

(2012) 06 CAL CK 0050

In the Calcutta High Court

Case No : C.O. No. 1649 of 2010 with C.O. No. 1924 of 2010 with C.O. No. 1925 of 2010

Employee's State Insurance Corporation

APPELLANT

Vs

M/s. Peerless General Finance and Investment Company Ltd.

RESPONDENT

Date of Decision : 11-06-2012

Acts Referred:

Constitution of India, 1950 — Article 227

Employees State Insurance Act, 1948 — Section 45(1)(b), 45A, 75(1)(c), 75(2B), 82

Citation : (2012) 134 FLR 597

Hon'ble Judges : Prasenjit Mandal, J

Bench : Single Bench

Advocate : T.K. Chatterjee, for the Appellant; Dipak Kumar Ghosh and Mr. Ranajay De, for the Respondent

Final Decision : Allowed

Judgement

Prasenjit Mandal, J.—These three applications are directed against the orders dated March 27, 2009, August 19, 2009 and March 27, 2009 passed by the learned Judge, Employee's Insurance Court, Calcutta, West Bengal in T.C. (Tender Case) No. 23 of 2009, T.C. (Tender Case) No. 31 of 2009 and T.C. (Tender Case) No. 21 of 2009 respectively. Since the common question is involved in the three matters, the said three applications are disposed of by this common judgment. For convenience, the fact of the case being C.O. No. 1649 of 2010 is stated below in short.

C.O. No. 1649 of 2010:-

2. The opposite party filed an application u/s 75(1)(c) of the Employees' State Insurance Act, 1948 and in that application he filed an application for temporary injunction and another application u/s 75(2B) of the said Act before the Employees' Insurance Court, Calcutta, West Bengal. The opposite party challenged therein the order passed u/s 45A of the E.S.I. Act, 1948 whereby an amount of Rs. 32,30,256/- only as contribution for the period of 4/92 to 3/97

was worked out. The said amount had been finally determined by the Authorised Officer under the said Act. The opposite party did not challenge the said order before the Employees' Insurance Court after receipt of the order. Thereafter, for non-payment of the said contribution, the Authorised Officer issued a requisition notice on February 18, 2009 for initiating recovery action by the Recovery Officer for recovery of the said amount along with interest. The opposite party did not raise any dispute till then. Thereafter, the Recovery Officer initiated steps for recovery of the amount mentioned in the notice dated February 18, 2009. Then, the case being T.C. (Tender Case) No. 23 of 2009 was initiated challenging the notice, order u/s 45A of the E.S.I. Act and the requisition notice dated February 18, 2009.

3. Subsequently, the Recovery Officer issued notices on March 16, 2009 and March 17, 2009 asking the Managers of the concerned Axis Bank restraining them from making further payment of the amount of Rs. 1,91,73,184/- being the certificate dues in respect of certificate case and other cases. Notice was served upon the opposite party.

4. By the impugned order, the learned Judge, Employees' Insurance Court directed the petitioner to deposit the balance amount of Rs. 67,78,925/- after keeping the security deposit amounting to Rs. 17 lakhs only. Being aggrieved, this application has been filed by the Corporation.

5. Now, the question is whether the impugned order should be sustained.

6. Upon hearing the learned counsel for the parties and on going through the materials on record, I find that by Annexure-P1 relating to order dated January 28, 2009 u/s 45A of the E.S.I. Act, 1948, the petitioner has proved that a sum of Rs. 32,30,256/- was payable by the opposite party to the Corporation as contribution and this amount was finally decided by the concerned authority. The employer's authorised representative, Shri Pradip Roy, Manager, H.R., Eastern Region attended the hearing in connection with the said matter and a written submission along with documents were furnished by Mr. Roy. This order dated January 28, 2009 was not challenged, at all, by the opposite party immediately.

7. Thereafter, by Annexure-P2, the petitioner served an application dated February 18, 2009 upon the opposite party for recovery of the contribution u/s 45(c) to 45(I) of the E.S.I. Act, 1948. In spite of such notice, no challenge was made either of the order of the Authorised Officer or of the notice dated February 18, 2009. Accordingly, the concerned authority under the E.S.I. Act started a recovery proceeding and order of attachment was issued by the concerned Officer upon the concerned Axis Bank. Thereafter, the impugned order was passed on March 27, 2009 on the application u/s 75(1)(c) of the Act.

8. Upon perusal of the impugned order, I do not find that the concerned Judge has ever held that the first order dated January 28, 2009 appearing as Annexure-P1 was ever challenged by the opposite party at earlier point of time. This is the final order on the matter. There is no observation by the learned Judge,

Employees" Insurance Court to the effect that the said order is illegal, inoperative or without notice to the opposite party. Even after passing of the order dated January 28, 2009, the notice dated February 18, 2009 was served upon the opposite party, but, this order was not challenged immediately on getting the notice.

9. While disposing of an application u/s 75(2B) of the E.S.I. Act, the learned Judge is required to see whether an appropriate condition should be imposed upon the principal employer relating to deposit of contribution in respect of any dispute between the principal employer and the Corporation in respect of any contribution or any other dues.

