



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 28.11.2024

ORDERS DELIVERED ON : 03.01.2025

Coram:

THE HONOURABLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

**W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214 and 20778 of 2021
& W.M.P.Nos.22044, 22045, 22468, 22487, 22488, 24873, 24876, 22475,
22485, 22486, 24878, 22484, 22491, 24869, 22470, 22474, 24765, 24882,
22481, 24780 and 22492 of 2021 & 11565 of 2024**

W.P.No.21187 of 2021:

The Chairman
RVS Educational Trust
Trichy Road
Kumaran Kottam Campus
Kannampalayam – 641 402
Coimbatore District.

... Petitioner

Vs.

1.The State of Tamil Nadu
Rep.by its Principal Secretary
Labour and Employment Department
Fort St.George, Chennai – 600 009.

2.Employees State Insurance – Regional
Corporation (Tamil Nadu)
Represented by its Regional Director
143, Sterling Road
Chennai – 600 034.



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

3.The Deputy Director

Employee's State Insurance Corporation
Sub-Regional Office, Coimbatore
1897, Trichy Road, Panchdeep Bhavan
Ramanathapuram, Coimbatore – 641 045.

4.The Authorized Officer

Employee's State Insurance Corporation
Sub-Regional Office, Coimbatore
1897, Trichy Road, Panchdeep Bhavan
Ramanathapuram, Coimbatore – 641 045.

5.The Recovery Officer

Employee's State Insurance Corporation
Sub-Regional Office, Coimbatore
1897, Trichy Road, Panchdeep Bhavan
Ramanathapuram, Coimbatore – 641 045.

6.The Branch Manager

Lakshmi Vilas Bank
Ganapathy Branch
Sri Durga Towers
No.1157, Sathy Road, Ganapathy
Coimbatore District – 641 006.

... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus, to call for the records relating to the impugned notice of demand issued by the 5th respondent – Recovery Officer in Ref.No.56561109390011303/CP/435114/CR-52877 dated 22.07.2021 and the proceedings No.CBE/RECY/CP-3/56/56/110939/001/1303 dated 10.09.2021 prohibiting and restraining the petitioner trust from withdrawing any amount from the 6th respondent bank and further directing the 6th respondent bank to immediately transfer to the ESI Corporation the amount to the tune of



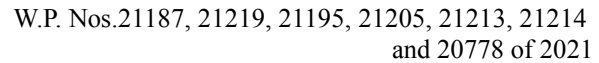
W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

Rs.2,29,56,038/- and to forward the pay order/DD/ Cheque to the 5th respondent, quash the same and further direct the 3rd respondent – Deputy Director to consider the petitioner - Trusts request for waiver of arrears of contribution Interest and damages, made vide representation dated 28.08.2021 under Section 91C of ESI Act, 1948 in terms of the Order of the Full Bench of this Honourable High Court in the batch of Writ Petitions in WP.No. 34246 of 2019 dated 29.07.2020.

(Prayer amended vide order of this Court dated .01.2025 in W.M.P.No.24778 of 2021)

In all the W.P's.:

For the Petitioner	:	Mr.Isaac Mohanlal Senior Counsel Asst.by Mr.P.Godson Swaminath for M/s Isaac Chambers
For the Respondents	:	Mr.K.Surendran Addl. Government Pleader for R1 Ms.G.Narmadha for Mr.G.Bharadwaj for R2 to R5 Mr.N.Somasundar for R6 (In W.P.Nos.20778, 21195 and 21214 of 2021)



A. The Petitions :

1.1. These Writ Petitions are by the Chairman, RVS Educational Trust, which runs various educational institutions and is also in the name of the institutions. Separate Writ Petitions are filed, because, the Trust applied for separate code numbers for each of the educational institution/campus and the Employees' State Insurance Corporation (hereinafter referred to as ESIC') – the 2nd respondent herein allotted different code numbers and separate accounts in respect of each educational institutions and separate orders have been passed. Therefore, separate Writ Petitions are filed challenging the recovery orders of the contribution determined under Section 45A of the Employees' State Insurance Act, 1948 (in short 'the Act') along with interest as per Section 45C of the Act, freezing the bank accounts, directing the garnishee to pay the amounts to the ESIC etc..

B. The Overview of the Act:



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

2. It is essential to look into the broad overview of the Act before proceeding to the other facts and events.

2.1. By Act 34 of 1948, the Employees' State Insurance Act, 1948 was enacted by the Parliament, which came into effect from 01.09.1948. It aims to provide certain benefits to the employees in case of sickness, maternity and employment injury and to make provisions for certain other matters in relation thereto. Chapters II and III of the Act create the 'Employees State Insurance Corporation' and provide about its constitution, duties and functions, finance, audit, etc. Chapter IV of the Act deals with contributions.

2.2. As per Section 1(4), the Act shall apply at the first instance to all the factories, including the factories belonging to the Government and other seasonal factories. Section 1 (5) of the act vests the power in an appropriate Government, in consultation with the ESIC and with the approval of the Central Government to extend the provisions of this Act to any other establishment, class of establishment, industrial, commercial, agricultural or otherwise. The extension is to be made by giving one month's notice of its intention by a



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

notification in an official gazette. For ready reference, Section 1 of the Act is

WEB COPY

extracted here :

“1. Short title, extent, commencement and application :

(1) This Act may be called the Employees' State Insurance Act, 1948.

(2) It extends to the whole of India.

(3) It shall come into force on such 2 date or dates as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and for different States or for different parts thereof.

(4) It shall apply, in the first instance, to all factories (including factories belonging to the government) other than seasonal factories:

PROVIDED that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.

(5) The appropriate government may, in consultation with the Corporation and [where the appropriate government is a State Government, with the approval of the Central Government], after giving six months' notice of its intention of so doing by notification in the Official Gazette, extend the provisions of this Act or any of them, to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise:

PROVIDED that where the provisions of this Act have been brought into force in any part of a State, the said provisions shall stand extended to any such establishment or class of establishments within that part if the provisions have already been extended to similar establishment or class of establishments in another part of that State.

(6) A factory or an establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under this Act or the manufacturing process therein ceases to be carried on with the aid of power.”



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

WEB COPY

2.3. Section 38 of the Act mandates that subject to the provisions of the Act, all employees in factories or establishments to which the Act applies shall be insured in the manner provided by the Act. Section 39 of the Act mandates that the contribution payable under the Act, in respect of an employee shall comprise the contribution payable by the employer, which is referred to as an employer's contribution and the contribution payable by the employee, which is referred to as an employee's contribution. Both the sums shall be paid to the ESIC.

2.4. Under Section 39 (4) of the Act, the contributions payable in respect of each period shall ordinarily be due on the last day of the wage period. As per Section 39 (5) (a) of the Act, if the contribution payable under the Act is not paid by the principal employer on the date on which the contribution has become due, the employer is liable to pay simple interest at the rate of 12 % per annum or at such higher rate as may be specified till the date of its actual payment. The said Section 39 of the Act is extracted hereunder:-

“39. Contributions

(1) The contribution payable under this Act in respect of an employee shall comprise contribution payable by the employer



WEB COPY



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

(hereinafter referred to as the employer's contribution) and contribution payable by the employee (hereinafter referred to as the employee's contribution) and shall be paid to the Corporation.

(2) The contributions shall be paid at such rates as may be prescribed by the Central Government: PROVIDED that the rates so prescribed shall not be more than the rates which were in force immediately before the commencement of the Employees' State Insurance (Amendment) Act, 1989.

(3) The wage period in relation to an employee shall be the unit in respect of which all contributions shall be payable under this Act.

(4) The contributions payable in respect of each wage period shall ordinarily fall due on the last day of the wage period, and where an employee is employed for part of the wage period, or is employed under two or more employers during the same wage period, the contributions shall fall due on such days as may be specified in the regulations.

(5)(a) If any contribution payable under this Act is not paid by the principal employer on the date on which such contribution has become due, he shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the regulations till the date of its actual payment:

PROVIDED that higher interest specified in the regulations shall not exceed the lending rate of interest charged by any scheduled bank.

(b) Any interest recoverable under clause

(a) may be recovered as an arrear of land revenue or under sections 45C to 45-1.

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)."

2.5. Section 43 of the Act enables the ESIC to make regulations for any



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

matter relating or incidental to the payment and collection of contributions payable under this Act, which shall include the manner and time of payment of contributions, how the contributions can be paid, etc. As per Section 44 of the Act, the employers have to furnish returns and maintain registers in such form and containing such particulars relating to the person employed by him. Section 45 of the Act empowers the ESIC to appoint Inspectors who can inspect the premises and examine any matter relevant to the aforesaid purposes of the Act. If any employee fails to file returns and particulars or fails to maintain the registers and to make payments, the Inspectors who are appointed under Section 45 of the Act or such other officer enabled in this regard, based on the information available, by an order determine the amount of contributions payable in respect of the employees of the factory or establishment. Such an order under Section 45 (A) of the Act, determining the amount of contribution payable, shall be made after giving an opportunity to be heard.

