IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.07.2019

CORAM:

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.A.Nos.572 , 573, 574, 575, 576 and 577 of 2010

ESI Corporation,
No.134, Sterling Road,
Chennai 34
Rep. by The Insurance Inspector ... Appellant /Complainant in all appeals

Vs

T.H.Ganesh Kumar Sha
S/o T.K.Rajahamsi
Proprietor,
M/s.Apparel Creation,
No.12, T.H.Road,
Tiruvellikeni
Chennai-87... ... Respondent /Accused in all the appeals

Prayer in all Appeals:- These Criminal Appeals are filed under section 378 of Cr.P.C., to set aside the orders of acquittal passed by the Trial Court in C.C.Nos.11195/2000, 11193/2000, 11192/2000, 11188/2000, 11187/2000 and 11191/2000 by orders dated. 30.06.2010 on the file of the Metropolitan Magistrate No.II, Egmore, Chennai, and convict the accused for the offence charged U/s 85 (a) of the ESI Act.

For Appellant in all the appeals	:	Mr. K.Prabakar
For Respondent in all the appeals	:	Mr.G.Harihasan, Amicus Curiae

COMMON JUDGMENT

1. All these Criminal Appeals are filed by the Appellant / Complainant against the orders passed by the Trial Court, viz., the II Metropolitan Magistrate, Egmore, Chennai, in C.C.Nos.11195/2000, 11193/2000, 11192/2000,

11188/2000, 11187/2000 and 11191/2000 by order dated. 30.06.2010 , whereby the accused was acquitted for offence u/s 85 (a) of the ESI Act.

2. The brief averments made in the complaint filed by the appellant are hereunder:

    a) the complaint has been filed by the Regional Officer of the Employees State Insurance Corporation through the Insurance Inspector (legal), ESI Corporation.

    b) The respondent/accused is the proprietor of the factory known as M/s.Apparel Kreation. The respondent/accused covered under the ESI Act as per provisions of section 1(4) r/w section 2(12)ibid of the Act and the respondent/accused had been given a distinctive No.51-19472 known as a code No.

    c) The ESI Act read with (General) Regulations 1950 is applicable to the said factory. The respondent/accused being a proprietor of the factory is In-charge of a responsible for the factory, for the conduct of basis of business of the factory. Under section 40 of the ESI Act, the accused as the Principal Employer should pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the Employer's contribution and the Employee's contribution and that the contribution should be paid within the time limit specified under Regulation 31 of the ESI (General) Regulations Act 1950.

    d) by failure to pay the contributions within the specified period, the respondent/accused had violated the provisions of section 40(1) of the Act r/w Regulation 31 of the Regulations and thereby, the respondent/accused had committed the offence u/s.85(a) of the Employee's State Insurance Act.

e) The Regional Director had accorded sanction to prosecute the respondent/accused as required u/s.88 (1) of the Act and the complaints have been filed in accordance of section 86 (3) of the Act on 12.10.1999.

a) Since the respondent/accused failed to make payment of contribution to ESI Corporation within the statutory period, complaints were filed on 12.10.1999 before the learned II Metropolitan Magistrate Egmore, Chennai for offences under section 85(a) of the ESI Act. All these appeals have been filed against six complaints. The details of the complaints, the period of default in each complaint and the amount of default is stated hereunder :-

sl.no	CC No	Contribution Period	Contribution in Rupees
1	11193/2000	10/94-12/94	7855
2	11195/2000	04/95-06/95	11641
3	11192/2000	07/95-09/95	11895
4	11191/2000	10/95-12/95	14066
5	11187/2000	01/96-03/96	10576
6	11188/2000	04/96-06/96	10491

3. On the side of the complainant, in all these above cases, 3 witnesses were examined as Pws.1 to 3 and Ex.P.1 to P.6 were marked. PW.1 is the Inspector of ESI Corporation, PW.2 is the Office Superintendent of ESI Corporation, PW.3 is the legal Inspector in the Regional Office.

4. On the side of the respondent/accused, the respondent was examined as defence witness DW1 and Exs. D1 to D5 were marked as defence documents. Ex.P1 is the Inspection Report, Ex.P2 is the certificate copy of the C-6 Register, Ex.P3 is the sanction issued by the Regional Director, Ex.P4 is the authorization given to the complainant, Ex.P5 is the letter dated 05.02.2009 sent by the complainant to the Head Office of the complainant to the accused, Ex.P6 is the acknowledgement card and Ex.D1 is the challan for payment, Ex.D2 is the receipts, Ex.D3 is the entries in the C-6 Register, Ex.D4 is the challans for proof of Ex.d4 series is the challans for payment of contribution. Ex.D5 is the representation dated 24.12.2008 given by the accused when the Amnesty scheme was in existence.

