(1978) 09 BOM CK 0020

Bombay High Court

Case No: Special Civil Application No. 2824 of 1973

B.M.K. Industries (P) Ltd.		APPELLANT
	Vs	
Employees'' State Insurance Corporation		RESPONDENT

Date of Decision: Sept. 20, 1978

Acts Referred:

- Constitution of India, 1950 - Article 14, 19, 31
- Employees State Insurance Act, 1948 - Section 1, 2, 40, 41, 43

Citation: (1979) 81 BOMLR 529 : (1979) MhLj 202

Hon'ble Judges: Kurdukar, J; Dharmadhikari, J

Bench: Division Bench

Judgement

Dharmadhikari, J.

The Petitioner in this case is a company registered under the Companies Act, having a Silk Weaving Factory at Kurla, Bombay. The petitioner received a notice from the respondent corporation dated May 31, 1971 calling upon them to pay employers'' special contribution and employees'' contribution as enumerated in the said letter. Thereafter the Regional Director of Employees'' State Insurance Corporation issued two separate recovery certificates which are dated July 14, 1971 requesting the Naib Tahsildar, Recovery of Government Dues to recover the said amount as arrears of land revenue. The petitioners then filed an application u/s 75 of the Employees'' State Insurance Act, 1948 on October 9, 1971, and the said application is still pending. The petitioner also filed an application before the Employees'' Insurance Court on August 4, 1972 challenging the vires of Sections 45A, 45B and 73D of the Act and requested the Court to make a reference to the High Court u/s 81 of the said Act. However, the Employees'' Insurance Court by its order dated July 24, 1973 declined to make such a reference and, therefore, the petitioners have filed the present writ petition challenging mainly the vires of Section 45A of the Employees'' State Insurance Act. The petitioners have also prayed in this writ petition for a writ

of mandamus directing the respondent to withdraw the notice and recovery certificates.

2. Mr. Shetye, learned counsel appearing for the petitioners has only raised one contention before us i.e. regarding the vires of Section 45A of the Employees'' State Insurance Act. According to the learned counsel Section 45A is ultra-vires Article 14 of the Constitution of India as it confers unbridled and arbitrary power upon the Corporation to determine the amount. According to the learned counsel, the right of the Corporation to determine the amount u/s 45A of the Act without taking recourse to the Employees'' State Insurance Act u/s 75 of the Act or to a civil Court in the absence of the constitution of Insurance Court is wholly arbitrary. The learned counsel further contended that Section 45A does not lay down any guidelines as to how and in what circumstances the power conferred upon the authorities concerned should be exercised. Therefore, in substance it is his contention that as the said section confers arbitrary power upon the authorities to arbitrarily determine the amount of contribution, the said section is violative of the petitioners'' fundamental right under Article 14 of the Constitution of India.

3. It is not possible for us to accept this contention. It is not correct to say that Section 45A of the Employees'' State Insurance Act confers any unguided or or unbridled power upon the corporation. Section 45A is a part and parcel of Chap. IV of the Employees'' State Insurance Act which deals with the contributions payable under the provisions of the Act. The petitioner is not challenging before us the rates of contribution. By Section 40 of the Act principal employer is made liable to pay contribution in the first instance. Then Section 41 makes it clear that the contribution could be recovered from immediate employer. The method of payment of contribution is also provided by Section 43 of Act. Then comes Section 44 which lays down the duty of the employer to submit to the corporation or to such officer of the corporation as it may direct such return in such form and containing such particulars etc. as may be specified in the regulation made in that behalf. By Section 45 a provision is made for appointment of inspectors and then Sub-section (2) of Section 45 lays down the duties and powers of the inspectors in the matter of inquiry into the correctness of any of the particulars stated in any return referred to in Section 44 or for the purpose of ascertaining as to whether any of the provisions of the Act has been complied with or not. Then comes Section 45A which reads as under:

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 obstructed 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. (2) An order made by the Corporation under Sub-section (7) 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 45B.

4. From the bare reading of Section 45A it is quite clear that the said section comes into operation when the normal procedure prescribed by the Act cannot be adhered to because the factory or establishment concerned has not submitted or maintained returns, particulars, registers or records in accordance with the provisions of Section 44 of the Act. It also comes into operation in those cases where any inspector or other official authorised by the corporation referred to in Sub-section (2) of Section 45 is obstructed by the principal or immediate employer or any other person, in exercising his functions or discharging his duties u/s 45. In those cases it is not possible either to verify the correctness or otherwise of the particulars or returns, registers or records submitted by the employer because of the obstruction by the principal or immediate employer or any other person on his behalf. Thus this provision has been made so as to enable the corporation to determine the amount of contribution in cases where the employer refused to co-operate or fails to abide by the relevant provisions of law. The very words used in the section contemplate passing of an order by the corporation determining the amount of contribution payable by the factory or establishment. This order is to be passed on the information available to the corporation. Therefore, the corporation is obliged to pass a speaking order indicating as to how it has determined the amount of contribution and what was the information available to it for determining such amount. Under Sub-section (2) of Section 45A this order is to be treated as sufficient proof of the claim of the corporation u/s 75 or for recovery of the amount determined by such order as arrear of land revenue u/s 45B. Therefore, in our opinion sufficient guidelines have been provided by the section itself and it does not confer any unguided or unbridled power on the corporation.