2.6. Section 45 (B) of the Act, mandates that the contributions payable under the Act can be recovered as an arrear of land revenue. Section 45 (C) of the Act enables the authorized officer, where any amount is in arrears under the Act, to issue to the Recovery Officer a certificate under his signature,



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

specifying the amount of arrears and the Recovery Officer on receipt of such certificate shall proceed to recover the amounts specified therein, from the factory or establishment by attachment and sale of the movable properties of the factory or establishment, arrest of the employer and detention in prison, appointing a receiver for management of movable and immovable property or establishment. The provisions make it clear that at the first instance, attachment and sale of property shall be effected and if only the proceeds are insufficient in recovering the amount of arrears, the other modes shall be resorted to.

2.7. Section 45 (D) of the Act provides the role of the Recovery Officer in recovering the amount. Section 45 (F) of the Act provides that notwithstanding a certificate being issued to the Recovery Officer, the authorized officer may grant time for payment of the amount. Section 45 (G) of the Act provides for the other modes of recovery whereby a third party - garnishee holding the amount to the employer can be directed to pay the amount to the ESIC and the detailed procedure mentioned therein.

2.8. Chapter V of the Act delineates the various benefits for employees



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

under the Act, and Chapter V-A provides for framing various schemes. Chapter VI provides for adjudication of disputes and claims, Chapter VII provides for various penalties, and Chapter VIII contains miscellaneous provisions.

C. The Notification:

3. While so, for the first time, the Government of *Tamil Nadu*, after due notice, thought it fit to extend the provisions of the Act to the educational institutions run by the individuals, trustees, societies or other organizations where 20 or more persons are employed or were employed on any day preceding 12 months with effect from the date of publication of the notification, excluding Government and Government aided institutions. The original intention to extend the benefits was published on 04.06.2008 in the *Tamil Nadu* Gazette vide notification No.11(2/LE/265/2008). Thereafter, by G.O.Ms.No.237 dated 26.11.2010, the provisions of the Act were extended to the educational institutions as aforesaid by a due notification published in the gazette. The notification:-

O R D E R



WEB COPY



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

In Government Order first read above, orders were Issued for the publication of Preliminary Notification in respect of extension of the Employees' State Insurance Act, 1948 (Central Act XXXIV of 1948) to the educational Institutions (excluding Government and Government aided Institutions), Inviting objections and suggestions from any person/ Institutions likely to be affected thereby. The Additional Commissioner/Regional Director, Employees' State Insurance Corporation, Chennai and the Director of Medical and Rural Health Services (ESI) have stated that no objection/ suggestion has been received.

2. The Government have decided to issue final Notification in this regard.

3. The appended Notification will be published in the Tamil Nadu Government Gazette.

4. The Secretary to Government, Tamil Development, Religious Endowments and Information (Translation) Department, Secretariat, Chennai-600 009 is requested to send the Tamil Translation of the Notification to the Works Manager, Government Central Press, Chennai-600 079.

3.1. Thus on and from the notification, all these educational institutions came under the purview of the Act.

D. The Litigations:

4. A third party viz., *Maharaja College of Arts and Science* as well as the Association of the Management of *Coimbatore Anna University Affiliated Colleges* etc, challenged the said Government Order and by a Judgment dated 14.03.2011, a learned Single Judge upheld the above Government Order. Aggrieved thereby, Writ Appeal Nos.1233 of 2011 etc Batch, were preferred



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

and by an order dated 25.07.2011, an interim order of stay of the notification was granted by the Division Bench of this Court.

4.1. The petitioner-Trust herein preferred W.P.(MD).Nos.3969 of 2013 etc., in which an interim order of stay of operation of the G.O.Ms.No.237 dated 26.11.2010 and the consequential orders(which related to the particular institution run by the trust), was granted.

4.2. In the meanwhile, in the case of *State of UP Vs. Jaibir Singh*¹, a question as to whether employment in a welfare scheme undertaken by the Social Forestry Department can be termed as an industry or not was referred to a Constitution Bench earlier by noting the cleavage of opinion between the two Judgments of the Supreme Court in *Chief Conservator of forest Vs. Jagannath Maruthi Kondare*² and the *State of Gujarat Vs. Pratham Singh Narsing Parmar*³. The Constitution Bench considered the various Judgments of the Hon'ble Supreme Court of India concerning the definition of industry and

1 (2005 5 SCC 1)

2 AIR 1996 SC 2898

3 (2001) 9 SCC 713



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

found that the question arises pursuant to the interpretation of the term ‘industry’ by a larger Bench consisting of Seven Judges in the case of ***Bangalore Water Supply & Sewerage Board and Others Vs. R. Rajappa and others***⁴.

4.3. The Constitution Bench after considering the several Judgments quoting the ***Bangalore Water Supply & Sewerage Board’s case*** (cited supra), felt that the enunciation of law in ***Bangalore Water Supply & Sewerage Board’s case*** is leading to the dormancy concerning the meaning of the word ‘industry’ for a long time and there are pressing demands of the competent sectors of employers and employees and noting the helplessness of the legislature, the Constitution Bench referred the matter to be placed before the larger Bench, so that the issue regarding the definition of the term ‘industry’ and what are the types and activities which could be brought in within the said definition can be reconsidered by a Bench of proper strength. The reference was made by the Constitution Bench on 15.05.2005 and the matter is pending before the Hon’ble Supreme Court of India, to date.

4 1978 AIR 548



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

4.4. On 09.06.2005, when the said Writ Appeal Nos.1233 of 2011 etc Batch, arose in the case of ***Maharaja College of Arts and Science Vs. State of Tamil Nadu*** (W.P.No.2872 of 2011 dated 14.03.2011), came up for hearing, considering the arguments that whether a labour welfare legislation can be extended to an educational institution by terming it as an industry was argued by the learned counsel, citing the aforementioned Judgment of the Constitution Bench. Therefore, the Division Bench passed an order that since the interim orders were operating in the matter, in view of the fact that the matter had been referred to a larger Bench, the Writ Appeals and Writ Petitions were disposed of by an agreement between the parties. It was agreed that the interim order would continue till the disposal of the matters by the Hon'ble Supreme Court and the parties would remain bound by the legal position that is to be enunciated by the Hon'ble Supreme Court.

4.5 After the above Judgment was delivered, when again a group of Writ Petitions filed by the petitioner – Trusts came up for hearing on 22.06.2015, the Division Bench disposed of the same on the same terms and it is essential to verbatim extract the Judgment which reads thus:-

“On 11.06.2015 vide order in W.A. (MD) No.2763 of



WEB COPY



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

2012 etc. batch the Hon'ble Division Bench of this Court passed the following orders:

"In connected matters, W.A.No.1233 of 2011 etc., batch, dated 09.06.2015, the Principal Seat has passed the following order: -

"Learned counsel for the parties state that as recorded in the order dated 05.05.2005 reported in 2005 (5) SCC 1 (State of U.P vs. Jai Bir Singh) the question of law has been referred to the Larger Bench of the Honourable Supreme Court, i.e. whether the Employees State Insurance Act, 1984, would apply to educational institutions. Interim orders have been operating in the present matter.

In view of the aforesaid position, the writ appeals and the writ petitions are disposed of by agreement that the interim orders would continue till the disposal of the matter by the Honourable Supreme Court and the parties would naturally remain bound by the legal position enunciated by the Honourable Supreme Court on such decision being rendered. No costs. Consequently, connected miscellaneous petitions are closed."

2. The present writ petitions are also disposed of in terms of the above said order. closed.. No costs, Consequently, connected miscellaneous petitions are closed"

(emphasis supplied)

4.6. Apart from the above orders, in some of the Writ Petitions filed by the institutions, by separate judgments of Single Benches, this Court had also upheld the notification. There were different orders passed by the different benches. In that scenario, in ***All India Private Educational Institutions Association represented by its State General Secretary Vs. State of Tamil Nadu and Others*** (W.P.No.34236 of 2019 etc Batch dated 29.07.2020), the Division Bench of this Court referred the matter to the Full Bench of this Court



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

and the following were the terms of reference:-

WEB COPY

“i. Whether the the final disposal of two writs appeals vide orders dated 09.06.2015 and 16.06.2015 are based on a correct construction and reading of the ratio of the referring order in the case of State of U.P. v. Jal Bir Singh, (2005) 5 SCC 1, paragraphs 38, 41, 42 and 44 in particular?

ii. If the answer the first question is in the positive, then too does propriety demand awaiting a decision in the reference keeping in view the fact that the orders dated 09.06.2015 and 16.06.2015 are only interim orders that do not attach a finality by an adjudication on the issue?

iii. Whether unaided private educational institutions can be treated to be an establishment within the meaning of Section 1(5) of the Employees State WEB COPY Insurance Act, 1948 and be capable of being governed By notifications issued under the 1948 Act as being an establishment being covered within the word "otherwise"?

iv. Whether the State has discriminated between private unaided educational institutions on the one hand and the public and government aided private educational institutions on the other by issuing a notification applying the same only to the former, which may amount to an act of invidious discrimination under Article 14 of the Constitution of India so as to enable the petitioners to resist the Impugned notification dated 26.11.2010

v. Whether the State or Central Government can notify the applicability of the 1948 Act only after an amendment either under the 1948 Act or the State Acts, keeping in view that the word "Insurance" occurring in Section 19 of the 1973 Act and a pari materia provision under the 1976 Act already covers insurance coverage of the teachers and other employees of schools and colleges?

vi. Whether the notification dated 26.11.2010 can be enforced even without an amendment in the provisions as referred to in Question (v)?”

