

(2017) 06 CAL CK 0005
In the Calcutta High Court
Case No : 1744 of 2016

M/s Supreme Industrial Security Co.

APPELLANT

Vs

Employees State Insurance Corporation

RESPONDENT

Date of Decision : 06-06-2017

Acts Referred:

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

Citation : (2017) 06 CAL CK 0005

Hon'ble Judges : Mir Dara Sheko

Bench : SINGLE BENCH

Advocate : Uddipan Banerjee, T.K Chatterjee, ?Abhishek Banerjee, ?Sinthiya Banerjee

Judgement

1. The application under Article 227 of the Constitution of India has been filed assailing order dated 26th April, 2016 passed by learned Employees" Insurance Court West Bengal at Calcutta (hereafter to be called on only as the E.S.I. court) in Tender Case No.39 of 2015, rejecting the prayer of the petitioner as was prayed for in the application to direct the authorities of the Employees" Insurance Corporation, shortly to be called on hereafter only as the E.S.I.C to appear in person with show cause as to why they would not be punished for violating order dated 22.05.2015 in the matter of refunding the amount of Rs.6,70,000/- passed by the court.

2. The given fact reveals that the petitioner has the business of supplying private security personnel in different district under licence no.033/WB/PSA/2013 dated 26th April, 2013 with reference to its allotted code. The petitioner contended that despite continuation of deposit of contributions as per the code number so allotted by the E.S.I.C. but the petitioner got a notice dated 13th March, 2015 with a demand of Rs.7,12,506/- for which certificate proceeding was initiated alleging that the contributions for its employees from April, 2010 to March, 2014

was not deposited. The petitioner in denying the text of the letter dated 16th February, 2015 of E.S.I.C authority as regard instruction to deposit the contribution under a different changed code, asserted in a letter dated 23rd February, 2015 that the petitioner did never apply for change in the code number of their business, and thereby the petitioner disowned liability in making payment of said amount.

3. Over such demand and dispute two proceedings were instituted earlier in this court at the instance of the petitioner vide W.P 7427(w) of 2015 and C.O. 2665 of 2015. The first writ was disposed of on 6th April, 2015 with following directions:- "In order to give the writ petitioner a chance to approach the Authorities under the E.S.I Act, 1948, I only order that the account will continue to be frozen but the moneys lying therein will not be debited out of the account in favour of the E.S.I Authorities till 27th April, 2015."

The C.O 2665 of 2015 (supra) in terms of order dated 5th May, 2015 passed by learned ESI Court in the same Tender Case No.39 of 2015 was disposed of on 8th March, 2016 with the following direction:-

"The employees" State Insurance Corporation is directed to decide the matter on remand after giving a reasonable opportunity of hearing to the petitioners and after taking into consideration of the letter dated 23rd February, 2015.

Under such circumstances, this Court finds no reason to interfere with the impugned order.

The petitioners are directed to comply with the order dated 5th May, 2015 passed by the learned Judge, Employees" Insurance Court, West Bengal, Kolkata."

The Operative part of the order dated 5th May, 2015 passed by learned ESI Court in disposing of said Tender Case No.39/2015 is set out:-

"That the Tender Case No.39/15 is disposed of contest but without cost with a direction upon OP/ESIC to inspect the applicant company regarding change of name and code number and considering letter at dt. 23.2.15 and thereafter decide the point of contribution afresh in accordance with law. The OP/ESIC must serve notice upon the applicant. The notice dated 03.2.15 in Form C-19 vide annexure-"D" and Garnishee order dated 10.3.15 vide annexure "F" to the main application are hereby set aside. The attachment amount of Rs.6,70,000/- is hereby released. The applicant has liberty to withdraw said amount. The Bank Manager is directed not to wait the order of recovery officer to release the holding amount. The ad interim order is hereby vacated."

4. It also appears that the petitioner further persuaded the E.S.I court with reference to said Tender Case to implement its order dated 5th May, 2015 seeking also necessary order(s) in presence of the petitioner's banker. In then the concerned UCO Bank, Haldia defended by submitting that while receiving the Garnishee order from the ESI Corporation the amount of Rs.6,70,000/- was

remitted from the account of the petitioner by issuing a Demand Draft on 19th March, 2015. Accordingly upon hearing both sides including the banker of the petitioner, Learned ESI Court, again on 22nd May, 2015 directed the ESI authority as follows:- "Under the above circumstances I direct the O.P/E.S.I Corporation and Recovery Officer to refund the amount of Rs.6,70,000/- to the applicant bank account forthwith. The petition dated 13/5/15 and 22/5/15 is thus disposed of on contest."

