Jose

IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL UNDER E.S.I. NO.4 OF 2009

The Regional Director,
Regional Office,
Employees State Insurance Corp.
46, Defence Colony,
Porvorim Goa. ... Appellant.

Versus

1. M/s Wallace Pharmaceuticals Pvt. Ltd.
3rd floor, Dempo Trade Centre,
Patto Plaza, EDC Complex,
Panaji Goa.
Represented by their Vice President,
Human Resources, Mr. Eurico Noronha.

2. Alcon Construction Pvt. Ltd.,
Sukerkar Mansion,
Afonso de Albuqerque Road,
Panaji, Goa.

[3. M/s United India Water proofing,
G-2, Annapurna Apartments,
Near Gomantak Press,
St. Inez, Panaji, Goa.]

(Appeal stands dismissed against R-3 in view of order dated 14.02.2013)

... Respondents.

Ms. A.A. Agni, Senior Advocate with Ms. Jay Sawaikar, Advocate *for the Appellant.*

Mr. G.K. Sardessai with Ms. S. Bangera, Advocates for *Respondent No.1.*

CORAM: BHARAT P. DESHPANDE, J.
RESERVED ON: 06 October, 2022
PRONOUNCED ON: 15 October, 2022

JUDGMENT:

This appeal was admitted on 18.09.2009 on the following substantial question of law:-

> "*1. Whether the Court could have at the most directed that for the period prior to 20.10.1989 when the default continued, the interest would be restricted to 6 per cent but where the default continued after 20.10.1989, when the interest had been increased to 12% the respondent no. 1 would be liable to pay interest on the amount of contribution remaining in default after 20.10.1989 at the rate of 12% p.a.*"

2. Respondent M/s Wallace Pharmaceuticals Pvt. Ltd. preferred application under Section 75 of Employees' State Insurance Act, 1948 (hereinafter called as "ESI Act") before the learned ESI Court, Panaji, challenging the demand notice. The said application was registered as E.S.I. Case No.5/2000 before Panaji Court. The said application was decided with the following operative order:-

> " *O R D E R*
>
> *a) Application is partly allowed.*
>
> *b) The applicant is held liable to pay to the respondent no.1, the contribution on the amount equivalent to 25% of the total compensation of Rs.45,63,067.65 paid to the respondents no.2 and 3, alongwith corresponding prescribed interest upto the date of payment, within a period of 30 days.*
>
> *c) The respondents no.2 and 3 shall pay to the applicant the said contribution and interest within a period of 30 days, after the same is paid by the applicant to the respondent no.1.*"

3. Respondent thereafter received the demand notice from the appellant dated 08.09.2008 directing the Respondent to pay the total amount of interest payable as on 11.08.2008 calculating the rate of interest at the rate of 6% per annum from 23.02.1988 to 19.10.1989 at the rate of 12% per annum from 20.10.1989 to 31.08.1994, at the rate of 15% per annum from 01.09.1994 to 30.09.2005 and at the rate of 12% per annum from 01.10.2005 to 11.08.2008. The Appellant demanded the interest of such rates on the ground that the provisions under ESI Act and more specifically Section 39(5)(a) was amended from time to time by changing the rate of interest to be paid on the unpaid contribution. It is an admitted fact that the contribution which was ordered to be paid pertains to the period from March, 1984 to September, 1986 and at that time, the prevailing rate of interest was 6% per annum. Admittedly, the rate of interest was enhanced from 6% to 12% with effect from 20.10.1989, 15% from 01.09.1994 and reduced to 12% from 01.10.1995 by virtue of amendment to Section 39(5)(a) of ESI Act.

4. The Respondent accordingly filed an application for clarification of the order passed by ESI Court which was registered as C.M.A. No.141/2008 in E.I.C. No.5/2000 specifically asking clarification in the operative part of the earlier order dated 17.05.2008 with regard to charging of the rate of interest. After hearing both the parties, the learned ESI Court decided the said application vide its order dated 20.04.2009 and the operative part in para 10 reads thus:-

> "*10. The operative part of the order of this Court dated 17.5.2008 in E.I.C. No.5/2000 at the paragraph 22(b) stands modified and shall be read as under:*
>
> "*The applicant is held liable to pay to the respondent no.1 the contribution on the amount equivalent to 25% of the total compensation of Rs.45,63,067.65 paid to the respondents no.2 and 3, alongwith corresponding interest at the rate of 6% per annum upto the date of payment, within a period of 30 days.*"

5. The Appellant being aggrieved by such clarification order thereby charging interest only at 6% per annum on the unpaid amount, preferred the present appeal which was admitted on the substantial question of law as disclosed above.

