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

***Decided on:- 10<sup>th</sup> October, 2019***

+      FAO 495/2017

CENTRAL COTTAGE INDUSTRIES  
CORPORATION OF INDIA LTD

..... Appellant

Through:      Mr. Shaurya Sahay, Adv.

versus

EMPLOYEES STATE INSURANCE  
CORPORATION

..... Respondent

Through:      Mr. V.K. Singh, Ms. Prachi  
Singh & Ms. Nisha Hans, Advs.

**CORAM:**

**HON'BLE MR. JUSTICE R.K.GAUBA**

**ORDER (ORAL)**

1.      The appellant Central Cottage Industries Corporation of India Ltd. (CCIC), a public sector undertaking, has been established by the Government of India and is functioning under the control of Ministry of Textiles. The respondent Employees State Insurance Corporation (ESIC), on the other hand, is a statutory authority established by Section 3 of Employees State Insurance Act, 1948 (ESI Act) with the responsibility of “*administration of scheme of Employees State Insurance*” in accordance with the provisions of the said law.

2. The appellant CCIC had earlier approached this Court invoking the writ jurisdiction by civil writ petition no. 344/1997 requesting for “*exemption*” to be granted to it “*from applicability of ESI Scheme*” which had been declined by the Government of India (it being referred to as “the appropriate government”) by its order dated 01.10.1996. It may be mentioned here itself that the dispute persists between the appellant on one hand and ESI on the other respecting the period 1988-1995, the request of the appellant with regard to the subsequent period having been acceded to.

3. The prime contention on the basis of which the appellant sought relief from the writ court against applicability of ESI scheme was that it was an establishment belonging to the Government and was providing to its employees “*benefits substantially superior to the benefits provided under the ESI Act*”. The respondent ESIC had resisted the writ petition arguing that the appropriate statutory remedy under Section 75 of ESI Act should have been invoked referring in this context to the decision of Supreme Court reported as *Regional Director, Employees’ State Insurance Corporation vs. Narayan Chandra Rajkhowa & Ors. (1997) 11 SCC 234*. The learned Judge in *seisin* of the said matter accepted the objection and held that the writ petition could not be entertained, also for the reason that it involved disputed questions of fact. While the writ petition was dismissed, the appellant was granted liberty to have resort to the remedy under Section 75 of ESI Act before the Employees Insurance Court (EI Court), the issue of limitation being taken care of by directing that the

EI Court would entertain the petition under Section 75, it not being treated as “*barred by limitation*”.

4. In the wake of the above mentioned order dated 13.07.2006 in the writ petition, the appellant approached the EI Court by a petition (ESIC no. 04/2016) under Section 75 of ESI Act. It appears that a preliminary issue was framed by EI court on 04.07.2015 to address the question “*as to whether the petition corporation is not covered under ESI Act in view of proviso to Section 1(4) of the ESI Act, 1948*”. The respondent ESIC, however, took an inherently contradictory position by raising objection to the maintainability of the petition under Section 75 before the EI Court, now placing reliance on another decision of the Supreme Court reported as *Zuari Cement Limited vs. Regional Director, Employees’ State Insurance Corporation, Hyderabad & Ors.* (2015) 7 SCC 690. The EI Court accepted the objection referring to the decision in *Zuari Cement Limited* (supra) and by order dated 25.10.2017 returned the petition holding that it did not have the jurisdiction to decide the issue that had been raised.

5. Feeling aggrieved by the decision to above effect passed by EI Court, the present appeal was brought before this Court under Section 82 of the ESI Act. Though in some of the pleadings in the earlier round of litigation, and also in the matter leading to the present appeal being filed, the appellant has been raising the claim of “*exemption*”, mention being made in this context, *inter alia*, to the provisions contained in Section 87 and 90 of ESI Act, at the hearing, the counsel for the appellant submitted that the issue actually is of “*inapplicability*” of the ESI Act, this with reference to the provision

contained in Section 1 (4), the cause of action for such petition as mentioned above to be brought before EI Court being on account of the demand raised by the ESIC it having the effect of recoveries being made without jurisdiction.

6. The learned counsel for the appellant also places reliance on another decision of the Supreme Court reported as *Srinivasa Rice Mills & Ors. vs. ESI Corpn. (2007) 1 SCC 705*.

7. *Per contra*, the counsel for ESIC submitted that the decision of Supreme Court in *Zuari Cement Limited* (supra) governs the field and there can be no request entertained by EI Court constituted under Section 75 of ESI Act to decide on the issue involved here which, according to his submission, is essentially that of “*grant of exemption*”.

8. Section 1 of ESI Act, 1948 deals, *inter alia*, with the subject of “*application*” of the enactment and its sub-section (4) provides as under:-

*“(4) It shall apply, in the first instance, to all factories (including factories belonging to the Government) other than seasonal factories:*

*Provided that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act”.*

9. It may be added here that the proviso to above-quoted sub-section 4 of Section 1 was inserted by amending Act (no. 29 of 1989) which had come into effect from 20.10.1989.

