MANU/MH/2683/2012

Equivalent Citation: [2013(139)FLR491]

IN THE HIGH COURT OF BOMBAY

CAJ First Appeal No. 920 of 1998 Along with First Appeal No. 1109 of 2004

Decided On: 18.09.2012

Appellants: **Regional Director, Employees State Insurance Corporation**
Vs.
Respondent: **Shalimar Hotel and Another**

Hon'ble Judges/Coram:
R.P. Sondurbaldota, J.

Counsels:
For Appellant/Petitioner/Plaintiff: H.V. Mehta

For Respondents/Defendant: S.C. Naidu, Saurabh Kalkarni i/by C.R. Naidu and Company

Case Note:
Insurance - Barred by time - Sections 38, 45A, 45B and 77(1-A)(b) of Employees State Insurance Act, 1948 - Present appeal filed for challenging order whereby, Respondent's appeal against order of demand of contributions interest on delayed payment, was allowed - Whether order of dismissal of demand on basis of beyond limitation justified - Held, obligation on Respondents to file returns annually and pay contribution towards Insurance - Provisions of Act, 1948 invested right to determine contribution on basis of material that might be available to Appellant - Legislature was of opinion that such procedure was necessary for effectively implementing provisions of Act - Provision of Act, 1948 was in nature of investing substantive right in Appellant to determine contribution under Act, 1948 - Amendment to section 45A introduced period of limitation for determination of contribution from errant employers was not procedural in nature and hence could not be retrospective - Therefore amendment was only prospective in it's application and could not affect proceedings pending as on date of amendment coming into effect - Appeal allowed.

JUDGMENT

R.P. Sondurbaldota, J.

1. The above two appeals are being disposed off by a common judgment, since the question of law arising therein is identical The appellant in both the appeals is Employees State Insurance Corporation ("Corporation" for short). The respondents are two principal employers who are liable to pay contribution under the Employees State Insurance Act (hereinafter referred to as "E.S.I. Act").

The brief factual background of the appeals necessary for comprehending the question of law arising therein is as follows:

The Corporation by the orders passed under section 45A of the ESI Act

The Corporation by the orders passed under section 45A of the ESI Act, demanded contributions interest on delayed payment from the respondents for the period beyond 5 years prior to the demand. The demand came to be challenged by the respondents by filing applications under section 75 of the E.S.I. Act. One of the grounds of challenge was that, demand for the period beyond 5 years was barred by limitation under section 77(1-A)(b) of the E.S.I. Act. The Employees State Insurance Court ("the E.S.I. Court" for short) by the orders impugned in the appeals, upheld the objection of the respondents that the applications to the extent of the demand for the period of 5 years prior thereto was beyond limitation.

The Corporation therefore filed the present appeals.

The learned Counsel for the Corporation in the two appeals Mr. Mehta and Mr. Palshikar, refer to the decision of the Apex Court in the case of Employees State Insurance Corporation v. C.C. Santhakumar, MANU/SC/8689/2006 : 2007 (112) FLR 636 (SC) wherein the Apex Court has held, in similar facts, that proviso (b) to section 77(1-A) of the Act fixing the period of 5 years for the claim made by the Corporation, will apply only in respect of the claim made by the Corporation before the E.S.I. Court and to no other proceedings. The reasons stated for so holding, noted at paragraphs 23 and 24 read as follows:

> **23.** On a plain reading of sections 45A and 45B in Chapter IV and 75 and 77 in Chapter VI of the Act, as indicated above, there cannot be any doubt that the area and the scope and ambit of sections 45A and 75 are quite different.
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> **24.** If the period of limitation, prescribed under proviso (b) of section 77(1-A) is read into the provisions of section 45A, it would defeat the very purpose of enacting sections 45A and 45B. The prescription of limitation under section 77(1-A)(b) of the Act has not been made applicable to the adjudication proceedings under section 45A by the legislature, since such a restriction would restrict the right of the Corporation to determine the claims under section 45A and the right of recovery under section 45B and, further, it would give a benefit to an unscrupulous employer. The period of five years, fixed under Regulation 32(2) of the Regulations, is with regard to maintenance of registers of workmen and the same cannot take away the right of the Corporation to adjudicate, determine and fix the liability of the employer under section 45A of the Act, in respect of the claim other than those found in the register of workmen, maintained and filed in terms of the Regulations.

