove that any intimation or notice ever given to employer to afford an opportunity of being heard. However, Exhibit "A" is dated April 16, 1999 whereas the inspection was made on March 16, 1999 and March 19, 1999, however, the report bears the name of 13 persons without any signature and there is only one signature of Bishwanath Singh however, the parentage and address of Bishwanath Singh is not there and the learned Labour Court has well considered the evidence of the witnesses and rightly come to the conclusion that there is no participation of the Respondents in the proceeding u/s 45-A, which is quasi judicial proceeding. Hence, under the facts and circumstances of the case the Labour Court rightly come to the conclusion that no notice to the Respondent and no opportunity was ever given to Respondent, hence, I find that it is apparently violation of proviso to Section 45-A of Employees" State Insurance Act, 1948. I do not find any illegality or irregularity in the impugned order to interfere with.

17. This miscellaneous appeal is dismissed.