THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Writ Petition No.18722 of 2006

ORDER:

This Writ Petition under Article 226 of the Constitution of India is filed seeking a writ of *mandamus* declaring the assessment order issued by the 1st respondent, vide proceedings dated 25.07.2006 and consequential recovery order No.52.G/00669/49978/2006 dated 25.08.2006 issued by the 2nd respondent as illegal, arbitrary, capricious and contrary to the scheme and provisions of the Employees State Insurance Act, 1948, ('the Act', for brevity) and a consequential direction to grant exemption to the petitioner from payment of the ESI contributions for the period from 01.06.1997 to 31.03.2002.

2. I have heard the submissions of *Ms. G.Sudha,* learned counsel appearing for the petitioner and of *Sri B.G.Ravinder Reddy*, learned Standing Counsel appearing for the respondents 1 and 2. I have perused the material record.

3. The short but important question that falls for consideration in this writ petition is this:

> Having regard to the facts and circumstances and considering the equities, whether this Court can direct the petitioner not to bear with the liability with regard to payment of the contributions for the period from 01.06.1997 to 31.03.2002 and direct the employer/ petitioner and its employees to make ESI contributions for the future by granting the relief as prayed for in the writ petition?.

4. To begin with, the admitted facts are as follows:

The petitioner, M/s. Sundaram Motors (herein after, 'petitioner') was required to pay contributions under the Act in respect of all coverable employees as per the provisions of the Act and the ESI general regulations. While so, a notification was issued by the Union of India by which the Central Government amended the Employees' State Insurance (Central Rules), 1950, pursuant to which the wage-limit for coverage of an employee under Section

2(9)(b) of the Act was enhanced from Rs.3,000/- to Rs.6,500/- instead of existing wage ceiling of Rs.3,000/- per month. However, various employees associations challenged the said notification. In the instant case, the employees union of the petitioner also filed Writ Petition No.5586 of 1997 before this Court challenging the said notification dated 23.12.1996 issued by the Government of India and the circular communication dated 01.01.1997 issued by the Regional Director of the ESI Corporation. This Court, in W.P.M.P.No.6664 of 1997 granted stay orders and directed the 4th respondent therein, i.e., the petitioner herein not to give effect to the said notification and the circular and not to deduct contributions from the salaries of the employees towards ESI contributions and if already deducted not to remit the same to the account of the ESI Corporation. Therefore, following the orders of this Court, the petitioner neither deducted the contributions from the salaries of its employees covered by the Notification nor made any contributions under the Act. While so, the union of the petitioner withdrew the writ petition afore-stated and the writ petition was dismissed, on 21.09.2004, by this Court as withdrawn. Therefore, the Insurance Inspector visited the factory of the petitioner to ascertain the details of the salaries/wages of the employees covered by the Act and who were brought under the coverage of ESI Act under the notification, due to revision of the wage ceiling under the Act from Rs.3000/- to Rs.6500/- per month for the period from 01.01.1997 to 31.03.2004. Initially, on the information furnished by the petitioner for the period from 01.04.2002 to 31.03.2004, Rs.4,24,718/-was claimed by a notice dated 13.03.2006 and the petitioner paid, in all, Rs.5,77,000/- (Rs.4,24,718/- + interest Rs.1,52,282/-). Subsequently, such wage details for the period from 01.06.1997 to 31.03.2002 were obtained by the said Inspector and a notice in Form C-18 claiming an amount of Rs.11,20,591/- for the said period was issued to the employer, that is, the petitioner. Thereafter, the insurance inspector issued demand notice dated 25.08.2006 calling upon the petitioner to pay the said amount of Rs.11,20,591/- with interest up to 31.07.2006, i.e., Rs.11,29,930/-. Thus, a total claim of Rs.22,50,521/- was made. Aggrieved thereof, the present writ petition is filed by the petitioner.

