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CMA.No.711 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 28.11.2023

Pronounced on: 30.11.2023

CORAM: JUSTICE N.SESHASAYEE

CMA.No.711 of 2022

The Regional Director,
Employees State Insurance Corporation,
143, Sterling Road, Nungambakkam,
Chennai – 600 034.

... Appellant

Vs

1.M/s.Habib Exports
Represented by its Proprietor Mr.Abdul Razack
81/1, S.R.P.Kovil Street,
Akaram, Chennai – 600 032.

2.Mr.SH.H.Jamuludhin

...Respondents

Prayer: Civil Miscellaneous Appeal filed under Section 82(2) of the ESI Act, against the order of the Employees Insurance Court(Principal Labour Court) Chennai dated 28-09-2021 made in EIOP.No.35/2007.

For Appellant	: M/s.G.Narmadha for Mr.G.Bharadwaj
For R1	: Mr.Syed Jaffer Ahmed
For R2	: Given up



CMA.No.711 of 2022

WEB COPY

JUDGMENT

The ESI Corporation challenges an order of the ESI Court, dated 28.09.2021, passed in an original petition preferred by the first respondent - employer under Section 75 of the ESI Act by which the ESI Court has set at naught the proceedings of the Corporation, dated 02.02.2007, passed under Sec. 45A ESI Act (henceforth would be referred to as the Act).

2. The brief statement on facts necessary for appreciating the rival submissions is as below:

(a)The first respondent is a partnership firm, and it came into existence in 1989. The size of its business, according to the Corporation automatically brings it within the net of the ESI Act. However, the first respondent did not volunteer to register itself under the Act, and waited till the provisional demand was made by the Corporation on 21.06.1993. This demand was to take effect from 01.03.1995, and ever since the first respondent has been making the contribution that it has collected from its employees promptly.



CMA.No.711 of 2022

WEB COPY

(b) While so, on 13.07.1995, the ESI Corporation caused an inspection and found that the first respondent would be liable to contribute from 01.10.1991. Accordingly, it issued a notice dated 26.04.2001, and followed it with an enquiry. The first respondent participated in the enquiry which took place between 2002 and 2007 and finally vide its proceedings dated 02.02.2007 passed under Section 45A, the Corporation required the first respondent to pay Rs.1,56,865/-.

(c) Aggrieved by the same, the first respondent moved the ESI Court with E.S.I.O.P.No.35 of 2007. Vide its order dated 28.09.2021, the ESI Court (Principal Labour Court), Chennai, allowed the petition on the solitary ground that the entire proceedings are bad in view of the second proviso to Section 45A, without indicating that the claim of the Corporation was barred by limitation, and all it states is that the Corporation is not entitled to make the claim as there was delay in determining the compensation.

3.The learned counsel for the Corporation submitted that Section 45A



CMA.No.711 of 2022

enables the Corporation to determine the contribution based on the information available before it. However, Vide amendment to the provision that took effect from 01.06.2010, a proviso was inserted to this, as per which the Corporation shall not pass any order under Section 45A beyond 5 years from the date on which the contribution becomes payable.

4.The learned counsel for the appellant submitted that so far as the present case is concerned, the proceedings under Sec.45A was concluded on 02.02.2007, about 30 months prior to the coming into force of the second proviso to Sec.45A. In other words, some 2 ½ years prior to the insertion of the provision. Arguing further, the learned counsel submitted that the amendment will have only prospective operation and cannot have any retroactive operation to reopen a concluded proceedings. Reliance was placed on *Hindustan Times Ltd., Vs Union of India and others* [(1998) 2 SCC 242], *ESI CORPN. Vs C.C.Santhakumar*[(2007) 1 SCC 584], *Regional Director, Employees State Insurance Corporation Vs Shalimar Hotel and Another* [MANU/MH/2683/2013], *The District Livestock Farm Vs The Regional Director* [W.P(MD)No.173 of 2013], dated 11.02.2019 before the Madurai Bench of the Madras High Court, and *Thirumurugan Matriculation School Vs The Deputy Director*



CMA.No.711 of 2022

[CMA.No.72 of 2022], dated 12.04.2022 before the Madras High Court,
Civil Appeal Nos.3191 to 3194 of 2011 before the Hon'ble Supreme
Court of India.

4.2 What was before the ESI Court was the correctness of what has been
done and concluded under Sec.45A, and not with regard to anything
which is still pending before the Corporation, argued the learned counsel.

