IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 701 of 2020

M/s L.K. Shishu Shiksha Niketan
Vs.
Employees' State Insurance Corporation & anr.

For the petitioner	:	Mr. Soumya Majumder Ms. Sanjukta Dutta
For the ESI	:	Mr. Mihir Kundu
Heard on	:	15.07.2024
Judgment on	:	29.07.2024

Ajoy Kumar Mukherjee, J.

1. Assailing order dated 23rd December, 2019 passed by Employees State Insurance (in short ESI) court, West Bengal Kolkata in Tender Case no. 08 of 2019, present application has been preferred by the petitioner under article 227 of the Constitution of India. By the order impugned learned court below rejected petitioners application under section 75(2-B) of the Employees State Insurance Act 1948 (in short Act of 1948).

2. Being aggrieved by that order petitioner herein submits that the petitioners set up a small kindergarten school for imparting education upto Class IV standard, principally among the students of the rehabilitation colony of the locality and the total number of students in the school is about 170 and the total number of teaching and non-teaching staff at present is 7. Said employees hails from the locality and largely render almost voluntary service and only the conveyance allowance is paid on monthly basis to the teaching and non teaching staff.

3. The petitioners aforesaid institution is covered under the Act of 1948 and all the employees employed by the petitioner's institution for wages are duly insured as "employees" under section 2(9) of the Act of 1948 and their contribution under the Act has been duly paid on the actual remuneration received by them, which would be evident from the pay register maintained by the petitioner.

4. The petitioner was served with a notice on 6th July, 2017 from the opposite party claiming contribution of ten employees amounting to Rs. 2,94,938/- for the period from June 2012 to December, 2016, on the basis of the assumed notional wages of Rs. 8250/- per month per employee. Petitioner alleged that the said recoverable amount is much higher than that reckoned as per the salary register of the employee from 2012 to 2016. Petitioner further alleged that on 7th May, 2012 the school security officer of the opposite party checked and verified the attendance register and wage register and he also put his signature approving the contents of both the documents but surprisingly opposite party (OP) computed the contribution on the basis of assumed average wage and not on the basis of the actual wages and as such aforesaid claim of the opposite party is not just or legal and in fact is without jurisdiction.

5. Thereafter on 16th November, 2012 the Assistant Director of ESI Corporation passed an order under section 45A of the Act of 1948 claiming Rs. 2,73,488/- for the period of 01.10.2012 to 31.12.2016 as due contribution on an assumed monthly average wage at the rate of 8250/- per month per employee. Thereafter on 16.03.2018 notice was issued to the petitioner by the opposite party demanding Rs. 3,78,720/- after imposing interest on recoverable amount. The petitioner contended that the contribution for the period from October, 2012 to December, 2016 has already been paid by the petitioner

6. In the above background the petitioner herein filed an application on 31st January, 2019 before the ESI Court below, under section 75(1) (g) along with an application under section 75 (2-B) praying *interalia* to pass such order to invalidate the said impugned notices and also from restraining the opposite parties from realizing the alleged amount of Rs. 3,78,785/- and to waive the condition for keeping the deposit of 50% of the claim amount as envisaged under section 75 (2-B) of the Act of 1948, along with a further prayer for temporary injunction. Learned court below by the order impugned rejected petitioners both the aforesaid applications filed under the aforesaid provisions under the Act of 1948.

7. Being aggrieved by that order Mr. Mazumder Learned counsel appearing on behalf of the petitioner submits that the petitioner somehow manages to run that school primarily for the education of slum dwellers children and for the children of the inhabitants of rehabilitation colony and the tuition fees charged are very meager. The monthly remuneration paid to the employees is also meager and infact they are only paid the conveyance charges, which is reflected in the wage register. Learned court below did not consider that the amount claimed by the ESI Corporation as alleged contribution was calculated on the basis of assumed average wages of Rs. 8250/- per month per employee and not on the basis of actual wages paid to the employees and as such the order passed by ESI Corporation is without jurisdiction. The opposite party also did not disclose the basis of such calculation and arbitrarily and illegally has imposed the claim amount based on presumption and hypothesis. Accordingly he prayed for setting aside the order impugned.

8. Mr. Mihir Kundu learned counsel appearing on behalf of the petitioner submits that an inspection was made by the social security officers which transpires that the said establishment failed to pay the contribution for ten employees and on the basis of such report submitted by the social security officer, the ESI Corporation initiated proceeding under section 45A of the Act determining amount of contribution of the employees for the period from June, 2012 to December, 2016. Mr. Kundu further submits that after initiating the said proceeding, reasonable opportunity of hearing was given to the petitioner/employer and he was further requested to furnish school particulars, statements of return of actual contribution payable by him for the said period but the petitioner neither appeared before the authority concerned for hearing nor supplied the requisite documents. Accordingly upon consideration of relevant record and applying its judicial mind, the concerned authority under the provision of section 45 A of the Act of 1948, passed the order.

