

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.12.2015

CORAM

THE HONOURABLE MR.JUSTICE C.S.KARNAN

W.P.No.30311 of 2013

and

M.P.No.1 of 2013

Kanchi Silk Palace
No.103/1A, Pondy Bazaar
T.Nagar, Chennai-17
rep.by its Proprietrix
P.K.M.S.Mohamed Beevi

... Petitioner

vs.

The Employees State Insurance Corporation
No.143, Sterling Road
Chennai-34
rep.by the Assistant Director

... Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for a Writ of Certiorarified Mandamus calling for the records of the respondent in his notice No.TN/INS V/51-00-085173-000-1002/C-18 Adhoc, dated 17.09.2013 and quash the same and direct the respondent to issue an individual notice to the petitioner.

For Petitioner : Mr.G.Jeremiah

For Respondent : Mr.K.Prabakar

O R D E R

Reserved on : 22.07.2015
Pronounced on : 17.12.2015

The prayer in the writ petition is for issuance of a writ of certiorarified mandamus to quash the notice, dated 17.09.2013, issued by the respondent to the petitioner and to direct the respondent to issue an individual notice to the petitioner.

2. The short facts of the case are as follows:

According to the petitioner, their firm is carrying on silk sarees and textile business in a rented premises, which has a separate electricity service connection bearing S.C.No.235-29-1194. Their firm is an assessee under the Income Tax Act in respect of the income derived from the business and having five employees. Since their firm is not carrying out any manufacturing activity, they are not covered under E.S.I.Act.

3. They have submitted that on 16.11.2005, an Officer claiming to be an Inspector from the respondent Corporation, had inspected their premises. He called upon the proprietrix of the firm to produce all the statutory registers such as attendance register, salary register and all other ledgers, which were duly produced by her. After inspecting the same, he had directed her to produce a consolidated register containing the name of persons, who were working in the entire complex under various establishments. She had stated that she did not possess any consolidated register and it was not possible for her to maintain such a register of employees of other establishments. The Inspector left the premises saying that he would be back for another inspection and in the meantime she has to make ready a consolidated register.

4. They have further submitted that the Inspector returned on 28.11.2005 and demanded her to produce the consolidated register. When the proprietrix expressed her inability to produce the same, he informed her that he would report that she had refused to produce the register. Subsequently, by letter, dated 28.11.2005, the Inspector claimed that she had failed to produce the necessary records for verification. In such circumstances, all the six establishments, by letter dated 14.12.2005, protested the action of the Inspector and informed that they were independent establishments having no connection whatsoever with each other. The respondent sent a communication, dated 10.01.2006, to all the six establishments, claiming that they had not produced relevant records to the Inspector. By letter, dated 30.01.2006, all the six establishments had jointly protested the action of the respondent and informed that each of the establishment was an independent establishment and they have no connection with each other. In spite of their objection, the respondent had passed an order, dated 06.03.2006, assigning a common code number in respect of all the six independent establishments and all the establishments were brought under the purview of the Act with effect from 26.10.2005. By letter, dated 03.04.2006, the proprietrix of the petitioner firm had protested the respondent's unilateral action in clubbing all the six

independent establishments and assigning a common code number. She had also sought for a personal hearing from the respondent so as to enable her to establish her claim. Instead of replying to her letter and giving her an opportunity of personal hearing, the Inspector kept on coming to her establishment and demanded to know whether she had remitted contribution in respect of all the employees, who were employed in the complex.

5. Further, they have submitted that in such circumstances, she had filed W.P.No.11163 of 2006 to quash the order dated 06.03.2006, passed by the respondent, and this Court by Order, dated 21.04.2006, granted an order of interim stay and observed that the stay order shall not stand in the way of the respondent in considering the allotment of individual code number to the petitioner firm. Subsequently, the said writ petition was dismissed. In the meantime, the E.S.I.Inspector had issued a notice, dated 27.06.2007, in Form C20, proposing to conduct an inspection on 26.07.2007. There was no quarrel or objection on the petitioner's side for inspection. However, their grievance was that the notice had been once again addressed to all the six establishments. The action of the Inspector was in violation of the order of stay, dated 21.04.2006, granted by this Court. On 03.07.2007, the proprietrix of the firm had replied to the notice of the Inspector and brought to his notice the earlier order passed by this Court and called upon him to withdraw the notice and issue individual notices to each establishments. But, the letter was returned unclaimed.

