

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.1149 OF 2015
WITH
CIVIL APPLICATION NO.3010 OF 2016

Bombay Gymkhana Limited)
Mahatama Gandhi Road,)
Fort, Mumbai - 400 001.) ... Appellant

Vs.

Regional Director, ESI Corporation)
Panchadeep Bhavan, Lower Parel,)
N. M. Joshi Marg, Mumbai - 400 013.) ... Respondent

Mr. S. C. Naidu a/w. Mr. Manoj Gujar, Mr. T. R. Yadav, Ms. Divya Yajurvedi and Mr. Pradeep Paswan i/b. C. R. Naidu & Co. for Appellant.
Mr. Sujeet Kurupkar for Respondent.

CORAM : N. J. JAMADAR, J.

Reserved on : DECEMBER 15, 2021

Pronounced on : FEBRUARY 8, 2022

JUDGMENT :-

1. This appeal under Section 82 of the Employees' State Insurance Act, 1948 (the Act, 1948) is directed against the judgment and award dated 20th August 2015 passed by the learned Judge, Employees Insurance Court, Mumbai in Application (ESI) No. 11 of 2011 whereby the application preferred by the appellant / applicant under Section 75 of the Act, 1948 assailing the demand of interest on the unpaid contribution, came to be dismissed.

2. The background facts leading to this appeal can be stated in brief as under:

- a] The appellant is a 'Club' incorporated and registered under the Indian Companies Act VII of 1913 with the object to promote or manage or assist in promotion or management of

all forms of athletic sports, pass time and recreation. The Regional Director of the Corporation / the respondent came to the conclusion that the applicant / club is a 'factory' within the meaning of Section 2(12) of the Act, 1948 and was liable to be provisionally covered w.e.f. 1st December, 1982. The appellant was allotted Code No. 31-14345-09. Subsequently, the coverage was preponed to 1st August 1972.

- b] The appellant assailed the coverage on the premise that it was not covered by the definition of 'factory' under Section 2(12) of the Act, 1948 by filing Application (ESI) No. 88 of 1983. By a judgment and order dated 29th May 1987, the challenge was negatived by ESI Court. The appellant carried the matter in appeal, being First Appeal No. 479 of 1989, to this Court. In the said First Appeal, initially, by the interim order, stay was granted to the recovery of the contribution as claimed by the Corporation. The respondent challenged the interim order in Letters Patent Appeal No. 6 of 1991. During the pendency of the proceeding, wherein the coverage was assailed, the appellant decided to voluntarily cover all its employees under the Act, 1948 w.e.f. 1st April, 1989.
- c] On 15th March 1989, the respondent raised a demand for the sum of Rs. 14,92,474.40/- towards the contribution for the period from 1st August 1972 to 31st January 1989. Interest at the rate of 6% p.a. was claimed for the delayed payment of contribution. Eventually, on 30th August 2000, the appellant without prejudice to its rights and contentions agreed to deposit the sum of Rs. 14,92,474.40/-. Accordingly, the said sum of Rs.14,92,474.40/- was deposited with the S.B.I., Main Branch, Mumbai.
- d] On 5th March 2011, the respondent served another demand in Form C-18 dated 28th February 2011, to which a statement of computation was annexed. The respondent levied interest on

the contributions payable for the period from 1st August 1972 to 31st March 1989, at varying rates as under:-

Period of unpaid contribution	Rate of Interest
21-09-1972 to 19-10-1989	6% p.a.
19-10-1989 to 31-08-1994	12% p.a.
31-08-1994 to 30-08-2000	15% p.a.

- e] An aggregate demand of Rs.30,65,623/- was made. In response, the appellant questioned the legality of the said demand and also pointed apparent errors in computation. Thereupon the respondent revised the demand of interest to Rs.29,17,104.27/- vide communication dated 23rd March 2011. The appellant assailed the demand of interest on the delayed payment of contribution for the period from 1st August 1972 to 31st March 1989 by preferring Application (ESI) No. 11 of 2011.
- f] The respondent resisted the application by filing written statement. The respondent endeavored to justify the claim for interest at varying rates by placing reliance on the provisions contained in Section 39(5) of the Act, 1948 and Regulation 31A of the E.S.I. (General) Regulations, 1950 (the Regulations, 1950).
- g] The learned Judge recorded the evidence of Sharad Chemburkar (AW.1). After appraisal of the evidence and the documents tendered for his perusal, the learned Judge was persuaded to dismiss the application. It was, *inter alia*, recorded that the demand of interest under the demand letter dated 23rd March 2011 was legal and valid and the appellant was not entitled to a declaration that the said demand of interest in excess of 6% per annum was bad in law.