6. Thus, the question which needs to be answered in the present appeal in other words is whether on the unpaid contribution, the Appellant is entitled to charge interest payable as on 11.08.2008 calculating the rate of interest at the rate of 6% per annum from 23.02.1988 to 19.10.1989 at the rate of 12% per annum from 20.10.1989 to 31.08.1994, at the rate of 15% per annum from 01.09.1994 to 30.09.2005 and at the rate of 12% per annum from 01.10.2005 to 11.08.2008.

7. While deciding the Civil Miscellaneous Application No. 141/2008 in ESI No.5/2000, the learned ESI Court considered the decision passed by this Court in the case of ***Regional Director, ESIC vs. Hotel Suresh***[1]. It is observed by the learned ESI Court that since amendments made to Section 39(5)(a) of ESI Act in connection with change of interest rate are in the form of penal provisions, same cannot be applied to the matter in hand when the default was

1 2006 (III) CLR 534

committed prior to such amendment. Admittedly, the default in making the payment was prior to 1989 when the first amendment came in Section 39(5)(a) of ESI Act by changing interest from 6% to 12%.

8. The learned Senior Counsel Ms. Agni forcefully submitted that the observation in the case of *ESIC vs. Hotel Suresh* (supra) is on different facts and circumstances and that ratio laid down in the said decision will not be applicable to the facts and circumstances of the present matter. She then submitted that in case this Court considers that the observations in the case of *ESIC vs. Hotel Suresh* (supra) is not having a correct view, the option open to this Court is to distinguish or defer with such finding and refer the matter for the Larger Bench. She then fairly submitted that in case this Court considers the view taken by the above decision as correct, then, the petition needs to be rejected. However, according to her, the matter needs to be decided as to whether the interest rate as amended from time to time needs to be applied to the default payment when the default continued during the amended period.

9. She then submitted that in case of ***Goetze (India) Limited vs. Employees' State Insurance Corporation***[2], the Apex Court has observed in para no.9 as under:-

> "*9. As there was delay in making the payment of the contribution the Corporation had issued notice on 29-6-1990 at the first instance and thereafter the order was passed under Section 45-A of the Act on 23-7-1992. The same was challenged before the ESI Court in which an interim stay was granted on 9-10-1992. During the*

2 (2008) 8 SCC 705

> *pendency of the matter there was reverification and the quantum payable by the appellant was worked out. The liability to pay interest is statutory. There is no power of waiver. The question of any compromise or settlement does not really arise. Even otherwise the order of the ESI Court referred to and relied upon by the appellant is of no assistance to the appellant. It only noted statement of the appellant that he had deposited contribution payable. The reference to "no further dues" is obviously relatable to the contribution payable and nothing beyond that.*"

10. The learned Senior Counsel Ms. Agni then placed reliance in ***the case of Regional Director vs. Shaikh Mustafa Kadar & ors.***[3], wherein this Court observed in para 5 as under:-

> "*5. I have carefully considered the submissions of the learned Counsel appearing for the Appellant and I have also gone through the impugned Order as well as the relevant provisions of the said Regulations. On perusal of the Regulations 31 and 31A, Shri Kholkar, learned Counsel, is justified to contend that in case of default in payment of the contribution, the employer is liable to pay interest in terms of Section 31A of the said Regulations. On perusal of the Judgment of the Apex Court in the case of Goetze (India) Limited vs. Employees' State Insurance Corporation (supra), the Apex Court has categorically held that there is no power or waiver for making the payments of such statutory interest. In the present case, by passing the impugned Order, the E.S.I. Court has exceeded its jurisdiction and, inter alia, directed that the Appellant is not entitled to claim the interest. This part of the impugned Order cannot be sustained in view of the Judgment of the Apex Court in the case of Goetze (India) Limited vs. Employees' State Insurance Corporation (supra). The learned E.S.I. Court was, as such, not justified to pass such an Order and direct*

3 2012 (4) Bom.C.R. 15

recovery of only Rs.90,908/- and that the claim of the Appellant stands accordingly satisfied. As such, the impugned Order cannot be sustained and deserves to be quashed and set aside and E.S.I. Case no. 5/2002 be directed to be decided afresh in accordance with law. The substantial question of law is answered accordingly."

