

THE HIGH COURT OF SIKKIM: GANGTOK
(Civil Extra Ordinary Jurisdiction)

SINGLE BENCH: HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

W.P. (C) No. 47 of 2021

Cafe Live & Loud,
Represented by Mr. Dawa Sherpa,
Manager,
Sonam Tshering Marg,
Gangtok-737 101.
Sikkim.

..... **Petitioner**

Versus

1. Employees' State Insurance Corporation,
Represented by Mr. Debabrata Pramanik
Recovery Officer,
Regional Officer-Sikkim,
5/1 Grant Lane, Kolkatta-700012.
2. Mr. Sandip Bhar,
Assistant Director/Authorised Officer,
Employees' State Insurance Corporation,
Siliguri Camp Office,
Siliguri Industrial Real Estate,
2nd Floor, A & B Block,
2nd Mile, Sevoke Road,
Siliguri, District Jalpaiguri-734001.
3. Regional Office,
Employees' State Insurance Corporation,
H#. 169, NH 31 A,
Upper Tadong, Gairi Gaon,
Sikkim-737102.
4. Branch Manager,
HDFC Bank Ltd.
Ground Floor, C/o Hungry Jack Restaurant,
NH 31 A, Gangtok 737102
Sikkim,
5. The Secretary,
Department of Labour,
Government of Sikkim,
Shrain Bhawan, Sokaythang,
Gangtok, East Sikkim-737102.

..... **Respondents**

Writ Petition under Article 226 of the Constitution of India.

(for issuance of writ in the nature of Mandamus and writ of Certiorari, or any other appropriate writ, order or direction of like nature.)

Appearance:

Mr. Thupden Youngda, Mr. Purab Wangdi and Ms. Roshni Chettri, Advocates for the Petitioner.

Mr. Rahul Rathi and Ms. Lidya Pradhan, Advocates for the Respondent Nos. 1, 2 and 3.

None for Respondent No. 4.

Mr. Yadev Sharma, Government Advocate and Mr. Sujan Sunwar, Assistant Government Advocate for Respondent No.5.

Date of hearing : 23.09.2022

J U D G M E N T (O R A L)

Bhaskar Raj Pradhan, J.

1. The writ petition challenges demand notice dated 24.09.2020 issued by the Recovery Officer of the respondent no.1 for recovery of Rs.9,49,699/- as contribution arrears for the period May, 2017 to March, 2019 issued under section 45-C to 45-I of the Employees' State Insurance Act, 1948 (the ESI Act) read with Rule 2 of the II Schedule to the Income Tax Act, 1961 and Income Tax (Certificate Proceedings) 1962. It also challenges the consequential attachment order dated 19.04.2021/23.04.2021 under section 45-G of the ESI Act

issued by the respondent no.1 to the respondent no.4, the petitioner's bankers, requiring it to transfer an amount of Rs.14,33,473/- along with further interest @ Rs.381.34 per day w.e.f. 28.01.2021 till the date of remittance. The petitioner's further grievance is that the amount so arrived at is also inflated.

2. Heard Mr. Thupden Youngda, learned Counsel for the petitioner and Mr. Rahul Rathi, learned Counsel for the respondent nos.1 to 3 and Mr. Yadev Sharma, learned Government Advocate for the respondent no.5.

3. The primary attack of the petitioner is that the impugned orders are discriminatory, abusive, high handed and amounts to harassing the petitioner. The petitioner is aggrieved by the fact that very little time for compliance was granted to them to pay the outstanding dues; they were misled by the authorities to accept that they had misplaced the official notices and communications, although, in fact, they had not received them. They allege that irreparable financial loss has occasioned the petitioner by the attachment of its current account and transfer of Rs.7,27,980/- from there. The petitioner is also aggrieved by the failure of the respondent no.5 to constitute the Employees' Insurance Courts (ESI Courts) in Sikkim as mandated under section 74 of the ESI Act.

4. On perusal of the counter affidavit filed by the respondent nos. 1 to 3, it is evident that prior to the recovery and attachment proceedings impugned by the petitioner, the respondent nos. 1 to 3 had first issued a show cause notice dated 20.05.2019 to them assessing its contribution at Rs.9,49,699/-. On their failure to appear for personal hearing granted on 21.06.2019, a further notice dated 22.07.2019 had been issued for its appearance on 22.08.2019. The petitioner was yet again given a further opportunity of personal hearing on 05.11.2019 by the respondent nos. 1 to 3 by issuing another notice dated 14.10.2019. The relevant tracking consignment report as well as the acknowledgment due cards of the postal authority have been filed by the respondent nos.1 to 3 to evidence receipt thereof. It transpires that when the petitioner failed to appear or show cause in spite of repeated opportunities an order dated 29.11.2019 under section 45-A of the ESI Act was passed confirming the ad-hoc assessment made and directing the petitioner to pay an amount of Rs.9,49,699/- within a period of 60 days. The order also mentioned that the petitioner could file an appeal against this order under section 45-AA of the ESI Act to the Appellate Authority within 60 days from the date of the order after depositing

25% of the contribution so ordered, or the contribution as per the petitioner's own assessment whichever is higher.

5. The order dated 29.11.2019 is the substantive order passed by the respondent nos. 1 to 3 assessing and confirming the liability of the petitioner under the ESI Act. This order, however, has not been challenged. The order dated 29.11.2019 can be challenged by way of a statutory appeal as provided under section 45-AA of the ESI Act. Under the scheme of the ESI Act the impugned order passed under section 45-C to 45-I relates to recovery proceedings. 45-E provides that when the authorized officer issues a certificate to a Recovery Officer under section 45-C, it shall not be open to the factory or establishment or the principal or immediate employer to dispute before the Recovery Officer the correctness of the amount, and no objection to the certificate on any other ground shall also be entertained by the Recovery Officer. Notwithstanding the issue of certificate to a Recovery Officer, sub-section (2) thereof provides that the authorized officer shall have the power to withdraw certificate or correct any clerical or arithmetical mistake in the certificate by sending intimation to the Recovery Officer. The authorized officer is also permitted to grant time for payment of the amount under section 45-F. The ground on which the present writ

petition is based is devoid of merit. Although a statutory appeal was available to the petitioner they failed to prefer the appeal and instead seek to attack the subsequent recovery proceeding solely on the ground that they were not aware of the assessment proceedings which is untrue. In such circumstances, the discretionary relief under Article 226 of the Constitution of India cannot be exercised in favour of the petitioner. The scheme of the ESI Act reflects that it was the duty of the petitioner to make its contribution payable under the ESI Act as well as file its returns. The failure to make contribution would deprive the petitioner's employees their benefits in case of sickness, maternity and employment injury.

6. Mr. Yadev Sharma, Government Advocate informs that the State Government is actively working on establishing the ESI Courts in Sikkim and it shall be done soon. Establishing the ESI Courts in Sikkim would definitely undo the hardship caused to the residents of Sikkim. Accepting the statement of the learned Government Advocate there is nothing further which needs deliberation. In the circumstances, the writ petition is rejected. The parties to bear their own costs.

7. The writ petition as well as the pending application stands disposed accordingly.

(Bhaskar Raj Pradhan)
Judge

Approved for reporting : **Yes**
Internet : **Yes**
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