

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present :

The Hon'ble Justice Raja Basu Chowdhury

WPA 13814 of 2017

**The Ganges Manufacturing Co. Ltd.
Vs.
Employees State Insurance Corporation & Ors
.**

For the petitioner	:	Mr. Partha Bhanja Choudhury Mr. S.K. Singh Mr. Ravi Kumar Dubey
For the ESI Authority	:	Mr. Shiv Chandra Prasad
Heard on	:	19.04.2023 & 11.05.2023
Judgment on	:	11.05.2023

Raja Basu Chowdhury, J:

1. The present writ application has been filed, inter alia, challenging the order dated 8th April, 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 48 of the writ application. The petitioner claims to be the owner of a Jute Mill and is covered under the provisions of Employees' State Insurance Act, 1948 (hereinafter referred to as the "said Act"). It is the petitioner's case that challenging the order passed under section 45A of the said Act dated 30th January, 2013,

an appeal under section 45AA of the said Act was filed. The same culminated in an order dated 25th June, 2013. Challenging both the aforesaid orders passed under section 45A and 45AA of the said Act, that the petitioner had moved before the Employees' Insurance Court (hereinafter referred to as the E.I. Court), under Section 75 of the said Act and a case being tender No.100 of 2013, which was later converted into ESI Case No.06/2014 was registered.

2. The petitioner says that during the pendency of the proceedings before the E.I. 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 employees under Sections 84, 85 and 85A of the said Act and for settlement of cases filed by the employers under Section 75 of said Act.
3. Mr. Choudhury, learned Advocate representing the writ petitioner, by drawing attention of this court to page 21 of the writ application submits that since the petitioner had already filed proceedings before the E.I. Court under Section 75 of the said Act, disputing the contribution payable by the petitioner and since the assessment made by the respondents were 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 a dispute as regards contributions payable by him, was entitled to pay the

contribution as per his records or in the alternative if no records could be produced and the assessment having been made in respect of wages, other than shown in Regulation 32 of the register, to pay contribution not less than 30% of the assessed amount, provided, assessment has not been made on actual basis.

4. He says that withdrawal of Court case with prior permission of the Court, for effecting out of Court settlement, was made a condition precedent for applying under the said Scheme. By referring to Annexure-A to the said Scheme, which is at page 34 of the writ application, he says that the petitioner, as required, duly applied as per Annexure-A, for withdrawal of the case pending before the E.I. Court. It is submitted that on the basis of the application made by the petitioner, by order No.8, dated 24th of December, 2014, the E.I. Court was, *inter alia*, pleased to permit the petitioner to withdraw the case in order to avail benefits under the said Scheme, by adjusting the security given by the petitioner towards the Scheme. Consequent upon withdrawal of the aforesaid Court case, by an application in writing dated 14th January, 2015, the petitioner had exercised its right to avail the benefit of the said Scheme. It is still further submitted that in compliance of the provisions of the said Scheme, the petitioner had 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 payment made by the petitioner. The

petitioner says that subsequently, the petitioner was shocked to receive a communication dated 8th April, 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 made in the petitioner's case had been made as per Hqrs. Instruction No.P-11/13/97-Ins IV dated 26th May, 2003.

5. Mr. Choudhury, learned Advocate representing the petitioner, submits that a perusal of the said Scheme would demonstrate that the respondents did not reserve in themselves the right to deny the benefits of the said Scheme to the petitioner on the grounds other than those specified in the said Scheme. The ground cited by the respondents in the aforesaid order as regards assessment having been made as per the instructions issued by the headquarters, to deny the benefits 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 has withdrawn the pending case. 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 respondent having led the petitioner to alter its position to its disadvantage, cannot 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.

6. In support of his aforesaid contention, he places reliance on a judgment delivered by the Hon'ble Supreme Court in the case of ***S.V.A. Steel Re-rolling Mills Limited and Ors. v. State of Kerala and Ors.***, reported in **(2014) 4 SCC 186**. It is submitted that the aforesaid order is violative of the Article 14 of the Constitution of India and should be set aside. The petitioner says that the petitioner had complied with all the formalities, as are required for availing the benefits under the said Scheme and nothing further requires to be done. Unfortunately, the respondents had denied the benefits of the Scheme to the petitioner. By drawing attention of this Court to a communication in writing dated 24th April, 2015, it is submitted that the petitioner has already demanded justice but the same has been denied. He prays that the respondents be directed to afford the petitioner the benefits, as are available under the said Scheme. He further submits that after the petitioner's application for availing the benefits under the said Scheme had been turned down, the Recovery Officer in the most illegal manner, by taking advantage of withdrawal of the Court case, had levied a demand on the petitioner which is unjust and improper. He prays for quashing of the said demand raised by the respondents.
7. *Per contra*, Mr. Prasad, learned Advocate representing the respondents, by relying on the affidavit in opposition and the order

dated 8th April, 2015, which is impugned in the present writ petition submits that in this case the determination was made on actual basis. He says that by paying 30% of the demand, the petitioner cannot avoid its liability. He submits that the prayer for out of Court settlement has already been rejected by the Competent Authority. It is submitted that there was a cutoff date for availing the benefits under the Scheme. The said date for availing such benefits 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.

