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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 18.09.2023

\+ CRL.M.C. 812/2023 & CRL.M.A. 3052/2023 (for stay)

GYAN CHAND TATHER ..... Petitioner

Through:

versus

EMPLOYEES STATE INSURANCE CORPORATION & ORS. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Keshav Thakur, Ms. Palak Mathur, Mr. Prithvi Thakur and Mr. Rajesh Singh Chauhan, Advocates.

For the Respondents : Ms. Priyanka and Mr. Aniket Rajput, Advocates for R-1 along with Mr. Arvind Kumar Bansal, SSO ESIC.
Mr. Aniket Prasoon, Mr. Utsav Mukherjee, Mr. Sanjeev Singh Thakur and Mr. Vikalp Wange, Advocates for R-2 and R-3.

CORAM:
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

TUSHAR RAO GEDELA, J. (ORAL)

[The proceeding has been conducted through Hybrid mode]

1. This is a petition under Section 482 Cr.P.C., 1973 read with Article 227 of the Constitution of India praying for necessary orders and directions for quashing the complaint No. 4872/2020 under the

85(G) of the Employees' State Insurance Act, 1948 (hereinafter referred to as 'ESI Act') pending before the learned CMM, South East District, Saket Courts, New Delhi.

2. The relevant brief facts as culled out from the petition are as under :-

> *"2. Briefly, the fact of the case are that on 2.09.2014 Minutes of Proceedings of the Extra Ordinary General Meeting of Respondent No. 2 was held at New Delhi wherein amongst other resolutions the Chairman proposed the resolution that the resignation of Petitioner from Directorship of the Company was accepted with effect from 2.09.2014. This resolution was passed unanimously and as such the Petitioner ceased to be the Director of the Company w.e.f 2.09.2014.*
>
> *3. That in the same Minutes of Meeting of 2.09.2014 the Chairman proposed the appointment of Gonzalo Gomez Garcia and Santiago Cabezas Carbonell as the new Directors of the Company.*
>
> *4. That the Respondent no. 3 Rajesh Kumar Jha, the Managing Director of the Company was given the authorization to sign and send the notice for the above said Extra Ordinary General Meeting to the members and to file the Form DIR-12 with ROC, Delhi.*
>
> *5. That on 2.09.2014 itself pursuant to Section 152 (5) and Rule 8 of the Companies (Appointment and Qualification of Director) Rules, 2014 consent is given by Gonzalo Gomez Garcia and Santiago Cabezas Carbonell to act as the Directors of the Company who are of Spanish Nationality. As such pursuant to Section 164(2) and Rule 14(1) of the Companies (Appointment and Qualification of Director) Rules, 2014 Gonzalo Gomez Garcia and Santiago Cabezas Carbonell were appointed as the Directors of the Company.*
>
> *6. That on 2.09.2014 itself the Petitioner formally tendered his resignation for the post of the Director of the Company. In the letter the Petitioner sited personal reasons for this decision and also asked the Board of the Directors to relieve him w.e.f 2.09.2014. The Petitioner also asked the Board of Directors for arranging to submit the necessary forms with the office of the Registrar of Companies, NCT of Delhi & Haryana accordingly.*

7. That on 9.12.2019 and again on 13.12.2019 the Respondent No. 1 issue Notice U/s 45 (2) of the ESI Act, 1948 asking for the following records such as Muster Roll, Wages/ salary Register, Cash Books, Ledger and supportive vouchers in r/o balance sheet (s)/P&L A/c's. All other documents pertaining to employment. Contractors records, viz. names and insurance number of all contractor Employees, their attendance/wages records/ Copy of Return of contribution(s). Copies of challans for ESI contribution / return of contribution. Inspection book under regulation 102-A. Employees/ Contribution Register Under Regulation 32. Accident book under Regulation 66. Returns of Contribution and Return of Declaration Forms. All documents relating to Constitution of Firm / Factory / Company / Establishment. TDS Deducted & deposited (in respect of employees as well as of Contractors) and copies of Form 16 issued to employees.
8……….
9……….
10 ……….
11……….

12.That on 6.10.2020 a complaint is filed by the Respondent No. 1 against the Respondent No. 2 company for offences U/s 85 (G) of the ESI Act, 1948 before the court of CMM, Saket Court wherein the Petitioner is also arrayed as accused No.3. In the complaint it is alleged that the accused being under the statutory obligation to pay the contribution amount as required under ESI Act, 1948 in respect of the employees has failed to produce the records at the time of Inspection of document and for verifying correction of the correction of the due contribution which has to be paid by the unit under ESI Act, 1948. It also alleged that the Respondent No. 1 personally visited the premises of the Respondent No. 2 on 9.12.2019, 13.12.2019, 19.12.2019 & 3.01.2020 for inspection of record as per S. 45(2) of the Act for the period of last five years but the Respondent No. 2 failed to produce any of the records which is in violation of the statutory obligation under the Act by not producing complete and relevant records."

3. At the outset, Mr. Keshav Thakur, learned counsel for the petitioner draws attention of this Court to page No. 78 of the present petition to submit that the FORM DIR-12, is to be filed by a Company, before the Registrar of Companies, to update the ROC regarding particulars of appointments of Director and Key Managerial Personnel

as to whether there are any changes or additions or deletions in respect of the directors of a particular company.

4. Learned counsel submits that according to FORM DIR-12 at page No. 78 of the present petition, one Mr. Gonzalo Gomez Garcia along with Mr. Santiago Cabezas Carbonell were inducted as Directors w.e.f., 02.09.2014.

