

Serial No. 01
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

WP(C) No. 316 of 2022

Date of Decision: 17.08.2023

Shri. Ngaitlang Dhar Vs. Employees State Insurance Corporation (ESIC)

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. S. Deb, Adv.

For the Respondent(s) : Ms. W.B. Khongjee, Adv.

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| i) | Whether approved for reporting in Law journals etc.: | Yes/No |
| ii) | Whether approved for publication in press: | Yes/No |

JUDGMENT AND ORDER

1. This is a petition under Article 226 of the Constitution of India with a prayer for issuance of a writ in the nature of Mandamus and/or Certiorari or any other appropriate Writ, Order and direction preferred by the petitioner herein.

2. Heard Mr. S. Deb, learned counsel for the petitioner who has submitted that the petitioner is a well-respected and reputed businessman of

Meghalaya who has provided employment to numerous individuals through his various businesses.

3. The petitioner was, however, surprised to receive copy of communication dated 30.11.2021 being No:43000064460000704/11182021419/617/419 issued by the Authorised Officer, ESI Corporation Regional Office, Guwahati addressed to the Recovery Officer, ESI Corporation, Guwahati for recovery of contribution under section 45C to 45-I of the Employees' State Insurance (ESI) Act, 1948 amounting to ₹ 69,719/- plus interest @ of 12% p.a. with effect from 21.07.2012. The petitioner was addressed as Proprietor/Principal Employer of M/s N Dhar Construction.

4. Again, vide communication No. 43000064460000704/RRC dated 17.08.2022 the Recovery Officer ESIC, NE Region has issued Prohibitory Order to the Branch Manager, State Bank of India, Laitumkhrah (Shillong) Branch prohibiting operation of Account No. 20011865907 operated by the petitioner, again, addressed as Proprietor/Principal Employer/Director of M/s N Dhar Construction. The petitioner has then addressed a letter dated 22.08.2022 to the Authorised Officer, ESIC, Regional Office, Guwahati informing him that there is no such establishment/factory by the name of M/s N Dhar Construction nor is he the Principal Employer as alleged. It was also clarified that there is no such workshop of the petitioner located at Mawblei, Opp. Syiem Workshop, Shillong.

5. The learned counsel has also submitted that having failed to receive any response to the letter dated 22.08.2022 the petitioner has caused a legal notice dated 24.08.2022 to be issued upon the Recovery Officer, ESIC NE Region, Guwahati. The same also being addressed to the Branch Manager,

SBI Laitumkhrah (Shillong) Branch, with a request to withdraw/recall the impugned order dated 17.08.2022.

6. The learned counsel has further submitted that the petitioner not being the Principal Employer of the said M/s N Dhar Construction, he is not liable for any claim for recovery of contribution under the ESI Act. In extension, the provision of section 75(2)(a) of the ESI Act, 1948 being the powers of the Employees' Insurance Court to adjudicate as regard recovery of contribution from the Principal Employer, the same may not be applicable to the petitioner.

7. Again, it is submitted that there is no basis or evidence whatsoever for the respondent/Corporation to prove any fact from the alleged inspection conducted at Mawblei, when on some baseless and unverified information received from one Smti. Durka Dhar who is an illiterate person and who has no knowledge of the business of the petitioner, the said recovery proceedings was initiated. It is reiterated that there is no establishment belonging to the petitioner under the banner of M/s N Dhar Construction at Mawblei, Shillong.

8. On the legal aspect, the learned counsel has submitted that though there is no definition of the word 'establishment' under the said Act of 1948, section 2(12) defines 'factory' to mean any premises including the precincts thereof whereon ten or more persons are employed or were employed on any day of the preceding twelve months. Here again, there is no record to show that there are ten or more persons employed with M/s N Dhar Construction at Mawblei Shillong, therefore, the impugned order is entirely unfounded, misconstrued and not tenable in law. The same is liable to be interfered with by this Court and to be quashed accordingly.

9. Ms. W.B. Khongjee, learned counsel for the respondents No. 1, 2 and 3/ESIC has submitted that the process of recovery initiated under section 45A of the ESI Act was for the failure of the petitioner to furnish a Declaration of Registration in Form-01 as required under Regulation 10-h of the ESI (General) Regulation, 1950 following which, a Social Security Officer (SSO) visited the unit at Mawblei on 24.04.2012 for the purpose of survey. The SSO met Smti. Durka Dhar who introduced herself as the Workshop Manager and has also verbally furnished the information as regard the name and address of the Principal Employer and the nature of business but has failed to produce basic records such as attendance register, salary register, etc. On the basis of the recommendation made by the SSO, the ESI Act was extended to M/s N Dhar Construction.

10. The learned counsel has further submitted that since the petitioner who is the Principal Employer has failed to comply with the relevant provisions of the ESI Act notice dated 17.07.2015 was issued to determine the contribution due for the period April 2012 to May 2015. On the employer failing to respond to the said notice, another opportunity to be heard on 07.05.2019 was afforded to the employer but having failed to do so, accordingly an order under section 45A of the ESI Act was passed on 10.04.2019 and on no appeal being preferred against such order, the matter was then referred to the Recovery Office vide Form C-19 dated 30.11.2021 to recover the dues.