8. I have heard the submissions made by the learned Advocates appearing for the respective parties and have considered the materials on record, I find that the present application has been filed, in effect 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 E.I. Court. I find that the petitioner has filed a separate proceeding before the E.I., Court which was pending, as on the date when the said Scheme was introduced. In this context it would be profitable to refer to the relevant provisions of the said 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.”*

9. From the aforesaid it would appear that in order to avail the benefits of the aforesaid Scheme, an applicant should be eligible as per the said Scheme and is required to apply as per enclosed proforma being Annexure-A of the said Scheme. The said proforma provides for withdrawal of Court case. I find that the petitioner claims to be eligible as per the Scheme and had duly applied as per Annexure-A, in proforma provided for withdrawal of the pending Court case before the E.I. Court and on the basis of the application made by the petitioner and after hearing the learned Advocates for both the parties, the E.I. Court permitted the petitioner to withdraw Tender Case No.100 of 2013 renumbered as ESI Case No.06/2014, by its order No.8 dated 24th December, 2014. It does not appear from the aforesaid order, which forms 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 enforced 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 has also while applying in terms of the provisions of the said Scheme, deposited 30% of the demanded amount. In paragraph 8 of the writ application, it has been categorically asserted by the petitioner that the petitioner in order to avail the benefits of the aforesaid Scheme had complied with necessary formalities like deposit of 30 percent of the demanded

amount. Such fact has not been denied by the respondents in their affidavit-in-opposition. I find that the grounds provided in the order dated 8th April, 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 case pending before the E.I. Court for availing the 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 Headquarter's instructions.

10. I find that both the orders under Section 45A and 45AA of the said Act were challenged before the E.I. Court in Case No. 06/2014. Ordinarily, such orders are passed subject to final decision of the E.I. 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. v. 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.”*

11. Although Mr. Prasad, has claimed that the determination has been made on actual basis yet there is nothing on record to demonstrate such determination. As noted above, the order passed under Section 45A of the said Act is passed in a summary manner, which can be challenged before the Appellate Authority under Section 45AA of the Act and again before the E.I. Court. Only the orders which are not challenged before E.I Court have a finality attached to them. It is, therefore, difficult to accept the respondents' contention that the determination under Section 45AA of the Act was made on actual basis. The other contention raised by the learned Advocate representing the respondents is that the petitioner by merely paying 30 percent of the determination made under the said Act, cannot evade the entire liability. In my opinion, the

aforesaid stand cannot be accepted, for reasons discussed hereinafter. The Hon'ble Supreme Court in the case of **S.V.A. Steel Re-rolling Mills Limited and Ors.** (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.”

12. 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 the said Scheme and are estopped from denying the benefits of the said Scheme to the petitioner by referring to grounds that are not envisaged by and do not find place in the said Scheme. The respondents after having permitted the petitioner to withdraw its case for claiming benefits under the said Scheme cannot be permitted to deny such benefits to the petitioner. If the respondents were so aggrieved on the petitioner getting away by merely making payment of 30% of the demand, they ought to have thought so before introducing the Scheme. Having introduced the Scheme and having led the petitioner to withdraw its case, the benefits under the said Scheme cannot be denied on the aforesaid pretext.
13. Having regard to the aforesaid, the order dated 8th April, 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.
14. I find that the petitioner has also challenged a demand raised by the Recovery Officer dated 6th March, 2017, forming annexure P-7 to the writ application. It would, however, appear from the aforesaid demand that a Certificate Case No.C-28593/13-14/5, for the period April, 2010 to March, 2011 has also been included in the aforesaid demand. Records reveal that the Tender Case No.100 of 2013 was

filed challenging the orders passed under sections 45A and 45AA of the said Act, dated 30th January, 2013, and 25th June, 2013, respectively. The aforesaid Tender Case No.100 of 2013, registered as ESI case no. 06/2014, had been withdrawn by the petitioner, for availing the benefits under the said scheme.

15. The learned advocates for the parties have jointly submitted before me that subsequent to rejection of the petitioner's application under the New Amnesty Scheme, 2014, recovery proceeding has been initiated, by enforcing the Certificate No.C-28593/13-14/5 and consequentially a demand for Rs 3,40,226/- has been raised which also forms subject matter of the recovery notice dated 6th March, 2017, forming annexure P-7 to the writ application.
16. Since I have already set aside the order dated 8th April, 2015, and have directed the respondent no.3 to take a fresh decision, the aforesaid demand, insofar as the same concerns Certificate No.C-28593/13-14/5 cannot be sustained the same is accordingly quashed and set aside.
17. I further make it clear that the demands, if any, arising out of the orders passed under sections 45A and 45AA of the said Act, which formed subject matter of challenge before E.I. Court in Tender Case No.100 of 2013, shall also not be enforceable till such time a fresh decision is taken by the respondents in connection with the writ petitioner's case, as directed above.

18. Since the writ application is being allowed, learned Registrar General of this Hon'ble 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 commission, payable if any.
19. This order shall not prevent the ESI authorities from enforcing the other certificates forming subject matter of the notice dated 6th March, 2017, in accordance with law.
20. With the aforesaid observation and direction, the writ application being WPA 13814 of 2017 stands disposed of.
21. There shall be no order as to costs.
22. Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis upon compliance of requisite formalities.

(Raja Basu Chowdhury, J.)

S.S.
Assistant Registrar (Court)