IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDER RESERVED ON : 05.03.2024

ORDER PRONOUNCED ON : 15.04.2024

CORAM

THE HON'BLE MRS. JUSTICE N.MALA

W.P.No.29714 of 2018
and
WMP.No.34675 of 2018

M/s.SRI GOWTAM TEX,
Rep. by its Partner
Mr.R.Easwara Murthy,
S/o.Rassappa Gounder,
4B, Gopal Nagar, Near KVR Lay out,
Karuvamplaayam, Mangalam Road,
Tiruppur-641 604.

...Petitioner

Vs

The Recovery Officer,
Employees State Insurance Corporation,
1897, Trichy Road,
Coimbatore – 45.

...Respondent

Writ petition is filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus calling for records of the respondent in Ref.No.CBE/RECY/CP-3/56/00/61164/16, dated 06.09.2018 and quash the same and consequently directing the Respondent not to take any coercive action for recovery of dues form the petitioner's.

For petitioner : Mr.S.Ravindran, Senior Counsel
for M/s.P.Navaneethakrishnan.

For respondent : Mr.C.V.Ramachandramurthy

ORDER

Writ Petition is filed challenging the prohibitory order dated 06.09.2018 and for consequential direction to the respondent not to take any coercive action for recovery of dues from the petitioner.

2. The petitioner is engaged in the business of garments and allied products and covered under the Employees State Insurance Act (Hereinafter called as ESI Act, 1948). According to the petitioner due to inadvertence, it failed to update the total amount of contribution payable to the respondent from the year 1995 and ending with the year 2002. The respondent issued a notice on 02.05.2003 directing the petitioner to pay a sum of Rs.20,54,823/- for the period between 1995 to March 2003, as regular contribution payable by petitioner. On 26.05.2003, Form C-18 notice

was sent demanding Rs.20,54,823/- towards contribution. According to the petitioner, it was called for hearing on 12.06.2003, but the petitioner's manager did not attend the enquiry. The respondent on 21.08.2003, issued a demand notice claiming contribution of Rs.20,98,950/-, without conducting enquiry under Section 45A of the ESI Act. The petitioner on 30.09.2003 sent his explanation to the respondent with reference to the aforesaid demand and prayed for reopening of the case. According to the petitioner even without considering the petitioners explanation dated 30.09.2003, respondent issued a Form C-19 notice on 13.08.2003 demanding the payment of contribution at Rs.20,98,950/-. In the meantime the petitioner paid a sum of Rs.4,48,611/- and Rs.1,19,702/- totally Rs.5,68,313/-, but the same was not accounted by the respondent, while arriving at the contribution payable by the petitioner. The petitioner filed writ petition in W.P.No.7187 of 2004 challenging the recovery notice dated 13.08.2003 as well as demand notice dated 21.08.2003. This Court granted interim stay on 23.03.2004 in the writ petition subject to payment of Rs.5,00,000/- within eight weeks from 23.03.2004. The petitioner thereafter filed writ appeal in W.A.No.1703 of 2004 and the Hon'ble Division Bench passed orders on 29.04.2004 reducing the amount from Rs.5,00,000/- to Rs.3,00,000/- payable within two weeks. Thereafter an extension petition to extend time to remit the amount of Rs.3,00,000/- was filed and the Hon'ble Division Bench vide order dated 02.06.2004 extended the time to 31.07.2004. The petitioner remitted a sum of Rs.50,000/- on 24.07.2004 and filed a petition for permission to pay the balance amount of Rs.2,50,000/- in installments. The Hon'ble Division Bench passed orders on 29.10.2004 granting installment facility and further directed the respondent corporation to hear the petition dated 30.09.2003. The petitioner though got the order for making the payment in installments paid the entire balance amount of Rs.2,50,000/- in three installments before 21.10.2004. According to the petitioner the respondent did not comply with the orders of the Division Bench directing the respondents to rehear the petition dated 30.09.2003. The petitioner further stated that right from 12.07.2010, the petitioner was not carrying any business activity. The petitioner stated that an amount of Rs.1,81,675/- was recovered on 25.08.2010 and thereafter on

06.09.2018 after lapse of 8 years, the respondent passed the impugned order directing the petitioner to pay contribution and interest at Rs.32,05,586/- without any corresponding orders and without adhering to the Hon'ble Courts order in W.A.No.1703 of 2004 dated 29.10.2004. The petitioner stated that the respondent corporation claimed contribution after 14 years without even identifying the beneficiaries. It was stated that the petitioner even after lapse of 14 years was not in a position to identify the employees and it was not possible for the petitioner to generate Aadhar,bank account and ID proof for the employees and their family members and therefore even if the amount is deposited, it would not benefit the concerned employees. The petitioner further stated that the impugned order was invalid, as no orders were passed under 45-A of the ESI Act and also that the claim for contribution was made beyond the 5 years period provided under Section 77(1A)(b) of the ESI Act. The petitioner therefore prayed for dismissal of the recovery notice, as being illegal, arbitrary and contrary to the facts and circumstances of the case.

