

**IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE**

**BEFORE:
The Hon'ble Justice RAJA BASU CHOWDHURY**

WPO/2471/2022

**BELUR SRAMAJIBI SWASTHYA PRAKALPA SAMITY AND ANR
VS
STATE OF WEST BENGAL AND ORS**

For the Petitioners : Mr. Supriyo Chattopadhyay, Adv.
Mr. Tapan Sarkar, Adv.

For ESI Corporation : Mr. Siv Chandra Prasad, Adv.

For the Respondent : Mr. Debashish Ghosh, Adv.
Nos. 1 and 2 Mr. Pratik Garai, Adv.

Heard on : 09.02.2023

Judgment on : 09.02.2023

RAJA BASU CHOWDHURY, J.:

1. The present writ application has been filed, inter alia, challenging the order dated 8th June, 2022 passed by the Principal Secretary, Department of Labour, Government of West Bengal. The petitioner

no.1 claims to be a society registered under the Societies Registration Act, 1961 and claims to be a Charitable Organization engaged in providing, inter alia, health care facilities to the poor and needy. The petitioner no.1 is involved in other philanthropic activities.

2. It is the petitioners' case that in the year 2012, the Principal Secretary, Department of Labour, Government of West Bengal while considering an application for grant of exemption under Section 91 of the Employees' State Insurance Act, 1948 (hereinafter referred to as the 'said Act'), by an order dated 1st November, 2012, was, inter alia, pleased to observe as follows:-

"The Applicant Establishment, it appears, is a Charitable organization. The way the activities of the establishment are administered apparently justify its claim for exemption from application of the provisions of ESI Act. The organization therefore may be considered eligible for exemption in terms of Section 91 of the Act. However, since such order of exemption is required to be issued with consent of the Corporation, Additional Commissioner & Regional Director is requested to examine and advise suitably on the limits of exemption that may be considered in case of this establishment.

Since a decision on exemption under Section 91 of the Act will take some time, exemption hereby is given to the Applicant Establishment under Section 87 of the Act for one year from 01.4.2012 to 31.3.2013."

3. Since then, the appropriate Government had from time to time granted exemption to the petitioner no.1. Incidentally, by an order dated 17th November, 2016, the appropriate Government, had inter alia, rejected the petitioners' application for grant of exemption, for the period from 1st April, 2016 to 31st March, 2017.
4. Although, the writ petitioners had challenged such order before this Court by filing a writ application, which was registered as WPO no.1113 of 2016 and notwithstanding such application being entertained by this Court, the same was ultimately dismissed for default on 15th January, 2020.
5. Since then, the petitioners had made a representation dated 28th September, 2021, calling upon the Hon'ble Labour Minister to look into the matter, for grant of permanent exemption to the petitioner no.1. Simultaneously, since WPO No. 1113 of 2016 was dismissed, without a decision on merit, the petitioners also filed a fresh writ application challenging the order dated 17th November, 2016, which was registered as WPO. 917 of 2022. It is, in connection with the aforesaid application that this Hon'ble Court, by taking note of the order dated 1st November, 2012 passed by the Principal Secretary, Labour Department, whereunder the petitioner no. 1 was found to be eligible, for grant of exemption under Section 91 of the said Act, by order dated 17th February, 2022, directed the Joint Secretary, Government of West Bengal, Labour Department, Directorate of ESI

Branch, to consider and dispose of the representation filed by the petitioner no.1 on 28th September, 2021, within one month from the date of communication of this order, after giving reasonable opportunity of hearing to all the interested parties. The Hon'ble Court by the aforesaid order, also directed the concerned respondent, in considering the representation to take into consideration the observation made by the Principal Secretary, Department of Labour, Government of West Bengal, in his order dated 1st November , 2012, without in any way, being influenced by the observation made in the order dated 17th November, 2016 as aforesaid.

6. Pursuant to the aforesaid order the Principal Secretary, Department of Labour, Government of West Bengal, had given an opportunity of hearing to the petitioners and thereafter, had passed an order dated 8th June, 2022 thereby disposing of such representation, by granting exemption to the petitioner no.1's establishment under Section 87 of the said Act, from 1st July, 2022 to 31st March, 2023. Subsequently, by a separate order dated 27th July, 2022, the Deputy Secretary, Government of West Bengal was inter alia pleased to record the approval of the Governor, for renewal of exemption in respect of the coverage of regular employees of the petitioner no.1 under Section 87 of the said Act for the period from 1st July, 2022 to 31st March, 2023.

