IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.08.2021

CORAM:

THE HON'BLE MR.JUSTICE M.S.RAMESH

W.P.NO.10461 OF 2011

Salem District Consumers Co-operative
Wholesale Stores Ltd.,
Rep. by Special Officer,
Sitaraman Road,
Salem - 636 009. ...Petitioner

vs.

1.Principal Secretary to Government,
Labour and Employment (L1) Department,
Fort St. George, Chennai - 600 009.

2.The Regional Director,
Employees State Insurance Corporation,
143, Sterling Road,
Nungambakkam, Chennai - 600 034.

3.The Assistant Director,
Sub-Regional Office,
Employees State Insurance Corporation,
33/57, Three Roads,
Salem. ...Respondents

Prayer:

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus to call for the records in G.O.(D).No.579 on the file of the Principal Secretary to Government, Labour and Employment (L1) Department, Fort St. George, Chennai - 600 009, the 1st respondent herein, to quash the order dated 09.11.2010 passed therein and to grant exemption to the petitioner from the provisions of the Employees State Insurance Act under Section 88 r/w. Section 91A of the Employees State Insurance Act for the period 01.04.2006 to 31.03.2008.

For Petitioner : Mr.M.R.Raghavan

For Respondents : Mr.K.V.Sajeev Kumar
Government Counsel for R1
Mr.C.V.Ramachandra Murthy
for R2 & 3

ORDER

By consent of both the parties, this writ petition is taken up for final disposal.

2. The petitioner's application seeking for exemption under Section 88 read with Section 91A of the Employees' State Insurance Act, 1948, (hereinafter referred to as 'ESI Act') has been rejected, through the impugned order passed by the Government in G.O.(D).No.579, Labour and Employment (L1) Department, dated 09.11.2010, which is put under challenge in the present writ petition.

3. One of the predominant grounds raised by the learned counsel for the petitioner is that earlier, the Government had granted exemption on 16.03.2005 under Section 88 r/w Section 91A of the ESI Act to the permanent employees of the respondent for the period between 01.04.2005 and 31.03.2006 and since the grounds for rejection in the present impugned order were also available at that relevant point of time, when the earlier exemption was granted, the Government is not justified in rejecting their request for exemption. The learned counsel further submitted that since the management is following a scheme, whereby, substantive medical benefits are being extended to their employees, the Government ought to have positively considered their request for exemption from the Act.

4. On the contrary, the learned Government Counsel appearing for the first respondent would submit that the benefits under the ESI Act is much more beneficial than the benefits provided under the Management Scheme and therefore, the petitioner's request for exemption has been rejected. The learned counsel pointed out the comparison made in the impugned order with regard to the benefits provided under the Act in this regard. He would also point out to Section 91A and submitted that the exemption can be sought for only prospectively, whereas the request made by the petitioner was for a retrospective period, which is impermissible.

5. The learned counsel for the respondents 2 and 3 relied upon a decision of a learned single Judge of the Nagpur Bench of Bombay High Court in the case of Deputy Regional Director, ESIC Vs. M/s.Navyug Minerals reported in 2005 (3) LLJ 71 and submitted that just because the Government had granted exemption for the earlier period, it would not give a right to the petitioner to claim exemption for the subsequent periods also.

6. I have given careful consideration to the submissions made by the respective counsels.

7. The powers of the Government to grant exemption under Sections 88 and 91A of the ESI Act is a discretionary power. The very language implicated in the provision reveals such a discretion. Likewise, Section 91A of the Act provides that such exemption, if granted, would take effect prospectively. For the sake of clarity, the relevant provisions of Section 88, 91 and 91A are extracted hereunder:-

> Section 88 - Exemption of persons or class of persons.
> The appropriate government may, by notification in the Official Gazette and subject to such conditions as it may deem fit to impose, exempt any person or class of persons employed in any factory or establishment, or class of factories or establishments to which this Act applies from the operation of the Act.
>
> Section 91 - Exemption from one or more provisions of the Act.
> The appropriate government may, with the consent of the Corporation, by notification in the Official Gazette, exempt any employees or class of employees in any factory or establishment or class of factories or establishments from one or more of the provisions relating to the benefits provided under this Act.
>
> Section 91A - Exemptions to be either prospective or retrospective.
> Any notification granting exemption under section 87, section 88, section 90 or section 91 may be issued so as to take effect either prospectively or retrospectively on such date as may be specified therein.

8. It cannot be disputed that the powers vested with the Government under Section 88 and 91 is discretionary in nature,

particularly, in the light of the word "may" used in Section 88 and 91. In the instant case, we are concerned with the exemption sought for by the petitioner under Section 88 of the Act.

9. It is a settled proposition that while exercising such discretionary powers, the scope of interference by the High Court under Article 226 of the Constitution of India, is very limited. In other words, it would not be appropriate for this Court to issue mandatory directions to the Government to exercise such a discretion. It is also a settled proposition that such discretion requires to be exercised in a judicious manner.