5. In all the above complaints, the complainant had examined himself as PW.1 . He has deposed about having inspected the premises of the respondent/accused factory on 17/07/96, 10/02/1998 and 11.02.1998 and that he had stated that the respondent/accused is covered under the ESI Act as per the provision of Section 1(4) r/w 2(12) of the Act and that respondent/accused had given a distinctive code Number was allotted to the respondent factory as No.51-19472. In the complaints, three witnesses have been examined on the side of the complainant as PW.1 to PW.3 and documents, Exs.P1 to P6 were marked in each case and on the side of the respondent/ accused, the respondent/accused was examined as DW.1 and documents 1 to 5 were marked as Exs.D1 to D5. The complainant who has been examined as PW.1 had deposed that he had conducted an inspection

and found that the respondent /accused had defaulted in payment of contributions. The Inspection Report was marked as Ex.P1. PW.2 had corroborated with the evidence of PW.1 and he had deposed that the respondent/accused had a specific identification No.51-19472 and that the contribution given by such assesse will be entered in C-6 register , maintaining by them and that there was no entry with regard to the payment of contributions paid by the respondent/accused in C-6 Register. The copy of the C-6 was marked as Ex.P.2.

6. The Legal Inspector of the Zonal office of ESI Corporation was examined as PW.3 he had deposed that based on the information from C-6 Register finding that the respondent/accused has not paid its contribution amounts, the Regional Director of ESI Corporation, Chennai had granted sanction to prosecute the respondent/accused and the sanction order was marked as Ex.P3 and that he had been authorized to prosecute and the authorization was marked as Ex.P4. Further during the pendency of the case, ESI corporation had sent a communication to the accused to make the balance payments and the letter was also received by the respondent/accused, the said letter was marked as Ex.P5 and the acknowledgment was marked as Ex.P6. The Court after completion of evidence on the side of the complainant had questioned the Respondent/accused under section 313 of Cr.P.C., the respondent/accused had denied the same.

7. The respondent/accused had examined himself as DW1 on the side of the of the defence and he had deposed that the factory was started during the

month of May, 1989 and that he had registered himself with ESI and that he was given a specific identity code No. 51-19472-18 and that he had been regularly paying the contributions and prior to the filing of the complaint, he had received notice on 29.12.1998 and that he had paid the entire amount. The Challan for payment was marked as Ex.D1 and the receipt was marked as Ex.D2 series, the entries in C-6 register was marked as Ex.D3 series and that the amount were paid on 23.08.98 and that the details of payment were entered in the C-6 Register. Further, he had deposed that from June 1998 the factory did not function and that he had also informed to the ESI corporation whereas without properly verifying the registers accounts, a case had been filed against him after two years. The Challans numbering 60, for payment made during the year 1989-95 were marked as Ex.D4 series and that the petition filed during the Amnesty Scheme was marked as Ex.D5. The Trial Court after hearing both sides acquitted the accused on the ground that the complaint is filed after 3 years and thereby is barred by limitation also by believing the evidence on the side of defense had acquitted the accused stating that the complainant has not proved the case beyond reasonable doubt. Assailing the orders of acquittals passed by the trial Court the present appeals are filed by the Respondent Corporation.

8. Mr. K. Prabakar, learned counsel appearing for the ESI Corporation would submit that the appellant/complainant had filed the complaints against the respondent /accused for the offence punishable U/s 85 (A) of the Employees State Insurance Act-1948 for having failed to pay the contributions under

Section 40 of the ESI Act. As per the Regulation 31 of the Employees State Insurance (General) Regulations, 1950, a time frame is fixed for payment of contributions and that on the failure of the employer to pay the contributions within **21** days of the last day of the calendar month on which day it falls due, he is liable to pay with an interest at the rate of 12 percent per annum in respect of each day in default for delay of payment of contributions and further, on such non-payment within the specified date, a fresh period of limitation would come into play on each day of continued default.

9. He would further submit that contravention of Section 40 and Regulation 31 gives rise to prosecution irrespective of the fact the amounts have been subsequently paid and thereby belated payments do not absolve or exonerate the accused from the charge and in all the cases the due amounts have been paid belatedly only on 21.03.1999 and the learned trial Judge without proper appreciation of law regarding the provisions under the Act the relevant Regulations and the evidence on record, had dismissed the complaints, stating that the complaints are barred by limitation. He would further submit that though categoric evidence has been let in by the complainant with regard to the registration of the respondent/accused factory under the said Act and their failure to pay the contributions within the time frame specified under Regulation 31(A) of the Employees State Insurance (General) Regulations, 1950, the learned trial Judge without properly analysing and discussing about the dates on which the contribution amounts fell due and the dates on which the amounts have been paid by the

accused, had acquitted the respondent/accused, stating that the amounts have been paid by the respondent/accused and that the complaint is barred by limitation.

10.He would further submit that the learned Trial Judge simply relying on the defence of the respondent/accused that the amounts have been paid, had acquitted the respondent/accused. He would further submit that no discussion have been done by the trial Judge with regard to period of contribution, the dates on which they fell due and the dates on which the respondent is stated to have paid the amount and thereby the trial Judge committed a grave error in acquitting the respondent/accused. He would further submit that Section 39(5)(a) was introduced by Act 29, 1989 for payment of interest and thereby the principal/ employer is entitled to pay the simple interest till the date of its actual payment and thereby it is a continuing offence.

11.He would submit the proper and legal evidence has been let by the complainant in all the cases to prove that the offence was committed by the accused by defaulting in payment of contribution within the prescribed time and that only part of the contributions were paid. He would submit that the learned Trial Judge has erred in accepting the evidence let in on defence and without there being any proper appreciation and discussion had acquitted and further the trial Court failed to look into the relevant provisions in the right perspective and without any discussion with regard to the due date and date of payments relying on the evidence of the respondent/accused has wrongly held that the amount has been paid and thereby no offence was made out.

