

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1441 OF 2024.

M/s. Mondelez India Foods Pvt. Ltd.,]
India Bulls Finance Tower,]
Tower 3, Wing-C,]
Unit 2001-20th Floor,]
Lower Parel, Mumbai – 400 013.] **...Appellant.**

Versus

1. **The Deputy Director,**]
Employees State Insurance Corporation,]
Regional Office, Maharashtra,]
108 Panchdeep Bhavan,]
N. M. Joshi Marg, Lower Parel,]
Mumbai – 400 013.]
2. **The Appellate Authority**]
Employees State Insurance Corporation,]
Regional Office, Maharashtra,]
108 Panchdeep Bhavan,]
N.M. Joshi Marg, Lower Parel,]
Mumbai – 400 013.] **...Respondents.**

*Mr. S. C. Naidu, Ms. Samiksha Kanani, Mr. Abhishek Ingle and Mr. Pradeep Kumar
for Appellant.*
Mr. Shailesh S. Pathak for Respondent.

Coram : Sharmila U. Deshmukh, J.

Reserved on : 24th February, 2025.

Pronounced on : 05th March, 2025.

Judgment :

1. The First Appeal has been preferred under Section 82 of the Employees' State Insurance Act, 1948 [for short, "***ESI Act***"] impugning the judgment dated 11th October, 2023 passed by the Employees' State

Insurance Court, Mumbai in an Application filed under Section 75 read with Section 77 of the ESI Act, challenging the legality and validity of the order dated 11th September, 2019 passed under Section 45AA and order dated 20th May, 2019 passed under Section 45A of the ESI Act, by which the Application came to be dismissed.

2. The facts as discerned from record is that Appellant is a Private Limited Company, which is covered under the provisions of ESI Act. On 22nd October, 2018, show cause notice in Form C-18 (Ad hoc) was received by Appellant from the Employees' State Insurance Corporation proposing to claim contribution amounting to Rs. 20,18,15,174/- for the financial years 2014-2016. The Appellant's Representative attended the hearing and produced the account ledger, bills/vouchers, invoices and bank payment acknowledgment, etc. before Employees' State Insurance Corporation. Appellant made oral as well as written submissions objecting the proposed claim on expenses, which according to Appellant do not fall within the definition of 'wages' under the ESI Act. Considering the voluminous record, which was produced during the hearing, the Employees' State Insurance Corporation constituted a committee of two Social Security Officers on 13th February, 2019 to verify the record. Due to some administrative reason, the earlier committee was replaced with another committee on 19th March, 2019 comprising of three Social Security Officers who

examined the record and submitted its report on 8th May, 2019. Considering the report and the submissions made by the Appellant, the Employees' State Insurance Corporation passed an order under Section 45A of the ESI Act on 20th May, 2019, assessing the contribution of omitted wages under various heads of accounts by holding that the same are in nature of 'wages' as defined under Section 2 (22) of ESI Act and determined compensation of Rs. 74,93,436/- to be recovered from Appellant.

3. The Appellant filed an Appeal against order dated 20th May, 2019 before the Appellate Authority under Section 45AA of the ESI Act. On 11th September, 2019, the Appellate Authority addressed a communication to Appellant contending that Appeal has been received by their office on 24th July, 2019, i.e. after 60 days from the date of receipt of Section 45A order passed on 20th May, 2019 and requested the Appellant to produce the documentary evidence to show that conditions of Appeal are satisfied. The said communication came to be responded by Appellant vide communication dated 25th September, 2019 contending that order was received by Appellant only on 27th May, 2019 and copy of acknowledgment evidencing the receipt of order was produced along with the communication. By communication dated 26th September, 2019, the Appellate Authority informed the Appellant that their Appeal cannot be admitted as according to their

office record, order under Section 45A was received by Appellant on 24th May, 2019 and the Appeal has been filed beyond the period of sixty days.

4. The Appellant approached the Employees' State Insurance Court under Section 75 read with Section 77 of the ESI Act challenging the order dated 20th May, 2019 passed under Section 45A of the ESI Act and to stay the implementation of letter dated 11th September, 2019 issued by the Employees' State Insurance-Corporation. In proceedings before the Employees' State Insurance Court [for short, "**ESI Court**"], an Application was filed below Exhibit-9 by Appellant to direct the Appellate Authority, i.e. ESI-Corporation to produce the proceedings/noting sheets as well as the Inspection Reports, which came to be allowed in view of 'no objection' of Corporation to produce the record by order dated 9th August, 2023. The Opponent instead of producing the Social Security Officer's reports, Visit Notes, Noting Sheets, Observation Sheet, based on which order under Section 45A was passed, produced only the attested copy of the noting sheets of proceedings under Section 45A and under Section 45AA.

