

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

TUESDAY, THE 15TH DAY OF SEPTEMBER 2015/24TH BHADRA, 1937

WP(C).No. 37347 of 2010 (P)

PETITIONER(S):

**THE MARAVANTHURUTHU HANDLOOM WEAVER'S
SERVICE CO-OPERATIVE SOCIETY LTD.NO.3504,
KULASEKHARAMANGALAM P.O., VAIKOM,
REPRESENTED BY ITS PRESIDENT VIJAYAMMA.**

**BY ADVS.SRI.P.V.BABY
SRI.R.KIRAN**

RESPONDENT(S):

- 1. STATE OF KERALA, REPRESENTED
BY ITS SECRETARY, LABOUR (F) DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM-695 001.**
- 2. THE EMPLOYEES STATE INSURANCE
CORPORATION, SUB REGIONAL OFFICE (KOLLAM),
KURUMPELIL AVENUE, POLAYATHODE, KOLLAM-691 021.**

**R1 BY GOVERNMENT PLEADER SMT.LILLY LESSLIE
R2 BY ADV. SRI.P.SANKARANKUTTY NAIR, SC**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
15-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

msv/

APPENDIX

PETITIONER(S)' EXHIBITS:

EXT.P1: TRUE PHOTOCOPY OF THE APPLICATION DTD. 24.6.1989 SUBMITTED BY THE PETITIONER BEFORE THE 2ND RESPONDENT.

EXT.P2: TRUE PHOTOCOPY OF THE APPLICATION SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT.

EXT.P3: TRUE PHOTOCOPY OF THE JUDGMENT DTD.2.8.1989 IN OP.NO.7114/1989.

EXT.P4: TRUE PHOTOCOPY OF THE JUDGMENT DTD.23.11.1999 IN OP.NO.581/1993.

EXT.P5: TRUE PHOTOCOPY OF THE ORDER DTD.28.1.2000 OF THE 1ST RESPONDENT.

EXT.P6: TRUE PHOTOCOPY OF THE ORDER DTD.30.10.1991 ISSUED BY THE 2ND RESPONDENT.

EXT.P7: TRUE PHOTOCOPY OF THE JUDGMENT DTD.28.2.2006 IN OP.NO.10354/2000.

EXT.P8: TRUE PHOTOCOPY OF THE ORDER DTD.23.9.2006 OF THE 1ST RESPONDENT

EXT.P9: TRUE PHOTOCOPY OF THE NOTICE DTD.15.3.2010 ISSUED BY THE 2ND RESPONDENT.

EXT.P10: TRUE PHOTOCOPY OF THE NOTICE DTD.28.4.2010 ISSUED BY THE 2ND RESPONDENT.

EXT.P11: TRUE PHOTOCOPY OF THE ORDER DTD.4.10.2007 ISSUED BY THE 1ST RESPONDENT.

EXT.P12: TRUE PHOTOCOPY OF THE JUDGMENT 1.6.2010 IN WP(C) NO.16836/2010.

EXT.P13: TRUE PHOTOCOPY OF THE ORDER DTD.12.11.2010 ISSUED BY THE 1ST RESPONDENT.

RESPONDENT(S)' EXHIBITS:

NIL

//TRUE COPY//

P.S.TO JUDGE

ANU SIVARAMAN, J.

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W.P.(C).No.37347 of 2010

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Dated this the 15th day of September, 2015

JUDGMENT

This writ petition was filed challenging Ext.P13 order issued by the Government rejecting the application made by the petitioner society for permanent exemption under Section 88 of the Employees State Insurance Act (hereinafter referred to as the “ESI Act” for short) as well as for exemption under Section 87 of the ESI Act for the period from April 2003 to March 2010. A prayer for declaration to the effect that amendment to Section 91A of the ESI Act is not applicable to the petitioner's application is also urged in the writ petition. The petitioner is a Handloom Weaver's Co-operative Society registered under the Kerala Co-operative Societies Act. The workers who are engaged in weaving are the members of the co-operative society and are not employees in the strict sense of the term. It is the case of the petitioner that no wages or salary are paid to the members of the society as the society is

working on the principles of co-operation and the members are only entitled to be supplied with yarn from the society which is woven by them and the cloth is given back to the society for sale. It is also submitted that the society is in dire financial straits and is surviving only on the basis of the subsidies granted by the Government and support from the Apex society. It is also submitted that the general body of the society which is the collective body of its members has also taken a decision to seek exemption from the provisions of the ESI Act, since the society has no means to pay contributions under the Act and the members are not workers or employees of the society. It is submitted that though applications for exemption were submitted as early as in the year 2003, no orders were passed thereon. It is stated in the writ petition that on the basis of applications made by the society, orders of exemption were being granted up to April 2003 by the Government under Section 87 of the ESI Act. It is further stated that the society has filed applications under Section 87 and 88 for exemption from April 2003 to March 2010. It is stated that the District

