

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. _____ OF 2022
(@ Special Leave Petition (C) No. 16380/2022)

THE REGIONAL DIRECTOR/ RECOVERY
OFFICER & ANR. . . . APPELLANT (S)

VERSUS

NITINBHAI VALLABHAI PANCHASARA . . . RESPONDENT (S)

O R D E R

Though served, nobody has entered appearance on behalf of the respondent.

Leave granted.

We have heard Shri Santosh Krishnan, learned counsel appearing on behalf of the appellants at length.

Feeling aggrieved and dissatisfied with the impugned judgment and order dated 03-02-2022 passed by the High Court of Gujarat at Ahmedabad in R/First Appeal No.297/2022, by which the High Court has dismissed the said appeal preferred by the appellant(s) herein and has not interfered with the order passed by the Employees State Insurance (ESI) Court restricting the levy of interest leviable under Section 39(5) (a) of the Employees State Insurance Act, 1948 (For short the 'the ESI Act') for two years only, the Employees State Insurance Corporation and another have preferred the present appeal.

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The facts leading to the present appeal in nut-shell are as under -

That the Authority sent Demand Notice to the respondent demanding the amount of Rs.17,295/- for the period from April 1988 to April, 1990, and amount of Rs.4,195/- for the period from April, 1990 to September, 1990. Being aggrieved and dissatisfied with the said demand, the respondent filed ESI Application No.53 of 1991 before the ESI Court. The ESI Court rejected the said application by order dated 17.01.2012 and it was decided that the ESI Act has been applicable to the respondent organisation w.e.f. 01.04.1988.

The Authority under the ESI Act passed an order on 01.04.1988 covering the respondent under the provisions of the ESI Act from 01.04.1988. The respondent was allotted the ESI Code also. The order passed by the Authority under the ESI Act covering the respondent under the provisions of ESI Act w.e.f 01.04.1988 was challenged by the respondent.

That, thereafter, the respondent started paying ESI contribution w.e.f. 01.04.1988. However, as there was delay in making the payment of ESI contribution, the Authority issued notices and raised the demand of Rs.10,486/- for the period between 01.04.1988 to March, 1990 and interest thereon @12% (interest component of

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Rs.6,333/-). The said demand was in exercise of powers under Section 39(5) (a) of the ESI Act. The demand of interest leviabale under Section 39(5) (a) of the ESI Act was again challenged by the respondent before the ESI Court by way of ESI Application No.9/2012. Relying upon the decision of this Court in *Employees State Insurance Corporation Vs. HMT Ltd. and another* (2008) 3 SCC 35, the ESI Court partly allowed the said application and restricted the amount of interest to two years only. The order passed by the ESI Court was the subject matter before the High Court. The High Court by the impugned judgment and order has dismissed the appeal by observing that no substantial question of law arises. The impugned judgment and order passed by the High Court is the subject matter of present appeal.

Learned counsel appearing on behalf of the appellants has vehemently submitted that both, the ESI Court as well as the High Court have not properly appreciated that the levy of interest under Section 39(5) (a) of the ESI Act is mandatory and neither the Court nor the Authority have any jurisdiction and/or authority to waive the interest.

It is further submitted that as such the conclusion and the findings arrived at by the ESI Court, confirmed by the High Court that the interest can be leviabale for

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two years only is not supported by any statutory provision. It is further submitted by learned counsel appearing on behalf of the appellants that the decision of this Court in the case of *Employees State Insurance Corporation Vs. HMT Ltd.* and another (supra) shall not be applicable at all as in the said case, this Court was considering Section 85-B and not interest leviable under Section 39(5) (a) of the ESI Act.

It is submitted that the language used in both the Sections is different. It is submitted that in Section 39(5) (a) of the ESI Act, the word used is "Shall", however, in Section 85(B) which is related to the levy of damages/compensation, the word used is "may". It is submitted that, therefore, when the levy of interest under Section 39(5) (a) of the ESI Act is mandatory and the liability to pay the interest is a statutory liability, the ESI Court erred in restricting the interest to two years only. It is submitted that though, the aforesaid was question of law, the High Court has failed to consider the same and has dismissed the appeal by way of observing that no substantial question of law arises.

