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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.6816 OF 2018

Royal Western India Turf Club Ltd.	]	
a Limited Company, registered under the	]	<u>Petitioner</u>
Companies Act, 1913 having their	]	Original
registered office at: Race Course, Mahalaxmi	]	Applicant
Mumbai 400 034	]	

V/s.

- | | | |
|--|---|--------------------|
| 1. The Employees State Insurance Corporation |] | |
| established under Section 3 of the Employees |] | |
| State Insurance Act, 1948, having it's |] | |
| Regional Office at ESIC Bhavan |] | |
| Colaba, Mumbai 400 005 |] | |
| |] | Respondent |
| 2. Regional Director, |] | <u>Nos. 1 ro 3</u> |
| Employees State Insurance Corporation |] | Original |
| having it's |] | opponents. |
| Regional Office at ESIC Bhavan |] | |
| Colaba, Mumbai 400 005 |] | |
| |] | |
| 3. The Dy. Regional Director, |] | |
| Employees State Insurance Corporation |] | |
| having his office at |] | |
| Panchdeep Bhavan, Lower Parel |] | |
| Mumbai 400 013 |] | |
| |] | |
| 4. Shri. Patel C.P. |] | |
| an Indian inhabitant of Mumbai |] | |
| residing at: A-30, New Khare Ghat Colony |] | |
| Babulnath Road |] | Respondent |
| Mumbai 400 007. |] | Nos. 4 & 5. |
| |] | |
| 5. Shri. Sethna J.L. |] | |
| An Indian inhabitant of Mumbai |] | |
| residing at: 168 Hilla Mansion |] | |

1st floor, Bora Bazar Street]
Fort, Mumbai 400 001.]

**ALONGWITH
WRIT PETITION NO.7916 OF 2018**

Regional Director,] Petitioner
Employees State Insurance Corporation] Original
having it's] opponent
Regional Office at ESIC Bhavan] No.1.
Colaba, Mumbai 400 005]

-vs-

Royal Western India Turf Club]
Ltd. Having it's office at Race Club] Respondent
Mahalaxmi, Mumbai 400 034] Ori. Applicant.

Mr. J. P. Cama, Senior Advocate a/w Gobindram D.
Talreja i/by Gobindram D. Talreja, for the Petitioner.

Mr. H. V.Mehta, for respondent Nos. 1 to 3.

Ms. Alka Mungekar, for respondent Nos. 4 and 5.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

CLOSED FOR ORDER : 21st NOVEMBER, 2018.

JUDGMENT DEIVERED ON : 4th DECEMBER, 2018

JUDGMENT :

1] Heard learned Senior Counsel for the Petitioner and

learned counsel for respondents.

2] Admit.

3] With the consent of both the learned Counsels, these petitions are taken up for final hearing at the stage of admission itself.

4] These are two counter Writ Petitions, challenging the interim order dated 12.06.2018, passed by the Employees State Insurance Court at Mumbai, below Exh.243, in Application (ESI) No.20 of 2004.

5] For the sake of convenience, the parties to the petitions that is “Royal Western India Turf Club Ltd”, and “Employees State Insurance Corporation”, are referred to as “Petitioner” and “respondent”, respectively.

6] The application at Exh.243 was preferred by petitioner, for issuance of the Summons to the various employers as witnesses as per the list. As the said application was strongly resisted by the respondent E.S.I. Corporation, it came to be dismissed.

7] Being aggrieved thereby, the petitioner has preferred Writ Petition No.6816 of 2018; whereas Writ Petition No.7916 of 2018 is preferred by the respondent E.S.I. Corporation, challenging the very maintainability of the Application (ESI) No.20 of 2004 alongwith such connected Applications, and for quashing them on the ground that the issue involved therein is already settled and set at rest by the Hon'ble Apex Court in the Writ Petition between the same parties.

