

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

WPA 13783 of 2017

The Ganga Manufacturing Co. Ltd.
Vs.
The Employees' State Insurance Corporation & Ors.

Mr. P. B. Chowdhury
Mr. S. K. Singh
Mr. R. K. Dubey
... For the petitioner.

Mr. S. C. Prasad
... For the ESI authority.

The present writ application has been filed inter alia challenging the order dated 19th February, 2015 passed by the Deputy Director, Employees' State Insurance Corporation (in short, ESIC), being the respondent no.3. The petitioner also challenges the demand notice dated 6th March, 2017, issued by the Recovery Officer of the ESIC, which is at page 67 of the writ application.

The petitioner claims to be the owner of a jute mill and is covered by the provisions of Employees State Insurance Act, 1948 (hereinafter referred to as the "said Act"). It is the petitioner's case that challenging the orders passed under Section 45A and 45AA of the said Act, the petitioner had moved before the Employees Insurance Court under Section 75 of the said Act and three separate

cases being ESI Case No. 122 of 2009, ESI Case No. 53 of 2013 and ESI Case No.6 of 2014 were registered.

The petitioner says that during the pendency of the proceedings before the Employees Insurance Court, the respondent no.1 introduced a scheme popularly known as 'New Amnesty Scheme 2014' (hereinafter referred to as the said Scheme), for withdrawal of criminal cases filed against insured persons and employers under Sections 84, 85 and 85A of the said Act and for settlement of cases filed by employers under Section 75 of the said Act.

Mr. Chowdhury, learned advocate representing the writ petitioner by drawing attention of this Court to page 48 of the writ application submits that since the petitioner had already filed proceedings before the Employees Insurance Court under Section 75 of the said Act, disputing the contributions payable by the petitioner and since the assessment made by the respondents was not made on actual basis, the petitioner became entitled to apply in terms of clause A(2) of the said Scheme. The petitioner says that the aforesaid scheme was extremely attractive since an employer who had raised dispute as regards contributions payable by him, was entitled to pay the contributions as per his records or in the alternative if no records could be produced and assessment having been made in respect of wages, other than wages shown in Regulation 32 Registrar, to pay contributions no less than

30% of the assessed amount provided assessment has not been made on actual basis.

He says that withdrawal of Court cases was made a condition precedent for applying under the said Scheme. By referring to Annexure 'A', which is at page 52 of the writ application, he says that the petitioner, as required, duly applied as per the said Annexure for withdrawal of the two pending cases before the Employees Insurance Court. It is submitted that on the basis of the applications made by the petitioner, by two separate orders dated 24th December, 2014 and 30th December, 2014, Employees Insurance Court was inter alia pleased to permit the petitioner to withdraw the cases, to avail the benefits under the Scheme, by adjusting the security given by the petitioner towards the claim. Consequently, upon withdrawal of the aforesaid Court cases by an application in writing dated 25th January, 2015 the petitioner had exercised its right to avail the benefits of the said Scheme. It is still further submitted that in compliance of the provisions of the said Scheme, the petitioner complied with the terms of deposit of 30 per cent of the total demand raised by the respondents. According to the petitioner, the respondents not only acknowledged the said application but also accepted the payments made by the petitioner. The petitioner says that subsequently, the petitioner was shocked to receive a communication dated

19th February, 2015 issued by the respondent no.3 whereby the petitioner's application for availing the benefits under the said Scheme had been rejected, *inter alia*, on the ground that the assessment in the petitioner's case had been made as per the Headquarters Instruction No. P-11/13/97-Ins IV dated 26th May, 2003.

