

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Raja Basu Chowdhury

WPA 23983 of 2019

Development Consultants Private Limited & Anr.
Vs.
The State of West Bengal & Ors.

For the petitioners: Mr. Jayanta Dasgupta,
 Mr. Balaram Patra

For the State : Mr. Narayan Chandra Bhattacharya
 Ms. Sujata Ghosh

For the respondent: Mr. Shiv Chandra Prasad
no. 3

Heard on : 15.09.2022

Judgment on : 15th December, 2022

Raja Basu Chowdhury, J:

1. The present writ application has been filed *inter alia* praying for a direction upon the respondent nos. 1 and 2 to grant exemption under Section 87 of the Employees' State Insurance Act, 1948 (hereinafter referred to as the "said Act") for the period April 2019 to March 2020. The petitioner no.1 is an existing company incorporated under the Companies Act, 1956. The petitioners claim that all its employees and their

family members are eligible for medical treatment at the cost of the petitioner no.1 at Sri Aurobindo Seva Kendra at 1H, Gariahat Road (South), Jodhpur Park, Kolkata 700068, which is a modern, self-sufficient hospital having outdoor, indoor operation theatre with investigation facilities, including C.T. Scan and M.R.I. A management policy is also in place for providing medical treatment to the employees at the cost of the petitioner no.1, which also includes medical insurance. Details of facilities as are made available to the employees have been disclosed in the application.

2. Mr. Dasgupta learned advocate, appearing in support of the aforesaid application submits that the medical benefits offered by the petitioner no.1 are more beneficial and are superior to those as are made available under the Employees' State Insurance Scheme (hereinafter referred to the "said scheme"). The employees of the petitioner no.1 in the past had made representations, requesting the petitioner no.1 to seek exemption under Section 87 of the said act.
3. The respondent no. 2 had since on the basis of an application, in proforma – A, had granted the petitioner no. 1 an exemption, under section 87 of the said act, for the period 1st April, 2012 to 31st March, 2013. Since then, from time to time, the petitioner no.1 had applied in Proforma – A, detailing the

medical benefits and other allied facilities, provided to the employees of the petitioner no.1, and had sought for exemption under section 87 of the said Act. According to the petitioners, the benefits offered by the petitioner no.1, is far superior to those available under the said scheme. From time to time the respondent nos. 1 and 2, upon scrutinizing the applications made by the petitioners had granted exemption under section 87 of the said Act, at least till the year 2016-17. Unfortunately, despite there being no change in the circumstances, the application made by the petitioner no.1 on 28th December, 2016 for the period 2017-18, was rejected by an order dated 8th December, 2017. The aforesaid order was an unreasoned order, no opportunity of hearing was provided to the petitioners.

4. Challenging the aforesaid order dated 8th December, 2017 the petitioners had filed a writ application before this Hon'ble Court, being WP No. 4633 (W) of 2018. By a judgment and order dated 25th February, 2019 this Hon'ble Court upon taking note of the fact, that the aforesaid order was passed by the respondent no.2, without granting an opportunity of hearing to the petitioners, set aside the same by directing the respondent no.2 to consider the petitioners application for exemption under section 87 of the said Act, afresh, after granting an opportunity of hearing to the petitioners.

5. Drawing attention of this Court to section 87 of the said Act, Mr. Dasgupta submits that since no permanent exemption can be granted, an application for renewal of an exemption is required to be made, three months prior to the expiry of the period of exemption. In due compliance of the aforesaid provision, the petitioner no.1 had made an application for renewal of the exemption on 11th December, 2018 for the period 2019-20. Such an application was filed along with Proforma – A, which, *inter alia*, included a comparative statement, details of medical benefits and other allied facilities provided to the employees of the petitioner no.1, as is required for renewal. Additionally, declarations given by the employees of the petitioner no.1 stating they do not want to be covered by the said Act were also enclosed to such application. Notwithstanding, it was the obligation of the respondent no.2, to dispose off the said application within two months from receipt thereof, no steps having been taken by the said respondent, a reminder letter dated 11th April, 2019 was issued by the petitioner no 1.
6. Drawing attention of this Court to an order dated 5th July, 2019, Mr. Dasgupta submits that after more than six months from the date of making application in Proforma – A, the respondents without affording any opportunity of hearing to the petitioners, by a mechanical order, rejected the

petitioners' application dated 11th December, 2018, for renewal of exemption under section 87 of the said Act.

