

(2017) 06 CAL CK 0009

In the Calcutta High Court

Case No : 4197 of 2016?With?C O No 4198 of 2016

M/s Daga Bandhu

APPELLANT

Vs

Employees State Insurance Corporation

RESPONDENT

Date of Decision : 07-06-2017

Acts Referred:

Constitution of India, Article 227 -
Power of superintendence over all courts by the High Court
Code of Civil Procedure, 1908, Section 151,

Citation : (2017) 06 CAL CK 0009

Hon'ble Judges : Mir Dara Sheko

Bench : SINGLE BENCH

Advocate : Piyush Chaturvedi, Uddipan Banerjee, ? Subal Moitra

Judgement

1. The orders impugned dated November 18, 2015 and August 24, 2016 of learned Judge, Employees" Insurance Court, West Bengal at Kolkata arose in the Tender Case No.42 of 2015 in respect of the applications filed by the petitioner and therefore both the C.O.s pursuant to order dated 26.04.2017 have been heard for analogous disposal.

2. Admitted backdrops are as follows:- (a) The petitioner filed application before Employees" Insurance Court, West Bengal at Kolkata being Tender Case No.42 of 2015 for certain declarations against the Employees" State Insurance Corporation with the following prayer:-

"It is, therefore, most humbly and respectfully prayed that Your Honour would be graciously pleased to pass an order condoning, waiving and/or reducing the amount as per provision of Section 75(2B) of Employees" State Insurance Act and/or waiving the condition for deposit of 50% of the alleged demand/claim amount vide order dated 31.03.2015 by invoking the proviso of the said section and register the application of the dispute and/or to pass any order or orders as Your Honour may deem fit and proper, for the ends of justice."

(b) The petitioner also filed application praying temporary injunction against the opposite party pending said tender case. The prayer of said application for temporary injunction is set out:-

"to pass an order of temporary injunction restraining the opposite party, ESI Corporation jointly or severally through their men and agents, officers from proceedings any further for recovery of the purported/alleged contribution plus interest till the final disposal of the main petition."

To pass ad-interim injunction pending final disposal of the main application.

To pass any other orders as Your Honour may deem fit and proper, for the ends of justice.

(c) On being moved learned Judge, Employees' Insurance Court, shortly to be called on hereafter as learned Court passed interim order on July 3, 2015, penultimate part of which is set out:-

"HD. Ld. Lawyers of both sides. LD. Lawyer for the E.S.I Corporation with his usual fairness submitted that he has got no objection if ad-interim order be passed till the next date i.e. on 24.07.2015 and to give permission to operate Bank Account since the case is pending and next date has been fixed on 24.07.2015. Considering the respective submissions of the LD. Lawyers, materials on record and the attending circumstances of the instant case I find sufficient prima facie case in favour of the applicant. Balance of convenience and inconvenience is also in favour of the applicant.

Thus, I am inclined to grant ad-interim order in favour of the applicant. The O.P its men and agents are hereby restrained by the ad-interim order of injunction from realizing and/or recovering any amount on the strength of the impugned order under Section 45A of the E.S.I Act and on the strength of the recovery notice till 24.07.2015."

(d) Xerox copy of aforesaid interim order of injunction was communicated to the ESI Corporation by the learned Counsel of the Petitioner along with a letter of the same day i.e. July 03. 2015, by hand delivery.

(e) Admittedly the AXIS Bank, Burrabazar Branch, was the Banker of the petitioner, where the petitioner's current account in question has been lying from where transaction between the parties takes place on Garnishee order.

(f) Said AXIS Bank was not a party either in the suit or in the temporary injunction application or even in the contempt application where punishment only against the opposite parties i.e. concerned E.S.I. authorities was sought for.

