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

**REVIEW PETITION NO.195 OF 2018
IN
WRIT PETITION NO.7916 OF 2018
ALONG WITH
REVIEW PETITION NO.196 OF 2018
IN
WRIT PETITION NO.6816 OF 2018**

Royal Western Indian Turf
Club Ltd.

... Petitioner.

V/s.

The Employees State Insurance
Corporation.

... Respondent.

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

Mr. H.V. Mehta, for respondent corporation

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 17th JANUARY, 2019.

P.C. :

1] Heard learned Senior Advocate for the Review Petitioner
and learned counsel for the respondent.

2] By these Petitions, the petitioner is seeking review of the
judgment and order dated 21st November, 2018, passed by this Court
in W.P. No.6816 of 2018 and W.P.No.7916 of 2018.

3] It is submitted by learned Senior Counsel for the Review Petitioner that the relevant issue raised for consideration by the petitioner in these Writ Petitions, was the applicability of the Regulation 38 of the Employees State Insurance (General) Regulation, 1950, and its Proviso, according to which, the liability of payment of contribution under the E.S.I. Act, lies on both the employers, if the employee has worked with two or more employers during the same wage period. It is submitted that the Regulation 38 of Employees State Insurance (General) Regulation, 1959, reads as follows;-

“38. Employment for part of a wage period - 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, if it is satisfied that the scheme is such as will secure the due payment of the contributions, approve such a scheme subject to such terms and conditions as it may think necessary.

Provided that if no such scheme is submitted to or approved by the Corporation, 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 the regulation relating to contributions, and in

such a case the contribution for any wage period shall fall due on the last day of the wage period on which an employee was employed by the employer so specified.

4] Thus, it is submitted that according to Regulation 38 of the Employees State Insurance (General) Regulations, 1950, where an employee is ordinarily employed by two or more employers in the same wage period, the employers of such employee, 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, if it is satisfied that the scheme is such as will secure the due payment of the contributions, approve such a scheme subject to such terms and conditions as it may think necessary. Provided that, if no such scheme is submitted to or approved by the Corporation, 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 the Regulations relating to contributions, and in such a case the contribution for any wage period shall fall due on the last day of the wage period on which an employee was employed by the employer so specified.

5] It is urged that this specific point was raised for consideration in these Writ Petitions, but this Court has not

considered the same and only on the basis of the judgment of the Apex Court, in the case of same parties, this Court has rejected both the Writ Petitions. It is urged that the issue raised for consideration before the Apex Court in the said judgment was whether the establishment of race course is covered under the provisions of E.S.I. Act and another issue was whether the race day employees were covered under the provisions of the said Act. It is submitted that this issue about the respective liability of the two employers about payment of contribution was not at all raised before the Apex Court, as the liability towards the individual employee was to be determined by the E.S.I. Corporation. Hence, for that purpose, petitioner has requested the trial Court to issue witness summons which the trial Court has refused to issue. Hence the petitioner has approached this Court. But this aspect of the matter was not considered by this Court and on the basis of the judgment of the Apex Court, in the case of same parties, this Court has quashed the proceedings pending before the E.S.I. Court. Hence, according to learned counsel for petitioner, the order passed by this Court needs to be reviewed.

6] In support of his submission, learned counsel for the petitioner has relied upon the judgment of the Apex Court, in the case of **S.Nagraj and others -vs- State of Karnataka and anr, 1993**

Supp (4) SCC 595¹, wherein the scope of review jurisdiction is explained.

7] Secondly, it is submitted by him that this Court has by it's order quashed the proceedings pending before the Trial Court which order cannot be sustainable in writ jurisdiction filed under Article 227 of the Constitution of India and therefore, on this count also, the order needs to be reviewed.

8] Per contra, learned counsel for the respondent has relied upon the provisions of the Factories Act and Shops and Establishment Act, to submit that the employee cannot work at two establishments or at two factories during the same wage period and if he is doing so, it would amount to illegality and this aspect needs to be considered. Secondly, it is submitted that already all these contentions were raised by the petitioner before the Apex Court and the Apex Court has held the liability of the petitioner to be proved towards payment of E.S.I. contribution of these employees. A specific direction to that effect was given in paragraph No.16 of the judgment by the Apex Court, in the case of **Royal Western India Turf Club Ltd -vs**

1 1993 Supp (4) SCC 595

Employees State Insurance Corporation And anr². It is urged that the Hon'ble Apex Court in paragraph No.16 has directed that, "let the amount be contributed within a period of three months from that day" and consequently the appeals preferred by the E.S.I. Corporation were allowed and the ones preferred by the petitioner were dismissed with costs of Rs.2 lakhs payable to the E.S.I. Corporation.

9] In my considered opinion also, though this specific Proviso of Regulation 38 might not have been raised before the Apex Court, all the contentions which were raised here, were already argued before the trial Court. Moreover, it was for the petitioner to allege in the said proceeding before the Hon'ble Apex Court and also to prove that the race day employees were working at two places and hence, both the employers should have submitted to the E.S.I. Corporation a Scheme for the payment of contribution in respect of those employees and the Corporation on satisfying that the scheme is such as will secure the due payment of contributions, approve such a scheme. No such contention having been raised and if raised being rejected by the Apex Court as the Apex Court has clearly directed the petitioner to pay the contribution, it cannot be raised now. It will be in the teeth of the order passed by the Apex Court.

² [(2016) 4 SCC 521].

10] Moreover, the Proviso to Regulation 38 does not in any way help to the petitioner because as no such scheme was submitted by any of the employer, as per the Proviso, the E.S.I. Corporation has made it clear by issuing notice to the petitioner that petitioner has to pay contribution of the employees working with them on race days. Hence, it is not necessary anymore to issue witness summons to make a roving enquiry as to whether these employees were working with other employers, during the same wage period and whether that employer has paid the contribution of such employee. It was as good as stalling the compliance of the order of the Hon'ble Apex Court which has clearly directed the petitioner to pay the contribution as per demand made by the E.S.I. Corporation. Hence, this Court was constrained to quash the proceedings before the Trial Court. It was done only to secure the compliance of the direction given by the Apex Court, in paragraph No.16 of the judgment.

11] In this view of the matter, when this Court has passed order, it is difficult to hold that any injustice or any illegality is caused. Therefore, both the Review Petitions being without merit stand dismissed.

12] At this stage, learned counsel for the petitioner seeks

extension of stay granted by this Court, to its order dated 21.11.2018, for a period of six weeks. Learned counsel for respondent corporation opposes the stay. However, considering the issue involved, stay granted by this Court, which was on account of “no objection” given by learned counsel for respondent, is extended for a further period of four weeks.

[DR.SHALINI PHANSALKAR-JOSHI, J.]