IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	**07.08.2024**
Pronounced on	**19.09.2024**

CORAM:

THE HON'BLE Ms.JUSTICE **R.N.MANJULA**

W.P.No.21471 of 2024
and
WMP.No.23432 & 23434 of 2024

St.Joseph's College of Engineering
rep.by its Chairman,
Dr.B.Babu Manoharan ... Petitioner

Vs.

The Employees' State Insurance
Corporation (Tamil Nadu),
Rep. by its Additional Commissioner
& Regional Director,
143, Sterling Road, Nungambakkam,
Chennai 600 034. ... Respondent

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of CERTIORARI, calling for the records pertaining to the impugned order passed by the respondent in No.TN/INS.VI/51-00-106414-000-1304 dated 19.04.2024 and quash the same.

For Petitioner : Mr.S.Rajasekar

For Respondent : Mr.C.V.Ramachandramoorthy

ORDER

Heard Mr.S.Rajasekar, learned Counsel for the petitioner and Mr.C.V.Ramachandramoorthy, learned counsel for the sole respondent and perused the materials available on records.

2. This Writ Petition has been filed challenging the impugned order passed by the respondent in No.TN/INS.VI/51-00-106414-000-1304 dated 19.04.2024.

3. The petitioner is a minority, self-financing and private educational institution and the ESI Act was not applicable to the private educational institution until the year-2010. Subsequently, G.O.Ms.No.237, dated 26.11.2010 has been issued by the Government of Tamil Nadu for extending the coverage of the ESI Act to the self-financing private educational institutions. Therefore, the above said Government order was challenged by various institutions by way of filing various litigations and it resulted in conflicting decisions. Later, a Full Bench was constituted to decide on the validity of G.O.Ms. 237 dated 26.11.2010. A batch of Writ Petitions in W.P.No.34236 of 2019 batch

which raised the question of validity and the legality of the above government order were placed before the Full Bench. After hearing the parties elaborately, on 29.07.2020, the Full Bench has rendered its judgement by upholding the validity of the above government order. Hence, there cannot be any quarrel on the above point. Consequent to the above decision, the petitioner's institution was directed by the respondent vide order dated 25.01.2023 passed under Section 45(A) of the ESI Act, to pay a sum of Rs. 3,21,38,191/- towards ESI corporation for the period from 29.12.2010 to 31.03.2020. A further demand was raised by issuing C-18 Notice dated 18.10.2023, claiming interest for the delayed payment amounting to a sum of Rs.2,25,29,814/- and the petitioner had paid the above demands; however, he also paid the ESI dues for the period from 01.04.2020 to 30.6.2023 which was calculated at Rs.1,23,38,857/-. But the petitioner is aggrieved by the further demand raised by the respondent under D-18 Notice dated 18.10.2023 by claiming Rs.2,02,00,750/- towards damages.

4.The learned counsel for the petitioner submitted that the damages have been calculated with a whooping interest at the rate of 25% which is highly unreasonable and arbitrary. It is submitted by the petitioner that while disposing the batch of writ petitions challenging the validity of the Government Order issued to cover the educational institutions under the Employers State Insurance Scheme, directions have been given to the respondent authority to consider the then prevailing pandemic situation and resultant economic crisis faced by the institutions and give suitable waiver by invoking Sec.91(c) ESI Act. The petitioner has also approached the respondent authority to consider his poor economical condition and to waive the damages imposed on him. But the respondent authority has passed an order rejecting the petitioner's claim and hence, the petitioner has challenged the above order by way of preferring this Writ Petition.

5. Mr.S.Rajasekar, learned counsel for the petitioner submitted that the orders passed by the Full Bench of this Court has not been applied by the respondent authority in its letter and spirit and he did not have the intention to consider the difficulties of the petitioners and just

confirmed his earlier order passed for claiming damages.