12.He would submit that **Chapter IV** deals with regard to the insurance of the employees and the contributions to be made by the employees and the employer to the ESI Corporation. As per **section 40**, the Principal Employer has to pay the contribution in the first instance and the Principal Employer has to pay Contribution in respect of every employee whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution at the first instance and that he is entitled to deduct the employers contribution and to pay his contribution to the Corporation. **Regulation 31** of the Employee's State Insurance General Regulation Act,1950 prescribes a time frame for payment of contribution and as per Regulation 31 an employer who is liable to pay contribution in respect of any employee shall pay his contributions within a period of 21 days from the last date of the every English Calendar month in which the contributions falls due and therefore, if the contributions is not paid within time, the employer is liable to pay with interest the contribution due which is not paid in time as per Regulation 31 -A.

13.He would further submit that Rule 40 of the Employee's State Insurance Act, is in pari materia with Section 6 and 6(a) of the Employee's Provident Fund and Miscellaneous Provisions Act, which is also an employee beneficial legislation and the Hon'ble Apex Court as well as this Court have held that non-payment of contribution within prescribed time limit and failure to pay is a continuing offence and thereby, the complaint could not have been held as barred by limitation. In support of the above contentions the learned counsel for the appellant would rely on the following decisions **(1984) 4 SCC 222 [Bhagirath Kanoria and others Vs. State of M.P.], 1980 L.W.Crl. 226 [M/s.Premier Studs & Chaplets Co., rep by Partner R.K.Ramadoss and her, In re]** and **1996(1) MWN (Cr.) 304 [Employee's State Insurance Corporation, rep. By the Insurance Inspector (Legal) Madurai V. Alagasundaram Chettiar and Others]**

14.Since the learned counsel for the respondent/accused on record, did not appear, despite the matter being listed on several hearings, this Court appointed Mr.G.Hariharan, to represent the respondent/accused and to assist the Court.

15.The learned Amicus Curiae representing the respondent/accused would submit that the Employees State Insurance Act is a welfare legislation brought in by the Government of India and the Act provides for benefits to employees in case of sickness, maternity benefits to women employees, and employment injury and to make provisions for certain other materials in relation thereto. The insured workmen will be entitled to the following benefits viz., the maternity benefit , disablement benefit, medical care and treatment and it also covers the welfare of the dependents of the employees in case of their death. He would further submit that as per evidence on record the factory had been closed during the year June 1998 and proper intimation was given to the authorities and the pending contribution amounts have been paid by the respondents subsequently and thereby the trial court had rightly acquitted the respondent/accused holding that the amounts have been paid and that the complaint is barred by limitation. However he would submit that no discussion has been made by the trial Judge with regard to the dates on which the contributions fell due and the dates on which the amounts have been made.

16.Now what is to be decided in (i) Whether failure to pay contribution within the prescribed period will be a continuing offence? (ii) Whether payment of contribution after the prescribed period will absolve or exonerate theacused from criminal liablity? (iii) Whether the Trial Court is right in acquitting the respondent/accused holding that the complaint is barred by limitation? and (iv) Whether it is proper for the trial Court to arrive at a conclusion that the respondent/accused has paid the contributions within the time without a discussion being made with regard to the date on which the contributions fell due and the date on which the respondent/accused has made the payments?

17.At this juncture, it is apposite to refer to the finding of the Trial Court for acquitting the respondent/accused which is extracted hereunder :

"15,தொழிலாளர் காப்பீட்டுச்சட்டம் பிரிவு 85 (எ) படியான குற்றமானது 3 வருடம் வரை தண்டனை வழங்கப்படக்கூடிய குற்றம் என்பதால் அது குறித்த புகாரினை தாக்கல் செய்ய 3 ஆண்டுகள் வரையறை நிர்ணயம் செய்யப்பட்டுள்ளது. கடைசியாக ஆய்வு செய்த தேதி 17.07.96, 12.10.99 அன்று புகார் மனுவினை தாக்கல் செய்யப்பட்டுள்ளது. பங்களிப்பு தொகை செலுத்தத் தவறிய காலங்கள் ஏப்ரல் 95 முதல் ஜூன் 95 வரை. மேற்சொன்ன காலங்கள் மற்றும் ஆய்வு செய்த தேதியிலிருந்து கணக்கிட்டால் 12.10.99 தேதியில் தாக்கல் செய்யப்பட்ட இந்த புகார் காலவரையறையால் பாதிக்கப்பட்டுள்ளது என்று இந்நீதிமன்றம் தீர்மானிக்கிறது. இந்த வழக்கு நிலைக்கத்தக்கதல்லயென எதிரி தரப்பில் முன் வைக்கப்பட்ட வாதம்

ஏற்றுக்கொள்ளும் வகையில் அமைந்துள்ளது. வாதி இந்த புகார் மனுவை காலம் கடந்து தாக்கல் செய்துள்ளதால் இவ்வழக்கு நிராகரிக்கத்ததக்கது என இந்நீதிமன்றம் கருதுதுகிறது. இவ்வழக்கின் மற்ற சங்கதிகளை விவாதிக்க வேண்டிய அவசியமில்லையென்று இந்நீதிமன்றம் முடிவு செய்கிறது.