4.7. Thereafter the issue was taken up by the Full Bench, the Full Bench



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

answered the reference on the following terms:-

WEB COPY

“(i) The decision regarding the validity of the impugned notification issued under Section 1(5) of the ESI Act could well have been taken by the Division Bench and the postponement of the same pending decision of the reference in *Jai Bir Singh* (paragraphs 38, 41, 42 and 44 in particular) by the Larger Bench was not warranted;

(ii) The answer to question No.(1) is in the negative and hence, question No.(ii) does not require resolution. However, we are of the view that the orders of the Division Bench dated 09.06.2015 orders and 16.06.2015 are only in the nature of Interim orders;

(iii) The ESI Act can very well treat the private unaided private educational institutions as ‘establishments’ within the meaning of the said Act and the term ‘otherwise’ has clearly been placed to specify that genus of establishments is not restricted to those organisations, which are industrial, commercial or agricultural only, but also includes organisations like educational institutions;

(iv) There is no discrimination between the private unaided educational institutions and the public and government aided private educational institutions, pursuant to the issuance of the notification No.II 2/LE/52/2013, dated 02.01.2013; and

(v) As far as question Nos. (v) and (vi) are concerned, no amendment is required to be made by the State or Central Government to implement the Impugned notification.”

4.8 Thus, the Full Bench was of the view that the decision as to the validity of the Government Order passed by the State of *Tamil Nadu* need not await the Judgment of the Hon’ble Supreme Court of India answering the reference to a Larger Bench in *Jaibir Singh's Case* (cited *supra*). The Full Bench also considered the Government Order, extending the provisions of the Act to the educational institutions upheld its validity and found that the same is



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

not unconstitutional. Apart from answering the reference, while dealing with the Contempt Petitions and considering the consequential orders that were passed by ESIC, the Full Bench held that the orders which are passed by the Division Bench shall be treated as in the nature of an interim order. The Full Bench also considered the hardship which has pleaded on behalf of the educational institutions and also held that the authorities can consider the waiver of past arrears as per Section 91 (c) of the Act.

4.9. As against the Judgment of the Full Bench, both sides have preferred Appeals to the Hon'ble Supreme Court of India. The Special Leave Petition preferred on behalf of the ESIC in S.L.P.Nos.19410 of 2021 etc., was specifically entertained by the SLP concerning paragraph Nos.131 to 133 of the Full Bench and by an order dated 29.11.2022 there was an order of interim stay of the Judgment of the Full Bench, with reference to that portion alone.

4.10. All these educational institutions have started paying the contributions with effect from 01.10.2019 and there is no quarrel over the coverage or the payment of contribution with effect from October 2019 or in



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

some cases 2020 onwards, after the Full Bench Judgment on 29.07.2020. Since during the interregnum, i.e., from the date of notification from 27.11.2010 up to 30.09.2019, no contributions were paid and the returns were also not filed, further proceedings were initiated for determination of the arrears of contribution payable under Section 45A of the Act. On 03.03.2020, an order under Section 45A of the Act was passed, determining the compensation payable. In respect of each of the code numbers of the petitioner, viz., M/s RVS Educational Trust, different orders were passed. For instance concerning code no.56-56-110939-001-1303 situated at *Kumarankottam Campus, Tiruchy Road, Kannampalayam Road, Coimbatore*, the arrears for the period 29.12.2010 to 30.09.2019 was determined as Rs.1,30,74,970/- and it was further ordered that the amount be paid within 60 days from the date of the said order. The operative portion of the order is extracted hereunder for ready reference:-

“For the above reasons, I, V.Md.ABDUL KAREEM DEPUTY DIRECTOR in exercise of the powers delegated to me by the ESI Corporation think fit and accordingly order that the contributions totaling to Rs.13089362/- for the period from 29.12.2010 TO 30.09.2019. The employer has paid Rs. 14397/- for the period from 01.04.2019 to 30.09.2019. Therefore the balance amount payable works out to Rs. 1,30,74,970/- (Rupees one crore thirty lakhs seventy four thousand nine hundred and seventy only) are finally determined and Shri. Dr.K.V.Kuppusamy, 242 B, RVS Illam, Trichy Road, Sular, COIMBATORE 641402-,is hereby ordered to pay the amount within a period of 60 days from the date of this order, failing which this shall be caused to be recovered under Section 45-C to 45-1'of the ESI Act, through the recovery



WEB COPY



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

process.

This order is issued without prejudice to the right of the corporation to claim additional contribution if any detected as a result further verification of the employer's records for the above period under Section 45(4) of the ESI Act and Regulation 102 of the ESI (General) Regulations 1950.

Under Section 45-AA of the ESI Act 1948, if an employer is not satisfied with the order referred to in Section 45-A, he may prefer an appeal to an appellate authority as provided under Regulation 31-D within sixty days of the date of such order after depositing twenty five percent of the contribution so ordered or the contribution as per his own calculation whichever is higher with the ESI Corporation.”

4.11. Since the orders were not complied with, the consequential orders which are impugned in these Writ Petitions are passed, in exercise of the powers under Section 45(c) of the Act, on 10.09.2021, whereby prohibitory orders were passed freezing the various bank accounts of the petitioners. In the prohibitory orders, the following amounts, including the statutory interests, were claimed,

“And in terms of this Prohibitory Order, the amount kept by you (Whatever Amount available in the Account) in respect of the said account(s)/debt(s)/dues, is directed to be transferred to the "ESI Corporation" to the following extent and the pay order/DD/ Cheque concerned forwarded to the undersigned, duly drawn in favour of "ESI Corporation" payable at Coimbatore: -

1.	Contribution Amount	Rs.1,30,74,970/-
2.	Interest	Rs.95,11,776/-
3.	Further Interest up to 15.09.2021	Rs.3,35,292/-
4.	Damages	Rs.0/-



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

1.	Contribution Amount	Rs.1,30,74,970/-
5.	Cost and Charges	Rs.34,000/-
	Total	Rs,2,29,56,038/-

Aggrieved by the same, the present Writ Petitions are filed.

E. THE SUBMISSIONS:-

5. Heard, *Mr.Isaac Mohanlal*, the learned Senior Counsel for the petitioners; *Mr. K.Surendran*, learned Additional Government Pleader for the 1st respondent; *Ms.G.Narmadha*, learned counsel for the respondents 2 to 5 and *Mr.N.Somasundar*, learned counsel for the 6th respondent.

5.1. *Mr.Isaac Mohanlal*, the learned Senior Counsel appearing on behalf of the petitioners would submit that in these cases, even though various measures which are taken by the ESIC are under challenge on various technical grounds and violations of statutory procedure and rules, would submit that the essence of the contention of the petitioners is regarding the claim of arrears from 29.12.2010 to 30.09.2019, until the Full Bench clarified the issue. When the law was nebulous, though the notification was made on 26.11.2010 when no determination was made and both parties did not act upon, for the first time, the



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

act was extended to the educational institutions claiming huge arrears, as in this case, a sum of Rs.1,30,74,970/- cannot be made. The same would virtually cripple the educational institutions.

5.2. In addition thereto, the interest amount, treating as if these contributions were payable for the respective periods as per Section 39 of the Act, another sum of Rs.98,47,068/- is claimed. When the notification was not enforced in time the matters were pending in Court and contributions could not be paid on account of the interim orders that were passed, the entire arrears as well as the interest are to be waived. He would further submit that in the instant case, even as on today, no review was filed with reference to the Judgment which was rendered in the earlier Writ Petitions. Even after clarification of the legal position, the specific order with reference to the petitioner – Trusts not being modified or set aside as on date, there is no scope for the respondents to proceed further. He would submit that this Court in exercise of Article 226 of the Constitution of India have to consider the above background in which these litigations arose and waive the entire arrears along with interest and thus save the educational institutions.



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

5.3. *Mr. Issac Mohanlal*, would submit that the Act provides for exemption if the employees receive the benefits substantially similar or superior to the benefits provided under the Act. The petitioner group of institutions has a medical college of its own. The employees are provided with superior medical facilities free of cost. All other benefits are also granted by the Institution. The employees were at material times enjoying benefits that are granted by the petitioner – Trusts and none of them approached or availed any benefit under ESIC. Therefore, there was no justification in passing an order under Section 45A of the Act in determining the arrears for the period 2010 to 2019 especially when the petitioner – Trusts are all duly complying with the provisions with effect from 01.10.2019. Therefore, he would submit that this Court should interfere with the orders impugned in these Writ Petitions and grant relief to the petitioner–Trusts.