3. Being aggrieved by and dissatisfied with the impugned judgment and award, the appellant has preferred this appeal.

4. During the pendency of the appeal, the appellant deposited a sum of Rs.16,26,128/- in terms of the order passed by this Court on 11th January 2016. By an order of even date, the appeal came to be admitted on the following questions of law:-

(a) Whether the ESI Corporation was entitled to levy interest over and above 6% for the period from 1st August 1972 to 31st January 1989?

(b) Whether the Corporation can levy different rates of interest, i.e. from the due date to 19th October 1989 @ 6% from 19th October 1989 to 31st August 1994 @ 12% and from 31st August 1994 till date of payment (30-08-1994) @ 15% for each month?

(c) Whether the Corporation can vary the rate of interest once a Show Cause Notice specifying the rate of interest has been issued and after the principal employer has paid contribution as demanded?

(d) Whether the Corporation exercising powers under Regulation 31-A of the ESI Act has exhibited remissness, indifference and casual approach by issuing a notice after 10 years from the date of payment of contribution?

(e) Whether the Corporation has levied interest at two different rates for the same date throughout the period amounts to recovery of interest in excess of the jurisdiction?

5. I have heard Mr. S.C. Naidu, learned counsel for the appellant and Mr. Sunil Kurup, learned counsel for the respondent at length. With the assistance of the learned counsel for the parties, I have also perused the material on record including the impugned demand notice and the order.

6. Mr. Naidu, learned counsel for the appellant, after taking the Court through the chronology of the events, submitted that the challenge in the instant appeal essentially revolves around the rate of interest which the Corporation can levy for the delayed payment of contribution. The core question which, according to Mr. Naidu, comes to the fore is whether the Corporation / respondent is entitled to levy interest at more than 6% per annum from 20th October 1989. It was strenuously submitted that the respondent / Corporation is, in law, not entitled to charge the interest at varying rates i.e. 6% p.a. upto 19th October 1989, at the rate of 12% p.a. from 20th October 1989 to 31st August 1994 and at the rate of 15% p.a. from 1st September 1994 to 30th September 2005 and 12% p.a. from 1st October 2005 till the date of payment i.e. 30th August 2020. Since the respondent had issued a show case notice specifying the rate of interest for the delayed payment, the liability to pay the interest stood crystallized and, thus, the respondent could not have claimed rate of interest at a higher rate consequent to change of rate of interest in the provisions authorizing levy of interest.

7. Mr. Naidu, further submitted that the question is no longer *res integra* and covered by three judgments of this Court, in the cases of **Regional Director, Employees State Insurance Corporation Vs. Hotel Suresh¹; Hotel Oberoi Towers Vs. Regional Director, ESIC and Others²; and The Regional Director, Employees Insurance Corporation Vs. Oxford University Press³.**

8. *Per contra*, Mr. Kurup, learned counsel for the respondent supported the impugned judgment. It was urged that the learned Judge committed no error in dismissing the application as it is well recognized that there is no jurisdiction to levy interest at the rate less than the prescribed one. Since the appellant had not paid the due contribution till

1 2007 I LLJ 673

2 2013 II CLR 258

3 F.A.Nos.1059 of 2010 with 318 of 2009 and 420 of 2010 Dt.18-11-2010

30th August 2000, the Corporation was justified in claiming interest at the applicable rate for the different periods of time. Thus, the appeal is devoid of substance, submitted Mr. Kurup.