5. So the fact remains as admitted one that pursuant to the Garnishee order received by the banker of the petitioner, namely, the UCO Bank, Haldia Branch, from the Receiving Officer of the ESI Corporation a Demand Draft an amount of Rs.6,70,000/- was released on 19th March, 2015 from the account of the petitioner. Accordingly, said amount had come to the custody of ESI Corporation. On being moved, the ESI Court disposed of the Tender Case as quoted in paragraph 3 above. No appeal or revision was ever filed by the opposite party challenging either of the aforesaid order(s) bearing direction to comply order dated 5th of May, 2015. Nonetheless, having been suffered by the impugned order dated 26th April, 2016, as mentioned above, the present C.O is now under consideration, which requires disposal on the following points:- (i) Whether the order dated 5th May, 2015, is executable?

(ii) Whether the OP/ESI Authority is bound to comply with the said order dated 5th May, 2015 followed by order dated 22nd May, 2015.

(iii) Whether the rule of estoppel, waiver and acquiescence would come on the way for not preferring appeal or revision by the opposite party against the order(s) dated 5th may, 2015 and 22nd May, 2015.

(iv) Does the impugned order dated 26th April, 2016 suffer from any perverseness or legal infirmity requiring interference under Article 227 of the Constitution of India?

(v) Whether the impugned order should be upheld or is liable to be set aside?

6. Mr. Banerjee, learned Counsel for the petitioner company argued that the order under challenge was devoid of any reason or logic. Submitted that learned ESI Court while upon hearing both sides passed the order dated 5th May, 2015 (supra) and again on 22nd May, 2015 and when the High Court also directed the ESI Court to implement its own order and since the opposite party did not move before any higher forum challenging either order(s) dated 5th May, 2015 (supra), or 22nd May, 2015 the ESIC had evaded time instead of complying with those orders, the ESI court wrongly rejected the prayer of the petitioner made in the application dated 11th June, 2015. Mr. Banerjee, however, disowned any liability of the petitioner in view of changing the Code number of the company behind their back, since according to Mr. Banerjee there was no role of the petitioner/ company in changing the code number so allotted by the ESIC, and his client accordingly used to run its business in view of license and code previously allotted. Mr. Banerjee relying on the case of Employees' State Insurance

Corporation Vs. M/S M.P Associates Engineers & another decided by this court on 10th October, 2012 further submitted that order(s) dated 5th May and 22nd May 2015 being still there which were passed by the ESI Court stretching just relief exercising its inherent power the impugned order dated 26th April, 2016 should be set aside and the revisional application should be allowed with necessary directions so that the petitioner would be able to pursue for implementation of earlier order(s) dated 5th May and 22nd May, 2015 which according to him, was passed in exercise of inherent power available to the court by acting within the power vested to the Court by the Act itself. Mr. Banerjee relied on the case of M/s. Agarwal Hardware Industries Vs. The Employees' State Insurance Corporation reported in 1976 CHN page 652.

7. Mr. Tarun Chatterjee learned Counsel representing the opposite party/ Employees' State Insurance Corporation, shortly to be called as ESIC, in the tune of earlier stand as submitted before learned ESI Court opposing the impugned application dated 11th June, 2016, per contra replied that the learned ESI Court had no inherent power and eventually had no authority to pass any order beyond what was vested by Section 78 of the Act. Submitted thereby, any such order if passed by the court without jurisdiction is void since its inception, which need not be challenged before any higher forum. Submitted that since the Tender Case 39 of 2015 was filed by the petitioner only on 13th April, 2015 and while the impugned amount was directed to be remitted from account of the petitioner in terms of Garnishee order issued by the Recovery Officer, and since said amount had come to the statutory custody of the opposite party on the strength of Demand Draft date 19th March, 2015, the revisional application having no merit should be dismissed. Mr. Chatterjee relied on the following cases:-

(a) Employees' State Insurance Corporation

Vs

M/s Mackintosh Burn Limited

(decided in C.O 1765 on 1st April, 1999 by the Single Bench of this court)

(b) Employees' State Insurance Corporation & Another

Vs.

M/s Haldiram Bhujawala

(decided in C.O 161 of 2000 on 24th August, 2007 by the Single Bench of this court.)

(c) The Regional Director, Employees' Insurance Corporation & Ors

Vs.

M/s VML Film Distributors

(decided by the Division Bench of High Court Andhra Pradesh on 20th October, 2010.)

(d) Employees" State Insurance Corporation

Vs.

