SUPREME COURT OF INDIA

Employees State Insurance Corporation

Vs

All India I.T.D.C. Employees Union and Others

Appeal (Civil) 313 of 2005 With C.A. No. 315 of 2005

(Arijit Pasayat and Tarun Chatterjee, JJ)

24.03.2006

JUDGMENT

ARIJIT PASAYAT, J.

These two appeals are inter-linked and are, therefore, taken up for disposal together. Challenge in these appeals is to the legality of the judgment rendered by a Division Bench of the Rajasthan High Court at Jodhpur confirming the order passed by a learned Single Judge, who while dismissing the writ petition filed by the respondent no.1 (hereinafter referred to as the 'Union') in Civil Appeal No.313 of 2005 gave certain directions. The judgments in the said case were followed in the connected Civil Appeal No.313 of 2005.

Background facts in a nutshell are as follows:

Pursuant to the amendment made in the provisions of the Employees' State Insurance (Central) Rules, 1950 (in short the 'Rules') framed under Employees State Insurance Act, 1948 (in short the 'Act') vide Notification dated 23.12.1996 which became effective with effect from the date 01.01.1997, the employees who were drawing monthly salary of Rs.6, 500/- which limit was earlier Rs.3, 000/- were required to make contributions at the enhanced rate of 1.75 % in place of the

earlier figure of 1.5%. The employers contribution was increased from 4% to 4.75%. In view of the Notification those employees who were drawing salary upto Rs.6, 500/- were required to secure new insurance cards after filing requisite declaration. The concerned employer notified the employees accordingly. The Union challenged the employer's notice on the ground that in view of proviso to Section 1(4) of the Act, the amendment as brought in by the Notification had no application to the concerned employees. However, prayer in the writ petition was to grant exemption. In the case of ITDC which were subsequently taken over by Laxmi Vilas Palace Hotel, Udaipur, stand was that the employer-hotel was a Government of India undertaking and is State within the meaning of Article 12 of the Constitution of India (in short the 'Constitution'). According to the Union, the applicability of the Act cannot be extended to the employees of the said establishment. Therefore, the demand for payment for contribution from the concerned employees to be deducted from their salaries is not warranted. The Employees State Insurance Corporation (in short the 'Corporation') raised preliminary objections as regards the maintainability of the writ petition. It was pointed out that since the Notification in question was issued by the Union of India, without making the Union of India as a party the petition was not maintainable. A further plea was taken that in view of the alternative remedy available under the Industrial Disputes Act, 1947 (in short the 'ID Act') the writ petition was not maintainable. Learned Single Judge found the writ petition to be not maintainable in view of the alternative remedy provided. It, however, gave following direction:

"It would be appropriate to direct the E.S.I. Corporation to consider that since the petitioners have not availed the facility of E.S.I. from then they should waive the realization of the contribution for this period from the petitioners in the aforesaid circumstances and the necessary orders in this regard would be issued by the E.S.I. Corporation." $ (Underlined for emphasis)

This direction was given on the basis that operation of the Notification was stayed by order dated 26.2.1996 in the writ petition. Both the Corporation and the Union filed appeals before the Division Bench. By the impugned judgment the Division Bench gave the following directions:

"1. The deduction of the employees' contribution will be made by the employer and along with the employees' contribution, employer's contribution shall be deposited with the ESI Corporation.

2. Such deposits shall be kept in separate account by the ESI Corporation for a period of three months

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3. If within the said period of three months, any dispute is raised about the applicability of the Act to the establishment in question by the employer or employees before the appropriate forum, the said arrangement of regular deposits of the contribution and maintenance of the separate account by the Corporation shall continue until the adjudication of that dispute by the said forum.

4. However, if no such application is made within three months, the amount of contribution of the employee's and the employer's so deposited with the corporation shall be appropriated to the normal fund in accordance with the law.

5. If any such dispute is raised and the petitioners succeed, the refund of the amount can appropriately be ordered at the end of such adjudication."

In the appeal filed by the Corporation the aforesaid directions were given, while the appeal filed by the Union was dismissed. In the connected case the writ petitioner was the J.K. White Cement Mazdoor Sangh (in short the 'Sangh') and the decision which forms the challenge in the Civil Appeal No.313 of 2005 was followed.

Mr. C.S. Rajan, learned counsel for the appellant submitted that merely because of the order of stay was granted, there was no bar on the Corporation recovering the amounts. The High Court's order virtually means that the Notification has to operate prospectively. Such a direction cannot be given by the High Court.

Learned counsel for the respondents i.e. Union and the concerned employers supported the order. It was their stand that because of the stay order, recovery was not made and, therefore, the direction given by the High Court needs no interference.

The question relating to the jurisdiction of the High Court to direct that statute shall operate prospectively is no longer res integra. A few decisions of this Court can be noted by way of illustration.

In Kanoria Chemicals and Industries Ltd. and others v. U.P. State Electricity Board and Others 0), it was observed.