Both the Counsel point out, after holding that the limitation under section 77 of the E.S.I. Act cannot be dragged to section 45A, the Apex Court held that, the Corporation, however, was required to determine the amount of contribution within a reasonable period depending upon the surrounding circumstances and the relevant factors. They further point out that, our Court, by following the ratio in the decision of Santhakumar (supra), has remanded similar applications to the E.S.I. Court for deciding whether the determination of the contribution made by the Corporation, was within a reasonable time. The decision relied upon by them is of a Single Judge of this Court in Regional Director, E.S.I.C. v. Precimax. MANU/MH/1402/2007 : 2008 (117) FLR 153 (Bom.) They request that similar order is required to be passed in the present two appeals also.

2 . Mr. Naidu, the learned Counsel for the respondent, opposes the request for

remand, submitting that the decision in Santhakumar's case and the order of the learned Single Judge of this Court in Precimax's case, cannot be followed in view of substantial legislative change in the E.S.I. Act after the two judgments. He refers to the amendment to section 45A of the E.S.I. Act by the Amendment Act, 18 of 2010 dated 24th May, 2010 made effective from 1st June, 2010. This Amendment Act inserts a Second Proviso into section 45A imposing the same limitation of 5 years on determination of the contribution. Mr. Naidu, submits that after the decision of the Supreme Court in Santhakumar's case, the legislature thought it fit to enact an almost identical provision in section 45A of the Act by inserting second proviso thereto. This amendment being procedural in nature, is retrospective in operation, barring recovery of contribution in respect of the period beyond 5 years from the date on which the contribution became payable. Hence, the appeals should be dismissed.

3 . Mr. Mehta seeks to meet the argument of Mr. Naidu, by submitting that the amendment to section 45A, which has been effective from 1st June, 2010 shall have a prospective effect and cannot affect the claim made by the Corporation in the two proceedings.

4. On the above contentions, the question emerging for consideration of the Court in these appeals is, whether the amendment to section 45A of the E.S.I. Act by the Amendment Act 18 of 2010 is retrospective or prospective in nature. If it is held to be retrospective in nature, the above appeals will have to be dismissed. If the amendment is held to be prospective in nature, remand of the dispute following the decisions in Santhakumar's case and Precimax's case, will be due in order.

5 . Before delving into the rival submissions in support of their respective contentions, it will be convenient to make a brief reference to the relevant provisions of the E.S.I. Act. The E.S.I. Act was enacted to provide for benefits to the employees in case of sickness, maternity, injury and to make provision for certain other matters in relation thereto. Under the E.S.I. Act, Corporation has been established, which is put incharge of the Employees State Insurance Fund created under section 26 of the Act. Section 38 of the Act, mandates that all the employees in factories or establishments to which the Act applies, shall be insured in the manner provided by the Act. The contributions to the fund, by the employer, as also, the employee are to be paid at such rates as may be prescribed by the Central Government. The mode, manner and procedure for resolution of a dispute or claim arising under the Act, has been provided for in Chapter VI of the Act titled "Adjudication of disputes and claims". It sets out the machinery for resolution of a dispute in the form of E.S.I. Court established under section 74 of the Act. Section 75 sets out the matters to be decided by the E.S.I. Court and sections 76 to 82 provide for the procedure for the proceedings before the E.S.I. Court.

6 . The existing provisions relating to determination of contributions and recovery thereof were found to be inadequate in certain situations. Section 38 imposes obligation on the employer to file returns and to pay contribution towards insurance and upon failure, he is liable to pay interest on a recurring basis until it is paid. In cases of defaults by the employers in filing returns, the only remedy available to the Corporation was approach E.S.I. Court for recovery under section 75 of the Act. This procedure delayed the process of recovery and hence was found not practicable. Therefore, the legislature amended the Act, by the Amending Act 44 of 1966 w.e.f. 17th June, 1967. The Amendment Act introduced new sections 45A, empowering the Corporation to determine, in cases of erring employers, the amount of contributions payable in respect of the employees of a factory or establishment on the basis of