Mr. Chowdhury submits that a perusal of the said Scheme would demonstrate that the respondents did not reserve in themselves any right to deny the benefits of the said Scheme to an applicant on the grounds other than those specified in the said Scheme. The ground cited by the respondents as regards assessment having been made as per the instruction issued by the headquarters, to deny benefit of the scheme is *dehors* the scheme itself. It is submitted that the respondents are discriminating against the petitioner. The petitioner has already altered its position and had withdrawn the pending cases. The petitioner had already complied with the terms of deposit of 30 per cent of the demand raised by the respondents, for availing the benefits under the said Scheme. The respondents having led the petitioner to alter its position to its disadvantage, cannot today turn around and deny the benefits of the said Scheme to the petitioner by citing grounds which does not constitute grounds as envisaged

in the said Scheme to deny the benefit of the said Scheme. In support of his contention he places reliance on a judgment delivered by the Hon'ble Supreme Court in the case of **S.V.A. Steel Rerolling Mills Limited and Others. -Vs.- State of Kerala and Others.**, reported in **(2014) 4 SCC 186**. It is submitted that the aforesaid order is violative of Article 14 of the Constitution of India and should be set aside. The petitioner says that the petitioner had complied with all formalities, as are required for availing the benefits under the said Scheme. By once again referring to clause A(2) of the said Scheme and its various paragraphs, it is submitted that there was nothing more required to be done, for the petitioner, for availing the benefits under the said Scheme. He says that the petitioner had since by letter dated 21st April, 2015 demanded justice, but the same has been denied. He prays that the respondents should be directed to afford the petitioner the benefits as are available under the said Scheme. He submits that after the application for availing benefits under the Scheme was turned down, the recovery officer taking advantage of withdrawal of the Court cases had levied a demand which is unjustified. He prays for quashing of the same.

Per contra, Mr. Prasad, learned advocate representing the respondents by relying on the affidavit-in-opposition submits that in the instant case, the

determination of dues has been made under Section 45A of the said Act on actual basis. He says that by merely paying 30 per cent of the demand, the petitioner cannot avoid its liability. He submits that the prayer for out of court settlement had already been rejected by the competent authority. It is submitted that there was a cut-off date for availing the benefits. Such date is long over. Today the clock cannot be turned back so as to direct the respondents to reconsider the case. He says that the present application is devoid of merits and should be dismissed.

I have heard the submissions made by the learned advocates for the respective parties and considered the materials on record. I find that the present application has been filed in effect for claiming benefits arising out of the said Scheme, introduced by the respondents. I find that the aforesaid Scheme not only provides for amnesty from criminal cases but also provides for settlement of cases filed by the employers under Section 75 of the said Act before the Employees Insurance Court. I find that the petitioner had filed separate proceedings before the Employees Insurance Court which were pending as on the date when the aforesaid Scheme was introduced. In this contest it would be profitable to refer to the relevant provisions of the Scheme:-

**“A. SETTLEMENT OF COURT CASES FILED
U/S. 75 AND APPEAL U/S 82**

1. DISPUTE OF COVERAGE – The Scheme shall include all cases filed in which the employer has disputed the coverage which may be settled subject to the following conditions:-

.....

If the factory is functioning and the employer produces genuine records to substantiate his plea regarding non-coverage or coverage from later date.

2. DISPUTE OF CONTRIBUTION – This Scheme shall also include cases in which the employer has disputed the determination or recovery of contribution in the Employees’ State Insurance Court, U/S 75 of the ESI Act and appeal u/s 82 Upto 31st December 2013, subject to the fulfillment of the following conditions:-

I) The employer shall file a petition before the court where he has raised the dispute and seek permission of Hon’ble Court for out of the court settlement of matter under litigation. If court allows, then the matter shall be settled as per this Scheme. The employer/IP shall apply for the scheme in the enclosed proforma of Annexure ‘A’.

II) The employer shall pay both the Employees’ and Employers’ share of contribution in full as per their records, which he shall produce before the assessing officers if the contribution has been assessed on assumed wages and he shall comply

with other provisions of the Act.

III) In case the relevant records are not available with the employer, they shall produce alternative records such as Income Tax Record etc and shall pay the contribution accordingly as per that record.

IV) However, if the employer is not able to produce any records and the assessment has been made in respect of wages other than the wages shown in Regulation 32 Register, he shall pay the contribution which shall not be less than 30% of the assessed amount of contribution. The cases where assessment has already been made or where the contribution has been assessed on actual bases will not fall under the purview of this Scheme.