5.4. The learned Senior Counsel placed before this Court the relevant Judgments where the Courts have interfered in the matters of arrears whenever litigation was going on for years and also cases where the Courts have directed the parties to pay the arrears. The following decisions were relied upon:



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

WEB COPY

- “1) 24-01-1985 ***South India Viscose Co-op Society Vs. Regional Director, Employees State Insurance Corporation***
(1986) 2 LLN 598 (Mad)
- 2) 15-01-1993 ***Employees State Insurance Corporation Vs. Hotel Kalpaka International***
(1993) 2 SCC 9
- 3) 19-08-1993 ***Regional Director, Employees State Insurance Corporation Vs. Kerala State Drugs & Pharmaceuticals Ltd and Ors.***
1995 Supp (3) SCC 148
- 4) 30-08-1993 ***Employees State Insurance Corporation Vs. Harrison Malayalam Pvt Ltd.***
(1993) 4 SCC 361
- 5) 11-10-1993 ***Employees State Insurance Corporation Vs. Kerala State Handloom Development Corporation Employees Union***
(1994) 1 SCC 268
- 6) 27-11-1996 ***Goodyear India Ltd. Vs. Regional Director, Employees State Insurance Corporation and Ors.***
(1997) 3 SCC 189
- 7) 04-11-1997 ***Employees State Insurance Corporation Vs. Harrison Malayalam Ltd.***
(1998) 9 SCC 74
- 8) 28.07.2004 ***Employees State Insurance Corporation Vs. Hyderabad Race Club***
(2004) 6 SCC 191
- 9) 17-07-2006 ***Employees State Insurance Corporation Vs. Distilleries & Chemical Mazdoor Union and Ors.***
(2006) 6 SCC 581



WEB COPY



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

10) 25-07-2006 ***Employees State Insurance Corporation and Ors.
Vs. Jardine Henderson Staff Association and Ors.***

(2006) 6 SCC 581

11) 30-07-2013 ***National Cement Workers Union Vs. Government of
Tamil Nadu and Ors.***

2013 SCC OnLine Mad 2250”

5.5. *Ms. G. Narmadha*, the learned counsel appearing on behalf of the respondents 2 to 5 – ESIC at the outset would submit that when the arrears of contribution has been determined in the exercise of the powers under Section 45A, the petitioners have an appeal remedy under Section 45AA or a remedy to approach the Employees' State Insurance Court (ESI Court), under Section 75 of the Act. Therefore, the Writ Petitions which are being filed only against the consequential orders of realizing the amounts are not maintainable. In support of her submission, the learned counsel would rely upon the Judgment of the Hon'ble Supreme Court of India in ***Employees State Insurance Corporation Vs. C.C. Shanthakumar***⁵, where the argument was made that given the condition of pre-deposit, the parties need not resort to an alternative remedy and the Hon'ble Supreme Court after considering the same held that the employers shall move the ESI Court in respect of their challenges.

⁵ (2007) 1 SCC 584



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

WEB COPY

5.6. Once the notification extending the Act to an educational institution has come into force, then as per Section 2-A read with Rule 10 (b) of the Employees State Insurance (General) Regulations 1950, it is the primary duty of the employer to register themselves and pay the dues. The contribution becomes due from the last date of the wage period and it has to be remitted within 21 days from the last date of the calendar month, in which the contribution fell due. Thereafter, the interest shall accrue automatically and the liability is statutory in nature. The interest is payable as per Section 39 of the Act (extracted supra).

5.7. This apart, the learned counsel would rely upon Regulations 31, 31A and 31B of the Employees State Insurance (General Regulation, 1950), the same are extracted hereunder for ready reference:

“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



WEB COPY



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

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.

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-B. Recovery of interest. — Any interest payable under regulation 31-A may be recovered as an arrear of land revenue or under section 45-C to section 45-I of the Act.”

5.8. It is the further contention of the learned counsel that when the Act has been extended to the educational institutions, the validity of the G.O.Ms.No.237 is upheld by the Full Bench Judgment in ***All India Private Educational Institutions Association's case*** (cited supra). The learned counsel would submit that it is the petitioners' own action that they chose to challenge the Government Order. If they are unable to sustain in the challenge, then ultimately when the stay is vacated they have no other option than to pay the entire arrears as well as the interest. She would rely upon the Judgment of the Karnataka High Court in ***Workman of Bharat Electronics Limited Vs. Employees State Insurance Corporation***⁶, more specifically relying upon

⁶ (1997) 1 LLN 315



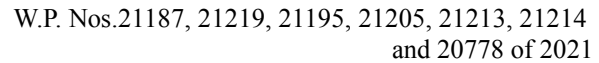
W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

paragraph Nos.9 and 17 to contend that it is the primary liability of the employer to pay the contribution and even by virtue of the stay, the employer is unable to recover the contribution from the employee, it is the employer, who is liable to pay the entire amount and the same cannot be pleaded as an excuse. Placing reliance on the Judgment of the Hon'ble Supreme Court of India in ***Kannoria Chemicals Industries Limited and Others Vs. U.P State Electricity Board and Others***⁷ more specifically in paragraph No.11, she would submit that the order of stay comes to an end with the disposal of the proceedings and the parties should be put into the same position they would be but for the interim orders of the Court. She would rely upon the Judgment of the Kerala High Court in ***Bharat Coffee House Vs. Regional Director***⁸ more specifically on paragraph No.9. The learned counsel would rely upon the following Judgments to contend that once the interim order of stay is vacated, the employer must pay all the arrears of contribution as well as the interest;

- 1) 29-03-2010 ***Madras Fertilizers Ltd VS Employees State Insurance Corporation***
2010 SCC Online 2883
- 2) 13-12-2012 ***Madras Fertilizers Ltd VS Employees State Insurance Corporation and another***
2012 SCC Online Mad 5084

⁷ 1997 (5) SCC 772

⁸ 2006 SCC Online Ker 788



***Rane Engine Valves Ltd VS Govt of Tamilnadu
and others***
2011 SCC Online Mad 2866

5.9. The learned counsel would further contend that once the petitioner comes to approach the Court of law against the notification and obtain an interim order, ultimately when the petitioner is not able to sustain the challenge, the order of interim stay would get merged with the final order and even if the petitioner has not collected the contributions from the employees, it will be the duty of the petitioner to pay the entire contribution as well as the interest. The parties should be placed in the same position as if there had been no interim orders. In support of her contention, she would rely upon the following arguments:-

“1) 19-09-1960	<i>Indrapuri Studio Pvt.Ltd Vs. Employees State Insurance Corporation</i> AIR 1961 Cal 381
2) 15-01-1993	<i>Employees State Insurance Corporation VS Hotel Kalpaka International</i> AIR 1993 SC 1530
3) 19-08-1993	<i>Employees State Insurance Corporation Vs Kerala State Drugs &Pharaceuticals Ltd</i>



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

1995 Supp(3) SCC 148

WEB COPY

- 4) 30-08-1993 ***Employees State Insurance Corporation Vs Harrison Malayalam Pvt.Ltd***
1993(4) SCC 361
- 5) 11-10-1993 ***Employees State Insurance Corporation Vs Kerala State Handloom Development Corporation Employees Union (CITU), Kannur Dist and others***
(1994) 1 SCC 268”

5.10. She would submit that the liability to pay the contribution as well as the interest are statutory in nature and lack of financial resources or financial difficulty cannot be pleaded with reference to the same. She would rely upon the Judgment in ***South India Viscos Co-operative Stores Limited's case*** (cited *supra*) for the said proposition. Further, she would contend that the employer cannot take advantage of its own act of not paying the contributions in time and the obligation to pay the contribution commences as per the dates mentioned in the Act and the contribution is payable irrespective of the benefits availed.

5.11. She would submit that in the case of the instant nature, the doctrine of restitution and the principle *actus curiae neminem gravabit* will be applicable and as such the entire contribution along with interest is liable to be paid. In support of her contention, she would rely upon the following



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

Judgments:-

WEB COPY

- “1) 13-10-2003 ***South Eastern Coalfields Ltd Vs State of M.P and others***
2003 (8) SCC 648
- 2) 06-03-2020 ***Indore Development Authority Vs Manoharlal and others***
2020 (8) SCC 129”

5.12. She would submit that not even the Courts can direct waiver of the contribution. In support of her submission, she would rely upon the Judgment in ***Employees State Insurance Corporation Vs. All India ITDC employees***⁹ . In the present group of institutions, there are enough resources and the process of recovery is being carried out. As a matter of fact, the Hon'ble Supreme Court had stayed that portion of the direction by the Full Bench by an order dated 06.12.2021 in the Special Leave Petitions. Therefore, she would submit that the Writ Petitions have to be dismissed.

F. The Questions:

6. Upon considering the rival submissions made on either side and perusing the material records of the case the following questions arise to be determined in these Writ Petitions,

⁹ (2006) 4 SCC 257



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

(i) Whether the Writ Petitions are liable to be rejected on the grounds of availability of alternative remedy?

(ii) Whether ESIC was right in proceeding further with the determination as well as the consequential prohibitory orders freezing the bank account and other recovery measures?

(iii) Whether this Court in exercise of powers under Article 226 of the Constitution of India should order waiver of the past arrears and interests from 29.12.2010 to 30.09.2019?