5. By impugned judgment dated 11th October, 2023, the ESI Court held that Appeal, which was filed on 24th July, 2019 was not within sixty days and thus, Appeal has been rightly rejected by the learned Appellate Authority. On the aspect of validity of order passed under

Section 45A of the ESI Act, which was challenged *inter alia* on the ground that the contribution has been assessed based on report, without considering the documents produced by Appellant, the ESI Court held that Appellant has neither adduced any oral or documentary evidence to support their contention and there is no iota of evidence to prove that order passed under Section 45A of the ESI Act is invalid or illegal, and dismissed the Application.

6. Mr. Naidu, learned counsel appearing for Appellant would submit that as far as order under Section 45AA is concerned, there was no opportunity of hearing, given to the Appellant and by a cryptic communication of 26th September, 2019, the bar of limitation was applied and the Appeal was rejected. He submits that Appellant had produced evidence in the form of acknowledgment to show that order was received on 27th May, 2019 and therefore, the Appeal which was filed on 24th July, 2019 was within time. He submits that as no opportunity of hearing was given, the necessary facts could not be submitted before the Appellate Authority. As regards the order passed under Section 45A of the ESI Act is concerned, he submits that show cause notice issued in Form C-18 (Ad hoc) proposed contribution of Rs. 20,18,15,174/-. He submits that voluminous documents were thereafter produced and order under Section 45A was passed, which substantially reduced the contribution assessed, however, by taking

into account, the various heads of accounts which did not form part of the show cause notice. He would further submit that order passed under Section 45A was based on report of the committee dated 8th May, 2019, which report was not made available to Appellant. He submits that as order under Section 45A travelled beyond the show cause notice, it was not possible for Appellant to submit an explanation as regards those heads of accounts, which was construed as 'wages'. He would further submit that before the ESI Court, an Application was moved for producing Social Security Officer's report, visit note, observation sheet, etc. Though the Corporation had no objection to produce the said reports, all that was produced was noting sheets, which did not amount to compliance of directions of the Employees' State Insurance Court. He submits that ESI Court without noticing the fact that order under Section 45AA was passed without complying with principles of natural justice and without furnishing the Report dated 8th May, 2019 to the Appellants, based on which the order under Section 45A was passed, had erroneously dismissed the Application by holding that there is no evidence produced by Appellant. He submits that record was more than sufficient to come to conclusion that the basis for order under Section 45A, which was Committee's report dated 8th May, 2019 was not furnished to Appellant, thereby vitiating the order dated 20th May, 2019. He would

also submit that amount assessed under Section 45A was duly recovered by Corporation, and therefore, Appellant is entitled for refund of amount, which was paid at the time of filing the Appeal under **Section 45AA** as well as the amount, which was deposited while filing the Appeal before the ESI Court. In support, he relies upon the following decisions:

UMC Technologies Pvt. Ltd. vs. Food Corporation of India¹
Optical Instrument Company vs. Employees State Insurance Corporation²
Small Gauges Ltd. vs. V. P. Ramaiah³
Nasik Screw Industries vs. Regional Provident Fund Commissioner, Maharashtra and Goa⁴
Johra vs. State of Haryana⁵
Daffodills Pharmaceuticals Ltd. vs. State of Uttar Pradesh⁶
Buldana Urban Co-op. Society Ltd. vs. Dy. Director, ESI Corporation⁷
Raja Harish Chandra Raj Singh vs. Dy. Land Acquisition Officer⁸
M/s. Guruji Infrastructure Pvt. Ltd. vs. The Pimpri Chinchwad Municipal Corporation, Pune⁹
M/s. Garage Kamat vs. Regional Director, ESIC, Bombay¹⁰
SBI General Insurance Company Limited vs. Employees' State Insurance Corporation¹¹

7. *Per contra*, Mr. Pathak, learned counsel appearing for Respondent would submit that under Section 45AA of ESI Act, there is

1 (2021) 2 SCC 551.

2 1986 SCC OnLine Del 205.

3 2009 (1) Mh.L.J.