11. Per contra, learned Counsel Shri G.K. Sardessai placed reliance on the following judgments:

a. ***Organo Chemicals Industries and another vs. Union of India and Others***[4];

b. ***Roma Henny Security Services Pvt. Ltd. vs. Central Board of Trustees EPF Organisation***[5];

c. ***The Regional Director, ESIC vs. M/s. Hotel Suresh***[6];

d. ***The Regional Director ESIC vs. Oxford University***[7];

e. ***The Regional Director ESIC vs. Oxford University***[8];

f. ***Hotel Oberoi Towers vs. Regional Director ESIC and Ors.***[9];

g. ***Regional Director ESIC and Ors vs. Hotel Oberoi Towers***[10];

h. ***Bombay Gymkhana Ltd vs. Regional Director ESI Corporation***[11];

i. ***Vassudev Madkaikar & Ors. vs. State of Goa & Ors.***[12]; and

4 1979 (11) LLJ 416

5 2013 I LLJ 29 (Del)

6 F.A. No.2284/2005

7 F.A. No.1059/2010 with F.A. No.318/2009 with F.A. No.420/2010 dt.18.11.2010

8 SLP (C) No. 011270/2011 and SLP (C) 005967/2011 dt.11.04.2011

9 C.A.J FA No.1424/2012 and CA 3234/2012 dt.13.08.2013

10 SLP No. 18254 dt. 19.11.2012

11 2022 (2) Bom C.R. 511

12 WP 92/21 (Filing) dt.18.01.2021

j. ***Transport Corporation of India Ltd. through Pradeep Sharma vs. Employees State Insurance – Corporation & 2 Ors.***[13]

12. Learned Counsel Shri Sardessai fairly pointed out that in the case of *Bombay Gymkhana Ltd* (supra), the Single Bench of this Court sitting at the Principal Seat found that the interest as amended from time to time will have to be paid by the defaulter if the default continues. However, he submitted that such view ought not to have been taken when there is earlier decision in the case of *ESIC vs. Hotel Suresh* (supra)of the Hon'ble Single Bench and an appropriate course is to refer the matter to a larger Bench.

13. Thus, he submitted that the question of freezing of interest on the first default has to be considered and not the amendment incorporated in Section 39(5)(a) of ESI Act. He then submitted that Respondent has already paid the amount as per the order of this Court and therefore same could be considered for deciding present issue. Alternatively, he submitted that if this Court is not endorsing the view taken in the case of *Hotel Suresh* (supra), in that case, the matter can be referred to a larger Bench for deciding the issue.

14. CMA No.141/2006 decided by the ESI Court on 20.04.2009 thereby holding that the appellant is entitled to charge interest at the rate of 6% only, is entirely based on the observation in the case of *Hotel Suresh* (supra). Thus, the observations in the said case are required to be dealt with in detail in order to find out whether the same are applicable to the matter in hand.

13 LPA No. 529/2010 dt.29.03.2010

15. It is also necessary to look into another decision of this Court (Single Bench) at the Principal Seat in FA No.1059/2010 decided on 18.11.2010 in the matter of *Regional Director ESIC vs. Oxford University* (supra). The said decision is also based on the observation made in *Hotel Suresh* (supra).

16. The Regional Director ESIC filed appeal in this Court against Hotel Suresh thereby challenging the common judgment and order dated 15.04.2005 passed by the ESIC Court at Bombay in Application (ESI) No.13/1992 and Application (ESI) No.106/1990. Specific facts of that matter are found disclosed from para no.2 onwards. In short, *Hotel Suresh* was found covered for the purpose of ESI Act, 1948 for the period between 01.10.1987 to 30.09.1989. An order for recovery of contribution of ₹40,424/- was issued by ESIC under Section 45-A of the Act of 1948. Hotel Suresh challenged the said order of recovery by filing application under Section 75 of the Act of 1948 before ESI Court vide Application No.13/1992. By a judgment and order passed by the learned ESI Court, it was observed that the demand made by the ESIC was legal and valid. While passing the operative order, the ESI Court directed thus:-

> "*In Application ESI No.13 of 1992 applicant is hereby directed to pay an amount of Rs.40,424 to the ESI Corporation with interest at the rate of 6% per annum from the date of order passed under Section 45A of the ESI Act i.e. 28.3.1991 till the date of filing this application i.e. 14.2.1992.*"