G. Question No. (i):

7. There can be no quarrel over the proposition that in all these cases a determination of liability under Section 45A of the Act has been made. Against the determination, there is an alternative remedy of filing an appeal under Section 45AA of the Act or approaching the ESI Court under Section 75 of the Act and normally this Court does not entertain the Writ Petitions. But in this case, I answer the question in favour of the petitioners and reject the submissions to dismiss the writ petitions in view of the alternative remedies, for the following reasons :



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

(a) This case presents complex questions about the nature of the order that was passed in the earlier Writ Petitions filed by the petitioners by the Division Bench of this Court in W.P.Nos.3969 of 2015 etc and the import of the Judgment of the Hon'ble Full Bench;

(b) The prayer that is made is also about exercise of the jurisdiction of this Court under Article 226 of the Constitution of India and consider equities. The detailed discussions with references to the facts and the law involved while considering the other questions infra would justify the entertaining of these writ petitions on merits;

(c) These writ petitions were entertained as early as in the year 2021 and are pending for almost four years. As a matter of fact, both sides argued the matters on merits and earlier my predecessor had reserved orders in the year 2022 and then the matter was de-part heard. Thus, considering alternative remedies at this stage is inappropriate.

H. Question No.(ii):

8. The petitioner – Trusts viz., RVS Educational Trust has several institutions in several places including *Coimbatore, Dindugal* etc., and it is admitted factually that different code numbers were issued in respect of each



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

educational institution/campus. Be that as it may, when the petitioner as an entity, viz., the Trust files a Writ Petition whereunder the very Government Order is challenged and when an interim order of stay was granted, it cannot be restricted that it would apply to one code number alone. It is only the consequential orders that are stayed in the particular Writ Petition that would relate to the particular code number of the educational institution. However, when the petitioner filed the earlier Writ Petition, the prayer was for a Writ of Certiorari by calling for the records pertaining to the impugned Government Order in G.O.Ms.No.237 dated 26.11.2010 and also the consequential orders. In that matter, the order which was passed has already been extracted supra. It can be seen that the interim order of stay which was operating, was ordered to continue till the disposal of the matter, by the Hon'ble Supreme Court of India in the larger bench reference in the ***Jaibir Singh's case*** (cited supra) and then the parties would be bound by the outcome of the said decision. Therefore, when the stay is in respect of the Government Order extending the Act to the educational institutions, it cannot be meant to be restricted to the particular 'code numbers' or the campus.

8.1. The order was disposing of the main Writ Petition itself. The order



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

has not been expressly modified so far and remains as such. However, the contention on behalf of the petitioner that ESIC could not have proceeded cannot be countenanced given the Full Bench Judgment in ***All India Private Educational Institutions Association's case*** (cited supra). Though the Writ Petition of the petitioner stood disposed earlier and was not referred to the Full Bench, the Full Bench considered these orders and held that though these were final orders, however were to be considered interim in nature. It is essential to extract paragraph No.63 of the Judgment of the Full Bench, which reads as follows:-

“63. When the Division Bench passed the orders referred to in Question No.(i), the reference in Jai Bir Singh was cited without pointing out the fact that the said reference was not under the ESI Act. A reading of the Division Bench order dated 09.06.2015 (supra), also goes to show that the submissions of the learned counsels were just recorded. Thus, the final orders of interim nature were invited by the learned counsels from the Division Bench of this Court.”

(emphasis supplied)

8.2. The Writ Petitions filed by the petitioners were closed with a view to await the reference by the Supreme Court. Subsequently, the Full Bench has held that the decision regarding the validity of the Government Order could be independently taken up, and there was no justification to await the decision of the Hon'ble Supreme Court. The Full Bench concluded that the extension of the



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

Act to educational institutions was in order. If further proclaimed that the earlier orders were merely interim in nature, without adjudicating the rights of the parties. In light of the same, I am of the view that ESIC had the right to proceed further, *dehors* the said earlier judgment inter-parties to await the larger bench judgment of the Hon'ble Supreme Court of India.

8.3. It is a settled proposition that the Judgment inter-parties would bind both sides, even if the law is settled otherwise in other matters subsequently. In the instant case, though there is a Judgment inter parties, the Judgment did not decide any issue. The decision itself was not to decide the matter. The Full Bench has seen that when the larger Bench reference was concerning the term 'industry' as contained in the Industrial Disputes Act, that too in the context of whether the welfare measures performed regarding the sovereign functions can also be termed as an industry or not. It considered that no question directly arising from the Act was involved. Therefore, it opined that the earlier orders should at best be considered as interim in nature. There is no stay concerning that portions of the Judgment of the Hon'ble Full Bench. Accordingly, I answer the question that the ESIC was justified in proceeding with the matter further in determining the contributions as well as the taking up the recovery proceedings.



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

WEB COPY

I. Question No.(iii):

9. To answer this question, it is relevant to advert to the various decisions relied upon by either side.

9.1. In *South India Viscos Co-operative Stores Ltd. Vs. Employees State Insurance Corporation (by Regional Director)*¹⁰, the Court rejected the contention about the lack of resources and that the employees of the establishment not getting any benefit in any manner by paying the contribution for the period in question. The relevant portion is extracted hereunder:-

“3.....As already stated, before the Employees' State Insurance Court the only two grounds urged for non-liability to pay the contribution as quantified by the authority are (1) that the society has not resources, and (2) that the employees of the establishment are not getting any benefit in any manner by paying the contribution for the period in question. These two grounds have been rejected by the Employees' State Insurance Court. We are of the view that the Employees' State Insurance Court is right in coming to the conclusion that the ability of the society to pay the contribution is not relevant even assuming that the society has no resources. That is not a ground which can be urged against the liability imposed by a statute. If that were to be legal position, practically every one who is made liable to pay the contribution under the Act will say that he has no sufficient resources and so the statutory liability cannot be enforced. Therefore, whether the appellant has sufficient resources or not, its liability under the Act cannot be disputed. Similarly, the fact that there is not possibility for the members in the society to get

¹⁰ (1986) 2 LLN 598 (Mad)



WEB COPY



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

benefit for the back period from 12th February, 1978, to 1st October, 1982, is not a ground for escaping the statutory liability. It should be remembered that the liability to pay contribution is not made to depend on the benefit to be received by the members in respect of whom the contribution is sought for. In this case, the notification has been issued bringing the Act into force with effect from 12th February, 1978, in Coimbatore District, and, as per the notification, the appellant's undertaking stands covered by the provisions of the Act. Even though the appellant has not made the contribution as per the provisions of the Act, the employees, if the undertaking is covered by the Act, could have had the benefit as per the provisions of the Act. It is the appellant, who has not paid the contribution for the period 12th February, 1978, to 1st October, 1982, and the appellant cannot rely on his own default for saying that since the employees of his establishment would not have the benefit for the past period, the contribution is not payable. If the appellant had paid the contribution for the said period, the employees would have had the benefit of the provisions of the Act. Thus, the appellant cannot take advantage of his own default and say that by his default, the employees of the society had no benefit of the Act and that, therefore, the appellant is not liable to pay the contribution for the past period. Thus the second ground also has been rightly rejected by Employees' State Insurance Court. In view of this, we are not in a position to take a different view from the one taken by the Employees' State Insurance Court. The appeal is dismissed.”

9.2. In *Employees State Insurance Corporation Vs. Hotel Kalpaka*

*International*¹¹, it was held as follows in paragraph No.28:-

“28. It is equally fallacious to conclude that because the employees had gone away there is no liability to contribute. It has to be carefully remembered that the liability to contribute arose from the date of commencement of the establishment and is a continuing liability till the closure. The very object of establishing a common fund under section 26 for the benefit of all the employees will again be thwarted if such a construction is put.”

11 (1993) 2 SCC 9



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

WEB COPY

9.3. In *Regional Director, Employees State Insurance Corporation Vs. Kerala State Drugs & Pharmaceuticals Ltd. And Others*¹², it was held in paragraph No.3 as follows:-

“3. There is thus no quid pro quo between the persons insured and the benefit available under this Act. As regards the finding that the workmen were unidentifiable, what is forgotten is that under the act, once an establishment comes to be covered by the Act. the employer becomes liable to pay the contribution in respect of the employees in his employment directly or indirectly. The contribution which had become payable for the relevant period has to be paid even if the employees concerned are no longer in employment. Whether the employees are unidentifiable today or not is, therefore, irrelevant so long as the contribution was liable to be paid on their behalf, when they were in employment.”

9.4. In *Employees State Insurance Corporation Vs. Harrison Malayalam Pvt. Ltd.*¹³, the relevant portion in paragraph No.3 is extracted hereunder:-

“3.....What is more, there is no relation between contribution made and the benefit availed of. The contribution is uniform for all workmen and is a percentage of the wages earned by them. It has no relation to the risks against which the workman stands statutorily insured. It is for this reason that the Act envisages

12 (1995) Supp (3) SCC 148

13 (1993) 4 SCC 361



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

automatic obligation to pay the contribution once the factory or the establishment is covered by the Act, and the obligation to pay the contribution commences from the date of the application of the Act to such factory or establishment. The obligation ceases only when the Act ceases to apply to the factory/establishment. The obligation to make contribution does not depend upon whether the particular employee or employees cease to be employed employees after the contribution period and the benefit period expire.”

