IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.10.2020

CORAM

THE HON'BLE MR. JUSTICE R.SURESH KUMAR

W.P. No. 15405 of 2020
and
W.M.P. No. 19260 of 2020

M/s.Joshua Matriculation School,
Rep. by its Correspondent,
No. 62 B, Ambedkar Street Extension,
Parvati Nagar, Old Perungulathur,
Chennai-600 063. ...Petitioner

-vs-

1. The E.S.I. Corporation,
Regional Office (T.N.),
Rep. by its Regional Director,
Panchadeep Bhavan,
No. 143, Sterling Road,
Chennai-600 034.

2. The Assistant / Deputy Director,
Regional Office (Tamil Nadu),
Employees State Insurance Corporation,
No. 143, Sterling Road,
Chennai-600 034. ...Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records relating to the order of the second respondent passed in No. 51000923670001301/Ins-8 dated 08.10.2020 and quash the same and direct the respondents to write-off the amount demanded under Section 91-C of the ESI Act 1948.

For Petitioner : Mr. P.Ebenezer Paul.

For Respondents: Mr. Bharathwaj,
Standing Counsel for ESI

O R D E R

The prayer sought for herein is for a Writ of Certiorarified Mandamus calling for the records relating to the order of the second respondent passed in No. 51000923670001301/Ins-8 dated

08.10.2020 and quash the same and direct the respondents to write-off the amount demanded under Section 91-C of the ESI Act, 1948.

2.With the consent of the learned Counsel appearing for both sides, this Writ Petition is taken up for final disposal and accordingly, is disposed of at the admission stage itself.

3.The short facts which are required to be noticed for the disposal of this Writ Petition are as follows:

(i)That the Petitioner / School was established and being administered by an Educational Charitable Trust from its own funds. In the year 1999-2000, the School was started with Standards I to VII and thereafter, permission was granted to open VIII Standard as well as IX and X Standards. The School is a recognized private unaided School under the minority Management. Therefore, for the entire expenses to be incurred, for running the School, is borne out of the funds from the Educational Charitable Trust, as no aid is given from the State or Central Governments.

(ii)In this context, the State Government issued a notification sometime in the year 2010, whereby, they wanted to extend the provisions of Employees' State Insurance Act 1948 (in short "The Act") to self financing recognized educational institutions also. Aggrieved over the same, the said notification dated 26.11.2010, was accordingly challenged by number of Private Educational institutions, where, originally, a learned Judge of this Court / Writ Court decided the issue in favour of Employee's State Insurance Corporation (E.S.I.), ultimately, appeals have been filed before Division Bench, where, in the year 2015, two batch of Writ Appeals were decided and disposed of stating that, in this regard, since the issue was pending before the Hon'ble Supreme Court to be decided in one way or the other in the matter of "State of Uttar Pradesh -vs- Jai Bir Singh" reported in "2005 (5) SCC 1", the parties can act accordingly as per the ultimate decision of the Hon'ble Supreme Court. Therefore, the said issue was given a quietus temporarily for sometime from 2015 onwards.

(iii)Thereafter, still the respondents / Employee's State Insurance Corporation started issuing notices to various private unaided educational institutions, seeking to contribute under the provisions of the Act. Ultimately, in view of the divergent opinions of separate Division Benches of this Court, the matter has been referred to for an authoritative pronouncement before a Full Bench of this Court, where among other things, whether the notification impugned therein dated 26.11.2010 issued by the State Government extending the provisions of Employees' State Insurance Act to private unaided educational institutions is valid or not was sought to be decided.