16. இந்த வழக்கு நிலைக்கத்தக்கது அல்ல என்று தீர்மானிக்கப்பட்ட நிலையில் வாதி தரப்பில் எதிரி மீது சாட்டப்பட்ட தொழிலாளர் காப்பீட்டுச்சட்டம் **85 (எ)** படியான குற்றச்சாட்டு சரிவர நிரூபிக்கப்படவில்லையென்று தீர்மானித்து, முடிவில் எதிரியை குற்றவாளி இல்லையென்று முடிவு செய்த அவரை கு.வி.மு.ச.பிரிவு **248 (1)** ன் கீழ் விடுதலை செய்து தீர்ப்பளிக்கப்படுகிறது."

18.In all these cases the claims were in respect of the following periods10/94-12/94, 04/95 -06/95, 07/95-09/95, 10/95-12/95, 01/96-03/96 and 04/96-06/96 and admittedly the contributions have been paid by the respondents on only 23.08.1998 after three years of the first claim and two years after the last claim fell down.

19.The relevant provisions and regulations regarding payment of contributions under the ESI Act, 1948 are Section 39, Regulations 31,31-A and the penal provision of section 85, are extracted hereunder:

> "**Section 39.Contributions**: (1) The contribution payable under this Act in respect of an employee shall comprise contribution payable by the employer (hereinafter referred to as the employer's contribution) and contribution payable by the employee (hereinafter referred to as the employee's contribution) and shall be paid to the Corporation.
>
> (2) The contributions shall be paid at such rates as may be prescribed by the Central Government:
>
> Provided that the rates so prescribed shall not be more than the rates which were in force immediately before the commencement of the Employee's State Insurance (Amendment) Act, 1989.
>
> (3) The wage period in relation to an employee shall be the unit in respect of which all contributions shall be payable under this Act.
>
> (4) 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.

(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.

Regulations 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 employer shall furnish in the prescribed pro forma [Form 5-A] 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.]

31.A. 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 [twelve percent] per annum] in respect of each day of default or delay in payment of contribution.

85.Punishment for failure to pay contributions, etc., --If any person--

(a) **fails to pay any contribution which under this Act he is**

liable to pay, or
(b)deducts or attempts to deduct from the wages of an employee the whole or any part of the employer's contribution, or
(c) in contravention of section 72 reduces the wages or any privileges or benefits admissible to any employee, or
(d) in contravention of section 73 or any regulation dismisses, discharges, reduces or otherwise punishes an employee, or
(e) fails or refuses to submit any return required by the regulations, or makes a false return, or
(f) obstructs any Inspector or other official of the Corporation in the discharge of his duties, or
(g) is guilty of any contravention of or non-compliance with any of the requirements of this Act or the rules or the regulations in respect of which no special penalty is provided,
[he shall be punishable---
[(i) where he commits an offence under clause (a), with imprisonment for a term which may extend to three years but--
(a) which shall not be less than one year, in case of failure to pay the employee's contribution which has been deducted by him from the employee's wages and shall also be liable to fine of ten thousand rupees;
(b) which shall not be less than six months, in any other case and shall also be liable to fine of five thousand rupees:

Provided that the Court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term;

(ii) where he commits an offence under any of the clauses (b) to (g) (both inclusive), with imprisonment for a term which may extend to one year or with fine which may extend to four thousand repees, or with both]]"

20. In the decision reported in **1980 LW.(Crl) 226 [M/s.Premier Studs & chaplets Co., rep by Partner R.K.Ramadoss and hers, In re:]** a Division Bench of this Court has held hereunder:

"**16.** The government of the change against the revision petitioners in all these cases except one is that they failed to submit the returns in Form Nos. 5, 10 and 12 as required under sub-paragraph (b) of paragraph 76 of the Employees' Provident Funds Scheme for various months. The question is whether such an offence is a continuing offence. Unfortunately, the Act itself does not define what a continuing offence is. But the expression 'continuing offence' has however acquired a well recognised meaning in criminal law and M has been observed in State v. Bhiwandiwalia MANU/MH/0085/1955 : A.I.R. 1955 Bom 101 : if an act committed by an accused person constituted an offence and if that act continued from day to day, then from day to day a fresh offence is committed by the accused so long as the act continues. Normally; and in the ordinary course an offence is committed only once. But there may be offences which can be committed from day to day and it is offences falling is this latter category that are described as continuing offences. In every case of a continuing offence it may be possible to describe the default as amounting to an omission or to a positive act on the part of the defaulter. Hence the distinction between a default which consists in failure to comply with a direction to do a positive act may not be very helpful in determining the character of a continuing offence. In that case the offences complained of were failure to apply for the registration of a factory and for grant of license and failure to give a' notice of occupation under the Factories Act read with the Bombay Factories Rules. It was held that the failure to apply for the registration of the factory and to give a notice of occupation was not a continuing offence but that the conduct of the accused in using the premises as a factory without obtaining a license constituted a continuing offence and as such no bar of limitation under S. 106 of the Factories Act could be pleaded in respect of that charge. The learned Judges of the Bombay High Court have referred to the decision in Bhchartas v. Emperor A.I.R. 1930 Bom. 340 where it was held that the failure to remove a building in respect of which a person has been convicted under S. 123(7) or S. 118,4) of the Bombay City Municipalities Act was not a continuing contravention and in dealing with the question of limitation the Bench took the view that limitation for the prosecution for a continuing offence runs from the time when the offence is first committed, or, where the offence consists in failure to remove the building after conviction, from the date of the conviction which view, however, was dissented from in Emperor v. Karsandaa Govindji, MANU/MH/0048/1942 : A.I.R. 1942 Bom 326 where it was held that the establishing of a factory without permission is an offence committed once and for all when the factory is established, but that the working of factory without permission is an offence which arises on every day on which the factory is so worked and hence S. 514 of the City of Bombay Municipal Act, can be no bar to a charge in respect of working the factory without permission. The decision in State v. Babu Gulah Mahomed Crl. Rev. Appln. No. 114 of 1951 of the Bombay High Court and the decision in State of Bombay v. Devaraj Tulsi A.I.R. 1932 Bern. 146 have also been considered by the Division Bench in State v. Bhiwandiwalia. The Division Bench however would not subscribe to the view expressed by Bhagawati, J., in State of Bombay v. Devaraj Tulsi MANU/MH/0050/1952 : A.I.R 1952 Bom 146. That view, as expressed by Bhagwati, J., was as follows : ...it is a misnomer to say that fresh offences are committed at each period of time when particularly the non compliance of the order which constitutes the offence is the omission to do an act which has been ordered to be done. Bhagwati, J., was of the view that where a positive act is ordered to be done, a case or cases may arise where by reason of the breach of the terms of the order you might have commission of a series of offences from day to day. The Division Bench in State v. Bhiwandiwalla AI.R. 1935 Bom. 161, however, commenting on that view has observed as follows : With respect, the distinction which these observations seems to bring out between a default which consists of an omission to do an act and a default which consists in failure to comply with a default which consists in failure to comply with a direction to do a positive act may not be very helpful in determining the character of a continue offence. We are in respectful agreement with this view of the Division Bench.

17. The Division Bench further referred to the decision in Public Prosecutor v. Veerabadrappu A.I.R. 1953 Mad 204 where it was held that failure to comply with the provisions of S. 14 of the Factories Act is a continuing offence and agreed with the view therein.

18. In Md. Hussain Bhai and Another v. State 19 F.J.R. 171 Krishnan, J., of the Madhya Pradesh High Court held that the failure to pay up the contributions and to submit returns, for which the punishment is laid down in Paragraph 76 (a) and (c) of the Scheme, is a continuing wrong. He further observed that while fixing of a date may mean that the employer should pay into the fund and send to the Commissioner the returns by that date, it does not mean that once the date is passed, the employer is relieved of his duty and there is nothing more to be done, and, therefore, even if the provisions penalizing the default were supposed to come into force after the date so fixed for payment into the fund or for sending in the return, the offence being continuous would fall within the scope of the penal provisions. In that case the accused persons had failed to comply with paragraph 38 of the Scheme and thereby committed an offence punishable under paragraph 76 (a) and (c) of the Scheme. Krishnan, J., referred to the decision in G. B. Dhattar v. State MANU/WB/0132/1957 : A.I.R. 1957 Cal. 483 where it was observed as follows : The question whether an illegal omission is a continuing offence or not, can hardly be answered in a summary manner without considering the nature of the duty imposed, and the object which the legislature had in view in imposing the duty.... The pithead baths and the mines craches are amenities required by the legislature, the first for the sanitation an health of the minors and the second for the proper care of the children of female miners...without these, the miners could not be expected to preserve their health, and children of the female minors could not be properly looked after. The mere fact, therefore, that the specified date within which the baths and the craches were required under the rules to be constructed expired, cannot possibly mean that the duty of the owner ended with the expiry of the date. That duty still remains. It continues till the pithead baths and the craches are constructed as required by the rules. A continuing wrong or a continuing offence is, after all, a continuing breach of a duty which itself is continuing. If a duty continues from day to day the non-performance of that duty from day to day is a continuing wrong. With great respect we are of the view that his definition of a continuing wrong or a con-that tuning offence lays down the proper test that should be adopted in determining the question as to whether a particular wrong or an offense is a continuing one. Krishnan, J" then went on to observe as follows: The creation of the Employees' Provident Fund and the fixing of the contributions of the employees and the employer was for the purpose of the welfare, of the employees. The mere fact that the 15th of the month next alter the one for which the contributions were due, expired, has not, in any manner, terminated the duty of the employer to pay in the contributions to the fund and send the return to the Commissioner. It is a duty created by the statute and continues day after day till, of course the payment is made and the returns are submitted. It is, therefore, obvious that the tailor to pay up contributions and to submit the returns was a continuing wrong.