9.5. In *Employees State Insurance Corporation Vs. Kerala State Handloom Development Corpn.and Others.*¹⁴, the Hon'ble Supreme Court of India has held that the High Court cannot postpone the date of operation of the notification and paragraph No.3 is extracted hereunder:-

“3. We have heard learned counsel for the parties. We are of the view that the High Court fell into patent error in postponing the date of the operation of the notification. The notification, amending the Rules, was a legislative act. The amendment of the Rules being a delegated legislation, the High Court could not have interfered with the date of operation of the notification.”

9.6. In *Employees State Insurance Corporation Vs. Hyderabad Race Club*¹⁵, the Hon'ble Supreme Court of India had considered the fact that the law at the relevant point of time was uncertain and held that there could be an exception to the general rule and the High Court was right in concluding that it is unjustifiable for the ESIC to call upon the employer to pay the past arrears. Paragraphs Nos.2 and 6 of the said Judgment are relevant and are extracted

¹⁴ (1994) 1 SCC 268

¹⁵ (2004) 6 SCC 191



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

hereunder:-

WEB COPY

“2. The grievance of the appellant Employees State Insurance Corporation (the Corporation) in CA No. 4686 of 1999 is that the High Court having come to the conclusion that Hyderabad Race Club is an establishment under the Act, erred in reducing its liability and holding that the demand made on the said Club for contribution for the period between 1975 and 1986 was unreasonable because the law at that time on this point was uncertain. In this appeal, the appellant contends that the same cannot be a ground for exempting an establishment of its statutory liability once it is held that the establishment comes under the purview of the Act.

.....

.....

6. It is true as contended by the learned counsel on behalf of the Corporation that once a court of law declared the applicability of a statute the said declaration in the ordinary course should apply from the date the law in question was brought into force, but there could be an exception to this principle depending upon the facts of the case. It is undisputed that till the judgment of this Court in the case of *Hindu Jea Band v. Regional Director, ESI Corpn.* [(1987) 2 SCC 101 : 1987 SCC (L&S) 88 : AIR 1987 SC 1166] the law in regard to institutions like a club coming within the purview of the definition of establishment for the purpose of the Act was nebulous. It was so understood even by the Corporation itself which is evident from the fact that the action against the appellant for non-compliance with its liability was not taken for nearly 15 years until the visit of the Inspector of the Corporation on 17-6-1990. In that background, even the Corporation was not very certain whether the word establishment used in the notification concerned of 26-3-1975 included a club. Therefore, in our opinion, the High Court was justified in coming to the conclusion to call upon the Club to make contribution for the period between 1975 and 1986, would be somewhat unreasonable. Thus on the peculiar facts of this case, we are in agreement with the finding of the High Court that the demand under the Act as against this Club can be enforced only from the year 1987 onwards.”



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

9.7. In *Employees State Insurance Corporation Vs. Distilleries & Chemical, Mazdoor Union and Others*¹⁶, the Supreme Court had considered the matter, in which originally the Writ Petition was admitted and interim order was passed, not to make deduction towards the contributions of the Employees State Insurance ESIC and held that the High Court was justified in passing judicious order after considering the equities by directing the employer and employees to make contribution only for the future. Paragraph Nos.26,29 and 31 which are relevant are extracted hereunder:

“26. In our opinion, the High Court was fully justified in passing the judicious order after considering the equities by directing the employer and the employees to make Employees State Insurance Corporation contribution for the future i.e. from the date of disposal of the writ petition and should not bear with the liability for the past inasmuch as the employees of the respondent No.2 has not availed any medical facilities from Employees State Insurance Corporation and at the same time the employer was providing the medical facilities due to interim order of the High Court. In these circumstances, the order passed by the High Court, in our considered opinion, meets the ends of justice and does not require interference by this Court under [Article 136](#) of the Constitution of India.

27. This apart it is important to note that in the past 17 years when the interim orders passed by the High Court was enforced, several employees have left/retired and were paid the entire salary without any deduction and, therefore, it will be impossible for the employer to recover the part of the employees contribution in respect of the Employees State Insurance Corporation from the employees.

.....
.....

16 (2006) 6 SCC 604



WEB COPY



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

29. As regards the question of law raised by learned counsel for the Employees State Insurance Corporation regarding the view taken by the High Court, we are of the opinion that the view taken by the High Court was on account of the peculiar facts and circumstances of the case. As already noticed, the deduction of contribution of the members of the Union had been specifically stayed by the High Court and the same continued for a period of 18 years till the disposal of the petition and that none of the members of the Union had availed facilities of the ESI. In our view, passing of the final order by the High Court directing the payment of ESI contribution from the date of the said judgment does not amount to postponing the enforcement of notification and the same is also not in violation of the principles laid down by this Court in the various judgments referred to above. There has been no postponement of the enforcement of the notification in view of the peculiar circumstances of the case, namely, the non-availability of the facilities, non-deduction of contribution from the members of the Union for 18 long years, provision of medical relief by the Management. The High Court had directed deduction of contribution with effect from the date of the judgment, which, in our opinion, is perfectly justified.

.....

.....

31. The High Court, in our opinion, while disposing off the writ petition filed by the Union has taken a just, pragmatic, fair and judicious view after considering all the equities and facts and circumstances of the case. Extreme hardship might have been caused to both the employer as well as the employee since no medical facilities have been availed by the workmen from Employees State Insurance Corporation and the employer had provided medical facilities to the workmen as per the Court orders and also had paid medical allowances.”

9.8. In ***Employees State Insurance Corporation and Others Vs. Jardine Henderson Staff Association and Others***¹⁷, the Hon'ble Supreme Court of India considered the principles of *actus curiae neminem gravabit* and *lex non cogit ad impossibilia* and it is relevant to extract paragraphs Nos.23 to 28 of the said

17 (2006) 6 SCC 581



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

Judgment, which reads as follows:-

WEB COPY

“23. It is submitted that interim stay order was granted on 25.03.97 which continued till the passing of the Division Bench judgment dated 16.3.2004. By the interim order, the respondents were restrained from deducting the contribution required to be deposited with the Corporation. Further, the respondents were directed to continue to provide existing medical benefits. Under Section 39 of the ESI Act employees' contribution is to be deducted from their salary. The contribution by the employer is to be made as per Rule 51 of The Employees' State Insurance (Central) Rules, 1950 which is given below. Rule 51 of the Employees' State Insurance (Central) Rules, 1950 is as follows:

"51. Rates of contribution- The amount of contribution for a wage period shall be in respect of-

(a) employer's contribution, a sum (rounded to the next higher multiple of five paise) equal to [four and three-fourth per cent] of the wages payable to an employee; and

(b) employee's contribution, a sum (rounded to the next higher multiple of five paise) equal to [one and three-fourth per cent] of the wages payable to an employee"

24. In view of interim stay order which continued for almost seven years, the employers were restrained from making any deduction. Whereas, the employers continued to provide satisfactory medical benefits to its employees. The said interim order was not appealed or challenged by the Corporation nor was it stayed during the pendency of the appeal before the Division Bench.

25. It is further submitted that with the passage of time several employees would have left the organization and to deduct the employees contribution from their salary is not workable.

27. In the matter of Mohammed Gazi vs. State of M.P., (2000) 4 SCC 342, the facts were that on account of litigation initiated by one of the respondents, the appellant was prevented from taking benefit of the acceptance of his tender notice. For no fault of his, the appellant was prevented from collecting the tendu leaves. The High Court directed that a sum of Rs.30,000/- be deducted from the earnest money of the appellant. Such a direction was not sustained by this Court.

28. The maxim of equity which is founded upon justice and good sense was applied as well as other maxim "lex non cogit ad



WEB COPY



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

impossibilia" the law does not compel a man to do what he cannot possibly perform. The applicability of the aforesaid maxim has been approved by this Court in *Raj Kumar Dey vs. Tarapada Dey* (supra) and *Gursharan Singh vs. New Delhi Municipal Committee*”

9.9. In the self-same Judgment when the Court considered the undue hardship which is pleaded, has held as follows in paragraphs Nos.57 to 59 and the same is also extracted hereunder:-

“57. In our opinion, the High Court was fully justified in passing the judicious order after considering the equities by directing the employer and the employees to make Employees State Insurance Corporation contribution for the future and should not bear with the liability for the past inasmuch as the employees of the respondents have not availed any medical facilities from Employees State Insurance Corporation and at the same time the employer was providing the medical facilities due to interim orders of the High Court. The order passed by the High Court, in our considered opinion, meets the ends of justice and does not require interference by this Court under Article 136 of the Constitution of India.

58. In our view, passing of the final order by the High Court directing the payment of the ESI contribution from the date of the said judgment does not amount to postponing the enforcement of notification and the same is also not in violation of the principles laid down by this Court in various judgments referred to above. There has been no postponing of the enforcement of the Notification in view of the peculiar circumstances of the case, namely, the non-availability of the facilities, non-deduction of contribution from the members of the union for several years and provision of medical relief by the Management. The High Court's direction for deduction of contribution w.e.f. the date of the judgment in our view, is perfectly justified. This apart, the members of the union included casual, temporary contractual and it will be practically impossible to find each and every member of the union to recover their contribution for the past several years and in fact some of the workmen who would have been the employees during all these years would have left, expired etc. and on account thereof also their contribution cannot be recovered. The



order passed by the High Court, in our opinion, is perfectly justified in view of the peculiar facts and circumstances of the case.