8] Brief facts of the Writ Petitions, are to the effect that the petitioner herein is engaged in the business of conducting Horse Races and other related activities in Mumbai and Pune. It is registered as Public Amusement Club under the provisions of Bombay Shops and Establishment Act, 1948. In addition to regular workmen, the petitioner also engages the services of certain persons for the purpose of issuance of tickets and payments of dividends to punters on Race Days only. This category of persons engaged by the petitioner is called as "Race Day Persons". Their services are obtained by the petitioner, on certain days in a week, only for 2 to 3 hours when Horse Races are organized and scheduled and during Racing season in Mumbai, which extends for the period of six months in a year and elsewhere. They are paid compensation for the services rendered, immediately on the same day.

9] As per case of petitioner, when these Race Day Workers are not rendering the services to the petitioner, they are engaged in some other employment/business/ occupation/activities and thus, gainfully employed somewhere else. Hence, looking to the particular nature and character of the activities conducted by the petitioner and engagement of these Race Day Persons for different activities of the Club, there was dispute about their coverage under the E.S.I. Act and applicability of the E.S.I. Act to such casual workers.

10] The Petitioner has challenged the same by filing E.S.I. Application No.16 of 1976 when the Demand Notice for the payment of their E.S.I. contribution, was made to the petitioner. The said Application came to be disposed off, by the order dated 17.4.1979, in the light of the Consent Terms arrived at between the parties. However, thereafter again on 11.11.1987, another Demand Notice came to be issued, which was followed by the Demand Notice dated 14.5.1999, calling upon the petitioner to pay E.S.I. contribution on the payments made to such Race Day Persons engaged on Race days.

11] The petitioner replied the said notice contending inter alia that the claim was not proper and legal. However, respondent

proceeded with the recovery of the said claim amount. As per demand notice dated 22.3.1999, the claim was revised to the amount of Rs.30,82,848/- as E.S.I. Contribution on the payments made to Race Day Persons. Hence, the petitioner preferred another Application No.73 of 2001, before the E.S.I. Court, for declaration of the said demand as illegal. For challenging the demands of subsequent periods, petitioner has filed following Applications, the details of which are given in paragraph No.21 of the Writ Petition as follows :-

A	Application (ESI) No. 20 of 2004	April 1989 to June 1997
B	Application (ESI) No.43 of 2004	July 1999 to June, 2000
C	Application (ESI) No.15 of 2005	July 2000 to June 2001
D	Application (ESI) No.25 of 2004	July 2001 to June 2002
E	Application (ESI) No.17 of 2006	July 2002 to June 2004

12] Meanwhile one of the earlier Applications, Application No.2 of 1988 filed by the petitioner came to be decided by the E.S.I. Court on 17.2.2005, holding that Race Day Persons are covered under the provisions of E.S.I. Act. The petitioner challenged the said order before this Court and the Full Bench of this Court, before whom Reference was made, by its order dated 31.7.2014, held that the E.S.I. Act, is applicable to the Race Day Persons. The matter was taken by the petitioner upto the Hon'ble Supreme Court and the Hon'ble

Supreme Court, by its order dated 29.2.2016, was pleased to hold that the Turf Club was also covered under the provisions of E.S.I. Act and Race Day Persons are also falling under the umbrella of the E.S.I. Act, therefore, the petitioner was liable to make E.S.I. contribution on the payment made to these Race Day Persons.

13] Thus, the issue as to whether the petitioner is liable to make E.S.I. contribution on the payment made to the Race Day Persons, is decided once and for all, by the Apex Court of the land. Petitioner has, however, filed various interim applications in these E.S.I. Applications, before the E.S.I. Court, contending inter alia that, as these Race Day Persons were also working with the other employers, during the relevant period, it needs to be clarified as to whether those employers, have made E.S.I. contribution on payments made to these Race Day Persons.