10. The learned counsel for the second and third respondents relied upon a decision in M/s.Navyug Minerals (supra), wherein it was held that merely because of the earlier exemption, there cannot be a subsequent automatic exemption. The relevant portion of the order reads as follows:-

> "Considering his own admission and undisputed position on the record, according to me, the learned Judge ought not to have exempted the respondent from the liability of paying contribution as required under the provisions of the E.S.I. Act. According to me, if specific provision is made for issuing specific Notification under the Specific Act, there is no question of exemption by an implication, merely because earlier the said factory was exempted from the purview of E.S.I. Act. In my view, in absence of the specific Notification for the factory of the respondent, on the basis of the general statement as referred and relied, that itself cannot be the foundation for automatic exemption, in the facts and circumstances of the case, specially when the respondent had applied for exemption in respect of the said Notification and prayed for exemption. The non-availability of medical facilities, may be an irregularity, but that cannot be the reason to grant total exemption from payment of contribution under the E.S.I. Act."

11. Incidentally, the Hon'ble Supreme Court in the case of Zuary Cement Ltd. Vs. Regional Director, E.S.I.C and others reported in (2015) 7 SCC 690 has held that as per the scheme of the Act, the appropriate Government alone could grant or refuse exemption and that, when the statute prescribes the procedure

for grant or refusal of exemption from the operation of the Act, it is to be done in that manner alone and not in any other manner.

12. In the light of the above observations, the impugned order passed by the Government dated 09.11.2010 was perused. The main reason assigned by the petitioner invoking Section 91 is that they have floated a scheme of their own, by which, various mental benefits are being extended to their employees and therefore, they have sought for exemption of their employees from the provisions of the ESI Act. The Government had made a comparative study of the benefits under the ESI scheme together with the scheme floated by the management and had then come to the conclusion that the scheme under the Act is more beneficial to the employees of the petitioner, than the scheme provided by the management. The comparative study touches upon 12 areas of the scheme provided by the management.

13. To sum up the comparison, it was found that the ESI scheme provides for sickness benefits for 91 days in a year when compared to the 18 days provided by the management. Apart from the sickness benefits, the ESI scheme provides for long term cash benefits for diseases upto a maximum period of 730 days as against the 240 days of accrued earned leave on medical grounds provided by the management. The sickness benefits under the ESI scheme extends to both men and women together with cash benefits and full medical care, which is absent under the management scheme. There is no compensation provided for loss incurred during injury or accident by the management, whereas the ESI scheme provides for the same. The dependant's benefits and maternity benefits under the ESI scheme is far more beneficial than the management Scheme. The full medical care given under the ESI hospitals/dispensaries and through tie-up arrangements with accredited private hospitals is not a benefit extended by the management. Apart from these benefits, the ESI scheme takes care of funeral expenses, RGKSY unemployment allowance, confinement expenses, vocational rehabilitation and physical rehabilitation, which features are not beneficially provided under the management scheme.

14. Thus, while exercising the discretion under Section 91 of the Act, the Government has made a comparative study, by substantiating the beneficial features available under the ESI Act and has therefore had come to the judicious conclusion that such features are much more beneficial than the scheme provided by the management and thereby have rejected the petitioner's request.

15. I do not find any reason to interfere with the discretion exercised by the Government in this regard. The very object of the ESI Act is to provide certain benefits to the employees covered under the Act, in cases of sickness, maternity and employment injury. When most of the benefits of the scheme seem much more beneficial than the management scheme, I do not find any logical reason to deprive the employees of the petitioner from such benefits by directing the Government to grant exemption. Since the Government has exercised its jurisdiction in a judicious manner, the impugned order cannot be found fault with.

16. There is yet another aspect of the matter. Section 91A of the Act provides for prospective exemption. In the instant case, the petitioner has sought for retrospective exemption through his application dated 05.06.2008, whereby, they have sought for exemption for the period from 12.02.1978 to 31.03.2005. Since Section 91A does not provide for retrospective exemption, the application itself seeking for retrospective exemption cannot be sustained.

17. For all the foregoing reasons, I do not find any merits in the present writ petition and accordingly, the same stands dismissed. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

hvk

To

1.The Principal Secretary to Government,
Labour and Employment (L1) Department,
Fort St. George, Chennai - 600 009.

2.The Regional Director,
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143, Sterling Road,
Nungambakkam, Chennai - 600 034.

3.The Assistant Director,
Sub-Regional Office,
Employees State Insurance Corporation,
33/57, Three Roads,
Salem.

+1cc to Mr.C.V.Ramachandra Murthy, Advocate, S.R.No.41009
+1cc to Mr.M.R.Raghavan, Advocate, S.R.No.40959
+1cc to the Government Pleader, S.R.No.41490

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GPL(CO)
PM/16/09/2021