available information. Section 45B was introduced for recovery of such amount determined, as arrears of land revenue. Sections 45C to 45I lay down detailed procedure for recovery of contribution. The order under section 45A passed by the Corporation is subject to challenge by the employer under section 75 of the Act. If unchallenged it becomes final. Thus, a separate, independent, distinct and speedy machinery came to be provided for the first time for determination and recovery of contributions payable by an employer in the specific cases. After it's initial enactment, the provision of section 45A underwent two amendments. The first amendment of the year 1989 inter alia, provided for reasonable opportunity of hearing to the employer before any order under section 45A was made. The second amendment relates to the restriction of limitation. The section as introduced in the beginning did not fetter the rights of the Corporation by any period of limitation. When this was noticed by the Apex Court in it's decision in Santhakumar's case, the provision came to be amended by the Amendment Act 18 of 2010 to impose limitation of five years on the Corporation to recover the amounts under it. The provisions of section 45A and 45B with subsequent amendments read as follows:

-A. Determination of contributions in certain cases.--

(1) Where in respect of a factory or establishment, no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 or any Inspector or other official of the Corporation referred to in sub-section (2) of section 45 if [prevented in any manner] by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment:

Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard:

Provided further that no such order shall be passed by the Corporation in respect of the period beyond five years from the date on which the contribution shall become payable.

(2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation under section 75 or for recovery of the amount determined by such order as an arrear of land revenue under section 45B or the recovery under section 45C to section 45I.

7. Mr. Mehta and Mr. Palshikar submit that the general rule as regards amendment to any statute is that it is prospective in operation unless the amending Act makes it either expressly retrospective in action or by necessary implication. Since the amendment neither makes it expressly retrospective nor is there anything in the provision to imply it's retrospective application, the amendment cannot affect the orders passed as far back as 18th December, 1998. In this connection, both rely upon the decision of the Apex Court in C. Gupta v. Glaxo Smithkline Pharmaceuticals Limited, MANU/SC/2625/2007 : (2007) 7 SCC 171 : 2007 (114) FLR 585 (SC) The

observations relied upon by Mr. Mehta and Mr. Palshikar at paragraph 21 of the decision read as follows:

> 21. In the present case, we find that for determining the nature of amendment, the question is whether it affects the legal rights of individual workers in the context that if they fall within the definition then they would be entitled to claim several benefits conferred by the Act. The amendment should be also one which would touch upon their substantive rights. Unless there is a clear provision to the effect that it is retrospective or such retrospectivity can be implied by necessary implication or intendment, it must be held to be prospective.

Mr. Mehta points out that even the challenge by the respondents to the determination had been decided by the E.S.I. Court in the year 2003. The amendment to the statute introducing limitation was effected much later thereafter i.e. in the year 2010.

8. Mr. Naidu, seeks to distinguish the decision of the Apex Court in the case of C Gupta (supra) relied upon by the Corporation with an argument that the amendment to Industrial Disputes Act referred to therein was held to be substantive because a new category was introduced for the first time by the provision, which could benefit rights under the Industrial Disputes Act. According to him, such is not the situation in the cases on hand. Therefore, the judgment cannot assist the Corporation in establishing the amendment herein is prospective in nature. This submission is not correct. Mr. Mehta has relied upon the decision only to emphasise the general rule that amendment to any statute is prospective in operation unless the made retrospective either specifically or by necessary implications.

9. Mr. Naidu then relying upon decision of the Apex Court in Pundalik Jalam Patil (D) by L.Rs. v. Executive Engineer, Jalgaon Medium Project and another, MANU/SC/4694/2008 : 2008 (6) Bom. C.R. 513 emphasises upon relevance and significance of the law of limitation. The observations in the decision referred to by him are:

> Statutes of limitation are sometimes described as 'statutes of peace'. An unlimited and perpetual threat of action creates insecurity and uncertainty; some kind of limitation is essential for public order.