M/s M.P Associates Engineers & Another

(decided by the Single Bench of this court on October 10, 2012)

8. I have gone through the materials on record. Perused the citations as submitted at the Bar, which will be dealt with hereafter appropriately Chapter VI of the Employees" State Insurance Act, 1948 deals with constitution of the ESI Court vesting power and jurisdiction to adjudicate dispute(s), claim(s) specified under Section 75 of the Act which are debarred to be adjudicated by a regular civil court. The adjudication power as vested accordingly to the E.S.I Court is available under Section 78 of the Act, which is set out hereunder:- "Section 78, powers of Employees" Insurance Court.- (1) The Employees" Insurance Court shall have all the powers of a Civil Court for the purposes of summoning and enforcing the attendance of witnesses, compelling the discovery and production of documents and material objects, administering oath and recording evidence and such Court shall be deemed to be a Civil Court within the meaning of [Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974)]

(2) The Employees" Insurance Court shall follow such procedure as may be prescribed by rules made by the State Government.

(3) All costs incidental to any proceeding before an Employee"s Insurance Court shall, subject to such rules as may be made in this behalf by the State Government, be in the discretion of the Court.

(4) An order of the Employees" Insurance Court shall be enforceable as if it were a decree passed in a suit by a Civil Court".

9. So it is very apparent that only some, amongst the powers enjoying by a regular civil court, have only been conferred upon the E.S.I Court since during setting up a tribunal the legislature on its own wisdom did not set the same as one of the regular civil courts functioning as the courts of justice in the hierarchy of courts envisaged by the constitution of India. Transfer of such judicial function and power however does not affect the competence of the State to take appropriate measures to transfer a part of its judicial power and functions to the tribunals by vesting jurisdiction for adjudicating some special nature of disputes. However, on apparent reading that exercise of discretion of the E.S.I Court can be effected only in some eventualities laid down under sub-section (3) of Section 78. There is also no specific provision in the ESI Act like Section 151 of the Code of Civil Procedure. The judicial pronouncement formulated by the Division Bench of this Court in the case of M/s. Agarwala Hardware Industries (supra) is the

answer as to whether the ESI Court possesses inherent power or not. Relevant portion(s) therefrom will be set out appropriately which were observed on taking note of some other leading decisions, operative in the field.

10. Some portion from the case of Associated Cement Companies Ltd. Vs. P.N. Bharmha & Anr., reported in AIR 1965 SC 1595, which had a reference in the case of M/s. Agarwal Hardware Industries reported in 1976 CHN Page 652, is reproduced since arguments on jurisdiction and inherent power of the E.S.I Court were made at length before this Court. In the aforesaid decision the Supreme Court observed:- "It is really not possible or even expedient to attempt to describe exhaustively the features which are common to be tribunals and courts and features which are distinct and separate. The basic and the fundamental feature which is common to both courts and the tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign state."

11. In ordinary sense in Common parlance, it may be logical to take it granted that for the sake of appropriate administration of justice inherent power for making substantial justice remains inbuilt to grant effective relief, even of interim nature in an appropriate case. The Division Bench of this Court accordingly in the case of M/s. Agarwal Hardware Industries (supra) allowing the appeal directed the Tribunal to hear the stay application on merit since the E.S.I Court dismissed said application on the ground that it had no jurisdiction envisaged under the Act to grant any interim relief like stay order or restraint order or injunction order. To make it clear once again this Court also observes that the E.S.I Court in exercise of judicial powers and functions also has inherent powers to utilize and apply the same in an appropriate case. A few lines of the penultimate portion from the case of M/s. Agarwal Hardware Industries (supra) is set out:- "We are of the opinion that the tribunal below was clearly in the error in thinking that it had no jurisdiction to entertain the application for interim relief filed by the appellant. On merits whether the appellants would be entitled to interim relief or not is a different issue yet to be decided on merits as the tribunal had refused to go into the merits of the claim and had thrown away the application in limine. "

12. But law has been established equally to keep maintain and balance so that the E.S.I Court in the name of exercising jurisdiction vested on its does not display inherent power to decide any matter at its whims or caprice at the instance of a party to the proceeding invoking either of the provisions laid down under Section 75 of the Act. Even though the term "any other matter" available under the residuary clause (g) of Section 75(1) of the Act, should not be misinterpreted. Such term is to be interpreted pertaining to any dispute between ESIC and such person falls under the Act, which is to be decided through the parameters established by law and judicial precedents.

13. In the case on hand the dispute and difference arose in view of change in the code of the petitioner. At the beginning the business of the petitioner used to run with the allotted code no- 41000571480001018. As contended by the petitioner,

by letter dated 16th February, 2015, they were asked to deposit the contribution under a different code no.41000270300001018. Mr. Banerjee, however, could not clarify to the query of this Court as to at whose instance or how the allotted code was changed. This Court however, refrains to lay any observation on the dispute arose on account of change in the code since the same is not the lis before this Court, and the same would be adjudicated by the learned ESI Court, if so approached.

