IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

BEFORE
The Hon'ble Justice RAJA BASU CHOWDHURY

WPO/122/2023
THE TELOIJAN TEA COMPANY LIMITED & ANR.
VERSUS
EMPLOYEES' STATE INSURANCE CORPORATION & ORS.

For the Petitioner : Mr. Soumya Majumder, Advocate
Mr. Saunak Sengupta, Advocate
Mr. Pradip Kr. Sarawgi, Advocate

For the Respondents: Mr. Subal Maitra, Advocate
Mr. Arindam Maitra, Advocate

Heard on : 19.06.2023

Judgment on : 19.06.2023

RAJA BASU CHOWDHURY, J.:

1. The present writ application has been filed, inter alia, challenging the order dated 16th January, 2019 passed under Section 45-A of the Employees' State Insurance Act, 1948 [hereinafter referred to as 'the said Act'], the order dated 3rd August, 2022 passed under Section 45-AA of the said Act as also the recovery notice dated 16th November 2022.

2. At the time of admission of the present writ application, Mr. Maitra, learned Advocate for the respondents has raised a point of maintainability of the writ application.
3. By order dated 27th February, 2023, this Court upon taking into consideration the submissions made by the learned Advocates appearing for the respective parties was, inter alia, pleased to admit the writ application by overruling the objection as to the maintainability of the writ application and while directing exchange of affidavits, had passed an interim order restraining the respondents from enforcing the order dated 3rd August, 2022 and from taking any coercive step against the petitioners for a period of three weeks from the date of such order. The petitioners were further directed to deposit a sum of Rs.1,70,742/- with the Registrar, Original Side of this Court within a period of three weeks of such order. It was further, inter alia, provided in the event the petitioners make deposit of the aforesaid amount, the interim order passed should continue till the disposal of the present writ application.
4. In course of hearing of the present writ application, it has been submitted on behalf of the petitioners that in compliance of the order dated 27th February, 2023, the petitioners had deposited a sum of Rs.1,70,742/- with the Registrar, Original Side, High Court at Calcutta on 15th March, 2023.

5. Records would reveal that the respondents have filed their affidavit-in-opposition to the present writ application.

6. The matter has come up for hearing after exchange of affidavits. It is the petitioners' case that the petitioner no.1 is an establishment having a tea garden at P.O. Moran, District Dibrugarh, in the State of Assam where it has a factory for manufacturing tea and the same is a seasonal factory. As such, the said Act does not apply to the petitioners' establishment. The petitioners' claim that the petitioner no.1 also has an office at Diamond Heritage, 14th Floor, Suite No.1401, 16, Strand Road, Kolkata – 700001 wherein it employs only eight (8) persons. The office of the petitioner no.1 carries out administrative and other functional jobs through its eight (8) employees. Apart from the aforesaid employees, there are four (4) directors on the Board of Directors of the petitioner no1. It is the petitioners' case that by order dated 16th January, 2019 passed under Section 45-A of the said Act, the authorities by treating twelve (12) persons employed at the office address of the petitioner no.1 at Diamond Heritage, had extended the coverage of the said Act to the petitioner no.1. Challenging the said order, a writ application had been filed before this Hon'ble Court. By order dated 14th March 2019, this Hon'ble Court was, *inter alia,* pleased to grant liberty to the petitioners to file an appeal under Section 45-AA of the said Act. Pursuant to the liberty granted as aforesaid, the petitioners had filed an appeal which ultimately

culminated in the order dated 3rd August 2022, which also forms subject matter of challenge in the present writ application.

7. Mr. Majumder, learned advocate appearing for the petitioners, by referring the said order, submits that the Appellate Authority upon scrutinising the number of persons employed at the petitioner no.1's office at Diamond Heritage had concluded that on the basis of disclosure made by the petitioners, the four directors of the petitioner no.1 who are engaged in the aforesaid office are drawing salary in excess of Rs.21,000/- per month. He says that the Appellate Authority had also concluded that only eight (8) employees of the petitioner no.1 employed at the aforesaid establishment who are drawing salary less than Rs.21,000/-. As such, since the number of employees employed in the aforesaid establishment at Kolkata is less than 10, the coverage of the aforesaid Act ought not to be extended to the petitioner no.1's establishment.

8. By referring to Section 2(9) of the said Act, he says that 'employee' means any person employed for wages or in connection with the work of a factory or establishment to which the Act applies and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof but does not include any person so employed whose wages excluding remuneration for overtime work, exceeds such wages as may be prescribed by the Central Government, in a month. By

drawing attention of this Court to the Employees' State Insurance (Central) Rules, 1950, he says that the wage limit for coverage of employee under the Act is Rs.21,000/-. Since, admittedly, on the basis of the findings arrived at by the Appellate Authority, four of the directors are drawing salary in excess of Rs.21,000/- per month, such directors cannot be taken into account and cannot be treated as an employee within the meaning of the said Act.

