

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

TUESDAY, THE 11TH DAY OF FEBRUARY 2020 / 22ND MAGHA, 1941

OP(LC) .No.23 OF 2019

AGAINST THE INTERIM ORDER IN IC 42/2018 DATED 24-09-2018 OF  
E.I.COURT,TRIVANDRUM

PETITIONERS/OPPOSITE PARTIES 1 & 2:

- 1        THE DEPUTY DIRECTOR  
            SUB-REGIONAL OFFICE,  
            EMPLOYEES STATE INSURANCE CORPORATION,  
            THIRUVANANTHAPURAM - 695014.
  
- 2        RECOVERY OFFICER  
            SUB DIVISIONAL OFFICE,  
            EMPLOYEES STATE INSURANCE CORPORATION,  
            THIRUVANANTHAPURAM - 695014.

BY ADVS.  
SRI.ADARSH KUMAR  
SRI.K.M.ANEESH  
SRI.K.SANTHOSH KUMAR (KALIYANAM)  
SRI.BIJU VARGHESE ABRAHAM  
SRI.DILEEP CHANDRAN  
SRI.SHASHANK DEVAN

RESPONDENTS/APPLICANT/OPPOSITE PARTIES 3 & 4:

- 1        SURENDRA DAS  
            AGED 63 YEARS  
            S/O. BHANU PANIKER, PROPRIETOR, HOTEL SREE VISAKH,  
            KOVALAM BEACH ROAD, THIRUVANANTHAPURAM - 695527.
  
- 2        ABHILASH  
            'KAMALA SADANAM', NEDIYASALA, ARAMANA P.O.,  
            KANYAKUMARI DISTRICT - 685608.
  
- 3        SAMRAJ S.  
            THEKKEKANDATHIL, KUNNANVILA, CHENKAL,  
            VATTAVILA P. O., NEYYATINKARA,  
            THIRUVANANTHAPURAM - 695132.

R1-3 BY ADV. SRI.K.B.PRADEEP

THIS OP (LABOUR COURT) HAVING BEEN FINALLY HEARD ON  
11.02.2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"CR"

## **JUDGMENT**

The Employees' State Insurance Corporation through its Deputy Director and Recovery Officer has preferred this Original Petition assailing the interim order passed by the Employees' Insurance Court, Thiruvananthapuram in I.C.No.42 of 2018.

2. The petitioners herein are the opposite parties in the above Insurance Case, which was instituted by the 1<sup>st</sup> respondent herein challenging the recovery notice issued by the petitioners for recovering the dues to the Corporation for the period upto 10/2014 to the tune of Rs.20,02,684/-.

3. It is the case of the petitioners that the 1<sup>st</sup> respondent had filed the above case by suppressing the fact that the previously instituted cases challenging the coverage of his establishment were dismissed by the Insurance Court.

4. When the case came up for admission before the Employees' Insurance Court, Thiruvananthapuram, the following ex parte order was passed:

### **"ORDER**

Heard Counsel for petitioner. Stay granted as prayed till the final disposal of the case."

5. It is contended that the procedure adopted by the Insurance Court is violative of Section 75(2B) of the ESI Act, which mandates pre-deposit of 50% of the amount due from the employer to the Corporation to be deposited by the 1<sup>st</sup> respondent. It is further contended by referring to Ext.P1 order that the petitioners herein were not even heard before passing the interim order. The failure of the court to assign reasons in writing before waiving or reducing the pre-deposit is also highlighted by the learned counsel to bring home his point that the interim order passed by the Insurance Court is perverse and is liable to be interfered with. The counsel has also produced Ext.P7 series of orders passed by the Insurance Court in similar fashion to bring home his point that the court has been acting irrationally and arbitrarily according to its whims.

6. I have heard Sri.Adarsh Kumar, the learned Standing Counsel appearing for the petitioners and Sri.K.B.Pradeep, the learned counsel appearing for the respondents.

7. To understand the significance of the contention raised by the petitioners, it would be apposite to take note of the statutory prescription in the ESI Act. Section 75 of the Act reads as follows:-

**"75. Matters to be decided by Employees' Insurance Court.**

- (1) If any question or dispute arises as to

- (a)       xxxxx                     xxxxx  
              xxxxx                     xxxxx
- (2)        xxxxx                     xxxxxx  
(2A)      xxxxx                     xxxxxx
- (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."

8. Sub-section (2B) of Section 75 of the ESI Act, 1948, which is the bone of contention in this petition, provides that unless the principal employer deposits with the Insurance Court 50% of the amount due as claimed by the Corporation, he will not be entitled to raise a dispute challenging the action taken by the Corporation. The proviso, however, enables the court to waive or reduce the amount to be deposited under section 75 (2B) on condition that adequate reasons to be recorded in writing is given by the court for exercising the said discretion.