3. Mr. Chaturvedi, assisted by Mr. Banerjee learned Counsel for the petitioner relying upon the letter dated July 03, 2015 argued that though the injunction order passed by the court was an interim order bearing prohibition on satisfaction of prima facie case of the petitioner, and while there was injunction restraining the E.S.I Corporation "from realizing and/or recovering any amount"

on the strength of the Garnishee order in question, and while it was brought to the knowledge of the opposite party then there was clear violation of injunction order since money from the petitioner's account from the said bank was withdrawn. Accordingly criticizing the impugned order dated November 18, 2015, since the contempt application was rejected observing that learned Court found no force on it, prayed for its setting aside, since, as argued, the rejection order was without any reason. Further submitted that being frustrated by aforesaid rejection order against complain of contemptuous act while the petitioner filed application on February 02, 2016 praying for direction upon the Recovery Officer of the ESI Corporation to refund the money, so recovered from the AXIS Bank violating the injunction order, said application also was rejected under wrong perception by observing incorrectly that there was no violation of court's order. Further argued that learned court also wrongly rejected the application dated February 17, 2016 with the observation that the earlier application dated December 12, 2015 "is in substance akin to the application under consideration." Mr. Chaturvedi relying upon the case of Tara Narayan & Ors. Vs. Sheo Krishna & Ors. reported in 2011(1) CHN (CAL) 237, and in the case of Samee Khan Vs. Bindu Khan reported in AIR 1978 Supreme Court 2765 submitted that even if the order of temporary injunction would exist as interim measure pending final disposal of application for temporary injunction it would have to be presumed to exist till the court would order otherwise, therefore according to Mr. Chaturvedi, the act of disobedience of order dated July 03, 2015 having been taken on 6th July, 2015 the impugned orders should be set aside and to allow the Revisional applications by giving appropriate direction to the court below, since, according to him at least the money of the petitioner ought to have been directed for refund.

4. Mr. Subal Moitra, learned Counsel for the opposite party per contra supporting the orders impugned replied that the impugned money having been arrived to the ESI Corporation from the AXIS Bank by way of payment order dated June 30, 2015 i.e., before passing of the injunction order dated July 03, 2015 on the basis of the Garnishee order issued by the Recovery Officer, the contempt application would not be maintainable. On the other hand Mr. Moitra going at the root of the impugned order dated July 03, 2015 submitted that even the order of interim injunction was yet to take final shape, on the basis of such an interim order a contempt proceeding should not be ensued. Thus, relying upon two unreported decisions of the Single Bench of this court decided on 1st April, 1999 in C.O. 1765 of 1998 (Employees' State Insurance Corporation Vs. M/s Mackintosh Burn Limited) and on 16th April 2004 in C.O. No. 2065 of 1998 (Employees' State Insurance Corporation Vs. M/s Gloster Jute Mills Ltd) Mr. Moitra submitted to reject both the Revisional applications. Submitted, until final adjudication on merit refund order as proposed by the opposite parties was rightly declined by Court below, this Court within the scope under Article 227 of the Constitution of India should not interfere with the order dated November 18, 2015 rejecting the contempt application dated July 22, 2015 and the impugned order dated August

24, 2016 under reference declining also to refund the money so recovered by the Recovery Officer of ESI Corporation from the account of the petitioner lying in the AXIS Bank on the basis of Garnishee order.

5. The letter of communication to the Recovery Officer of the ESI Corporation and the Bank's intimation sent on July 07, 2015 to the petitioner thereby are the two key documents to answer the Lis. There is nothing on record however to show that the petitioner had also sent ever the similar intimation on July 03, 2015 to the AXIS Bank informing about the interim injunction order or giving advice not to allow the ESI Corporation from raising any money from the petitioner's account in question. The said bank was also not a party to the tender Case No.42 of 2015.

6. From order of interim injunction dated July 03, 2015, it reveals that the same was passed by the court recording also "no objection" submitted by learned Advocate representing the ESIC before the court.