9. In the backdrop of the aforesaid submissions, the pivotal issue around which the questions of law framed by this Court (extracted above) revolve, is the justifiability of levy of interest over and above 6% on the unpaid contribution, claimed by the respondent consequent to the change in the charging provisions. Two facts, which are uncontroverted, deserve to be noted to explore a legitimate answer to the aforesaid question. First, a demand of Rs.14,92,474.40/- was raised by the respondent No.1 on 15th March 1989 along with interest thereon at the rate of 6% per annum. There is no controversy over the fact that the said amount of Rs.14,92,474.40/-, which constituted the principal unpaid contribution, was deposited by the appellant on 30th August 2000, albeit, without prejudice to its rights and contentions. Second, pursuant to the order of this Court dated 11th June 2016, the appellant deposited a sum of Rs.16,26,128/-, which according to the appellant, constitutes the entire interest component on the unpaid amount of contribution for the entire period for which the contribution remained unpaid, at the rate of 6% per annum. The appellant, thus, asserts that now the appellant does not owe any amount even towards interest.

10. With the aforesaid clarity on facts, before adverting to consider the core question of justifiability of charge of interest on the unpaid contribution, at varying rates, it may be apposite to note the governing provisions of the Act, 1948 and the Regulations, 1950. Section 38 of the Act declares that subject to the provisions of the Act, 1948, all the employees in factories, or establishments to which the said Act applies shall be insured in the manner provided by the said Act. Section 39 mandates payment of contribution at the rate prescribed by the Central Government. Sub-section (5) of Section 39, which bears upon the controversy at hand, came to be introduced by Act No.29 of 1989 with

effect from 20th October 1989. It reads as under:-

“39. Contributions.-

* * * * *

(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 45C to section 45-I.

Explanation.- In this sub-section, “scheduled bank” means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934).”

11. With the incorporation of sub-section (5), the employer was made liable to pay simple interest at the rate of 12% per annum or at such higher rate, as may be specified in the Regulations, till the date of its actual payment, if the employer committed default in payment of the contribution on the date on which such contribution became due. The proviso to clause (a) of sub-section (5), however, sought to put an upper ceiling on the rate of interest by providing that the higher interest specified in the Regulations shall not exceed the lending rate of interest charged by any scheduled bank. Evidently, before sub-section (5) came to be inserted in the Act 1948, the interest which was required to be paid on the contribution, which had fallen due and remained unpaid, was governed by the Regulations framed under the Act 1948.

12. Section 97 empowered the Corporation to make Regulations not inconsistent with the provisions of the Act 1948 and the Rules made thereunder, for the administration of the affairs of the Corporation and for carrying into effect the provisions of the said Act. Sub-section (2) of Section 97 empowered the Corporation to make regulations, *inter alia*,

in respect of the levy of interest on the contribution due but not paid. Before the Amending Act 29 of 1989, clause (iii-a) of sub-section (2) of Section 97 read as under:-

“(iii-a) the levy of interest at a rate not exceeding six per cent per annum on contributions due but not paid;”

The said clause was introduced by Act No.44 of 1966 with effect from 28th January 1968.

13. Subsequent to the amendment, incorporated by Amending Act 29 of 1989, clause (iii-a) reads as under:-

“(iii-a) the rate of interest higher than twelve per cent on delayed payment of contributions.”

14. It would be contextually relevant to note that Regulation 31A, framed by the Corporation in exercise of the power under Section 97(2) of the Act, 1948, initially provided as under:-

“31A. Interest of contribution due but not paid in time.- *An employer who fails to pay contributions within the periods specified in Regulation 31 shall be liable to pay interest at the rate of 6 per cent per annum in respect of each day of default or delay in payment of contributions :*

Provided that where the contribution is paid by affixing the contribution stamps, the employer shall be deemed to have not paid the contributions in time if he fails to submit the contribution cards within the time prescribed under Regulation 26.”

15. Subsequent to the amendment, introduced by the Amending Act 28 of 1989, Regulation 31A came to be substituted as under:-

“31A. Interest of contribution due, but not paid in time.- *An employer who fails to pay contributions within the periods specified in regulation 31 shall be liable to pay simple interest at the rate of fifteen per cent per annum in respect of each day of default or delay in payment of contribution.”*

16. It is imperative to note that with effect from 1st October 2005, the rate of interest came to be substituted to 12% instead of 15% p.a.