4 Writ Petition No. 6423 of 1998 dtd. 28.09.2010

5 (2019) 2 SCC 324.

6 (2020) 18 SCC 550.

7 Writ Petition No. 4607 of 2014 dtd. 9th March, 2015.

8 1961 SCC OnLine SC 140.

9 Writ Petition No. 7432 of 2024 dtd. 10th July, 2024.

10 1998 (2) Mh.L.J. 574.

11 Writ Petition No. 3796 of 2024 dtd. 18th September, 2024.

no discretion, which is vested in the Corporation to condone the delay beyond the period of sixty days. He submits that in the present case, order dated 20th May, 2019 was received on 24th May, 2019 and as the Appeal was filed beyond the period of sixty days, the same was barred by limitation. He submits that before the ESI Court, there was no evidence, which was produced on record to assail the validity of Section 45A order, and therefore, the Application was rightly dismissed. In support, he relies upon the decision of this Court in the case of ***Garage Kamat*** (supra).

8. Considering the submissions of parties, the following substantial questions of law would arise:-

(i) Whether in view of disputed questions being involved, it was necessary for the Appellate Court to comply with principles of natural justice and grant opportunity of hearing to the Appellants?

(ii) Whether the findings of ESI Court suffers from perversity by not noticing that Appellate Authority had disregarded the evidence produced by Appellant showing the service of order by ESI Corporation on 27th May, 2019?

(iii) Whether the ESI Court committed an error while upholding the validity of the order dated 20th May, 2019 passed under Section 45A of the ESI Act without noticing that the order was based on Committee's report dated 8th May, 2019, which report was not furnished to the

Appellant vitiating the order passed under Section 45A?

As to Point Nos. (i) and (ii):

9. Section 45AA of the ESI Act provides for an Appeal against the order passed under Section 45A within a period of sixty days from the date of order. In the present case, order was passed on 20th May, 2019 and Appeal has been filed on 24th July, 2019. The Appellate Authority had by communication dated 11th September, 2019 called upon Appellant to produce the documentary evidence as regards limitation, which was responded by Appellant enclosing the copy of acknowledgment evidencing receipt of order on 27th May, 2019. Despite the said document being produced on record, the Appellate Authority without considering the documentary evidence and without granting any opportunity of being heard, by communication dated 26th September, 2019 informed the Appellant that their Appeal cannot be admitted and advised to comply with the order passed under Section 45A. The remedy availed by Appellant was Appeal remedy provided under Section 45AA of the ESI Act. The record makes it clear that there were disputed questions as the evidence produced by Appellant showed receipt of order on 27th May, 2019, whereas the official record of Appellate Authority showed receipt of order on **24th May, 2019**. In such facts, it was necessary to grant an opportunity of hearing to the Appellants before refusing to admit the Appeal. The cursory dismissal

of Appeal violates principles of natural justice. Though it is sought to be contended by Mr. Pathak that in the proceedings under Section 45AA of the ESI Act, there is no provision for leading evidence, the fact remains that Appellate Authority had called upon Appellant to produce the documentary evidence to satisfy the conditions as regards the period of limitation. As there was dispute as regards the date on which the order passed under Section 45A was received by Appellant, the Appellate Authority was bound to give an opportunity of being heard to the Appellant before rejecting Appeal as being barred by limitation. The provisions of the ESI Act do not expressly bar the oral hearing in case of Appeal under Section 45AA of the ESI Act. The Trial Court had held that the order was received by Applicant on 24th May, 2019 and therefore, the limitation would begin from the date of receipt of the order, i.e. 24th May, 2019 and therefore, the Appeal was filed beyond the period of limitation. Before the Trial Court, the decision in the case of ***Buldana Urban Co-operative Society Ltd. vs. Deputy Director, Sub-Regional Office, Employees' State Insurance Corporation*** (supra) was relied upon, which provided that in the absence of actual or constructive knowledge, it cannot be said that period of limitation would commence from the date of order itself. In the present case, though the provisions would not specifically provide for leading of evidence before the Appellate Authority, principles of natural justice

by giving an opportunity of hearing to Appellant was required to be complied with. As no opportunity of oral hearing was given to the Appellant, the order of Appellate Authority is liable to be set aside. Point Nos. (i) and (ii) are accordingly answered in favor of Appellant.

