IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:10.04.2019

Coram

The Hon'ble Mr. Justice V.PARTHIBAN

W.P.No.5885 of 2018
and
W.M.P.No.7224 of 2018

Nava Bharath National School,
rep.by its Chairman K.P.Nandhakumar ... Petitioner

vs.

The Deputy Director,
Sub-Regional Office,
Employees State Insurance Corporation,
1897, Trichy Road, Panchdeep Complex,
Ramanathapuram,
Coimbatore-641 045 ... Respondent

Petition filed under Article 226 of the Constitution of India praying to issue a writ of mandamus directing the respondent herein to unlock the ESI Account number 56001174330001303 allotted to the petitioner herein so as to enable the petitioner to pay the ESI contribution from the month of August 2017 onwards without insisting on payment of interest, penalty and damages.

For Petitioner .. Mrs.Hema Muralikrishnan

For Respondent .. Mr.K.Prabhakar

ORDER

The petitioner is an Educational Institution affiliated to the Central Board of Secondary Education (C.B.S.E.). The School is a member of the Association of Management of Private Schools. The Government has issued orders bringing the Educational Institutions within the purview of Employees' State Insurance Act (hereinafter referred to as 'the Act' for short) and directed all Educational Institutions to enroll their employees under the Act and pay the ESI contribution for them.

2.The consortium of private schools challenged the Government Order bringing the institutions within the purview of the ESI Act, before this Court. Several Writ Petitions and Writ Appeals were filed. One such writ petition was filed in W.P.No.39613 of 2013.

3.A Division Bench of this Court decided a batch of Writ Appeals in W.A.Nos.918 of 2013 etc., pertaining to the question as to whether the Employees' State Insurance Act would apply to the Educational Institutions and by a common order dated 16.6.2015, the following direction was issued.

> "2.In view of the aforesaid position, the writ appeals and the writ petitions are disposed of by agreement that the interim orders would continue till the disposal of the matter by the Honourable Supreme Court and the parties would naturally remain bound by the legal position enunciated by the Honourable Supreme Court on such decision being rendered. No costs. Consequently, connected Miscellaneous Petitions are closed."

4.A perusal of the above order would go to show that the issue in relation to applicability of ESI Act to Educational Institutions was referred to Larger Bench by the Hon'ble Supreme Court and till a decision is taken by the Larger Bench of the Supreme Court, it was agreed by the parties that interim order could continue in the matter and accordingly the Division Bench passed the order.

5.While matter stood thus, the respondent issued proceedings dated 16.08.2013, stating that the petitioner Institution was liable to pay ESI contributions in respect of its employees and suo motu allotted ESI Code number to the Petitioner Institution. In view of the omnibus direction of the Division Bench of this Court, as extracted supra, the petitioner Institution did not react to the proceedings issued by the respondent Corporation.

6.In the meanwhile, the Government has announced a scheme of Registration under the Employees' State Insurance Act in order to attract more employers to get them covered under the said Act. The said scheme was called 'SPREE'. As per the SPREE Scheme, which was published in various newspapers and other publications, the employers were called upon to register themselves under the ESI Act from 20.12.2016 to 31.03.2017. As per the scheme, the Employers, who registered themselves within the period prescribed will be liable to pay ESI Contribution in respect of their employees as declared by them only from the date of registration. It was further notified that no action will be taken against the employers registering under the scheme for any violation of the ESI Act for any past period.

7.The petitioner institution, though was covered under the ESI Act earlier, wanted to take advantage of the new Scheme and therefore, registered itself with the respondent on 01.02.2017, without prejudice to their rights and the results flowing from the reference to the Larger Bench constituted by the Hon'ble Supreme Court.

8.According to the petitioner, in view of their institution registering itself in the new SPREE scheme, they were not liable to pay any contribution prior to 20.12.2016. According to the petitioner school, the school was also allotted a new ESI Code number.

9.In pursuance of the Registration under the SPREE Scheme, when the petitioner school attempted to make ESI contribution in 2017, they were unable to access the ESI Website with the new Code number allotted under the new SPREE Scheme. Repeated attempts were made, but only in vain. In this regard, written representation was also made to the ESI authorities to provide access to the Website for the school to make contribution. According to the petitioner, the respondent had blocked the Code number allotted to the School under the SPREE Scheme and the school has been prevented from making any contribution from 2017. In the said circumstances, the petitioner is before this Court seeking for issue of mandamus directing the respondent to unlock ESI Code number allotted to them under the SPREE Scheme.