5. Learned counsel for the petitioner would submit as follows: "Since the employees union questioned the Notification and this Court granted a stay order and the said stay order was in force from 02.05.1997 till 21.09.2004, the date of dismissal of the W.P.No.5586 of 1997 as withdrawn, the petitioner did not collect any contributions from its employees and also did not make contributions. But for the stay orders, the petitioner would have collected the contributions from the employees and also made contribution towards employer's share. During the relevant period, the petitioner provided medical facilities to all its employees and towards such medical facilities and medical reimbursement claims a sum of Rs.10,59,184/- was incurred by the petitioner. Further, during the period of stay, the ESI Corporation has not extended any medical benefits to the employees and the employees of the petitioner have not availed any medical facilities from the ESI Corporation; and at the same time, the petitioner provided medical facilities. No contribution can be claimed either from the petitioner or from its employees when no service or benefit was rendered by the ESI Corporation to the employees concerned. If at this stage, the contributions are demanded with penal interest, extreme hardship would be caused to the employer/the petitioner as well as the employees. As no medical facilities were provided and/or availed by the workmen from the ESI Corporation and on the other hand, the employer/petitioner provided medical facilities to the workmen, if arrears are demanded to be paid at this distance of time, nobody stands to gain in the facts and circumstances. Even though, as per law, the contribution has to be made, relief can be granted to the petitioner, under Article 226 of the Constitution of India, keeping in view the special facts and circumstances of the present case and considering the equities and the hardship that would

ensue if the arrears are now directed to be collected. If at this stage, the contributions for the past period are to be collected from the employees, there would be industrial unrest. By now, some of the employees might have left the organization or might have retired and it will be practically impossible to find out each and every member and recover their contributions for the past several years. The petitioner cannot be penalized by recovering from it the contributions for the past period during which no contributions were collected from the employees for no fault of the petitioner."

5.1 Learned counsel would also bring to the notice of this Court the fact that the Deputy General Manager, HRD, of the petitioner along with the Deputy Personal Manager appeared for hearing before the Officer concerned of the ESI Corporation and that it was submitted before the said authority that the medical expenditure of not only the employees but also of their families was reimbursed and that a sum of Rs.10,59,184/- was incurred towards such medical facilities extended to the employees, but, the officers of the petitioner were informed that there was no such provision in the ESI Act to grant exemption. Therefore, left with no other option the writ jurisdiction was invoked.

6. Per contra, the learned Standing Counsel would submit as follows: "It is an admitted fact that there is a revision of wage ceiling under the Act from Rs.3,000/- to Rs.6,500/-. Therefore, the petitioner is statutorily obligated to recover contributions from its employees towards employees' share and make contributions. Even though the employees union challenged the Notification, the writ petition was eventually withdrawn without taking it to its logical conclusion; and at the time of dismissal of the writ petition as withdrawn, no reliefs as now being sought for in the present writ petition were claimed and the petitioner kept quiet. On the withdrawal of the writ petition, the officers concerned of the ESI Corporation rightly proceeded in accordance with the

procedure established by law and assessed retrospectively the contribution payable by the petitioner and issued proceedings, which are impugned in the writ petition. As no orders were obtained in the earlier writ petition when it was withdrawn, the present writ petition seeking the present reliefs is not maintainable. When once the notification is enforceable, on the dismissal of the writ petition of the employees union, the notification is applicable from its date and not from a future date. The orders impugned in the writ petition are sustainable both under facts and in law. In case, the petitioner is aggrieved of the impugned orders, the petitioner ought to have filed an appeal under Section 75 of the Act before the appropriate appellate authority. And, when an efficacious alternative remedy is available, the writ petition is not maintainable. The writ petition is devoid of merit and is liable for dismissal.

