

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 27TH DAY OF JULY 2015/5TH SRAVANA, 1937

Ins.APP.No. 2 of 2015 ()

AGAINST THE JUDGMENT IN IC 44/2013 of EMPLOYEES
INSURANCE COURT, ALAPPUZHA, DATED 18-12-2014

APPELLANT/OPPOSITE PARTY:-

THE DEPUTY DIRECTOR
SUB REGIONAL OFFICE, ESI CORPORATION, ERNAKULAM
KALOOR, KOCHI-682017.

BY ADV. SRI.K.SANDESH RAJA

RESPONDENTS/APPLICANTS:-

1. LALITHA RAMAKRISHNAN
W/O.LATE K.S.RAMAKRISHNAN, ANITHA BHAVAN,
KARIKKAMURI
COCHIN-682011.

2. P.G.SIVAN
ANITHA BHAVAN, KARIKKAMURI, COCHIN-682011.

R1 BY ADV. SRI.A.V.XAVIER

THIS INSURANCE APPEAL HAVING BEEN FINALLY HEARD
ALONW WITH INS.APPEAL NO.3 OF 2015 AND OTHER CONNECTED
CASES ON 27-07-2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

Kvs/-

C.R.

P.B.SURESH KUMAR, J.

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Ins.Appeal Nos.2, 3 & 4 of 2015.

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Dated this the 27th day of July, 2015.

J U D G M E N T

Does the bar under the second proviso to Section 45A of the Employees' State Insurance Act apply to orders determining the contributions passed pursuant to orders issued by the Employees' Insurance Court, in exercise of the power under Section 75 the said Act, is the common question arising for consideration in these appeals.

2. The appeals are preferred by the Employees' State Insurance Corporation ('the Corporation' for short), challenging the decisions in three different applications filed before the Employees' Insurance Court ('the Insurance Court' for short) under Section 75 of the Employees' State Insurance Act ('the Act' for short). The applicants before the

Insurance Court were persons running toddy shops.

3. Ins.Appeal No.2 of 2015 is preferred against the decision in I.C.No.44 of 2013 on the file of the Employees' Insurance Court, Alappuzha. The contributions payable by the applicants in the said case under the Act in respect of their employees for the period from 1.4.1991 to 31.3.1993 were determined by the Corporation invoking its power under Section 45A of the Act. The order issued by the Corporation was however, set aside by the Insurance Court in I.C.No.42 of 1995. The matter was taken up in appeal by the Corporation before this Court. This Court remitted the matter to the Insurance Court for fresh consideration. On remittance, the Insurance Court allowed the application and directed the Corporation to determine the contributions payable by the applicants afresh. The contributions payable by the applicants were accordingly redetermined by the Corporation as per the order dated 5.4.2013. The order dated 5.4.2013 was challenged by the

applicants in I.C.No.44 of 2013 and the said case was allowed by the Insurance Court as per the order impugned in this appeal, holding that the redetermination order passed on 5.4.2013 is hit by the second proviso to Section 45A of the Act.

4. Ins.Appeal No.3 of 2015 is preferred against the decision in I.C.No.61 of 2013 on the file of the Employees' Insurance Court, Alappuzha. The contributions payable by the applicants in the said case under the Act in respect of their employees for the period from 1.4.1994 to 31.3.1996 were determined by the Corporation invoking its power under Section 45A of the Act. The order issued by the Corporation was set aside by the Insurance Court in I.C.No.35 of 1997. The matter was taken up in appeal by the Corporation before this Court. This Court remitted the matter to the Insurance Court for fresh consideration. In the meanwhile, the applicants filed yet another case as I.C.No.65 of 2000 challenging the determination of the

contributions payable by them under the Act for the period from 1.4.1996 to 31.9.1996. The Insurance Court allowed the said application and directed the Corporation to determine the contributions payable by the applicants afresh. Pursuant to the said order of the Insurance Court, the contributions payable by the applicants were redetermined by the Corporation as per order dated 5.4.2013. The order dated 5.4.2013 was challenged by the applicants in I.C.No.61 of 2013 and the said case was allowed by the Insurance Court as per the order impugned in this appeal, holding that the redetermination order passed on 5.4.2013 is hit by the second proviso to Section 45A of the Act .