7. Mr. Chaturvedi, of course did not raise any objection as against marshalling of the gist of fact as recorded by learned court therefore from the order dated July 03, 2015, relevant part is set out:- "Sum and substance of the instant petition is that 24.07.2015 was fixed for hearing under Section 75(2B) and injunction petition but during pendency of the case the Recovery Officer of the E.S.I Corporation issued C-19 dated 08.06.2015 and also CP-2 dated 09.06.2015 the applicant prayed the Recovery Officer not to give effect of the said CP-2 till 24.07.2015. But the Recovery Officer of E.S.I Corporation without considering the facts and circumstances of the case has issued prohibitory order to the Bankers of the applicant and the Banker had informed that the applicant cannot operate the Bank Account till the amount are realized by the Recovery Officer.

Due to prohibitory orders passed by the Recovery Officer of the E.S.I Corporation to all the Bankers of the applicant, total business of the applicant has come to an end and even it is not possible to pay the salary and wages of the employees and/or any payment to the parties."

8. From the above quoted text noted by learned Court below the sequence of events concurring alleged CP-2 took place upto June 9, 2015 while the petitioner on his own prayed before the Recovery Officer, ESI Corporation not to give effect of said CP-2 till July 24, 2015 which was a regular date already fixed by learned court below hearing of the application under Section 75 (2B) i.e. whether the issue would be entertained unless deposit of 50% in court, or, alternatively whether the court for any logical reason would pass any order of waiver or would pass order to reduce the said amount of statutory deposit. Further in the above quoted following texts the petitioner did not put any assertion by complaining respective date(s) of the alleged overt acts as to when those happened, as to when the opposite party issued prohibitory order to the Bankers of the petitioner, or, on which day the banker informed the petitioner that he could not operate the bank account till realization by the Recovery Officer of the opposite party, or on

which day the money went to the custody of ESIC from the petitioner's bank account.

9. It cannot be believable in common parlance that when the petitioner would be complaining of any overt act, the petitioner would remain out of touch or would not keep any contact with his banker(s) where, according to them a huge fund allegedly was about to be withdrawn pursuant to the Garnishee order, which has been challenged by the petitioner in the Tender case. So, it reveals that in the matter of seeking equity the petitioner did not come in clean hands. Rather from the above quoted text and in view of above observation it reveals that the petitioner had disclosed some facts pertaining to their account with the AXIS Bank but suppressed some other material facts by not allowing the court to take note of the impugned dates of events, for which the petitioner had filed application of alleged contempt seeking imprisonment of the recovery authorities.

10. Of course, learned Court below passed interim order of injunction on 3rd July, 2015 restraining the opposite party from realizing and/or recovering any amount on the strength of impugned Garnishee order. It is obvious that even under the mother provision of order 39 Rules 1 and 2 of the Code of Civil Procedure the very term like "interim order" of injunction is absent but the civil court in exercise of its inherent judicious discretion under Section 151 and proviso to Order 39 Rule 3 of the Code of Civil Procedure order the civil court directs interim order of injunction, which subsequently may be absolute or may be vacated or may be modified. But even though taking the ratio available from the case of Samee Khan Vs. Bindu Khan (supra) this court finds that if any such order, even if interim nature, is passed and it is set aside at any subsequent date, but if proved disobedience takes place during existence of any such order of interim injunction, said disobedience may be actionable, provided such order of injunction was obtained only by fair play and honest deal and not by suppressing any material fact.

11. Section 78 of the Employees' State Insurance Act 1948 however though has vested some of the powers of the Civil Court, the interim order of injunction as was passed by learned ESI Court obviously was passed in exercise of inherent power and within its jurisdiction of competence of court presumably under the given impression that the fund was not yet transferred from the bank to the custody of the ESIC. Of course such competence in granting interim relief was not under challenge in this case.

12. But let me now examine the orders impugned which are, of course, as an outcome of interim injunction order dated 3rd July, 2017.

13. It is doubtless that obedience or disobedience or violation of order dated 3rd July, 2015 (supra) which was communicated to the Recovery Officer of the ESIC, is to be construed on the basis of intimation supplied by the concerned bank by its letter dated July 07, 2015 to the petitioner the text of which is set out:- "This is to inform you that we have received a garnishee order against your current

account DAGA BANDHU account no- 915020022938939 from ESI department.