6. Per contra, Mr.C.V.Ramachandramoorthy, learned counsel for the respondent submitted that even though the waiver has to be considered under Sec.91(c) of the ESI Act, that has to be read along with Rule 53 of the Employee's State Insurance (C) Rules 1950 which prescribes certain conditions for waiver. The conditions laid down under Rule 53 the Employee's State Insurance Rules 1950 has been referred in the impugned order, which are extracted hereunder for the sake of convenience:

> "53. Writing off of losses. - (1) Where the Corporation is of the opinion that the amount of contribution, interest and damages due to the Corporation has become irrecoverable, the Corporation or any other officer authorised by it in this behalf may sanction the writing off of the said amount, subject to the following conditions, namely:-
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> (i)establishment or factory has been closed for more than five years and the whereabouts of the employer cannot be ascertained, despite all possible efforts;
>
> (ii)decree obtained by the Corporation could not be executed successfully for want of sufficient assets of the defaulting employer; or

(iii)claim for contribution is not fully met by-

(a)the Official Liquidator in the event of factories/establishments having gone into liquidation; or

(b)the Commissioner of payments in the event of unit being nationalized or taken over by the Government. "

7. Having found that the petitioner 's institution did not fall under the above three conditions, the petitioner's request for waiver has been rejected.

8. No doubt, in normal circumstances while considering the waiver under Sec.91 (c) of the ESI Act, the essential conditions laid down under Rule 53 have to be taken into account. Apart from the applicability of the above conditions, an extraordinary circumstances like COVID pandemic has also been mentioned in the Full Bench order and that cannot be lost sight off by the respondent.

9. In fact there was confusion in the minds of the various institutions as to the applicability of the very Government Order itself and many of them have challenged the same stating that they cannot be brought under the purview of the ESI Act. As several litigations were

pending and uncertainties existed, the respondent could have shown a better consideration while appreciating the claim of the petitioner for waiver of damages.

10. Apart from the above extraordinary circumstances, another unusual factor like COVID pandemic was also explicitly referred in the order of the Full Bench. The pandemic and the resultant lock down had an impact on every institution including the educational institutions. As the respondent cannot find the above circumstances under Rule 53 of the ESI Act, the Rule could be comprehensively read along with the spirit of the judgment rendered by the Hon'ble Full Bench of this Court in W.P.No.34236 of 2019 etc., batch, dated 29.07.2020 ***(All Indian Private Educational Institutions Association Vs. The State of Tamil Nadu)***.

11. To be noted that subsequent to the orders passed by this Court, following the above order of Full Bench, in W.P.No.15405/2020 dated 29.10.2020 ***(M/s. Joshua Matriculation School Vs. The E.S.I.***

Corporation), the various types of financial crisis faced by the educational institutions due to the extraordinary circumstances prevailed during the pandemic and its consequences have been elaborated. The above part of the order reads as under:

> *"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."*

12. In the above part of the order, it is clarified that the Full Bench had mandated the application of provisions of waiver by considering the ground realities. But the impugned order would only show the pedantic application of the conditions contemplated under Rule 53 of the ESI Act, unmindful of the unusual circumstances which surrounded every business including the educational institutions. It would have taken much time for the institutions to recover from the desperation caused on them during the pandemic and gain normalcy.

13. Since the pandemic situation is an extraordinary one, the authorities can not expect that to be listed as one of the conditions prescribed under Rule 53 of the ESI Act. The Court has mandated in its

judgment to consider the claim of waiver in letter and spirit. Since the impugned order has been passed, without having least regard to the spirit in which the Full Bench had directed, I feel it appropriate to direct the respondent to redo the exercise by following the spirit and object of the directions/observations made in the orders of the Full Bench.

14. In the result, this Writ Petition is **allowed.** The impugned order passed by the respondent in No. TN/INS.VI/51-00-106414-000-1304 dated 19.04.2024 is set aside and the matter is remitted back to the respondents/Employees' State Insurance Corporation for reconsideration. While considering the same, an opportunity for being heard shall also be given to the petitioner by giving separate notice to that effect. No costs. Consequently, the connected miscellaneous petitions are closed.

19.09.2024

Index : Yes
Internet : Yes
Speaking
Neutral Citation : Yes

jrs

R.N.MANJULA, J.

jrs

To
The Additional Commissioner
& Regional Director,
Employees' State Insurance
Corporation (Tamil Nadu),
143, Sterling Road, Nungambakkam,
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