17. On behalf of ESIC, the only contention raised in the appeal before this Court is that the order directing payment of interest at the rate of 6% per annum is contrary to Sub-Section 5(a) of Section 39 of

the Act of 1948. It was contended that the ESI Court has no jurisdiction to fix the rate of interest which is lesser than the rate fixed by the statute. It was claimed that there was no discretion left with the ESI Court to award less interest than what is provided in the statute. On behalf of Hotel Suresh, it was argued that during the relevant period for which demand was made, the rate of interest was 6% per annum, however, amendment was carried out to the statute enhancing the rate of interest to 12% per annum and thus, such enhanced rate cannot be retrospectively applied to the demand for a period prior to the date on which the said Act of 1948 was amended thereby increasing rate of interest to 12% per annum. After considering the above submissions and the amendments carried out to Section 39(5)(a) of ESI Act together with coming into force of such amendment i.e. with effect from 20.10.1989 and observing that the demand made by the ESI for the contribution is for the period prior to 20.10.1989, it was held that such enhanced rate of interest cannot be invoked retrospectively. While observing this, the learned Single Judge of this Court relied upon the case of ***Pratap Narain Singh Deo vs. Srinivas Sabata & Anr.***[14], which was arising out of the provisions of Workmen Compensation Act, 1923 as found in para no.10 of the case of *Hotel Suresh* (supra).

18. The learned Senior Counsel Ms. Agni submitted that the decision in the case of *Pratap Narain Singh Deo* (supra) cannot be made applicable to the matter in connection with ESI Act as contribution which the employer is required to pay under the ESI Act is for the benefit of the employees and if the default continues, it is

14 AIR 1976 SCC 222

the continuing liability of the employer till such contribution is paid. Therefore, the provisions of Workmen Compensation Act are totally different as in that case when any accident or death occurs, the liability stands fixed as on date of the accident and it does not continue further, which is not the case with regard to the provisions of ESI Act. There is substance in the above arguments.

19. In this respect, she submitted that Chapter IV of ESI Act, 1948 deals with contributions. In case a contribution is not paid, it is a continuing liability of the employer/defaulter. In case of ***E.S.I.C. vs. C.C. Santhakumar***[15], it was observed by the Apex Court in para 16 as under:-

> "*Where an order is passed under Section 45A, it is the duty of the employer and not the Corporation to approach the E.S.I. Court. Since no application need be filed by the Corporation after an order is passed under Section 45A, the limitation prescribed under Section 77 does not get attracted. The non-payment of contribution is a continuing cause, which is clear from the fact that the employer is enjoined to pay the interest under Section 39(5)(A), which was introduced by Act 29 of 1989, until the date of its actual payment.*"

20. Now coming back to the case of *Hotel Suresh* (supra) and more specifically para no.2, it has been observed in that case that said Hotel Suresh establishment was found covered for the purpose of ESI Act, 1948 for the period between 01.10.1987 to 30.09.1989. Accordingly, order for recovery of contribution of ₹40,424/- was issued under Section 45-A of the Act of 1948. This order was challenged in the year 1992 vide Application (ESI) No.13/1992.

15 2007 (1) SCC 584

21. The only contention raised on behalf of ESIC in that matter is that the order of the learned ESI Court directing payment of interest at the rate of 6% per annum is contrary to Section 39(5)(a) of the Act as by that time said provision was amended by increasing rate of interest at the rate of 12%. It was not the case of ESI Corporation that till the date when the first amendment was brought on the statute book increasing the rate of interest to 12%, the interest should have been charged at 6% and from the date of the amendment, it should be charged at the rate of 12% since the default continues. Thus, the contention of ESIC of charging amended rate of interest with retrospective effect was negated by this Court in the case of *Hotel Suresh* (supra). There was no argument canvassed either on behalf of ESIC or otherwise that the Corporation is entitled to recover interest at the rate of 6% till it was amended in the year 1989 and thereafter at the rate of 12% on the fact that the default continues.

22. Thus, in the present matter, question which needs to be answered is whether Corporation is lawfully entitled to charge interest at the varying rates in view of the amendments from time to time as default in making payment of contribution continued till the year 2008.

23. The learned Counsel Shri G.K. Sardessai filed an affidavit dated 06.10.2022 together with "Annexure A" wherein it has been stated that ESI Court passed the order dated 17.05.2008 directing the present Respondent to pay a contribution on the amount equivalent to 25% of the total compensation of ₹45,63,067.65 along with corresponding interest at the rate of 6% per annum, upto the date of

payment, within a period of 30 days. This order was then modified by the ESI Court vide its order dated 20.04.2009 thereby clarifying that the interest shall be charged at only 6% per annum as default in paying contribution was in respect of a period from March, 1984 to September, 1986.

