IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.01.2024

PRONOUNCED ON : 19.01.2024

CORAM

THE HON'BLE MR.JUSTICE G.CHANDRASEKHARAN

W.P.No.5612 of 2011
and
M.P.No.1 of 2011

M/s. MMTC Ltd.,
Rep.by Deputy General Manager,
(Personnel) No.7, Esplanade,
Chennai – 600 104. ... Petitioner

Vs.

1.Employees State Insurance,
Corporation, rep. by its Director
2nd Floor, Padmanabha Buildings,
No.14-20-37, Gandhi Nagar,
Vijayawada – 520 003.

2.The Recovery Officer,
Sub Regional Office,
ESI Corporation,
2nd Floor, Padmanabha Buildings,
No.14-20-37, Gandhi Nagar,
Vijayawada – 520 003. ... Respondents

PRAYER: Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of Certiorarified Mandamus calling for the records of the 1st respondent herein culminating in order dated 24.09.2010 vide

No.AP/SRO/VJA/Ins.I/62-0075-101 and consequent Recovery Notice dated 28.1.2011 vide AP/SRO:VJA/Ins.II/62-0075-101 and quash the same and direct the 1st respondent to consider the petitioner's representation dated 21.10.2010 for waiver of damages within the time frame as may be fixed by this Court.

For Petitioner : Mr.M.Santhanaraman,
for Mr.G.Govindarajan

For Respondents : Mr.G.Bharadwaj

ORDER

This Writ Petition has been filed to call for the records of the 1st respondent herein culminating in order dated 24.09.2010, vide No.AP/SRO/VJA/Ins.I/62-0075-101 and consequent Recovery Notice dated 28.1.2011, vide AP/SRO:VJA/Ins.II/62-0075-101 and quash the same and direct the 1st respondent to consider the petitioner's representation dated 21.10.2010 for waiver of damages within the time frame as may be fixed by this Court.

2.M/s.Mica Trading Corporation of India Ltd., (hereinafter referred to as MITCO), an erstwhile subsidiary of the petitioner company was having its registered office at Gudur, Andhra Pradesh. This Company is exempted from the coverage of Employees State Insurance Scheme with effect from

26.03.1978, as per Letter No.AP/Ins.I/51-1740-101, dated 07.08.1978, Letter No.AP/ins-i/5/1740-101, dated 12.06.1980 and Letter No.AP/Ins-I/5-1740-101, dated 15.09.1980, issued by the Assistant Regional Director of the respondents. On 21.03.1990, Mr.N.Venugopal Rao, the Inspector of the 1st respondent visited the office of MITCO and informed that MITCO was amenable to the Employees State Insurance Act (hereinafter referred to as ESI Act). By the time, a letter dated 29.09.1992 stating that MITCO is covered under the ESI Act, with effect from 20.10.1989 was received from the 1st respondent, 45 workers of MITCO retired voluntarily on 31.07.1991. A show cause notice was received from the 1st respondent seeking payment of contribution from March 1990 to March 1994. MITCO sent a representation dated 30.08.1994 seeking exemption from the application of the said Act. MITCO was directed to approach the Ministry of Labour, Government of India, for exemption by the 1st respondent vide its letter dated 17.10.1994. MITCO clarified through its letter dated 27.10.1994 that only three workers were on the rolls and MITCO was referred to BIFR and verdict of BIFR was awaited. The 1st respondent passed an order dated 15.12.1995 under Section 45A of ESI Act seeking payment of Rs.1,16,106.75 for the period from 21.10.1989 to 30.04.1995. On 15.04.1997, another notice was received seeking payment of Rs.2,09,322/-. In the meantime, MITCO was closed and it was declared as a sick company by BIFR and it got merged with the petitioner company on the basis of an order dated 08.04.1996 passed by the BIFR in case No.502 of 1993. Vide order dated 02.02.2005, the Recovery Officer demanded Rs.3,64,923/- and attached the inoperative bank accounts of the MITCO. In order to avoid the cascading effect, the petitioner made a payment of Rs.4,05,578/- on 19.02.2007 and Rs.6,923/- on 27.03.2007. The 1st respondent imposed a sum of Rs.1,16,254/- and Rs.5,445/- towards damages for the delayed payment of contributions. In such circumstances, this writ petition is filed for the aforesaid reliefs.

