

THE HON'BLE Dr. JUSTICE G. RADHA RANI

WRIT PETITION No.30176 OF 2021

ORDER:

This petition is filed by the petitioner to declare the action of the respondents in insisting for payment of Rs.5,46,975/- from the petitioner under Section 45A of the Employees' State Insurance Act (for short 'ESI Act') dated 16-3-2016 for the period from 1-4-2011 to 30-6-2015, though it was brought to their notice that the partnership firm was closed in the year 2011 itself, as illegal and arbitrary and to set aside the same.

2. Heard the learned counsel for the petitioner and the learned Standing Counsel for the respondents 1 to 4.

3. The learned counsel for the petitioner submitted that the petitioner joined in partnership with one P. Praveen Kumar to carry on mechanical, electrical and electronic engineering works in the name of Isha Engineering with effect from 22-2-2008 and entered into partnership deed on the said date. One Mr. P. Srinivasa Rao was looking after the affairs of the partnership firm. The petitioner was only a silent (sleeping) partner. As the firm sustained losses, the partnership was closed in the year 2011. Since then, the petitioner had no contacts with the Managing Partner P. Praveen Kumar Reddy. The impugned order would disclose that the

show cause notice was given on 24-11-2015 and on the said date the representative of the firm appeared before the 3rd respondent and informed him that the partnership firm was closed in the year 2011. Despite the same, the 3rd respondent passed the impugned order on 16-3-2016 for payment of contributions totaling to Rs.5,46,975/- and sought to serve notice on the partners. Only because, the address furnished in the partnership deed as well as ESI registration would contain the residential address of the petitioner, the order was addressed to the petitioner. Though, the said order said to have been passed on 16-3-2016, it was not served on the petitioner. Only on 17-11-2021, when the recovery officer approached the petitioner, the petitioner came to know about the said order and collected a copy of the order from the respondents on 18-11-2021. Immediately, the petitioner brought to the notice of the respondents about the closure of the firm and that the consultant person P. Srinivasa Rao died on 26-1-2017 and he was not aware of the said order and produced bank statement to show that the firm stopped business in the year 2011. Despite bringing the said fact to the notice of the respondents, the respondents were insisting for payment of the said amount. As such the petitioner was constrained to file this Writ Petition.

4. The learned Standing Counsel for the respondents contended that the petitioner had got an alternative and effective remedy under Sections 75 of ESI Act. The petitioner filed the writ petition invoking the extraordinary jurisdiction of this court without availing the said remedy. As such the writ petition was liable to be dismissed on the above ground. M/s.Isha Engineers were covered under ESI Act with effect from 1-6-2008. The petitioner himself registered his establishment with the respondent corporation by submitting Form-1 duly signed by him on 5-8-2008 and paid Rs.19,500/- as advance contribution by Demand Draft vide letter dated 30-12-2008. The petitioner failed to pay the contributions for the period from 1-12-2008 to 30-9-2010. Notice in Form C-18 (adhoc) dated 29-11-2010 for Rs.1,75,175/- was issued. The employer failed to respond to the notices in writing and also failed to avail the opportunity of personal hearing, as such the authorized officer proceeded to determine the contribution u/s 45A of ESI Act leaving the time barred period from 1-12-2008 to 31-3-2009 and as the employer paid contributions from 1-4-2009 to 30-9-2009, determined the contributions for the remaining period from 1-10-2009 to 30-9-2010 as Rs. 1,03, 675 and issued order u/s 45A dated 19-8-2014. As the employer failed to pay contributions from 1-10-2010 to 31-3-2011, notice in Form C-18 was issued for Rs.65,350/-

on 23-4-2015. The employer failed to respond to the said notice as such the respondent Corporation issued an order under Section 45A dated 28-7-2015 for Rs.65,350/-. The said order was received by the petitioner on 5-8-2015. Notice in Form C-18 (ad hoc) was issued for the period from 1-4-2011 to 30-6-2011 for Rs.5,46,975/- on 29-10-2015. The representative of the employer, Sri P. Srinivasa Rao appeared on 24-11-2015 and informed that the unit was closed in 2011, but failed to produce any record in support of his statement. He was given another opportunity to produce all the relevant records and documents on 24-12-2015, but the employer did not turn up on the said date. As such the respondent Corporation issued an order under Section 45A. The same was refused by the petitioner. The petitioner failed to avail opportunity under Section 45AA. The respondent Corporation issued C-19 dated 10-6-2016 to the recovery officer to recover the dues. The same was refused by the petitioner. The petitioner submitted a letter on 20-5-2016 to cancel the registration as the business was not in progress. The respondent requested the petitioner to submit documentary proof for closure of the unit, but the petitioner failed to submit the same.

5. The learned Standing Counsel submitted that as per the partnership deed, both the partners have overall supervision and power

over the business of the firm and both of them were responsible for conducting the affairs of the business which would mean that the petitioner was not a sleeping partner. Even if the whereabouts of the Managing Partner were not known, the petitioner was the responsible person to clear the recovery dues. The respondent Corporation followed the due procedure as per the provisions of ESI Act, 1948. The petitioner failed to produce relevant documents or proof of evidence about the closure of the unit and prayed to dismiss the petition by vacating the interim order dated 24-11-2021 in IA 1 of 2021.

6. Perused the record. The learned counsel for the petitioner relied upon the judgment of the Hon'ble Apex Court in **Whirlpool Corporation v. Registrar of Trademarks, Mumbai and others**¹ on the aspect that existence of alternative statutory remedy is not a constitutional bar to the High Court's jurisdiction under Article 226 of the Constitution of India, but is a self imposed restriction. The Hon'ble Apex Court in the above judgment held that the alternative remedy would not operate as a bar in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is violation of principles of

¹ (1998) 8 SCC 1

natural justice; or (iii) where the order or the proceedings are wholly without jurisdiction or the vires of an Act is challenged.

7. But in the present case the Writ petition is not filed for enforcement of any of the Fundamental Rights nor there was any violation of the Principles of Natural Justice as show cause notice was issued to the petitioner and opportunities are provided to the petitioner to submit his written representation as well as for personal hearing, some of which were availed by him by sending his representative and some not availed by him even after receipt of notice. The order passed is not without jurisdiction nor vires of any Act are challenged in this case. The petitioner failed to produce the documentary evidence in support of his contention about closure of the firm before the concerned authorities.

8. He filed a certificate issued by the Asst. Commercial Tax Officer dated 7-12-2021 about the cancellation of registration under VAT with effect from 31-8-2009 before this court. He ought to have filed the documents relied by him before the concerned authorities or ought to have challenged the orders of the authorities under Section 45A of the Act by filing an appeal under Section 45AA of the Act. An opportunity was also provided under Section 75 of the Act to challenge the orders under Section

t45A before EI Court. Exhausting the remedy available for appeal is the rule and entertaining a writ petition is an exception. The petitioner directly approached this court by filing the writ petition without availing the statutory remedy of appeal provided under the Act. The High Court cannot adjudicate the disputed issues and such disputed issues are to be decided with reference to the original documents and evidences to be produced by the respective parties.

9. Hence, the Writ Petition is disposed of directing the petitioner to approach the EI Court under Section 75 of the ESI Act by filing an appropriate application and the EI Court is directed to dispose of the said application in accordance with law. The respondent shall not take any coercive steps for recovery of the purported due amount from the petitioner for a period of 60 days. No costs.

Miscellaneous Petitions pending, if any, shall stand closed.

Dr. G. RADHA RANI, J

April 12, 2022
KTL