24. The Affidavit filed by the Respondent further shows that after the order dated 20.04.2009, total contribution to be paid to ESIC worked out to ₹74,150/-. The rate of interest of 6% on ₹74,150/- works out to ₹90,925/- which is of the period from 23.02.1988 upto 31.07.2008, totalling to ₹1,65,075/-. The Respondent deposited the said amount along with interest with the ESIC vide challan dated 31.07.2008. At "Annexure A" of the affidavit, the letter giving clarifications along with the challan is produced. Thus, it is clear from the said affidavit that the default in making payment continued till 31.07.2008. The contribution was payable in respect of the period from March, 1984 to September, 1986. Thus, practically the amount/contribution was not paid till the year 2008.

25. As held in the case of *E.S.I.C. vs. C.C. Santhakumar* (supra), non-payment of contribution is a continuing cause and therefore, liability to pay such contribution exists on day to day basis unless the contribution is deposited with the Corporation.

26. According to learned Counsel Shri G.K. Sardessai appearing for the Respondent, since the unpaid contribution pertains to the period before Sub-Section 5 came to be introduced in Section 39 of the Act of 1948 and Regulation 31-A authorizing levy of interest at the rate of 6% per annum only for the said period, the demand of interest

over and above 6% by the Corporation is illegal and unacceptable as such levy of interest is in fact a penal provision and therefore, must relate back to the date when the contribution falls due and not thereafter.

27. Chapter IV and more specifically Section 39 of the Act of 1948 deals with contribution payable under the said Act in respect of an employee shall comprise contribution payable by the employer and a contribution payable by the employee and shall be paid to the Corporation. Sub-Section 2 deals with contribution which shall be paid at the rate specified by the Central Government or at such rates as the Corporation may fix in its behalf. Sub-Section 3 deals with the wage period in relation to an employee which shall be the unit in respect of which all contributions shall be payable under the Act. Sub-Section 4 provides that 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.

28. The most important provision for the purpose of deciding present dispute is Section 39(5)(a) which reads thus:-

> " *(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.*"

29. The intention of the Legislature in specifically mentioning the words, "till the date of its actual payment" found in the above provision is very much significant and important.

30. This provision has to be read along with Regulation 31-A of The Employees' State Insurance (General Regulations), 1950, which was introduced by way of amendment with effect from 26.03.1983 and reads thus:-

> " *[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 12 per cent per annum in respect of each day of default or delay in payment of contribution.]*"

31. Here also, the words, "in respect of each day of default or delay in payment of contribution" are again significant and having importance while deciding the issue in question.

32. Section 40 of the Act of 1948 puts the initial burden on the principal employer who shall pay in respect of each employee whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution. Sub-Section 5 of Section 40 again puts the burden on the principal employer who shall bear the expenses of remitting the

contributions to the Corporation. Thus, it is the primary duty of the principal employer to deposit the contributions within time with the Corporation and any default in this respect will have to be considered as violation of such provisions. If the default continues, the Corporation is entitled to charge interest for each day's default or delay in payment of the contribution. Thus, it is a continuing offence or default when the contribution is not paid within time and inspite of demand.

33. Considering above submissions and with utmost respect, at my command, the ratio laid down in the case of *Hotel Suresh* is not applicable to the facts of the present matter as first of all, the Corporation is not praying for interest to be charged at the rate of 12% from the date of first default i.e. from the year 1986. It is their specific case that such interest at the rate of 6% per annum on the defaulted amount is required to be calculated from 23.02.1988 upto 19.10.1989, when amendment came into effect and at the rage of 12% per annum from 20.10.1989 to 31.08.1994 and at the rate of 15% per annum from 01.09.1994 to 30.09.2005 and finally at the rate of 12% per annum from 01.10.2005 to 11.08.2008. Here the last date of 11.08.2008 needs to be modified as the Respondent paid the amount along with interest at the rate of 6% per annum on 31.07.2008. The letter along with the challan is produced along with the affidavit filed by the Respondent in this Court.

34. In the result, the decision passed in the case of *Hotel Suresh* (supra) will not help the Respondent in any manner. Similarly, the learned ESI Court while placing reliance on the case of *Hotel Suresh* (supra), failed to take into consideration the above aspect and

thereby committed the error while rejecting the claim of the Corporation for charging varying interest as the default continued till 2008.