"11. it is equally well settled that an order of stay granted pending disposal of a writ petition/suit or other proceeding, comes to an end with the dismissal of the substantive proceeding and that it is the duty of the court in such a case to put the parties in the same position they would have been but for the interim orders of the court. Any other view would result in the act or order of the court prejudicing a party (Board in this case) for no fault of its and would also mean rewarding a writ petitioner in spite of his failure. We do not think that any such unjust consequence can be countenanced by the courts. As a matter of fact, the contention of the consumers herein, extended logically should mean that even the enhanced rates are also not payable for the period covered by the order of stay because the operation of the very notification revising/enhancing the tariff rates was stayed. Mercifully, no such argument was urged by the appellants. It is ununderstandable how the enhanced rates can be said to be payable but not the late payment surcharge thereon, when both the enhancement and the late payment surcharge are provided by the same notification-the operation of which was stayed.

12. As has been pointed out by S. C. Agrawal, J., speaking for a three-Judge Bench in Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn.

4: (SCC p. 9, para 10)

"While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence."

In Union of India and Another v. Murugan Talkies 7 it was observed as follows:

"3. It is contended for the respondents that the High Court has granted the relief taking into consideration that some workmen had retired and it would be inequitable to deduct from the meager wages of existing employees with retrospective period. Therefore, the High Court directed deduction of their share from the date of the judgment. It is needless to mention that since some of the workmen have already retired and from some existing workmen deduction from date of enforcement of the notification would cause great hardship to them, so it cannot be made to bear the burden of their contribution with retrospective effect from the date of the notification towards their share of contribution.

4. To that extent, the order of the High Court is upheld. As regards the liability of the owners of the theaters who approached the High Court, the operation of the notification had stayed at their instance. We find that the High Court was wholly unjustified in granting the same relief to these owners/licensees. After their writ petitions were dismissed, they were to bear the liability from the date of the enforcement of the notification as held by this Court. It is, therefore, necessary that from the date on which the respective owners of the theaters or the licensees, who had filed the writ petition in the High Court, are made liable to deposit their share of contribution towards provident fund account under the scheme."

In Employees' State Insurance Corpn. v. Kerala State Handloom Development Corpn. Employees Union (CITU), Kannur, Dist. Kannur, Kerala and others it was observed as follows :

"3. We are of the view that the High Court fell into patent error in postponing the date of the operation of the notification. The notification, amending the Rules, was legislative act. The amendment of the Rules being a delegated legislation, the High Could could not have interfered with the date of operation of the notification."

In U.P. State Sugar Corporation and Another v. Mahalchand M. Kothari and Others it was

observed in paras 35, 36 & 37 as follows:

"35. xxx xxx xxx

During course of the writ petition filed by the owner of the sugar mill in which the constitutional validity of the Ordinance/Act was challenged, a stay order, on the limited terms and conditions, was passed on 9.7.1971. The terms and conditions of the order reproduced above, restored the de jure possession of the sugar mill to the erstwhile owner but de facto possession and management of the sugar mill was allowed to remain undisturbed with the Receiver although with limited powers to him. The Receiver was specifically allowed in accordance with Term 3 of the stay order to sell sugar, molasses and other waste products. By virtue of the order of stay passed by the High Court, during pendency of the writ petition, the Receiver appointed under the Act of 1950, continued to manage the sugar mill subject to the ultimate result of the writ petition. The writ petition ultimately came to be dismissed on 3.5.1979 and the stay order containing the terms and conditions passed on 9.7.1971 stood automatically vacated. The natural consequence was restoration of full operation of the provisions of the Ordinance/Act as was originally passed. In accordance with Section 3 of the Act, the sugar mill stood transferred and vested in the Corporation from the appointed date 3.7.1971. On vacation of the stay order with effect from the appointed day 3.7.1971, the operation of the Ordinance/Act was revived. The liability arising from breach of contract committed by the Receiver was not of the Corporation. It was an obligation attached to the property of the sugar mill which was under the management of the Receiver, initially under the 1950 Act and continued under the order of stay passed by the High Court. Since the liability towards breach of contract was attached to the sugar mill under the management of the Receiver, the Corporation in whom title of the sugar mill stands vested under Section 3 of the Act cannot avoid the liability it being a burden on the said property and recoverable from it.

36. It is of no importance or consequence that actual or de facto possession of the property was received by the Corporation under a formal order of the Collector, Deoria on 23.5.1979, only after dismissal of the writ petition on 3.5.1979 and consequent discharge of the Receiver.

37. The Ordinance was stayed by the High Court to restore status quo ante existing on 2.7.1971, that is, a day prior to the appointed date 3.7.1971. But on the dismissal of the writ petition and automatic vacation of the stay order of the High Court, the operation of the Ordinance/Act with all legal consequences flowing from the said law stood restored from the appointed date. The trial court and the High Court are perfectly right in holding in their judgments that the order of stay passed in the writ petition could have no effect of postponing the "appointed day" statutorily fixed under Section 3 of the Ordinance/Act."

