*   **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+   **FAO No. 329/2017**

%   **2st August, 2017**

M/S. NANCY KRAFTS PVT. LTD. & ANR.   ..... Appellants
Through: Mr. Manish Malhotra, Advocate

versus

EMPLOYEES STATE INSURANCE CORPORATION
..... Respondent

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No. 27444/2017 (for exemption)

Exemption allowed subject to just exceptions.

C.M. stands disposed of.

FAO No. 329/2017 & CM No. 27443/2017 (for stay)

1. This first appeal is filed under Section 82 of the Employees' State Insurance Act, 1948 (hereinafter referred to as the 'ESI Act'), impugning the order of the ESIC Court dated 29.04.2017 which has declined the prayer of the appellants/petitioners for waiving

the statutory pre-deposit which is required of 50% of the amount in terms of Section 75(2B) of the ESI Act.

2. No doubt, the court below has erred in observing that the application is liable to be dismissed as it does not contain particulars, because, the application refers to the main petition, however, this error of the trial court would not be determinative of the matter because the issue has to be examined on merits as to why the ordinary requirement of a statutory pre-deposit should not be complied with by the appellants/petitioners.

3. The subject petition under Section 75 of the ESI Act was filed by the appellants/petitioners challenging the recovery certificate dated 30.07.2015 issued by the competent authority under the ESI Act and re-opening the order passed by the competent authority dated 23.05.2006 by a subsequent order of July, 2015.

4. The issue with respect to denial of entitlement of the appellants/petitioners to question the recovery certificate is mentioned in paras 5, 9 and 10 of the written statement filed by the ESI Corporation and these paras read as under:-

"5. That contents of the para 5 are utterly wrong and vehemently denied. On 11/11/2005, on surprise physical verification of employees, extra employees off the rolls were found in the factory. Because of undercompliance, the Respondent/ESI Corporation issued C-18 (Adhoc) Notice dated 14/03/2006 for Rs.793850/- on ad hoc basis (512*4125*6.5) after adjusting part compliance for the period 04/2004 to 02/2005 (Non ledger verification period) providing date of personal hearing to represent his case on 29/03/2006 was issued to the petitioner. Sh. Sanjay Arora authorized representative of petitioner appeared before the Authorized Officer who stated that the ESI contribution had already been paid but was asked to produce audited balance sheet etc., to check the veracity of contribution paid by the petitioner. Accordingly, next date of hearing was fixed on 13/04/2006 in consultation with the authorized representative of the petitioner. However, none appeared on 13/04/2006 for personal hearing. Due to the non appearance of the petitioner or its authorized representatives on assigning date the Respondent/ESI Corporation was therefore was constrained to pass a reasoned Speaking order u/s 45A of the ESI Act 1948 (as amended) for Rs.7,93,850/- for the period 04/2004 to 02/2005. Copy of this order were delivered to Sh. Narender Pal Singh (M.D.) Sh. Surenderjeet Singh (Manager) and Nancy Krafts Pvt. Ltd. which were duly received by them. Due to non compliance by the petitioner, the Respondent/ESI Corporation was left with no other option but to issue C-19 (Recovery Certificate) to the Recovery Officer for recovery of dues. Copy of this C-19 (Recovery Certificate) was also endorsed to Sh. Narender Pal Singh (M.D.) and M/s. Nancy Krafts Pvt. Ltd. against acknowledgment. (The copy of C-18 dated 14/03/2006, so dated 21/04/2006 and C-19 dated 23/05/2006 are annexed and marked as ANNEXURE.R/1).

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9. That the contents of the para 9 are absolutely wrong and specifically denied. Petitioner has submitted misguiding facts. After taking into consideration petitioner's representation (as referred in above para) submitted to the Respondent/ESI Corporation, petitioner was provided another opportunity on 08/08/2006 to produce records before the Insurance Inspector at the office of Respondent/ESI Corporation. However, petitioner did not produce records on 08/08/2006 and requested for 15-20 days more time for production of records. The Insurance Inspector again visited the petitioner's premises for verification of records but petitioner once again failed to produce records before the Insurance Inspector. Due to non production of records despite giving two further opportunities, this office proceeded with C-19 dated 23/05/2016 for Rs.9,61,734/-. Petitioner was a willful defaulter and did not produce records before the Insurance Inspectors of the Respondent/ESI Corporation. But vide a letter dated 26/09/2006, the petitioner again sought another date for inspection. The Insurance Inspector