As per ESI order an amount of Rs.1,18,88,623/- has been claimed by them. In this context, we have marked lien for the said amount in your account and the amount of Rs.11,60,141/- lying in your current account was paid to ESI by way of Pay order PO No-021151 dated 30/06/2015 in the name of ESIC FUND.

The PO was received at ESI Office on 06/07/2015.

This is for your information and necessary action."

14. The aforesaid text did not keep any ambiguity but to inform all concerned that the amount lying in the account of the petitioner "was paid to ESI by way of pay order PO NO.021151 dated 30.06.2015". Rest information relates to other usual formality. Had the concerned Bank been made a party by the petitioner, some more information in details could have been expected. The petitioner did not keep that option opened by way of not impleading his Banker as party. Because, had there been any violation of court's subsisting order of interim injunction then the petitioner's banker also could not avoid its collusive liability if there was at all any violation of Court's order. Mr. Chaturvedi apprised this court that said letter dated July 07, 2015 was obtained under petitioner's persuasion. Therefore, in absence of better materials, by no stretch of imagination the fact of payment of the referred money by way of pay order dated June 30, 2015 cannot be stretched back to accept the petitioner's contention that said payment connected with the recovery proceedings was realized or recovered by the opposite party during existence of order of interim injunction, i.e. on or after July 3rd, 2015 till July 24th, 2015.

15. Mr. Chaturvedi, of course rightly criticized the impugned order dated November, 2015 by which learned Court below rejected the contempt application without offering proper discussion and without assigning reason. The penultimate portion of such impugned order which is noticed to be the wholesome logic is set out:- "Considering the respective submissions of the Ld. Lawyers and materials on record I find no force in the application filed by the applicant on 20.07.2015. Thus, it is considered and rejected." It is obvious that any order, by favouring one and disfavours the other, must be framed by the court adjudicating the lis with adequate reasons. Difference is lying there between the Judiciary and Executive. Any order without reason would be simply a skeleton of either Tom or Dick or Harry without no scope of identifying as to whose it is, since such a conclusion without reason can be sembled also with a living agent without tongue having all capability without speaking organ to answer to any query or give any expression. The term "reason" is the "expression" of a judge's judicious mind as to how far or in what context, or with what indication it is allowing or rejecting the prayer. Though learned ESI Court held that in the face of material on record it did not find force, but the order is silent as to why any force was not found in the prayer of the contempt application, or, how he measured the force, or, what were the reasons in rejecting said application. Therefore, from said

angle of vision exception of Mr. Chaturvedi was not justified.

16. But, as apart from challenging the order dated November 18th, 2015 in C.O 4197 of 2016 another C.O 4198 of 2016 as also filed by the petitioner assailing order dated August 24th, 2016, by which prayer of refunding back the impugned amount so recovered from the banker of the petitioner, was also refused, cumulatively have given to understand that since the transaction of the amount-in-question was completed before interim order of injunction, both the prayers were rejected.

17. Since, the interim order dated 3rd July, 2015 is the genesis of above noted two impugned orders connected with the respective C.O, and the well-reasoned order dated August 24th, 2015 has supplemented the wanting of reasons in the order dated November 18th, 2015 of the same Court, and since both the C.Os are being disposed of analogously and since on examination of materials to weigh the merit of grievance of the petitioner, this court finds at least no perversity in coming to conclusion against the prayer of contempt, the order dated November 18th, 2015 deserves to be upheld. In usual course, due to deficiency in assigning reasons a matter may be remand bound with direction to hear afresh. But the result in finality having been accepted by this court in view of the factual aspects, as detailed above, this court refrained from doing so in case of rejection of the contempt application.