5.1 Per contra, the learned counsel for the first respondent submitted that
it is a case which falls not strictly under the second proviso to Sec.45A,
but on the grounds of laches involved in passing the order under the said
Section. It is not in dispute that the Corporation had conducted an
inspection on 13.07.1995. Thereafter, the Corporation literally slept over
the issue for close to six years and on 26.04.2001, it issued show cause
notice under Form-C18 to explain why contribution should not be
demanded from 01.10.1991. The first respondent had responded to the
show cause notice, and had also participated in the enquiry fixed by the
appellant. The enquiry had taken place on 08.03.2002, and then on
18.03.2003 (which finds a mention even in the impugned proceedings of
the Corporation). The Corporation again spends another five years to



CMA.No.711 of 2022

issue a show cause notice intimating about the enquiry to be held on 24.03.2006.

5.2 It is judicially settled in ***ESI Corporation Vs C.C.Santhakumar*** [2007 II LLJ SC 3] that even though no time is stipulated under Section 45A of the Act for the conclusion of the proceedings by the ESI Corporation (prior to the amendment in June 2010) it has to be concluded within a reasonable time. This view is also followed by another learned Single Judge of this Court in ***The Regional Director, Employees State Insurance Corporation Vs Mod Fasions*** (CMA.No.2671 of 2002) dated 12.04.2010 and also in ***Hotel Guru Pvt Ltd., Vs Deputy Director, ESI Corporation*** (CMA.No.3608 of 2012) dated 25.03.2013.

6. So far as the present case is concerned, an inspection was made on 13.07.1995, and the ESI Corporation literally was on sleep-mode till 26.04.2001, and again went into hibernation for the next five years. Set in the context, the notice dated 20.02.2006 was of zero consequence for it was only intended to create a false impression that the proceedings are still pending. It is therefore, not adequate to wipe away the laches which



CMA.No.711 of 2022

the ESI Court has helped itself with in concluding the proceedings under Section 45A. This apart, there is no provision under the ESI Act to make a claim for contribution from an earlier date.

7. In response, the learned counsel for the appellant submitted that in **C.C.Santhakumar** case, the Hon'ble Supreme Court had discussed about the reasonable time within which the statutory power may be exercised by the authorities concerned. In so doing, it referred to the ratio in **Hindustan Times Ltd., Vs Union of India and others** [(1998) 2 SCC 242] wherein, the Hon'ble Supreme Court has underscored that mere laches unaccompanied by irretrievable prejudice to a party will not be adequate to upset anything done by the statutory authority. Here in this case, the employer ought to plead and demonstrate the irretrievable prejudice that has occasioned to it owing to the alleged laches on the part of the Corporation. One of the circumstances where laches may apply was discussed in the **Hindustan Times Ltd., Vs Union of India and others**, such as where the employer had lost the evidence which are required to be produced by passage of time. However, in the present case, the employer did produce his records even in 2002. It is also not its case



CMA.No.711 of 2022

that an opportunity of hearing was denied. That the authority took some time to pronounce the order by itself could not be adequate to invoke the doctrine of laches to the order passed under Section 45A. This apart, in ***Santhakumar*** case, the Hon'ble Supreme Court ultimately proceeded to decide the issue on the facts of the case, and had only required the employer to move the ESI Court.

8. Few facts are required to be made clear. In the case at hand, Section 45-A proceedings commenced with the issuance of notice dated 26.04.2001, and was concluded vide proceedings dated 02.02.2007. However, the five years limitation period for concluding Sec.45A proceedings was inserted through the second proviso to Sec.45A which came into effect from 01.06.2010, after the conclusion of the proceeding, and hence, the employer cannot take advantage of the introduction of limitation to affect a proceeding concluded in 2007. However, as would be seen later, its effect is considered in an entirely different context.

9. The only other aspect is whether Sec.45A proceeding is hit by laches. Here the learned counsel for the respondent relied heavily on the dictum



CMA.No.711 of 2022

in *Santhakumar case* and a couple of other Orders of this Court. In *Santhakumar case*, the issue before the Supreme Court was the permissibility of stretching the limitation period in Explanation (b) to Sec.77(1A) of the ESI Act, in terms of which the Corporation cannot realise any arrears beyond five years from the date of first demand, into a proceeding under Sec.45-A Act (since prior to 01.06.2006 there was no period of limitation prescribed for concluding it), but the Court held it in the negative, on the ground that it will defeat the very objective behind Sec.45A and 45B of the Act. Ultimately, the Supreme Court chose not to apply the rule of laches to the facts before it and chose to decide the issue on a different point.