(iv)Based on the said references, a Full Bench of this Court, after hearing the parties concerned, has passed an order giving authoritative pronouncement in the matter of "All India Private Educational Institutions Association, represented by its State General Secretary -vs- State of Tamil Nadu represented by Principal Secretary to Government, Labour and Employment Department, Chennai - 9 and other" reported in "2020 (5) CTC 93". In the said Full Bench Judgment of this Court, the question was answered in favour of Employees' State Insurance Corporation and against the private unaided educational institutions. While making the said authoritative pronouncement, among other things, the Full Bench has also passed the following order:-

> "129.Needless to state that by virtue of exercise of powers under Section 1(5) of the ESI Act, more and more Educational Institutions have been brought within the umbrella of the ESI Corporation to cater the needs of the subscribers. Therefore, it can no longer be stated that ESI Dispensaries can be established only on the Industrial belt catering the Medical needs and allied services to the Workers. As the nation itself is looking at 100% literacy, every town and village having sufficient number of Schools and Colleges, as per the norms fixed by the ESI Corporation, should, definitely, have ESI dispensaries or Hospitals with all the facilities. It is mandatory on the part of the ESI Corporation to achieve the said milestone without any delay.
>
> 130.This matter was heard and reserved for orders just before the preparations for lock down of the Country on account of COVID-19 Pandemic were announced. Thus, in addition to whatever we have stated above on the merits of the issue referred to us, we are also of the view that the present economic conditions necessitate some leeway and negotiations in the matter of settlement of arrears due by the Educational Institutions.
>
> 131.Section 91-C of the ESI Act comes to aid. Section 91-C provides for the writing off of loss and states as follows:
>
> "91-C. Writing off of losses Subject to the conditions as may be prescribed by the Central Government, where the Corporation is of opinion that the amount of contribution, interest and damages due to the Corporation is irrecoverable, the Corporation may sanction the writing off finally of the said amount."

132.A provision is, thus, made for the Corporation to sanction the writing off of the contribution, interest and damages due to it if the Corporation is of the opinion that such amounts are irrecoverable from the Educational Institutions concerned. The pandemic has resulted in a situation where several Educational Institutions are reportedly unable to even pay regular salaries to their Employees. The financial crunch faced by them, at this juncture, is a matter of public knowledge. The impugned Notification no doubt mandates certain contributions to be made and we have upheld the validity of the same. The contributions to be made under the Notification enure to the coffers of the Corporation and it is not the Corporation's case that there are claims that have been made by the Employees of the Educational Institutions that remain unfulfilled on account of the failure of the Institutions to make the contributions in the first place. No prejudice has thus been caused to the Employees per se for the periods till date on account of such failure by the Educational Institutions.

133.We, thus, strongly recommend that the provisions of Section 91-C be applied in letter and spirit by the Corporation in considering the case for reduction / waiver of pending arrears, if and when made by the Educational Institutions. Such requests, if and when made, shall be considered by the Corporation in line with the object and spirit of Section 91-C, particularly in the light of the present economic conditions."

4.Pursuant to the said Full Bench Judgment of this Court, the respondents / Employees' State Insurance Corporation seems to have started issuing notices to various private unaided educational institutions for making the contribution towards Employees' State Insurance Corporation. Insofar as the Petitioner / School is concerned, such notice has been issued by the Employees' State Insurance Corporation on 08.09.2020 and on receipt of the same, the Petitioner / School on 06.10.2020 has given a detailed reply, where among other things, it has raised three major points, such as,

(i)That under second proviso of 45-A of the Employees' State Insurance Act, Employees' State Insurance contribution beyond five years cannot be recovered. Therefore, notice intending to recover such contribution from 2012 onwards is bad in law.

(ii) That under Section 91-C of the Employees' State Insurance Act, the power has been vested with Employees' State Insurance Corporation to give waiver or write off with arrears, interest etc., to any organizations, institutions, establishments / employers, if it is in the opinion of the Corporation, when such amount of dues cannot be recovered.

(iii) Due to Covid – 19 Pandemic situation, since educational institutions/ Schools like the petitioner have not been permitted to have physical classes and they would be permitted to have only virtual or online classes, in W.P.No.8951 of 2020, this Court by order dated 17.07.2020 had permitted private unaided educational institutions to collect only 40% of the fee payable by the students.