18. The petitioner has filed the suit being Tender Case No.42 of 2015. Both parties obviously would be expecting its favourable disposal on merit in accordance with the provision of law. Fact remains so far, that the amount in question has already been recovered by the opposite party from account of the petitioner sometimes before the order of interim injunction, as held by learned court below and said amount now has found place in the fund of the opposite party. Some text from the penultimate part held by this court in the case of Employee's State Insurance Corporation Vs. M/s Mackintosh Burn Ltd (supra) is set out:- "Over and above, the law is now settled that mere existence of an alternative remedy by way of an appeal is no bar in invoking under Article 227 of the Constitution of India if the order impugned is without jurisdiction.

In view of the fact that the Act does not authorize the employees' Insurance Court to pass any order of refund of money already realized before adjudication of the dispute under Section 75 of the Act, the order No.8 was patently without jurisdiction and as such this is a fit case where this court should exercise its jurisdiction under Article 227 of the Constitution of India."

19. However the case on hand is juxtaposed, since the impugned money from the banker of the petitioner has already come to the custody of the opposite party, and now by the subsequent application the petitioner claimed for its refund. It is apparent that if during subsequent discussion this court fails to accept the proposition of Mr. Chaturvedi, then, subject to attainment of finality in the order, the main application of the petitioner pending before the learned court

below may be the only hope if the petitioner would be able to get favourable final disposal order on merit, and, in that event it is believed that learned ESI Court would take all possible measures to attend the grievances of the petitioner within a reasonable period as early as it would be possible.

20. But, in the present circumstances to allow the prayer of refund by the ESI Court would be an act without jurisdiction, as Mr. Moitra rightly submitted. The relevant part of the penultimate portion of order of this court held in the case of Employees' State Insurance Corporation Vs. M/S Gloster Jute Mills Ltd. is (supra) accordingly set out:- "The position of law is very much clear which has been buttressed by the decision of the reported case as indicated above. The law indicates that unless the petition pending before the court is finally disposed of on merit, there cannot be any order of refund of the amount of Rs.23,000/- to the opposite party company. That being the position in law, the order of the learned Judge, directing the ESI Corporation for refund of the money and to treat Rs.18,000/- as security cannot be sustained and that part of the order is set aside."

21. Mr. Chaturvedi criticized the impugned order dated 24th August, 2016, on two folds, viz, learned Court below caused miscarriage of justice declining to refund the money of the petitioner, and it was wrongly held that order dated 21st January, 2016 bearing order of rejection of earlier petition dated 9th December, 2015 acted as res judicata. Since according to Mr. Chaturvedi prior to the impugned application dated 17th February, 2016 by previous applications the petitioner prayed for punishment of the opposite party and having become failure in achieving order of punishment so far, the impugned application dated 17th February, 2016 was filed only for getting refund of their own money which were lying in their accounts with their banker.

22. Learned Court below after making thorough discussion coupled with observation in the face of materials, particularly on the bank's intimation dated July 07, 2015 (supra), held:- "Further, on perusal of the materials on the record, I find from the orders No.11 dated-18/11/2015 this court observed that the pay order has been issued on 30/06/2015 by the concerned bank prior to passing of ad interim order of injunction by this court on 03/07/2015. Moreover, the order No.17 dated 21/01/2016 passed by this court speaks that this court has rejected the application dated 09/12/2015 which is in substance akin to the application under consideration. On total consideration of materials on the record and the rival submissions of the Ld. Advocates for the parties I am of the opinion that this court cannot revise its own order. The application dated 17/02/2016 is devoid of any merit and is liable to be rejected."