14. The fact is admitted that the impugned amount was remitted by the petitioner's banker by issuing Demand Draft on 19th March, 2015 i.e., well before institution of the Tender case no. 39 of 2015 by the petitioner on 13th April, 2015. The impugned order dated 26th April, 2016 virtually did not decide anything save and except rejecting the application dated 11th June, 2015 by which punishment was sought for due to not refunding the impugned amount pursuant to the later part of order dated 5th May, 2015 (supra)

15. By the order dated 5th May, 2015, learned E.S.I Court disposed of said Tender case no. 39 of 2015 on contest sending on remand since according to learned E.S.I Court the case was fit for remand to ESIC for affording patient hearing to the applicant company for arriving at the decision after considering the letter dated 23rd February, 2015, which was a reply sent by the petitioner to the letter dated 16th February, 2015 of the ESIC. The order dated 5th May, 2015 has some parts B which are described below:- (i) It was disposed of on contest

(ii) The case was sent back on remand for fresh decision,

(iii) Direction was upon ESIC to inspect the office of the petitioner- company upon notice regarding its change of name and code,

(iv) Thereafter to decide the point of contribution in accordance with law

(v) Garnishee order dated 10.03.2015 was set aside,

(vi) By vacating interim order, the order of attachment of Rs.6,70,000/- was directed to be released giving liberty to the petitioner to withdraw the same for which the concerned bank manger was also directed not to come on the way in holding said amount.

16. At the cost of repetition it may be mentioned that order dated 22nd May, 2015 (supra) was passed by learned E.S.I Court to implement the portion of its earlier order noted in column(vi) above.

17. At such sequence, this Court does not find any legal problem in accepting former parts of order dated 5th May, 2015 mentioned above under column nos. (i) to (v), which obviously might have been within the domain and jurisdiction and in exercise of inherent power of the learned E.S.I Court, since said order was passed after apparent satisfaction about prima facie case of the petitioner and favouring thereby the petitioner also on the point of balance of convenience and inconvenience. It appears from record that though order dated 5th May, 2015

(supra) indicates disposal of the Tender case no.39 of 2015, but in fact, it would remain alive so long the lis is not settled. Therefore, the subsequent order(s) dated 22nd May, 2015 and even the impugned order dated 26th April, 2016 have been passed in the same tender case and number, of course, on being moved by application(s) submitted with reference to Tender case no. 39 of 2015. There is nothing on record till date about the fate of matter after remand.

18. This Court however finds that the order as mentioned in column no. (vi) above regarding refund of the amount from custody of the ESIC has been recorded not only by exceeding jurisdiction, rather by misusing the power of inherent nature, which ought not to be passed in devoid of establish law. It has been established as an admitted fact that the aforesaid amount had already arrived at the custody of the ESIC on the basis of the then Garnishee order, which, of course, has been set aside for consideration afresh. However, in view of above, the proceeding for adjudication of the lis is yet to reach finality which may restart on receipt of the fate of remand provided the ESI Court is again moved by either of the parties being aggrieved and dissatisfied.

19. This Court in the case of M/s. Mackintosh Burn Ltd. (supra) set aside the order of refund recorded by learned E.S.I Court with the observation which is set out:- "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"

Another Single Bench of this Court in the case of Haldiram Bhujwala (supra) observed that ESIC is a statutory custodian of the contributory insurance amount to be deposited by the principal or immediate employer and held as follows:-

"In my view the learned Judge of the Employees" State Insurance Court has acted illegally in this regard and the jurisdiction entrusted upon the said court was not properly exercised by the learned Judge.

Also share the same view taken in the decision reported in 1999(83) FLR 805 (supra) wherein the order of refund of recovered amount of contribution was declared to be without jurisdiction of the Employees" State Insurance Court since it was not so authorized under the Act

In view of all the discussions made above, I am of the view that the learned Judge of Employees" State Insurance Court was not justified in passing the order of refund of already recovered amount of Rs.51,806/- from the Bank Account of the opposite party no.1 "

20. Division Bench of Andhra Pradesh High Court in the case of Regional Director ESIC & Ors. Vs. M/s. VMC Film Distributors (supra) also accepted the view as was held by this Court in the case of Mackintosh Burn Ltd. (supra) and held:- "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"

