

(2023) 01 KL CK 0296
In the High Court Of Kerala
Case No : Writ Appeal No.61 Of 2023

Employees' State Insurance Corporation Regional Office
(KERALA) APPELLANT

Vs

M/s Uae Exchange And Financial Services Limited RESPONDENT

Date of Decision : 16-01-2023

Acts Referred:

Employees State Insurance Act, 1948 — Section 87, 91, 91A

Citation : (2023) 01 KL CK 0296

Hon'ble Judges : A.K. Jayasankaran Nambiar, J;Mohammed Nias C.P., J

Bench : Division Bench

Advocate : Adarsh Kumar, Shashank Devan, Shinu J.Pillai, Asok M.Chcrian,
Mariya Rajan Mariya Rajan, S.Suja, Nesmel Divan, Gauri Haridas

Final Decision : Dismissed

Judgement

Mohammed Nias.C.P., J.

1. This appeal is preferred by the Employees State Insurance Corporation (ESI Corporation), the second respondent in the writ petition filed by the first respondent herein, aggrieved by the judgment dated 8.11.2022 passed by the learned single Judge quashing Ext.P10 order that rejected the request for exemption claimed by the petitioner from the provisions of the Employees State Insurance Act, 1948 ('ESI Act' for short) for the period from 2004 to 2006. Learned single Judge also directed for a fresh consideration of the application claiming exemption by the Government.

2. Briefly stated, the writ petitioner challenged Ext.P10 order rejecting the claim for exemption from the provisions of the Act on the ground that it was in violation of Ext.P8 judgment of this Court dated 11.2.2013, which specifically directed the Government to consider the exemption applications in accordance with the observations contained therein. The reasons for rejecting the application submitted by the petitioner on 10.9.2004 and 11.5.2006 was that the

amendment made in the year 2010 to the Act, which was in force when the Government considered the case, did not contain any provision for granting exemption retrospectively. The writ petitioner contended that the amendment brought to Section 91A of the Act is effective only from 1.6.2010 and the same has no impact in the instant case as the applications were filed and once considered well before the amendment and in view of the mandamus issued in Ext.P8 judgment, they were to be considered on the basis of the pre-amended section of the Act. The finding of the Government in Ext.P10 that Section 87 is purely discretionary was attacked by the petitioner as illegal as the applications preferred by them were statutory applications to be considered in terms of the Act. It was the contention of the writ petitioner that by Ext.P5 series, the petitioner Company had provided superior benefits and they were exempted from the provisions of the Act till 2004 and there was no change in any circumstances thereafter to reject their request by Ext.P10 order.

3. The learned single Judge by the judgment impugned in the appeal accepted the contention of the writ petitioner that the applications preferred by them were much prior to the amendment to Section 91 and also relied on the judgment of this Court reported in *Kerala educational Society v. The State of Kerala and Others* [2011 (4) KLT 318]. Since the application for exemption for the period from 1.9.2004 to 31.8.2005 was made on 10.9.2004 and for the period from 1.9.2005 to 31.8.2006 was made on 11.5.2006 and which were received by the Government on 30.9.2004 and 6.8.2006 respectively, the learned single Judge after relying on the provisions of Section 91A of the Act found that the reasons in Ext.P10 order rejecting the claim is wrong and that the Government had abdicated its functions while rejecting the applications on the basis of the amended provisions of Section 91A as the applications which were filed much earlier ought to have been considered on the basis of the then existing provisions, and accordingly set aside the order impugned in the writ petition and remitted the matter to the Government to decide in terms of the directions in the judgment within a period of two months from the date of receipt of a copy of this judgment.

4. The ESI Corporation had filed this appeal contending that the applications of the petitioner had to be considered in the light of the amended provisions of the year 2010, and that the direction of the learned single Judge is an exercise in futility as the applications could not have been considered under the pre-amended provisions and that the establishment which otherwise would have been under the purview of the Act would be taken away from the ambit of the Act if the exemption is granted by the Government on account of the directions granted in the impugned judgment. Further submission is that no hearing need to be granted to the petitioners either under Section 87 or 91, and therefore quashing of Ext.P10 on that ground is not proper. It is also argued that the provisions of the Act are in the nature of conditional legislation, whereby, the parent statute delegated the exercise of authority to delegatee envisaged under the Act and in the instant case the power conferred on the Government as per

Section 87 of the Act falls within the ambit of conditional legislation and therefore the applications could not have been considered under the pre-amended provisions. It is also the argument of the Corporation that the very authority to grant exemption prospectively has been taken away by the amendment and by the coming into force of Section 91A, and therefore the Government was interdicted from granting exemption for a period between 2004 and 2006. The learned counsel also cited the following decision in support of his arguments:-

Pantheerankavu Service Co-operative Bank Ltd. and others v. State of Kerala and others [ILR 2016(2) Kerala 1073], State of Tamil Nadu, Represented by Secretary Housing Department, Madras v. K.Sabanayagam and another [(1998) 1 SCC 318], The Indian Coffee Workers' Co-op.Society Ltd. v. The Secretary, Industries, Energy & Labour Department and another (Writ Petition No.768 of 2014) and I.T.C.Bhadrachalam Paperboards and Others v. Mandal Revenue Officer, A.P. and others (MANU/SC/1292/1996). He also argued that the judgment in Kerala Educational Society (supra) relied on by the learned single Judge does not lay down the correct position of law.