5. The Supreme Court had an occasion to consider the validity of Section 1(3) of the Employees'' State Insurance Act on the ground of excessive delegation of power in Basant Kumar Sarkar and Others Vs. Eagle Rolling Mills Ltd. and Others, and while considering such a challenge it was observed by the Supreme Court that the Act has prescribed a self-contained code in regard to the insurance of the employees covered by it. The Supreme Court further found that enough guidelines have been provided by the relevant provisions of the Act. In this context a reference can usefully be made to the following observations of the Supreme Court in para. 5 of the said judgment (p. 1262) :

Assuming that there is an element of delegation, the plea is equally unsustainable, because there is enough guidance given by the relevant provisions of the Act and the very scheme of the Act itself. The preamble to the Act shows that it was passed because the legislature thought it expedient to provide for certain benefits to

employees in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. So, the policy of the Act is unambiguous and clear. The material definitions of ''benefit period'', ''employee'', ''factory'', ''insured person'', ''sickness'', ''wages'' and other terms contained in S. 2 give a clear idea as to the nature of the factories to which the Act is intended to be applied, the class of persons for whose benefit it has been passed and the nature of the benefit which is intended to be conferred on them. Chapter II of the Act deals with the Corporation, Standing Committee and Medical Benefit Council and their constitution; Chapter III deals with the problem of finance and audit; Chapter IV makes provisions for contribution both by the employees and the employer, and Chapter V prescribes the benefits which have to be conferred on the workmen; it also gives general provisions in respect of those benefits. Chapter V-A deals with transitory provisions; Chapter VI deals with the adjudication of disputes and claims; and Chapter VII prescribes penalties. Chapter VIII which is the last Chapter, deals with miscellaneous matters. In the very nature of things, it would have been impossible for the legislature to decide in what areas and in respect of which factories the Employees'' State Insurance Corporation should be established. It is obvious that a scheme of this kind, though very beneficent, could not be introduced in the whole of the country all at once. Such beneficial measures which need careful experimentation have some times to be adopted by stages and in different phases, and so, inevitably, the question of extending the statutory benefits contemplated by the Act has to be left to the discretion of the appropriate Government. ''Appropriate Government'' under S. 2(1) means in respect of establishments under the control of the Central Government or a railway administration or a major port, or a mine or oil-field, the Central Government, and in all other cases, the State Government. Thus, it is clear that when extending the Act to different establishments, the relevant Government is given the power to constitute a Corporation for the administration of the scheme of Employees'' State Insurance. The course adopted by modern legislatures in dealing with welfare scheme has uniformly conformed to the same pattern. The legislature evolves a scheme of socio-economic welfare, makes elaborate provisions in respect of it and leaves it to the Government concerned to decide when, how and in what manner the scheme should be introduced. That, in our opinion, cannot amount to excessive delegation.

6. In our opinion these observations will aptly apply to the provision of Section 45A also. In the very nature of things such a provision was necessary for effectively implementing the provisions of the Act. Therefore though it is true that the power to determine the amount is conferred upon the corporation itself, it is not correct to say that Section 45A confers unguided or uncontrolled discretion upon the corporation to determine the amount of contribution.

7. A complaint has been made by Mr. Shetye, that the power conferred upon the corporation though quasi-judicial in nature, the procedure for determining the amount of contribution has not been laid down, nor it is made obligatory upon the

corporation to observe the principles of natural justice in that behalf. In our opinion it is not necessary in this case to go into the question as to whether the power exercised by the corporation u/s 45A is judicial, quasi-judicial or administrative in nature.