7. Mr. Chattopadhyay, learned Advocate representing writ petitioners submit that notwithstanding this Hon'ble Court by order dated 17th February, 2022 directing the Joint Secretary, Government of West Bengal, Department of Labour to hear out, consider and dispose of the petitioners' representation filed on 28th September, 2021, on the basis of observation made in the order dated 1st November, 2012, the same has not been done. By referring the order dated 8th June, 2022, he says that the Principal Secretary, Department of Labour, Government of West Bengal has already ascertained that the petitioner no.1 is a charitable organization and is engaged in providing health care for poor, including establishing school facilities, colleges, libraries, hospitals and is also involved in other philanthropic activities. He says notwithstanding the aforesaid and despite taking note that the doctors and other workers associated with the petitioner no.1 are paid allowances and have no employer-employer relationship with the petitioner no.1, and despite finding the petitioner no.1 to be justified in its claim for exemption, from the provisions of the Employees' State Insurance Act, 1948, had merely granted an exemption under Section 87 of the said Act, for a period from 1st July, 2022 to 31st March, 2023.
8. He says that the Principal Secretary, Department of Labour, Government of West Bengal while passing the aforesaid order, did not take note of the observations made in the order dated 1st November, 2012 passed by the Principal Secretary, Department of

Labour, Government of West Bengal, which was directed to be taken into consideration, while disposing of the petitioners representation. He says that the aforesaid order is contrary to the directives issued by this Hon'ble Court on 17th February, 2022.

9. He says that the Principal Secretary, Department of Labour, West Bengal has not even considered whether the petitioner no.1 is entitled to an exemption under Section 91 of the said Act. He says that unless an order is made directing the Principal Secretary, Department of Labour, Government of West Bengal, to grant an exemption under Section 88 read with Section 91 of the said Act, the petitioners shall suffer irreparable loss, injury and prejudice.
10. The writ application is contested both by the State respondents as also by the Employees' State Insurance Corporation. Although Employees' State Insurance Corporation has filed its Affidavit-in-Opposition, the State respondents have chosen not to file any affidavit.
11. Mr. Garai, learned Advocate representing the State respondents submits that the present writ application is not maintainable before this Court. He says that the matter pertains to disputes as regards grant and non-grant of the exemption under the provisions of the said Act. According to Mr. Garai, the Employees' Insurance Court, in short ESI Court, established under the said Act is competent to adjudicate the disputes inter se between the petitioners and the appropriate Government, in relation to grant and non-grant of

exemption under Sections 87 to 91 of the said Act. The ESI Court under Section 75(1)(g) of the said Act has the jurisdiction and competence to do so. He says that the Hon'ble Supreme Court had the occasion to consider the aforesaid issue in the case of ***Regional Director, Employees' State Insurance Corporation v. Narayan Chandra Rajkhowa and Others.***, reported in **1997(11) SCC 234**. In the aforesaid judgment Hon'ble Supreme Court had been pleased to observe that such disputes can only be adjudicated upon by the ESI Court. He, however, fairly submits that there is a contrary view of the Hon'ble Supreme Court and in this connection, he refers to the judgment, delivered in the case of ***Zuari Cement Limited v. Regional Director, Employees' State Insurance Corporation***, reported in **(2015) 7 SCC 690**.

12. He says that this Hon'ble Court ought not to entertain the present application and the present application should be dismissed, for the petitioners to avail the remedy before the ESI Court. He further submits that in the event, this Court is of the view that the directions passed by this Hon'ble Court dated 17th February, 2022 has not been complied with in its true spirit, this Court may be pleased to remand back the matter to the Principal Secretary, Department of Labour, Government of West Bengal for re-hearing on this issue.

13. Mr. Prasad, learned Advocate appearing on behalf of the ESI Corporation submits that the scheme of the Act does not authorize

the appropriate Government to grant permanent exemption. He says, since no permanent exemption can be granted, the appropriate Government taking into consideration, the eligibility of the petitioner no.1 to be entitled to the exemption, had granted an exemption under Section 87 of the said Act. He says that the Principal Secretary, Department of Labour, Government of West Bengal cannot be faulted for having granted exemption to the petitioner no.1 for a limited period. He says that the petitioner no.1 was given opportunity of hearing. The Principal Secretary, Department of Labour, Government of West Bengal ultimately found that the petitioner no.1 was eligible for grant of exemption and it is for such reason, exemption had been granted in terms of Section 87 of the said Act. The petitioners cannot be aggrieved by such decision.

