

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CWP No. 1252 of 2014 (O&M)

Date of decision :28.5.2016

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M/s Pyoginam

.....Petitioner

vs.

Employees State Insurance Corporation, Gurgaon and another

.....Respondents

Coram: Hon'ble Mr. Justice P.B. Bajanthri

Present: Mr. Pawan Kumar Mutneja, Advocate for the petitioner.

Mr. Vikas Suri, Senior Standing Counsel for
ESIC – respondents No. 1 and 2.

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| 1. <i>Whether Reporters of local papers may be allowed to see</i> |] |
| <i>the judgment?</i> |]yes |
| 2. <i>To be referred to the Reporters or not?</i> |] |
| 3. <i>Whether the judgment should be reported in the Digest?</i> |] |

P.B. Bajanthri, J.

In the present petition, the petitioner has assailed the order dated 18.11.2013 passed by the Deputy Director, ESIC, SRO, Gurgaon - 1st respondent and the order dated 31.12.2013 passed by the Appellate Authority-cum-Sub Regional Director, ESI Corporation, Gurgaon -2nd respondent.

2) The petitioner-firm is engaged in fabrication and export of garments and accessories. It has been registered under the Employees' State Insurance Act, 1948 (for short 'the Act'). M/s M.R.

Stitch Well is an establishment, having separate registration under the Act. It has done job work for the petitioner. The 1st respondent inspected the petitioner's premises on 24.9.2008, 12.1.2011 and 26.6.2012. On 12.1.2011 surprise inspection was conducted by the vigilance team of 1st respondent – ESI Corporation. Pursuant to the inspection report on 18.9.2013 show cause notice was issued to the petitioner in Form C-18, to show cause within 30 days as to why the contributions for the default be not be determined as proposed in the said notice and recovered from the petitioner. In case of any objection to the determination proposed in the said notice, an opportunity of personal hearing to represent petitioner's case with relevant records in person or through an authorized representative has been offered to the petitioner for appearance on 15.10.2013 at 11.00 A.M. The petitioner was also requested to furnish full particulars/statement of actual contributions payable by the petitioner for the said default. During inspection, the vigilance team noted down the names, designations, wages etc. of the workers found in factory and obtained their signatures also as 'Exempt Wages' which was contrary to the facts brought out during physical verification. Thus show cause notice was issued proposing to determine contribution on the wages purportedly shown as non-coverable wages etc.

(3) On 30.9.2013, petitioner by way of letter informed 1st respondent that inspection team already collected both information and documents and further a detailed reply was submitted on 10.10.2013.

4) On the fixed date of hearing i.e. 15.10.2013 Mr. R.K. Yadav, representative of the petitioner appeared before the 1st respondent pursuant to the show cause notice. Necessary and relevant documents were not made available by the representative. On the contrary some wages documents have been placed which were alleged to be false and fabricated one. Representative of the petitioner was given further three opportunities on 23.10.2013, 31.10.2013 and 12.11.2013. Despite given reasonable opportunity, the petitioner could not produce necessary material. On 12.11.2013, one Mr. Gajraj Singh, Manager (Production), represented petitioner and stated that Mr. R.K. Yadav, who had appeared on the earlier occasion fell ill, therefore, time was sought. The same was taken note of by the Deputy Director of the 1st respondent.

5) On 18.11.2013, a detailed order has been passed by the Deputy Director of the 1st respondent, determining the ESI contribution totaling Rs.43,26,095/- for the period from November 2008 to March 2011 and the petitioner - principal employer was directed to pay the contribution within 60 days from the date of the order, failing which it would be recovered under Section 45-C to 45-I of the ESI Act. Under the note it was made clear to the petitioner that if he is not satisfied with the order, he may prefer an appeal before the Appellate Authority under Section 45 A (1) of the Act within 60 days from the date of order after depositing 25% of the contribution (Annexure P-12)

6) The petitioner feeling aggrieved by the order of Deputy Director - 1st respondent, dated 18.11.2013, preferred an appeal

before the Appellate Authority - 2nd respondent under Section 45 A A of the ESI Act. Due to non-depositing 25% of the contribution assessed by the Deputy Director - 1st respondent, the appeal of the petitioner was turned down vide order dated 31.12.2013 (Annexure P-16). It is learnt that petitioner requested the Appellate Authority to give relaxation in respect of depositing 25% of the contribution assessed. The same has not been considered by the Appellate Authority - 2nd respondent. Hence this petition.