17. The Corporation has professed to levy interest at the rate of 6% per annum upto 19th October 1989; 12% per annum from 20th October 1989 to 31st August 1994; 15% per annum from 1st September 1994 to 30th September 2005; and again 12% per annum with effect from 1st October 2005, in conformity with the aforesaid changes in the charging provisions under Section 39(5) of the Act 1948 and Regulation 31A of the Regulations 1950, as they governed the varying periods of time. *Whether the Corporation is lawfully entitled to charge interest at the varying rates*, is the moot question.

18. Mr. Naidu, the learned counsel for the appellant, strenuously submitted that since the unpaid contribution pertained to a period before sub-section (5) came to be introduced in Section 39 of the Act, 1948 and Regulation 31A authorized levy of interest @ of 6% per annum only for the said period, the demand of interest over and above 6% was wholly unsustainable. As indicated above, it was urged, with a degree of vehemence, that the issue has been set at rest by three decisions of this Court and yet the Corporation resorted to the device of charging interest at higher rates. The learned Judge also committed a grave error in law in dismissing the application of the appellant despite the authoritative pronouncements having been brought to the notice of the learned Judge, submitted Mr. Naidu.

19. The linchpin of aforesaid submission was the decision of this Court in the case of **Hotel Suresh** (*supra*). Since, the judgment in the case of **Hotel Suresh** (*supra*) has been followed in the subsequent judgments in the cases of **Hotel Oberoi Towers** (*supra*) and **Oxford University Press** (*supra*), it may be appropriate to note the factual backdrop of **Hotel Suresh** so as to properly appreciate the ratio therein.

20. In **Hotel Suresh**, the establishment of the respondent was found covered for the purposes of the Act, 1948 for the period between October 1, 1987 and September 30, 1989. Thus, an order for recovery of

contribution of Rs.40,424/- was issued under Section 45-A of the Act, 1948. The respondent questioned the recovery by filing an application under Section 75 of the Act, 1948. The learned Judge negatived the challenge and directed the respondent to pay the said amount to the Corporation / appellant with interest at the rate of 6% per annum. The appellant / Corporation assailed the said direction of the learned Judge on the count that in view of sub-section (5)(a) of Section 39 of the Act, 1948, the respondent ought to have been directed to pay interest at the rate of 12% per annum instead of 6% per annum.

21. The learned Single Judge, after noting that sub-section (5)(a) of Section 39 was brought on the statute book by the Amendment Act, 1989 with effect from 20th October 1989, and the contribution in question was due for the period prior to October 20, 1989, framed and determined the following question:-

"Whether in case of a demand under Section 45-A of the Act 1948, which relates to a period prior to October 20, 1989, interest at the rate of 12% per annum can be ordered to be paid on the basis of the amended provision, which has come into force on October 20, 1989?"

22. Placing reliance on a four-Judge Bench decision of the Supreme Court in the case of **Pratap Narain Singh Deo Vs. Srinivas Sabata**⁴, wherein the apex Court had held that the benefit of the amended provision contained in Sections 4 and 4A of the Workmen's Compensation Act, 1923 cannot be given to a claim arising out of an accident which has occurred prior to the date on which the amendment came into force, learned Single Judge answered the aforesaid question in the negative.

23. The observations in para No.12 are material and, hence, extracted below:-

"12. In the present case the demand for compensation by the Appellant relates to a period prior to October 20, 1989. At that

time the Employees State Insurance (Amendment) Act, 1989 had not come into force. If the submission made by Shri Mehta appearing for the Appellant is accepted, interest at the rate of 12% per annum will be payable on the contribution payable by the Respondent. When the default was committed by the Respondent, the law provided for payment of interest at the rate of 6% per annum on the outstanding amount. On the outstanding amount for the period prior to October 20, 1989, the Respondent cannot be penalised by directing him to pay interest at the rate of 12% per annum. The amended provision will apply in a case in which default is for a period after October 20, 1989. Therefore, no fault can be found with the order passed by the learned Trial Judge of directing payment of interest at the rate of 6% per annum which was the rate provided prior to October 20, 1989. The Trial Court had no discretion to award interest at the rate which is more than the rate prescribed by the statute at the relevant time. Therefore, the Trial Court has applied the prevailing rate of interest as on the date of the default. I do not agree with the view taken by the learned Single Judge of Karnataka High Court that from the date on which the amendment came into force, interest at the rate of 12% per annum will be payable on contribution amount payable in respect of a period which is prior to October 20, 1989. Retrospective effect cannot be given to a penal provision of payment of interest.”

