IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.03.2022

CORAM:

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

W.P.No.17948 of 2012
and
M.P.Nos. 1 & 2 of 2012

M/s.Mangalore Ganesh Beedi Works,
Door No.1, Yadavalar East Street,
Melapalayam,
Tirunelvi 627 005. ...Petitioner

vs.

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

2. Joint Director,
   Sub Regional Office,
   Employees State Insurance Corporation,
   Tirunelveli.

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

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari, to call for the records from the file of the first respondent herein in his G.O. bearing G.O.(D).No.155 dated 17.04.2012 and to quash the above mentioned G.O.(D).No.155 dated 17.04.2012 issued by the first respondent herein.

For Petitioner : Mr.S.Jayaraman

For Respondents : Mr.P.Ganesan for R1
Mrs.S.Jayakumari for R2 & R3

ORDER

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

2. The petitioner's request for exemption from the provisions of the Employees' State Insurance Act, 1948, under Section 87 read with Section 91-A for the period between 01.04.2012 to 31.03.2013, on the ground that the Management of the petitioner already have a scheme for Medical Insurance, came to be rejected, through the impugned order dated 17.04.2012, stating that the benefits provided by the ESI Corporation are superior in nature and more beneficial to the employees than the benefits provided by the Management. The claim for exemption based on a comparison of the Management claim as well for retrospective exemption had already came for consideration before this Court in the case of Salem District Consumers Co-operative Wholesale Stores Ltd., Vs. Principal Secretary to Government, Labour and Employment Department & others' in W.P.No.10461 of 2011 dated 17.08.2021, wherein it was held that the Government would be well within its powers to compare the benefits provided by the ESI Corporation and the Management and that retrospective exemption is impermissible. The relevant portion of the order reads as follows:

> "........
>
> 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. .......”

3. The aforesaid extract is self-explanatory. As such, the claim of the Management that the provisions of the ESI Act will not apply to them as well as their request for retrospective exemption under Section 91-A, cannot be sustained.

4. Accordingly, the Writ Petition stands dismissed. No costs. Connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

Pns

To

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

2. The Joint Director,
   Sub Regional Office,
   Employees State Insurance Corporation,
   Tirunelveli.

3. The Regional Director,
   Employees State Insurance Corporation,
   No.143, Sterling Road,
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+1cc to the Government Pleader, S.R.No.14627

W.P.No.17948 of 2012

AK(CO)
CT 18/03/2022