IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.12.2020

CORAM

THE HON'BLE MR.JUSTICE R. SURESH KUMAR

W.P.No.19768 of 2020
and W.M.P.Nos.24425 and 24426 of 2020

C.S.I. Bain School
Represented by The Correspondent
42 to 48, Ormes Road,
Kilpauk,
Chennai-600 010 ...Petitioner

-vs-

1.The Government of Tamil Nadu,
represented by its Principal Secretary,
Labour and Employment Department,
Fort St. George, Chennai 600009.

2.E.S.I. - Regional Corporation (Tamil Nadu)
Represented by its Regional Director
143, Sterling Road, Chennai - 600 034

3.E.S.I. - Regional Corporation (Tamil Nadu)
Represented by its Deputy Director
143, Sterling Road, Chennai - 600 034. ...Respondents

Prayer : Writ Petition under Article 226 of the Constitution of India praying for the issue of a Writ of Certiorarified Mandamus calling for the records pertaining to the impugned show cause notice dated 24.09.2020, in No.TN/INS.VIII/ 51-00-101568-000-1302, on the file of the 3rd respondent in respect of the petitioner school and quash the same, directing the respondents to consider the waiver of arrears of contribution, Interest and Damages u/s 91C of ESI Act, 1948, in terms of the order dated 29.07.2020 of the Full Bench of this Hon'ble High Court in the batch of writ petitions in W.P.No.34246 of 2019.

For Petitioner : Mr. Father Xavier Arulraj, Senior Counsel
for M/s. Father Xavier Associates

For Respondents : Mr. Ramachandramurthy
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 pertaining to the impugned show cause notice dated 24.09.2020, in No.TN/INS.VIII/ 51-00-101568-000-1302, on the file of the 3rd respondent in respect of the petitioner school and quash the same, directing the respondents to consider the waiver of arrears of contribution, Interest and Damages u/s 91C of ESI Act, 1948, in terms of the order dated 29.07.2020 of the Full Bench of this Hon’ble High Court in the batch of writ petitions in W.P.No.34246 of 2019.

2. At the consent of the learned counsel for both sides, this writ petition 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 in the year 1929 as a Matriculation school and further upgraded as Matriculation Higher Secondary school. It was established and is being administered by “The Church of South India, Diocese of Madras”. The Diocese of Madras is a religious Charitable, Educational and Social service organization bearing Registration No. 112 of 1947-48. The said society has established and is administering a number of educational institutions for the welfare of the Christian Minority Community.

(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. As far as this writ petition is concerned, a show cause notice was issued by the respondent ESI authorities on 13.01.2020 requiring the petitioner to appear before the authorities for enquiry to determine the quantum of contribution to be made under the ESI Act and at that stage, challenging the said show cause notice dated 13.01.2020, the petitioner filed a writ petition in W.P.No.3342 of 2020 and the said writ petition when came up for hearing along with other connected writ petitions, a Division Bench of this Court, 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 24.09.2020. On receipt of the same, the petitioner, on 20.10.2020, has given a detailed reply-cum-representation raising so many grounds for the consideration of the ESI authorities at the time of deciding the issue of determination of the quantum of amount by way of contribution and to recover the same by way of arrears. However, at this stage the apprehension of the petitioner is that, after having considered the said grounds raised by the petitioner filed through the request-cum-representation dated 20.10.2020, the respondent ESI authorities might decide the issue by passing the determination order under Section 45A of the Act and therefore with that apprehension, the petitioner has now challenged the very notice dated 24.09.2020 in this writ petition.

5. Since the issue raised in this writ petition has already come across before this Court where in a couple of cases, this Court passed the orders taking into account the import of the Full Bench judgment referred to above and also the other grounds raised by the institutions as that of the petitioner and accordingly an order has been passed on 29.10.2020 in a similar writ petition in W.P.No.15405 of 2020 in the matter of "M/s.Joshua Matriculation School -Vs- The E.S.I. Corporation and Another" wherein this Court has 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.
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> 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.
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> (ii)The matter is remitted back to the respondents / Employees' State Insurance Corporation for reconsideration.
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> (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."

6. Subsequently, a group of writ petitions involving similar issue also had come up before me where also, after considering the Full Bench judgment as well as my earlier order dated 29.10.2020 in W.P.No.15405 of 2020 in "M/s.Joshua Matriculation School -Vs- The E.S.I. Corporation and Another", I have passed a very detailed order in a batch of writ petitions on 21.12.2020

in W.P.No.18890 of 2020 etc., batch of writ petitions, where, in the penultimate paragraph next to the reasoning portion, I have given the following directions.

> "32. For all these reasons discussed above, this Court is inclined to pass the following orders in these batch of Writ Petitions:
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> "(i) That the matters are remanded back at the stage, where it stands for reconsideration to the respondents / ESI Corporation.
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> (ii)In each of the cases, a fresh hearing date shall be given, except in W.P. No. 18904 of 2020, where according to the learned Standing counsel appearing for the respondents / ESI, hearing date has already been fixed as 08.02.2021. Therefore in all other cases, fresh date shall be fixed, including in W.P. No. 18899 of 2020, where a needful shall be made by the ESI to have a fresh look on the determination already been made, in view of the subsequent developments taken place as indicated above.
>
> (iii)Therefore, in all these cases, fresh determination shall be made, for which, a personal hearing shall be given to the Management of each of the petitioners. On receipt of notice of hearing, they shall appear before the respondents / ESI Authorities without fail with all supporting documents and raise whatever grounds urged or raised before this Court as indicated above and put forward their case.
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> (iv)Once such grounds are urged and supporting documents are filed during the hearing by the respective petitioners, the same shall be taken into account as per the observations made by the Full Bench of this Court referred above, as well as the observations made in this order and accordingly pass orders of determination under Section 45A of the Act, where the orders passed for the purpose of rejection / waiver after applying Section 91C, if any arises, still some amount or dues or contribution had to be made by these institutions, determination order to that effect shall be passed by the ESI Authorities."

7. In view of the said orders passed by this Court, one is dated 29.10.2020 and other is dated 21.12.2020, I am of the view that in this case also since it is only a show cause notice issued that is impugned in this writ petition, this Court is inclined to issue similar directions as has been referred to above. Therefore, this writ petition is disposed of with the following orders.

8. That the matter is remitted back to the respondent ESI authorities to consider the grounds raised by the petitioner vide their representation dated 20.10.2020 and in addition to that, while determining the amount of contribution to be made by the petitioner under Section 45A of the Act, the respondent ESI authorities shall bear in mind the various directions issued in the aforesaid two orders ie., in W.P.No.15405 of 2020 dated 29.10.2020 and in W.P.No.18890 of 2020 etc., batch of writ petitions dated 21.12.2020 and accordingly after affording reasonable opportunity of being heard to the petitioner by issuing a notice to that effect, needful shall be done and final orders shall be passed by the ESI authorities.

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

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

KST

To

1.The Principal Secretary to Government of Tamilnadu,
Labour and Employment Department,
Fort St. George, Chennai 600009.

2.The Regional Director,
E.S.I. - Regional Corporation (Tamil Nadu)
143, Sterling Road, Chennai - 600 034

3.The Deputy Director,
E.S.I. - Regional Corporation (Tamil Nadu)
Represented by its Deputy Director
143, Sterling Road, Chennai - 600 034.

+1cc to Mr.C.V.Ramachandra murthy, Advocate, S.R.No.42935
+1cc to the Government Pleader, S.R.No.43158

W.P.No.19768 of 2020

PP(CO)
KKV/23/02/2021