10.In response to the notice issued in the writ petition, Mr.K.Prabhakar, learned counsel entered appearance on behalf of the respondent Corporation and a detailed counter affidavit has been filed.

11.In the counter affidavit, the claim of the petitioner is stoutly resisted stating that the Registration under the SPREE Scheme is only in respect of establishments, who were not covered by ESI Act till 20.12.2016. The scheme has been introduced with an intent to extend the social security benefits to all eligible employees under the Act, who were not already covered under the Act till 20.12.2016. As far as the petitioner institution is concerned, it was originally allotted ESI Code number on 16.8.2013 itself on implementation of the ESI Act with effect from 01.11.2012.

12.The school which registered under the SPREE Scheme in 2017 was with the sole intention to evade previous ESI Contribution, by generating a new Code number. Therefore, the access was denied to the School. In any event, the SPREE Scheme is not applicable to establishments, who were already covered under the ESI Act prior to the introduction of the Scheme i.e. 20.12.2016.

13.As regards the contention of the petitioner school regarding the applicability of the ESI Act to the Educational institutions and the reference of the said issue before the Larger Bench of the Hon'ble Supreme Court, it is submitted on behalf of the Corporation that the issue has been settled in favour of the ESI Corporation and the reference before the Larger Bench of the Supreme Court was not in relation to the present issue as clarified by this Court in number of decisions by the Single Judges as well as Division Benches. In this regard, in paragraph Nos.4 and 5 of the counter affidavit it has been clearly averred as to how the issue has been settled against the Educational Institutions by the subsequent decisions of our High Court and confirmed by the Hon'ble Supreme Court. Averments in paragraph Nos.4 and 5 of the counter affidavit are extracted hereunder.

> "4.I submit that the notification dated 08.10.2007, issued by the Kerala Government under Section 1(5) of the ESI Act extending the provisions of the Act to educational institutions in Kerala State had been challenged in the case of Kerala Unaided School Management Association vs. State of Kerala in W.P.No.20279 of 2008 (W.P.(C) Nos.5986 of 2008 Batch cases) and the same had been dismissed by the Hon'ble Kerala High Court on 03.07.2009 holding that the words employed in Section 1(5) of the ESI Act 'or otherwise' should be given the widest possible meaning and therefore the ESI Act will cover the educational institutions also. I further submit that the said order passed by the Hon'ble High Court of Kerala had been upheld by the Hon'ble Supreme Court by order dated 15.03.2016 in SLP(C) No.28285 of 2009.
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> 5.I submit that following the above said order of Hon'ble Supreme Court, this Hon'ble Court in various numbers of writ petitions including W.P.No.22948 of 2017 upheld that the private Educational Institutions are also bound to pay the ESI contribution under the ESI Act. I further submit that the order passed by this Hon'ble High Court in the said W.P.No.22948 of 2017 had also been upheld by the Hon'ble Supreme Court in SLP.(Civil) Diary Nos.1626 of 2018 by order dated 06.09.2017, which makes clear that the private Education institutions fall under Section 1(5) of the ESI Act and hence they are bound to pay the ESI contributions under the ESI Act."

14.In fact, the learned counsel for the respondent Corporation would also rely on the recent decision of this Court passed in W.P.No.3317 of 2019 dated 19.02.2019, wherein, this

Court has discountenanced similar contention as to the maintainability of the ESI claim and held that the ESI Act will be applicable to Educational Institutions as well.

15.The learned counsels appearing for the petitioner as well as the respondent have reiterated the above facts and held on their respective positions as aforementioned.