7. I have bestowed my attention to the facts and given earnest consideration to the submissions.

7.1 It is to be restated that the writ petitioner was required to pay the contribution in respect of all its employees covered by the provisions of the Act. It is also not in dispute that by a notification, the Union of India amended the relevant rules and enhanced wage ceiling from Rs.3,000/- to Rs.6,500/- and that the petitioner's employees union challenged the notification and obtained stay orders in WPMP 6664 of 1997 in W.P.No.5586 of 1997 from this Court on 02.05.1997 and the said stay orders were in force till the writ petition was dismissed, on 21.09.2004, as withdrawn. After the writ petition was withdrawn, an initial assessment was made and payment of Rs.5,77,000/- (Rs.4,24,718/-+ interest Rs.1,52,282/-) was made and the said amount was paid by the petitioner. Thereafter, on further assessment, after collecting the wage details and other information from the records of the petitioner, by the impugned order, dated 25.07.2006, it was determined that additional contribution in a sum of Rs.11,20,591/- is payable by the petitioner for the period from 01.06.1997 to 31.03.2002. Pursuant thereto, the insurance inspector issued further demand dated 25.08.2006 demanding the amount of contribution for the period from 01.06.1997 to 31.03.2002 with interest. Thus, the petitioner was demanded to pay Rs.22,50,521/-. Admittedly in due obedience to the stay orders of this Court, no contributions were collected from the employees of the petitioner during the period the stay orders were in operation. Therefore, the petitioner did not make any contributions to the Corporation towards Employees State Insurance.

8. Taking into consideration the admitted and undisputed facts and the equities, this Court, for the following among other reasons, finds that this case is an eminently fit case to direct the petitioner not to bear with the liability with regard to payment of the contributions for the period from 01.06.1997 to 31.03.2002.

(i) During the subject period, i.e., from 01.06.1997 to 31.03.2002 because of the operation of the stay order, the petitioner could not deduct the contributions from the wages/salaries of the employees and pay its contributions towards the ESI. If this Court had not passed the stay order, the petitioner would have contributed to the ESI.

(ii) During the subject period, the petitioner extended medical facilities and medical reimbursement facilities not only to its employees but also to the members of families of its employees. The employees of the petitioner are not disputing the fact that such medical facilities were extended by the petitioner and were availed by the employees. Thus, in lieu of ESI contribution, the petitioner provided medical facilities to its employees. The object of the enactment is otherwise fulfilled. Therefore, it would be unjust and unfair to make the petitioner pay the contributions retrospectively from the date of notification.

(iii) During the subject period, the employees of the petitioner have not availed any medical facilities from the ESI Corporation.

(iv) The Act was enacted to provide for certain benefits to the employees in case of sickness, maternity and employment injury etcetera. Under the scheme of the Act, the function of the ESI Corporation is to derive insurance fund from the contributions from the employees/workmen and the employer is entitled to recover workmen's share from the wages of the workmen. In the case on hand, in view of the stay orders, no contributions were collected from the employees of the petitioner and during the subject period, as already noted, the ESI Corporation has not rendered any services like medical benefits to the employees whose wages were above Rs.3,000/-, but less than Rs.6,500/- per month. Therefore, there is absence of *quid pro quo* during the subject period. When employees did not enjoy any benefits during the subject period, it is unreasonable if the arrears are asked to be paid by the employees as well as the petitioner.

(v) If at this distance of time, contributions are to be collected retrospectively from the employees of the petitioner, as rightly urged by the learned counsel for the petitioner, the said action may lead to industrial unrest and may severely affect the industrial relations.

(vi) Further, some of the workmen might have retired and some other workmen might have left the petitioner factory. Therefore, it would be a hardship and it may be practically impossible for the petitioner to collect contributions from all its employees from the date of enforcement of the Notification. At the same time when it is not possible for the petitioner to collect retrospectively the contributions from all its employees it cannot be made to bear the burden of the contributions, which the employees are required to pay towards their share of contributions. Compelling the petitioner to collect the contributions at this distance of time would amount to compelling it to do an act which it cannot possibly perform.

(vii) It is well settled that the act of Court can prejudice no party. The maxim '*actus curiae neminem gravabi*' fully applies to the instant case facts. This Court is of the considered view that the petitioner should not suffer because of the orders of the Court which it has duly complied with.