3.The learned counsel for the petitioner submitted that MITCO was declared as a sick unit and it was merged with the petitioner company. As per Regulation 31-C (a) of ESI (General) Regulations 1950, when a sick unit is merged or amalgamated with a healthy company, the sick unit is entitled for complete waiver of damages levied or leviable. The impugned order reads that as per the provisions of Regulation 31-C (a) of ESI (General) Regulations 1950, the Corporation may waive the damages levied or leviable. But, instead of waiving the damages, the authority proceeded to pass an order under

Section 85-B of the ESI Act, 1948, directing the payment of Rs.1,16,254/-. It is illegal, unjust and contrary to law. The authorised officer has not properly exercised his jurisdiction to waive the damages and therefore, this order is challenged by way of filing this writ petition. It is not necessary to file an appeal against this order. Moreover, there is a specific mention in the impugned order that "No appeal/representation will be entertained against this order".

4.In reply, the learned counsel for the respondents objected this petition on the following two important grounds, (i) Section 75 (1) (g) of the ESI Act provides remedy to the petitioner to challenge the impugned order passed under Section 85 B of the ESI Act before the ESI Court. However, the petitioner has not resorted to the effective alternative remedy and filed this writ petition, which is not maintainable. (ii) If at all any writ petition is to be filed, the writ petition could only be filed before the High Court of Andhra Pradesh. In support of his submissions, the learned counsel for the respondents relied on the following judgments and the relevant portions of the judgments are extracted hereunder:

(i) Calcutta Gujarati Education Society and another Vs. Regional Provident Fund Commissioner and others, reported in (2020) 19 SCC 380.

7.In Ambica Industries Case, the consideration in the appeal was with regard to the determination of the situs of the High Court in which the appeal would lie under Section 35-G of the Central Excise Act,1944. The issue therein was with regard to the maintainability or otherwise of the writ petition before the High Court at New Delhi merely because the Central Excise and Service Tax Appellate Tribunal (CESTAT) is situated at New Delhi. While considering the said question, this Court has arrived at the conclusion that when such Tribunals exercise its jurisdiction in respect of the issues arising from the different parts of the country, the territorial jurisdiction for filing the writ petition at the place where the Tribunal is situated would not be justified. It has been held therein that the writ petition would be maintainable at the place where the original authority/court had exercised the jurisdiction.

8.The relevant paragraph No.13 and 17 read as follows:

"13. The Tribunal, as noticed hereinbefore, exercises jurisdiction over all the three States. In all the three States there are High Courts. In the event, the aggrieved person is treated to be the dominus litis, as a result whereof, he elects to file the appeal before one or the other High Court, the decision of the High Court shall be binding only on the authorities which are within its jurisdiction. It will only be of persuasive value on the authorities functioning under a different jurisdiction. If the binding authority of a High Court

does not extend beyond its territorial jurisdiction and the decision of one High Court would not be a binding precedent for other High Courts or courts or tribunals outside its territorial jurisdiction, some sort of judicial anarchy shall come into play. An assessee, affected by an order of assessment made at Bombay, may invoke the jurisdiction of the Allahabad High court to take advantage of the law laid down by it and which might suit him and thus he would be able to successfully evade the law laid down by the High Court at Bombay.

17. There cannot be any doubt whatsoever that in terms of Article 227 of the Constitution of India as also Clause (2) of Article 226 thereof, the High Court would exercise its discretionary jurisdiction as also power to issue writ of certiorari in respect of the orders passed by the subordinate courts within its territorial jurisdiction or if any cause of action has arisen therewithin but the same tests cannot be applied when the appellate court exercises a jurisdiction over a tribunal situated in more than one State. In such a situation, in our opinion, the High Court situated in the State where the first court is located should be considered to be appropriate Appellate Authority. The Code of Civil Procedure did not contemplate such a situation. It provides for jurisdiction of each court. Even a District Judge must exercise its jurisdiction only within the territorial limits of a State. It is inconceivable under the code of Civil Procedure that the jurisdiction of the District Court would be *exercisable beyond the territorial jurisdiction of the district, save and except in such matters where the law specifically provides therefor.” (emphasis supplied)*

9.The learned counsel for the respondents no doubt referred to the decision in the case of Kusum Ingots & Alloys Ltd. Vs. Union of India & Anr. (2004) 6 SCC 254 wherein it is held that the territorial jurisdiction will be at the place where part of the cause of action arises. Apart from the fact that Calcutta has the territorial jurisdiction since the cause of action has arisen there, it is seen that this Court while considering this aspect in the case of Ambica Industries (supra) has referred to the decision in Kusum Ingots (supra) and declared the position of law. Hence no further discussion is required on that aspect.

