IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.10.2021

CORAM

THE HON'BLE MR.JUSTICE P.D.AUDIKESAVALU

W.P.NO.34525 OF 2012
AND
M.P.NO.2 OF 2012

V.Naaharaj ...Petitioner

-vs-

1. The Recovery Officer,
   Employees' State Insurance Corporation,
   39/57, Theerthamalai Vaniga Valagam,
   Three Roads,
   Salem - 636 009

2. The Manager,
   Bank of Baroda,
   Attur Branch,
   1250, Salem - Cuddalore Main Road,
   Attur – 636 102,
   Salem District. ...Respondents

Prayer:-

Writ Petition filed under Article 226 of the Constitution of India, 1950, praying to issue a Writ of Certiorari, praying to call for the records relating to proceeding No. SLM/ESI/Recy/CP-3/63-22093/RR Cell dated 05.06.2012 on the file of the First Respondent herein and quash the same.

For Petitioner : Mr. D.Sathya for Mrs. Zeenath Begum

For Respondents: Mr. T.N.C.Kaushik (for R1)
No appearance (for R2)

O R D E R
(through video conference)

Heard Mr. D.Sathya, Learned Counsel for the Petitioner and Mr. T.N.C.Kaushik, Learned Counsel for the First Respondent and perused the materials placed on record, apart from the pleadings of the parties.

2. The Writ Petition impeaches the Prohibitory Order No. SLM/ESI/Recy/ CP-3/63-22093/RR Cell dated 05.06.2012 passed by the First Respondent under Rule 26(1) of the Second Schedule to the Income Tax Act, 1961 read with Section 45-H of the Employees' State Insurance Act, 1948 (hereinafter referred to as 'the ESI Act' for short). Though the impugned order mentions that the Petitioner has failed to pay the arrears due with interest in respect of the Certificate bearing No. SLM/INS/63-22093/C19 dated 'various' in Form No.C-19/C-19(INT)/D-19 forwarded by the Authorized Officer, Employee State Insurance Corporation, Salem Sub-Region, Salem amounting to Rs. 4,52,326/- (Rupees Four Lakh Fifty Two Thousand Three Hundred and Twenty Six only) and the interest payable under Sub-Section 5(1) of Section 39 of the ESI Act (as amended) for the period commencing immediately after the dates specified therein, **(*)the** details of the assessment of contribution towards the employees insurance dues and the relevant periods for which it is claimed has not been reflected either in the impugned order or in the Counter-Affidavit dated 20.11.2019 that has been filed.

3. In reply to the queries raised in that regard during the earlier hearing on 24.08.2021, the First Respondent has filed an additional counter-affidavit dated 27.09.2021 stating that the amount claimed in the impugned order pertains to assessments made for various periods under Section 45-A of the ESI Act which had culminated in the orders dated 11.04.1988, 04.06.1993, 27.04.2001 and 20.06.2001, the receipts of which are said to have been acknowledged by the Petitioner. In this context, it must be recapitulated here that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise as ruled by the Constitutional Bench of the Hon'ble Supreme Court of India in Mohindhr Singh Gill -vs- Chief Election Commissioner, New Delhi [(1978) 1 SCC 405]. Moreover, the Petitioner has raised a factual contention in the affidavit filed in support of the Writ Petition and has produced documents to show that there have been remittance of contribution towards employees insurance dues when demanded. In other words, there are disputes between the parties as to the existence and calculation of the arrears of the employees insurance dues, which is sought to be recovered by the impugned order prohibiting the Petitioner from operating its bank account with the Second Respondent. Further, there is also considerable force in the grievance ventilated by the Petitioner regarding the hasty manner in which the First Respondent has proceeded with recovery action in contravention of the relevant statutory provisions governing the recovery process.

4. It must, at once, be pointed out that the authorities under the ESI Act cannot have unbridled power to flout the prescribed procedure for recovery infringing the safeguard provided in Article 300-A of the Constitution of India, which mandates as follows:-

> "300-A. Persons not to be deprived of property save by authority of law:-
> No person shall be deprived of his property save by authority of law."

It cannot be gainsaid that the right to property of a person can be taken away only by a procedure established by law, which has to be fair and reasonable and not arbitrary. At this juncture, it would be appropriate to quote the relevant passages from the decision of the Hon'ble Supreme Court of India in Ram Kishun -vs- State of Uttar Pradesh [(2012) 11 SCC 511], which read as follows:-

> "Recovery of public dues
> 13. Undoubtedly, public money should be recovered and recovery should be made expeditiously. But it does not mean that the financial institutions which are concerned only with the recovery of their loans, may be permitted to behave like property dealers and be permitted further to dispose of the secured assets in any unreasonable or arbitrary manner in flagrant violation of the statutory provisions.
> 14. A right to hold property is a constitutional right as well as a human right. A person cannot be deprived of his property except in accordance with the provisions of a statute. (Vide Lachhman Dass -vs- Jagat Ram [(2007) 10 SCC 448] and State of M.P. -vs- Narmada Bachao Andolan [(2011) 7 SCC 639]. Thus, the condition precedent for taking away someone's property or disposing of the secured assets, is that the authority must ensure compliance with the statutory provisions."

Referring to the same, the Hon'ble Supreme Court of India in the decision in Mathew Varghese -vs- M.Amirtha Kumar [(2014) 5 SC 610] has held as follows:-

> "43. The above principles laid down by this Court also make it clear that though the recovery of public dues should be made expeditiously, it should be in accordance with the procedure prescribed by law and that it should not frustrate a constitutional right, as well as the human right of a person to hold a property and that in the event of

> a fundamental procedural error occurred in a sale, the same can be set aside."

