IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1387 OF 2011

The Hongkong and Shanghai
Banking Corporation Limited .....Petitioner
: V/S :
Mr. Harikrishnan,
Recovery Officer,
M/s. Employees State
Insurance Corporation & Ors. .....Respondents

* * * * *

Mr. S.C. Naidu i/by. C.R. Naidu & Co., Advocate for the petitioner.
Mr. H.V. Mehta, Advocate for respondents no.1 and 2.
Mr. M. Khan i/by. Mulla & Mulla & Craigie Blunt and Caroe, Advocate for respondent no.3.

* * * * * *

Coram :- Smt. R.P. SondurBaldota, J.

3rd July, 2015.

P.C. :-

1). Rule. Rule made returnable forthwith. Heard the Counsel.

2). The petitioner is Hong Kong Shanghai Bank and Corporation Ltd. Respondent no.3, the Indian Hotels Co. Ltd is one of the customers of the petitioner bank. It enjoys all the financial facilities extended by the bank. Respondent no.3 is an establishment amenable to the provisions of the Employees State Insurance Act, 1949 (“the ESI Act”, for short).

Respondent no.2, the Employees State Insurance Corporation had raised a claim against respondent no.3 for damages under Section 85B of the ESI Act. The proceedings initiated by respondent no.2 resulted into orders dated 29th January, 2010 and 8th February, 2010 against respondent no.3. Pursuant to the same, four recovery certificates, all dated 10th March, 2010 were issued by respondent no.2 under Section 45C to 45I of the ESI Act for recovery of the amount aggregating to Rs.36,07,519/-. Respondent no.1 is the Recovery Officer of respondent no.2. He issued notice entitled "Prohibitory Order" under Section 45G dated 18th May, 2010 of the ESI Act to the petitioner bank since respondent no.3 held accounts with the petitioner. The notice was received by the petitioner on 20th May, 2010 at about 14.15 hrs. The order sets out that respondent no.3 had failed to pay their arrears due from them in respect of the recovery certificates and hence the petitioner was prohibited and restrained, until further orders were received from respondent no.2 to pay amounts from the Current Account or any other Account maintained by respondent no.3 with the petitioner. The order specifically stated that, "No Withdrawal Is Permissible From The Above Said Accounts". On receiving the order, the Branch Manager of the petitioner immediately put a hold on the accounts of the petitioner by processing the order until the amount under the Certificate was duly paid. The order of hold became effective from 15.12 hours of 20th May, 2010 itself. After the officers of the petitioner ascertained the amount available to the credit of respondent no.1, the petitioner froze an amount of Rs.36,07,519/- from the account and issued instructions for drawing a pay-order for making payment to respondent no.2. It had forwarded the requisition therefor to the processing unit. While the requisition was being processed, the petitioner on 21st May, 2010 at about 5.00 p.m. received intimation that the Employment Insurance Court, Mumbai had stayed the Recovery Certificates issued by respondent no.1 with a request from respondent no.3 not to forward the pay-order if received, to respondent no.2. In addition to that intimation, fax message was received from respondent no.3 about the order dated 21st May, 2010 on the Application (ESI)-10 of 2010 preferred by respondent no.3 against the Recovery Certificates. In view of the order of stay, the petitioner stopped the process of compliance of the order under Section 45G against it and did not make any payment to respondent no.2. In view of the stay, it also lifted the hold on the Accounts of respondent no.3.

3). On 5th June, 2010 the petitioner received show cause notice dated 2nd June, 2010 alleging that the petitioner, by sheer delay in compliance of the order, had given an elbow-room to respondent no.3. It helped respondent no.3 in obtaining an order of stay from the Court against the recovery proceedings and called upon the petitioner to show cause as to why action be not taken against the petitioner for recovery of ESI dues from it by treating the petitioner as a defaulter in terms of Section 45-G of ESI Act read with Rules 36(3)(b) of the Income Tax Act (Certificate Proceedings) Rules, 1962. The petitioner replied the show cause notice by its letter dated 14th June, 2010 explaining the circumstances in which the petitioner had not complied with the prohibitory orders. The explanation offered by the petitioner was not accepted and respondent no.1 proposed to hold an enquiry into the show cause notice and directed the petitioner to remain present for the hearing for ascertaining appropriate action against the petitioner for non-compliance with the prohibitory order.

