Anand

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.138 OF 2015

Oberoi Realty Limited .Petitioner

v/s.

The Assistant Director .Respondent
Employees State Insurance Corporation

Mr.Prateek Sekseria a/w. Mr.Mayur Khandeparkar i/b. I.C.Legal, Advocate for the Petitioner
Mr.P.M.Palshikar, Advocate for the Respondent

CORAM : A.A.SAYED, J.

DATE : 06.08.2015

P.C.

. By the above Petition filed under Article 226 of the Constitution of India, the Petitioner seeks to challenge the order dated 14 August, 2014 passed by the Employees Insurance Court in an Application filed by the Petitioner under Section 75(2B) of the Employees State Insurance Act, 1948 (hereinafter referred to as 'E.S.I.' Act). By the impugned order, the Petitioner has been directed to deposit 40% of the amount of Rs.1,65,36,288/- payable by the Petitioner in terms of the order dated 24 June, 2014 of the Respondent – Assistant Director, being the arrears of the Petitioner – employer's contribution under the provisions of the E.S.I.Act for the period June, 2009 to March, 2010. According to the Petitioner, it ought to have been granted complete waiver of the requirement of 50% of deposit in terms of the proviso to Section 75(2B) of the

E.S.I.Act, instead of directing 40% deposit thereby granting waiver of only 10% amount.

2. The Petitioner is covered under the provisions of the ESI Act. The Petitioner is engaged in the business of real estate. According to the Petitioner, it engages direct employees for its office as well as employees through outside agencies at various construction sites. On 14.08.2012, the Social Security Officer and Inspector visited the Petitioner's establishment for inspection of the records and upon verification, the total omitted wages was arrived at Rs.35,91,683/- and contribution payable was worked out @ 6.5% aggregating to a sum of Rs.2,33,461/- for the period April, 2009 to March, 2010. On or about 17.08.2012, the Petitioner made the aforesaid payment. The Petitioner was issued a show cause notice dated 08.05.2014 proposing to determine and recover from the Petitioner, contribution in a sum of Rs.1,65,36,288/- under the ESI Act in respect of alleged default for the period 2009-10 i.e. April, 2009 to March, 2010 on the basis that the Petitioner had not produced complete records such as bills, vouchers, compliance report of contractors/vendors in respect of the account head and labour expenses amounting to Rs.25,44,04,437/-.

3. The Petitioner filed its reply dated 29.05.2014 inter alia contending that in terms of the Instruction No.4/99 dated 14.06.1999 the employees engaged at the construction site of the Petitioner were not covered under the provisions of the ESI Act; Outside agencies/parties working at the construction site of the Petitioner are independently covered under the provisions of the ESI Act with their individual code numbers. The SSO/Inspector after visiting the site and verifying all necessary records had assessed construction at Rs.2,33,461/- in respect of the period April, 2009 to March, 2010 which was accordingly paid by the Petitioner on 17.08.2012. On 24.06.2014, the Respondent passed an order under Section 45-A of the ESI Act determining the arrears of contribution at Rs.1,65,36,288/- for the period 2009-10.

4. Being aggrieved by the order dated 24.06.2014 directing the Petitioner to pay Rs.1,65,36,288/-, the Petitioner has filed its dispute before the Employees Insurance Court under Section 75 of the ESI Act. The Petitioner also filed Misc. Application (Exemption) (ESI) No.27 of 2014 under Sub Section 2-B of Section 75 of the ESI Act seeking waiver and/or reduction of the amount of Rs.1,65,36,288/- as deposit, pending the dispute. By the impugned order, the Misc. Application was disposed of and the Employees Insurance Court has directed the Petitioner to deposit 40% of the

amount within one month from the date of the order. Hence, the present Petition.

5. The crux of the dispute raised by the Petitioner is that construction workers engaged by construction agencies who are working on construction site of the project are not to be considered for the purpose of coverage of an establishment dealing with construction activities. The Petitioner has relied upon the Instruction No. 4/99 dated 14 June 1999. According to the Petitioner, even the Instruction dated 3 January 2011 makes a reference to the Instruction No. 4/99. It is contended by the Petitioner that out of the total entry for contract labour expenditure of Rs. 25,73,94,342/-, a sum of Rs. 15,76,40,835 was paid by L&T which has not been considered in the impugned order.

6. In the Affidavit in Reply filed on behalf of the Respondent it is stated that the departmental instruction dated 14 June 1999 is an internal communication issued to the Regional Director by the Additional Commissioner Revenue and is neither a Circular nor a Notification under the Act and that construction employees are covered under the Corporation. It is pointed out that the Petitioner having opted for the remedy under section 75 of the ESI Act, instead of approaching the Appellate Authority under

section 45AA whereunder it is required to deposit 25% amount, cannot now make a grievance against the impugned order directing it to deposit 40% amount. It is submitted that the Petitioner had failed to produce the relevant records before the Authority and therefore the order of deposit of 40% amount by granting waiver of 10% amount has been rightly passed by the Employees Insurance Court.

7. Having heard the learned Counsel for the parties in my view, the impact and binding nature of the Instruction dated 14 June 1999 shall be examined by the Employees Insurance Court in the main dispute and it would not be appropriate for this Court to go into that aspect at this stage. The impugned order records that as per 1st Annexure 7 construction companies are covered under the ESI Act, working at the Petitioner's site and 32 Contractors are shown who are not covered under the ESI Act and therefore the Contractors who are covered under the ESI Act are only 10% compared to the uncovered Contractor. Further, the order dated 24 June 2014 passed by the Respondent-Asst Director pursuant to the Show Cause Notice dated 8 May 2015 and hearing being granted to the Petitioner, records that the Petitioner did not produce the records viz. bills, vouchers, compliance records of Contractors and vendors and books of accounts in respect of the contested head of account.

It is not even the case of the Petitioner that there is any financial difficulty on their part.

8. Taking an overall view of the matter, in my opinion, the following order would meet the ends of justice:

"The impugned order dated 14 August 2014 shall stand modified to the extent that out of 40% which the Petitioner has been directed to deposit, 50% may be deposited in cash and the balance 50% be secured by way of Bank Guarantee of the Nationalised Bank (as prayed in the Misc Appln) to the satisfaction of the Registrar of Employees Insurance Court."

9. The Petition is disposed of in the aforesaid terms.

(**A.A.SAYED, J.)**