9. However, before parting, it is to be examined as to whether such a relief based on equities can be granted by this Court. This question is no longer *res integra* in view of the ratio in the decision of the Supreme Court in Employees' State Insurance Corporation v. Jardine Henderson Staff Association[1], wherein while dealing with a case with nearly similar set of facts, the Supreme Court upheld the orders of the High Court and dismissed the appeals of the ESI Corporation by directing the respondents therein to make contributions prospectively. In deed, the reasons assigned supra in support of this Court's finding are based upon the precedential guidance in the above cited decision. However, it is apposite to note that the learned counsel for the respondents/ESI Corporation pointed out that in the cited case the contributions were made towards medical benefits of the employees as per the interim direction of the Court and that therefore, the decision of the Supreme Court is distinguishable on facts. In the case on hand, contributions were made by the petitioner towards medical benefits is not in dispute. In fact, the said aspect was considered by one of the officers of the ESI Corporation, but he is of the view that under the provisions of the Act, no exemption can be granted and therefore, he did not consider the request of the petitioner. As already noted, in the case on hand, the employees are not disputing the medical facilities extended to them by the petitioner during the subject period and the employees are fully satisfied with such medical facilities/services provided by the employer/petitioner and thereby, the object of the Act is fulfilled. Hence, the cited decision applies on all fours to the instant case.

10. Before concluding, there is one more aspect to be considered. The learned Standing Counsel for the respondent Corporation contended that since an effective alternative remedy of appeal is available under Section 75 of the

[1] (2006) 6 Supreme Court Cases 581

Act, the present writ petition under Article 226 of the Constitution of India is not maintainable. In support of the said contention, he placed reliance on the decision in Ashok Leyland Limited, Ductron, Castings Limited, R.R. District v. Deputy Tahsildar/Special Revenue Inspector (ESI) Recovery Cell, Collectorate, R.R. District, Hyderabad and another[2]. The facts of the cited case disclose that a writ petition was filed questioning the applicability of the Act to the unit of the employer, which was purchased from the State Financial Corporation. Having regard to the subject matter and the provisions of law, this Court held that the writ petition is not maintainable in view of the alternative remedy available under the provisions of the Act. In the instant case, it was already noticed that the petitioner was informed by an officer of the Corporation that the exemption cannot be granted by the Corporation under the provisions of the Act. Be that as it may. Under Article 226 of the Constitution of India, this Court is having discretion to entertain or not to entertain a writ petition having regard to the facts of a case. It is no doubt true that this Court has imposed upon itself certain restrictions and one of which is that if an effective and efficacious remedy is available, this Court will not normally exercise its jurisdiction. But the alternative remedy has been consistently held by the Supreme Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principles of natural justice or where the order or proceedings are wholly without jurisdiction or the *vires* of an Act is challenged. There is a plethora of case-law on this point. There is no need to refer to any decisions on this settled legal principle, which is elementary. In the case on hand, the remedy of appeal, if any, available, in the facts and circumstances of the case, is not an efficacious alternative remedy, in the well considered view of this Court. In a matter of this nature, where the Court has to consider the equities

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[2] 2001 (4) ALD 96 (DB)

and exercise its discretionary jurisdiction, it is not possible to accept the contention that the writ petition is not maintainable on the ground that an alternative remedy is available to the petitioner. On the above analysis, this Court finds that the writ petition is maintainable. The findings of this Court also find complete support from the decision in Employees State Insurance Corporation v. Distilleries and Chemical Mazdoor Union & others.: (2006 LAB. I.C.3971).

13. Accordingly, the writ petition is allowed granting exemption to the petitioner from payment of contributions for the period from 01.06.1997 to 31.03.2002. Since it is admitted that the petitioner has already paid Rs.5,77,000/- covering the relevant period, it is needless to state that the petitioner is entitled to refund of the said amount from the respondents. However, the said amount may be adjusted by the ESI Corporation towards future contributions. No costs.

Pending miscellaneous petitions, if any, shall stand closed.

M. SEETHARAMA MURTI, J

31.01.2017
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