35. In the case of *Oxford University* (supra), this Court in its order dated 18.11.2010 fully relied upon the case of *Hotel Suresh* and rejected the contention of ESIC in connection with the rate of interest which was amended from time to time. As discussed earlier, the case of *Hotel Suresh* (supra) was squarely on the aspect of charging penal interest with retrospective effect and not on varying interest even though the default continued on day to day basis and thus the said decision in the case of Oxford University is also not helpful to decide the present matter.

36. In the case of *Hotel Oberoi Towers* (supra), the question which was raised before this Court was as to whether while passing order in the year 1992 without any connection with the period of contribution for the year 1982 to 1986, the Corporation is entitled to charge interest at the rate of 12% per annum. The observation in para 4 are material which reads thus:-

> "*As far as the rate of interest is concerned, prior to the amendment of 1989, the Corporation was entitled to levy interest at the rate of 6% p.a. The claim in the present matter is for the year 1982 to 1986. At the relevant time, the rate of interest was 6% p.a. Simply because the order has been passed subsequently, that would not entitle the Corporation to claim interest @12% p.a. The learned Single Judge of this Court in a case of Regional Director, E.S.I. Corporation v. Hotel Suresh, MANU/MH/1432/2006:2007 (112) FLR 43 (Bom) has held that the relevant period for levying the interest would be the period for which the claim is due.*"

37. Thus, it is clear that in the case of *Hotel Oberoi Towers* (supra), the order for recovery of contribution was passed in 1992 though for the contribution period of 1982 to 1986 and therefore, it was observed that Corporation will not be entitled to claim interest from 1986 at the rate of 12% per annum though such rate of interest was amended in the year 1989. Accordingly, said decision is again not helpful to decide the matter in hand.

38. The main contention raised by the learned Counsel Shri Sardessai is that the rate of interest freezes once the default is committed and therefore, the rate has to be considered as applicable on the date of first default and not on continuous defaults. The above submissions are in fact contrary to the Act of 1948 and Regulations 1950 and more specifically Regulation 31-A which deals specifically on the interest to be charged on the contribution due but not paid in time. It provides that the employer who fails to pay contribution within the period specified in Regulation 31 shall be liable to pay interest at the rate specified in respect of each day of default or delay in payment of contribution.

39. Regulation 31 deals with time for payment of contribution and reads thus:-

> " [*31. Time for payment of contribution. – An employer who is liable to pay contributions in respect of any employee shall pay those 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 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.]"

40. A plain and simple reding of this Regulation 31 puts burden on the employer to pay contributions in respect of any employee within 15 days of the last day of the calendar month in which the contributions fall due. Therefore, in simple words, the contributions for the month of January shall fall due on 15th February which the employer has to pay. The word, "shall" used in these Regulations as well as in Section 39 of the Act of 1948 shows the intention of the Legislature and the mandate which is put on the employer to deposit such contributions with the Corporation.

41. The object and reasons of the Act of 1948 again need to be considered as the said Act was introduced to provide certain benefits to the employees in case of certain sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. It is therefore a beneficial legislation for the benefit of the employees in case of sickness, maternity, employment injury, etc. The bounden duty put on the employer to pay contribution within time is therefore required to be considered. In default of

making such payment, the intention of Legislature is to charge interest of each day's of continuous default on the employer.

42. Admittedly, in the present case, the initial demand was for the period from March, 1984 to September, 1986 and the Corporation issued notice which was replied by the Respondent vide their letter dated 25.02.1998 thereby denying their liability to pay such contribution. The order passed under Section 45-A was therefore challenged before the ESI Court. Since the contribution remained unpaid and in the meantime, the provisions of Section 39(5)(a) was amended by changing the rate of interest, it is clear that the default continued from the date of demand till the amount was deposited on 31.07.2008. Regulation 31-A therefore comes into picture wherein it provides that the employer shall be liable to pay interest in respect of each day of default till the payment is made. Thus, the liability to pay interest on the unpaid amount of contribution is considered to be a continuing liability of the employer and therefore, such employer who commits default is liable to pay interest in respect of each day's of default of such contribution.

43. In the case of ***Bhagirath Kanoria and others vs. State of M.P.***[16], the Hon'ble Apex Court was dealing with regard to the limitation under Section 468 of Cr.P.C. with regard to the offences punishable under the Provident Fund Act. In para 19, it is held thus:-

> "*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*

16 AIR 1984 SC 1688

> *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 appellant 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.*"

Above observation regarding late payment and its consequences about commission of fresh offence on each day's default are squarely applicable to the matter in hand.