5.Apart from these three major points, the Petitioner / School also raised a point before the Employees' State Insurance Corporation that, during the last few years, which is covered under the impugned order, the private unaided schools in this State are collecting tuition fee, based on the fee fixed by the Fee Determination Committee under the legislation and beyond which under no head, amount can be collected by the School Management. When that being so, there was absolutely no contribution either from the employer or from the employee or there is no special fund allotted for the purpose of meeting the contribution to the Employees' State Insurance Contribution all these years and therefore, for the past years, no amount can be recovered from the employees i.e., teaching and non-teaching staff working in the School concerned and therefore, on that ground also, the present demand could not be made from the Petitioner / Management. Instead, the plea of the Petitioner/Management to give waiver or write off, can very well be considered by the Employees' State Insurance Corporation. Contending all these grounds, on 06.10.2020, a detailed representation was given by the Petitioner / School for consideration of the respondents / Employees' State Insurance Corporation.

6.However, the respondents / Employees' State Insurance Corporation without having considered those aspects, especially in the context under Section 91-C of the Employees' State Insurance Act, has come forward to issue the demand letter, which is impugned herein, dated 08.10.2020, whereby, the respondents/ Employees' State Insurance Corporation has demanded to pay the employees contribution to the Employees' State Insurance corporation with 12% interest and the arrears for the past five years and if the said amount is not paid within a period of fifteen days, it would be constrained to pass the order, under Sections 45-C to 45-I of the Employees' State Insurance Act. Only at this juncture, challenging the said impugned demand letter, the Petitioner / School has approached this Court by filing the present Writ Petition with the aforesaid prayer.

7.I have heard Mr.P.Ebenezer Paul, learned counsel appearing for the Petitioner / School who has reiterated the aforesaid facts as well as the grounds raised by the School before the Employees' State Insurance Corporation, especially in the context under Section 91-C of the Employees' State Insurance Act for waiver or write off. He would also state that, absolutely there is no contribution from the side of the employees for the past several years towards the Employees' State Insurance Contribution as there had been litigations pending before this Court, filed by various institutions and associations from the year 2015. Admittedly, a quietus was given by the two orders of a Division Bench of this Court and it was continued till 2020. Absolutely there was no contribution towards Employees' State Insurance Contribution for the teaching and non-teaching staff who are working in the School and there was also no provision for the purpose of making such Employees' State Insurance contribution along with the fee to be collected as this contribution has not been taken into account by the Fee Determination Committee before fixing the fee to be collected from each of the students from various classes. Therefore this due of arrear, whatever amount now cannot be called upon for recovery as proposed by the Employees' State Insurance Corporation through the impugned demand notice, and it is not an amount to be recovered as it has become an irrecoverable amount. Therefore, Section 91-C of the Employees' State Insurance Act is very much invokable in the present case and therefore the said consideration ought to have been given by the Employees' State Insurance Corporation before issuing the impugned demand notice, he contended.

8.On the other hand, Mr. Bharathwaj, learned Standing Counsel appearing for the respondents / Employees' State Insurance Corporation would submit that, after the Full Bench Judgment of this Court referred to above, all the private unaided Educational Institutions have been brought under the provisions of the Employees' State Insurance Act. Therefore, there is no impediment for the Employees' State Insurance Corporation to make demand of the Employees Contribution. In this regard, in view of the proviso of 45-A of the Act, the past arrears beyond five years have not been demanded and only in the past five years from 2015 onwards, the demand has been now made through the impugned order and therefore such a contribution can very well be demanded by the Employees' State Insurance Corporation.

9.The learned Standing Counsel appearing for the respondents / Employees' State Insurance Corporation however submitted that, the point raised by the Petitioner's side, with regard to the request of waiver or write-off, under Section 91-C of the Employees' State Insurance Act, 1948, though such consideration has been specifically not mentioned in the impugned order, that would not automatically entail the Petitioner to seek indulgence of this Court, because, it is the provision under which discretion has been given to the Employees' State Insurance Corporation to form an opinion as to whether the amount demanded is recoverable or not and in this context he also referred to Rule 53 of the Employees' State Insurance Rules. By referring the same, he would submit that, only in exigency, as has been contemplated under Rule 53 of the Employees' State Insurance Rules alone, the decision as to whether waiver or write off can be given to a particular employer or institution may be decided for which opinion can be formed by the Employees' State Insurance Corporation.