3. The respondent filed a counter denying all the averments made

in the writ affidavit. The respondent stated that the petitioner failed to disclose its business activities and identify its partners. As the petitioner defaulted in the payment of ESI dues, C-18 (Actuals) notice dated 26.05.2003 was issued for non payment of Rs.1,19,702/- for the period between 4/1999 to 3/2003 and Rs.19,35,121/- for the period 1995-1996 and 2001-2002 and thus a total amount of Rs.20,54,823/- was claimed. It was further stated that on inspection of the petitioners factory on 01.04.2003, 17.04.2003 and 02.05.2003, it was found that the petitioner had failed to register all its employees to whom the act was applicable. It was seen that the petitioner failed to remit Rs.1,19,702/-, the contribution for the period 4/1999 to 03/2003 in respect of wages as per the wage records. It was further found that petitioner concealed wage paid under various accounting heads from the book of accounts for the period from 4/1999 to 3/2003. The aforesaid findings made in the inspection were communicated to the petitioner and also acknowledged by the petitioner's manager by affixing his signature and the companies seal. The petitioner failed to raise any objection during the inspection or immediately after the receipt of the inspection report identifying the amounts due. The petitioner neither disputed the amount identified as due nor did he pay the same. Hence the claim in form C-18 (Actual) dated 26.05.2003 claiming a sum of Rs.20,54,823/- towards contribution was issued to the petitioner. According to the respondent the petitioner wantonly mixed up the facts so as to confuse the Court by stating that in C-18 (Actual) notice dated 26.05.2003, the petitioner was called for personal hearing, when in fact the hearing was in no way related to the said notice, but was in relation to a earlier notice. The respondent denied the contention of the petitioner that without the 45-A order the respondent could not recover the amount. The respondent stated that the C-18 (Actual) notice dated 26.05.2003 was based on the records produced by the petitioner and therefore there was no necessity of passing a 45-A order by giving the petitioner an opportunity of hearing. According to the respondent, the determination under Section 45-A was required only if the conditions stated in Section 45-A arose. In the present case, as the C-18 (Actual) notice was passed based on the information collected from the records of the petitioner, produced at the time of inspection, no hearing was required as contemplated under Section 45-A of the ESI Act, because there could be no dispute on the quantum of amount determined, as the said determination was made on the basis of the petitioners own record. The respondent referred to the various proceedings initiated by the petitioner to establish that the challenge to the impugned order was gross abuse of process of Court. The respondent relied on the various legal proceedings initiated by the petitioner as also his tenants to delay the recovery of the corporations legitimate dues. It was further stated that as the petitioner challenged only the consequential recovery order without challenging the C-18 (Actual) notice, the writ petition was not maintainable. The respondent categorically denied that the Hon'ble Division Bench directed the respondent to rehear the petition dated 30.09.2003. The respondent submitted that the petitioner was unreliable, as he went to the extent of manipulating the High Court's order, by stating that the respondent was directed to rehear the 30.09.2003 petition. The respondent referred to the various summons issued to the petitioner and stated that the respondent was deligently prosecuting the matter.

4. The learned counsel for the petitioner submitted that from 12.07.2010, the petitioner was not carrying out any business and therefore the impugned prohibitory order passed after a lapse of 8 years directing the petitioner to pay contribution and interest of Rs.32,05,586/- without adhering to the order of the Hon'ble Division Bench dated 29.10.2004 in W.A.No.1703 of 2004 was untenable. The learned counsel submitted that in the absence of 45-A order, the impugned order based on the C-18 (Actual) notice was illegal and unsustainable. The learned counsel further submitted that this was a fit case for remand, as the explanation of the petitioner dated 30.09.2003 was not considered by the respondent and therefore an opportunity ought to be given to the petitioner to challenge the C-18 (Actual) notice dated 26.05.2003. The learned counsel therefore prayed that the writ petition may be allowed.

5. The learned counsel for the respondent on the other hand

submitted that the petitioner has challenged only the consequential order without challenging the assessment order and therefore the writ petition deserved to be dismissed on the said point. The learned counsel further submitted that when the contribution was claimed under C-18 (Actual) notice on the basis of the petitioner's own records produced by it at the time of inspection, further order under Section 45-A was not necessary.

6. I have heard both the learned counsels and I have perused the materials placed on record.

7. Before venturing into the respective submissions of the learned counsels, I would like to refer to the conduct of the petitioner in filing false affidavit before this Court. In my view the petitioner has approached the Court with unclean hands and therefore at the threshold the writ petition deserves to be dismissed.

8. The petitioner in more than one place in the affidavit filed in

support of the writ petition, stated that vide order dated 29.10.2004, the Division Bench had directed the respondent to rehear the petition dated 30.09.2003. It was further stated in the writ affidavit that the Division Bench in the above order had permitted the petitioner to pay in installments. The petitioner further stated that the respondent had not adhered to the orders of this Court in W.A.No.1703 of 2004. In order to consider the petitioner's said statements, the order in W.A.No.1703 of 2004 was perused. It is seen from the order dated 29.10.2004 that the Division Bench had merely extended the time and condoned the delay in payment. The operative portion of the order reads as follows:

"*Time extended. Consequently, delay in payment is condoned.*"

9. It is therefore unfathomable, as to how the petitioner has raised a plea that the Division Bench directed the respondent corporation to rehear the petition dated 30.09.2003 and further permitted the petitioner to pay in installments. These statements are clearly false and therefore the petitioner should be non-suited on this short ground. In any event for the

sake of completion, I have considered the merits of the case and I find that there are no merits in the writ petition.