10.In that case, the Supreme Court relied on an earlier dictum in *Hindustan Times Ltd., Vs UOI & Others* [(1998)2 SCC 242], where the Court was concerned with the power of the Commissioner of Provident Fund to recover damages under Sec.14B of the Provident Fund and Miscellaneous Provisions Act, 1952, and while dealing with the issue, it considered the application of doctrine of laches vis-a-vis the said power of the Commissioner. The Supreme Court proceeded to hold that laches can



CMA.No.711 of 2022

have an application but added a rider that it may be applied only if the employer is shown to have suffered irretrievable prejudice by the delay complained of. In other words, where there is no prejudice to the employer, then mere delay cannot relieve the employer of its statutory obligation.

11. Turning to the facts of this case, vis-a-vis assessment of contribution payable from 01.01.1991, the respondent-employer cannot claim to have suffered any prejudice vis-a-vis the proceedings initiated under Sec.45A of the Act, since he had all the opportunity to defend the notice issued by the Corporation, which he did defend.

12. But there are ancillary issues that relate to the statutory obligation of the employer to pay interest under Sec.39(5) of the Act. And, this statutory liability which arises as a fallout of the employer's failure to pay the contribution does not stop there, but it goes to impact the damages which the ESI Corporation may impose on the employer under Sec.85B. If these consequences are reflected on the facts of the present case, then the employer is required to pay interest from 01.01.1991, the commencing date of default in paying contribution, till 02.02.2007, the



CMA.No.711 of 2022

date of conclusion of Sec.45A proceedings, with a time difference of 16 years, of which about 12 years constitute the time between the date of inspection (13.07.1995), and the date of conclusion of the proceeding. In a proceeding which the Corporation had initiated under Sec.45A of the Act, it had absolute control over the proceedings, and also the opportunity to complete it within a reasonable time. However, the Corporation chose to snail-pace the proceedings with no justifiable reason to back it. The principle of law is too firmly entrenched that where no period of limitation is specified for commencing or concluding an action, it has to be done within a reasonable time. If the facts of this case are tested for justifiability on this plane, it fails, since 12 years for concluding a proceeding under Sec.45A of the Act can hardly be termed reasonable. When the Corporation is seen to be in fault here, why should the employer pay interest for the entire 16 years? Does it not then constitute an irretrievable prejudice to the employer of the *Hindustan Times* dictum variety?

13. Here the learned counsel for the appellant-Corporation submitted that the Hon'ble Supreme Court vide its decision in *Regional Director/Recovery Officer Vs Nitinbhai Vallabhai Panchasara* [2022



CMA.No.711 of 2022

SCC OnLine SC 1992] has held that the liability to pay interest by a defaulter-employer is statutory in character, and hence he cannot be relieved of this liability.

14. In ***Nitinbhai case*** [2022 SCC OnLine 1992], the Hon'ble Supreme did hold that the liability to pay interest is statutory and it cannot be waived or interfered with. However, it needs to be underscored that the Hon'ble Supreme Court has not considered the effect of laches whose application it had earlier approved vide its dictum in ***Santhakumar case and Hindustan times Ltd., case*** referred to supra.

15. At one level, this Court finds that on facts the employer will be prejudiced as regards payment of interest for a period consumed by the unreasonable delay of the Corporation to complete the Sec.45A proceedings from the date of inspection in 1995. At another level, this Court is faced with the dictum of the Hon'ble Supreme Court in ***Nitinbhai case.***

16.1 Should the employer be burdened with additional interest for the period which may constitute unreasonable delay on the part of the ESI



CMA.No.711 of 2022

Corporation to conclude Sec.45A proceedings? The situation is therefore, ideally set for ascertaining if the ratio in *Santhakumar* and *Hindustan Times cases* and the *Nitinbhai case* [2022 SCC OnLine 1992] can coexist.

16.2 This Court is now dealing with a situation which arose before the introduction of limitation period for concluding the Sec.45A proceedings in 2010. There is, therefore, a necessity, nay, a compulsion to read the ratio of *Hindustan Times case* and *Nitinbhai case* conjointly to eliminate an unequal treatment of two defaulters – the employer and the Corporation, leading to inequitable consequences. If equality before law has to be established as between two defaulters – the citizen and the statutory authority – contextually the employer and the Corporation, then the Court is under a duty not to tread along the lane of discrimination to approve the fattening of the statutory liability of the employer due the default of the Corporation. To state it differently, if the liability to pay interest on arrears of contribution is understood as the statutory consequence of an employer's indiscipline to abide by the statute, then it should necessarily be matched by an offsetting factor to deal with the consequence of the indiscipline of the Corporation in working the statute.