24. Mr. Naidu, learned counsel for the appellant strenuously submitted that the aforesaid pronouncement is on all four with the facts of the case at hand. Like **Hotel Suresh**, in the instant case also, the respondent claimed contribution for the period from 1st of August, 1972 to 31st of January, 1989 i.e., before sub-section (5)(a) of Section 39 of the Act, 1948 came to be introduced by way of amendment. Since this Court has categorically ruled that the amended provision cannot be made applicable to the unpaid dues for the period prior to the amendment and retrospective effect cannot be given to a penal provision of payment of interest, the demand of interest over and above 6% per annum is legally infirm.

25. In the case of **Regional Director, Employees State Insurance Corporation Vs. Oxford University Press**⁵, another learned Single

5 F.A. No.1059 of 2010 and connected matters, decided on 18th November 2010.

Judge of this Court negated the claim for demand of interest at a higher rate than 6% per annum following the decision in the case of **Hotel Suresh** (*supra*).

26. In **Hotel Oberoi Towers** (*supra*), the claim was for the period from 1982 to 1986. The Corporation claimed interest @12% per annum. This Court, following **Hotel Suresh**, held that prior to the Amendment Act, 1989, the Corporation was entitled to levy interest at the rate of 6% per annum. Simply because the order has been passed subsequently, the Corporation would not be entitled to claim interest at the rate of 12% per annum on the contribution which remained unpaid for the years from 1982 to 1986.

27. Mr. Naidu would urge that this Court has consistently ruled against retrospective application of the amended provision enhancing the rate at which interest can be levied and collected by the Corporation. Therefore, the learned Judge was not at all justified in sustaining the claim of the respondent Corporation at a higher rate of interest.

28. I have given my anxious consideration to the aforesaid submissions. Undoubtedly, in the case of **Hotel Suresh** (*supra*) and the decisions which follow **Hotel Suresh**, this Court has held that the Corporation would not be entitled to claim interest at the enhanced rate prescribed by Amendment Act 29 of 1989 with effect from 20th October 1989 in respect of the contributions, which remained due for the period pre-amendment.

29. As indicated above, in the decision in the case of **Hotel Suresh**, this Court mainly relied upon the judgment of the Supreme Court in the case of **Pratap Narain Singh Deo** (*supra*). It is imperative to note that in the case of **Pratap Narain Singh Deo**, the question of liability essentially turned upon the date on which the employer becomes liable to pay compensation to an employee who suffered death or disablement

in an accident arising in the course of and out of employment. The liability to pay compensation was held to have arisen on the very date of the accident. On this premise, it was ruled that the employee would not be entitled to the benefit of the amended provision as the liability to pay compensation arose on the date of the accident.

30. With a lot of respect at my command to the views recorded in the case of **Hotel Suresh** (*supra*) and the succeeding judgments, I am afraid to concur with the said view as the essential aspect of the nature of the liability where the contribution remains unpaid has not been adequately addressed. As noted above, Regulation 31A, before sub-section (5) came to be introduced in Section 39 of the Act 1948, provided that an employer who fails to pay contribution within the period specified in Regulation 31A shall be liable to pay interest at the rate of 6% per annum in respect of each day of default or delay in payment of contribution. Sub-section (5)(a) of Section 39 introduced by the Act No.29 of 1989 gave a statutory mandate to charge interest at the rate of 12% per annum or at such higher rate as may be specified in the Regulations till the date of its actual payment. Regulation 31A, post the amendment, again provided that the employer shall be liable to pay simple interest at the rate of 12% per annum in respect of each day of default or delay in payment of contribution.

31. The liability to pay interest on the unpaid amount of contribution is evidently of a continuing nature. An employer who commits default in payment of contribution is liable to pay interest in respect of each day of default or delay in payment of contribution. Undisputably, the default in payment of contribution, in the case at hand, is for the period before 20th October 1989. Undoubtedly, for the said period of default, the Corporation was entitled, under the then governing Regulation 31A, to charge interest at the rate of 6% per annum. This does not, however, necessarily imply that the liability to pay interest on the said amount of unpaid contribution is freezed in the point of time of default *qua* the rate

of interest. The non-payment of contribution under Section 38 of the Act, 1948 is a continuing cause. The liability to pay interest on unpaid contribution subsists and continues each passing day.