6. They have further submitted that the respondent threatened to conduct a joint inspection of all the six establishments, which was contrary to the Order of this Court. The earlier order of the respondent, assigning a common code number to several independent establishments, had been stayed by this Court. Hence, they filed W.P.No.24452 of 2007 to quash the notice, dated 27.06.2007 and to direct the respondent to issue individual notices to them. This Court, by order, dated 27.08.2007, allowed the said writ petition and quashed the notice, dated 27.06.2007. However, liberty was given to the respondent to issue individual notice. Subsequently, the respondent had conducted inspection of each establishment independently and submitted a report. The inspection report has clearly indicated that there was no scope for clubbing all the six establishments as there was no commonality except for geographical proximity as all the establishments were housed in the same building and hence further action was also dropped.

7. Further, they have submitted that none of the six establishments fell within the ambit of E.S.I.Act as none of them employed 20 or more employees. However, after coming into force of the Amending Act 18 of 2010, five of the establishments came within the ambit of the Act as they have ten or more employees. However, as the petitioner firm had not ten or more employees, the provisions of the Act were not attracted to them. The respondent had assigned individual code numbers to five establishments, which came within the purview of the Act and they have paid contribution in respect of their respective employees. The respondent had, by letter dated 09.02.2013, addressed the five establishments and informed that their respective establishments were covered under the Act from 02.01.2013. Since then the other establishments have been remitting contribution in respect of their respective employees. The inspection conducted by the respondent during 2007 had covered the period from April 2005 to July 2007. Thus, the receipt of the impugned order was a rude shock to them. By the impugned notice, dated 17.09.2013, the respondent has once again clubbed all the six establishments and issued a notice in form C-18 (adhoc) demanding contribution for the period from 26.10.2005 to 31.07.2013. The impugned order is a mala fide exercise of executive power without any application of mind. There cannot be levy of contribution from the same establishments individually and jointly. On and from 02.01.2013, the other five establishments have been remitting contribution. In such circumstances, the impugned notice amounts to levy double contribution. Hence, the petitioner firm has filed this writ petition seeking the relief as stated above.

8. The respondent has filed counter affidavit stating that first of all the petitioner firm ought to have approached E.S.I.Court to raise such an issue under Section 75 of E.S.I.Act. Without exhausting the efficacious remedy very much available to the petitioner firm, they have rushed to this Court under a writ jurisdiction, which is unwarranted. This Court, in Regional Director, ESIC v. Nizam International [2008 (II) LLJ 50] has held that it is premature to challenge a C-18 show-cause notice under Section 75 of the Act and such challenge is not maintainable against a mere show-cause notice, unless on receipt of reply the ESI Corporation passes orders on merits under Section 45-A of the Act. Only such orders can be challenged under Section 75 of the Act if there is any fault and not C-18 show-cause notices. Hence, this petition is liable to be dismissed in limine.

9. Further, the respondent has submitted that the Inspector had visited the petitioner firm on 16.11.2005 and

requested the proprietrix to produce a consolidated register viz., attendance register, wage register and other statutory registers in respect of six units. She had not produced the same and sought adjournment to make it ready. On 28.11.2005, when the Inspector again inspected the premises, she had expressed her inability to produce the consolidated register. Subsequently, by letter dated 14.12.2005, she had denied the clubbing of six units and informed that the six units are purely independent and are in no way connected with each other.

10. The respondent has further submitted that on receipt of the report from the Inspector, he issued a letter dated 10.01.2006, to the petitioner firm informing that as per Section 44(2) of E.S.I. Act, the Corporation may require any person in charge of factory / establishment to furnish such particulars as it may necessary for the purpose of enabling the Corporation to decide the coverage. Form-01 was also enclosed with a direction to send it within fifteen days after duly filling it up. But, the petitioner firm had not sent the same and instead sent a letter, dated 30.01.2006, stating that the six units are independent units and not a single unit. He informed his allotment letter in form-C11, dated 06.03.2006, stating that all the six units are covered as a single unit with effect from 26.10.2005 under Section 1(5) of the Act. The petitioner firm had not submitted Form-01 and all the six units are functioning at the same premises under a common time register, common cashier, common punching, common entrance and common trade name. Owners of the six units belong to one family and the employees are transferable to any entity according to the sales as reported by the Inspector.