9. According to Mr. Majumder the appellate authority in the aforesaid order had arrived at a finding that only eight (8) persons are drawing wages within the ceiling limit of Rs.21,000/-, as such, on the basis of the finding reached by the Appellate Authority, the Appellate Authority ought not to have treated the petitioner no.1, to be covered under the said Act on the basis of the contributions payable by the eight (8) employees. By referring to a notification dated 10th February, 2011 issued by Government of West Bengal Labour Department, he says that only in the event ten (10) or more persons being employed in any establishment or were employed on any day of the preceding twelve months, the establishment is to be covered under the provisions of the said Act.

10. Unless the Appellate Authority reaches a finding that there are ten (10) or more persons employed in the establishment of the petitioner no.1, the provisions of the said Act cannot be extended to the aforesaid establishment of the petitioner no.1. By further drawing attention of

this Court to paragraph 9 of the affidavit-in-opposition filed by the respondents, it is submitted that the respondents themselves having admitted that the petitioners' factory at Assam is not covered under the said Act, no proceedings for covering petitioners' establishment at Kolkata, ought to have been initiated against the petitioners in the given facts. He says that the jurisdictional issue for covering the petitioners' establishment being absent, the Appellate Authority ought not to have extended the coverage of the Act to the petitioners. The order, therefore, is bad and is without jurisdiction and should be set aside.

11. Per contra, Mr. Maitra, learned Advocate representing the respondents, submits that in this case admittedly there are twelve (12) persons who have been employed by the petitioner no.1 at its Kolkata office. According to Mr. Maitra the respondents have treated the said office as a shop and although the Director may not be liable for payment of contribution, yet they are required to be counted as employees for the purpose of computation and applicability of the said Act. He says that the remuneration earned by a Director amounts to wages and the said Director has to be considered as an employee within the meaning of the said Act. It is further submitted that a person who is employed may get salary in excess of the ceiling limit, as provided in the said Act and may not be insured for the aforesaid reason. However, he is required to be counted for the purpose of

coverage of the said Act. In support of his contention that a Director is to be reckoned as an employee within the meaning of Section 2(9) of the said Act, Mr. Maitra has relied on a judgment delivered by the Hon'ble Supreme Court in the case of ***Employees' State Insurance Corporation vs. Apex Engineering Pvt. Ltd***., reported in (1998) 1 SCC 86. He has also placed reliance on a judgment delivered by the Hon'ble Supreme Court in the case of Employees' State Insurance Corporation vs. Venus Alloys Pvt. Ltd., reported in 2019 (161) FLR 156**:** (2019) 14 SCC 391. By referring to the notification dated February 10, 2011, he says that the petitioners are covered under the Provisions of the said Act as there are twelve (12) employees at the Kolkata office. He says that the petitioners should not be permitted to evade the liability. In the given facts, it is submitted that the writ application deserves to be dismissed with costs.

12. Heard learned advocates appearing for the respective parties and considered the materials on record. The primary question that falls for consideration in the present writ application is whether the four Directors of the petitioner no.1 who have been identified in the order dated 3rd August, 2022, despite drawing salary in excess of Rs.21,000/- can be considered to be employees within the meaning of the said Act. To appreciate the aforesaid contention, it is relevant to consider the provisions of Section 2(9) of the said Act, the same is reproduced hereinbelow:-

"(9) "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and—

> *(i) who is directly employed by the principal employer, on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or*
>
> *(ii) who is employed by or through an immediate employer, on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or*
>
> *(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;*

[and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment] [or any person engaged as apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961),

[and includes such person engaged as apprentice whose training period is extended to any length of time] but does not include]—

> *(a) any member of 20 [the Indian] naval, military or air forces; or*
>
> *[(b) any person so employed whose wages (excluding remuneration for overtime work) exceed [such wages as may be prescribed by the Central Government] a month:*
>
> *Provided that an employee whose wages (excluding remuneration for overtime work) exceed [such wages as may be prescribed by the Central Government] at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period;]"*

13. From the aforesaid, it would be apparent that the persons who are drawing wages excluding remuneration for overtime work, and such

wages exceeds the wages prescribed by the Central Government, are not covered under the provisions of the said Act. A perusal of Rule 50 of Employees' State Insurance (Central) Rules, 1950, demonstrates wage limit for coverage of employee under the said Act is Rs.21,000/-.

14. Perusal of the order impugned, in no uncertain terms, shows that the Appellate Authority had arrived at a finding that out of twelve (12) persons working at the establishment, four (4) of them are directors and were being paid salary which is above Rs.21,000/- during the relevant period. By recording as aforesaid, the Appellate Authority concluded that no contribution could be charged from the aforesaid persons since these four persons/directors cannot become insured persons as per the said Act.