32. A profitable reference, in this context, can be made to **ESI Corporation Vs. C. C. Santhakumar**⁶, wherein the nature of the liability was expounded as under:-

“16. 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.

(emphasis supplied)”

33. It is a well recognized principle of interpretation that a statute dealing with substantive rights is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective effect. In contrast, a statute dealing with matters of procedure or evidence or the one which is declaratory in nature is ordinarily construed to have retrospective operation, unless there is a clear indication to the contrary. An amending Act is also construed on the aforesaid touchstone. Thus, an amendment which affects the substantive rights will ordinarily take effect only from the date it was brought into force and will have no application to prior transactions, in the absence of an express provision or implication to the contrary.

34. It is trite that the rule against retrospective construction is not applicable to a statute merely because a part of the requisites of its action is drawn from a time antecedent to its passing. It is more so, where the default which entails enhanced liability is a continuing default and not a default once and for all. A continuing default can be dealt with under the

amended provisions, if it continues when the Amending Act comes into force, although the default was committed when the old regime of law was in force.

35. A profitable reference in this context can be made to a three-Judge bench decision of the Supreme Court in the case of **Maya Rani Punj Vs. Commissioner of Income Tax, Delhi**⁷. In the said case, there was default in filing return of income within the stipulated period. The assessee filed the return beyond seven months of the due date i.e., 3rd of May, 1962. With effect from April 1, 1962, the Income Tax Act, 1961 had come into force. Under Section 28 of the 1922 Act (Old), the assessee was liable to pay penalty not exceeding one and half time of amount of income tax and super tax. Under the 1961 Act (New), the assessee was liable to pay penalty equal to 2% of the assessed tax for every month during which the default continued.

36. The Supreme Court considered the question as to whether the default of non-filing of the return within the time stipulated by law is a continuing default. Repelling the contention that the default pertained to a period before the Act, 1961 (New) came into force, the Supreme Court held that the imposition of penalty was not confined to the first default but was with reference to the continued default. The observations of the Supreme Court in paragraphs 17 to 19 are instructive and hence extracted below:-

"17. In Words & Phrases, Permanent Edition, under the head 'Continuing Offence', instances have been given which indicate that as long as the default continues the offence is deemed to repeat and, therefore, it is taken as a continuing offence. As has been appropriately indicated in Corpus Juris Secundum, Vol. 85, p. 1027, accrual of penalty depends upon the terms of the statute imposing it and in view of the language used in section 271(1)(a) of the 1961 Act, the position is beyond dispute that the Legislature intended to deem the non-filing of the return to be a continuing default - the wrong for which penalty is to be visited, commences from the date of default and continues month after month until compliance is made and the default comes to an end. The rule of de die in diem is applicable not on daily but on monthly basis.

18. *In State v. A. H. Bhiwandiwalla, A.I.R. 1955 Bombay 161, (a decision referred to in Suresh Seth's case), Gajendragadkar, J. (as he then was), after quoting the observations of Beaumont, C.J. in an earlier Full Bench decision of that Court observed:*

Even so, this expression has acquired a well-recognised meaning in criminal law. If an act committed by an accused person constitutes an offence and if that act continues 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 we may have offences which can be committed from day to day and it is offences falling in this latter category that are described as continuing offences.

19. *The imposition of penalty not confined to the first default but with reference to the continued default is obviously on the footing that non-compliance with the obligation of making a return is an infraction as long as the default continued. Without sanction of law no penalty is imposable with reference to the defaulting conduct. The position that penalty is imposable not only for the first default but as long as the default continues and such penalty is to be calculated as a prescribed rate on monthly basis is indicative of the legislative intention in unmistakable terms that as long as the assessee does not comply with the requirements of law he continues to be guilty of the infraction and exposes himself to the penalty provided by law.*

(emphasis supplied)"

37. In view of the aforesaid exposition of law, I find it rather difficult to accede to the submission that the rate of interest to be charged on the amount of contribution, which remained unpaid, has reference to the point of time of default only. Since the liability to pay the contribution under Section 38 of the Act, 1948 is in the nature of a continuing liability and default in making such contribution is at the pain of payment of interest for each day of default or delay, in my considered view, the rate at which the interest is to be charged cannot be freezed to the period of default.