44. In the case of *M/s Hotel Suresh* (supra), the decision in the case of *Pratap Narain Singh Deo* (supra) with regard to the Workmen's Compensation Act, was considered for the purpose of accepting the date of liability. Admittedly, the matter in hand is not in connection with the claim of compensation under Workmen's Compensation Act. In this regard, the Hon'ble Apex Court in the case

of ***Kerala State Electricity Board and another vs. Valsala K. and another***[17], has held as under in para nos.5 and 7:-

> "*5. Our attention has also been drawn to a judgment of the Full Bench of the Kerala High Court in United India Insurance Co. Ltd. v. Alavi 1998 (1) Ker LT 951 (FB) wherein the Full Bench precisely considered the same question and examined both the above noted judgments. It took the view that the injured workmen becomes entitled to get compensation the moment he suffers personal injuries of the types contemplated by the provisions of the Workmen's Compensation Act and it is the amount of compensation payable on the date of the accident and not the amount of compensation payable on account of the amendment made in 1995, which is relevant. The decision of the Full Bench of the Kerala High Court, to the extent it is in accord with the judgment of the larger Bench of this Court in Pratap Singh Narain Singh Deo v. Srinivas Sabata (AIR 1976 SC 222) : 1976 lAB IC 222) (supra) lays down the correct law and we approve it.*
>
> *7. Insofar as these special leave petitions are concerned, we find that the accident took place long time back. Compensation became payable to the workmen, as it is not disputed that the accidents occurred during the course of employment, as per the law prior to the amendment made in 1995. Keeping in view the peculiar facts and circumstances of these cases, pettiness of the amounts involved in each of the cases and the time that has since elapsed, we are not inclined to interfere with the impugned orders, decided on the basis of the 1995 amendment, in exercise of our jurisdiction under Article 136 of the Constitution of India and, therefore, dismiss the special leave petitions, but, after clarifying the law, as noticed above.*"

17 AIR 1999 SC 3502

45. Thus, claim of compensation under Workmen's Compensation Act cannot be termed as continuing claim or offence so as to charge varying interest as amended from time to time. The compensation is payable and due on the date of accident itself and therefore, whatever compensation is payable as on the date of accident is necessarily to be taken into account and not the compensation which is payable at the time of passing such order.

46. The matter in hand clearly goes to show that the contribution was payable from March, 1984 to September, 1986. Thus, as on the date of payment of such contribution which was due, the rate of interest was 6% per annum.

47. Admittedly, Section 39(5)(a) was amended and inserted by Act 29 of 1989 with effect from 20.10.1989 thereby increasing the rate of interest at 12%. Subsequently, with effect from 01.09.1994, the rate of interest was amended to 15% per annum. Finally, with effect from 30.09.2005, the rate of interest was again brought to 12% per annum.

48. In such circumstances and by applying the proposition laid down by the Apex Court in the case of *Goetze (India) Limited* (supra) and *C.C. Santhakumar* (supra), it is clear that there is no power to waiver of interest and the liability to pay interest is statutory. Similarly, non-payment of contribution is a continuing cause till the date of its actual payment. One thing is clear that the Corporation was statutorily entitled to recover interest on the delayed payment or defaulted payment at the rate of 6% per annum from 23.02.1988 upto 19.10.1989.

49. Since, from 20.10.1989 by way of amendment to Section 39(5)a) of ESI Act, the rate of interest was changed to 12% per annum, neither the Corporation nor the Court is entitled to levy interest on the defaulted payment from 20.10.1989 onwards at the rate of 6% per annum as the statute by way of amending the provision cast a duty on the Court and the Corporation to charge interest at the rate of 12% per annum which neither could have been waived nor changed in any circumstances.

50. Similar is the case with regard to rate of interest on the defaulted payment from 01.09.1994 onwards till 30.09.2005 at the rate of 15% per annum, since the statute mandate of charging such interest on the defaulted payment between the above period. Finally, from 01.10.2005 the rate of interest was brought down to 12% per annum and therefore, the Corporation as well as ESI Court was duty bound to award interest on the unpaid/defaulted contribution at the rate of 12% per annum. There was no other option available with the Court or with the Corporation either to waive or to change rate of interest as it is the statutory duty of the defaulter to pay such interest at such rate from time to time in case default continues and till the actual contribution is paid. It was not possible to charge 6% interest from 20.10.1989 onwards on the defaulted payment since such rate of interest was not on the statute book. The rate of interest amended from time to time has to be applied prospectively and from the date when it came on the statute book. There is no provision under the ESI Act either to reduce or to waive rate of interest as tried to be projected in the present matter. In other words, when the rate of interest of 6% per annum was not at all on the statute book from

20.10.1989, so also the rate of interest of 12% from 01.09.1994 due to respective amendments, the Court was not empowered to either waive or reduce such rate of interest to 6% on the premise that the contribution which the employer defaulted is actually of the years 1984 to 1986 as it is well settled that duty to pay such contribution is on the employer and it continues on day to day basis till the actual payment is made. Thus, the rate of interest as on the date of initial default cannot be freezed or arrested as on that date. Such rate of interest if amended, is to be applied from the date when it comes on the statute book if the default continues.