It also requires to be noticed that Section 45-H of the ESI Act which prescribes the procedure for recovery of employees insurance dues reads as follows:-

> "45-H. Application of certain provisions of the Income-Tax Act. — The provisions of the Second and Third Schedules to the Income-tax Act, 1961 (43 of 1961) and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time, shall apply with necessary modifications as if the said provisions and the rules referred to the arrears of the amount of contributions, interests or damages under this Act instead of to the income-tax:
> Provided that any reference in the said provisions and the rules to the " assessee " shall be construed as a reference to a factory or an establishment or the principal or immediate employer under this Act."

In the context of attachment of the bank account of the Petitioner with the Second Respondent for the recovery of the employees insurance dues by the First Respondent, it would be necessary to look into Rules 2, 3, 4, 5, 8, 11, 12, 13, 20, 21, 22, 26, 28, 30 and 47 of the Second Schedule to the Income Tax Act, 1961. On a conspectus of those legal provisions, it becomes clear that the concerned authorities under the Act would have to ensure that the following requirements must be fulfilled while taking any recovery action:-

(i) A notice would have to be served upon the defaulter to pay the specified amount within 15 days from the date of its service and intimating that in default, steps would be taken to realize that amount.

(ii) No steps in execution shall be taken until the period of 15 days has elapsed from the date of service of the notice requiring such payment.

(iii) However, if the defaulter is likely to conceal or remove or dispose of the whole or any part of his movable property, which would delay or obstruct the realization of the amount due, the Recovery Officer may attach the movable property by dispensing with the notice to the defaulter for reasons to be recorded in writing while passing such order.

(iv) When a defaulter, whose property has been so attached, furnishes security to the satisfaction of the Recovery Officer, such attachment shall be cancelled from the date of acceptance of the security by the Recovery Officer.

(v) Where any objection is made to the attachment of any property on the ground that the property is not liable to such attachment, the Recovery Officer would have to investigate into that objection on the basis of the evidence adduced by the objector in that regard.

(vi) Where the Recovery Officer on such investigation comes to the conclusion that the property attached is not owned by the defaulter, such part of the property shall be released from the attachment made.

(vii) A warrant of attachment signed by the Recovery Officer with his name specifying the name of the defaulter and the amount to be realized shall be served on the defaulter.

(viii) The Recovery Officer shall proceed to attach the movable property of the defaulter only if the amount mentioned in the warrant is not paid forthwith.

(ix) In the case of debt or other movable property not in the possession of the defaulter, the attachment has to be in writing prohibiting the creditor from recovering the debt and the debtor from making payment thereof or giving it over to the defaulter until further order from the Recovery Officer and a copy of such order shall be furnished to the defaulter and the person in possession of the debt.

(x) Where the property attached is currency notes, it shall be credited to the Central Government and the amount so credited shall be adjusted towards employees insurance dues and other amounts recoverable from the defaulter and the balance, if any, remaining shall be paid to the defaulter.

It would assume significance that every stage of the recovery proceedings contemplates to afford an opportunity to the defaulter to either remit the dues or place his objection with supporting materials in that regard in consonance with the principles of natural justice before proceeding further. Such protection statutorily guaranteed to ensure the salutary object that justice **(*)is** not only done, but also manifestly seen to be done, cannot be lost sight in the anxiety to complete the recovery process by the authorities under the ESI Act.

5. Apart from the fact that the impugned order does not contain the details of the assessment orders for which the recovery

proceedings have been initiated, the First Respondent has not placed any materials before this Court to show that the First Respondent has waited for a period of 15 days after calling upon the Petitioner to remit the amount claimed to be due. Similarly, no order containing reasons for dispensing with such notice informing the Petitioner before attaching its bank account, has been produced. There is also nothing to show that the Petitioner was simultaneously informed of the attachment of its bank account. Such non-compliance would necessarily mean that the required opportunity to remit the dues before effecting attachment of the amount in the bank account of the Petitioner had not been granted. That apart, the scheme for recovery postulates that objections could be made in respect of the attachment which would have to be investigated by the Recovery Officer. In this case, no time had been granted for raising such objections and on the other hand, the First Respondent has been warned in the attachment orders itself that if payment of the attached amount had not been made, recovery would be made from the Second Respondent as if it was the defaulter for payment of the arrears of employees insurance of the Petitioner that had fallen due. Such coercive methods of recovery adopted by the First Respondent in glaring transgression of the rule of law cannot be countenanced.

6. The result of the foregoing discussion is that the impugned order is set aside and the matter is remitted back to the First Respondent to follow the prescribed procedure for recovery of employees insurance dues claimed from the Petitioner in accordance with law as explicated in this order.

In the upshot, the Writ Petition is disposed on the aforesaid terms. Consequently, the connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CS VII)
(21.10.2021)

(*) Corrected order to go
Sd/-
Sub Assistant Registrar
(28.10.2021)

//True Copy//

Sub Assistant Registrar

vjt/dm

To

1. The Recovery Officer,
   Employees' State Insurance Corporation,
   39/57, Theerthamalai Vaniga Valagam,
   Three Roads,
   Salem - 636 009

2. The Manager,
   Bank of Baroda,
   Attur Branch,
   1250, Salem - Cuddalore Main Road,
   Attur – 636 102,
   Salem District.

To be Substituted to the order already despatched on 22.10.2021

+1cc to M/s.Zeenath Begum, Advocate, S.R.No.53258

W.P. No. 34525 of 2012

PVS(CO)
PM/21/10/2021

RGA(28/10/2021)