According to him, introduction of limitation in section 45A must be considered in this context. He submits that after the decision of the Apex Court in Santhakumar's case, the legislature thought it fit to amend section 45A of the Act so as to bring into the provision limitation identical to that in section 77(1-A)(b) of the Act, by inserting second proviso therein. Thus, according to him, the legislative intent is clear that the limitation as obtained in the proceeding under section 77 of the Act should also be provided for the proceedings under section 45A of the Act. In that circumstance, the second proviso would be implicitly retrospective. His next submission is that section 45A of the Act is procedural in nature and insertion of second proviso thereto is either curative or clarificatory or declaratory. It is to avoid invidious discrimination and to harmonize the law. Mr. Naidu argues that the clarificatory amendment is always retrospective. In this connection, he relies upon decision of the Apex Court in Allied Motors (P) Ltd. v. Commissioner of Income Tax. MANU/SC/0317/1997 : AIR 1997 SC 1361 In the case cited, the Hon'ble Supreme Court was concerned with insertion of a proviso in section 43B of the Income Tax Act, 1961. It held that the proviso supplied an obvious omission and was inserted to remedy unintended

consequences and make the provision workable. Therefore, the proviso was curative, merely declaratory and hence retrospective. Two more cases relied upon by him in support of the same submission are- (i) Commissioner of Income Tax Bombay etc. v. M/s. Podar Cement Pvt. Ltd. etc., MANU/SC/0649/1997 : AIR 1997 SC 2523 and (ii) Commissioner of Income Tax v. Alom Extrusions Ltd. MANU/SC/1846/2009 : (2010) 1 SCC 489.

10. The question, therefore to be considered now is whether the amendment to section 45A by way of insertion of second proviso is either curative or declaratory or clarificatory in nature. Section 45A as its stood prior to it's amendment under consideration granted unfettered right to the Corporation to recover the amounts of contribution from recalcitrant employers, who failed to file returns and pay the contribution by a coercive process. The second proviso inserted into the section has restricted that right by imposing limitation. Bare reading of the provision is sufficient to know that it, by itself, did not need any clarification/further declaration/curation of any defect. The Legislature in it's wisdom, thought of only limiting that right of the Corporation. Therefore, in my opinion, the amendment can be said to be neither curative nor clarificatory nor declaratory. Hence, it cannot be said to be retrospective on that count.

11. Mr. Naidu, argues that the amendment has to be treated as procedural and not substantive because imposition of period of limitation affects only the remedy available and cannot affect the substantive rights of the parties. It is only the enforcement of rights, which is regulated by limitation. He submits that the right to seek remedy is substantive but the time within which the remedy is to be sought is procedural.

12. Mr. Bapat, the learned Counsel appearing for the respondent in the second appeal for the same purpose relies upon the decision of the Apex Court, in Dhannalal v. D.P. Vijayvargiya and others. MANU/SC/0541/1996 : (1996) 4 SCC 652 The statute concerned in the decision cited was Motor Vehicles Act, 1988 and the amendment thereto was in section 166, sub-section (3), of which was omitted by way of amendment. The effect of deletion Sub-Section 3 was to remove limitation for filing claims for compensation before the Tribunal in respect of any accident. The appellant before the Apex Court had filed his claim petition after expiry of the period of limitation, with an application for condonation of delay. That application was allowed by the Tribunal, but the order was set aside by the High Court holding that with deletion of sub-section (3) to section 166, the power of condonation of delay by the Tribunal stands withdrawn. The Apex Court, while setting aside the order of the High Court held that from the amendment in the Act, it did not appear that sub-section (3) had been deleted retrospectively but at the same time, there is nothing in the Amending Act to show that the benefit of deletion of sub-section (3) of section 166 is not to be extended to pending the claim petitions, where a plea of limitation had been raised. The Apex Court drew distinction between a petition for compensation filed beyond the period of limitation and the Tribunal having condoned the delay, from a petition filed beyond time, which has been rejected by the Tribunal or the High Court and the claimant does not challenge the order and allows the judicial order to become final. According to the Apex Court in cases of second type, the Amending Act shall be of no help to a claimant. The reason is that a judicial order saying that such petition of claim was barred by limitation had attained finality. This decision cited, in fact, would be of assistance to the appellants because in the cases on hand, the appellants have not accepted the order of E.S.I. Court, but have challenged it by preferring the present appeals. Therefore, unless the amendment is

held to be specifically retrospective in operation, the same cannot affect maintainability of the appeals.