51. In the case of ***Transport Corporation of India Ltd. through Santnu Patra, Manager-Legal vs. Employees State Insurance Corporation and Others***[18], the issue raised before the Supreme Court is with regard to the rate of interest. The Corporation demanded the contribution together with interest initially at the rate of 6% per annum and thereafter from 20.10.1989 i.e. the date when the amendment was carried out in Section 39(5)(a) of Act of 1948, at the rate of 12% per annum upto 31.07.1990. The argument which were advanced on behalf of *Transport Corporation of India Ltd.* (supra) is found in para 7 wherein it was claimed that the Corporation is not entitled to claim interest which was amended from time to time. This point was set at rest by observing in para 10 and 11 as under:-

> "*10. We have given careful consideration to the submissions. There is no dispute that the interest demanded from the appellant is in terms of Regulation 31-A of the said Regulations. In the writ petition filed*

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> *by the appellant before the Gujarat High Court, in letters patent appeal and in this appeal, the appellant has not challenged the validity of Regulation 31-A. It must be noted here that the judgment and order dated 10-7-2006 of the Gujarat High Court affirming the liability of the appellant to pay contribution from 30-3-1975 onwards has attained finality and therefore, the liability of the appellant to pay contribution as demanded cannot be questioned.*
>
> *11. As noted earlier, for the period up to 19-10-1989, interest @ 6% p.a. was demanded as per unamended Regulation 31-A. Only for the arrears of contribution payable after 19-10-1989, interest @ 12% has been claimed. Interest @ 12% is payable as per clause (a) of sub-section 5 of Section 39 of the said Act of 1948 which was brought on the statute book with effect from 20-10-1989. For a period prior to 20-10-1989, interest has been claimed @ 6% p.a. as per unamended Regulation 31-A. Hence, the demand for interest cannot be faulted with in absence of any challenge to Regulation 31-A.*"

52. At the outset, above observation of the Supreme Court gives the *quietus* to the dispute in the present matter as in clear terms it has been observed that the rate of interest has to be charged as provided under Regulation 31-A of the Regulations, 2010, when the contribution remained unpaid.

53. In the case of *Bombay Gymkhana Ltd.* (supra), the above Judgment in the case of *Transport Corporation of India Ltd.* (supra) is already referred in para 38. In para 40, a Single Judge of this Court at the Principal Seat has in fact observed that such proposition in fact supports the contention raised by the Corporation on charging varying rates in accordance with the amended provisions.

54. In view of the above, the other decisions relied upon by Advocate Sardessai for the Respondents need not be gone into as they are not on the proposition which is discussed above.

55. In sum and substance, it is clear from the Act, Rules and Regulations discussed above that the Corporation is entitled statutorily to charge interest on the defaulted amount as per the amended/varying rates of interest from time to time till the entire amount is deposited by the employer as it is continuing default on day to day basis. There is no question of freezing of rate of interest as on the date of first default as tried to be projected.

56. The question of law framed above is answered in affirmative. Accordingly, the following:-

ORDER

i. The appeal stands allowed.

Correction carried out as per order dated 01.12.2022. sd/-

ii. The impugned order dated 20.04.2009 ~~28.04.2009~~ in CMA No.141/2008 in EIC No.5/2000 is hereby quashed and set aside.

iii. The Appellant is entitled to charge interest on the defaulted amount as per the amended provisions from the date when such rate is modified (prospective) till the date of actual payment of contribution by the employer.

iv. The amount deposited by Respondent No.1 shall be adjusted while calculating the interest as allowed above.

v. The proceedings stand disposed of accordingly.

vi. Parties shall bear their own costs.

BHARAT P. DESHPANDE, J.

JOSE FRANCISCO DSOUZA Digitally signed by JOSE FRANCISCO DSOUZA Date: 2022.12.07 17:03:23 +05'30'