8. As observed by the Supreme Court in A.K. Kraipak and Others Vs. Union of India (UOI) and Others, the dividing line between the administrative power and quasi-judicial power is quite thin and is being gradually obliterated. It is further observed therein that the principles of natural justice apply to the exercise of administrative powers as well. These principles are obviously not embodied rules nor they can be imprisoned within a straight-jacket or rigid formula. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of the case, the framework of the law under which the inquiry is held and the constitution of the tribunal or body or persons appointed for that purpose. In all cases the principles of natural justice need not necessarily imply a personal hearing. This obviously depends upon the facts and circumstances of each case. However, in our opinion, the very phraseology used in the Section 45A clearly indicates that the employer will have to be given an opportunity before the amount is determined by the corporation. It is no doubt true that because of certain acts and omissions on the part of employer, the corporation is forced to take recourse to the provisions of Section 45A of the Act. However, the corporation is obliged to pass an order determining the amount of contribution. It is obvious that the corporation when it proceeds to determine the amount of contribution payable by the employer will have to depend upon the information available to it. For this it had to come to an objective conclusion. This is the only manner in which it could carry out the duties imposed on it. Even though there is no lis, in the sense that there are not two contending parties before it, the corporation will have to hear the defaulting employer who might be affected by the decision. Though, therefore, there is nothing express one way or other in Section 45A or other provisions of the Act or regulations casting a duty upon the Corporation to act judicially or in quasi-judicial manner, as the order of determination of liability will adversely affect the employer the principles of natural justice would apply to these proceedings. Therefore, it is not correct to say that by necessary implication the principles of natural justice have been excluded by the provisions of Section 45A and, therefore, the said section is bad on that count or it confers any arbitrary power on the corporation. Similar view seems to have been taken by the Delhi High Court in Masco Private Limited Vs. Employees'' State Insurance Corporation, by the Madras High Court in Free India Private Ltd. Vs. Regional Director, Employees'' State Insurance Corporation, .

9. It appears that somewhat similar challenge was raised before the Gujarat High Court in Dhrangadhra Chemi. W. v. E. S. I. Cor. (1971) 13 Guj. L.R. 230. Before Gujarat High Court also the provisions of Sections 73A, 73B and 73D of the Employees'' State Insurance Act were challenged on the ground that they are violative of the

petitioners'' fundamental rights under Articles 14, 19 and 31 of the Constitution of India and ultimately Gujarat High Court held that the various provisions of the Act clearly lay down the guidelines for the exercise of the powers and the power which the corporation is expected to exercise is quasi-judicial in nature. Therefore it has to follow the elementary principles of natural justice by giving a person an opportunity to make a representation in that behalf before the amount is determined. These observations will apply with equal force to Section 45A of the Act.

10. As the amount of contribution is to be determined on objective consideration of the information available, there is neither unfairness nor unreasonableness in this determination. The rates of contribution are already fixed. Even though officers determining the amount would be administrative officers, they are expected to decide the matter objectively obviously in consonance with the well established principles of natural justice. The party aggrieved by the order passed u/s 45A of the Act can approach Employees'' Insurance Court u/s 75 of the Act. As per provisions of Section 74(2) of the Act a person trained in law is qualified to be appointed as a Judge of the Employees'' Insurance Court. As to in which classes of cases recourse could be taken to Section 45A of the Act is also clearly laid down by the Legislature. This section was introduced by Act No. 44 of 1966. The scheme of the Act after amendment is that in cases where there is omission on the part of employer to maintain records in accordance with the provision of Section 44 or where the employer fails to submit or furnish necessary returns etc. or where the inspector is not allowed to exercise his function or discharge his duties, the corporation itself should determine the amount on the basis of such information as it may collect. Thus the statute itself has laid down the classes of cases which are governed by Section 45A of the Act. The object of introducing this new provision discloses a definite legislative policy, which has been sought to be achieved by a somewhat different procedure as incorporated in Section 45A of the Act. This was considered necessary to cope up with abnormal situation, arising out of omissions or obstruction on the part of the defaulting employers. To remove the lacuna and to provide for a speedy procedure and remedy Section 45A was introduced by amending Act No. 44 of 1966. It also lays down the purpose behind it. It also provides the guidelines as to the class of cases in which procedure prescribed by Section 45A is to be resorted to. This provides sufficient guidelines for the authorities on whom the power has been conferred. This provision cannot be struck down on the fanciful theory that the power will be abused or exercised in an unrealistic manner. A provision of law cannot be invalidated on the ground of mere possibility of abuse of such a power. The abuse of power cannot be easily assumed. Moreover there is a presumption that public officials will discharge their duties honestly and in accordance with the rules of law. As observed by the Supreme Court in Pannalal Binjraj Vs. Union of india (UOI), there may be cases where improper exercise of power will result in injustice, but possibility of such abuses or discriminatory treatment cannot necessarily invalidate the legislation and where

there is an abuse of such power, parties aggrieved are not without remedies under the law. What will be struck down in such cases will not be the provision which invests the authorities with such power but the abuse of the power itself. In the present case the party aggrieved can take recourse to remedy provided by Section 75 of the Act. Once such an amount is determined u/s 45A a further procedure for recovery of such an amount as arrears of land revenue is provided by Section 45B of the Act. This procedure is also well known. (See Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others, . It is by now well settled that such procedure for expeditious recovery is in public interest and does not violate Article 14.