14] Initially the petitioner called upon the respondent itself to produce the details of those employers, including their employer code and the contribution, if any, made by them. Respondent pleaded it's inability to produce those details on account of the record being lost or destroyed due to passage of time. The petitioner, therefore, made various applications before the E.S.I. Court, for issuance of witness

summons to 114 employers, with whom those many Race Day Workers were alleged to be employed.

15] The E.S.I. Court, vide its order dated 19th December, 2017, allowed some of the Applications and directed that, as issuance of witness summons to these 114 employers is an attempt to protract and prolong the matter for years together, only by way of sample or specimen, to verify whether, in respect of these Race Day Persons, their other employers had made contribution, witness summons be issued only to 10 employers, as per choice of the petitioner. Out of the witness summons issued to those employers, some employers remained present and they also stated that they do not have any record or information about the payment of E.S.I. contribution of those employees.

16] The petitioner, therefore, filed further applications of issuing witness summons to more employers. The trial Court, rejected the same vide its order dated 17.4.2018. Being not satisfied therewith, the petitioner made another Application at Exh.243, submitting that the petitioner has not given up its legal battle and also its stand and factual position that Race Day Persons are employed in other establishments and therefore, not covered under the E.S.I. Act. It was

submitted that to that effect the petitioner had filed separate curative petitions in the Hon'ble Supreme Court and those petitions are pending. Therefore, the petitioner may be given an opportunity to examine as many as employers as possible, practically by issuing witness summons to all the employers as per the list given by the petitioner.

17] The E.S.I. Court has again rejected this application, in the light of it's earlier orders and also in the light of the judgment of the Apex Court dated 29th February, 2016 holding that the petitioner is liable to pay contribution in respect of Race Day Persons, as per the demand made by the respondent.

18] Being aggrieved by this order, the petitioner has approached this Court.

19] According to learned counsel for the petitioner, the only legal issue decided by the Hon'ble Supreme Court is that Race Day Persons are covered under the provisions of E.S.I. Act. However, the issue pertaining to Section 36 of the E.S.I. Act, as to which of the two employers, whether the employer with whom the Race Day Persons are employed on regular basis or whether the petitioner with whom

they are working only on week days, is liable to pay E.S.I. contribution is not clarified and hence for clarification of said issue, the evidence of various employers, with whom these Race Day Persons were working full time is necessary. According to him, the proper course, for the respondent E.S. I. Corporation was to make available to the petitioner the details of those employers and the contributions made by them as regards these Race Day Persons. However, as respondent corporation is unable to do so, the petitioner has no option, but to call for such details from the employers themselves and for that purpose the evidence of those employers being necessary, the E.S.I. Court should not have rejected the request made by the petitioner for issuance of witness summons to those employers. According to learned counsel for the petitioner, therefore, the impugned order passed by the E.S.I. Court, call for interference.

20] To substantiate this submission, learned counsel for the petitioner has placed reliance on the judgment of the Apex Court in the case of *Food Corporation of India -vs- Provident Fund Commissioner and ors [MANU/SC/0184/1989]*, in *Civil Appeal NO.4552 of 1989 decided on 26.10.1989*; wherein the issue raised for consideration was, “Whether the Provident Fund Commissioner has the powers to collect relevant evidence before determining the

amount payable under the said Act?”. In the said case also, as it was found that the Provident Fund Commissioner has some problems in collating the lists of workers, request was made to the Commissioner to summon the Contractors to produce the relevant list of workers engaged by them. As the Commissioner did not summon the contractors, the matter was agitated before the Apex Court and the Apex Court, had relying upon the provisions of Section 7-A of the said Act, held that the Provident Fund Commissioner is having powers of the Court under the Code of Civil Procedure for trying a suit and is, therefore, authorized to enforce attendance in person and also to examine any person on oath. It was held that the Commissioner should exercise his power to collect all evidence and collate all material before coming to proper conclusion. It is his legal duty and it would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person.