7. Referring to the aforesaid order, it is submitted, the decision that was taken by the respondent no.2, despite being based on consultation and an opinion of Employees' State Insurance Corporation (ESIC) dated 2nd April, 2019, the petitioners were not made privy to the same. No opportunity was given to the petitioners to appreciate the contents of the opinion of ESIC or to respond to the same, based on which the aforesaid order was passed. In support of the above contention reliance is placed on paragraphs 20 and 21 of the writ application to highlight, disclosure of a comparative statement, showing the medical benefits and other allied facilities provided by the petitioner no.1 to the employees' vis-a-vis the medical benefits and allied facilities provided under the ESI Scheme. Referring to paragraph 13 of the affidavit-in-opposition filed on behalf of the respondent nos. 1 and 2, it is submitted that the respondents have not denied the statement made by the petitioners in the aforesaid paragraphs under reference, the extent of availability of benefits to the workers of the petitioner no. 1 have also not been denied.

8. It is submitted that there is no change in pattern of the benefits offered to the employees of the petitioner no.1 and as such there was no case for denial of exemption as sought for.
9. Being aggrieved by the aforesaid order dated 5th July, 2019, the present writ application has been filed.
10. Drawing attention of the Court to a subsequent order dated 2nd March, 2021 issued by the respondent no.2, it is submitted that under similar circumstances, on the basis of an application made by the petitioners for the subsequent year, the respondent no.2 has extended the benefit of exemption under section 87 of the said Act, despite there being no change in the pattern of the benefits being offered to the employees of the petitioner no.1, in the subsequent year. The rejection of the petitioner no.1's application for grant of exemption is bad in law. In the factual backdrop, as aforesaid, the petitioners seek an order so as to direct the respondent no.2, to grant an exemption to the petitioners under section 87 of the said Act for the period April, 2019 to March, 2020. On the issue of applicability of principles of natural justice, reliance is placed on a judgment delivered in the case of **Lohiya Machines (L.M.L.) Karamchari Sangh and The State of U.P. and**

others.,¹ and Tata Yodogawa Ltd. and State of Bihar and others.,²

11. *Per contra*, Mr. Bhattacharya appearing for the respondent nos. 1 and 2, submits that there has been due compliance of the provisions of Sections 87, 88 and 89 of the said Act. The petitioners did not disclose all relevant documents. There is no irregularity on the part of the respondent no.2 in taking the views of the respondent no.3 prior to passing the order impugned. Scheme of the said Act provides for consultation with the respondent no.3. No documentary evidence has been produced by the petitioner no.1 to demonstrate that the benefits made available by the petitioner no.1 to its employees are superior to the benefits made available by the Corporation. The order passed by the respondent no.2 is a well-reasoned order and this Court ought not to interfere with such order in exercise of its power under judicial review. To highlight on the scope of grant of an exemption under Section 87 of the said Act and the authority of the appropriate Government to deal with the same, reliance has been placed on the judgment delivered in the case of **Zuari Cement Limited Vs. Regional Director, Employees' State Insurance Corporation, Hyderabad &**

¹ *Lohiya Machines (L.M.L.) Karamchari Sangh and The State of U.P. and others.*, [1999 (82) FLR 985]

² *Tata Yodogawa Ltd. and State of Bihar and others.*, [2008 (117) FLR 781].

Ors.,³. On the issue that unless prejudice is caused, failure to afford opportunity of hearing is not fatal, reliance has been placed on the judgment delivered in the case of **Dharampal Satyapal Limited Vs. Deputy Commissioner of Central Excise, Gauhati & Ors**⁴. It is submitted that mere ritual of affording hearing without possibility of a change in the decision of the case on merits, cannot render the decision bad, simply because no opportunity of hearing was granted. The principles of natural justice have to be addressed with the object, whether grant of such an opportunity would tantamount to an exercise in futility. Reliance is also placed on a judgment delivered in the case of **Aligarh Muslim University & Ors. Vs. Mansoor Ali Khan**⁵, in support of the contention, that unless the petitioner can demonstrate that he had suffered prejudice, mere allegation of violation of principles of natural justice is not sufficient to have the decision set aside. The order passed by the respondent no.2 is a well-reasoned order and should not be set aside on technical grounds.

12. Mr. Prasad learned Advocate, appearing for the respondent no.3, while adopting the submissions made by Mr. Bhattacharya, draws the attention of this Court to paragraph 9

³ *Zuari Cement Limited Vs. Regional Director, Employees' State Insurance Corporation, Hyderabad & Ors.*, (2015) 7 SCC 690.

⁴ *Dharampal Satyapal Limited Vs. Deputy Commissioner of Central Excise, Gauhati & Ors.* (2015) 8 SCC 519

⁵ *Aligarh Muslim University & Ors. Vs. Mansoor Ali Khan.* (2000) 7 SCC 529

of the affidavit-in-opposition filed by the respondent no.3 and submits that the claim for grant of an exemption, cannot be sought for as a matter of right. The same is a privilege. He says that an exemption can only be granted prospectively. He further submits that after notifying the Employees State Insurance (Amending) Act, 2010, (hereinafter referred to the Amending Act, 2010) section 91A of the said Act has been amended, to grant exemption prospectively. It is also argued that previously an exemption could be granted both prospectively as also retrospectively. By notifying the Amending Act, the word 'retrospectively' has, in effect been removed from section 91A of the said Act. As such, since exemption can only be granted prospectively, the issue at hand has become academic, as the period for which exemption was sought for, has already lapsed. He says that benefits are better available under the said scheme than those made available by the petitioners and that exemption cannot be claimed as a matter of right.