21. Thus after passing order of remand for fresh hearing question may arise that since before the Court the matter is no more pending for adjudication under Section 75 of the Act then how the question of jurisdictional error may crop into? Answer would be that uptil now either the parties, or, the E.S.I Court did not withdraw themselves from the Tender case no.39 of 2015. Rather, as also pointed out earlier that with the proposed reliefs till before the impugned order dated 26th April, 2016 there was always reference of Tender case no. 39 of 2015, which was filed after some days of recovery of the impugned amount. Therefore, everyone was/is amidst the proceeding of Tender case which may get restart after result of remand. Therefore, the later part of the order dated 5th May, 2015 bearing direction of refund of the amount being without jurisdiction is set aside. Eventually any contempt application pursuant to that order of refund is held not maintainable, since the E.S.I Court was not authorized to direct refund of said amount without final adjudication of the lis, while said amount had already arrived to statutory custodian like ESIC.

22. But for substantial Justice learned Trial Court ought to exercise its inherent jurisdiction to monitor about the fate of the lis after sending the matter back to the ESIC for fresh consideration. It is noticed that taking advantage of not fixation of any stipulated period of said consideration afresh on remand upon hearing the opposite party perhaps the ESI Corporation has been enjoying its scope in an unfettered manner, as if, there would be nobody to compel them to give fresh decision within a reasonable period on the lis of change in the name and code of the petitioner, from where the present dispute remains yet unsettled. Meaning thereby, on the dispute proceeding has been started but the same has not yet been completed. Therefore, this Court taking oxygen from the above noted judicial pronouncements further holds that when the order of refund directed by the E.S.I Court is held as an order without authority or without jurisdiction; in effect the said order of refund whenever or wherever was passed by learned E.S.I Court being void order, the authority of the ESIC in keeping said impugned money on hold pending final settlement of the lis is not a violation of any legal or implementable order. Therefore, due to not preferring any appeal or revision by the ESIC against such a void order would not affect its right in keeping the recovered amount on hold. Act of complying of such void order else would be in devoid of established law. So a contemptuous act does not arise because a void order means an order non-est in the eye of law and any such void order need not necessarily be challenged. In view of such legal proposition, this Court in C.O. 2665 of 2015 did not interfere with the order dated 5th May, 2015. Thus noncompliance of any void order does not tantamount to a contemptuous act. The direction of a Court always shall be deemed for complying only legal order and not a void order. During former discussion this Court took notice of

different components of order dated 5th May, 2015 of which the first part being legal need not be interfered with, as also was not interfered with in the C.O 2665 of 2015. The aforesaid judicial pronouncements establishing the law operative in the field also obviously were not placed during hearing of said C.O. 2665 of 2015.

23. Now looking back to the impugned order dated 26th April, 2016 this Court observes that instead of making even slightest attempt for rendering substantial justice learned E.S.I Court has withdrawn itself from its scope and inherent power in seeking compliance of the first part of the order dated 5th May, 2015. Learned Court below ought to have directed a fixed period for complying said first part of order as regard fresh decision afresh remand. Had it be done birth of all these branches of proceeding(s) one after another could have been avoided. Learned E.S.I Court rather failed to exercise its discretionary inherent power so that the lis could have attained finality by cut shorting the litigation(s). Here takes place the lapses in the decision making process. Therefore, the impugned order dated 26th April, 2016 is also set aside for sending the matter back on remand with direction that keeping the application dated 11th/8th June 2015 on hold learned E.S.I Court by recording appropriate order shall obtain the decision of the ESIC W.B at the Calcutta through its recovery officer by name within a stipulated period not exceeding three months from the said order of learned E.S.I Court, which shall be passed with reference to the Tender case no.39 of 2015 in presence of both sides, so that, on its failure, learned E.S.I Court, either suo motu or on being approached, can record appropriate further order to deal with the officer(s) at fault, since the refund of impugned money, or, otherwise, would be dependent upon finality of the main dispute covering liability pertaining to the fact of change in the name and code number of the company, and, such direction, as to be recorded by learned E.S.I Court shall be preemptory, so far as the stipulated period for giving decision after remand. Needless to mention that subject to result of the fresh decision after remand the application dated 1st /8th June 2015 shall be disposed of in accordance with law if the same is pressed.

24. In view of the above, the order(s) dated 26th April, 2016, 22nd May, 2015 and later part of order dated 5th May, 2015 (regarding direction of refund) are set aside and the revisional application being C.O 1744 of 2016 is allowed in part by sending the matter on remand for fresh decision after subserving all the directions as indicated above.

25. No order as to costs.

26. Department is directed to send copy of this order immediately to learned E.S.I Court with reference to Tender case no. 39 of 2015 for information and compliance.

27. Urgent photostat certified copy be supplied, if applied for.