21] In the present case, therefore, it is submitted that as the petitioner has applied for issuance of witness summons, it was legal duty of the E.S.I. Court to collect and collate all the material before coming to the proper conclusion. As the E.S.I., Court has refused to perform that duty, it has resulted into failure to exercise the

jurisdiction and hence, the impugned order passed by the E.S.I. Court, according to him, cannot be sustainable in law and is required to be quashed and set aside.

22] Per contra, according to learned counsel for respondent corporation, all these issues, which are now being raised by the petitioner, were already agitated before the Hon'ble Supreme Court and the Hon'ble Supreme Court has rejected the contentions raised by the petitioner. It is submitted that the judgment of the Hon'ble Supreme Court, being binding on every Court and it being a law of the land, the very Applications filed by the petitioner before the E.S.I. Court, challenging the demand of contribution were liable to be dismissed. According to learned counsel for respondent the entire attempt on the part of the petitioner in making such Applications is to protract and prolong the the payment towards E.S.I. contribution, on one pretext or the other and such attempt needs to be curbed.

23] The respondent corporation has, therefore, filed counter Writ Petition No.7916 of 2018, for quashing of the various Application Nos. 20/2004, 25/2005, 15/2005, 43/2005 and 17/2006, filed by the petitioner and pending before E.S.I. Court. According to learned Senior Counsel Mr. J. P. Cama, appearing on behalf of petitioner Club,

such prayer cannot be made in Writ Petition before this Court. He has reiterated his submission that when the workmen are employed under two or more employers during the same wage period, contribution is required to be paid by one of the employer. Hence in this case, it is necessary to ascertain whether the employer with whom these Race Day Persons were working as full time employee had already paid the contribution and if yes, how much amount of contribution is paid by them, so that the liability of the petitioner to pay the balance amount of contribution can be ascertained and to that extent only, the petitioner would be liable to pay the contribution and not as per the demand made by the respondent.

24] To substantiate this submission, he has relied upon the provisions of Section 39 (3) and 39 (4) of the Employees State Insurance Act, 1948 and Regulation 38 of the Employees State Insurance (General) Regulations, 1950.

25] Sub section (3) of Section 39 contemplates that wage period in relation to employee shall be the unit in respect of which all contributions shall be payable under the Act. Sub section 4 of Section 39, however, lays down that the contributions 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.

26] Regulation 38 makes provision for the Scheme to be submitted by joint employers. It lays down that, “where an employee is ordinarily employed by two or more employers in a wage period, the employers of such an employee may, if they think fit, submit to the Corporation a scheme for the payment of the contributions in respect of such employee and the Corporation may, approve such scheme if it is satisfied that the scheme is such as will secure the due payment of the contributions”.

27] The proviso to Regulation 38 makes it clear that, “if no such scheme is submitted to or approved by the corporation, then the corporation, may specify that any one of such employers shall be treated as the employer for the purpose of the provisions of the Act and regulation relating to contributions and in such case, contribution for any wage period shall fall due on the last day of the wage period on which the employee was employed by the employer so specified”.

28] According to learned counsel for the petitioner, as no such scheme was submitted in this case, for the payment of contribution in respect of these Race Day Persons, it was the duty of the corporation to specify which of the workers shall be treated as 'employer' for the purpose of this Act and the Regulation. According to learned counsel for the petitioner as the Corporation has not discharged this duty of specifying which employer in case of these Race Day Persons is to be treated as employer for the provisions of this Act, and even refused to give details of the employer code and the amount contributed by those employers with whom Race Day Persons were employed during week days, it has become necessary to issue witness summons to those employers so that the exact picture will come before the Court to determine the amount of contribution to be paid by the present petitioner.