23. To appreciate aforesaid order the sum and substance of the prayer made by the petitioner as recorded by learned ESI Court is set out:- "Sum and substance of the instant petition is that after hearing of both sides this Court passed an order being Order No.9 dated 01.10.2015 directing Recovery Officer of ESI Corporation, the O.P No.3 to refund the amount to the tune of Rs.11,60,141/-

which has been already debited from the Axis Bank, Burrabazar Branch being A/c No.915020022938939 from the Current A/c of the applicant. The applicant on 06.10.2015 appealed before the Recovery Officer of the O.P ESI Corporation to comply the order of the Court by the R.O, the O.P No.3 kept mum over the said matter. The applicant again vide their letter dated 30.11.2015 prayed before the Regional Director, ESI Corporation O.P No.1 for direction to the concerned Officer to take necessary action for refunding the aforesaid amount but no step has taken by O.P No.1. It is further contended that the Ld. Advocate of the applicant sent letter on 02.12.2015 to the O.Ps to comply the Order No.9 dated 01.10.2015 passed by this Court within 3 days from the receipt of the said letter but to no effect till date. The O.Ps willfully and deliberately made the order of this court infructuous and nugatory by the violation of not complying the said order and thereby interfered with the course of administration of justice. So, they should be punished and/or suitably dealt with for having committed contempt of this Court's order."

So the prayer of refund of the amount of Rs.11,60,141/- was very much kept alive along with other prayer in the earlier petition dated 9th December, 2015 which was rejected on 21st January, 2016 upon hearing both sides. After cogent discussion and offering sufficient reasons learned court below held:-

"Therefore, I am in complete agreement with the submissions of the Ld. Lawyer for the O.P Corporation that on self-same cause of action second contempt application cannot be tenable and the same is totally hit by the principles of res judicata since this court has already dealt with the contempt application filed on 20.07.2015 and passed an order on 18.11.2015. Therefore, I find no room to entertain the instant petition dated 09.12.2015 filed on behalf of the applicant."

24. Therefore when the petition dated 9th December, 2015 bearing also the prayer of refund as noted by learned ESI Court was rejected, then the argument cannot be accepted that rejection was made only with regard to prayer for punishing the violator of interim order. Learned Court accordingly in the impugned order while held, as quoted above, that it would not revise its own earlier order, it did not suffer from any illegality, far to speak of perverseness. Rather the present application dated 17th February, 2016 is also barred by the principles of constructive res judicata since earlier petition dated 9th December, 2015 contended also with the prayer of refund and said application was rejected. In such precincts, assigning of reasons in the impugned order if would have been done, it would be nothing but repetition. Therefore, challenge of the impugned order on the ground of having no assignment of reasons cannot sustain in view of such peculiar nature of the events, as took place in the case.

25. Thus, in view of above, while ESI Court is not empowered to record order of refunding the amount pending disposal of the case on merit while it had already come to the custody of the statutory authority, this court within the ambit of Article 227 of the Constitution of India cannot direct the ESI Court to record such illegal order directing to record order of refund of the amount from custody of

the Employees" Insurance Corporation, while it was received by them well before the impugned date of 3rd July, 2015.

26. Thus by examining the impugned order Nos. November 18, 2015 and August 24, 2016 in the perspective of the documents available on record and relevant judicial pronouncements available from the cited cases, learned ESI Court while in effect found no existence of interim order of injunction till before 3rd July, 2015, and the disputed transaction having been taken place well before the date of passing of interim injunction, and, the petitioner having failed to establish any overt act of the opposite party beyond 3rd July, 2015, this court found no lapses in the decision making process, which requires interference.

27. Therefore, affirming the order No. 18th November, 2015 (where shortcomings of reason is found to have been supplemented by subsequent orders, both the C.Os being 4197 of 2016 and 4198 of 2016 are hereby dismissed with costs of Rs.5,000/- (five thousand) only as condition precedent, payable and/or to be deposited within two months from this day of judgment in the ESI Court through appropriate challan with reference to the Tender Case No.42 of 2015, and such amount of cost shall be used by the Corporation for the welfare scheme of the employees.

28. Be it made clear, that subject to compliance regarding deposit of cost, so imposed, the pending Tender Case shall proceed for its final disposal in accordance with law, since stay order as was passed by this court stands vacated, and learned ESI Court in that event shall not be swayed by or influenced with any of the observations made by this court during disposal of by the C.Os as filed assailing the interlocutory order(s) under reference. Urgent photostat certified copy be supplied to the parties, if applied for.