10. For convenience, the said provision is quoted below:-

Section 75(2B):-

(2B) 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.

11. Therefore, the said Section does not relate to giving a direction for refund of the money already recovered by way of attachment in a recovery proceeding. But, it relates to imposing condition when the principal employer files application u/s 75(1)(c) of the said Act. Thus, I find that the learned Judge has erred in law in directing the petitioner to refund the amount as indicated above.

12. Mr. T.K. Chatterjee appearing for the petitioner has relied upon the decision of Employees" State Insurance Corporation v. Mackintosh Burn Ltd. & anr. reported in 1999 (83) FLR 805 and submitted that the Employees" Insurance Court cannot pass any direction for refund of the amount which had already been realised through due process of execution. In the instant case, there is no finding by the learned Trial Judge that the process of execution u/s 45(1)(b) of the Act was illegal or without jurisdiction. The finding under question does not involve the substantial question of law and so this decision is fully applicable in the present situation.

13. Mr. Chatterjee has also referred to the decision of an unreported case of Employees" State Insurance Corporation v. M/s. Gloster Jute Mills Ltd. in C.O. No. 2065 of 1998 and another unreported case of Employees" State Insurance Corporation & anr. v. M/s. Haldiram Bhujawala & ors. in C.O. No. 161 of 2000. I find that the last two decisions are based on the findings on the decision of 1999 (83) FLR 805.

14. On the contrary, Mr. Dipak Kumar Ghosh has referred to the decision of

Employees" State Insurance Corporation and Others Vs. Hotel Airport Ashok and Another, and thus, he submits that this revisional application is not maintainable. This is also endorsed by the judgment of Nurul Huda Layek Vs. Tapas Kumar Sen and Another, wherein the principles of granting relief under Article 227 of the Constitution of India have been discussed thoroughly. Thus, he submits that the application is not maintainable.

15. Mr. Ghosh has also submitted that the decision of 1999 (83) FLR 805 is not applicable at all in the instant situation. With due respect to Mr. Ghosh, I am of the view that the submission of Mr. Ghosh in this regard cannot be accepted. I have stated earlier that the matter under challenge in this revisional application is related to the order of refund of the attached money under a recovery proceeding. The findings, I am of the view, cannot be described in favour of the substantial question of law but findings on the fact of refund of money in disposing of an application u/s 75(2B) of the said Act. Rather, I am of the view that the decision of 1999 (83) FLR 805 is fully applicable in the instant case and this decision is also followed by other two Benches of this Hon"ble Court as referred to earlier. So, the impugned order does not involve any substantial question of law, but fact already stated. So, no appeal lies under the provision of Section 82 of the Act.

16. Mr. Ghosh has also contended that whether the order of direction to make payment is illegal or not is to be decided first and then the question of payment arises and so, the appropriate application u/s 75(1)(c) of the said Act was filed by the opposite party and the learned Judge has passed a reasoned order which should be supported.

17. With due respect to Mr. Ghosh, I am of the view that this submission cannot be accepted inasmuch as the opposite party did not challenge the final order dated January 28, 2009 passed by the competent authority under the E.S.I. Act immediately. Even when notice dated February 18, 2009 was issued, the final order was not also challenged. The attachment of the money from the bank accounts had been issued when there was no restraint order. The application u/s 75(1)(c) of the said Act has been initiated by the opposite party and this application shall be disposed of by the learned Judge in accordance with law.

18. In that view of the matter, I am of the opinion that the learned Judge has failed to address the issue properly and thus, he has committed errors of law by directing the petitioner to refund the amount already attached in a recovery proceeding. He has also failed to appreciate the fact that when the money has been attached in a recovery proceeding under the above circumstances by the Recovery Officer, no direction could be issued upon the petitioner to refund the amount so recovered before the final adjudication of the application u/s 75(1)(c) of the said Act. The recovery proceeding has not been described by the learned Judge as baseless or without jurisdiction. There was no order of injunction at the time of attachment of the money although the application u/s 75(1)(c) of the Act was then pending. The learned Judge has, therefore, passed the impugned order

on a total misconception of law and so, the impugned order cannot be supported. In such circumstances, an application under Article 227 of the Constitution is quite maintainable. The decisions referred to by Mr. Ghosh will not be helpful in favour of his client.

19. In that view of the matter, I am of the opinion that the application succeeds. So, the application is allowed. The impugned order is hereby set aside.

20. Considering the circumstances, there will be no order as to costs.

C.O. No. 1924 of 2010:-

21. In view of the above findings in C.O. No. 1649 of 2010, on the selfsame reasoning, this application is also allowed. The impugned order is hereby set aside.

22. Considering the circumstances, there will be no order as to costs.

C.O. No. 1925 of 2010:-

23. In view of the above findings in C.O. No. 1649 of 2010, on the selfsame reasoning, this application is also allowed. The impugned order is hereby set aside.

24. Considering the circumstances, there will be no order as to costs. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.