11. Further, the respondent has stated that the petitioner firm, in W.P.No.11163 of 2006, had challenged the letter, dated 06.03.2006, and this Court, by Order dated 10.12.2010, dismissed the same and directed the petitioner firm to avail remedy under Section 75 of the Act. However, this Court in its interim order, dated 21.04.2006, had observed that the stay order will not stand in the way of the respondent in considering the allotment of individual code number. When the Inspector had proposed to conduct an inspection, vide letter dated 27.06.2007, the petitioner firm had challenged the same by filing W.P.No.24452 of 2007 and this Court allowed the said writ petition and had given liberty to issue individual notices. The respondent on various dates in October, 2007 had conducted inspection. This Court had dismissed W.P.No.11163 of 2006 on the ground that alternative remedy is available and the factual finding of the case has to be decided on the basis of materials placed before E.S.I. Court. But, the petitioner firm had not filed any petition for the past three years before

E.S.I.Court and a demand was raised for Rs.12,17,913/- for the period from 26.10.2005 to 31.07.2013 on the Corporation side.

12. Further, the respondent has submitted that in view of amendment, dated 01.06.2010, all the units come under the Act and the contribution in respect of their employees from 02.01.2013 is only to avoid payment from 26.10.2005. The petitioner firm was afforded an opportunity of personal hearing on 10.10.2013 to prove their contention. Instead of proving their contention, they have approached this Court. The averments of the petitioner firm are misleading the Court and as per this Court's Order, they had not availed the remedy under Section 75 of the E.S.I.Act. Hence, the respondent had no other option except to raise demand as the petitioner firm is a total defaulter from the date of coverage I.e. 26.10.2005.

13. The respondent has further submitted that this Court in W.P.Nos.11163 and 11887 to 11891 of 2006, filed by the petitioner firm and other five units, has held that in the present case, prima facie, the respondent has taken a stand that it is a single establishment for the purpose of coverage under the Act. If the petitioners want to dispute the same, they have to avail remedy by way of dispute under Section 75 of the E.S.I.Act and this Court is not willing to embark upon factual finding on such issues, which may have to be determined only on the materials placed before the appropriate E.S.I.Court. The dismissal of writ petitions will not disentitle the petitioners from moving the E.S.I. Court with appropriate application. Whereas, the petitioner firm had chosen to remain silent and not moved the E.S.I.Court and hence the coverage of their firm by the Corporation under E.S.I.Act with effect from 26.10.2005 has become final and legal and hence the petitioner firm is liable to pay contribution as provided in the Act.

14. Further, the respondent has submitted that since the petitioner had neither contested the coverage before E.S.I.Court nor paid the contribution for the period from 26.10.2005 to 31.07.2013, he was constrained to issue a show-cause notice, dated 17.09.2013, proposing to determine the contribution to the tune of Rs.12,17,913/- with an opportunity of personal hearing to the petitioner firm on 10.10.2013. Even if the contribution is determined without considering their representation / contentions, the petitioner firm had the legal right to dispute the same before the Appellate Authority under Section 45AA of the E.S.I.Act or under Section 75 of the E.S.I.Act. Without availing any of the above remedies, they have filed this writ petition, which is against the direction of this Court in W.P.Nos.11163 and 11887 to 11889 of 2006.

Since they were vehemently opposing the coverage by clubbing the units, he had gone through the records during the course of inspection on 18.10.2007 and found that they had employed many employees commonly for all the units and the employees are interchangeable among the units. For instance, the employees, namely, M.Abudhagir, R.Sankar, J.Gayathri and D.Saraswathy were employed in both the units, namely, M/s.Kanchi Traders (formerly Kanchi Dresses) and M/s.Twin Bags, during the month of April, 2006 and received wages. Hence, it is well established that common functional, managerial and operational integrity exists among the units. The impugned show-cause notice, which was sent to Mohammed Beevi, alleged owner of the unit of M/s.Kanchi Silk Palace as per the Income Tax return, was received and acknowledged by her by affixing the seal of M/s.Kanchi Traders (formerly Kanchi Dresses). It clearly reaffirms the existence of the functional, managerial and operational integrity among the units.