9. It is luculent from the statutory provision that the Insurance Court is bound to insist that the principal employer deposits 50% of the amount unless for exceptional reasons which are to be recorded in writing,

the court chooses to exercise its discretion and altogether waives the pre-deposit or reduce the same. In the case on hand, the Insurance Court has chosen to take the easier path. A perfunctory and non speaking one line order has been passed staying the entire proceedings until the disposal of the case. Ext.P7 series of orders also make it clear that similar orders are passed in other cases as well. The reasons which persuaded the Insurance Court to exercise its discretion and waive the pre-deposit cannot be discerned from the order.

10. The Employees Insurance Court is constituted under Section 74 of the ESI Act, 1948 and Section 75 provides for the matters that are to be decided by the said court. The Parliament in its wisdom has incorporated Section 75 (2B) in the Statute book to curb and control the principal employer and to ensure that the interest of the employee is protected. However, in exceptional cases, and on sufficient grounds that are to be recorded, the Insurance court is vested with the discretion to waive pre-deposit or reduce the same for which, the court has to apply its mind and take into consideration all the facts and circumstances of the case which may include but not limited to a *prima facie* case, balance of convenience, irreparable loss etc. When the statute mandates that waiving or reducing of pre-deposit shall be for reasons to be recorded in writing, it certainly does not mean that it has

to be formed in a subjective or casual manner. That opinion must be formed objectively on relevant considerations. When the enactment vests discretion in the court to exercise its discretion in a particular manner, there is an implicit requirement that it shall be exercised in a reasonable and rational manner free from whims, vagaries and arbitrariness.

11. One need not labour much to conclude that the judicial discretion was not exercised by the Insurance Court in a sound and sensible manner. In **Union of India v Kuldeep Singh<sup>1</sup>**, the Apex court had occasion to explain the ambit of the term 'judicial discretion'. It was held as follows:

21. Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection; deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to the will and private affections of persons. When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office ought to confine himself (per Lord Halsbury, L.C., in Sharp v. Wakefield [1891 AC 173 : (1886-90) All

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1 [2004 (2) SCC 590]

ER Rep 651 (HL)] ). (Also see S.G. Jaisinghani v. Union of India [AIR 1967 SC 1427] .)

22. The word “discretion” standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care; therefore, where the legislature concedes discretion it also imposes a heavy responsibility. “The discretion of a judge is the law of tyrants; it is always unknown. It is different in different men. It is casual, and depends upon constitution, temper and passion. In the best it is often times caprice; in the worst it is every vice, folly, and passion to which human nature is liable,” said Lord Camden, L.C.J., in Hindson and Kersey [(1680) 8 How St Tr 57] .

23. If a certain latitude or liberty is accorded by a statute or rules to a judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him, it is judicial discretion. It limits and regulates the exercise of discretion, and prevents it from being wholly absolute, capricious, or exempt from review.

12. In the light of the above principles, if the impugned order is perused, what is discernible is that the Insurance Court had exercised its discretion in an arbitrary and fanciful manner against the mandate of the statute. The fact that it has chosen to waive pre-deposit without satisfying itself that the grounds made out by the 1<sup>st</sup> respondent warrants such a cause

is something that cannot be accepted. If the court was persuaded to exercise its discretion, it should have satisfied itself that the 1<sup>st</sup> respondent had *prima facie*, a good case on merits as well as the balance of convenience or any other legally sustainable ground. The reasons which persuaded the Insurance Court to adopt the said course should have been recorded, albeit briefly. In this context, it would be apposite to remind oneself that reasons are the links between the materials on which certain conclusions are based on the actual conclusions. The observations made by the Hon'ble Supreme Court in **Raj Kishore Jha v. State of Bihar and Ors.**<sup>2</sup> that "Reason is the heartbeat of every conclusion and without the same, it becomes lifeless" should have reverberated in the mind of Court while passing the order.

13. In **Hindustan Times V Union of India and others**<sup>3</sup>, it was held thus:

"(7).....As stated in Fauja Singh vs. Jaspal Kaur [1996 (4) SCC 461], on the plainest consideration of justice, the High Court should have given reasons. The absence of reasons has deprived the Supreme Court from knowing the circumstances which weighed with the High Court to dismiss the matter in limine. It was an unsatisfactory method of disposal. The necessity to provide reasons, howsoever brief, in support of the High Courts' conclusions is too obvious to be reiterated. Obligation to give reasons introduces clarity and excludes or at any rate minimises the chances of arbitrariness and the higher forum can test the correctness of those

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2 2003 CriLJ 5040

3 1998 (2) SCC 242

reasons. It becomes difficult for this Court in all such cases to remit the matters to the High Court inasmuch as by the time cases reach this Court, several years would have passed."

