

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.12.2020

CORAM

THE HON'BLE MR.JUSTICE R. SURESH KUMAR

W.P.No.18774 of 2020
and W.M.P.Nos.23337 and 23338 of 2020

M/s.G.S.R.Matriculation Higher Secondary School
rep.by its Principal R.Visalakshi, Palamalai Road
Kamatchipuram, Periyanaickenpalayam
Coimbatore-641 020.

..Petitioner

-Vs-

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

2.The Deputy Director, ESI Corporation
(Sub Regional Office) No.1897, Trichy Road
Panchdeep Bhavan, Ramanathapuram
Coimbatore - 641 045.

..Respondents

Prayer : Writ Petition under Article 226 of the Constitution of India praying for the issue of a Writ of Certiorari to call for the records pertaining to the proceedings in No.56-00-113539-000-1302/INS.IV/SRO/ dated 19.10.2020 on the file of the 2nd respondent and quash the same as illegal, incompetent and ultravires.

For Petitioner : Mr.R.Jayaprakash

For Respondents : Mr.Ramachandra Murthy,
Standing Counsel

O R D E R

The prayer sought for herein is to call for the records pertaining to the proceedings in No.56-00-113539-000-1302/INS.IV/SRO/ dated 19.10.2020 on the file of the 2nd respondent and quash the same as illegal, incompetent and ultravires.

2. With the consent of the learned counsel for both parties, this writ petition is disposed of at the admission stage itself.

3. The petitioner is a recognized private unaided matriculation higher secondary school. Initially educational institutions were not under the purview of the provisions of ESI Act and subsequently by virtue of the Notification issued in this regard by the State Government in the year 2010, the provisions of the ESI Act had been extended to private unaided recognized educational institutions.

4. The said Notification was under challenge in at least three rounds of litigation for several years from 2010 to 2020. Ultimately, the issue had been given a quietus by a Full Bench of this Court in "All India Private Educational Institutions Association represented by its General Secretary -Vs- State of Tamil Nadu represented by Principal Secretary to Government, Labour and Employment Department, Chennai-9 and others" reported in "2020 (5) CTC 93", where the Full Bench, having upheld the Notification issued in this regard by the State Government bringing these institutions under the purview of the provisions of the ESI Act, has held that the notices already given by the ESI authorities to various educational institutions can be pursued.

5. The petitioner herein is one such case where the ESI authorities have passed the determination order under Section 45A of the ESI Act by order dated 19.10.2020. Though this order dated 19.10.2020 had been passed subsequent to the Full Bench judgment it seems that, this order has been passed ex-parte, which has been stated by the respondents in the very order itself and the relevant portion to that effect reads thus,

"As there was non-production of records and non-submission of any oral or written representation by the employer, the order has been passed on ex-parte basis which is valid in law. The relevant order in the present case has been passed on ad hoc basis as per the "Best Judgment Assessment". Such a method is valid and justified as ruled by the Supreme Court in ESI Corporation Vs. M/s.F.Fibre, Bangalore AIR 1997 SC 2441 and by the Karnataka High Court in a similar case in ESIC Bangalore Vs. New Forge Company, Bangalore 2010 (4) LLN.669 (Kar)."

6. Pursuant to the same the petitioner, challenging the impugned order dated 19.10.2020, has filed this writ petition, where Mr.R.Jayaprakash, learned counsel for the petitioner has primarily raised two grounds. Firstly he submits that, under

the provisions of the ESI Act, if at all the petitioner School is liable to pay the contribution to the ESI, the same can be recovered from the School as arrears only for five years period in view of the limitation, as beyond five years no such claim can be made by the ESI authorities. Secondly the learned counsel would contend that, in view of Section 91C of the Act, where the educational institution is not in a position to make contribution for the past arrears, in view of the factors such as

- a) that the fee determination committee has fixed the fee ie., Tuition Fee to be recovered from the students, beyond which no amount can be recovered from the students under the head ESI contribution, and
- b) that the Full Bench also having taken note of the COVID-19 situation has given some solatium or directed to give some solatium to these schools and that has been mentioned in the Full Bench judgment in its paragraph 129 to 133.

Waiver can be given to the employer like the petitioner.

7. By raising these two grounds, learned counsel for the petitioner would contend that, since the impugned order is admittedly an ex-parte order, the matter can be remitted back to the ESI authorities before whom the petitioner is ready and willing to appear and put forward their case including raising these grounds which have been urged before this Court in this writ petition.

8. I have heard Mr. Ramachandra Murthy, learned Standing Counsel appearing for the respondent ESI Corporation, who would submit that, though notice had been given, the petitioner has not chosen to appear before the authorities, and hence for making the determination order as per the provisions of the ESI Act, having no other option, the ESI authorities have proceeded to conclude the proceedings and passed the determination order and therefore, the same cannot be found fault with and it cannot be construed as an ex parte order purposely.

9. If at all the petitioner institution wanted to put forward their case, they could have appeared before the authorities and now the petitioner cannot turn around to say that, the determination order was passed without hearing them and it would go detrimental to the interest of the institution. Therefore, the impugned order can very well be sustained.

10. Learned counsel would further submit that, as against the impugned order, appeal remedy is available and the petitioner institution can prefer an appeal before the appellate authority and without exhausting such remedy, the petitioner should not have filed this writ petition by invoking Article 226 of the Constitution of India.

11. I have considered the submissions made by the learned counsel for both parties and have gone through the materials placed on record.

12. Admittedly, the order impugned is ex-parte order, which has been specifically mentioned in the order itself and the relevant portion is quoted herein above. Moreover, since this impugned order has been passed, after the Full Bench judgment referred above, in all fairness it is expected that, the ESI authorities should have taken into account the Full Bench judgment especially what has been observed by the Full Bench in Paragraphs 129 to 133.

13. When similar issue came up before this Court by similarly placed institutions challenging similar determination order passed by the authorities, this Court in W.P.No.15405 of 2020 dated 29.10.2020, having considered all these aspects passed the following order.

"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., 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.

14. The said order passed by this Court and the circumstances mentioned therein are almost similar to that of the present writ petition. Therefore, what has been stated in the said order would also be applicable to this case as well.

15. In that view of the matter, this Court is inclined to pass the following order in this writ petition.

16. That the matter is remitted back to the respondent ESI authorities for reconsideration where a notice can be given by the ESI authorities to the petitioner institution to appear and put forth their case. On receipt of such notice, the petitioner school shall appear before the ESI authorities and put forth their case and they can also raise the grounds urged in this writ petition in the context of the order passed by the Fee Determination Committee as well as the directives issued by the Full Bench to consider their case in view of the COVID-19 pandemic situation especially in the context of Section 91C read with Rule 53.

17. On consideration of the same, by taking into account the observations made in the aforesaid judgment dated 29.10.2020, the respondent ESI authorities shall consider all aspects and pass suitable orders within a period of two months from the date of hearing. Till such time, the impugned order shall be kept in

abeyance. Despite this order, on the date of hearing as per the notice to be served on the petitioner by the ESI authorities, if the petitioner institution does not appear, it is open to the ESI authorities to proceed in accordance with law.

18. With the above directions, this writ petition is disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

KST

To

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

2.The Deputy Director, ESI Corporation
(Sub Regional Office) No.1897, Trichy Road
Panchdeep Bhavan, Ramanathapuram
Coimbatore - 641 045.

+1 CC to Mr.R.Jayaprakash, Advocate sr 41433.

+1 CC to Mr. Ramachandramurthy, advocate sr 41252.

W.P.No.18774 of 2020

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MJB (CO)

SP(06/01/2021)

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