IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :17.03.2022

CORAM

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

W.P.No.15792 of 2012
and
M.P.Nos.1 & 2 of 2012

M/s.Muruga Home Industries,
H.No.20/8, M.H.Complex,
S.N.High Road,
Tirunelveli. ..Petitioner

Vs.

1.Principal Secretary to Government
Labour and Employment Department,
Fort St.George, Chennai – 600 009.

2.Joint Director,
Sub Regional Office,
Employee's State Insurance Corporation,
Tirunelveli.

3.Regional Director,
Employee's State Insurance Corporation,
No.143, Sterling Road, Chennai – 600 034. ..Respondents

Prayer: Writ Petition filed Under Article 226 of the Constitution of India, praying to issue a writ of Certiorari, to call for the records from the file of the first respondent herein in G.O.No.(D). 165 dated 26.04.2012 and to quash the above mentioned G.O.No.(D). 165 dated 26.04.2012 issued by the first respondent.

For Petitioner : Mr.S.Jayaraman

For R1 : Mr.P.Ganesan
Government Advocate
For R2 & R3 : M/s.Jaya Kumari

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 87 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.165, Labour and Employment (L1) Department, dated 26.04.2012, 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 03.02.2010 under Section 87 r/w Section 91A of the ESI Act to the permanent employees of the respondent for the period between 01.04.2008 and 31.03.2009 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 87 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 87, 91 and 91A are extracted hereunder:-

> **Section 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 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.

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 87 and 91 is discretionary in nature, particularly, in the light of the word "may" used in Section 87 and 91. In the instant case, we are concerned with the exemption sought for by the petitioner under Section 87 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 26.04.2012 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 27.12.2011, whereby, they have sought for exemption for the period from 01.04.2008 to 31.03.2009. 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. Connected Miscellaneous Petitions are closed.

17.03.2022

Internet:Yes
Index:Yes
Speaking order
Pns

M.S.RAMESH, J.

Pns

To

1.Principal Secretary to Government
Labour and Employment Department,
Fort St.George, Chennai – 600 009.

2.Joint Director,
Sub Regional Office,
Employee's State Insurance Corporation,
Tirunelveli.

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