16.From the pleadings, materials and the judgments, the uncontroverted position as remains today is that the ESI Act is applicable to the Educational Institutions as well. This Court in fact dealt with the objections by the Educational Institutions in extenso and dismissed their objections by a detailed order. Paragraph Nos.5 to 15 of the order dated 19.02.2019, made in W.P.No.3317 of 2019, are extracted hereunder:

> "5. According to the learned counsel for the petitioner, the present writ petition has been filed for a direction restraining the respondents from invoking the provisions of the employees State Insurance Act in respect of contribution from the school on the ground that the Larger Bench of the Supreme Court has not rendered any decision and that they are protected in the light of the orders passed by the Division Bench of this Court in W.A.No.918 of 2013 dated 16.6.15.
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> 6. Countering the said argument, learned counsel for the respondents submit that the learned Division Bench of this Court, in the aforementioned order, has mistakenly passed orders on the ground that the applicability of the Employees State Insurance Act (for short 'ESI Act')to unaided schools was the subject matter of reference before the Larger Bench of the Hon'ble Supreme Court, but the fact remains that the question that is referred to the Larger Bench by the Hon'ble Supreme Court is whether the Social Forestry Department was an industry under the provisions of Section 2 (j) of the Industrial Disputes Act. Citing the above mistaken order of the Division Bench order, several schools have obtained interim orders and they were enjoying the interim orders without making any contribution under the provisions of the ESI Act.
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> 7. Learned counsel for the respondents further submit that similar Government Order, which originally was the subject matter of litigation, has been upheld by the Kerala High Court and the matter had gone up to the Hon'ble Supreme Court and the

Hon'ble Supreme Court has affirmed the order passed by the Kerala High Court vide order dated 15.3.16 in SLP No.28285/09. The Kerala High Court, vide order dated 3.7.09, in W.P. (C) No.5986 of 2008(K) & 20279 of 2008, had passed a detailed order upholding similar Government Order bringing the private schools within the ambit of the provisions of the ESI Act.

8. As far as this Court is concerned, learned counsel for the respondents submit that following the order passed by the Kerala High Court as affirmed by the Hon'ble Supreme Court, a Division Bench of this Court in W.P. No.22948/17 dismissed similar challenge by a private school vide its order dated 6.9.17. The Division Bench of this Court has followed the order of the Hon'ble Supreme Court and dismissed similar claim. The relevant portion of the order of the Division Bench, as found in paras-3 and 4 are extracted hereunder :-

"3.When the matter is taken up for hearing, the Learned Counsel appearing for Respondents 2 and 3 / E.S.I.Corporation brings it to the notice of this Court that the present issue has been dealt with by the Hon'ble Supreme Court in a Batch of cases in S.L.P.No.28285 of 2009 etc., by virtue of the Order dated 15.03.2016 in and by which, it was held that Private Educational Institutions were also bound to pay the Employees' State Insurance Contribution, under the Employees' State Insurance Act, 1948.

4.In such view of the matter, the Writ Petition stands dismissed. However, taking into consideration the difficulties expressed by the Petitioner / School, the arrears of E.S.I Contribution as on 31.08.2017 are ordered to be paid in 12 Equal Monthly Instalments. Also, this Court makes it abundantly clear that the order would encompass the past arrears till the Month of August, 2017 and from the Month of September, 2017, the Petitioner is directed to pay ESI Contribution on regular basis without fail. Consequently connected Miscellaneous Petitions are closed. No costs."

9.Following the same, yet another Division Bench of this Court, vide order dated 26.10.17 in W.A. No.1308/17 has dismissed an appeal filed by a college holding that the private college has to pay the ESI contribution to the authority concerned. Para-7 of the order of the Division Bench is extracted hereunder for better clarity :-

"7. Having regard to the admitted fact that the petitioner College is a private educational institution, we do not find any reason to interfere with the order so passed by the learned Single Judge, as the issue involved herein is covered by the decision of the Hon'ble Supreme Court in a batch of cases in SLP(C) No.28285 of 2009 etc. dated 15.03.2016, wherein, it has been held that the private educational institutions are also bound to pay the Employee State Insurance contribution.

Therefore, the petitioner College has to pay the ESI contribution to the authority concerned, in accordance with law."

10.The writ appeal orders were taken on further appeal by way of SLP Nos.1626/18 and 3474/18 before the Hon'ble Supreme Court and the Hon'ble Supreme Court dismissed those special leave petitions vide order dated 9.2.2018.

11. Even recently, on 20.6.18, one another Division Bench of this Court has passed similar orders in W.A. No.420/18 and reference was made to referral order to the Larger Bench by the Hon'ble Supreme Court and the Division Bench held that the issue was no more res integra. The relevant portion of the order passed by the Division Bench, as found in paras-9 and 10, are extracted below for easy reference :-

"9. The judgment dated 3 July 2009 in W.P. (C) Nos.5986 of 2008 of the Kerala High Court was taken up before the Hon'ble Supreme Court in SLP (C) Nos. 28285 of 2009. The Hon'ble Supreme Court dismissed the Special Leave Petitions by order dated 15 March 2016.