Learned counsel appearing on behalf of the appellants has also heavily relied upon the decision of this Court in the case of *Goetze (India) Limited Vs.*

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Employees State Insurance Corporation (2008) 8 SCC 705
as well as the recent decision of this Court in the case
of *Transport Corporation of India Ltd. Vs. Employees*
State Insurance Corporation and Others (2021) 11 SCC
335, in support of his above submissions.

Having heard learned counsel appearing on behalf of
the appellants, the short question which is posed for
consideration of this Court is, "whether the ESI Court
was justified in restricting the levy of interest under
Section 39(5) (a) of the ESI Act for a period of two years
only?"

For the aforesaid purpose, Section 39(5) (a) of the
ESI Act is required to be referred to, which reads as
under -

"39. xxx xxx xxx

(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."

On a fair reading of Section 39(5) (a) of the ESI
Act, the organisation/employer in default is liable to
pay the simple interest @ 12% per annum or, as such,
higher rate as may be specified in the regulations till

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the date of its actual payment. The word used in Section 39(5) (a) is "Shall". Therefore, the interest leviable/payable is a statutory liability to pay the interest. Neither the Authority nor the Court have any authority to either waive the interest and/or reduce the interest and/or the period during which the interest is payable.

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.

Now, so far as the reliance placed on the decision of this Court in the case of *Employees State Insurance Corporation Vs. HMT Ltd.* and another (supra), relied upon by the ESI Court is concerned, the said decision shall not be applicable while construing the provision of Section 39(5) (a) of the ESI Act. In the case of

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Employees State Insurance Corporation Vs. HMT Ltd. and another (supra), this Court dealt with Section 85-B of the ESI Act. Section 85-B reads as under -

"85-B. Power to recover damages. - (1) Where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the Corporation may recover (from the employer by way of penalty such damages, not exceeding the amount of arrears as may be specified in the regulations]:

Provided that before recovering such damages, the employer shall be given a reasonable opportunity of being heard:

[Provided further that the Corporation may reduce or waive the damages recoverable under this section in relation to an establishment which is a sick industrial company in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in regulations].

(2) Any damages recoverable under sub-section (1) may be recovered as an arrear of land revenue [or under section 45-C to section 45-I]."

The word used in Section 85-B is "may". As observed hereinabove, the word used in Section 39(5) (a) of the ESI Act is "shall". Therefore, the ESI Court erred in relying upon the decision of this Court in the case of *Employees State Insurance Corporation Vs. HMT Ltd. and another (supra)* while considering the levy of interest under Section 39(5) (a) of the ESI Act.

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In view of the above and for the reasons stated hereinabove, the impugned judgment and order passed by the High Court and that of the ESI Court restricting the levy of interest under Section 39(5) (a) of the ESI Act to two years are hereby quashed and set aside. The respondent is liable to pay the interest under Section 39(5) (a) of the ESI Act from the date of contribution due and payable till the actual payment.

The present Appeal is allowed accordingly. No costs.

.....J.
[M.R. SHAH]

.....J.
[M.M. SUNDRESH]

NEW DELHI
November 17, 2022

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petition for Special Leave to Appeal (C) No. 16380/2022

(Arising out of impugned final judgment and order dated 03-02-2022 in R/FA No. 297/2022 passed by the High Court of Gujarat at Ahmedabad)

THE REGIONAL DIRECTOR / RECOVERY OFFICER & ANR. Petitioner(s)

VERSUS

NITINBHAI VALLABHAI PANCHASARA Respondent(s)

(FOR ADMISSION and I.R. and IA No.123043/2022-CONDONATION OF DELAY IN FILING)

Date : 17-11-2022 This petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE M.R. SHAH
HON'BLE MR. JUSTICE M.M. SUNDRESH

For Petitioner(s) Mr. Santosh Krishnan, AOR
Mr. Yakesh Anand, Adv.
Ms. Sonam Anand, Adv.

For Respondent(s)

UPON hearing the counsel the Court made the following
O R D E R

Though served, nobody has entered appearance on behalf
of the respondent.

Leave granted.

The present Appeal is allowed in terms of the signed
order.

Pending application(s) shall stand disposed of.

(NEETU SACHDEVA)
ASTT. REGISTRAR-cum-PS

(signed order is placed on the file)

(NISHA TRIPATHI)
ASSISTANT REGISTRAR