10.He would also submit that, though such a procedure is contemplated to form an opinion by the Employees' State Insurance Corporation before making demand, since the same has not been referred to or reflected in the impugned order, to state that under Section 91-C of the Employees' State Insurance Act, such consideration has been made but it was accepted or rejected as the case may be, for the said limited purpose of consideration of the request made by the Petitioner / School to give the waiver or write-off under Section 91-C of the Employees' State Insurance Act, the Employees' State Insurance Corporation is ready and willing to re-hear the matter and for that purpose, he fairly contended that, the matter may be reverted back to the respondents.

11.I have considered the rival submissions made by the learned counsel for both parties and also perused the materials placed before this Court.

12.As has been rightly pointed out by the learned counsel appearing for the Petitioner, Section 91-C of the Employees' State Insurance Act has provided that, the Employees' State Insurance Corporation can decide whether the losses can be write-off or it can be waived and in this context, an opinion has to be formed by the Employees' State Insurance Corporation to give or not to give such waiver or write-off to a particular employer or establishment. In this context, it is further to be noted that, insofar as, the past events are concerned, in the State of Tamil Nadu, right from the year 2010, when the notification was issued by the State Government, bringing private unaided educational institutions also under the Provisions of the Act, there had been series of litigations. With the result, most of the private unaided educational institutions have not provided any contributions towards

Employees' State Insurance Corporation and ultimately, now the issue has been concluded by the authoritative pronouncement of the Full Bench of this Court under the Judgment cited supra reported in “2020 (5) CTC 93”.

13.Therefore, in all these years, there could not have been any provision for collecting the Employees' State Insurance contribution. That apart, as has been pointed out by the learned counsel appearing for the Petitioner / School, by virtue of the school Fee Determination Committee of the State, before whom the private unaided educational institutions have to make their request with detail documents justifying the demand of a particular rate of tuition fee to be collected from the students of every classes and based on which, the Fee Determination Committee would decide the tuition fee to be collected from each of the students of various classes of the School and once such fee is determined by the Fee Determination Committee, that would prevail for three academic years. Accordingly, insofar as the Petitioner / School is concerned, Fee Determination Committee also seems to have fixed the fee to be collected from the students and while fixing the fee, the Fee Determination Committee has not taken note of the provisions under Employees' State Insurance Act, for making contribution on behalf of the teaching and non-teaching staff.

14.Since there was no determination to collect additional fee for the purpose of making contribution under the Employees' State Insurance Act, none of the teaching and non-teaching staff of the Petitioner / School would have contributed any amount towards Employee's State Insurance Corporation. The students who studied in those years, i.e., academic years prior to 2020-2021 would have completed their course and after completing their course or after passing out of their particular class, now the Petitioner / School or its Management cannot seek any further fee from the students under the Head of Employee's State Insurance Contribution. The same would become impossible, because, no students or parents will come forward to pay additional fee for the completed classes towards tuition fee or under any other head. Consequently, such recovery is not possible from the passed out students, in view of the determination already made by the Fee Determination Committee.

15.That apart, due to Covid-19 situation, World economy has come to too low and India is not an exception to that. That is the reason why, even though the School like petitioner are conducting online classes, for which every teaching and non-teaching staff are paid monthly salary without any reduction, as they have to make out expenses, they wanted to collect the tuition fee. However, this Court by Order dated 17.07.2020 in W.P.No.8951 of 2020 etc., batch had only permitted the School

Management to collect 40% of the tuition fee payable by each of the students. Therefore, only with that money contribution made by the students, now the Managements of the School are running these institutions, by conducting online classes.

16.In order to meet these situations, the Full Bench in the Judgment cited supra, in Paragraph Nos.129 to 133, has made out strong case on behalf of the educational institutions and made a mandate, especially in Paragraph No.133, with the strong words that, Section 91-C be applied in letter and spirit by the Corporation in considering the case for reduction/waiver of pending arrears, if and when such a request is made by the Educational Institutions.