of office of the Respondent then conducted verification of the petitioner's records for the period 04/2004 to 03/2006 on 26/07/2007, 27/07/2007 and 30/07/2007. The Insurance Inspector detected Rs.57,490/- as contribution payable under different heads and further reported an amount of Rs.10,98,25,189/- and Rs.9,56,86,448/- for the year 2004-05 and 2005-06 respectively booked under head "Fabrication, Embroidery, Washing and Pressing, Dying and Printing" to be decided by the Regional Office for charge of ESI contribution. Accordingly, petitioner was advised vide letter 24/09/2007 to make compliance on component constituting actual wages paid under the above head of A/cs and to send justification with documentary evidence in support thereof.

10. That the contents of the para 10 are patently false and fallacious and specifically denied. It is respectfully submitted that amount of Rs.10,98,25,189/- and Rs.9,56,86,448/- which was detected by the Insurance Inspectors at the time of inspection was duly acknowledged by the representative of petitioner without any objection. Period of Order under section 45A i.e. 04/2004 to 02/2005 was inspected due to repeated requests of petitioner and further period was verified/examined as part of regular inspection. It is pertinent to mention that period of 45A order in which C-19 dated 23/05/2006 for Rs.9,61,734/- was issued to be examined by the Insurance Inspectors of this office earlier also but due to non-production of records by the petitioner, the work could not be carried out as mentioned in previous para. Petitioner was advised vide a letter dated 24/09/2007 to make compliance as per provisions of the ESI Act and provisions made thereunder, but no compliance was made. Petitioner is concealing the fact that a letter dated 20/09/2012 was issued to him to produce records for the years 2004-05 and 2005-06 for the amounts of Rs.10,98,25,189/- and Rs.9,56,86,448/- respectively pertaining to Job Work. In pursuance of this letter S.S.O. of this office visited the petitioner's premises on 05/11/2012 and 12/11/2012 with prior intimation but petitioner again failed to produce records on both the occasions. S.S.O. (Insurance Inspector) then recommended prosecution u/S 85(g) of ESI Act for non-production of records. Subsequently, a letter to M/s Nancy Kraft Pvt. Ltd. was issued on 05/02/2013 wherein petitioner was reminded about this office letter dated 24/09/2007 to pay contribution on actual basis but in the absence of any reply or compliance a reminder was again issued to the petitioner on 03/06/2013 to submit details of job work for the period 2004-05 and 2005-06 in prescribed proforma. But the letter returned with the remakrs "No Such Firm" from the address C-11 East Uttam Nagar New Delhi-110059 thereafter a letter at the residential address of petitioner was sent on 22/07/2013. But in absence of any response, one more opportunity was given to the petitioner vide this office letter dated 27/03/2014 to submit the details of job work for the year 2004-05 and 2005-06 in the proforma prescribed [PAGE 74 of the petition]. This letter was sent to the address of M/s Nancy Kraft Pvt. Ltd. and Sh. Narender Pal Singh, which were duly

> received by the petitioner at both the addresses on 03/04/2014. The petitioner neither replied nor made any ESI compliance in r/o these letters. **Due to repeated non-compliance and non-production of records for verification by the petitioner this office was perforced to restore C-19 dated 23/05/2006 as per the provisions of Act.** [The copy of Inspection Report dated 30/07/2007 is annexed herewith and marked as ANNEXURE.R/2, Letter dated 24/09/2007 and petitioner, letter dated 15/10/2007 as ANNEXURE.R/3 and Complaint dated 16/09/2008 and Report dated 20/11/2008 as ANNEXURE-4]." (emphasis added)

5. A reading of the aforesaid paras of the defence of the ESI Corporation shows that, no doubt, proceedings originally emanated in terms of the order passed by the competent authority in 2006, however, subsequently also opportunities were given, after inspection, to the appellants to make compliance and give details which the appellants failed to do and, therefore, the competent authority restored the order dated 23.05.2006. The present appellants in view of the facts stated by the ESIC were *prima facie* rightly proceeded against in terms of the restored order C-19 dated 23.05.2006 and the recovery certificate dated 30.07.2015.

6. In my opinion in the facts of the case such as the present, and as given in the written statement of ESIC reproduced above, there is no entitlement to claim waiver of statutory pre-deposit more so because the court below has rightly held that in case the appellants

succeed, they will be restituted the amount along with appropriate benefits.

7. Dismissed.

AUGUST 02, 2017 **VALMIKI J. MEHTA, J**

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