29] In my considered opinion, though this submission advanced by learned counsel for the petitioner appears to be attractive and persuasive on the face of it, it can no more be upheld in view of the judgment of the Apex Court between the same parties and in the similar proceeding [*Royal Western India Turf Club Ltd -vs- E.S.I. Corporation and others 2016 II LLJ, 33*] dated 29th

February, 2016. Perusal of the said judgment goes to reveal that this exact contention was raised by the petitioner before the Apex Court for contending inter alia that in respect of such casual workers like Race Day Persons, who are temporarily engaged, the liability cannot be cast upon the petitioner for payment of their contribution. For advancing this submission, reliance was also placed on Section 39 of the Act, which deals with the contribution payable under the Act, with respect to the employee in respect of each wage period. This Section 39 of the Act, was considered by the Apex Court, after extracting it in it's judgment, it was held that:-

“it is apparent from Section 39 that an employee who is employed for a part of the wage period is also covered for the purpose of contribution”.

30] It was further held in paragraph 7 of the judgment that:-

“having regard to the provisions of Section 42 of the Act, it is nowhere prescribed that employee has to work for a particular period for availing the benefit of the said provision”.

31] Thereafter the Apex Court has also considered the definition of the wage period as given sub section 2(23) of the Act and then after considering the provisions of Regulation 36 which deals with the liability of employer with whom employee works for

part of wage period, it was held that:-

“Regulation 36 also makes it clear that when the employee is employed by an employer for a part of the wage period, the contribution in respect of such wage period, shall fall due on the last date of the employment in that wage period. The intendment of the regulation is clear to cover work rendered in part of wage period”.

32] Thereafter having regard to Section 39 of the Act, especially Sub Sections 3 and 4 of the said Section, it was held that:-

“even the casual employees like Race Day Persons are also brought within the purview of the Act”.

33] In paragraph No.12 of the judgment, thereafter it was categorically held that:-

“herein the case the employees work for the day of racing which is perennial activity of Royal Turf Club and in view of the provisions of the Act, Rules, Regulations and notifications dated 18.9.1978, there is no doubt that such employees are covered and consequently are entitled for benefit of the Act.”

34] Accordingly, it was held that, the High Court, on the facts of this case had erred in quashing the demand for the contribution with effect from 1978 till 1987. In paragraph No.15, the order was

passed as follows :-

“In our opinion, the Turf Club is liable to make the contribution as per notification dated 18.9.1978 along with interest at such rate as provided in the Act and the Rules till the date of actual payment. Let the amount be contributed within a period of three months from today. Consequently, the appeals preferred by ESI Corporation are allowed and the ones preferred by Turf Club are dismissed with costs of Rs.2 lakhs payable to the ESI Corporation”.

35] Thus, this judgment of the Apex Court makes it amply clear that all the contentions raised by the petitioner were considered at length and the Demand Notice issued to the petitioner for payment of contributions on the payments made to Race Day Persons, for the period 1978 till 1987 was held to be valid and the appeals preferred by the respondent corporation were allowed and the ones preferred by the petitioner were dismissed with costs. The petitioner was directed to pay contribution within three months.

36] Now in respect of this subsequent demand for the period, June, 2002 to June, 2003 and July, 2003 to June, 2004, by filing these various Applications, the petitioner is again raising the same contentions. As rightly submitted by learned counsel for respondent

Corporation, the petitioner is precluded from raising such contentions once those contentions were considered by the Apex Court. The judgment of the Apex Court on the ratio laid down therein is final and has to be treated as binding, not only on the E.S.I. Court, but on this Court also. There is clear dictum of the law laid down to that effect in Article 141 of the Constitution of India and also in the case of *Palitana Sugar Mills (P) Ltd and another -vs- State of Gujarat and ors [(2004) 12 SCC 645]*; wherein it was categorically held that:-

“the Supreme Court judgments and orders are binding on all the authorities and cannot be ignored on the ground that full facts had not been placed before the Supreme Court or that the judgment had decided certain issues only collaterally or incidentally”.

It was further held that:-

“such an attempt to belittle the Supreme Court Judgments and orders, would be perverse and would amount to contempt of Court”.