5. We have heard Sri.Adarsh Kumar, the learned counsel for the appellant, Sri.Bijoy Chandran, the learned Government Pleader and Sri. Shinu J. Pillai, the learned counsel for the first respondent-writ petitioner.

6. At the outset we find it difficult to comprehend as to how the Corporation can be considered to be aggrieved by the directions issued by the learned single Judge which in fact directed the Government to consider the application for exemption on the basis of the pre-amended law. It is pertinent to note that Government has not chosen to file any appeal. The contentions now being raised in this appeal are all matters which they can raise in view of the provisions of Section 89 of the Act when the Government considers the question of exemption. It is highly doubtful as to whether the Corporation has any locus to file this appeal at this point of time more so when the Government had not even decided the question of exemption. As a creature of the statute, the Corporation cannot prevent an establishment from seeking an exemption from the provisions of the Act when the grant of such exemption is an integral feature of the statutory scheme.

7. The grievance projected in the writ appeal is that the consideration is on the basis of the un-amended provision as the applications were filed for the period prior to the coming into force of the amendment. It is to be seen that by Ext.P8 judgment, which has become final inter partes this Court had clearly directed the consideration of the application preferred by the writ petitioner for the same period by its judgment dated 11.2.2008, much before the coming into force of the amendment, particularly, holding that the establishment was enjoying the benefit of exemption and therefore the Government had to give reasons as to why the exemption should not be continued. The earlier orders rejecting the exemption were quashed by Ext.P8 judgment and a fresh consideration in the

light of the observations made in the said judgment was ordered. Notwithstanding Ext.P8 judgment, Ext.P10 happened to be passed which as stated above and as extracted in the judgment under appeal was based on the ground that the date of application and the period sought for exemption were prior to amendment and that the power vested under Section 87 is discretionary in nature and finding that no special circumstances exist for reconsideration of the earlier order.

8. A learned single Judge in the decision in Kerala Educational Society (supra) considering the power under Section 91A to issue orders from the date of the applications for exemption as held as follows:-

"In my opinion the word 'prospectively' occurring in section 91A of the Act as amended with effect from 1.6.2010 cannot be interpreted to mean that an order of exemption can take effect only from the date on which it is granted. In a given case, the Government may have to spend some time on the application before granting an exemption. In another case, the Government may be in a position to pass expeditious orders. In other words, if the Government were to grant exemption with effect from the date of the application it cannot be said that such an order of exemption is illegal. The words "may be issued so as to take effect prospectively on such date as may be specified therein" cannot be interpreted to mean that that date can only be a future date. If that were the intention the Parliament would have stated that the notification granting exemption will take effect only from the date of the order. All that section 91A as amended prohibits is the grant of retrospective exemption from an earlier date, anterior in point of time, to the application for exemption itself. In other words in view of the stipulations in section 91A as amended, an order of exemption cannot take effect from a date earlier than the date of the application ."

The appellant Corporation had challenged the said judgment by filing WA No.334 of 2012, which was dismissed by the Division Bench by judgment dated 11.8.2014. Thus, the contention of the Corporation that the decision in Kerala Educational Society (supra) does not lay down the correct position of law cannot be accepted, as it has unsuccessfully challenged the said judgment in appeal. We see no reason to depart from the view taken by the learned single Judge in Kerala Educational Society (supra). As rightly found by the learned single Judge there was no application of mind at all and the Government had in fact abdicated its functions by rejecting the application relying on the amended provisions of Section 91A with respect to the applications filed years before and which was earlier considered by the Government in accordance with the pre-amended law and which was found to be illegal by this Court in Ext.P8 judgment. A reconsideration on the basis of Ext.P8 judgment could not have been on the basis of the amended law for the above reasons.

9. The judgments relied on by the learned counsel for the appellant are not at all relevant or supporting the contention of the appellant for deciding the issue on hand. The power of the Government to grant exemption cannot be disputed and

the Corporation gets a chance by virtue of Section 89 to put forth its views before Government decide on the question of exemption. The appeal we hold is premature if not one filed without any locus.

We find no good reason to interfere with the judgment of the learned single Judge and accordingly we dismiss the writ appeal.