15. The respondent has further submitted that the Hon'ble Apex Court in Sumangali v. Regional Director, Employees' State Insurance Corporation [(2008) 9 SCC 106] has dealt with the scope of clubbing of different establishments and has laid down certain guidelines based upon the factual findings recorded by the E.S.I.Court as well as the confirmation order passed by the High Court and thereafter held that the factual findings recorded by the E.S.I.Court and the High Court shows that there was unity in management, supervision and control, geographical proximity, financial unity, general unity of purpose and functional integrity between the different units and for the sake of E.S.I. Coverage, the different units could be treated as 'one establishment'. All the factors laid down by the Apex Court for clubbing the different units exists in the present case. By virtue of the long silence and reluctance to approach either the Authorized Officer of the Corporation or the E.S.I.Court, the petitioner firm's actions raise a reasonable belief that they attempt to hide the fact that all the six units have business integrity and hence they are coverable under E.S.I.Act as a single entity. For all these reasons, the respondent has prayed this Court to dismiss the writ petition.

16. The learned counsel appearing for the petitioner has submitted that the petitioner firm is carrying on sale of silk sarees and textile business in a rented premises. Their firm is an assessee under the Income Tax Act and having five employees. Since their firm is not carrying on any manufacturing activity, they are not covered under E.S.I.Act. In such circumstances, on 16.11.2005, an Inspector attached to E.S.I., had inspected the premises wherein the petitioner firm was carrying on business. He called upon the proprietrix of

the firm to produce all the statutory registers such as attendance register, salary register and all other ledgers. The Inspector, after verifying the same, had directed the proprietrix to produce a consolidated register containing the name of persons, who were working in the entire complex under various establishments. Since there were six separate establishments in the complex apart from the petitioner firm, it was not possible for her to maintain a consolidated register of employees of other establishments and therefore she had stated that she did not possess any consolidated register. However, on 28.11.2005, the Inspector, when he returned for inspection, again demanded the consolidated register and the proprietrix had also expressed her inability. Further, all the six establishments, by letter dated 14.12.2005, had protested the action of the Inspector and informed that they were independent establishments having no connection whatsoever with each other. In such circumstances, the respondent sent a communication, dated 10.01.2006, to all the six establishments stating that they had not produced relevant records to the Inspector. On receipt of the same, again they had jointly informed that each of them were independent establishments and they had no connection with each other. However, the respondent had passed an order assigning a common code number for all the six establishments and brought all of them under the purview of the Act with effect from 26.10.2005.

17. The learned counsel has further submitted that the proprietrix of the petitioner firm had filed W.P.No.11163 of 2006 to quash the order, dated 06.03.2006, passed by the respondent and this Court, by Order dated 21.04.2006, had granted an order of interim stay and observed that the stay order shall not stand in the way of the respondent in considering the allotment of individual code number to the petitioner firm. Subsequently, the said writ petition was dismissed. In the meantime, the Inspector had issued a notice, dated 27.06.2007, in Form C20 proposing to conduct an inspection on 26.07.2007. There was no objection on the petitioner's side for inspection, but their grievance was that the notice had been once again addressed to all the six establishments and it was in violation of the order of stay granted by this Court. Hence, they filed W.P.No.24452 of 2007 to quash the notice, dated 27.06.2007 and to direct the respondent to issue individual notices to them and this Court had allowed the writ petition and quashed the notice issued by the respondent. However, the respondent was at liberty to issue individual notice. Accordingly, the respondent had conducted inspection of each establishment independently during October, 2007 and by letter, dated 09.02.2013, addressed to five establishments, informed that their respective

establishments were covered under the Act from 02.01.2013. Since then the other establishments have been remitting contribution in respect of their respective employees. However, the respondent, by the impugned notice dated 17.09.2013, had again clubbed all the six establishments and issued notice in Form C18 (adhoc) demanding contribution for the period from 26.10.2005 to 31.07.2013. The said notice is a mala fide exercise of executive power without any application of mind and therefore the learned counsel has prayed this Court to quash the impugned order.

18. The learned counsel appearing for the respondent has submitted that if the petitioner firm is aggrieved by the action of the respondent, they have to approach E.S.I. under Section 75 of the E.S.I. Act. The petitioner firm, without exhausting the efficacious remedy, has approached this Court. Further, the impugned notice is only a show-cause notice and not a final order and hence the petitioner firm will not be prejudiced. As per the direction of the Inspector, who had conducted inspection, the proprietrix of the petitioner firm had not produced the consolidated register of all the six establishments, which are functioning at the same premises, under common time register, common cashier and also having common trade name.