Labour Officer, Kottayam had conducted an inspection in the society on 03.10.2007 and has submitted a report to the Government. However, even thereafter and in spite of directions issued by this Court, orders were not passed on the applications submitted by the petitioner for exemption. Ultimately Ext.P13 order has been issued on 12.11.2010 stating that Section 91A of the ESI Act has been amended with effect from 01.06.2010 taking away the power of the Government to grant retrospective exemption under Sections 87, 88, 90 and 91 of the Act. Aggrieved by the rejection of their request for exemption, the present writ petition is filed.

2. A counter affidavit has been filed by the ESI Corporation stating that after the amendment to Section 91A of the ESI Act with effect from 01.06.2010, the appropriate Government which is the 1st respondent in the instant case has no power to issue any orders of retrospective exemption under the Act and as such the orders of rejection of the application of the petitioner suffers from no legal infirmity or illegality.

3. Heard Sri.P.V.Baby, learned counsel appearing for the petitioner, Sri.K.Sandesh Raja, learned counsel appearing for the 2nd respondent as well as learned Government Pleader appearing on behalf of the 1st respondent. It is urged by the learned counsel appearing for the petitioner that the application for exemption submitted by the society has been pending since April 2003. The delay on the part of the Government in passing orders on the statutory application cannot be now contended as a reason for denying even consideration of the same by the appropriate Government. It is submitted that the amendment brought about to section 91A of the ESI Act with effect from 01.06.2010 can have no application in the instant case since the application pertains to the period from April 2003 to March 2010 and the same had been submitted in April 2003. Since all procedural formalities including the conduct of the inspection and submission of report had been completed as early as in the year 2007, it is urged that there is absolutely no merit in the contention that the amendment brought about in 2010 would govern the issue.

4. The learned counsel appearing for the 2nd respondent on the other hand contended that the ESI Act is a welfare legislation intended for making available benefits to persons who come within the definition of employee under Section 2 of the Act. It is contended that going by the definition of employee under the Act, all persons who are engaged for work in the society including members thereof would be covered under the provisions of the Act. It is further submitted that the establishment under the Scheme of the Act has no vested right for exemption and in the above circumstances the law to be applied to an application which is pending before the appropriate Government is the law as available on the date when the application is taken up for consideration. In the above circumstances, Ext.P13 order is perfectly legal, it is contended.

5. I have gone through the pleadings and the materials on record and the contentions advanced by the learned counsel appearing for the parties. The petitioner is a co-operative society of handloom weavers and has only one paid employee

and the employees on whose behalf converge is sought are actually members of the society. Taking into account the financial implications of coverage under the ESI act, the general body comprising of members of the society itself has resolved to seek exemption from the Act on account of the financial condition of the society. These facts were brought to the notice of the authorities under the Act, it was contended. However, in Ext.P13 order, the application of the petitioner for exemption has been rejected without considering the same on merits on the ground that the power of the Government to issue retrospective orders of exemption has been taken away by the amendment brought about with effect from 01.06.2010. Taking into account the contentions raised by the petitioner in the writ petition, I am of the opinion that this is a fit case where the Government is to be directed to consider the request made by the petitioner for exemption on its merits. To enable such consideration, Ext.P13 is set aside. The Government shall take up, consider and pass orders on the application for exemption submitted by the petitioner without further delay.

Orders in this regard shall be passed by the Government after due consultation with the ESI corporation and after hearing the petitioner within a period of three months from the date of receipt of a copy of the judgment. The contention raised by the corporation regarding the power of the Government to issue retrospective orders of exemption is left open to be urged before the Government.

The interim order issued on 21.12.2010 shall remain in force until orders are finally passed by the Government on the application, as directed above.

Anu Sivaraman, Judge

sj