17.Though such mandate has been given by the Full Bench of this Court, based on which, when a plea was raised by the Petitioner Management in its detailed representation dated 06.10.2020, in response to the notice, initially issued by the Employees' State Insurance Corporation, such plea has not at all been considered by the respondents / Employees' State Insurance Corporation as the same is not reflected in the impugned demand notice.

18.The said position was fairly accepted by the learned Standing Counsel appearing for the Employees' State Insurance Corporation. However, he would only submit that, the waiver / write-off has to be made under Section 91-C of the Act, however, for such waiver or write-off of arrears of due, the Employees' State Insurance Corporation shall form an opinion within the meaning of Rule 53 of the Employees' State Insurance Rules and accordingly, on case to case basis, the decision would be made by Employees' State Insurance Corporation.

19.The said stand taken by the learned Standing Counsel appearing for the Employees' State Insurance Corporation is taken note of by this Court.

20.No doubt under Section 91-C of the Act, opinion should be formed by Employees' State Insurance Corporation about the recoverability of the dues from any employer or establishment and in forming such opinion, what shall be the criteria should be taken into account, which, according to the learned Standing Counsel appearing for the Employees' State Insurance Corporation, is only under Rule 53 of the said Rule. However, this Court feels that, in addition to the situation mentioned under Rule 53 of the said Rule, the peculiar situation faced by the Schools, due to Covid-19, also should be taken into account, as that has been the mandate given by the Full Bench of this Court in the Judgment referred to above. Therefore, for making such reconsideration under Section 91-C of the Act on the plea raised by the Petitioner / institution to give write-off or waiver, the matter can very well be remitted back to the respondents as rightly pointed out by the learned Standing Counsel appearing for the respondents / Employees' State Insurance Corporation.

21.In that view of the matter, this Court is inclined to dispose of this Writ Petition with the following orders:

"(i)That the impugned order is set aside.

(ii)The matter is remitted back to the respondents / Employees' State Insurance Corporation for reconsideration.

(iii)While making such reconsideration, the mandate given by the Full Bench of this Court (2020 (5) CTC 93) in Paragraph Nos.129 to 133 shall be taken into account by the Employees' State Insurance Corporation.

(iv)Also, apart from the reasons stated in Rule 53 of the Employees' State Insurance Rules, the present economic situation, due to Covid-19, Pandemic and also the non-contribution towards Employees' State Insurance funds or Employees' State Insurance Contribution in the yester years either from the Management of the Institutions or from the teaching and non-teaching staff by virtue of the Fee Determination Committee's decision, to collect the fixed tuition fee from the students, shall also be taken into account.

(v)By taking into account of all the aforesaid aspects and points indicated above in the discussion, the final order shall be passed by the respondents / Employees' State Insurance Corporation with regard to waiver or write-off under Section 91-C of the Act.

(vi)While considering the same, opportunity of being heard shall also be given to the petitioner / Management by giving separate notice to that effect.

(vii)On receipt of such notice, it is open to the petitioner / Management to give any additional particulars or documents in support of the claim of the petitioner to seek write-off or waiver under Section 91-C of the Act and accordingly, final order shall be passed by the Employees' State Insurance Corporation as early as possible."

22.With all these directions, this Writ Petition is ordered accordingly. Consequently, connected Miscellaneous Petition is closed. However, there shall be no order as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Regional Director,
The E.S.I. Corporation,
Regional Office (T.N.),
Panchadeep Bhavan,
No. 143, Sterling Road,
Chennai-600 034.

2. The Assistant / Deputy Director,
Regional Office (Tamil Nadu),
Employees State Insurance Corporation,
No. 143, Sterling Road,
Chennai-600 034.

+1cc to Mr.G.Bharadwaj,Advocate, S.R.No.35003
+1cc to M/s.Ebenezer Paul, Advocate, S.R.No.34995

W.P. No. 15405 of 2020
and
W.M.P. No. 19260 of 2020

RSI(CO)
RV(11/12/2020)