19. Further, the learned counsel has submitted that this Court, by order, dated 21.04.2006, had granted an order of interim stay and also granted liberty to the respondent to issue individual notices to all the six establishments. The respondent had demanded a sum of Rs.12,17,913/- for the period from 26.10.2005 to 31.07.2013. Furthermore, in the impugned notice, it has been clearly stipulated that the petitioner firm has fifteen days time to give explanation regarding assessment pertaining to the regular contributions for the said period. Besides, the respondent had given an option to the proprietrix for enquiry. After receipt of the said notice, she has to give explanation and as such the impugned notice is fit to be proceeded with further. Hence, the learned counsel has prayed this Court to dismiss the writ petition.

20. On considering the facts and circumstances of the case, arguments advanced by the learned counsel on either side and on perusing the typed set of papers, this Court is of the view that the respondent had issued impugned notice calling the proprietrix of the petitioner firm to appear with relevant records for explaining her case on 10.10.2013, at 11.00 a.m. It clearly shows that it is a show-cause notice and not a final order. Therefore, the impugned order will neither prejudice the petitioner firm nor it will run against Article 14 of the

Constitution of India. Hence, the writ petition is liable to be dismissed.

21. In the result, the writ petition fails and it is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

krk

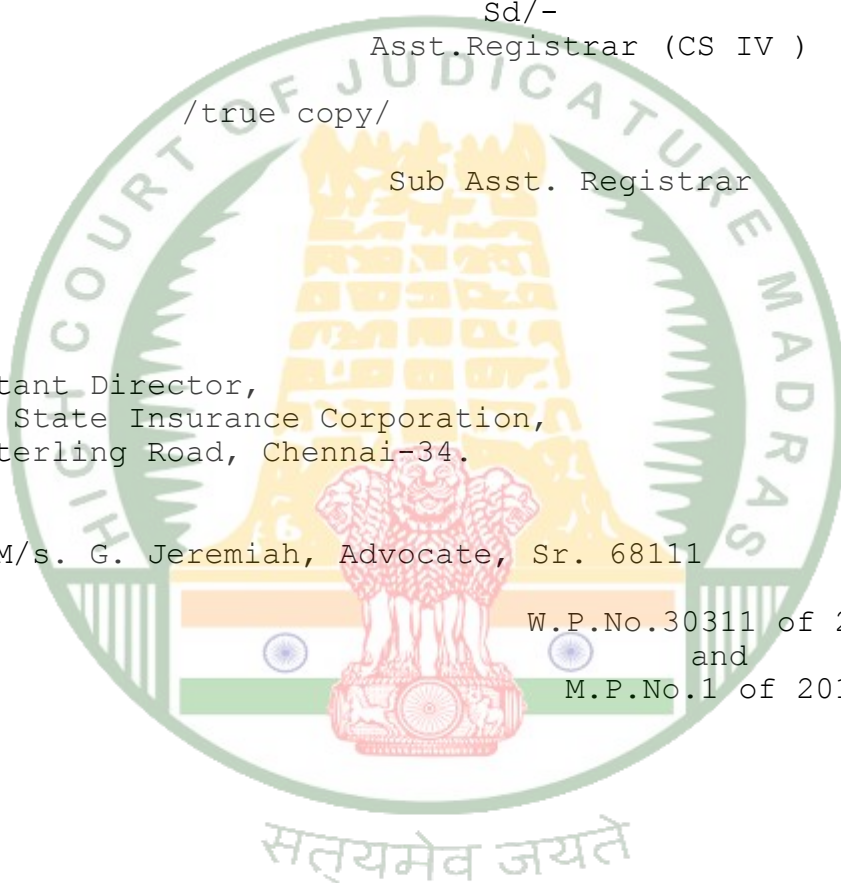
To:

The Assistant Director,
Employees State Insurance Corporation,
No.143, Sterling Road, Chennai-34.

2 ccs to M/s. G. Jeremiah, Advocate, Sr. 68111

W.P.No.30311 of 2013
and
M.P.No.1 of 2013

NM (CO)
kk 7/1



WEB COPY