BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 28.07.2021
CORAM:
THE HONOURABLE MR. JUSTICE P.D. AUDIKESAVALAU
W.P. (MD) No. 12662 of 2021
and
W.M.P. (MD) No. 9869 of 2021

The Principal,
Amala Matriculation Higher Secondary School,
Thuckalay - 629 175,
Kanyakumari District. ... Petitioner

-vs-

1.The State of Tamil Nadu,
Rep. by its Secretary,
Labour & Employment Department,
Fort. St. George, Chennai-9.

2.The Employees State Insurance Corporation,
Rep. by its Regional Director,
No.143, Sterling Road,
Nungambakkam, Chennai - 600 034.

3.The Deputy Director/
Authorized Officer,
Sub-Regional Office,
ESI Corporation, Panchdeep Bhawan,
ESIC Complex, Salai Street,
Vannarpettai, Tirunelveli - 627 003. ... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus calling for the records relating to the Impugned Order issued by the Third Respondent Deputy Director in No.66-00-041051-000-1302/45-A/SRO/TLI/550-19/42/2021, dated 13.05.2021, quash the same and further direct the Third Respondent Deputy Director to extend the benefit of 'Write Off' of the arrears of contribution from August 2014 to August 2018 to the Petitioner School in the light of the Orders passed by the Full Bench of the Principal Seat of Madras High Court in a batch of cases in WP.No.34236 of 2019, dated 29.07.2020.

For Petitioner : Mr. T.Cibi Chakraborthy
For Respondents : Mr. K.S.Selvaganesan for R1
Mr. N.Dilip Kumar,
Standing Counsel for R2

O R D E R
(through video conference)

Heard Mr. T.Cibi Chakraborthy, Learned Counsel for the Petitioner, Mr. K.S.Selvaganesan, Learned Counsel who takes notice for the First Respondent and Mr. N.Dilip Kumar, Learned Counsel who takes notice for the Second Respondent and perused the materials placed on record, apart from the pleadings of the parties.

2. The Writ Petition challenges the order No. 66-00-041051-000-1302/45-A/SRO/TLI/550-19/42/2021 dated 13.05.2021 passed by the Third Respondent under Section 45-A of the Employees' State Insurance Act, 1948, (hereinafter referred to as the 'E.S.I. Act' for short) determining the liability of the Petitioner to pay ESI dues amounting to a sum of Rs.21,31,337/- for the period from August 2014 to August 2018.

3. It has been mentioned in the impugned order itself that if the Petitioner is not satisfied, he can prefer appeal before the Regional Director, who is the Appellate Authority under Section 45-AA of the E.S.I Act within 60 days from the date of such order after depositing 25% of the contribution so ordered or the contribution as per his own calculation whichever is higher, with the Employees' State Insurance Corporation. In view of the same, Learned Counsel for the Second Respondent contends that the Petitioner has not exhausted the aforesaid remedy of statutory appeal before approaching this Court.

4. It has been brought to notice by the Learned Counsel for the parties that before passing of the impugned order, the Second Respondent had earlier assessed the liability of the Petitioner for the same period as Rs. 22,31,337/- by order No. 66-00-041051-000-1302-45-A/SRO/TLI/550/19/315/19 dated 26.12.2019, which was challenged by the Petitioner in W.P. (MD) No. 1221 of 2020 and this Court by an order dated 03.02.2020 disposed the said Writ Petition holding as follows:-

> *"3. Considering the fact that in several matters, ESI demands have been allowed to be paid in monthly installments for the educational institutions, this Court is of the view that 18 installments may be granted for the petitioner to pay the ESI contribution. Accordingly, the petitioner is directed to pay Rs.1 lakh per month for 18 months. The first installment shall commence from the 1st of March, 2020 and continue to pay the remaining installments on every first day of succeeding calendar month. So far as the contribution*

which has been withheld by the petitioner with respect to the 19 employees who are alleged to have been left, the third respondent is directed to conduct an enquiry on submission of relevant documents in that regard and pass a fresh assessment order. However, it is made clear that the payment of Rs.18 lakhs in 18 installments is not the final amount, it is subject to the outcome of the enquiry, which is directed as above."

It is submitted that in furtherance to the aforesaid order passed by this Court, the Petitioner had remitted a sum of Rs. 1,00,000/- towards first installment on 10.03.2020, but due to the covid pandemic situation that immediately followed thereafter, subsequent installments that have fallen due could not be paid in time and in such circumstances, the remaining installments may be re-phased from August 2021 onwards.

5. In this backdrop, the Third Respondent has re-assessed the liability of the Petitioner for contribution of E.S.I., dues for the said period as Rs. 21,31,337/- by the impugned order No. 66-00-041051-000-1302/45-A/SRO/TLI/550-19/42/2021, dated 13.05.2021. Having regard to that fact situation, Learned Counsel for the Petitioner represents that the Petitioner may be relegated to prefer the appeal under Section 45-AA of the E.S.I. Act before the Appellate Authority, but the requirement of pre-deposit may be dispensed with and the Petitioner may be permitted to pay the said amount in 18 installments.