10. If the said enunciation of law is kept in view, as already taken note, in the instant case the original order passed is by the Assistant Provident Fund Commissioner situate at Calcutta, West Bengal and the Calcutta High Court can exercise territorial jurisdiction. In that light we are of the view that the Calcutta High Court was not justified in its decision to decline to entertain the writ petition.

(ii) Alchemist Ltd. and another Vs State Bank of Sikkim and others reported in (2007) 11 SCC 335.

26.In Union of India & Ors. v. Oswal Woollen Mills Ltd. & Ors., (1984) 3 SCR 342 : AIR 1984 SC 1264, the registered office of the Company was situated at Ludhiana, but a petition was field in the High Court of Calcutta on the ground that the Company had its branch office there. The order was challenged by the Union of India. And this Court held that since the registered office of the Company was at Ludhiana and the principal respondents against whom primary relief was sought were at New Delhi, one would have expected the writ petitioner to approach either the High Court of Punjab & Haryana or the High Court of Delhi. The forum chosen by the writ petitioners could not be said to be in accordance with law and the High Court of Calcutta could not have entertained the writ petition.

27.In State of Rajasthan & Ors. v. M/s Swaika Properties, (1985) 3 SCC 217 : AIR 1985 SC 1289, the Company whose registered office was at Calcutta filed a petition in the High Court of Calcutta challenging the notice issued by the Special Town Planning Officer, Jaipur for acquisition of immovable property situated in Jaipur. Observing that the entire cause of action arose within the territorial jurisdiction of the High Court of Rajasthan at Jaipur Bench, the Supreme

Court held that the High Court of Calcutta had no territorial jurisdiction to entertain the writ petition.

(iii) Kusum Ingots & Alloys Ltd.. Vs. Union of India and another reported in (2004) 6 SCC 254.

26.The view taken by this Court in U.P. Rashtriya Chini Mill Adhikari Parishad, Lucknow (supra) that situs of issue of an order or notification by the Government would come within the meaning of expression 'cases arising' in clause 14 of the (Amalgamation) Order is not a correct view of law for the reason hereafter stated and to that extent the said decision is overruled. In fact, a legislation, it is trite, is not confined to a statute enacted by the Parliament or Legislature of a State, which would include delegated legislation and subordinate legislation or an executive order made by the Union of India, State or any other statutory authority. In a case where the field is not covered by any statutory rule, executive instruction issued in this behalf shall also come with within the purview thereof. situs of office of the Parliament, Legislature of a State or authorities empowered to make subordinate legislation would not by itself constitute any cause of action or cases arising. In other words, framing of a statute, statutory rule or issue of an executive order or instruction would not confer jurisdiction upon a court only because of the situs of the office of the maker thereof.

27.When an order, however, is passed by a Court or Tribunal or an executive authority whether under provisions of a statute or otherwise, a part of cause of action arises at that place. Even in a given case, when the original authority is constituted at one place and the appellate authority is constituted at another, a writ petition would be maintainable at both the places. In other words as order of the appellate authority constitutes a part of cause of action, a writ petition would be maintainable in the High Court within whose jurisdiction it is situate having regard to the fact that the order of the appellate authority is also required to be set aside and as the order of the original authority merges with that of the appellate authority.

(iv) State of Rajasthan and others Vs. M/s. Swaika Properties and another reported in (1985) 3 SCC 217.

9.It is to be deeply regretted that despite a series of decisions of this Court deprecating the practice prevalent in the High Court of passing such interlocutory orders for the mere asking , the learned Single Judge should have passed the impugned ad-interim exparte prohibitory order the effect of which , as the learned Attoreny General rightly complains , was virtually to bring to a standstill a development scheme of the Urban Improvement Trust , Jaipur viz. Civil Lines

Extension Scheme , irrespective of the fact whether or not the High Court had any territorial jurisdiction to entertain a petition under Art. 226 of the Constitution. Such arbitrary exercise of power by the High Court at the public expense reacts against the development and prosperity of the country and is clearly detrimental to the national interest.