As to Point No. (iii) :

10. The order passed under Section 45A of the ESI Act determines the contribution at Rs. 74,93,436/- by considering the report dated 8th May, 2019 submitted by the Committee, constituted by the Employees' State Insurance Corporation. Firstly, the copy of report dated 8th May, 2019 was not furnished to Appellant and therefore, Appellant was not provided an opportunity to submit its explanation to the said report. In the case of ***Small Gauges Ltd. vs. V. P. Ramaiah*** (supra) and ***Nasik Screw Industries vs. Regional Provident Fund Commissioner, Maharashtra & Goa*** (supra), Co-ordinate Bench of this Court held, in context of non-furnishing of report by Enforcement Officer under Employees Provident Funds and Miscellaneous Provisions Act, 1952, that the basic tenets of principle of *audi-alteram partem* requires that a person should not be condemned unheard and that all the documents relied upon by Department must be furnished to him before any conclusion is arrived at on the basis of those documents. The proposition of law laid down in the said decision and which is well-settled proposition of law is squarely applicable to the facts of the

present case. Before the order under Section 45A could have been passed, based on Committee's Report dated 8th May, 2019, the Appellant was required to be furnished with a copy of the said report and an opportunity was required to be given to Appellant to respond to the said report before the same could form the basis of the order passed under Section 45A. The non-furnishing of Report dated 8th May, 2019 has vitiated the order passed under Section 45A of ESI Act.

11. Further, the order passed under Section 45A assessed the contribution under various heads, which travelled beyond the show-cause notice, issued to the Appellant and therefore, no opportunity was given to Appellant to explain the payments under the heads of accounts, which were not part of show cause notice. The whole purpose of issuing show cause notice is to make the Appellant aware of the case of Corporation as regards the omission of contribution of wages, so construed by the Corporation. Unless and until, Appellant is informed about various heads of accounts, which according to Corporation amounts to 'wages' within the meaning of Section 2(22) of the ESI Act, Appellant would not be in a position to furnish proper explanation. It is not disputed by Mr. Pathak that expenses under certain heads of account were considered as wages, which were not part of show cause notice. For the reason that the order under Section 45A travels beyond show cause notice, the order stands vitiated.

This judgment is corrected pursuant to Speaking to the minutes order dated 10th March, 2025.

12. In the case of ***SBI General Insurance Company Limited*** (supra), learned single Judge of this Court held that reports which were submitted during the hearing were not furnished to Appellant and therefore, had resulted in violation of principles of natural justice.

13. Before the ESI Court, an Application was moved by Applicant-Appellant seeking production of committee's report, noting sheets, etc. which were allowed by ESI Court and despite thereof, Opponent-Corporation produced only evidence and report, which even at that stage was not furnished to Appellant. The Employees' State Insurance Court while adjudicating the validity of notice issued under Section 45A had failed to consider that record itself would indicate that order stands vitiated by non-furnishing of report based on which, order under Section 45A was passed. It was thus, not necessary for Appellant to produce any evidence on record as regards the validity of order passed under Section 45A.

14. Considering that no opportunity of hearing was given to Appellant at the time of filing of Appeal under Section 45AA resulting in violation of principles of natural justice, this is a fit case for remand to the Appellate Authority to be decided afresh after giving an opportunity of being heard to Appellant. Resultantly, the following order is passed :-

: ORDER :

- [i] The First Appeal is allowed.
- [ii] The impugned judgment dated 11th October, 2023 is hereby quashed and set aside.
- [iii] The Appeal filed under Section 45AA of the ESI Act is restored to file of the Appellate Authority, to be considered afresh on aspect of limitation uninfluenced by order dated 26th September, 2019 refusing to admit the Appeal.
- [iv] The Appellate Authority after granting an opportunity of being heard to Appellant to consider the issue of limitation and if so answered in favor of Appellant, to consider the appeal on merits.
- [v] All rights and contentions of all the parties are expressly kept open in that regard.

15. As regards the claim for refund of amount, which was deposited before the Appellate Authority as well as the ESI Court, in view of the fact that entire amount under Section 45A has been recovered, Mr. Pathak would submit that if the same is correct position then amount deposited at the time of filing of Appeal under Section 45AA and amount deposited at the time of filing of **Application** before the ESI Court would be permitted to be refunded to Appellant. In view thereof, there is no specific direction in this regard.

16. In view of **disposal** of First Appeal, nothing survives for consideration in the pending Civil/Interim Applications, if any, and the same stand disposed of.

[Sharmila U. Deshmukh, J.]