9. Mr. Kundu strenuously argued that if the petitioner was aggrieved by the said order he ought to have preferred an appeal to the Appellate authority within 60 days from the date of the said order, after depositing 25% of the said claim amount. However, inspite of their knowledge about the provision for preferring appeal, the petitioners did not choose to prefer any appeal but filed aforesaid application under section 75(1) (g) of the Act of 1948 for decision of the ESI Court. He further contended that as no appeal was preferred against the claim before the Appellate authority, the order attains its finality and there is no scope for re-determination of dispute in terms of section 75(1) (g) of the Act of 1948. He further submits that under the provision of 75(2-B) of the Act of 1948, it is mandatory to deposit 50% of the claim amount unless the court waves such deposit. Accordingly the order impugned is legal, justified and does not call for interference by this court invoking jurisdiction under Article 227 of the Constitution of India.

10. I have considered submissions made by both the parties.

11. Learned court below while rejecting petitioner's applications under section 75 (2-B) of the Act of 1948 observed that the petitioner miserably failed to make out any case not speak of good prima facie case, in support of his prayer for temporary injunction as well as weaver form mandatory deposit of 50% of the claim amount in terms of section 75 (2-B) of the Act of 1948. It was further ordered that the applicant shall deposit 50% of the amount due as claim by the corporation under section 45 A of the act of 1948 by the date fixed and in case of failure to make the deposit within the date fixed the Tender Case shall stands dismissed.

12. The argument raised by the counsel for the petitioner before this court is that in view of proviso to section 75 (2-B) of the Act of 1948, the learned court below could have waved or reduced the amount to be deposited. He further submits that the court below did not consider that the corporation has claimed contribution of 10 employees for the period from June 2012 to December 2016 on the basis of assumed notational wages of Rs. 8250/- per month per employee, though the social security officer visited the school on 7th may 2012 and he had checked and verified the attendance register and wage register and it clearly shows that the monthly wage of the employees is much less than the said notational amount as the employees largely rendered almost voluntary service and the conveyance charges are only paid to them. However the court below passed the order impugned assigning a reason based on assumption that the wages of the employee as shown in the register between Rs. 300/- to 900/- is highly improbable in the prevailing market index and circumstances of our society. Such reasoning in support of dismissal of the petitioner's prayer are absolutely no reason and also not sustainable in the eyes of law, as it based on surmise and conjecture.

13. Accordingly the main argument raised by the petitioner herein before this court is whether the order impugned passed by the court below is supported by valid reason or not, while not waving of deposit of 50% of the claim amount.

14. Before appreciating the argument raised by the counsel for the appellant let me reproduce section 75 (2-B) of the Act of 1948 which reads as follows:

> *"No matter which is in dispute between a principal employer and the Corporation in respect of any contribution or any other dues shall be raised by the principal employer in the Employees' Insurance Court unless he has deposited with the Court fifty per cent. of the amount due from him as claimed by the Corporation:*
> *Provided that the Court may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this sub-section."*

15. A plain reading of the section 75(2-B) provides that a dispute between the principal employer and corporation in respect of any contribution or any other dues would be raised by the principal employer in the court only after depositing 50% percent of the amount claimed by the corporation. The only relief provided in the said section is the proviso which states that the court may for reasons to be recorded in writing wave or reduce the amount to be deposited. Accordingly as per the proviso, recording reasons in writing would arise in a situation where the court decides to wave or reduce the amount to be deposited. In case the court is not waving of or is not reducing the mandatory deposit of the amount of 50%, the court is not required to record reasons in terms of section 75(2-B) of the Act.

16. This is also well settled that the High Court while exercising jurisdiction under Article 227 of the Constitution of India should not interfere for correcting mere error of facts or with a finding of the court below, which is within the jurisdiction of such court. However, if such finding is perverse in such a sense that no prudent person having the knowledge of law could have arrived at such finding or the finding is not based on any material evidence or if such finding results in manifest injustice or if there is a misdirection in law, then the High Court can obviously interfere invoking jurisdiction under article 227 of the Constitution of India.

17. In the present context there is no scope to say that the order impugned passed under the provision of section 75 (2-B) of the Act of 1948 is beyond the courts jurisdiction or the said finding is perverse in a sense that no prudent person having knowledge of law would not have arrived at such finding.

18. In such view of the matter I m not inclined to interfere with the order impugned.

19. Thus **C.O. 701 of 2020** stands dismissed.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(AJOY KUMAR MUKHERJEE, J.)