But it is really unnecessary to go into said question because the order of the High Court really did not give a positive direction. Relevant portion of the learned single Judge's order which has been extracted above, clearly goes to show that the learned Single Judge left the matter to be decided by the Corporation. The direction was to "consider" and in that sense there was no positive direction.

We may, in this context, examine the significance and meaning of a direction given by the Court to "consider" a case. When a court directs an authority to 'consider', it requires the authority to apply its mind to the facts and circumstances of the case and then take a decision thereon in accordance with law. There is a reason for a large number of writ petitions filed in High Courts being disposed of with a direction to "consider" the claim/case/representation of the petitioner(s) in the writ petitions.

Where an order or action of the State or an authority is found to be illegal, or in contravention of prescribed procedure, or in breach of the rules of natural justice, or arbitrary/unreasonable/irrational, or prompted by mala fides or extraneous consideration, or the result of abuse of power, such action is open to judicial review. When the High Court finds that the order or action requires interference and exercises the power of judicial review, thereby resulting in the action/order of the State or authority being quashed, the High Court will not proceed to substitute its own decision in the matter, as that will amount to exercising appellate power, but require the authority to 'consider' and decide the matter again. The power of judicial review under Article 226 concentrates and lays emphasis on the decision making process, rather than the decision itself.

The High Courts also direct authorities to 'consider' , in a different category of cases. Where an authority vested with the power to decide a matter, fails to do so in spite of a request, the person aggrieved approaches the High Court, which in exercise of power of judicial review, directs the authority to 'consider' and decide the matter. In such cases, while exercising the power of judicial review, the High Court directs 'consideration' without examining the facts or the legal question(s) involved and without recording any findings on the issues. The High Court may also direct the authority to 'consider' afresh, where the authority had decided a matter without considering the relevant facts and circumstances, or by taking extraneous or irrelevant matters into consideration. In such cases also, High Court may not examine the validity or tenability of the claim on merits, but require the authority to do so.

Where the High Court finds the decision-making process erroneous and records its findings as to the manner in which the decision should be made, and then directs the authority to 'consider' the matter, the authority will have to consider and decide the matter in the light of findings or observations of the Court. But where the High Court without recording any findings, or without expressing any view, merely directs the authority to 'consider' the matter, the authority will have to consider the matter in accordance with law, with reference to the facts and circumstances of the case, its power not being circumscribed by any observations or findings of the Court.

We may also note that sometimes the High Courts dispose of matter merely with a direction to the authority to 'consider' the matter without examining the issue raised even though the facts necessary to decide the correctness of the order are available. Neither pressure of work nor the complexity of the issue can be a reason for the Court, to avoid deciding the issue which requires to be decided, and disposing of the matter with a direction to 'consider' the matter afresh.

There are also several instances where unscrupulous petitioners with the connivance of 'pliable' authorities have misused the direction 'to consider' issued by court. We may illustrate by an

example. A claim, which is stale, time-barred or untenable, is put forth in the form of a representation. On the ground that the authority has not disposed of the representation within a reasonable time the person making the representation approaches the High Court with an innocuous prayer to direct the authority to 'consider' and dispose of the representation. When the Court disposes of the petition with a direction to 'consider', the authority grants the relief, taking shelter under the order of the Court directing it to 'consider' . Instances are also not wanting where authorities, unfamiliar with the process and practice relating to writ proceedings and the nuances of judicial review, have interpreted or understood the order 'to consider' as directing grant of relief sought in the representation and consequently granting reliefs which otherwise could not have been granted. Thus, action of the authorities granting undeserving relief, in pursuance of orders to 'consider', may be on account of ignorance, or on account of bona fide belief that they should grant relief in view of Court's direction to 'consider' the claim or on account of collusion/connivance between the person making the representation and the authority deciding it.

Therefore, while disposing of writ petitions with a direction to 'consider', there is a need for the High Court to make the direction clear and specific. The order should clearly indicate whether the High Court is recording any finding about the entitlement of the petitioner to the relief or whether the petition is being disposed of without examining the claim on merits.

The aforesaid aspects were highlighted recently in A.P.S.R.T.C. & Ors. v. G. Srinivas Reddy and Ors. 2006 AIR(SCW) 1108.

It is true as contended by learned counsel for the Corporation that the use of the expression "should" gives a scope for entertaining a doubt that there was a positive direction. It is, therefore, necessary to clarify that what learned Single Judge in the direction said was only consideration by the Corporation and there was no positive direction. In that view of the matter the Corporation shall now give opportunity to the concerned parties i.e. respondents 1, 2 & 3 in each case to present their respective stand before the Corporation so that after consideration necessary order can be passed in accordance with law. We express no opinion on that aspect. The appeals are disposed of accordingly with no order as to costs.