38. Mr. Naidu attempted to salvage the position by placing reliance on a recent judgement of the Supreme Court in the case of **Transport Corporation of India Vs. ESI Corporation and others**⁸. In the said

case, the notice was issued to the appellant establishment under the unamended Regulation 31A of the Regulations 1950 on 6th of April 1990, under which, interest at the rate of 6% per annum was payable on the overdue amount. Another notice dated 16th July 1990 was issued by the Corporation demanding interest at the rate of 12% per annum from 20th October 1989 upto 31st July 1990. When the charge of interest at the varying rates was sought to be assailed, the Supreme Court did not find merit therein and, in fact, upheld the levy of interest at varying rates consequent to the amendment.

39. The observations in para No.10 are material and hence extracted below:-

“10. As noted earlier, for the period up to 19 th October 1989, interest at the rate of 6% per annum was demanded as per unamended Regulation 31-A. Only for the arrears of contribution payable after 19 th of October 1989, interest at the rate of 12% has been claimed. Interest at the rate of 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 20th October 1989. For a period prior to 20 th October 1989, interest has been claimed at the rate of 6% per annum as per unamended Regulation 31-A. Hence, the demand for interest cannot be faulted with in absence of any challenge to the Regulation 31-A.

(emphasis supplied)”

40. The aforesaid pronouncement is of no assistance in advancing the cause of submission on behalf of the appellant. On the contrary, if properly construed, it supports the stand of the respondent that interest on overdue amount can be charged at the varying rates in accordance with the amended provisions. This judgment of the Supreme Court, in a sense, takes a view different from the one recorded by this Court in the case of **Hotel Suresh** and judgments which follow the said line of decision that interest over and above 6% cannot be charged for the period before 20th October 1989 for which contribution remained unpaid.

41. For the foregoing reasons, I am persuaded to answer questions (a)

and (b), extracted above, in the affirmative, and (e), in the negative.

Question Nos.(c) and (d)

42. Mr. Naidu, learned counsel for the appellant opened another front by canvassing a submission that once the respondent made a demand specifying the particular rate of interest (i.e. 6% p.a.), it was not open to the respondent to again seek interest at a higher rate, especially after the appellant paid the contribution, as demanded.

43. In the notice dated 15th March 1989, before the Amendment Act 29 of 1989 came into force, the respondent had demanded interest at the rate of 6% per annum by resorting to the provisions contained in Regulation 31A of the Regulations, 1950. There is not much controversy over the fact that the unpaid contribution of Rs.14,92,474.40/-, as demanded under the said notice dated 15th March 1989, was paid by the appellant on 30th August 2000, albeit without prejudice to the rights and contentions of the appellant. In this backdrop, a submission was sought to be advanced that the liability to pay interest at the rate of 6% per annum stood crystallized as of 15th of March, 1989. And, thus, the mere fact that the contribution for the period from 1st August 1972 to 31st January 1989 remained unpaid till 30th August 2000 would not entitle the Corporation to claim interest at the enhanced rate.

44. Though the submission appears attractive at the first blush, yet, on a close scrutiny, it crumbles traceless. Under communication dated 15th March 1989, the appellant was put to notice that in the event of failure to pay dues or offer a satisfactory explanation, the appellant would be liable to pay interest at the rate of 6% per annum, as provided under Regulation 31A of the Regulations, 1950. At that point of time, there is no qualm that, the Corporation could not have charged interest beyond 6% per annum. To urge that the liability thus stood crystallized, so far as the rate at which interest was to be paid on the delayed payment of

contribution, is to ignore the nature of the liability to pay interest. We have seen that the liability to pay interest is a continuing liability and is incurred each day of default. In this view of the matter, the endeavour on the part of the appellant to bind the Corporation to the rate of interest specified in the notice dated 15th March 1989 cannot be countenanced.

45. Mr. Naidu then urged that the demand of interest by notice dated 5th March 2011, despite the payment of the contribution on 30th August 2000, suffers from the vice of unreasonable delay and laches. Question (d), extracted above, revolves around this aspect of delay of more than ten years in issuing notice claiming interest component on the unpaid contribution.

