IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

WEDNESDAY, THE 14TH DAY OF JANUARY 2015/24TH POUSHA, 1936

Ins.APP.No. 11 of 2011 ( )

(AGAINST THE JUDGMENT IN IC 93/2009 of EMPLOYEES INSURANCE COURT, ALAPPUZHA, DATED 25-06-2010)

APPELLANT/RESPONDENT:-

THE DEPUTY DIRECTOR, EMPLOYEES STATE
INSURANCE CORPORATION, SUB REGIONAL, OFFICE
MALU'S COMPLEX, ST.FRANCIS CHURCH ROAD,
KALOOR, KOCHI-17.

BY ADV. SRI.T.V.AJAYAKUMAR

RESPONDENT/APPLICANT:-

ERNAKULAM REGIONAL CO-OPERATIVE
MILK PRODUCERS UNION LIMITED (ERCMPU LTD.MILMA)
ERNAKULAM DIARY, THRIPUNITHURA-682301
REPRESENTED BY ITS GENERAL MANAGER.

BY ADV. SRI.B.S.KRISHNAN(SR.), SC, MILMA
BY ADV. SRI.K.ANAND (A.201)
BY ADV. SMT.LATHA KRISHNAN

THIS INSURANCE APPEAL HAVING BEEN FINALLY HEARD ON 14-01-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Kvs/-

C.R.

P.B.SURESH KUMAR, J.

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Insurance Appeal No.11 of 2011.
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Dated this the 14th day of January, 2015.

JUDGMENT

When does the liability to pay interest for the contributions determined as due in a proceeding under Section 45A of the Employees' State Insurance Act commence, is the short question that falls for consideration in this appeal.

2. The respondent is an establishment covered under the Employees' State Insurance Act (hereinafter referred to as 'the Act'). The respondent failed to pay contributions payable under the Act for certain items of wages for the period from 1999 to 2005. On detecting the failure, the designated authority of the Employees' State Insurance Corporation (hereinafter referred to as 'the Corporation') issued an order determining the contributions payable in respect of the said items of wages, as provided for under Section 45A of the Act. The amounts

so determined as due was remitted by the respondent on 7.11.2008. Later, the Corporation raised a demand against the respondent for interest for the delayed payment of the contributions determined as due. The said demand notice was challenged by the respondent before the Insurance Court. According to the respondent, since their liability to pay contributions in respect of the disputed items of wages was crystallised only by virtue of the decision in the proceeding initiated under Section 45A of the Act, they are not liable to pay interest for the contributions determined as due for the period prior to the determination. The Insurance Court held that the contributions determined as due in the proceeding under Section 45A of the Act have ripened into a claim only on issuing the order under Section 45A of the Act and therefore, the employer is not liable to pay interest for the contributions determined as due up to the date of the order determining the dues and 21 days thereafter.

3. Sub section (4) of Section 39 of the Act dealing with the time at which the contribution payable under the Act falls due and sub section (5) of Section 39 of the Act, dealing with the liability to pay interest for delayed payment of contribution, read thus:

> "39(4). The contribution payable in respect of each wage period shall ordinarily fall due on the last day of the wage period, and where an employee is employed for part of the wage period, or is employed under two or more employers during the same wage period, the contributions shall fall due on such days as may be specified in the regulations.
>
> 39(5). (a) If any contribution payable under this Act is not paid by the principal employer on the date on which such contribution has become due, he shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the regulations till the date of its actual payment:
>
> Provided that higher interest specified in the regulations shall not exceed the lending rate of interest charged by any scheduled bank.
>
> (b) Any interest recoverable under clause (a) may be recovered as an arrear of land revenue or under section 45-C to section 45-I."

Regulation 31 of the Employees' State Insurance Corporation (General) Regulations, dealing with the time within which the contributions under the Act are to be paid and Regulation 31A of the said Regulations, dealing with the manner in which interest payable for delayed payment of contribution is to be worked out, read thus:

"**31. Time for payment of contribution**:

An employer who is liable to pay contributions in respect of any employee shall pay these contributions within 21 days of the last day of the calendar month in which the contributions fall due:

Provided that where a factory/establishment is permanently closed, the employer shall pay contribution on the last day of its closure:

Provided that an employer may opt, in such manner as may be prescribed by the Director-General for payment of amount in advance towards contribution to be adjusted against contributions payable by him (including employees' contribution) for a wage period so that the balance of advance amount continues to be more than the contributions due and payable at the end of the concerned wage period. Such an employer shall furnish in the prescribed proforma (Form 5A), a six-monthly statement of contributions payable and paid in advance with the balance left at the end of each month along with return of contributions to the appropriate regional office of the Corporation.

31A. Interest on contribution due, but not paid in time:

An employer who fails to pay contribution within the periods specified in Regulation 31, shall be liable to pay simple interest at the rate of 12 per cent per annum in respect of each day of default or delay in payment of contribution."

It is evident from the aforesaid provisions in the Act and the Regulations that the time for payment of contributions and the liability to pay interest for delayed payment of contributions, have been fixed statutorily. Section 45A of the Act reads thus :

[45A. (1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 or any Social Security Officer or other official of the Corporation referred to in sub-section (2) of section 45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his

> duties under section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment :
>
> [Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard:]
>
> [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.]
>
> (2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation under section 75 or for recovery of the amount determined by such order as an arrear of land revenue under section 45B [or the recovery under sections 45C to 45-I]].

From a bare reading of Section 45A of the Act, it is evident that the said provision empowers the Corporation to determine the amount of contribution payable by the employer in cases where the employer refuses to co-operate or fails to abide by the relevant provisions of law. It applies when the normal procedure prescribed by the Act cannot be adhered to on account of the failure on the part of the establishment concerned in submitting the returns or maintaining the particulars, registers or records in accordance with the provisions of the Act. It also applies in cases where any Inspector or other officials authorised by the Corporation is obstructed by the employer in exercising his functions or discharging his duties under the Act. In other words, Section 45A of the Act is a special provision for determination of the contributions payable by an employer under the Act. The determination so made is only the determination of the amounts due from the employer for the period during which it was found payable. As such, once it is found in a proceeding under Section 45A of the Act that certain amounts are due from the employer towards contributions for a particular period, it has to be presumed that the said contributions fell due as provided for in section 39 (4) of the Act. If the arreas determined as due is presumed to have fallen in arrears as provided for under Section 39(4) of the Act, the employer cannot deny the liability to pay the interest for the said amount as provided for under Section 39(5) of the Act read with Regulation 31A of the Regulations. Any other interpretation would go against the principle Nullus commodum capere potest de injuria sua propria viz., no man can take advantage of his own wrong. As such, the view taken by the Insurance Court that the employer is not liable to pay interest for the contributions determined as due in a proceeding under section 45A of the Act upto the date of the order and 21 days thereafter, is unsustainable in law.

In the result, the impugned order of the Insurance Court is liable to be set aside and I do so. The appeal is allowed as above.

Sd/-
P.B.SURESH KUMAR,
(Judge)

Kvs/-

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PA TO JUDGE.