37] Here in the case, what the petitioner is trying to do, is to give a go-bye to the order of the Hon'ble Supreme Court, which is passed between the same parties and in which all the contentions raised by the petitioner were rejected and thereafter, petitions were

dismissed with costs.

38] As the petitioner is raising the same contentions and that too, by taking recourse to the provisions of Section 39(4) of the E.S.I. Act, and Regulation 38 of E.S.I. (General) Regulations, which are already considered by the Hon'ble Supreme Court while fastening the liability on the petitioner, then such contentions cannot be allowed to be re-agitated. It is not only an attempt to again protract and avoid the payment of contribution in respect of Race Day Persons to the respondent Corporation, which is the statutory liability, the petitioner cannot evade on raising certain futile pleas, but it is also in a way belittling the judgment and order of the Hon'ble Supreme Court.

39] It is pertinent to note that the liability of the petitioner to pay the contribution is only in respect of the wage period within which these Race Day Persons, were working with it. Even if the employers with whom these Race Day Persons were working on permanent basis, had paid the contribution, it must be in respect of their wage period and it cannot cover the wage period during which the Race Day Persons were working with the petitioner. Hence, there is hardly any substance in the contention of the petitioner that the petitioner wants to ascertain its liability towards the payment of

contribution.

40] It may also be noted that by advancing such submission that these Race Day Persons were employed with other employers and with the petitioner during the same wage period, the petitioner is asking the Court to regularize their double employment which cannot be done by the order of the Court.

41] It also cannot be ignored that due to passage of time the record is no more available. Though the E.S.I. Court has issued witness summons to 10 employers on random basis, as representative exercise, they are also not coming before the Court and not having requisite record. The petitioner is also aware that nothing fruitful is likely to come out of this futile exercise. The only attempt on the part of the petitioner, however, appears to be to drag the proceeding, as according to petitioner their Curative Petitions are pending before the Apex Court and hence as stated in the Application at Exh.243, “the petitioner has not given up it's legal battle and also it's stand and factual position that Race Day Persons are employed in other establishments and therefore not covered under the E.S.I. Act”. This stand taken by the petitioner being totally in defiance to the order passed by the Hon'ble Supreme Court, no Court can permit it. Such

tendency needs to be nipped in bud. The very applications, therefore, filed by the petitioner before the E.S.I. Court, challenging the demand of contribution, is clear case of abuse of process of law.

42] The exercise, therefore, undertaken by the petitioner before E.S.I. Court of issuing witness summons, to not less than 114 employers, needs to be curbed as it is further an abuse of the process of the law. Once the Hon'ble Supreme Court has held that, "the petitioner cannot avoid the liability to pay the contribution of Race Day Persons", then the petitioner cannot be permitted to evade the liability by taking recourse to such exercise.

43] The Applications, therefore, filed by the petitioner before E.S.I. Court, challenging the various demand notices of the contribution being nothing but an abuse of the process of law, they are liable to be quashed and dismissed.

44] Hence, the Writ Petition No.7916 of 2018 preferred by the respondent corporation for quashing and setting aside the Application (ESI) No. 20 of 2004, Application (ESI) No. 25 of 2004, Application (ESI) No.15 of 2005, Application (ESI) No. 43 of 2005, and Application (ESI) No.17 of 2006 filed by petitioner before

Employees Insurance Court, is allowed. All these Applications stand dismissed with costs of Rs. One lakh payable to respondent corporation.

45] As a result, the Writ Petition No.6816 of 2018, preferred by the petitioner stands dismissed.

46] Learned counsel for the petitioner seeks stay to the execution and implementation of this order.

47] Learned counsel for respondent Corporation has no objection for grant of stay for a period of four weeks.

48] Accordingly, the execution and implementation of the this order is stayed for a period of four weeks.

[DR.SHALINI PHANSALKAR-JOSHI, J.]