7) Learned counsel for the petitioner contended that before passing the order dated 18.11.2013, reasonable opportunity has not been given to produce necessary documents. On this short ground the order dated 18.11.2013 is liable to be set aside. It was further contended that petitioner was collecting relevant documents under RTI from the office of 1st respondent. Necessary documents and information was not made available by the 1st respondent, therefore, he was not in a position to furnish necessary documents before the 1st respondent before passing the order dated 18.11.2013.

8) Learned counsel for the petitioner further submitted that M/s M. R. Stitch Well was not given notice and the said organization was not heard before passing order dated 18.11.2013. Since M/s M.R. Stitch Well is providing employees to the petitioner and the wages is being paid by M/s M.R. Stitch Well, therefore, determination of contribution assessed by the 1st respondent is without hearing M/s M.R. Stitch Well and not giving reasonable opportunity. It was further contended that Appellate Authority failed to consider the grievance of the petitioner in so far as relaxation in depositing 25% of

the contributions assessed by the 1st respondent. Therefore, Annexure P-16 dated 31.12.2013, the Appellate Authority's decision is illegal and arbitrary.

9) Learned counsel for the petitioner submitted that respondents have raised a preliminary issue that the petitioner has not exhausted remedy of appeal before the Appellate Authority. It was submitted that he had exercised the remedy of appeal on the preliminary issue. The Appellate Authority had rejected the appeal for not depositing 25% of the contributions assessed. That apart, before passing order dated 18.11.2013, the petitioner was not given reasonable opportunity, on that score petitioner need not exhaust remedy of appeal and this Court has ample power under Article 226 of the Constitution to entertain the petition.

10) Per contra, learned counsel for the respondents vehemently contended that petition is to be rejected at threshold on the ground of not exhausting statutory remedy of appeal provided under the ESI Act. In fact petitioner preferred an appeal. Due to defect in the appeal, i.e. non-depositing of 25% of the contributions assessed, the Appellate Authority has rejected. In other words, petitioner has availed the remedy of appeal. He has to comply the statutory provisions, namely, deposit of 25% of the contribution assessed for the purpose of entertaining appeal before the 2nd respondent authority. Therefore, remedy for the petitioner is to comply the mandatory requirement of depositing 25% of the contributions assessed by the 1st respondent and this writ petition is not maintainable before this Court. On this preliminary issue, the

petition is to be rejected. Petitioner contended before the Appellate Authority to relax the provision to deposit 25% of the contribution assessed, the Appellate Authority has not been delegated power to relax deposit of 25% of the contribution assessed when the statutory provision mandates to deposit 25%. Learned counsel for the respondents further submitted that petitioner has one more remedy, namely, in institution of proceedings under Section 76 of the ESI Act, 1948, after exhausting remedy of appeal before the Appellate Authority. Therefore civil writ petition is to be rejected on the score of not exhausting statutory remedy by the petitioner.

11) Learned counsel for the petitioner contended that M/s M.R. Stitch Well has not been arrayed as a party and not given opportunity to it before assessing the contributions vide order dated 18.11.2013 by the 1st respondent, on this ground, the order dated 18.11.2013 (Annexure P-12) is to be set aside, is concerned, respondents counsel submitted that petitioner being a principal employer, no question of impleading or hearing M/s M.R. Stitch Well would be necessary. The petitioner counsel all along contended that reasonable opportunity has not been given to the petitioner before passing order dated 18.11.2013. It is evident from the order dated 18.11.2013, that the petitioner was represented by its representative. Petitioner was given sufficient time of four dates. The same has not been availed by the petitioner. Therefore, contention of the petitioner that reasonable opportunity has not been given is contrary to the facts and the said contention is liable to be rejected.