59. The High Court, in our opinion, while disposing of the matter has taken a just, pragmatic, fair and judicious view after considering all the equities and facts and circumstances of the case. Extreme hardship might have been caused to both the employer as well as the employee since no medical facilities admittedly have been availed by the workmen from Employees State Insurance Corporation and the employer had provided medical facilities to the workmen as per the Court orders and in view of the interim order also had paid medical allowances.”

9.10. The High Court of Karnataka, in the case of ***Workmen of Bharath Electronics Ltd. Vs. Employees State Insurance Corporation***¹⁸ held that such stay orders cannot confirm any benefit on the employers and paragraphs Nos.17 and 18 of the Judgment are extracted hereunder:-

“17. As seen from the above provisions, the principal employer has to contribute both the employer's as well as the employee's contribution in the first instance. In *Employees State Insurance Corporation. v. Hotel Kalpaka International* 1993 I CLR 332 , the object of making a deeming entrustment under sub-section (4) of Section 40 was held to be rendered nugatory, if the employer is not made liable to pay the employee's contribution by contending that he had not deducted the employee's contribution on the wages of the employees and that he could not be made liable for the same. It was held that under Section 40, the primary liability is of employer to pay, not only the employer's contribution but also the employee's contribution.

18. The stay orders issued pending disposal of the Writ Petitions had no effect on the obligation of the principal employer to pay contributions as required by Section 40. If any hardship is caused to the employers by their understanding of the implications of the stay orders, it is open to them to make representations to the appropriate Government and seek exemptions under the provisions contained in Chapter VIII of the Act.”

18 (1997) 1 LLN 315



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

9.11. The Hon'ble Supreme Court of India in ***Kanoria Chemicals and Industries Ltd's case*** (cited supra) considered the effect of an interim order of stay and the relevant portion in paragraph No.11 is extracted hereunder:-

“11.....It is equally well settled that an order of stay granted pending disposal of a writ petition/suit or other proceeding comes to an end with the dismissal of the substantive proceeding and that it is the duty of the court in such a case to put the parties in the same position they would have been but for the interim orders of the court.

9.12 The High Court of Kerala in ***M/s Bharath Coffee House Vs. Regional Director, Employees State Insurance Corporation***¹⁹ has held that if only on account of the stay, the ESIC could not collect the contribution or could not take coercive steps to realize the same, after the stay is vacated, it would be entitled to release both the contribution as well as interest and it is essential to extract the relevant portion in paragraph No.9 of the Judgment, which reads as follows:-

“9.....The liability to pay contribution was challenged by the petitioner by filing O.P. No. 1863 of 1991 and he got an order of stay in his favour. Because of the stay, the Corporation could not collect contribution nor could it take coercive steps to realize the same. A party who has got the benefit of obtaining a stay cannot take advantage of the situation and contend that he is not liable to

19 (2006) SCC OnLine Ker 788



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

pay interest on the defaulted contribution amount. Though the order of stay was in his favour, it did not prevent him from paying the contribution. It only prevents the Corporation from realising the contribution. The inability of the Corporation to realise contribution, as realisation was stayed by an interim order of Court, is not an answer for absolving the liability of the employer to pay interest.....”

9.13 The Division Bench of this Court in ***Madras Fertilizers Ltd. Vs. Employees State Insurance Corporation and Another***²⁰ had held as follows in paragraph No.13:-

“13. As regards the argument of the learned counsel for the appellant that the Management was not in a position to comply with the provisions of the ESI Act only because of the stay granted in various connected Writ Petitions, it is only to be rejected. The learned Judge has categorically held that the stay order was obtained by the appellant Management on its own volition, but it was a condition, which the appellant must abide by. Therefore, we see no reason to interfere with the said finding.”

9.14. In ***South Eastern Coalfields Ltd. Vs. State of MP and Others***²¹, the Hon'ble Supreme Court of India considered the aspect of the parties suffering on account of the act of the Court in passing common interim orders and considered the question in detail and it is essential to extract paragraph No.28, which reads as under:-

“28. That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the 'act of the court' embraces within its sweep all such acts as to which the court may

20 (2012) SCC OnLine Mad 5084

21 (2003) 8 SCC 648



WEB COPY



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the Court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise corned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the set of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the court would act in conjunction with what is the real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced, we are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation.”



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

9.15. In *Indore Development Authority Vs. Manoharlal and Others*²², the Hon'ble Supreme Court of India has held that it is the litigant who takes his chances and therefore the restitution principle should be applied and the relevant portion in paragraph No.338 is extracted hereunder:-

“338. A wrong-doer or in the present context, a litigant who takes his chances, cannot be permitted to gain by delaying tactics. It is the duty of the judicial system to discourage undue enrichment or drawing of undue advantage, by using the court as a tool. In *Kalabharati Advertising v. Hemant Vimalnath Narichania* (2010) 9 SCC 437, it was observed that courts should be careful in neutralizing the effect of consequential orders passed pursuant to interim orders. Such directions are necessary to check the rising trend among the litigants to secure reliefs as an interim measure and avoid adjudication of the case on merits. Thus, the restitutionary principle recognizes and gives shape to the idea that advantages secured by a litigant, on account of orders of court, at his behest, should not be perpetuated; this would encourage the prolific or serial litigant, to approach courts time and again and defeat rights of others-including undermining of public purposes underlying acquisition proceedings.....”

9.16. In *M/s Modern Food Industries (India) Limited Vs. The Regional Director, ESI Corporation*²³, it was held as follows:-

“17. In the light of the aforesaid decisions, it is clear that the Courts cannot postpone the date of operation of the notification. Once the main petition is dismissed the parties are relegated to the original position. Consequently, the employer is liable to pay contribution from the date on which the notification came into force and not from the date of dismissal of the Writ petition. Therefore, I hold the first point in favour of the Corporation.”

9.17. The Division Bench of the High Court of Karnataka in *Employees*

²² (2020) 8 SCC 129

²³ ILR 2003 KAR 4830



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

State Insurance Corporation and Others Vs. Karnataka State Small

Industries Development Corporation Ltd.,²⁴ considered the question of interest

and the relevant portion of the Judgment in paragraph No.14 is extracted

hereunder:-

“14.Once the coverage which had been questioned is accepted or negated, the law is well settled that the coverage would relate back to the date on which the establishment was covered under the Act. Further the relevant provisions extracted and noticed by us supra would indicate a duty is cast on the employer himself to deduct and pay the contribution. Hence we see force in the contention of the learned Counsel for the ESI Corporation in this regard. That being so, we are of the view that the ESI Court was not justified in limiting the interest only for the periods from 7.2.1997 to 25.10.1997. On the other hand, the KSSIDC is liable to pay interest for the entire wage period till the date of deposit of the amount as claimed by the ESI Corporation by its notice dated 22.4.1998.”

9.18. In ***M/s Goetze (India) Ltd. Vs. Employees State Insurance Corporation*** (Civil Appeal No.8432 of 2001 dated 07.07.2008), the Hon'ble Supreme Court of India has held as follows and the relevant portion of the Judgment in paragraph No.6 is extracted hereunder:-

“6. 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 45A 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 pendency of the matter there was re-verification and the quantum payable by the payment was worked out. The liability to pay interest is statutory. There is no power of waiver. The question

²⁴ ILR 2006 KARNATAKA 4015



WEB COPY



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

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.....”

9.19. In ***Royal Western India Turf Club Limited Vs. Employees State Insurance Corporation and Others***²⁵, while considering the question of whether the casual employees would be covered under the Act, the Hon'ble Supreme Court of India held that even when consent is given in respect of the earlier period, the same cannot be claimed in view of the liability being statutory in nature and the relevant portion in paragraph no.14 is extracted hereunder:-

“14.Thus, no benefit can be derived by the consent terms which related to the earlier period when notification dated 18.9.1978 had not been issued. Notification has statutory force and agreement cannot supersede it. It is also clear that several departments of race club were covered under the notification issued in 1968. Thus, the submission raised on the basis of consent terms is hereby rejected.”

9.20. In ***the Transport Coprn. Of India Ltd. Vs. Employees State Insurance Corporation and Ors.*** (Civil Appeal No..3135 of 2011) the Hon'ble Supreme Court of India has held as follows with reference to payment of interest and paragraph No.9 is extracted hereunder:-

25 (2016) 4 SCC 521



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

“9. 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 by the Appellant before the Gujarat High Court, in Letters Patent Appeal and in this appeal, the Appellant has not challenged the validity of the Regulation 31-A. It must be noted here that the judgment and Order dated 10th July 2006 of the Gujarat High Court affirming the liability of the Appellant to pay contribution from 30th March 1975 onwards has attained finality and therefore, the liability of the Appellant to pay contribution as demanded cannot be questioned.”