13. In reply, Mr. Dasgupta, submits that by the Repealing and Amending Act of 2016 (hereinafter referred to 'The Repealing Act') published in the Gazette of India dated 9th May, 2016, the Employees' State Insurance (Amendment) Act 2010 as a whole has been repealed. Consequent upon repealing of the aforesaid Amending Act, 2010, the original provision of Section 91A

stands restored and as such there cannot be any embargo on the respondent no.2 to take a decision and retrospectively grant the exemption.

14. I have considered the submissions made by the advocates appearing for the respective parties and the materials on record. Looking at the sequence of events, it would appear, that the respondent no.1, between April 2012 and March 2017, had granted exemption under Section 87 of the said Act. Again, by an order dated 2nd March, 2021, similar exemption had been granted under section 87 of the said Act, with effect from 1st April, 2020 till 31st March, 2021.
15. From a perusal of the order dated 2nd March, 2021, which has been handed over by Mr. Dasgupta in Court, it would appear, that the respondent no.2 while granting the exemption for a subsequent period has, *inter alia*, observed as follows: -

“And whereas, before arriving at conclusion, the applicant authority i.e. M/s. Development Consultants private Limited was given opportunity of hearing on 18.01.2021 for presenting their case. Both parties, i.e. M/s. Development consultants Private Limited and ESIC attended the said hearing on 18.01.2021 and their views were heard and their submissions were checked and examined.

And whereas the scale and quality of medical benefits and allied facilities provided to the employees by the authority of M/s. Development Consultants Private Limited are satisfactory.

And whereas the employees are very much satisfied with the benefits provided for them by the authority of M/s. Development Consultants Private Limited and expressed willingness to continue to have medical benefits and allied facilities through existing system.”

16. It would be apparent from the aforesaid order that not only an opportunity of hearing was given to the petitioners but also to the respondent no.3 (ESIC). According to the petitioners, there is no change in the pattern of benefits that were made available to the employees of the petitioner no.1 in the year 2019 and in the year 2020-21. As such, the very basis and the foundation of the decision taken by the respondents in the year 2019, is in question. Although, it has been argued on behalf of the respondent nos. 1 and 2 that no documentary evidence had been disclosed by the petitioners, to demonstrate that the benefits made available to the employees of the petitioner no.1 are superior to those of ESIC, such stand does not hold much weight, especially, in the light of the subsequent grant of exemption under Section 87 of the said Act.

17. There is no dispute as regards the principles of law laid down in the cases cited by Mr. Bhattacharya. However, it is to be borne in mind that a judgement is an authority for what it decides. A slight variation in the facts may alter the basis of the entire judgment. In the case at hand, I find that the petitioners were not given an opportunity of hearing. The decision to deny exemption under section 87 of the said Act was taken by the authorities to the prejudice and detriment of the petitioners, by placing reliance on documents, opinion of (ESIC), without giving any opportunity to the petitioners, either to examine the same or to respond to the same. The aforesaid, in my opinion, is sufficient to vitiate the decision taken by the respondent no.2. Thus, it cannot be said that the petitioners were not prejudiced by non-disclosure of the aforesaid opinion of the ESIC or granting opportunity to the petitioners of being heard, at least for the purpose of responding to the opinion of ESIC would not have ultimately altered the final decision. It would be prejudging the objections of the petitioners, to say the least, at this stage if the petitioners are shut out from responding or objecting to the opinion given by respondent no.3, by holding that the objections would not have mattered much. Since the aforesaid opinion was relied by the respondent no.2 to deny the exemption to the petitioners, the least that was expected, was afford an opportunity to the

petitioners to respond to such opinion. In the present case, no such opportunity was provided. It is also well-settled that unless a statutory provision either specifically or by necessary implication excludes the application of the rules of natural justice, any exercise of power by any public or statutory authority prejudicially affecting a party, must be in conformity with the rules of natural justice. Since the order refusing to grant exemption prejudicially affects the petitioners' right, it cannot be said, the grant of opportunity to object to the report based on which the order refusing to grant exemption was passed, would not have made a difference.