12) Heard learned counsel for the parties.

13) The petitioner has questioned the order dated 18.11.2013 by which the 1st respondent assessed the contribution for the period from November 2008 to March 2011 and determined the contribution amount as Rs.43,26,095/-. Note of the order dated 18.11.2013, it was made clear that if the petitioner is not satisfied with the order referred to in Section 45 A (1), he may prefer an appeal to the Appellate Authority within 60 days from the date of the order after depositing 25% of the contribution so ordered or the contribution as per his own calculation whichever is higher, with the Corporation. The petitioner has availed the remedy of appeal and the same was rejected on the preliminary issue of not depositing 25% of the contribution assessed, which is mandatory requirement under Section 45-AA of the Act. Section 45-AA is reproduced herein:-

“45-AA. Appellate Authority. — If an employer is not satisfied with the order referred in section 45-A, he may prefer an appeal to an appellate authority as may be provided by regulation, within sixty days of the date of such order after **depositing twenty-five per cent.** of the contribution so ordered or the contribution as per his own calculation, whichever is higher, with the Corporation : Provided that if the employer finally succeeds in the appeal, the **Corporation shall refund such deposit to the employer together with such interest as may be specified in the regulation.]**

14) The petitioner has questioned the order dated 18.11.2013 and order dated 31.12.2013 by which 1st respondent assessed the contributions and determined the amount and the Appellate Authority declined to entertain appeal for non-compliance of Section 45-AA, in particularly not depositing of 25% of contributions assessed. Remedy for the petitioner is to deposit 25% of the contributions assessed as mandated under Section 45-AA of the ESI Act, 1948. The petitioner has rushed to this Court without complying statutory provision. One of the contention of the petitioner in approaching this Court is that he had contended before the Appellate Authority to relax the deposit of 25% of the contributions assessed. The same has not been considered by the Appellate Authority. The Appellate Authority has no power to relax in respect of depositing of 25% of the contributions assessed, since there is no power delegated to the Appellate Authority to relax 25% of the contributions assessed for the purpose of entertaining appeal. Therefore, the petitioner has no option except to approach the Appellate Authority by complying mandatory requirement of deposit of 25% of the contributions assessed. The Supreme Court has held in the following cases, under what circumstances, writ can be entertained under Article 226 of the Constitution without exhausting the statutory remedy of appeal:-

(1) *State Of Kerala & Ors vs M.K.Jose* (2015) 9

SCC 433, paragraph 14 reads as under:-

“14. In *State of Bihar v. Jain Plastics and Chemicals Ltd.*, a two-Judge Bench reiterating the exercise of power under Article 226 of the

Constitution in respect of enforcement of contractual obligations has stated: (SCC p.217, para 3)

“3. ...It is to be reiterated that writ petition under [Article 226](#) is not the proper proceedings for adjudicating such disputes. Under the law, it was open to the respondent to approach the court of competent jurisdiction for appropriate relief for breach of contract. It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under [Article 226](#).”

(2) **Union of India s. Shri Kant Sharma (2015) 6 SCC 773**, paragraphs 22 and 36 reads as under:-

“22. Judicial review under [Article 32](#) and [226](#) is a basic feature of the Constitution beyond the plea of amendability. While under [Article 32](#) of the Constitution a person has a right to move before Supreme Court by appropriate proceedings for enforcement of the rights conferred by Part III of

the Constitution, no fundamental right can be claimed by any person to move before the High Court by appropriate proceedings under [Article 226](#) for enforcement of the rights conferred by the Constitution or Statute.

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36. The aforesaid decisions rendered by this Court can be summarised as follows:

(i) The power of judicial review vested in the High Court under [Article 226](#) is one of the basic essential features of the Constitution and any legislation including [Armed Forces Act, 2007](#) cannot override or curtail jurisdiction of the High Court under [Article 226](#) of the Constitution of India.(Refer: L. Chandra and S.N. Mukherjee).

(ii) The jurisdiction of the High Court under [Article 226](#) and this Court under [Article 32](#) though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act.(Refer: Mafatlal Industries Ltd.).