15. A perusal of the provisions of the said Act read with relevant notification which is not disputed by Mr. Maitra would, in no uncertain terms, make it clear that for the provisions of the said Act to apply, an establishment must employ at least ten (10) persons and they are paid wages below the ceiling limit.

16. Mr. Maitra has relied on a judgment delivered by the Hon'ble Supreme Court in **Apex Engineering Pvt. Ltd. (supra)** which has been followed in the case of **Venus Alloys Pvt. Ltd (supra)** to contend that a director is an employee within the meaning of the Act. It would be appropriate to note that in the case of **Apex Engineering Pvt. Ltd.(supra)**, the Hon'ble Supreme Court was

considering whether the Managing Director could be treated to be an employee within the meaning of Section 2(9) of the said Act. While answering such a question the Hon'ble Supreme Court, in paragraph 6 of the said judgment, after reproducing Section 2(9) of the said Act, had been, inter alia, pleased to observe as follows:

> " 6................
>
> *A mere look at the afroesaid provision shows that before a person can be said to be an employee the following characteristics must exist qua his service conditions ---*
> *(1) He should be employed for wages. This would presuppose relationship between him as employee on the one hand and the independent employer on the other;*
> *(2) Such employment must be in connection with the work of the factory or establishment to which the Act applies;*
> *(3) He must be directly employed by the principal employer on any work of, or incidental or preliminary to or connected with work of, the factory or establishment;*
> *(4) In the alternative he should be employed by or through an immediate employer on the premises of the factory or establishment or under supervision of the principal employer or his agent;*
> *(5) We are not concerned with clause (3) of the said definition. But the inclusive part of the definition being relevant has to be noted as Condition No. 5. He should be employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof. We are also not concerned with the exempted categories of persons in the present case and hence we need not dilate on the same.*
> (6) *This is subject to the further condition that the wages of the person so employed excluding remuneration for overtime should not exceed such wages as prescribed by the Central Government. ....*"

17. A perusal of the aforesaid judgment would make it abundantly clear that there is no dispute that even a Director can be considered to qualify within the definition of an employee, provided the

characteristics, as enumerated therein, exist qua his service conditions. It is seen that the Hon'ble Supreme Court being conscious of the exclusion clause provided in Section 2(9) of the said Act, had categorically and in no uncertain terms indicated that the characteristics of employment should also include the further condition that the wages of the person so employed excluding remuneration for overtime should not exceed such wages as prescribed by the Central Government.

18. It is seen that in the case of **Venus Alloys Pvt. Ltd.(supra)**, the Hon'ble Supreme Court, while following the judgment delivered in the case of **Apex Engineering Pvt. Ltd.(supra)**, had concluded, in the facts of the case, a Director who has been receiving remuneration falls within the definition of an employee for the purpose of the said Act. Although Mr. Maitra, learned Advocate representing the respondents, has strenuously argued that the Hon'ble Supreme Court, in the judgment delivered in the case of **Venus Alloys Pvt. Ltd.(supra)**, had concluded that the Director who is receiving remuneration is to be considered as an employee irrespective of the quantum of remuneration received by him, I am unable to accept the same. I find that the Hon'ble Supreme Court had categorically construed the provision of the Section 2(9) of the said Act in the case of **Apex Engineering Pvt. Ltd.(supra)** and it is

for such reason that the Hon'ble Supreme Court had provided for the exception as indicated hereinabove.

19. Admittedly, from the impugned order it would be apparent that there are less than ten (10) persons below the wage ceiling who can be considered as employees within the meaning of Section 2(9) of the said Act. It is thus apparent from the said order that the basis of assumption of jurisdiction by the authority to hold the petitioner no. 1 to be covered under the provisions of the said Act is absent.

20. Having regard the aforesaid, the order dated 16th January, 2019 passed under Section 45-A of the said Act and the order dated 3rd August, 2022 passed under Section 45-AA of the said Act cannot be sustained. The same are accordingly set aside and quashed. The consequential demands issued by the respondents are also set aside and quashed. The writ application succeeds.

21. In view thereof, the learned Registrar, Original Side, High Court is directed to refund the petitioner no. 1 the deposit of Rs.1,70,742/- along with accrued interest thereon, by prematurely encashing the fixed deposit, if necessary, after deducting commission payable.

22. There shall be no order as to costs.

Later

23. After the aforesaid order has been dictated, Mr. Maitra, learned Advocate representing the respondents, prays stay of operation of this order. The same is considered and refused.

24. Urgent photostat certified copy of this order, if applied for, be made available to the parties on priority basis upon compliance of all formalities.

(RAJA BASU CHOWDHURY, J.)

akg/sk