10. The ESI Act, by its eighth chapter (titled “*Miscellaneous*”), *inter alia*, provided for certain exemptions, the jurisdiction or the power to grant such exemption under the various provisions (Sections 87 to 91A) having been conferred upon the “appropriate government”. Section 87 and Section 90, which have come to be referred, read thus:-

*“87. Exemption of a factory or establishment or class of factories or establishments.—The appropriate Government may, by notification in the Official Gazette and subject to such conditions as may be specified in the notification, exempt any factory or establishment or class of factories or establishments in any specified area from the operation of this Act for a period not exceeding one year and may from time to time by like notification renew any such exemption for periods not exceeding one year at a time:*

*Provided that such exemptions may be granted only if the employees in such factories or establishments are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act:*

*Provided further that an application for renewal shall be made three months before the date of expiry of the exemption period and a decision on the same shall be taken by the appropriate Government within two months of receipt of such application.*

*90. Exemption of factories or establishments belonging to Government or any local authority.—The appropriate Government may, after consultation with the Corporation, by notification in the Official Gazette and subject to such conditions as may be specified in the notification, exempt any factory or establishment belonging to any local authority from the operation of this Act, if the employees in any such factory or establishment are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.”*

11. For clarity, it may be added that the two provisos to Section 87 were added by amending Act (no. 18 of 2010) which had come into effect on 01.06.2010. Further, prior to the amendment of Section 90 by the amending Act (no. 29 of 1989), whereby proviso was also added to Section 1(4), the provision contained in Section 90 also conferred a power on the appropriate government to consider the request for exemption to “*any factory or establishment*” belonging to “*the government*”, the reference to a factory or establishment controlled by a government having been omitted. The corresponding amendment to Section 1(4), by insertion of proviso, clearly demonstrates that in the case of establishment passing the muster of the said provision, there need not be an occasion to seek exemption under Section 90 *inasmuch* as by virtue of the amended provision of Section 1 (4), the law contained in ESI Act would not even apply “*in the first instance*” to such a factory or establishment, provided, of course, it is able to demonstrate that its employees are in receipt of benefits “*substantially similar or superior to the benefits provided*” under ESI Act.

12. In *Narayan Chandra Rajkhowa* (supra), the case of the employees before EI Court was that there was no obligation to make a contribution for the ESI scheme in terms of the provision contained in Section 88 of ESI Act, which is similar to other above-mentioned provisions i.e. Sections 87 and 90. The petition before EI Court under Section 75 had been resisted and the issue of maintainability of such a petition before EI Court was answered thus:-

*“4. The learned counsel for the appellants, in support of these appeals, raised the question of jurisdiction of the ESI Court to entertain the application submitted by the respondent-employees and has urged that the only remedy available to the respondent-employees was to approach the Central Government for grant of exemption from the provisions of the Act under Section 88 of the Act. We do not find any merit in this contention. In our opinion, the High Court has rightly held that in view of the provisions contained in Section 75(1)(g) the ESI Court had jurisdiction to entertain the application that was submitted by the respondent-employees. Under Section 75(1)(g) the ESI Court has been conferred the jurisdiction “in respect of any contribution or benefit or other dues payable or recoverable under this Act or any other matter required to be or which may be decided by the Employees' Insurance Court under this Act”. The provisions contained in Section 88 whereby the appropriate Government can exempt any person or class of persons employed in any factory or establishment or class of factories or establishments to which the Act applies from the operation of the Act and Section 99-A which contains the power to remove difficulties would not, in our opinion, cover the dispute which was raised by the respondent-employees which involves adjudication of the dispute whether the benefits which were being availed of by them prior to the application of ESI Scheme to them were more advantageous than those under the ESI Scheme. The said dispute could only be adjudicated upon by the ESI Court, especially because the jurisdiction of the civil court has been barred under Section 75(3) which prescribes that no civil court shall have jurisdiction to decide or deal with any question or dispute as aforesaid or to adjudicate on*

*any liability which by or under this Act is to be decided by a medical board, or by a medical appeal tribunal or by the Employees' Insurance Court”.*

13. In *Zuari Cement Limited* (supra), the State government had rejected the application of an establishment for exemption for certain period placing reliance on Section 87 of ESI Act. In the wake of issuance of demand notices by ESIC, after the said decision, the EI Court was approached by a petition under Section 75. Eventually, the matter reached the Supreme Court and the issue raised there was similar to the one which has been agitated before the EI Court in the matter at hand. A bench of two Hon’ble Judges of the Supreme Court in *Zuari Cement Limited* (supra) ruled thus:-

*“9. As per the scheme of the Act, the power to grant exemption is a plenary power given to an appropriate Government. It follows that the ESI Court constituted under Section 74 of the Act has no jurisdiction to take up the question of grant of exemption. The Court constituted under Section 74 of the Act cannot decide such matters including the validity of an exemption notification. The order granting or denying exemption is certainly open to judicial review under Article 226 of the Constitution of India. But the question of exemption under Section 87 cannot be raised under Section 75 of the Act and the ESI Court constituted under Section 74 of the Act, cannot decide the legality or otherwise of an order relating to exemption passed by the appropriate Government.”*

14. Noticeably, the previous decision in *Narayan Chandra Rajkhowa* (supra), also a judgment rendered by the bench of two Hon’ble Judges, was not noted in *Zuari Cement Limited* (supra).

