

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.22760 of 2017
(Through Hybrid mode)

Orissa State Housing Board

....

Petitioner

-versus-

***Deputy Director (Revenue), ESI
Corporation, Bhubaneswar***

....

Opposite Party

Advocates appeared in this case :

For Petitioner :

Mr. Somanath Mishra, Advocate
Mr. G. Tripathy, Advocate
Mr. K. R. Mohanty, Advocate

For Opposite Party :

Mr. A. P. Ray, Advocate

CORAM: JUSTICE ARINDAM SINHA

JUDGMENT
06.12.2022

1. The writ petition was heard on 3rd November, 2022 by this Bench. Paragraphs 1 and 2 from order dated 3rd November, 2022 are reproduced below.

“1. Mr. Mishra, learned advocate appears on behalf of petitioner and submits, sub-section (4) in section 1 in Employees State Insurance Act, 1948 has proviso saying that the sub-section does not apply to a factory or establishment under control of the Government, whose employees are otherwise in receipt of benefits substantially similar or superior to benefits

provided under the Act. In paragraph 3 of the writ petition the statements have been made invoking the provision. Counter has not been filed.

2. *Mr. Ray, learned advocate appears on behalf of the Revenue and draws attention to paragraph 3 in impugned order dated 27th June, 2017. The paragraph is extracted and reproduced below.*

“However, employer did not submit any documentary evidence to substantiate their contention. The State Government, Labour and ESI Department vide their letter No.SS-II/SC/14/2015/763/L&ESI, Bhubaneswar dated 2.2.2016 also communicated to the Secretary, Odisha State Housing Board, Bhubaneswar that proposal for exemption, prayed by the employer is also rejected on the ground that there is no merit for consideration.”

Mr. Mishra replies that exemption under section 87 is distinguishable from the provision under the proviso in section 1(4).”

Paragraphs 2, 3 and 4 from order dated 22nd November, 2022 are reproduced below.

“2. Mr. Mishra, learned advocate appearing on behalf of petitioner and submits, rejection of exemption sought by his client is not relevant for adjudication of the writ petition since, under sub-section (4) in section 1 of Employees’ State Insurance Act, 1948, it is to be first determined whether the Act applies to his client. This was not done. Instead, notice issued under section 45A.

3. *Mr. Ray, learned advocate appears on behalf of the Corporation. He draws attention to communication dated 2nd February, 2016 issued by the Under Secretary to petitioner. Text of the communication is reproduced below.*

“I am directed to invite a reference to your Letter No.14585 dated 29.11.2014. Memo No.6006 dated 23.07.2015 on the subject cited above and to say that Government after careful consideration have been pleased to order that proposal for exemption, prayed in the Letter under reference does not merit any consideration. Hence rejected.”

4. *Petitioner will produce letter no.14585 dated 29th November, 2014 and memo no.6006 dated 23rd July, 2015. The documents be produced in Court on copies served to Mr. Ray. The purpose is, in event petitioner had applied for exemption, the contention for their being adjudication on whether the Act applies to it, will be unnecessary on petitioner's own conduct of having applied for exemption under the Act.”*

2. Today Mr. Mishra produces letter dated 29th November, 2014. It appears the letter was from Land-cum-Administrative Officer to Under Secretary to Government, Labour and ESI Department, Government of Odisha. There is no dispute that the letter was addressed to the appropriate Government, who rejected the proposal for exemption prayed for therein.

3. Mr. Ray relies on judgment of the Supreme Court in **Employees' State Insurance Corporation vs. F. Fibre Bangalore (P) Ltd**, reported in (1997) 1 SCC 625, paragraph 5. He submits, petitioner did not apply to the Insurance Court, raising dispute. As such, there should not be interference with impugned order of determination made under section 45A.

4. Mr. Mishra, in reply, relies on **order dated 16th September, 2008**, passed by co-ordinate Bench in **OJC no.7374 of 2001 (Orissa Tourism Development Corporation vs. Employees' State Insurance Corporation and another)**. He submits, his client's case stands covered by said order.

5. Relevant paragraphs from order dated **16th September, 2008** (supra) are reproduced below.

"Mr. P. Ray, learned counsel appearing for the E.S.I. Corporation submits that the O.T.D.C. had represented before the State Government for grant of exemption from the purview of the E.S.I. Act and the same has been rejected by the State Government vide its order dated 12.10.1995, as per Annexure-A/1 to the Counter affidavit filed in the connected writ application i.e. W.P.(C) No.2339 of 2007. Accordingly it is submitted that the question of application of the provisions of E.S.I. Act to the establishment of O.T.D.C. can be effectively adjudicated by the appropriate E.S.I. Court under section 75(1)(g) of the

E.S.I. Act and this Court in exercise of its extra-ordinary writ jurisdiction should not adjudicate the same, when alternate statutory remedy is available.

Without going into the merits of the case one way or the other, the writ petition is disposed of with a direction to the petitioner to approach the E.S.I. Court with regard to their grievances by filing appropriate application/dispute within a period of two months. In case any such dispute is filed, the E.S.I. Court shall condone the delay, if any, and dispose of the dispute on merit, in accordance with law. The petitioner is at liberty to file appropriate application for interim protection, which shall also be considered by the E.S.I. Court on its own merit. No coercive action shall be taken against the petitioner for realization of the ESI dues till its application for interim protection is taken up by the ESI Court.”

It appears the order was on concession since, then learned counsel appearing for the corporation had submitted that question of application of provisions under the Act to the establishment of the Tourism Corporation, could be effectively adjudicated by appropriate ESI Court under section 75(1)(g) though, therein also there was rejection of grant of exemption. That being the position it is of no consequence that petitioner did not approach the ESI Court and instead moved this Court.

6. **F. Fibre Bangalore (P) Ltd** (supra) is not applicable since, the Supreme Court pronounced view of the full Bench of the High Court to be erroneous, which was, except where order under section 45A becomes final, in all other cases, the corporation is required to go to the Insurance Court, have it adjudicated and then make a demand. Paragraph 5 from the judgment is reproduced below.

“The Full Bench of the High Court has held that in a case where the order under Section 45-A becomes final, there is no need for the Corporation to seek adjudication before the Insurance Court. In all other cases, the Corporation is required to go to the Insurance Court, have it adjudicated and then make a demand. We are of the view that the Full Bench of the High Court is clearly in error to reach that conclusion. Though Section 75 of the Act does not envisage as to who has to approach the Insurance Court, by necessary implication when the employer denies the liability or applicability of the provisions of the Act or the quantum of the contribution to be deposited by the employer, it is for him to approach the Insurance Court and seek adjudication. It is not for the Corporation in each case whenever there is a dispute, to go to the Insurance Court and have the dispute adjudicated. Otherwise; the Act would become unworkable and defeat the object and purpose of the Act.”

(emphasis supplied)

7. On basis of the concession as reflected in **order dated 16th September, 2008** (supra), impugned demand for three weeks, to enable petitioner to approach the ESI Court. In event the approach is made, impugned demand will thereafter be deemed set aside and quashed. On no approach by petitioner, the stay will stand automatically vacated and the corporation thereupon to proceed pursuant to impugned demand, in accordance with law.

8. The writ petition is disposed of.

(Arindam Sinha)
Judge

Prasant