10.Quite recently , Chinnappa Reddy , J. speaking for the Court in Assistant Collector of Central Excise , West Bengal v. Dunlop India Limited and Ors.(1) administered strong admonition deprecating the practice of the High Court of granting ad-interim exparte orders which practically have the effect of the grant of the main relief in the petition under Art. 226 of the Constitution irrespective of the fact whether the High Court had any territorial jurisdiction to entertain such a petition or whether the petition under Art. 226 was intended and meant to circumvent the alternative remedy provided by law or filed solely for the purpose of obtaining interim orders and thereafter delaying and protracting the proceedings by one device or the other particularly in matters relating to public revenue or implementation of various measures and schemes undertaken by the Government or the local authorities for general public benefit. Although the powers of the High Courts under Art. 226 of the Constitution are far and wide and *the Judges must ever be vigilant to protect the citizen against arbitrary executive action , nonetheless , the Judges have a constructive role and therefore there is always the need to use such extensive powers with due circumspection. There has to be in the larger public interest an clement of self- ordained restraint and trust that the High Court will determine the extent of its territorial jurisdiction before making such interlocutory orders.*

(v) South Indian Bank Ltd., and Others Vs. Naveen Mathew Philip and Another reported in 2023 SCC Online SC 435.

27. The principles of law which emerge are that:

27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.

27.3. Exceptions to the rule of alternate remedy arise where: (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

27.4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.

27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

5.In reply to his submissions, the learned counsel for the petitioner submitted that the petitioner's office is situated at Chennai, which is within the jurisdiction of the Madras High Court. The order passed under Section 85-B of the ESI Act was served to the petitioner in their Chennai address. The order reads that Mr.M.Vasanthakumar, Manager (Personnel) appeared for enquiry. A counter has also been filed by the Social Security Officer, ESI Corporation, Chennai. Therefore, it cannot be stated that this Court has no territorial jurisdiction to entertain this petition. In support of his submissions, he relied on the judgment of this Court in ***A.Madurai Veeran Vs. Union of***

India, represented by its Secretary to Government, Ministry of Defence, New Delhi and others reported in 2006 (2) MLJ 61, for the proposition that where most of the correspondences relating to rejection of disability pension and subsequent rejection of representations had been made within the territorial jurisdiction of the Madras High Court, the Madras High Court has authority to entertain the writ petition. He further submitted that the impugned order was served to the petitioner in Chennai; when the petitioner's representative participated in the enquiry and when the counter was filed by the Social Security Officer, ESI Corporation, Chennai, the writ petition filed in the Madras High Court is maintainable.

6.Considered the rival submissions and perused the records.

7.It is seen from the petition averments, submissions of the counsel appearing for the parties and the records produced that though the petitioner claims exemption from the operation of the ESI Act, ultimately, the petitioner made payments of Rs.4,05,578/- on 19.02.2007 and Rs.6,923/- on 27.03.2007 towards contribution and interest for delayed payment. Therefore, there is no need to look into the issue of exemption claimed by the petitioner. The issue now relates to the order passed for payment of Rs.1,16,254/- and Rs.5,445/- towards damages for the delayed payment of contributions for the period from October 1989 to April 1995 and April 1992 to March 1995.

8.It is seen from the Regulation 31-C of the ESI (General) Regulations, 1950 that it deals with the payment of damages as well as waiver. For better understanding, it is extracted hereunder.

> ***31-C Damages or contributions or any other amount due, but not paid in time.*** *-If an employer fails to pay contributions within the periods specified under regulation 31, or any other amount payable under the Act, the corporation may recover damages, not exceeding the rates mentioned below, by way of penalty:*

Period of delay	*Maximum rate of damages in per cent per annum of the amount due*
(i) Less than 2 months	5%
(ii) 2 months and above but less than 4 months	10%
(iii) 4 months and above but less than 6 months	15%

Period of delay	*Maximum rate of damages in per cent per annum of the amount due*
(iv) 6 months and above	25%

Provided that the Corporation, in relation to a factory or establishment which is declared as sick industrial company and in respect of which a rehabilitation scheme has been sanctioned by the Board for Industrial and Financial Reconstruction, may:-

(a) in case of a change of management including transfer of undertaking(s) to workers' co-operative(s) or in case of merger or amalgamation of sick industrial company with a healthy company, completely waive the damages levied or leviable;

(b) in other cases, depending on its merits, waive upto 50 per cent. damages levied or leviable;

(c) in exceptional hard cases, waive either totally or partially the damages levied or leviable.