V) The employer pays the Interest in full.

VI) No damages shall be levied.

VII) The employer shall also furnish an undertaking to the Corporation to the effect that he/she shall be regular in compliance in the provisions of ESI Act in future or else he/she shall forfeit the right to avail of such amnesty scheme.

.....

D. *The Scheme will also be available to those employers/insured persons who have already availed of the benefits of earlier Amnesty*

Schemes.

E. The New Amnesty Scheme-2014 will be in force from 28/1/2014 to 27/1/2015.”

From the aforesaid it would appear in order to avail the provisions of the aforesaid Scheme an applicant should be eligible as per the said scheme and is required to apply as per the enclosed pro-forma, forming Annexure ‘A’ to the said Scheme. The said pro-forma provides for withdrawal of Court cases. I find that the petitioner claims to be eligible as per the scheme and had duly applied as per Annexure ‘A’ in pro-forma for withdrawal of the pending Court cases before the Employees Insurance Court and on the basis of the application made by the petitioner and after hearing the advocates appearing for both the parties the Employees Insurance Court permitted the petitioner to withdraw the ESI Case No.122/2009 and 53/2013 by its orders dated 30th December, 2014 and 24th December, 2014 respectively. It does not appear from the aforesaid orders which form part of the aforesaid application that any objection was raised by the respondents. It would, however, appear from the provisions of the said Scheme that the same was to be in force from 28th January, 2014 to 27th January, 2015. The petitioner’s application claiming benefits under the said Scheme appears to be made within the time specified in the said Scheme. The petitioner had also while

applying in terms of the provisions of the said Scheme deposited 30 per cent of the demanded amount. In paragraph 8 of the writ application it has also been categorically asserted by the petitioner that the petitioner in order to avail the benefit of the aforesaid Scheme had complied with the necessary formalities like deposit of 30 per cent of the demanded amount. Such fact has not been denied by the respondents in their affidavit-in-opposition. I find that the ground provided in the order dated 19th February, 2015 for not accepting the petitioner's application does not find place in the said Scheme. In my view, the respondents having introduced the said Scheme and having permitted the petitioner to withdraw its cases pending before the Employees Insurance Court for availing benefits of the said Scheme, cannot subsequently turn around and reject the petitioner's application inter alia by holding that the assessment has been made as per the headquarters' instructions. I find that the orders forming subject matter of challenge before the Employees Insurance Court concerns two separate proceedings. In ESI Case No. 122 of 2009 arising out of tender case no. 61 of 2009, the order dated 23rd March, 2009 passed under section 45A of the said Act was under challenge, while in ESI Case No. 53 of 2013 arising out of Tender Case No. 63 of 2013, both the orders under section 45A and 45AA of the said Act, dated 30th November, 2012 and 25th March, 2013 respectively were under challenge.

Ordinarily, such orders are best-judgment assessments and are subject to final decision by the Employees Insurance Court. The scope of an order passed under Section 45A of the said Act has been discussed by the Hon'ble Supreme Court in the judgment delivered in the case of **ESI Corpn. -Vs. - C.C. Santhakumar**, reported in **(2007) 1 SCC 584**, wherein it has been, inter alia, observed as follows:

“25. Section 45-A of the Act contemplates a summary method to determine contribution in case of deliberate default on the part of the employer. By Amendment Act 29 of 1989, Sections 45-C to 45-I were inserted in the Principal Act, for the purpose of effecting recovery of arrears by attachment and sale of movable and immovable properties or establishment of the principal or immediate employer, without having recourse to law or the ESI Court. Therefore, it cannot be said that a proceeding for recovery as arrears of land revenue by issuing a certificate could be equated to either a suit, appeal or application in the court. Under Section 68(2) and Sections 45-C to 45-I, after determination of contribution, recovery can be made straightaway. If the employer disputes the correctness of the order under Section 45-A, he could challenge the same under Section 75 of the Act before the ESI Court.

