

MANU/MH/0904/2008

Equivalent Citation: (2008)IIILLJ202Bom

IN THE HIGH COURT OF BOMBAY

C.A.J.F.A. No. 2727/2007

Decided On: 17.01.2008

Appellants: **Rex Bakery**

Vs.

Respondent: **Employees State Insurance Corporation**

Hon'ble Judges/Coram:

Abhay Shreeniwas Oka, J.

Counsels:

For Appellant/Petitioner/Plaintiff: S.C. Naidu, Adv., i/b., C.R. Naidu and Co.

For Respondents/Defendant: P.M. Palshikar, Adv.

Case Note:

Civil - Opportunity of Hearing - Section 45-A of Employees' State Insurance Act, 1948 - Whether respondent-corporation was under an obligation to give an opportunity of being heard to appellant before determining amount payable by appellant in accordance with Section 45-A of Act? - Held, in B.M.K Industries Pvt. Ltd. v. Employees' State Insurance Corporation and Ors., Division Bench was dealing with provisions of Act, 1948 prior to its amendment which was brought into force in 1989 - Division Bench held that principles of natural justice will govern proceedings under Section 45-A of Act of 1948 - Order under Section 45-A of Act of 1948 has been passed without giving an opportunity of being heard to appellant - Therefore, impugned orders are quashed and set aside - Appeal is allowed

JUDGMENT

Abhay Shreeniwas Oka, J.

1. Heard advocates appearing for the parties. Appeal is admitted on the following substantial question of law:

Whether the respondent-corporation was under an obligation to give an opportunity of being heard to the appellant before determining the amount payable by the appellant in accordance with Section 45-A of the Employees' State Insurance Act, 1948?

Considering the controversy involved, the appeal is taken up for hearing.

2. By the impugned judgment and order, an application made by the appellant under Section 75 of the said Act of 1948 for challenging an order passed on March 2, 1989 by the respondent under Section 45-A of the said Act of 1948 has been rejected by the learned Judge of the ESI Court.

3. One of the submissions made before the learned trial Judge was that the appellant

was not given an opportunity of being heard before passing an order under Section 45-A. While dealing with the said submission, in paragraph No. 19 of the impugned judgment, the learned trial Judge has observed thus:

Admittedly, the inspection in the instant case is relating to the period from January 1, 1983 to November 30, 1988. The amendment is introduced *w.e.f.* October, 1989 only. No doubt, after amendment in the said provision it is mandatory to give reasonable opportunity of hearing to the applicant, but prior to the amendment there was no such provision to give opportunity of being heard. So, in view of above referred judgment of Hon'ble Madras High Court with due respect in my view case law under citation placed by the learned Counsel for the applicant are not applicable to the facts of the present case. In my view, it was not mandatory to give the opportunity of being heard to the applicant before passing the order under Section 45-A of the Act. Considering all these facts, I find that the applicant failed to prove that the order dated March 2, 1989 passed under Section 45-A of the Act is illegal.

(emphasis supplied)

4. My attention has been invited to a decision of a Division Bench of this Court in the case of *B.M.K Industries Pvt. Ltd. v. Employees' State Insurance Corporation and Ors.* MANU/MH/0253/1978 : (1979) MhLJ 202. In view of the said decision, the question of law which arises in the appeal will is no longer *res integra*. It must be noted here that the Division Bench was dealing with provisions of the said Act of 1948 prior to the amendment which was brought into force in October 1989. The Division Bench held that the principles of natural justice will govern the proceedings under Section 45-A of the said Act of 1948.

5. Only on this ground, the impugned judgment and order will have to be quashed and set aside. The order under Section 45-A of the said Act of 1948 has been passed without giving an opportunity of being heard to the appellant and therefore, the said order dated March 2, 1989 which was subject matter of challenge before the trial Court will have to be quashed and set aside. After hearing the appellant the respondent will have to pass a fresh order under Section 45-A of the said Act of 1948.

6. Hence, I pass the following order:

(i) The impugned judgment and order dated September 10, 2007 is quashed and set aside.

(ii) The order dated March 2, 1989 passed by the respondent under Section 45-A of the Employees State Insurance Corporation Act, 1948 is quashed and set aside.

(iii) It will be open to the appellant to file a reply to the show cause notice within a period of six weeks from today.

(iv) After giving an opportunity of being heard, the concerned authority will pass an appropriate order as expeditiously as possible and preferably within a period of six months from today.

(v) All contentions of the parties on merits are kept open.

7. Appeal is allowed in above terms with no orders as to costs.

© Manupatra Information Solutions Pvt. Ltd.