19. In Pankaja Mills Ltd. v. N. Siratamakrishna Iyer Natarajan, J., while referring to the said observations of Krishnan, J., has merely observed that be was unable to agree with the contentions of the Public Prosecutor who relied on the aforesaid decision, and he observed as follows:-

It very difficult to hold that the offences complained of against the petitioners in the several cases can be held as continuing offences. Since the contributions and charges had to be paid under the Act or the Scheme on the 15th of the month next after the one for which the contributions or charges were due the offences become completed as soon as the contributions on charges were not remitted within the stipulated time. There is nothing In the Act or the Scheme to show that the non-payment continued to be a recurring offence with each passing day. If the Legislature bad intended that defaults committed by employees would be continuing offences then that would have been clearly indicated in the Act or the Scheme. Natarajan, J., it must be observed, was dealing with a prosecution for non-payment of Provident Fund contributions and/or administrative charges, statutorily payable under the Employees' Provident Funds and Family Pension Fund Act and the Employees' Provident Fund Scheme and the Employees' Family Pension Fund Scheme. With great respect, we are unable to subscribe to this view expressed by Natarajan, J., for, it is not in accordance with the definition of a continuing wrong as given by the Supreme Court in State of Bihar v. Deokawn Menshi 1973 L.W. Crl. 129 where it was observed by the Supreme Court as follows : A continuing offence is one which Is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirements and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all, and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all.

20. The statute creates a duty on the part of the employers to pay a contribution as laid down by Ss. 6 and 6-A of the Act and paragraph 76 (a) of the Scheme penalizes the failure to pay such contribution and paragraph 76 (b) penalizes the deduction or attempting to deduct from the wages or other remuneration of a member the whole or any part of the employer's contribution and paragraph 76 (c) penalizes the failure or refusal to submit any return, statement or other document required under the Scheme. The failure to pay any such contribution or to submit any return or statement continues from day to day; a fresh offence is committed by the accused so long as he continues in his failure to pay the contribution or to submit the return or statement. It is not mere failure to obey an order or to comply with a direction. It is not as if once he fails to pay the contribution or to submit the return on the due date, the employer it relieved of his duty and there is nothing more to be done. The duty to pay the contribution or to submit the return still remains and continues till the contributions are made or the returns submitted. Therefore, a failure to pay the contribution or to submit the return is a continuing breach of a duty which continues till it is performed and the non-performance of such a duty from day to day is a continuing wrong. We are unable to agree with Natarajan, J's observation that since the contributions and charges have to be paid under the Act or the Schemes on the 15th of the month next after the one for which the contributions or charges were due the offences become completed as soon as the contributions or charges were not remitted within the stipulated time. A failure to pay the contributions or to submit the returns is an offence which is susceptible of continuance and is certainly distinguishable from the one which is committed once and for all and it is a liability which continues until the contribution is made or the return submitted and as such the offence complained of against the revision petitioners in our opinion, comes clearly within the definition of a continuing offence as contained in the decision of the Supreme Court in State of Bihar v. Deokaran Menshi. In the aforesaid case the Supreme Court was dealing with Ss. 66 and 79 of the Mines Act and the Indian Metaliferous Regulations, (1926) Reg.3 and the Supreme Court held that the infringement in that case occurred on January 21 of to relevant year under Regulation 3 read With S. 66 and is complete on the owner falling to furnish the annual returns by that day. The Supreme Court further noticed that the regulation did not lay down that the owner, manager, etc, of the mine concerned would be guilty of an offence if he continues to carry on the mine without furnishing the returns or that the offence continued until the requirement of Reg.3 was complied with or, in other words, Reg.3 does not render a continued disobedience or non-compliance of it an offence. It might be noted that the Supreme Court has in the aforesaid decision referred with approval to the decision in State

> v. Bhiwandiwalla MANU/MH/0102/1955 : I.L.R 1955 Bom. 192 : A.I.R. 1965 Bom 161 Therefore, in our view, the offences complained of, against the revision petitioners are continuing offences and as such under S. 472, Crl. P.C. a fresh period of limitation would begin to run at every moment of the time during which the offence continues."

21. In a later decision reported in **1996 (1) MWN (Cr.) 304 [Employee's State Insurance Corporation, rep. by the Insurance Inspector (Legal) Madurai V.Alagasundaram Chettiar and others]** a Single Judge of this Court has held hereunder:

> "**6.** I am entirely in agreement with the submissions made by learned counsel appearing for the appellant. The ground on which the accused/respondents were acquitted cannot be said to be valid in law, in view of the decision rendered in the case of *Rukmini and two Others* v. *Employees State Insurance Corporation, Madras rep. by E.S.I. Inspector, Madurai*, (1994 (2) L.W. (Cr.) 10. In that decision, a similar argument was advanced, stating that there cannot be any prosecution, in view of the subsequent payment of the employees' contributions towards insurance. This point has been elaborately considered, and it has been held that the Act imposed obligation on the employer to make stipulated payment within the stipulated time and that failure to make the payment, within the time stipulated, results in default of payment of the contribution in terms of the provisions of the Act, and Regulations. From the above observation, it is clear that failure to make payment of the contributions of employees towards insurance, within the specified period can give rise to prosecution, irrespective of the fact that the amount has been subsequently paid. In that view, I feel that the orders of acquittal were quite wrong. On perusal of the judgments, it is seen that the evidence of P.W. 1 was disbelieved, merely because P.W. 1 was not able to say the result of the Criminal Appeal No. 125 of 1983. This has no relevance to the point raised before the court below. The reasoning given by the trial court for throwing out the case of prosecution is not convincing. "