14. I have heard the learned advocates appearing for the respective parties and have considered the materials on record. Although, the State respondents have not filed any affidavit despite direction, however, since a point of maintainability though belatedly has been raised by the learned Advocate representing the State respondents the same has to be dealt with first.

15. It has been submitted on behalf of the State respondents that under Section 75(1)(g) of the said Act, the ESI Court is competent to adjudicate upon the disputes as regards grant and non-grant of exemption. In this context, the relevant provision of Section 75(1)(g)

of the Employees' State Insurance Act, 1948 is reproduced herein below:-

“(g) Any other matter which is in dispute between a principal employer and the Corporation, or between a principal employer and an immediate employer or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues payable or recoverable under this Act [or any other matter required to be or which may be decided by the Employees' Insurance Court under this Act], such question or dispute [subject to the provisions of sub-section(2A)] shall be decided by the Employees' Insurance Court in accordance with the provisions of this Act.”

16. Mr. Garai by placing reliance on the judgment delivered by the Hon'ble Supreme Court in case of **Regional Director, Employees' State Insurance Corporation v. Narayan Chandra Rajkhowa and Others.**, reported in **(1997) 11 SCC 234** has contended that a challenge to grant and non-grant of an exemption under the provisions of the said Act, can only be decided by the ESI Court, under Section 75(1)g of the said Act.

17. I find that the Hon'ble Supreme Court in the judgment delivered in case of **Zuari Cement Limited** (supra), upon deliberating upon the provisions of Section 75(1)g of the said Act and upon considering the scope and ambit of the words “any other

matter” as referred to therein, had specifically concluded that, as per the scheme of the Act, the appropriate Government alone is competent to grant or refuse exemption. The Hon’ble Court further held that the ESI Court does not have the jurisdiction to consider the question of grant or non-grant of exemption and in paragraph 13 of the aforesaid judgment has been pleased to observe as follows:

“13. The Employees’ Insurance Court is a tribunal specially constituted for the purpose of deciding any controversy that may arise on the matters enumerated in Section 75 of the Act. A reading of Section 75 of the Act would show that the ESI Court has full jurisdiction to decide all the matters arising between the employer and the Corporation under the Act. Section 75 of the Act sets out the matters to be decided by the ESI Court. As per Section 75(1)(g) of the Act, the ESI Court is empowered to decide any matter which is in dispute between the employer and the Corporation in respect of any contribution or benefit or other dues payable or recoverable under the Act or any other matter required to be or which may be decided by the ESI Court under the Act and such question or dispute subject to the provisions of sub-section (2-A) shall be decided by the ESI Court in accordance with the provisions of the Act. When considered in the light of clauses (a) to (d) in Section 75(1) of the Act, the expression “any other matter” occurring in Section 75(1)(g) only means any other dispute between an employer and Corporation or a person and Corporation pertaining to the contribution or benefit or other dues payable under the Act or any other matter required to be decided by the ESI Court under the provisions of the Act. Grant or refusal of exemption by the appropriate Government cannot be said to

be a dispute between the employer and the Corporation. For grant or refusal of exemption, a specific provision is prescribed under the Act, it cannot be brought within the ambit of “any other matter” required to be decided by the Employees' Insurance Court under this Act.”

18. The aforesaid provision of the said Act, in context with “any other matter” as appearing in Section 75(1)(g) of the said Act, has not been examined in the case of **Regional Director ESI**, (supra). Admittedly in such case. The tribunal (ESI Court) was adjudicating upon disputes raised by the employees It is in that context that the Hon’ble Supreme Court in paragraph 4 thereof has been, *inter alia*, pleased to observe as follows:

“4.The provisions contained in Section 88 whereby the appropriate Government can exempt any person or class of persons employed in any factory or establishment or class of factories or establishments to which the Act applies from the operation of the Act and Section 99-A which contains the power to remove difficulties would not, in our opinion, cover the dispute which was raised by the respondent-employees which involves adjudication of the dispute whether the benefits which were being availed of by them prior to the application of ESI Scheme to them were more advantageous than those under the ESI Scheme. The said dispute could only be adjudicated upon by the ESI Court, especially because the jurisdiction of the civil court has been barred under Section 75(3) which prescribes that no civil court shall have jurisdiction to decide or deal with any question or dispute as aforesaid

or to adjudicate on any liability which by or under this Act is to be decided by a medical board, or by a medical appeal tribunal or by the Employees' Insurance Court."

