BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **30.08.2022**

CORAM:

THE HONOURABLE **MR.JUSTICE M.S.RAMESH**

W.P.(MD)No.16133 of 2022
and M.P.(MD)No.11664 of 2022

The Proprietor,
M/s.T.N.Abdul Kader Noor Sait
Beedi Company,
145A, Nethaji Road,
Melapalayam,
Tirunelveli – 627 005. ... Petitioner

/vs./

1.The Government of Tamiil Nadu,
Rep. by its Secretary to Government,
Labour Welfare and Skill Development
Development (L1) Department,
Fort St. George,
Chennai – 600 009.

2.Joint Regional Director,
Employees State Insurance Corporation,
Salai Street,
Vannarapettai,
Tirunelveli,
Tirunelveli District. ... Respondents

PRAYER**:** Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorarified Mandamus, calling for the records relating to the impugned GO (D) No.225, Labour Welfare and Sill Development (L1) Department dated 09.06.2021 issued by the 1st respondent and quash the same as illegal and consequently direct the 1st respondent to grant exemption to the petitioner from the provisions of the Employees' State Insurance Act. 1948, for the period from 22.10.2019 to 21.10.2020.

For Petitioner	:	Mr.M.Jerin Mathew
For Respondents	:	Mr.R.Ragavendran, Government Advocate for R1.

ORDER

The request of the petitioner herein to grant exemption from the provisions of The Employees' State Insurance Act, 1948, under Sections 87, 88 r/w 91-A for the period between 22.10.2019 and 21.10.2020, has been rejected, through the impugned Government Order (D)No.225, Labour Welfare and Skill Development (L1) Department, dated 09.06.2021.

2. In connection with the claim of the petitioner, I had the occasion to pass a judgment in ***M/s.Mangalore Ganesh Beedi Works Vs. Principal Secretary to Government, Labour and Employment Department, Fort***

St. George, Chennai, in ***W.P.(MD)No.17948 of 2012,*** whereby, a similar claim for exemption from the provisions of the Employee's State Insurance Act, 1948, by a Beedi manufacturing company was rejected, in the following manner:

> *"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. The nature of dismissal as well as the claim made by the petitioner is similar to that of the decision rendered by me in the aforesaid case. Accordingly, I do not find any reason to interfere to the impugned order whereby, the Government had decided that the benefits provided under the Employees' State Insurance Corporation are superior in nature and more beneficial to the insurance scheme of the petitioner. Hence, no interference is required in the impugned order.

4. Accordingly, this writ petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

30.08.2022

vsm
Index : Yes / No
Internet : Yes/No

M.S.RAMESH, J.

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To
1.The Secretary to Government,
Government of Tamiil Nadu,
Labour Welfare and Skill Development
Development (L1) Department,
Fort St. George,
Chennai – 600 009.

2.Joint Regional Director,
Employees State Insurance Corporation,
Salai Street,
Vannarapettai,
Tirunelveli,
Tirunelveli District.

Order made in
W.P.(MD) No.16133 of 2022

Dated:
30.08.2022