18. Ordinarily I would have set-aside the order impugned on the short point as indicated above, however, since the matter has been argued extensively, I proceed to adjudicate all the issues raised herein.
19. From a perusal of the Gazette of India published on 9th May, 2016 it would be apparent that by The Repealing Act, the whole of Employees' State Insurance (Amendment) Act, 2010 has been repealed. At the same time notwithstanding the aforesaid repeal, section 4 of the Repealing Act provides for a saving clause. From a plain reading of section 4 of the Repealing Act it would appear, the same provides that the repeal shall not affect any of the enactments in which the repeal

enactment has been applied, incorporated, or referred to. The Repealing Act shall also not affect the validity, invalidity, effect or consequence of anything done or suffer or any right, title, obligation or liability already acquired or accrued or incurred etc. The Employees' State Insurance (Amendment) Act 2010 has already been applied and incorporated in the parent act. The effect of this Repealing Act read with section 6 A of the General clauses Act would make it clear that the Repealing Act does not have the effect of altering the existing law.

20. The above view finds support in a judgment delivered by the Hon'ble Supreme Court in the case of **Independent Schools' Federation of India (Regd.)**⁶, the Hon'ble Supreme Court while considering the impact of the Repealing and Amending Act 2016 in its application to The Payment of gratuity Act 1972, had also *inter-alia* relied on and had quoted with approval a paragraph from the Judgment delivered by this Hon'ble Court in the case of **Khuda Bux** ⁷:

“In Khuda Bux v. Manager, Caledonian Press, Chakravartti, C.J., neatly brings out the purpose and scope of such Acts. The learned Chief Justice says at p. 486:

“Such Acts have no Legislative effect, but are designed for editorial revision, being intended only to excise dead matter from the statute book and to reduce its volume. Mostly, they

⁶ *Independent Schools' Federation of India (Regd.) v. Union of India and Another*. 2022 SCC Online SC 1113.

⁷ *Khuda Bux v. Manager, Caledonian Press*. AIR 1954 Cal 484

expurgate amending Acts, because having imparted the amendments to the main Acts, those Acts have served their purpose and have no further reason for their existence. At times, inconsistencies are also removed by repealing and amending Acts. The only object of such Acts, which in England are called Statute Law Revision Acts, is legislative spring-cleaning and they are not intended to make any change in the law. Even so, they are guarded by saving clauses drawn with elaborate care,....”

21. It is therefore, clear that the main object of the Repealing Act was only to strike out the unnecessary acts by removing the dead matter from the statute in order to reduce its volume and lighten the burden so as to remove confusion from the public mind. The same also does not have the effect of reviving section 91A of the said act to its pre amended position.
22. Notwithstanding the aforesaid it would appear that the application for grant of an exemption from 1st April, 2019 to 31st March, 2020, was made on 11th December, 2018. The said application was not made claiming benefits retrospectively. The application was made prospectively. The order of rejection is also not based on refusal to grant exemption retrospectively. The writ petitioners also do not claim an exemption for any period prior to 1st April, 2019.

23. It is well settled that each action of the state must be informed and must disclose reasons. The order impugned not only suffers from irregularity in procedure but is also arbitrary.
24. A perusal of the pleadings of the instant writ application, would demonstrate that the responded no. 1 has not denied the positive assertion made by the petitioners, in the form of a comparative statement showing the medical benefits and allied facilities provided by the petitioner no.1 vis a vis the benefits available under the ESIC Scheme and that there is no change in pattern of benefits made available to the employees. I find that the respondent no.1 had granted exemption for the subsequent years to the petitioners, obviously, therefore, ought not to have rejected the application for grant of an exemption for the period April, 2019 to March 2020.
25. The respondents cannot thus be permitted to use two different yard sticks for the self-same unit, for two different periods, notwithstanding the medical benefits for the workers remaining the same. The respondent no. 1 having granted exemption under section 87 of the said Act, to the petitioner no. 1, for the period 1st April, 2020 to 31st March, 2021 could not deny such benefit to the petitioner no.1 for the period between 1st April, 2019 to March, 2020, especially when there is no change in pattern of medical benefits being made

available to the employees. Incidentally, the opinion of ESIC based on which the decision was taken has also not been disclosed by the respondents. As such the respondents are not entitled to rely on the same.

26. For reasons more fully discussed hereinabove, the order dated 5th July, 2019 is liable to be and is accordingly set aside. Consequentially, demands if any, raised by the respondents are also set aside. This Court directs the respondent nos.1 and 2 to reconsider the petitioners' application for grant of exemption under Section 87 of the said Act, for the period April 2019 to March 2020, afresh, after giving an opportunity of hearing to the petitioners, in light of the observations made herein.
27. With the aforesaid observations/directions the writ application, being WPA 23983 of 2019 is disposed of.
28. There shall, however, be no order as to costs.
29. Urgent Photostat certified copy of this order, if applied for, be given to the parties upon compliance of necessary formalities.

(Raja Basu Chowdhury, J.)