11. If the petitioner is aggrieved by the action of the respondent/ESIC on the issuance of the impugned order dated 30.11.2021, he should have sought relief from the Employees' Insurance Court as provided under section 75 of the said ESI Act, submits the learned counsel. By failing to do

so, the petitioner is precluded from approaching this Court with this instant petition.

12. In support of this contention, the learned counsel has referred to the case of Khasrul Islam v. Union of India & 5 Ors. wherein in WP(C)/981/2022 vide order dated 16.02.2022 the Hon'ble Gauhati High Court dealing with a case under the ESI Act has observed that there is a statutory remedy provided under section 75 of the ESI Act, 1948 available to the petitioner to agitate against a notice of demand therefore, the court has directed the petitioner therein to approach the Employees' Insurance Court in that regard. Similarly, in the case M/s Assam Railway Employees Co-Operative Association Ltd. v. The Employees State Insurance Corporation & 2 Ors., the Hon'ble Gauhati High Court vide order dated 24.08.2018 has, under the facts and circumstances of the case directed the petitioner/Association to approach the Employees' Insurance Court as provided under section 75 of the ESI Act.

13. In another case before the High Court of Tripura, the Hon'ble High Court vide order dated 11.05.2018 in WP(C) No. 476/2014 in a case where the petitioner was served with a show cause notice for non-compliance of the provisions of the Employees' State Insurance Act, 1948, has declined to exercise its inherent jurisdiction under Article 226 of the Constitution and has considered it appropriate for the petitioner to approach the competent court under section 75 of the said ESI Act.

14. In response to this, the petitioner has submitted that the case laws relied upon by the respondent/ESIC are not applicable to the case in hand inasmuch as the petitioner has denied the existence of any such establishment wherein, he is said to be the Principal Employer of the same

and as such, taking recourse to the provision of section 75 of the ESI Act is not the option available to the petitioner.

15. This Court has taken note of the respective stand of the parties, the respondent No. 4/Branch Manager, State Bank of India, Laitumkhrah (Shillong) Branch, not having participated in these proceedings the matter shall proceed *exparte* against the said respondent.

16. Without going into the merits of the case of the parties as noted hereinabove, what is apparent is that the petitioner at the outset has outrightly denied being the Principal Employer or the Proprietor of M/s N Dhar Construction. In the absence of any evidence as to the existence of such an establishment at Mawblei, Shillong which was the place where the alleged inspection and survey by the said SSO has taken place, the fact that no records of any employees, not to say of ten employees or more being employed by the said establishment is available would only lead this Court to believe that the basic dispute would be an issue of facts.

17. It is well settled that this Court more often than not, would not in judicial review go into disputed question of facts between the parties, though as observed in very exceptional or rare cases facts could be gone into. However, in this case, the initial resistance of the petitioner is that he is not the Principal Employer of M/s N Dhar Construction. This being the case, the provision of section 75 of the ESI Act would also not be applicable, since the provision speaks of adjudication of dispute by the Employees' Insurance Court as regard dispute which arises, *inter alia*, involving the Principal Employer and the Corporation or between a Principal Employer and an Immediate Employer, therefore, if the status of a Principal Employer cannot be attached to the petitioner herein, the

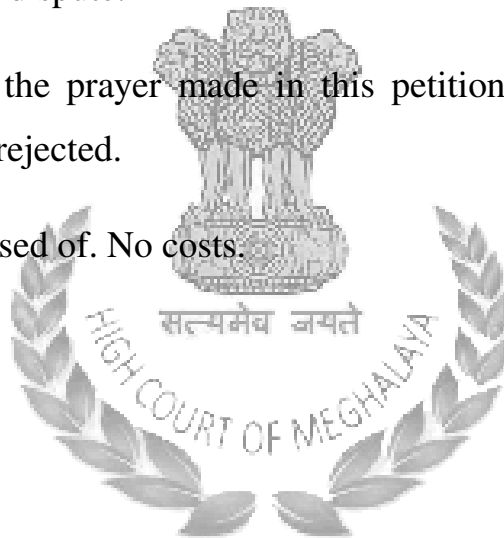
purview of section 75 is excluded from its operation to the case of the petitioner in this regard.

18. The question then would arise as to how to determine the issue of whether the petitioner is the Principal Employer of M/s N Dhar Construction. The simple answer will lie in this, that is, that the only competent court to decide this issue would be the civil court.

19. This being the case, the prayer of the petitioner cannot be decided in this lis and the parties are at liberty to approach the competent civil court for redressal of their dispute.

20. Accordingly, the prayer made in this petition cannot be accepted. The same is hereby rejected.

21. Petition disposed of. No costs.



Judge

Meghalaya
17.08.2023
"Tiprilynti-PS"