4). The petitioner then filed an application being Application (ESI) No. 24 of 2010 seeking cancellation of the prohibitory order issued against it, as also the show cause notice and a declaration that the petitioner is not liable to pay to respondents no.1 and 2 the amount which was due from respondent no.3. It applied for interim reliefs (Exhibit-2) of stay of the show cause notice, as well as, the prohibitory order. The Employees Insurance Court, by its order dated 25th February, 2011 dismissed the application for stay, solely on the ground that it does not have jurisdiction to entertain the application filed by the petitioner.

Being aggrieved by the order, the petitioner has approached this Court.

5). The reasons set out by the ESI Court for holding that it does not have jurisdiction to entertain the application filed by the petitioner, stated at para-13 read as follows :

> “. As observed by me, the applicant has approached before this Court by filing the Application against the opponents no.1 and 2 to grant the stay to the enquiry initiated by the opponents No.1 and 2. I have already observed that the dispute between the applicant and the opponents No.1 and 2 does not fall under the provisions of Section 75(1)(g) of the ESI Act because there is no dispute regarding the contribution or benefits in respect of any employee or dues payable or recoverable in respect of the contribution, interest and damages. This Court has no jurisdiction to entertain the application filed by the applicant and on this ground only the application filed by the applicant for grant of stay is deserves to be rejected.”

6). Undisputedly, action taken by respondents no.1 and 2 against the petitioner is under Section 45-G of the ESI Act. Under this provision, the Recovery Officer is authorized or empowered to recover the amount of ESI contribution by any one or more of the modes provided in the section including issuance of prohibitory order against any person who is liable to pay any debt to the principal employer. Non-compliance of the prohibitory order, entails the prospect of the creditor being treated as the principal or immediate employer in respect of the amounts specified in the notice. Thus, the notice dated 2nd June, 2010 treats the petitioner as the principal employer for recovery of the amount of contribution in the same manner as the recovery from respondent no.3. The ESI Act provides for adjudication of all disputes and claims as provided in Chapter-VI thereof. Section 74 is for constitution of Employees Insurance Court and Section 75 is for the matters to be decided by the Employees Insurance Court. As submitted by Mr. Naidu, Section 75(1)(g) thereunder, is applicable to the facts of the present case which reads as under :-

> "S.75(1)(g). any other matter which is in dispute between a principal employer and the Corporation, or between a principal employer and an immediate employer, or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues payable or recoverable under this Act, [or any other matter required to be or which may be decided by the Employees Insurance Court under this Act].
> Such question or dispute [subject to the provisions of sub-section (2-A) shall be decided by the Employees Insurance Court in accordance with the provisions of this Act."

Plain reading of the provision is sufficient to know that, the application filed by the petitioner is squarely covered by the provision. It provides for the matter in which dispute between a principal employer and the Corporation in respect of any contribution recoverable under the Act. Since the notice issued by respondent no.1 is in respect of contribution recoverable under the Act and since the notice drags the petitioner under the garb of the principal employer, the ESI Court was not correct in holding that it has no jurisdiction to entertain and try the application.

7). Mr. Mehta, the learned Advocate appearing for respondents no.1 and 2 seeks to justify the impugned order by relying upon a decision of Madhya Pradesh High Court in **Employees State Insurance Corporation, Indore And Swadesh Daily Newspaper, Gwalior, reported in III.L.J. (Suppl) page 643.** The decision cited by Mr. Mehta can be distinguished on facts. In the proceedings before the Madhya Pradesh High Court, the question for consideration was whether the ESI Court has jurisdiction to entertain an application for refund of the contribution wrongly collected by the Corporation, despite there being specific provision under Regulation 40 of the Employees State Insurance (General Regulations) Act and the Court held that since there is a specific provision made under the Regulation, the applicant could not be permitted to defeat the express statutory provision as contemplated under Section 40(1). Thus, the decision cited is not applicable to the facts of the present case.

8). In all the above circumstances, the petition is allowed in terms of prayer clause (b). The application for interim reliefs at Exhibit-2 is allowed. The Counsel appearing for both the sides, agree that the application filed by the petitioner shall be heard alongwith application (ESI) No.10 of 2010 preferred by respondent no.3.

(SMT. R.P. SONDURBALDOTA, J)