22. Further, in a similar matter in respect of Non Payment of contributions within the specified period under the Employee's Provident Funds and Miscellaneous Provisions Act, the Hon'ble Apex Court in (**1984) 4 SCC 222**

[Bhagirath Kanoria and others V. State of M.P] has held hereunder:

"**8.**The question as to whether the offence of non-payment of the employer's contribution to the provident fund is a continuing offence, arises because of the provisions contained in Chapter XXXVI of the Code which is entitled "Limitation for taking cognisance of certain offences". Sections 468, 472 and 473 which occur in that Chapter and which are relevant for our purpose, read as follows:

468. (1) Except as otherwise provided elsewhere in this Code, no court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be—

(*a*) six months, if the offence is punishable with fine only;

(*b*) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(*c*) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

472. In the case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues.

473. Notwithstanding anything contained in the foregoing provisions of this Chapter, any court may take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice.

9.It is contended by Shri Bobde who appears on behalf of the appellants that, the offence of non-payment of the employer's contribution can be committed once and for all on the expiry of fifteen days after the close of every month and, therefore, prosecution for that offence must be launched within the period of limitation which is mentioned in Section 468 of the Code. It is common ground that if the offence is non-continuing, the period of limitation for filing the complaint will be one year as provided in clause (*b*) of sub-section (2) of Section 468 since, the offence in the instant case is punishable with imprisonment which may extend to three months or with fine.

10. It is impossible to accept Shri Bobde's contention. The expression "continuing offence" is not defined in the Code but, that is because expressions which do not have a fixed connotation or a static import are difficult to define. How difficult it is to put the concept of a continuing offence in a strait-jacket is illustrated by the decision of this Court in *State of Bihar* v. *Deokaran Nenshi* [(1972) 2 SCC 890 : 1973 SCC (Cri) 114 : AIR 1973 SC 908 : (1973) 1 SCR 1004 : 1973 Cri LJ 347] . In that case, respondents who were owners of a stone quarry in Bombay were required to forward, certain annual returns in respect of the preceding year, on or before January 21 in each year. Failure to forward the returns as required is punishable with fine under Section 66 of the Mines Act, 1952. The respondents having failed to furnish the returns by the due date, which was January 21, 1960, a complaint was filed against them in a court at Dhanbad on April 12, 1961. One of the contentions of the respondents was that the complaint was barred by limitation under Section 79 of the Mines Act which provided that no court shall take cognizance of an offence under that Act unless the complaint was filed within six months of the date of the offence. The Explanation to Section 79 provided that if the offence in question was a continuing offence, the period of limitation shall be computed with reference to every part of the time during which the said offence continued. It was held by this Court that the infringement which occurred on January 21 of the relevant year was complete when the owner failed to furnish the annual returns on that date. Since, the Regulation did not lay down that the owner would be guilty of an offence if he continued to work the mine without furnishing the returns, the offence was non-continuing and, therefore, the complaint was time-barred. While discussing the question as to when an offence could be said to be a continuing offence, the Court made the following observations: [SCR p. 1006: SCC para 5, p. 892: SCC (Cri) p. 116]

"A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and reoccurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all.

11. This passage shows that apart from saying that a continuing offence is one which continues and a non-continuing offence is one which is committed once and for all, the Court found it difficult to explain as to when an offence can be described as a continuing offence. Seeing that difficulty, the Court observed that a few illustrative cases would help to bring out the distinction between a continuing offence and a non-continuing offence. The illustrative cases referred to by the Court are three from England, two from Bombay and one from Bihar.

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19. The question whether a particular offence is a continuing offence must necessarily depend upon the language of the statute which creates that offence, the nature of the offence and, above all, the purpose which is intended to be achieved by constituting the particular act as an offence. Turning to the matters before us, the offence of which the appellants are charged is the failure to pay the employer's contribution before the due date. Considering the object and purpose of this provision, which is to ensure the welfare of workers, we find it impossible to hold that the offence is not of a continuing nature. The appellants were unquestionably liable to pay their contribution to the provident fund before the due date and it was within their power to pay it, as soon after the due date had expired as they willed. The late payment could not have absolved them of their original guilt but it would have snapped the recurrence. Each day that they failed to comply with the obligation to pay their contribution to the fund, they committed a fresh offence. It is putting an incredible premium on lack of concern for the welfare of workers to hold that the employer who has not paid his contribution or the contribution of the employees to the provident fund can successfully evade the penal consequences of his act by pleading the law of limitation. Such offences must be regarded as continuing offences, to which the law of limitation cannot apply.

20. Our attention has been drawn to a judgment of the Bombay High Court in Criminal Revision Applications Nos. 337 and 338 of 1976, which were decided by a learned Single Judge on November 7, 1977. It was held in that judgment that the failure to pay the employer's share of contribution to the provident fund is not a continuing offence. For reasons which we have mentioned above, we dissent from that judgment. With respect, we are unable to appreciate the reasoning of that judgment that if the failure to pay the employer's contribution is regarded as a continuing offence, it would be open to the employer to pay the contribution even after the due date has expired, in order to escape punishment. The concept of continuing offence does not wipe out the original guilt. It keeps the contravention alive, day by day.