10. As rightly contended by the learned counsel for the respondent the petitioner has challenged only prohibitory order dated 06.09.2018 which is consequential order and has not challenged the C-18 (Adhoc) notice dated 26.05.2003, hence I am of the view that the writ petition is not maintainable.

11. The learned counsel for the petitioner submitted that the impugned order was passed without passing any order under Section 45-A of the ESI Act. The learned counsel therefore submitted that the impugned order had no legs to stand.

12. The learned counsel for the respondent on the other hand submits that the C-18 (Actual) notice was passed on the basis of the records furnished by the petitioner at the time of inspection that was conducted on

01.04.2003, 17.04.2003 and 02.05.2003 and therefore no order under Section 45-A was necessary. The learned counsel for the respondent relied on the Judgment of the Division Bench of this Court in W.A.No.2171 of 2023 dated 20.09.2023. The Division Bench in the said Judgment in paragraphs 12 and 14 held as follows:

> "*12. Thus, leaving all the factual issues open to the parties, including the issue of limitation, if any, excluding the period during whicht the writ petition was pending, we hold that it is open to the first respondent establishment to approach the ESI Court within a period of three months from the date of receipt of a copy of this order. In case, they have a longer period of limitation, it is open to them approach the ESI Court within such time.*
>
> *14. In view of the above discussion, the order passed by the Single Bench is set aside and we hold that determination under Section 45-A, ibid., is required in case of Form-C 18 (adhoc) and not in case of Form-C 18 (actuals).*"

13. From the above, it is clear that no orders are necessary under Section 45-A when Form C-18 (Actuals) is issued. In the present case form C-18 (Actuals) was passed as early as on 26.05.2003 and it remains unchallenged till date. Therefore the contention of the learned counsel for the petitioner that 45-A order is necessary is rejected.

14. It is further relevant to note here that in W.P.No.7187 of 2004 the petitioner did not challenge the C-18 (Acutal) notice dated 26.05.2003, but challenged only the consequential C-19 recovery notice dated 13.08.2003 and demand notice dated 21.08.2003. The said writ petition was kept pending till 08.01.2010 and was subsequentially withdrawn by the petitioner without even reserving a right to challenge the C-18 (Actual) notice. Therefore the petitioner even without challenging C-18 (Actual) notice has successfully dragged on the proceedings from 2003 to 2010. It is stated by the respondent that summons were served on the petitioner on 10.07.2013 and 14.06.2017, but petitioner failed to appear and make the payments and thereafter the impugned prohibitory order was passed. In

my view, the delay, if any, in passing the impugned order is of no significance because the original order has never been challenged till date.

15. The learned counsel for the petitioner referring to the above Judgment of the Hon'ble Division Bench, relied on by the respondents counsel, submitted that the Division Bench having held that determination under Section 45-A of the Act was not necessary, in case of Form C-18 (Actual) notice before the ESI Court, nevertheless permitted the petitioner therein to challenge the same before the ESI Court. The learned counsel therefore prayed that liberty may be given to the petitioner herein to challenge the Form C-18(Actual) notice before the ESI Court.

16. I am afraid that the said prayer of the petitioner's counsel cannot be countenanced, because the Form C-18 (Actual) notice in the aforesaid writ appeal was of the year 2016 and the writ petition was filed on 23.05.2017. Whereas, in the present case the Form C-18 (Actual) notice is dated 26.05.2003. As already stated above the Form C-18 (Actual) was not

challenged even in the earlier round of litigation in W.P.No.7187 of 2004 and I therefore find no justifiable reason to permit the petitioner to challenge the Form C-18 (Actual) notice before the ESI Court at this belated stage.

17. It is to be noted here that when the writ petition in W.P.No.7187 of 2004 was withdrawn on 08.01.2010, nothing prevented the petitioner from seeking liberty from the Court to challenge the Form C-18 (Actual) notice. The petitioner having failed to do so cannot be permitted to challenge the same. The petitioner has already successfully stalled recovery proceedings for almost 2 decades now and therefore, in my view, no indulgence can be shown to the petitioner.

I am therefore of the view that the writ petition is without merit and hence the same is dismissed. No costs. Consequentially, connected WMP is closed.

15.04.2024

dsn
Index:Yes/No
Speaking Order: Yes/No
Neutral Citation: Yes/No

To
The Recovery Officer,
Employees State Insurance Corporation,
1897, Trichy Road,
Coimbatore – 45.

N.MALA,J.

dsn

PRE-DELIVERY ORDER IN
W.P.No.29714 of 2018

ORDER DELIVERED ON
15.04.2024