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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7423 OF 2017

Wakson Pharmaceutical ...Petitioner
vs
The Employees State Insurance Corporation & Ors. ...Respondents
.....
Mr. S.K. Talsania, Senior Advocate, i/b. Mr. Abhay Kulkarni, for the Petitioner.

Mr. H.V. Mehta, for the Respondents.
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CORAM : S.C. GUPTE, J.

DATED: JULY 31, 2018

P.C. :

. Heard learned Counsel for the parties.

2. This petition challenges an order passed by the ESI Court on an application made under Employees State Insurance Act and subsequent orders passed on the basis of that order.

3. The Petitioner is a registered partnership firm engaged in the business of marketing of pharmaceutical products. It does not carry on any manufacturing activity. Initially, by its judgment and order dated 28 July 2008, passed in an application under the ESI Act, the ESI Court held that the medical representatives engaged by the Petitioner, whose area of operation was outside Mumbai headquarters of the Petitioner, as provided under the notification of State of Maharashtra, are not covered

by the ESI Act and set aside demand/recovery notice issued by the authorities of the Respondent Corporation. An appeal preferred by the Respondent Corporation against that order has been pending hearing and final disposal, but without any stay of the judgment and order of the ESI Court. By another judgment and order of the ESI Court dated 27 April 2010, passed on an application made under ESI Act, the ESI Court set aside and quashed another demand/recovery notice issued by the Respondent Corporation. The Court noticed that the notice (C 18) issued by Respondent Corporation did not disclose the names of employees, on whose behalf or for whom the notice was issued to the Petitioner. This was one of the grounds for quashing the demand/recovery notice. The ESI Court, however, reserved liberty to issue a fresh C-18 Notice. The Respondent Corporation did not avail of this liberty for more than 6 years. Suddenly, a notice was issued by the Corporation on 13 January 2016 directing the Petitioner to appear before the competent authority along with documents for computing dues for the period between November 1998 to May 2003. On this notice, Deputy Director, ESI Corporation, passed an order dated 23 June 2016 determining contribution amounting to Rs.12,41,852/- for the period between 5 November 1998 to May 2003 and ordering the amount to be paid within sixty days. This order was purportedly passed under Section 45-A of the ESI Act. The Petitioner challenged this order by filing an appeal under Section 45AA of the ESI Act. It appears that there is a noting on the file of the appeal that the case was remanded to the Deputy Director with a request to pass an order after affording reasonable opportunity to the Petitioner. In pursuance of this order, a fresh notice was issued by the Deputy Director to the Petitioner on 23

December 2016 for hearing on 17 January 2017. The Deputy Director, thereafter, passed a fresh order under Section 45-A of the ESI Act recording *inter alia* that the Petitioner had neither brought any record for verification nor stated anything for not producing the same in his written statement. The Deputy Director noted that whilst making their appeal under Section 45AA, the Petitioner had submitted that their documents were infested with white ants and hence could not be produced. The Deputy Director further noted that despite the opportunity afforded, the Petitioner had failed to produce the record by citing the same ground. The Deputy Director further noted that the Petitioner had nowhere agreed to produce the records and was only making lame excuses and using dilatory tactics. The Deputy Director, in the premises, confirmed that Rs.12,41,852/- was statutorily due as arrears of contribution payable by the employer in respect of the claim covered by the show cause notice. Pursuant to this order, a notice of demand was issued by the Corporation to the Petitioner. In this notice not only the original contribution but even interest under Section 39(5) of the ESI Act aggregating to Rs.24,34,456/- was levied. In the meantime, once again, the Petitioner challenged the order passed under Section 45A in an appeal filed under Section 45AA of the ESI Act. The appeal was not entertained by the appellate authority (order dated 9/16 June 2016) purportedly on the ground that the Petitioner had already availed of the remedy of an appeal under Section 45AA for the period between 5 November 1998 to May 2003. The last order, which is a prohibitory order under Section 45H of the ESI Act, was passed on 21 June 2017, in pursuance of the notice of demand. These orders are challenged in the present petition.

4. The fundamental point of challenge on behalf of the Petitioner concerns the power or authority of the Corporation to call for records and revise the matter after 6 years, i.e. long after the expiry of the limitation period. The notices, according to the Petitioner, were ex-facie illegal. The other grievance of the Petitioner is that whilst their challenge was pending before the appellate forum and before the matter was heard on merits, the Corporation, in the month of March 2018, proceeded to recover Rs.24,11,609/- and Rs.10,80,792/-, respectively, from the individual account of the Petitioner's partner and the firm's account.

5. The long and short of the case is that without examining the Petitioner's case on limitation and without considering how the liability of ESI dues arises against the Petitioner and without even recording the names of employees, for whom or on whose behalf the dues are owed by the Petitioner, the authority under the ESI Act has determined the Petitioner's liability and what is more, it has not only recovered that liability, but a substantial amount over and above that liability purportedly towards interest. This state of affairs obviously cannot be permitted to subsist. The matter must go back to the first authority for a fresh determination under Section 45A of the ESI Act after taking into account the matters referred to above. In the meantime, the Corporation has no credible reason for retaining the amount recovered from the Petitioner.

6. Learned Counsel for the Respondents refers to the judgment

of **Employees' State Insurance Corporation vs. Gloster Jute Mills Ltd.**[1] In this case, Calcutta High Court held that the ESI Court could not have ordered refund of the amount realized by the corporation through defaulting opposite party – establishment. That judgment dealt with the power of the ESI Court to order refund pending adjudication, and not the power of High Court to do so in an appropriate case. Here, the recovery itself was illegal. There was no proper adjudication under Section 45-A and pending appeal the amount was forcibly recovered. When the matter is remanded to the first authority for fresh determination of ESI dues, there is no warrant for allowing the Corporation to retain the amount unauthorizedly recovered.

7. In the premises, Rule is made absolute and the petition is disposed of in terms of the following order:

(i) The impugned orders referred to in prayer clause (a) of the petition are quashed and set aside.

(ii) The matter of ESI dues for the period of 5 November 1998 to May 2003 is remanded to the Employees State Insurance Corporation for a fresh hearing under Section 45A of the ESI Act on merits. The matter may be heard by any competent authority of the Corporation other than Respondent Nos. 3 and 4.

(iii) The amount recovered in two tranches by the Respondent Corporation from the Petitioner and its partner in March 2018 should be

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forthwith refunded to the Petitioner and its partner.

(iv) The Respondent Corporation shall also refund the amount of Rs.3,10,463/- deposited with the Corporation as pre-deposit for the original appeal under Section 45AA of the ESI Act.

(v) Fresh hearing shall be commenced by the Respondent Corporation only after the amounts noted above are refunded to the Petitioner and its partner.

(vi) The petition is disposed of in the above terms. All rights and contentions of the parties on merits are kept open.

(S.C. GUPTE, J.)