11. Apart from this the Act itself provides for sufficient safeguards for preventing the abuse of power. If an employer disputes his liability, he can take recourse to the provisions of Section 75 of the Act and in our opinion the said provision is sufficient safeguard for preventing any possible abuse of power. Determination of the amount which is based on the objective consideration is also subject to scrutiny by the Insurance Court u/s 75 of the Act. In these circumstances in our opinion it is not possible for us to hold that any unbridled power has been conferred upon the corporation to determine the amount. Various recent statutes have followed the practice of imposing upon the departments or offices of the State the duty of deciding or determining the questions of various types. This practice is well recognised. In the present case in the very nature of things corporation is not expected to take recourse to the Insurance Court for determination of the amount when the employer obstructs the inspector from carrying out or discharging his duties or has failed to comply with the relevant provisions of law. Section 45A applies to the special kind of cases which constitute a class by itself. In these circumstances it is not possible for us to hold that the said provision is violative of the petitioners'' fundamental right guaranteed under Article 14 of the Constitution of India.

12. Recently the Supreme Court had an occasion to consider the scope of Section 45A of the Act in The Employees State Insurance Corporation, Bhopal Vs. The Central Press and Another, While considering the scope of the said section in paras. 3 and 4 of the said judgment the Supreme Court observed as follows (p. 1352):

The powers of the Corporation are given in S. 45A of the Act, introduced by Act 44 of 1966, whereby the Corporation may, on the basis of the information available to it, determine the amount of contributions payable and make necessary demands. Apparently, the scheme of the Act, after the amendment, is that the Corporation itself should, in a case where there is omission on the part of the employer to maintain records in accordance with S. 44 of the Act, determine the amount of contributions on the strength of such information as it may collect. It can then make the demand. If the employer refuses to comply with the demand so made, the matter can come up before the Employees'' Insurance Court under S. 75 of the Act.

The Court should give the Corporation a direction to perform its duty where it considers that this should be performed by the Corporation. It cannot decline to perform its own duty because the Corporation has failed to discharge its function.

The matter having come up before that Court, the claim by the Corporation was rejected erroneously merely on the ground that there was difficulty in determining the basis of wages in a particular factory so as to enable -a calculation of the amount of contributions to be made by the employer. It seems that the notification of the Central Government under S. 99 of the Act, also introduced by Act 44 of 1966, was intended to overcome such a difficulty in determining the wages of the employees. After having considered the provisions of S. 99A of the Act, we doubt whether this provision can be availed of for the purpose of supplying a defect or overcoming difficulty in adjudication of a dispute for which the Employees'' Insurance Court is given ample powers. Moreover, the Corporation has itself to collect the information initially and make a provisional demand on the basis of that information under S. 45A in such a case.

13. This very decision was thereafter referred to by the Supreme Court in Royal Talkies, Hyderabad v. E. S. I. Corporation [1978] L.I.C. 1245. From these decisions of the Supreme Court also it is quite clear that the corporation has itself to collect the information initially and make a provisional demand on the basis of that information u/s 45A. The scheme of the Act clearly indicates that in cases where there is an omission on the part of the employer to maintain records in accordance with Section 44 of the Act, the corporation itself has to determine the amount of contribution on the strength of such information as it may collect and then it can make a demand. If the employer disputes his liability or is aggrieved by the order, the matter can come up before the Insurance Court u/s 75 of the Act. As a matter of fact in the present case the petitioner has approached the Insurance Court. Therefore, it is not correct to say that the power conferred on the corporation by Section 45A is either unguided or uncontrolled. In this view of the matter it is not possible for us to accept the contention raised by Mr. Shetye.

14. However, it appears to be an admitted position that before determining the amount or issuing of the recovery certificates the petitioners were not given any opportunity of being heard. Mr. Jaykar, learned counsel appearing for the corporation has conceded before us and in our opinion rightly, that the notice as well as certificates of recovery issued by the corporation should be quashed as the corporation is prepared to give a reasonable opportunity to the petitioner employer to put forward its case in this behalf.

15. In view of this admitted position the writ petition is partly allowed. The notice dated May 31, 1971 issued by the corporation demanding the amount towards special contribution and employees'' contribution and the certificates issued for the recovery of the said amount as arrears of land revenue are quashed. The corporation is directed to decide and determine the amount afresh in accordance

with law after giving a reasonable opportunity to the petitioner of being heard. As a necessary consequence of this the proceedings pending before the Employees'' State Insurance Court do not survive.

16. Hence rule is made partly absolute. However, in the circumstances of the case, there will be no order as to costs.