(iii) When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory

dispensation. (Refer: Nivedita Sharma).

(iv)The High Court will not entertain a petition under [Article 226](#) of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance. (Refer: Nivedita Sharma).”

(3) **Zuari Cement Ltd. vs. Regional Director E.S.I.C. Hyderabad & Ors. (2015) 7 SCC 690**

paragraph 2 reads as under:-

“2. Brief facts which led to the filing of these appeals are as under:- The appellant is engaged in the business of manufacture and sale of cement situated at Yerraguntla in Cuddapah District. The said area was brought under the purview of ESI Scheme with effect from 1.03.1986. The Government of Andhra Pradesh granted exemption to the appellant-cement factory from the operation of the Act by various orders for the period from 1.03.1986 to 31.03.1993. The State Government rejected appellant’s application for exemption for the period from 1.04.1993 to 31.03.2001. Following rejection of claim for exemption, the Regional Director, ESI Corporation, issued various demand notices

cumulatively demanding a sum of Rs. 65,38,537/- towards contributions for the period from 1.04.1993 to 31.03.1999. Challenging the order of appropriate government rejecting its claim for exemption and also challenging the demand notices, the appellant filed number of writ petitions before the High Court. The High Court disposed of those writ petitions with direction to the appellant to approach the ESI Court constituted under Section 74 of the Act. The appellant filed the review petition before the High Court, interalia, praying to remit the matter back to the government to rehear the representation of the appellant-company pertaining to its exemption of ESI Scheme under Section 87 of the Act for the period from 01.04.1993 to 31.03.1999 by affording personal hearing to the appellant. The review petition was dismissed observing that the appellant has an alternative remedy before the ESI Court constituted under Section 74 of the Act and therefore the question of remanding the matter back to the State Government does not arise.”

- 15) One of the contention of the petitioner that this Court can interfere under Article 226 of the Constitution of India, if reasonable opportunity has not been granted, while passing an adverse order

when there is a statutory remedy also, writ petition is entertainable. In the present case, petitioner has not been given reasonable opportunity. Therefore, petitioner can approach this Court directly without exhausting remedy of appeal. As evident from the order dated 18.11.2013, the petitioner has been granted ample opportunity to plead and for production of documents against the proposed contributions assessment, which was not availed by the petitioner. Thus reasonable opportunity has not been given by the 1st respondent before passing the order dated 18.11.2013 is contrary to facts and not tenable and it is rejected. The petitioner was collecting documents under RTI to place before the 1st respondent for the purpose of assessing contribution. Therefore, he had sought time before the 1st respondent before passing the assessment order dated 18.11.2013. It was noticed that inspection by the vigilance team of the 1st respondent conducted on 24.9.2008, 12.1.2011 and 26.6.2012, the petitioner has sufficient time to collect the documents and to place before the authorities. Moreover, the documents to be produced before the 1st respondent for the purpose of assessment of contributions are relating to the service conditions of the employees documents, like wages register, attendance register, contribution of ESI, PF etc. Custodian of these records is petitioner, who is principal employer, therefore, it is evident that it is only delay tactics by the petitioner in prolonging the issue of assessment of contribution. In so far as not impleading and hearing M/s M.R. Stitch Well is concerned, learned counsel for the respondents pointed out that principal employer is sufficient for the purpose of assessing contributions. There is no need

to hear M/s M.R. Stitch Well, who had lent workers to the petitioner. Since M/s M.R. Stitch Well was not immediate employer to the petitioner – principal employer, therefore contention of the petitioner that order dated 18.11.2013 has been passed without the knowledge of M/s M.R. Stitch Well may not hold good.

16) In view of the facts and circumstances of the case, the petitioner has not made out case to interfere with the order dated 18.11.2013 (Annexure P-12) and the order dated 31.12.2013 (Annexure P-16).

17) Civil Writ Petition is dismissed with cost of Rs.10,000/- Cost shall be paid to respondent No.1 within a period of 3 months from today.

May 28, 2016
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(P.B. Bajanthri)
Judge