6. Learned Counsel for the Petitioner has not shown any provision for waiving the pre-deposit required to be made while filing the appeal under Section 45-AA of the E.S.I. Act. It would be useful in this context to refer to the ruling of the Hon'ble Supreme Court of India in ***Shyam Kishore -vs- Municipal Corporation of Delhi*** [(1993) 1 SCC 22], where the law relating to prescribing pre-deposit as condition for entertaining an appeal under a statute has been explained in the following words:-

"44. It seems to us the words of Section 170(b) are capable of a broader interpretation. A perusal of Section 170 shows that the section uses three different expressions "heard or determined", "brought" and "admitted" in relation to an appeal and some significance is to be attached to the use of the expression "heard or determined". In like situations, other statutes such as the one considered by this Court in ***Lakshmiratan Engineering Works Ltd -vs- Assistant CST*** *(AIR 1968 SC 488) and those contained in certain*

other enactments like the Bombay and Calcutta Municipal Acts specifically prohibit the very entertainment of the appeal if the tax is not paid. When the D.M.C. Act has carefully avoided the use of that word, we must give full effect to the differential wording. Also, the absence of a language in clause (b) of the proviso similar to that in clause (a) — which indicates that an appeal filed beyond the period of limitation will not stand admitted unless the delay is condoned — also warrants an inference that the payment of disputed tax is not a condition precedent to the entertainment or admission of the appeal. In the present statutory context, it sounds plausible to say that such an appeal can be admitted or entertained but only cannot be heard or disposed of without pre-deposit of the disputed tax. Such an interpretation will provide some much-needed relief from the harshness of the provision. These are not days in which the calculation of the property tax is simple and uncomplicated; the determination of the annual value of the property, except when based on the actual rent received from the property, involves various subjective factors and, not unoften, there is a wide gulf between the tax admitted to be due and the tax demanded. Sometimes, to compel the assessee to pay up the demanded tax for several years in succession might very well cripple him altogether. This apart, an assessee may not be able to deposit the tax while filing the appeal but may be able to pay it up within a short time, or at any rate, before the appeal comes on for hearing in the normal course. There is no reason to construe the provision so rigidly as to disable him from doing this. Again, when an appeal comes on for hearing, the appellate judge, in appropriate cases, where he feels there is some great hardship or injustice involved, may be inclined to adjourn the appeal for some time to enable the assessee to pay up the tax. Though it will not be expedient or proper to encourage adjournment of an appeal, where it is ripe for hearing otherwise, only on this ground and as a matter of course, an interpretation which leaves some room for the exercise of a judicial discretion in this regard, where the equities of the case deserve it, may not be inappropriate. The appellate judge's incidental and ancillary powers should not be curtailed except to the extent specifically precluded by the statute. We see nothing wrong in interpreting the provision as permitting the appellate authority to adjourn the hearing of the appeal thus giving time to the assessee to pay the tax or even specifically granting time or *instalments to enable the assessee to deposit the disputed tax where the case merits it, so long as it does not unduly interfere with the appellate court's calendar of hearings. His powers, however, should stop short of staying the recovery of the tax till the disposal of the appeal. We say this because it is one thing for the judge to adjourn the hearing leaving it to the assessee to pay up the tax before the adjourned date or permitting the assessee to pay up the tax, if he can, in accordance with his directions before the appeal is heard. In doing so, he does not and cannot injunct the department from recovering the tax, if they wish to do so. He is only giving a chance to the assessee to pay up the tax if he wants the appeal to be heard. It is, however, a totally different thing for the judge to stay the recovery till the disposal of the appeal; that would result in modifying the language of the proviso to read: "no appeal shall be disposed of until the tax is paid". Short of this, however, there is no reason to restrict the powers unduly; all he has to do is to ensure that the entire tax in dispute is paid up by the time the appeal is actually heard on its merits. We would, therefore, read clause (b) of Section 170 only as a bar to the hearing of the appeal and its disposal on merits and not as a bar to the entertainment of the appeal itself."*

Viewed from that perspective coupled with the aforesaid submissions made, the Petitioner is relegated to forthwith prefer appeal against the impugned order before the Appellate Authority under Section 45-AA of the E.S.I. Act, but such appeal shall be taken up for final disposal, only after required amount of pre-deposit is made in terms of aforesaid decision. If the Petitioner intends to avert any coercive action for recovery initiated by the concerned authority, the Petitioner is not precluded from approaching the Appellate Authority for necessary interim orders for payment of the dues in installments and no view has been expressed by this Court on the correctness or entitlement of the claim of the Petitioner in that regard.

7. It is made clear that for the purpose of reckoning limitation for preferring such appeal, the period from the date of filing of the Writ Petition, viz., 20.07.2021, till the date on which the certified copy of this order is made ready by the Registry, shall be excluded.

In the result, the Writ Petition is disposed on the aforesaid terms. Consequently, the connected Miscellaneous Petition is closed. No costs.

Sd/-

Assistant Registrar (WRITS)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

mbi/dm

Note: (i) Issue order copy by 15.09.2021.

(ii) In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

1.The Secretary,
The State of Tamil Nadu,
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2.The Regional Director,
Employees State Insurance Corporation,
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3.The Deputy Director/
Authorized Officer,
Sub-Regional Office,
ESI Corporation, Panchdeep Bhawan,
ESIC Complex, Salai Street,
Vannarpettai, Tirunelveli - 627 003.

+1 CC to M/s.T.CIBI CHAKRABORTHY, Advocate (SR-24261[F] dated 29/07/2021)
+1 CC to M/s.SPL GP (SR-24398[F] dated 29/07/2021)

W.P. (MD) No. 12662 of 2021

28.07.2021

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