13. Mr. Naidu submits that in the case of Thirumalai Chemicals Limited v. Union of India and others, MANU/SC/0427/2011 : (2011) 6 SCC 739 the Hon'ble Supreme Court was required to consider an issue whether limitation would be governed by the repealed Act or by the Act which has been brought by the Parliament in place thereof. The Hon'ble Supreme Court held that limitation is prima facie procedural and retrospectively applicable. Since the limitation does not extinguish a right to only bars remedy. Mr. Palshikar, the learned Counsel appearing for the Corporation in the second matter however, points out further observation from the very decision to the effect mat the nature of question of limitation needs to be dealt with, with caution because it's nature depends upon the facts of the case. The provision of limitation can, in the certain circumstance be regarded as retrospective and can in certain circumstance be prospective. The observations from the judgment relied upon by Mr. Palshikar, read as follows:

> **26.** Therefore, unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective.
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> **32.** Limitation provisions therefore can be procedural in the context of one set of facts but substantive in the contest of different set of facts because rights can accrue to both the parties. In such a situation, test is to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations. An accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is nevertheless a right, even though it arises under an Act which is procedural and a right which is not to be taken away pleading retrospective operation unless a contrary intention is discernible from the statute. Therefore, unless the language clearly manifests in express terms or by necessary implication, a contrary intention a statute divesting vested rights is to be construed as prospective.
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> **33.** A statute, merely procedural is to be construed as retrospective and a statute while procedural in nature affects vested rights adversely is to be construed as prospective. The manner of filing an appeal, under sub-section (2) of section 19 of FEMA and the time within which such an appeal has to be preferred and the power conferred on the Tribunal to condone the delay under the proviso to sub-section (2) of section 19 are matters of procedure and act retrospectively, so as to cover causes of action which arose under FERA.

Section 45A is a part of Chapter IV of the Act, which deals with the contributions payable under the provisions of the Act. The question whether the amendment of limitation introduced into the section 45A of the Act is prospective or retrospective cannot be considered by looking only at the amendment. It must be considered in the context of the entire provision of section 45A, the object of introducing section 45A and the purpose of legislation served by that provision. Section 45A is resorted to by the Corporation by way of exception i.e. when the normal procedure prescribed by the Act cannot be adhered to on account either of the negligence or deliberate breach

of the duty cast upon the employer. As already seen earlier, section 38 of the Act imposes obligation on the employer to file returns annually and pay contribution towards the Insurance. In cases of breach of this obligation, section 45A invests a right in the Corporation to determine the contribution on the basis of the material that may be available to the Corporation. It was introduced into the Act, since the legislature was of the opinion that such a procedure was necessary for effectively implementing the provisions of the Act. The Act does not contain any provision for confirmation of determination of the contribution under section 45A by the Corporation. The order becomes final unless challenged by the employer under section 75 of the Act. On the order becoming final, the Corporation can proceed under section 45B to recover the amount, determined. Therefore, the provision of section 45A of the Act is in the nature of investing a substantive right in the Corporation to determine the contribution under the Act. This right, until the amendment in question was an unbridled right. It came to be restricted by the amendment to the provision. Therefore, the amendment cannot be said to be in respect of a procedural matter. It is certainly in respect of the substantive right of the Corporation which only got curtailed by the amendment. The provision is not by way of a remedy to the Corporation against an errant employer. The remedy in such a case, which was already available under the Act, is of approaching the E.S.I. Court under section 75 of the Act. That remedy is untouched by the amendment to introduce section 45A. Therefore, in my considered view, the amendment to section 45A introducing period of limitation for determination of contribution from the errant employers is not procedural in nature, and hence cannot be retrospective on that count. As already observed above, there is nothing in the Act, which specifically makes the operation of the amendment retrospective in nature. Similarly, there is also nothing in the provision to imply that it is retrospective in operation. Applying the general principle, therefore, of interpretation, it must be held that the amendment is only prospective in it's application and cannot affect the proceedings pending as on the date of the amendment coming into effect. Hence, the appeals must be allowed and remanded to the E.S.I. Court to consider whether the determination by the Corporation was within a reasonable time, as required by the decision of the Apex Court in Santhakumar case (supra) and in the decision of this Court in Precimax's case (supra). The appeals are therefore allowed. The impugned orders are quashed and set aside. The Application (ESI) No. 120 of 1991 and Application (ESI) No. 40 of 1998 are restored to file. The E.S.I. Court shall decide the applications afresh in the light of the observations made in this order. In the facts of the case, the parties shall bear their own costs.