CMA.No.711 of 2022

It is emphasized that fairness of a statutory consequence must be understood in terms of the discipline with which the statute is obeyed and/or administered.

16.3 The Constitution's respect for a citizen's right, no matter what its monetary value is, will be in peril if the administrative indiscipline in working the statute is granted an undeserving premium. Here, the rule of laches can work as an equalizer in restricting the time for which interest may be charged to enable downsizing the extent of statutory liability of the employer to match the inexplicable delay of the Corporation in concluding the Sec.45A proceedings. This is achievable if ***Santhakumar & Hindustan Times cases*** and ***Nitinbhai case*** are not read mutually exclusively, but together. If not, then one of the two defaulters would enjoy an unmerited patronage for its default, which is an anathema to the Constitutional promise of dispensing justice evenly and equally.

17. What then would be the right time-frame up to which the laches of the Corporation in concluding the proceedings can be condoned? Here, the legislative changes to the ESI Act, introduced by the insertion of second proviso to Sec.45A in 2010, offer an indication. The Parliament in



CMA.No.711 of 2022

its wisdom, has considered it fit that a five years period would be ideal for the ESI Corporation to conclude the proceedings under Sec.45A.

Therefore, any proceeding initiated after 01.06.2010, on which date the second proviso Sec.45A came into effect, should be concluded on or before the date on which the said five years period expires. This implies that a defaulting employer can be fastened with liability to pay interest at least for five years from the date on which the notice under Sec.45A was issued. That which the Parliament considers as the reasonable period for concluding the Sec.45A proceedings, can be considered as an ideal reference-period for limiting the duration of the statutory liability of the employer to pay interest.

18. Here the facts are slightly different. The delay occurred not only in concluding the Sec.45A proceedings but also in initiating the proceedings under Sec.45A. After the inspection on 13.07.1995, none prevented the Corporation from initiating the Sec.45A proceedings forthwith. But it took five years to issue the notice under Sec.45A, to be precise, on 26.04.2001. Then there is a second phase of the delay which the Corporation has entertained after the conclusion of enquiry on 18.03.2002 for passing the final orders on 02.02.2007. In between,



CMA.No.711 of 2022

sometime in 2006, the Corporation had issued another notice of enquiry, but it is not even reflected in the order passed on 02.02.2007. This notice appears to be an obvious farce. Here the rule of laches can be employed in both the phases. Accordingly, this Court considers that the period from 14.07.1995 till 26.04.2001 (the date on which the Corporation issued the notice under Sec.45A to the employer), and also any period beyond five years from the date of the said notice, are liable to be excluded from computing the interest payable by the respondent-employer herein.

19. The appellant's counsel would now come up with another argument: inasmuch as the interest payable has been reploughed by the employer in its business, it should not be absolved of its liability to pay interest. This argument is heard for too long, and it is premised on the presumption that the employer would have made profits by ploughing back its statutory dues in its business, and that it would be a double enrichment if the employer were to be again relieved of its statutory obligation to pay interest. This contention is spacious unless it is backed by a reality check. The issue at hand however, is not about the statutory obligation of employer to pay interest for its default, but over the additional interest which the employer is required to pay due to the lackadaisical



CMA.No.711 of 2022

administrative approach in concluding the Sec.45A proceedings. This argument necessarily has to fail, more so when it holds the possibility of mulcting an employer with liability for the fault of the Corporation. It is a Constitutional imperative that no citizen is expropriated of his right, nor is exposed to any burden due to the default of the statutory authority. That which the Constitution frowns the Court should not countenance.

20. In conclusion, this appeal is partly allowed, and the Corporation has the authority to realise the arrears of contribution of Rs.1,56,865/- with interest, payable from 26.04.2001 till 25.04.2006. And, this amount will form the basis for imposition of any damages which the Corporation may claim under Sec.85B of the Act. No costs.

30.11.2023

Index : Yes / No

Internet : Yes / No

Speaking order / Non-speaking order
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To:

1.The Presiding Officer
Employees Insurance Court
(Principal Labour Court)
Chennai.



CMA.No.711 of 2022

2.The Section Officer
VR Section
High Court, Madras.



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CMA.No.711 of 2022

N.SESHASAYEE.J.,

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Pre-delivery Judgment in
C.M.A.No.711 of 2022

30.11.2023