19. It is well settled that a judgment is an authority for what it decides and a slight variation in facts may lead to an entirely different conclusion. I find that the case of **Zuari Cement Limited** (supra), is a direct authority that the ESI Court does not have jurisdiction to decide whether exemption can be granted or not.
20. Independent of the above, records would reveal that the State respondents for the first time have raised a question of maintainability of the writ application without filing any affidavit that too at the hearing stage. Admittedly, on the previous occasion when this Court had directed the Principal Secretary, Department of Labour, Government of West Bengal to consider the petitioners' representation, no such objection was raised. In view of what has been discussed here in above and having regard to the judgement delivered by the Hon'ble Supreme Court in the case of **Zuari Cement Limited.**, (supra), the objection raised by the State respondents fail.
21. Although, it has been argued on behalf of the ESI Corporation that there is no provision in the said Act, to grant permanent exemption, I find the said Act recognises grant of exemption under certain categories and to certain persons and class of persons. In this case the appropriate Government would be

required to consider the case, for grant of exemption under section 88 read with Section 91 of the said Act. Admittedly, in this case no decision has, however, been rendered by the Principal Secretary, Department of Labour, Government of West Bengal with reference to the claim for exemption under the aforesaid provisions. I find that notwithstanding this Court directing the Joint Secretary, Department of Labour, Government of West Bengal, to decide the petitioners' representation for grant of exemption, in the light of the order passed by Principal Secretary, Department of Labour, Government of West Bengal on 1st November, 2012, the order dated 8th June 2022 does not reflect that the Principal Secretary, Department of Labour, Government of West Bengal had taken into consideration, the observations made in the order dated 1st November, 2012. I also find that the Principal Secretary, Department of Labour, Government of West Bengal has not returned any finding as to whether the petitioner no.1 is entitled to exemption under Section 88 read with Section 91 of the said Act or not.

22. I find that in the decision rendered by the Principal Secretary, Department of Labour, Government of West Bengal, as appearing in his order dated 8th June, 2022, in paragraph 4 thereof, has inter alia, observed as follows:-

“4. It appears that the establishment of the Petitioner is a charitable Organisation registered under Society Registration Act. The way the activities of the

establishment are administered apparently justify its claim for exemption from application of the provisions of Employee State Insurance Act, 1948. The organisation therefore may be considered eligible for exemption in terms of 87 of the Act.”

23. Having, thus, concluded, the petitioner no.1 is otherwise entitled to exemption, and having regard to the direction issued by the Hon’ble Court on 17th February 2022, the Principal Secretary, Department of Labour, Government of West Bengal, in my opinion, ought to have adjudicated upon the issue, as to whether the petitioner no.1 is entitled to exemption under Section 88 read with Section 91 of the said Act.

24. For reasons more fully discussed hereinabove, I am of the view that the Principal Secretary, Department of Labour, Government of West Bengal should reconsider the aforesaid issue afresh, having regard to the observation made in the order dated 1st November, 2012 and the aforesaid order passed by him, and a fresh decision should be taken, as regards grant of exemption under Section 88 read with Section 91 of the said Act in favour of the petitioner no.1 and if found eligible to grant exemption. Save to the aforesaid extent, the other portions of the order dated 8th June, 2022 are not interfered with.

25. The aforesaid decision must be taken strictly in terms of the observations made herein as within a period of six weeks from the date of communication of this order, upon affording opportunity of

hearing to both the petitioners as well as the Employees' State Insurance Corporation. The petitioners shall be at liberty to file documents, if necessary, which shall be taken into consideration while passing the order.

26. With the aforesaid observations, the present writ application is disposed of.

27. There shall be no order as to costs.

28. Urgent certified copy of this order and judgment, if applied for, be given to the appearing parties, as expeditiously as possible upon compliance with all necessary formalities.

(RAJA BASU CHOWDHURY, J.)