46. Again, the submission appears alluring instinctively. However, a deeper scrutiny renders the submission unworthy of acceptance. In the case of **C. C. Santhakumar** (*supra*), the Supreme Court, after an exhaustive analysis of the provisions contained in the Act 1948, ruled in clear and explicit terms that the right of the Corporation to recover the due amount by coercive process is not restricted by any limitation nor could the government by recourse to the rule-making power prescribe a period in teeth of Section 68, which empowers the Corporation to resort to coercive process, to recover the contribution from the employer as if it were an arrear of land revenue and the said right is not restricted by any limitation. Repelling the contention on behalf of the employers that the proviso to Section 77(1-A)(b) of the Act, 1948 prescribed a limitation of five years for the claim to be made by the Corporation, the Supreme Court enunciated the law as under:-

“29. Section 77 of the Act relates to commencement of proceedings before the E.S.I. Court. The proviso to sub-Section 77 of the Act cannot independently give any meaning without reference to the main provision, namely, Section 77 of the Act. Therefore, the proviso to Clause (b) of Section 77(1-A) of the Act, fixing the period of five years for the claim made by the Corporation, will apply only in respect of claim made by the Corporation before the E.S.I. Court and to no other

proceedings.

(emphasis supplied)”

47. The next question that wrenches to the fore is whether a concept of reasonable time can be read into the provisions even though no period of limitation is specifically provided under the Act, 1948 within which the Corporation can resort to the recovery of the amount of interest? It is a well recognized principle of law that even when no period of limitation is prescribed, the authority vested with the power is expected to exercise it within a reasonable time. A reasonable time, in turn, is a relative concept. By its very nature, it depends on the nature of action, the circumstances in which the authority is proposed to be exercised and the facts of the case. There can be no *strait jacket* formula as to what could be a reasonable time.

48. It is pertinent to note that the demand of interest on the delayed payment of contribution is not discretionary. As indicated above, under sub-section (5) of Section 39 of the Act 1948 and Regulation 31A of the Regulations 1950, it is the liability of the employer to pay interest on the unpaid contribution till the date of its actual payment. It is also noticed that the liability is of a continuing nature. No element of discretion is involved. In contrast to this, under Section 85-B of the Act 1948, the Corporation is vested with discretion to recover damages where an employer fails to pay the due amount in respect of any contribution or any other amount payable under the Act 1948. In a given case, where the Corporation professes to recover damages and it is shown that the action is commenced after several years of the default, the element of reasonable time may become significant. However, where there is a statutory liability to be discharged by the employer and the liability continues till the date of payment and no element of discretion is left with the Corporation in enforcing the said liability, in my view, the concept of reasonable time in seeking the recovery cannot be resorted to.

49. It is true that the demand of interest after about ten years of the payment of contribution by the appellant indicates indolence on the part of the respondent Corporation. However, having regard to the fact that such interest component is to form a part of the “employees’ state insurance fund” and the purposes for which the fund is to be expended, the inadvertence and remissness, on the part of the respondent, cannot be pressed into service to absolve the appellant from the liability to pay interest on the delayed contribution. For the foregoing reasons, I am inclined to answer question No.(c) in the affirmative and question No.(d) in the negative.

50. The conspectus of aforesaid discussion and answers to question Nos.(a) to (e) is that the appeal deserves to be dismissed. However, it is clarified that the appellant shall be entitled to point out the errors in the computation of the interest at the governing rates for the varying periods. Hence, the following order:-

: O R D E R :

- (i) The appeal stands dismissed.
- (ii) The appellant-employer is, however, entitled to point out the errors, if any, in the computation of the amount of interest at the governing rates for the varying period. Subject to such clerical or arithmetical correction in the amount of interest and deduction of the sum of Rs.16,26,128/- paid by the appellant, the balance amount of interest shall be paid by the appellant within a period of six weeks from today. For the said period of six weeks, the respondent Corporation shall not take any coercive action.
- (iii) In the circumstances, the parties shall bear their respective costs.

51. In view of the dismissal of the appeal, nothing survives in Civil Application No.3010 of 2016 and the same is disposed of accordingly.

(N. J. JAMADAR, J.)