26. On a plain reading of Sections 45-A and 45-B in Chapter IV and Sections 75 and 77 in Chapter VI of the Act, as indicated above, there cannot be any doubt that the area and the scope and ambit of Sections 45-A and 75 are quite different.”

Although in one of the case an appeal appears to have been preferred, subsequent to incorporation of section 45AA of the said Act in the statute, however, both the orders passed under Section 45A and Section 45AA of the said Act has been changed under Section 75 of the said Act before the Employees' State Insurance Court. It further appears that the respondents apart from making a bald statement that order under Section 45A of the said Act has been passed on actual basis, have not disclosed any document in support thereof. In any event, as noted above, orders passed under section 45A and 45AA of the said Act are passed in a summary manner which can be challenged before the Employees' State Insurance Court. . It is, therefore, difficult to accept the respondents' contention that determination of dues under Section 45A and 45AA of the said Act was made on actual basis. The only other contention raised by the learned advocate for the respondents is that the petitioner by merely paying 30 per cent of the demand, cannot evade the entire liability. I am afraid, the aforesaid stand cannot be accepted, for reasons discussed hereinafter. The Hon'ble Supreme Court in the case of **S.V.A. Steel Rerolling Mills Limited and Others.**, (supra) has, inter alia, been pleased to observe as follows:

“29. Framing such policies and doing the needful for its implementation are administrative functions of the

respondent State and therefore, normally this Court would not like to interfere with its policies but looking at the peculiar facts of the case, where an assurance had been given for uninterrupted supply of electricity, one would presume that the respondent State must have made necessary arrangements to provide 100% uninterrupted supply of electricity for 5 years to the new units. If for any reason it was not possible to supply electricity as assured, the respondent State ought to have extended the period of 5 years by the period during which assured electricity was not supplied. By doing so, the respondent State could have made an effort to fulfil its promise and satisfied the persons who had acted on an assurance given by the State and set up their manufacturing units in the State of Kerala.

30. *Before laying down any policy which would give benefits to its subjects, the State must think about pros and cons of the policy and its capacity to give the benefits. Without proper appreciation of all the relevant factors, the State should not give any assurance, not only because that would be in violation of the principles of promissory estoppel but it would be unfair and immoral on the part of the State not to act as per its promise.”*

In the light of the above, I am of the view that the respondents having themselves introduced the said Scheme are bound by the terms of such Scheme and are estopped from denying the benefits of the Scheme to petitioner by referring to grounds which are not envisaged and do not find place in the said Scheme, especially after having permitted the petitioner to withdraw their cases for

claiming benefit under the said Scheme. If the respondents were so aggrieved on the petitioner getting away by merely paying 30 per cent of the demand, they ought to have thought so before introducing the Scheme. Having introduced the Scheme and having led the petitioner to withdraw the cases, benefits under the said Scheme cannot be denied on the aforesaid pretext.

In view of the aforesaid, the order dated 19th February, 2015 cannot be sustained and the same is accordingly set aside and quashed.

The respondent no.3 is directed to take a fresh decision in respect of the petitioner's case in the light of the observations made herein.

I find that the petitioner has also challenged the demand raised by the Recovery Officer in respect of the Certificate Case No.C-25402/12/15/5 & Ors. reg. dated 6th March, 2017. Since the aforesaid order dated 19th February, 2015 has been quashed, the demand, if any, arising out of the orders passed under Section 45A and 45AA of the said Act which formed the subject matter of challenge in ESI Case No. 122 of 2009 and ESI Case No.53 of 2013 shall also not be enforceable, till such time a fresh decision is taken by respondents in connection with petitioner's case as directed above.

Since the writ application is partly allowed, the learned Registrar General of this Hon'ble High Court is directed to refund the deposit made by the petitioner along

with accrued interest by prematurely encashing the fixed deposit, if required, after deducting the commission, if any.

With the aforesaid observations and directions the writ application, being WPA 13783 of 2017 is partly allowed.

(Raja Basu Chowdhury, J.)