5. Ins.Appeal No.4 of 2015 is preferred against the decision in I.C.No.58 of 2013 on the file of the Employees' Insurance Court, Alappuzha. The contributions payable by the applicant under the Act in respect of his employees for the period from 1.4.1990 to 31.3.1991 and

1.4.1999 to 31.3.2000 were determined by the Corporation invoking its power under Section 45A of the Act. The Insurance Court set aside the said orders and directed the Corporation to redetermine the contributions payable by the applicant. Pursuant to the said order of the Insurance Court, the contributions payable by the applicant were redetermined by the Corporation as per order dated 5.4.2013. The order dated 5.4.2013 was challenged by the applicant in I.C.No.58 of 2013 and the said case was allowed as per the order impugned in this appeal, holding that the redetermination order passed on 5.4.2013 is hit the second proviso to Section 45A of the Act.

6. Heard the learned counsel for the appellant as also the learned counsel for the respondents.

7. It is beyond dispute that the orders impugned in the proceedings before the Insurance Court were passed by the Corporation in respect of periods beyond five years from the date on which contributions

under the Act became payable by the applicants concerned. According to the learned counsel for the appellant, the bar under the second proviso to Section 45A of the Act applies only to the first order passed by the Corporation in exercise of its power under Section 45A of the Act and the said bar does not apply to the subsequent orders passed by the Corporation on remittance by the Insurance Court in exercise of its power under Section 75 of the Act. The learned counsel for the applicants, on the other hand, contended that the second proviso to Section 45A of the Act being a provision prescribing the period of limitation, the same has to be construed strictly, and in that view of the matter, it has to be held that the bar under the said provision applies to every order passed by the Corporation in exercise of its power under Section 45A of the Act.

8. The second proviso was introduced to Section 45A of the Act by virtue of Act 18 of 2010 with effect from 1.6.2010. The second proviso to Section 45A of the Act

reads thus:

“Provided further that no such order shall be passed by the Corporation in respect of the period beyond five years from the date on which the contribution shall become payable.”

Section 75 of the Act provides that if a question arises as to the contribution payable by a person under the Act, the same shall be decided by the Insurance Court in accordance with the provisions of the Act. In other words, Section 75 of the Act is in the nature of a statutory appeal against orders determining contribution under Section 45A of the Act. As such, it has to be conceded that the power conferred on the Insurance Court under Section 75 of the Act includes the power to remit a matter for redetermination also, especially in matters in which determination orders had been passed without affording the parties concerned an opportunity of hearing or in matters where materials on record are not sufficient to decide the correctness of the determination made. As such, if the interpretation given to

the second proviso to Section 45A of the Act by the Insurance Court in the orders impugned in the appeal is accepted, the same would make the provision in Section 75 of the Act ridiculous and useless in as much as the Insurance Court may not be in a position to decide the applications in accordance with the provisions of the Act. Though out of context, I must also notice that the statute provides for a further appeal before this Court under Section 82 of the Act in matters involving substantial questions of law, and the interpretation of the second proviso to Section 45A the Act as aforesaid would make even the power of appeal conferred on this Court under Section 82 of the Act ineffective. In the context of the similar restriction imposed by Section 132 (5) of the Income Tax Act on the Income Tax Officer to pass orders, the Apex Court in **Director of Inspection of Income tax (Investigation), New Delhi v. M/s. Pooraran Mall and Sons** [AIR 1975 SC 67] had considered identical issue and held that such

requirements would be satisfied when the first order is passed. Paragraph 6 of the said judgement reads thus:

"6. Even if the period of time fixed under Section 132 (5) is held to be mandatory that was satisfied when the first order was made. Thereafter if any direction is given under Section 132 (12) or by a Court in writ proceedings, as in this case, we do not think an order made in pursuance of such a direction would be subject to the limitations prescribed under Section 132 (5). Once the order has been made within ninety days the aggrieved person has got the right to approach the notified authority under Section 132 (11) within thirty days and that authority can direct the Income-tax Officer to pass a fresh order. We cannot accept the contention on behalf of the respondents that even such a fresh order should be passed within ninety days. It would make the sub-sections (11) and (12) of S. 132 ridiculous and useless. It cannot be said that what the notified authority could direct under Section 132 could not be done by a Court which exercises its powers under Article 226 of the Constitution. To hold otherwise would make the powers of courts under Article 226 wholly ineffective. The Court in exercising its powers under Article 226 has to mould the remedy to split the facts of a case. If in a particular case a Court takes the view that the Income-tax Officer while passing an order under Section 132 (5) did not give an adequate opportunity to the party concerned it should not be left with the only option of quashing it and putting the party at an advantage even though it may be satisfied that on the material before him the conclusion arrived at by the Income-tax Officer was correct or dismissing the petition because otherwise the party would get unfair advantage. The power to quash an order under Article 226 can be exercised not merely when the order sought to be quashed is one made without jurisdiction in which case there can be no room for the same authority to be directed to

deal with it. But in the circumstances of a case the Court might take the view that another authority has the jurisdiction to deal with the matter and may direct that authority to deal with it or where the order of the authority which has the jurisdiction is vitiated by circumstances like failure to observe the principles of natural justice the Court may quash the order and direct the authority to dispose of the matter afresh after giving the aggrieved party a reasonable opportunity of putting forward its case. Otherwise, it would mean that where a Court quashes an order because the principles of natural justice have not been complied with it should not while passing that order permit the Tribunal or the authority to deal with it again irrespective of the merits of the case. A Division Bench of the Punjab High Court, in *C. I. T. v. Ramesh Chander*, 93 ITR 450 at p. 478 = (1973) Tax LR 1427 at p. 1440 (Punj)) took the view that what the notified authority could do under Section 132 (12) a Court could do in writ proceedings. Though the observation was obiter we consider that it is correct. In this connection we must refer to the decision of the Gujarat High Court, relied upon by the respondents, in *Ramjibhai Kalidas v. I. G. Desai*, (1971) 80 ITR 721 (Guj). In that case it was held that Rule 112-A, which provides that a show cause notice in respect of an inquiry under Section 132 (5) is to be made within 15 days from the date of the seizure, is mandatory and if that is not done no order under Section 132 (5) can be passed. It seems to have been admitted before the Bench by the Advocate General who appeared on behalf of the Revenue that he did not dispute that the period of ninety days prescribed under Section 132 (5) is a mandatory period. That decision is, therefore, no authority for the proposition that the period fixed under Section 132 (5) is mandatory. But even if it were the decision that R. 112-A is also mandatory is clearly erroneous. When Section 132 (5) permits an Income-tax Officer to pass an order within ninety days that power cannot be in any way

whittled down by a rule made under that section.”

In the said circumstances, I am of the view that the bar under the second proviso to Section 45A of the Act does not apply to orders determining the contributions passed pursuant to the directions issued by the Insurance Court in exercise of its powers under Section 75 of the Act.

9. The learned counsel for the respondents contended that the Corporation is duty bound to pass orders under Section 45A the Act within a reasonable time and since orders have not been passed in these cases within a reasonable time, even if it is held that the second proviso to Section 45A Act does not apply to the orders impugned before the Insurance Court, the appeals filed by the Corporation are liable to be dismissed. True, orders under Section 45A Act have to be passed within a reasonable period and it is a constitutional requirement. But, there cannot be any empirical formula to determine the question as to whether the period is reasonable or not and the same

has to be decided taking into account the facts and circumstances of the case. I do not propose to adjudicate the question as to whether orders have been passed in these cases by the Corporation within a reasonable time, for, the said question has not been considered by the Insurance Court in the orders impugned in the appeals.

In the result, the appeals are allowed and the applications are remitted to the Insurance Court for fresh consideration on merits. The parties shall appear before the Insurance Court on 10.9.2015. It is made clear that it will be open to the applicants to raise all contentions available to them before the Insurance Court.

**Sd/-
P.B.SURESH KUMAR,
(JUDGE)**

Kvs/-

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PA TO JUDGE.