9.The proviso reads that in relation to a factory or establishment declared as sick industrial company and in respect of which a rehabilitation scheme has been sanctioned by the BIFR, the Corporation may in case of change of management including transfer of undertaking(s) to worker's co-operative(s) or in case of merger or amalgamation of sick industrial company with a healthy company, completely waive the damages levied or leviable. No doubt that MITCO was declared as a sick unit and got merged with the petitioner company and therefore, in terms of the proviso of Regulation 31-C of the ESI (General) Regulations 1950, petitioner is entitled for waiver. The impugned order also reads that as per the proviso of Regulation 31-C (a) of the ESI (General) Regulations 1950, the Corporation may waive the damages levied or leviable. However, it proceeded to say that the waiver cannot be claimed as a matter of right and the question of waiver or otherwise has to be considered in due course. Order refers to the Draft Rehabilitation Scheme prepared by the BIFR and in the Draft Rehabilitation Scheme, it is mentioned that the promoters (MMTC) shall meet any other contingency or any other liability not known or not disclosed at the time of sanction of the loan. It is observed that the contribution of ESI is not reflected in the Draft Rehabilitation Scheme and then proceeded to levy the damages. It was also stated that the employer is at liberty to approach the ESI Corporation for waiver of damages in due course separately. Therefore, an option is made available to the petitioner to approach the ESI Corporation for waiver of damages.

10.Coming to the issue of jurisdiction, as rightly pointed out by the learned counsel for the respondents that Section 75 (1)(g) of ESI Act provides remedy to the petitioner to initiate appropriate proceedings before the ESI Court, challenging the order passed under Section 85 B of the ESI Act. Instead of challenging the impugned order before the ESI Court, the petitioner has chosen to file a writ petition before this Court. When considering the maintainability of the writ petition under Article 226 of Constitution of India, the Hon'ble Supreme Court in ***South Indian Bank Ltd. And Others Vs. Naveen Mathew Philip and another reported in 2023 SCC Online SC 435*** referred to the judgment of the Hon'ble Supreme Court in ***Radha Krishnan Industries Vs. State of H.P., reported in (2021) 6 SCC 771,*** wherein it was observed as follows:

> *27. The principles of law which emerge are that:*
>
> *27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.*
>
> *27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.*
>
> *27.3. Exceptions to the rule of alternate remedy arise where: (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the*

principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

27.4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.

27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

11.It is not as though the writ petition cannot be maintainable when an alternative remedy is available, but writ jurisdiction can be invoked only under the following three contingencies, (i) where the writ petition seeks enforcement of any of the fundamental rights (ii) where there is failure of principles of natural justice or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of the Act is challenged. None of these grounds exist in this case to challenge the impugned order. Therefore, this

Court is of the view that the filing of this writ petition instead of challenging the impugned order under Section 75 of the ESI Act before the ESI Court is not maintainable.

12.Assuming without admitting that the writ petition can be maintainable, the writ petition ought to have been filed before the High Court of Andhra Pradesh and not before this Court. Simply because the impugned order had been served on the petitioner at Chennai Office, petitioner's representative participated in the enquiry and a counter was filed by the Social Security Officer, ESI Corporation, Chennai, it cannot be stated that these factors give jurisdiction to the petitioner to file a writ petition in this Court. There are proceedings under Section 45A initiated against MITCO by the ESI Corporation at Vijayawada followed by the other proceedings which culminated into an impugned order dated 24.09.2010 and Recovery Notice dated 28.1.2011. The judgments relied by the learned counsel for the petitioner cannot be made applicable to this case for the reason that the facts of the present case are totally different.

13.In this view of the matter, this Court finds that the writ petition cannot be maintained, especially, in this Court and the writ petition is dismissed. However, liberty is granted to the petitioner to challenge the impugned order and recovery notice under Section 75 of the ESI Act before the ESI Court at Vijayawada. The time spent in prosecuting this writ petition has to be excluded for the purpose of calculating the limitation.

14.With the above observations, this Writ Petition stands dismissed. Consequently, connected Miscellaneous Petition is also closed. No costs.

sli **19.01.2024**
Internet:Yes
Index:Yes/No
Speaking/Non speaking order
NCC: Yes/No

To:

1.Employees State Insurance,

Corporation, rep. by its Director
2nd Floor, Padmanabha Buildings,
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2.The Recovery Officer,
Sub Regional Office,
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G.CHANDRASEKHARAN, J.
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**Pre-delivery Order in
W.P.No.5612 of 2011
and
M.P.No.1 of 2011**

19.01.2024