10.The issue raised by the appellant is therefore no longer res integra in view of the decision of the Kerala High Court, which was subsequently upheld by the Hon'ble Supreme Court. We are therefore of the view that there is absolutely no merit in the contention taken by the appellant.”

12. Likewise, a learned single Judge of this Court dismissed the writ petition filed by private colleges and a private school in W.P. Nos.26031, 25744 and 25752 of 2011 vide order dated 9.10.17. Para-5 of the said order, passed by the learned single Judge, is quoted hereunder for reference :-

“5. Since the order passed by the Division Bench of the Kerala High Court holding that the educational institutions are also amenable to the ESI Act and they should also make their contributions has been affirmed by the Apex Court, this Court, bound by the order passed by the Division Bench dated 6.7.2017, is not inclined to entertain the present writ petitions.”

13. From the above orders passed by this Court, it is clear that this Court has consistently taken the view that the ESI Act is applicable to unaided schools and colleges and, therefore, the reliance placed by the learned counsel for the petitioner on the order passed by the Division Bench of this Court in W.A. No.918/11 vide its order dated 16.6.15 is legally unacceptable and it cannot be sustained at all. The mistake, which had crept in, in the order passed by the learned Division Bench, cannot be taken advantage of by the petitioner to seek the indulgence of this Court. When several writ petitions have been filed in regard to the same subject matter and this Court, while deciding the case, had negatived such claims and the same having been affirmed by the Hon'ble Supreme Court, it is no more open to this petitioner to challenge the action of the respondent authorities in enforcing the provisions of the ESI Act against the petitioner.

14.As rightly contended by the learned counsel for the respondents, when the issue is no more res integra as held by the Division Bench of this Court, it would not be right for a single Judge to reappreciate the matter once over. Since atleast three Division Benches of this Court have taken a consistent view in negativing the challenge of the private schools and colleges, like the petitioner herein, this Court cannot take a different view in the matter, and particularly as a single Bench, this Court is bound by the orders passed by the Division Benches as affirmed by the Hon'ble Supreme Court.

15. For the reasons aforesaid, this writ petition lacks merit and the same is dismissed. Consequently, connected miscellaneous petition is also dismissed. However, there shall be no order as to costs."

17.In view of the above, it cannot be gainsaid that the petitioner institution is not covered by the ESI Act. Therefore, the original notice issued by the ESI Corporation cannot said to be invalid or without jurisdiction. Moreover, the Registration of the petitioner school under the SPREE Scheme cannot be construed to be a valid registration in view of the specific case of the respondent that the Scheme was introduced only with an intent to cover new establishments and to broaden the scope of the coverage to all eligible employees.

18.In this case, the petitioner institution was brought under the ESI cover in 2012, much earlier to the introduction of the SPREE Scheme in 2016 and therefore, it is not proper or fair for the petitioner Institution to re-register themselves under the new Scheme for the purpose of avoiding its earlier liability towards ESI contribution. The intention of the SPREE Scheme is not to cover the establishments, which were already covered under the ESI Act and such Establishments, which were already covered under the ESI Act cannot take advantage of the new scheme and seek to wipe out their liability of the past contribution. The scheme, as it is, is not an amnesty scheme, which can protect the establishments from its past liability.

19.Therefore, this Court is entirely in agreement with the submissions made on behalf of the respondent Corporation that the petitioner is not entitled to access the new Code Registered under the SPREE Scheme for them to make contribution. If at all the petitioner is to avoid any follow up action by the respondent Corporation, it is open to the petitioner Institution to access the original Code allotted to them and make contribution as per the demand of the respondent and certainly it is not open to the petitioner institution to avail the benefit of SPREE Scheme and avoid past liability.

In the above circumstances, this Court finds no merit in the writ petition and the same is dismissed. No costs. Connected miscellaneous petition is dismissed.

sd/
ASSISTANT REGISTRAR

/TRUE COPY/
SUB-ASSISTANT REGISTRAR

msk

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W.P.No.5885 of 2018

MK:12/06/2019