14. In the case on hand, there are no materials before the higher courts as to what persuaded the Insurance Court to adopt the extraordinary course that it has chosen in the instant case as also in the cases the details of which are borne out from Ext.P7. No court is competent to issue a direction contrary to law nor the court can direct an authority to act in contravention of the statutory provisions. (see **Manish Goel v. Rohini Goel<sup>4</sup>**) The courts are meant to enforce the rule of law and not to pass orders or directions which are contrary to what has been injected by law. On all counts, I find that the order passed by the Insurance Court cannot be sustained.

Ext.P1 order will stand set aside. The Insurance Court shall consider the application afresh after hearing both sides and pass appropriate orders in accordance with the statute mandate.

The Original Petition will stand allowed.

sd/-

**RAJA VIJAYARAGHAVAN V**

**JUDGE**

IAP

## APPENDIX

### PETITIONER'S/S EXHIBITS:

- EXHIBIT P1** TYPED COPY OF THE INTERIM ORDER DATED 24.9.2018 IN IC NO.42/2018 PASSED BY THE EI COURT, THIRUVANANTHAPURAM
- EXHIBIT P2** TRUE COPY OF THE RECOVERY ORDER BEARING NO.78000143230001101/REC DATED 28.6.2018 ISSUED BY THE PETITIONER CORPORATION TO THE 1ST RESPONDENT.
- EXHIBIT P3** TRUE COPY OF THE SUMMONS DATED 14.9.2018 ISSUED BY THE RECOVERY OFFICE, SUB REGIONAL OFFICE, THIRUVANANTHAPURAM TO THE 1ST RESPONDENT.
- EXHIBIT P4** TRUE COPY OF THE ORDER DATED 5.5.2009 PASSED BY THE E.I. COURT KOLLAM IN IC NO.5/2006.
- EXHIBIT P4 (A)** TRUE COPY OF THE ORDER DATED 28.7.2009 DISMISSING THE RESTORATION PETITION IN IC NO.5/2006.
- EXHIBIT P5** TRUE COPY OF THE JUDGMENT DATED 22.5.2012 PASSED BY THE EI COURT, KOLLAM IN IC NO.5/2006.
- EXHIBIT P5 (A)** TRUE COPY OF THE JUDGMENT DATED 16.7.2013 IN INSURANCE APPEAL NO.102/2012 PASSED BY THIS HON'BLE COURT.
- EXHIBIT P6** TRUE COPY OF THE SAID ORDER DATED 10.2.2017 PASSED BY THE EI COURT IN IC NO.2/2013.
- EXHIBIT P6 (A)** TRUE COPY OF THE ORDER DATED 25.02.2015 PASSED BY THE EI COURT, KOLLAM, DISMISSING IC NO.3/2013.
- EXHIBIT P6 (B)** TRUE COPY OF THE PETITION IA 26/2019 DATED 14.1.2019 IN IC NO.42/2018 PENDING ON THE FILES OF THE EI COURT, THIRUVANANTHAPURAM, FILED BY THE

PETITIONER CORPORATION.

- EXHIBIT P6 (C)** TRUE COPY OF IC NO.42/2018 FILED BY THE 1ST RESPONDENT HEREIN DATED 22.9.2018.
- EXHIBIT P7** TRUE COPY OF THE INTERIM ORDER PASSED BY THE EI COURT, THIRUVANANTHAPURAM IN IC NO.35/2018.
- EXHIBIT P7 (A)** TRUE COPY OF THE INTERIM ORDER PASSED BY THE EI COURT, THIRUVANANTHAPURAM IN IC NO.39/2018.
- EXHIBIT P7 (B)** TRUE COPY OF THE INTERIM ORDER PASSED BY THE EI COURT, THIRUVANANTHAPURAM IN IC NO.31/2018.
- EXHIBIT P7 (C)** TRUE COPY OF THE INTERIM ORDER PASSED BY THE EI COURT, THIRUVANANTHAPURAM IN IC NO.29/2018.
- EXHIBIT P7 (D)** TRUE COPY OF THE INTERIM ORDER PASSED BY THE EI COURT, THIRUVANANTHAPURAM IN IC NO.30/2018.
- EXHIBIT P7 (E)** TRUE COPY OF THE INTERIM ORDER PASSED BY THE EI COURT, THIRUVANANTHAPURAM IN IC NO.32/2018.
- EXHIBIT P7 (F)** TRUE COPY OF THE INTERIM ORDER PASSED BY THE EI COURT, THIRUVANANTHAPURAM IN IC NO.38/2018.

**RESPONDENTS' EXHIBITS:**

NIL