9.21. The Hon'ble Supreme Court of India in ***the Regional Director / Recovery Officer and Anr. Vs. Nitinbhai Vallabhaji Panchasara*** (S.L.P.(C).No.16380 of 2022 dated 17.11.2022) considered the question of reduction of payment of interest and held as follows:-

“From the order passed by the ESI Court, it appears that the ESI Court has reduced the period of interest to two years only. The same is not supported by any statutory provision. On going through Section 39(5)(a) of the ESI Act, the liability to pay the interest is from the date on which such contribution has become due and till the date of its actual payment. Therefore, as such the ESI Court was not justified at all in reducing the period of interest to two years only. The Respondent was liable to pay the interest Under Section 39(5)(a) from the date on which the contribution became due and payable and till the date of actual payment.”

9.22. Thus, upon consideration of the dicta in the above Judgments, the relevant legal position with reference to answering the present question can be crystallized as follows:-



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

(i) It is the principal duty of the employer to pay the contribution and liability does not arise on account of any demand, but it is statutory in nature from the date on which the act became applicable;

(ii) The employers themselves cannot self-proclaim that they have the hospital facilities or better benefits and remain not paying the contribution. Exemption has to be specifically granted under the Act, by an exercise of power by a notification under Section 87 of the Act.

(iii) The contributions as well as interest would fall due as per Section 39 of the Act and also Regulation 31 A and 31 B of the Regulations, upon the expiry of the period of 21 days of the concerned wage period and as such is statutory in nature and there is no provision for any postponement in respect thereof.

(iv) Merely because the employer did not deduct the employee's contribution or that the employee did not avail of any benefit is not a matter, as the contribution is towards the corpus fund which is meant to the benefit of the employees in general and not the employees of the particular institution alone.

(v) Having known that the institution is covered by the notification, if the employer chooses to indulge in litigation and if the stay is granted, it would



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

only temporarily prohibit the realisation / coercive measures by the ESIC and will not have the effect of obliterating of the dues for the period. Once final orders are passed, negating the claim of the employer, the order of stay merges with the final order and therefore, a litigant who takes his chance by obtaining the interim order would be bound to pay the entire contribution even for the stay period and any plea of hardship cannot be entertained.

(vi) Similarly, once the contribution is payable, by operation of law, the interest become payable as per Section 39 and also the Regulations and therefore, there is no question of any waiver of interest.

(vii) The High Court under Article 226 of the Constitution of India, is bound by the principles of restitution and the parties have to be put back into the original position once the interim order is vacated and no party can be put to prejudice by the action of the Court, whereby one party had convinced the Court to grant an interim order.

(viii) The High Court under Article 226 cannot normally waive the contribution for the litigation period or the anterior period and thus cannot postpone the date of notification or the date of interest.

(ix) There may be exceptional circumstances in which the High Court in



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

the exercise of powers under Article 226 can do equities between the parties by considering the hardship etc.

(x) The exceptional circumstances cannot be in a case where the employer himself on his own volition litigates and obtains an interim order.

(xi) The extraordinary situation can arise, (i) if the law relating to the levy of contribution remains nebulous; (ii) is belatedly settled by the Courts of law; (iii) if the employer is prevented by the interim orders which are not by its own action (such as action by trade unions, employees etc.); and (iv) such situation resulting in non-deduction of the employee's contribution, the employees availing other benefits and not availing any benefits from ESIC. The Court has to consider the combination of such factors to consider if it warrants interference to render equities between the parties.

9.23. Now, let us apply the above principles to the facts of the case. At the outset, this Court is conscious of the fact that the Full Bench had directed the ESIC to consider waiver as per Section 91 (c) of the Act. Section 91(c) comes into play, when the amounts become irrecoverable. The said direction has been stayed by the Hon'ble Supreme Court of India and the present claim is



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

not based on the said direction of the Full Bench, nor it is under Section 91(c)

for waiver but is seeking this Court to do equities.

9.24. Firstly, the act was, for the first time extended to educational institutions. Though a similar challenge to the *Kerala* Notification was rejected and the extension upheld, the fact remains that as far as *Tamilnadu* Notification is concerned, though the notification was upheld by the Single Bench, thereafter, different views were taken by different Hon'ble Division Benches, leading to the referral of the questions to be resolved. The very fact that the writ petitions filed by the petitioner and others were disposed of without deciding the validity adds to the situation. Therefore, for the question as to whether the law was nebulous, the answer would be in affirmative, until it was resolved by the Full Bench.

9.25. Secondly, the notification came into force on 29.12.2010. There were litigations and interim orders were also granted staying the operation of the notification itself. The notification was upheld and it was also clarified that the Courts need not await the larger bench decision of the Hon'ble Supreme



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

Court of India by the Judgment of the Full Bench dated 29.07.2020. Thus, without any hesitation, it can be concluded that the interim orders were operating and the law was settled almost after a period of 10 long years.

9.26. In this case, the litigation was filed by the employer of its own volition. However, the writ petition was disposed of on consent of both sides, that is, the employer and the ESIC. This is not a case where the employer can be said to be 'prevented' by interim order as it is not at the instance of the third party. But at the same time, it is not of its own volition that the employer convinced the court to grant an interim order. It is neither a case of the Court passing an interim order based on the principles of prima facie case and balance of convenience. It is an order passed by the Consent of parties. Thus, ESIC also contributed to the grant of the interim order. It also felt that the law is nebulous and that things can wait till the larger bench decision of the Hon'ble Supreme Court of India. Thus, this is not a case whether it can be said that the employer is the sole cause for obtaining interim orders and that he has to face the consequences once the order is vacated and he has to pay all the arrears along with statutory interest. Nor the entire arrears can be waived as this is also not a



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

case of 'prevention', as it is the employer who filed the litigation and not by any employee, or trade union or third party. Thus, it is a case where there is no 'prevention' but the employer was 'goaded' and 'encouraged' not to comply with the provisions of the Act by ESIC, by an agreement between the parties, which is recorded by the Court.

9.27. Thus, I conclude that the peculiar and special facts of the case, require the exercise of power under Article 226 of the Constitution of India to do equities. Since the litigation was initiated by the Employer, I hold that it is liable to pay the contribution for the entire period 29.12.2010 to 30.09.2019. However, since the ESIC itself agreed to await the larger bench decision and not to go by the dates on which the 'contributions fell due' as per the Regulation -31, belatedly now, it is claiming a huge amount as interest from the above said date as per Regulation 31-A, as if the employee 'failed to pay' on the respective dates. These are educational institutions. Thus, the interest of the parties will be better served that the interest portion stands deleted from the total claim. After agreeing to postpone the implementation of the Government Order extending the Act to the date of pronouncement of the larger bench



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

decision of the Hon'ble Supreme Court of India and thereafter, since the claim is made it would be only pragmatic and fair that the amount is collected without interest. Accordingly, I answer the question.

J.THE RESULT:

10. In the result, **these Writ Petitions are partly allowed** in the following terms:-

(i) The orders passed under Section 45 A of the Act, in all these cases, assessing the contribution payable stand upheld. The consequential orders enforcing the arrears shall remain set aside, in as much as they seek to recover interest alone;

(ii) The ESIC is entitled to recover the entire contributions and the other items claimed except the interest portion and accordingly the total amount due shall be reworked;

(iii) If the entire amount is already realised and if there is an excess, the



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

same shall be refunded to the petitioner - trusts within eight weeks from today and all the orders of freezing the bank account etc., shall come to an end and the petitioner would be free to operate those accounts;

(iv) If still balance amount is due, further steps can be taken to realise the same in accordance with law and the balance sum due shall be recoverable with further interest at the rate of 12% per annum from today;

(v) No costs. Consequently, the connected miscellaneous petitions are closed.

03.01.2025

Neutral citation : Yes/No

Jer

To

1.The Principal Secretary
State of Tamil Nadu
Labour and Employment Department
Fort St.George, Chennai – 600 009.

2.The Regional Director
Employees State Insurance – Regional
Corporation (Tamil Nadu), 143, Sterling Road
Chennai – 600 034.

3.The Deputy Director
Employee's State Insurance Corporation



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

Sub-Regional Office, Coimbatore
1897, Trichy Road, Panchdeep Bhavan
Ramanathapuram, Coimbatore – 641 045.

4.The Authorized Officer
Employee's State Insurance Corporation
Sub-Regional Office, Coimbatore
1897, Trichy Road, Panchdeep Bhavan
Ramanathapuram, Coimbatore – 641 045.

5.The Recovery Officer
Employee's State Insurance Corporation
Sub-Regional Office, Coimbatore
1897, Trichy Road, Panchdeep Bhavan
Ramanathapuram, Coimbatore – 641 045.

D.BHARATHA CHAKRAVARTHY, J.,

Jer

**W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214 and 20778 of 2021
& W.M.P.Nos.22044, 22045, 22468, 22487, 22488, 24873, 24876, 22475,
22485, 22486, 24878, 22484, 22491, 24869, 22470, 22474, 24765, 24882,
22481, 24780 and 22492 of 2021 & 11565 of 2024**



WEB COPY



W.P. Nos.21187, 21219, 21195, 21205, 21213, 21214
and 20778 of 2021

03.01.2025