21. For these reasons, we are of the opinion that the offence of which the appellants are charged, namely, non-payment of the employer's contribution to the Provident Fund before the due date, is a continuing offence and, therefore, the period of limitation prescribed by Section 468 of the Code cannot have any application. The offence which is alleged against the appellants will be governed by Section 472 of the Code, according to which, a fresh period of limitation begins to run at every moment of the time during which the offence continues.

22. Before we close, we consider it necessary to draw attention to the provisions of Section 473 of the Code which we have extracted above. That section is in the nature of an overriding provision according to which, notwithstanding anything contained in the provisions of Chapter XXXVI of the Code, any court may take cognizance of an offence after the expiry of the period of limitation if, inter alia, it is satisfied that it is necessary to do so

> in the interest of justice. The hair-splitting argument as to whether the offence alleged against the appellants is of a continuing or non-continuing nature, could have been averted by holding that, considering the object and purpose of the Act, the learned Magistrate ought to take cognizance of the offence after the expiry of the period of limitation, if any such period is applicable, because the interest of justice so requires. We believe that in cases of this nature, courts which are confronted with provisions which lay down a rule of limitation governing prosecutions, will give due weight and consideration to the provisions contained in Section 473 of the Code.
>
> **23.** We confirm the view of the High Court that in passing the impugned order, the learned Magistrate has not in any manner reviewed his earlier order dated September 20, 1976.
>
> **24.** In the result, these appeals are dismissed. The prosecutions will proceed and be disposed of expeditiously in accordance with law. The learned Magistrate will dispose of these cases by considering all the points together, that is to say, without treating any particular point as a preliminary point."

23.This Court having gone through the relevant provisions and the regulations under the E.S.I. Act and the decisions referred to by the counsel for the Appellant and having analyzed the judgments of the trial Court comes to the conclusion that failure to pay contributions within the prescribed period under the ESI Act is a continuing offence and payment of contribution after the prescribed period will not absolve or exonerate the accused from the criminal liability and thereby the complainant is not barred by limitation since the offences alleged against the accused will be governed by Section 472 of Cr.P.C. according to which as fresh limitation begins to run every moment of the time during which the offence continues. The Trial Court without analyzing that non payment of contributions within the specified time is a continuing offence, on wrong premises, had dismissed the complaint stating that the complaint is barred by limitation.

24.Further the perusal of the judgments would show that no discussion have been made by the trial Court with regard to dates on which the amounts fell due and when they were paid by the employer and whether they were paid within the statutory period, in such circumstances this Court is of the view that the order passed by the trial Court is illegal. Admittedly as stated above the amounts contributions due are in respect of all periods viz., 10/94-12/94, 04/95 -06/95, 07/95-09/95, 10/95-12/95, 01/96-03/96 and 04/96-06/96 and admittedly the amounts have been paid by the respondent /accused only on 23.08.1998. All these complaints have been filed on 12.10.1999 and there is no discussion regarding the dates when the amounts of contributions have fallen due and when the offence was committed and when the amounts were paid by the respondent/accused. In the opinion of this Court the offence stands committed on failure to pay on the due date and it is a continuing offence. Payment on a later date will not absolve or exonerate the defaulter from criminal liability. The trial Court without considering these aspects has acquitted the respondent /accused. No discussions have been made with regard to the days on which the contributions fell due and days on which the offence are committed and days on which the amounts have been made. I am of the view that the judgments of acquittal are manifestly illegal and are liable to be set aside. Accordingly these appeals are allowed and the judgment of acquittal passed by the Trial Court in C.C.Nos.11195/2000, 11193/2000, 11192/2000, 11188/2000, 11187/2000 and 11191/2000 dated 30.06.2010 by the learned Metropolitan Magistrate NO.II, Egmore, Chennai and acquitting the respondent/accused is set aside.

25.It is to be noted that since the trial Court has not made any discussion and not given any finding on the merits of the case, it is just and proper to remand the case to the Court below for disposal in accordance with law. Accordingly the cases are remanded to the trial Court for disposal on merits. It is also noted that the matter is remanded to the Court below by invoking the powers under section 386 (A) Cr.P.C. And the trial Court shall conduct further enquiry and shall render a finding whether the contributions have been paid by the respondent/accused within its time limit or whether the offence are continuing in nature and pass sentence in accordance with law.

26.The Registry is directed to send the order along with papers available before this Court to the Trial Court. The trial Court shall summon the respondent/accused and conduct an enquiry as stated above.

27.This Court appreciates the effective assistance rendered by Mr.G. Hariharan, Amicus Curie and he is entitled for payment from Legal Service Authority, High court, Chennai , as per the rules.

30.07.2019

Index:Yes/No
Web:Yes/No
Speaking/Non Speaking
jrs

To:

1. The Insurance Inspector, ESI Corporation,
   No.134, Sterling Road,Chennai 34

2. The learned Metropolitan Magistrate No.II, Egmore, Chennai
3. The Public Prosecutor, High Court, Madras.

A.D.JAGADISH CHANDIRA, J.

jrs

Crl.A.Nos.572 , 573, 574, 575, 576
and 577 of 2010

30.07.2019