5. Correspondingly, learned counsel submits that on the same Form at page No. 81, the name of the present petitioner i.e. Mr. Gyan Chand Tather has been shown as ceasing to be a Director of respondent No.2 company w.e.f., 02.09.2014.

6. In other words, learned counsel submits that simultaneously, corresponding with the induction of the aforesaid two directors, the petitioner had ceased to be a Director of the respondent No.2 company.

7. Learned counsel also invites attention of this Court to page 85 of the petition, which is Form 32, which is mandated to be filed under the provisions of Section 303(2) / 264(2) or 266(1)(a) and 266(1)(b)(iii) of the Companies Act, 1956 to disclose the particulars of appointments of Managing Directors, Directors, Managers, Secretaries and the changes among them, to the Registrar of companies.

8. According to learned counsel through the aforesaid Form 32 too, the respondent No.2 company had yet again confirmed the cessation of the petitioner as a Director of the respondent No.2 company w.e.f., 25.03.2013.

9. Learned counsel submits that once having informed about the aforesaid change and the cessation of the petitioner as a director, in law and or fact, i.e., *de jure* and *de facto,* the petitioner ceased to be a

director of respondent No.2.

10. Learned counsel for the petitioner submits that once the petitioner is no more a director of the company w.e.f., March 2014, no notices *qua* the period subsequent thereto can be issued to the petitioner.

11. Learned counsel draws attention of this Court to Annexure C, which is the notice dated 09.12.2019 issued by the Sub Regional Office, Okhla, Employees' State Insurance Corporation, which issued a show cause notice to the respondent No.2 in respect of placing on its record the inspection records of the factory/ establishment under Section 45(2) of the ESI Act, 1948 w.e.f., 01.04.2015 till date of the issuance of the show cause notice.

12. Learned counsel submits that it is the alleged violation of the said show cause notice that the petitioner was proceeded against by the ESIC and the complaint following the alleged violation was filed by the ESIC on 06.10.2020 before the Court of learned CMM, Saket District Courts, New Delhi by way of the complaint No. 4872/2020.

13. Learned counsel for the petitioner submits particularly that para 2 of the said complaint carries a wrong averment to the extent that the petitioner is one of the principal employees in terms of Section 2(17) of the ESI Act, 1948 and that he was in-charge and responsible towards the day-to-day conduct, supervision and control of business of the respondent No.2 company.

14. Thus, challenging the same the present petition was filed seeking quashing.

15. *Per contra*, learned counsel appearing for the respondent No.1/

ESIC submits that the show cause notice was issued correctly, since neither the FORM 32 nor the FORM DIR-12 was ever furnished to the ESIC. Not only that, neither the petitioner nor the company undertook the responsibility of giving any kind of information to the respondent No.1 that the petitioner has ceased to be a director of the said company w.e.f., March 2014.

16. Learned counsel submits that in the absence of such information, it cannot be expected that the ESIC had any information with regard thereto and, therefore, the issuance of show cause notice was correct and valid in law.

17. Learned counsel on that basis submits that the petitioner should face the proceedings instead of approaching this Court for seeking quashing of the said complaint.

18. This Court has considered the submissions of the learned counsel appearing for the parties.

19. The indelible fact arising from the records before the Court is that under FORM 32, the petitioner, through the respondent No.2 company, had already given prior information about the change in designation in respect of his position as a director of the respondent No.2 on 25.03.2013.

20. That apart, by virtue of FORM DIR-12, which is again a statutory document required to be filed by the respondent No.2 before the Registrar, the induction of two directors and the cessation of the petitioner as a Director of the said respondent No.2 company w.e.f., 02.09.2014 was also furnished and taken on record by the ROC.

21. There is nothing on record to show that the said documents

have not been submitted to the ROC and, therefore, this Court takes judicial notice of the FORM 32 as also FORM DIR-12 to the extent of the controversy in the present petition.

22. Considering the fact from a point of view that the petitioner had ceased to be a director from 02.09.2014, it would be logical to also conclude that the petitioner, if at all, would have been liable to any such inaction prior to the date of cessation as a director and surely any action, malfeasance or a misconduct or offence or any other inaction by the respondent No.2 company, subsequent to 02.09.2014 can surely not be saddled upon the petitioner.

23. So far as the submissions of learned counsel for respondent-ESIC is concerned, no doubt there is nothing to show on record that the petitioner or respondent No.2 company had ever submitted such information of cessation of directors to the petitioner to the ESIC. However, that alone will not saddle the petitioner with the offences or inaction as contemplated under the show cause notice issued on 09.12.2019.

24. It is not disputed that the petitioner ceased to be a director of respondent No.2 company w.e.f., 02.09.2014. It is also not disputed that the show cause notice only sought information records etc., of respondent No.2 company w.e.f., 01.04.2015 only. The period when the petitioner was admittedly the director has not been sought for by the respondent No.1 / ESIC.

25. If the petitioner had ceased to be a Director w.e.f., 02.09.2014, he would not be liable or answerable regarding any aspect relating to the company thereafter. Thus, the issuance of show cause notice and

subsequent arraying of the petitioner in the aforesaid complaint is unlawful.

26. Thus, the show cause notice dated 09.12.2019 and any other show cause notice subsequent thereto as also the CT Case No. 4872/2020 arising out of complaint dated 06.10.2020 filed by the ESIC before the learned CMM, South East District, Saket Courts, Delhi stands quashed only *qua* the petitioner Gyan Chand Tather/ accused No.3 therein, without affecting the other contents of the complaint.

27. The petition along with the pending application stands disposed of in the above terms.

TUSHAR RAO GEDELA, J

SEPTEMBER 18, 2023/*nd*