15. Be that as it may, the prime distinction between a claim for “*exemption*” under the provisions contained in eighth Chapter of ESI Act and an objection to the “*inapplicability*” in terms of Section 1(4) of ESI Act seems to have been missed in the present case by the EI Court. It seems to have fallen into error by observing (at second page of the impugned order) that the claim is for exemption from ESI Act on the ground that the benefits by the appellant are “*substantially similar and superior to the benefits given*” by ESIC.

16. No doubt, the test on which exemption is granted under Section 87 of ESI Act is similar to the one indicated by the proviso to Section 1 (4). But then, in order to be constrained to apply for exemption from the appropriate government, it is essential that the law must be “*applicable*” to the establishment “*in the first instance*”. The prayers made by the appellant in the petition brought before EI Court read thus:-

*“a) Declare that the ESI Act, 1948 is not applicable to the petitioner as the benefits made available to the employees of the petitioner are substantially similar or superior to the benefits provided under the ESI Act; and*

*b) Declare that the ESI Act, 1948 is not applicable to the petitioner as the wages being given to the employees of the petitioner is more than the wages prescribed in Rule 50 of the Employees’ State Insurance (Central) Rules, 1950; and*

*c) Declare that the ESI Act, 1948 is not applicable to the petitioner as the employees of petitioner are not covered under the definition of “employee” provided in Section 2(9) of the ESI Act, 1948 read with Rule 50 of the Employees’ State Insurance (Central) Rules, 1950; and*

- d) *Direct the respondents to return Rs. 99,99,687/- to the petitioner which was illegally recovered by the respondents from the petitioner; and*
- e) *Direct the respondents also to pay interest at the rate of 18% per annum on Rs. 99,99,687/- from 04.08.2016 till the date of return of the above sum to the petitioner,”*

(emphasis supplied)

17. From the above, it is clear that the appellant is not seeking exemption, its request instead being for a “*declaration*” that it was not covered by provision of the ESI Act and, therefore, not obliged to be answerable to ESI, the recoveries having been made by ESIC without jurisdiction.

18. More or less a similar dispute had arisen in *Srinivasa Rice Mills* (supra) and the following observations of the Supreme Court should guide the decision on the appeal at hand:-

*“18. Before an Act is made applicable, in the event a dispute is raised, the authorities exercising statutory power must determine the jurisdictional fact. Applicability of the Act would be a jurisdictional question. The employer is entitled to raise such a question before the appropriate authority. Such a question can also be raised for the first time before a court exercising the power of judicial review although ordinarily the same should be raised before the authority concerned as a preliminary issue. (See Express Newspapers Ltd. v. Workers & Staff [AIR 1963 SC 569] , AIR para 15)”*

19. Section 75 of the ESI Act indicates the matters that fall within the jurisdiction of EI Court. The said provision, to the extent relevant here may be quoted thus:-

*“75. Matters to be decided by Employees' Insurance Court.— (1) If any question or dispute arises as to—*

*xxx*

*(g) any other matter which is in dispute between a principal employer and the Corporation, or between a principal employer and an immediate employer, or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues payable or recoverable under this Act, or any other matter required to be or which may be decided by the Employees' Insurance Court under this Act*

*such question or dispute subject to the provisions of sub-section (2-A) shall be decided by the Employees' Insurance Court in accordance with the provisions of this Act.”*

*(emphasis supplied)*

20. Indeed, the objection to the jurisdiction of ESI to issue demand notices on account of the claim of the appellant being covered by the proviso to Section 1 (4) of ESI Act falls within the domain and jurisdiction of EI Court inasmuch as it is a matter which is in dispute between the principal employer (appellant) on one hand and the corporation (respondent) on the other and concerns the issue of dues “*recoverable*” under the law.

21. In the factual matrix, this Court is of the view that the decision of the Supreme Court in *Zuari Cement Limited* (supra) cannot come in the way for the simple reason that the issue brought by the appellant before EI Court is of jurisdiction of ESI and not for any exemption.

22. For the foregoing reasons, the impugned order is set aside. The petition of the appellant under Section 75 of Employees' State Corporation Act, 1948 before the EI court stands restored and revived to be considered on its merits in accordance with law.

23. The parties are directed to appear before EI Court on 1<sup>st</sup> November, 2019.

24. The appeal is disposed of in above terms.

**R.K.GAUBA, J.**

**OCTOBER 10, 2019**

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