

**(2012) 03 BOM CK 0222**

**In the Bombay High Court**

**Case No : Appeal Under E.S.I. No. 6 of 2003**

Francis S. Cabral, Proprietor (Deceased), Mandovi  
Enguneering Works by L.Rs.

APPELLANT

Vs

Regional Director, E.S.I.C. Goa and Others

RESPONDENT

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**Date of Decision : 26-03-2012**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11

Employees State Insurance Act, 1948 — Section 45A, 45C, 75, 77, 77(1A)

**Citation : (2012) 134 FLR 611 : (2012) 4 LLJ 815**

**Hon'ble Judges : F.M. Reis, J**

**Bench : Single Bench**

**Advocate : G. Sardessai Along with Vijay A. Palekar, for the Appellant; A. Agni, for the Respondent**

**Final Decision : Dismissed**

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## **Judgement**

F.M. Reis, J.—Heard Shri G. Sardessai along with Shri V. Palekar, learned Counsels appearing for the appellant and Mrs. A. Agni, learned Counsel appearing for the respondents.

The above appeal came to be admitted by this Court on 11.9.2003. On perusal of the records, I find that no substantial question of law came to be framed. Considering the said aspect, by consent, the following substantial question of law is framed as arising in the present appeal:

Whether the learned Employees Insurance Court had powers to reject the application filed by the appellant u/s 77 read with section 75 of the ESI Act ?

Briefly the facts of the case are that the factory belonging to the appellant was initially owned by the respondent No. 3, a firm which is represented by the respondent Nos. 4 and 5 as partners and right from the beginning the factory was covered under the Act and was registered under a specific registration Code with effect from 5.2.1983. In view of the contract of sale dated 29.10.1988, the

said factory was sold by the respondent No. 3 to the appellant herein and later it was closed w.e.f. 22.1.1995 and the said closure was communicated to the respondent No. 1 herein by a letter dated 17.6.1995. The Corporation being the respondent No. 1 by a letter dated 4.6.1991 called upon the appellant to pay the contributions for the period from October, 1975 to July, 1981 and by a reply dated 4.6.1991, the appellant informed the circle inspector who had inspected the factory for the inspection of the records that the appellant was not in a position to produce the records prior to 15.10.1988, as the unit was taken over by the appellant from the earlier owner from 16.10.1988. By a letter dated 6.12.1993, the respondent No. 1 called upon the appellant to pay the contributions in accordance with law. But however the appellant replied and informed the respondent No. 1 that in view of the contract of the sale dated 29.10.1988, though all the assets of the said factory were purchased by the appellant nevertheless in view of clause 7 of the contract of sale, the past liabilities under any Labour Law was the responsibility of the respondent Nos. 3 to 5 and as such called upon the respondent No. 1 to take necessary action against the said respondents. It is further their case that they received a notice u/s 45-A dated 27.9.1996 from the Corporation claiming contribution for the period from 5.10.1975 to 31.7.1981 for an amount of Rs. 36,708/- and further interest and the final amount was due of Rs. 56,801/-.

It is further their contention that they have received another notice u/s 45-C of the said Act, dated 23.7.2002 seeking for recovery of the total amount of Rs. 1,26,152/- including the interest for the period from October, 1975 to July, 1981. On the basis of the said submissions, the learned ESI Court considered the application under Order VII, Rule 11 of CPC for rejection of the application filed by the appellant u/s 77 of the said Act as the said application filed by the appellant is time barred. The learned ESI Court after perusing the records and considering the submissions advanced by the rival parties came to the conclusion that the application filed by the appellant was time barred and consequently the same came to be dismissed by order dated 4.4.2003. Being aggrieved by the said order, the appellant preferred the present appeal.

2. Shri Sardesai, learned Counsel appearing for the appellant has assailed the impugned order essentially on the ground that the powers exercised by the learned ESI Court under Order VII, Rule 11 of CPC were not available to the Court as according to him, the provisions of C.P.C. are not applicable to the proceedings u/s 77 of the said Act. The learned Counsel further pointed out that even assuming that the first demand made by the respondent No. 1 in the year 1996 was time barred as the application u/s 77 of the said Act was filed in the year 2002 nevertheless, the petition challenging the order dated 23.7.2002 u/s 45-C of the said Act which was filed in the year 2002 cannot be said to be time barred. The learned Counsel further pointed out that the powers exercised by the learned ESI Court under Order VII, Rule 11 of CPC were not available to the Court as according to him, the provisions of C.P.C. are not applicable to the proceedings u/s 77 of the said Act and consequently the impugned order cannot

be justified. The learned Counsel further pointed out that at least as far as the order passed u/s 45-C in the year 2002 the claim should have been considered by the ESI Court. In support of his submissions, he has relied upon the judgment of the learned Single Judge of this Court in the case of Western Coalfields Ltd. and another v. Shri Chandraprakash Khare, 1984 Lab.IC 527. dated 10.12.2009 and the judgment of this Court in the case of Regional Director, the Employees' State Insurance Corporation v. Shashikant and another.

3. On the other hand, Mrs. Agni, learned Counsel appearing for the respondent Nos. 1 and 2 has supported the impugned order. The learned Counsel pointed out that on the face of it, the petition filed by the appellant u/s 77 of the said Act is barred by limitation. The learned Counsel further pointed out that it cannot be disputed that such petitions are to be filed within three years from the date the demand was made by the respondent No. 1 and as such demand was made way back in the year 1996, the question of filing such application in the year 2002 does not arise. The learned Counsel further pointed out that u/s 77 (1-A) of the said Act, the cause of action for filing such an application is within three years from the date of such cause of action. The learned Counsel has further taken me through the Explanation (b) to section 77(1-A) of the said Act and pointed out that the cause of action in respect of a claim by the Corporation for recovering contribution (including the interest and damages) from the principal employer shall be deemed to have arisen on the date on which such claim is made by the Corporation for the first time. The learned Counsel further pointed out that considering that the claim is made in the year 1996, challenge in the year 2002 is hopelessly time barred. The learned Counsel in support of her contention relied upon the judgment reported in the case of ESI Corporation v. C.C. Santhakumar. 2007 (112) FLR 636 (SC).

4. Having heard the learned Counsels and on perusal of the records, the only point for consideration is whether the provisions of Order VII, Rule 11 of C.P.C. is applicable to the proceedings u/s 77 of the said Act. Section 78(2) of the ESI Act, 1948 provides that the Employees' Insurance Court shall follow such procedure as may be prescribed by the rules made by the State Government. In exercise of the powers conferred under the said provisions of the said Act, the State Government has framed the Rules which are called as Goa, Daman and Diu Employees State Insurance (Court) Rules, 1976. Rule 46 provides as under:

46. Provisions in the Code of Civil Procedure, 1908 (V of 1908) etc., to apply.--In respect of matters relating to powers, procedure or admission of evidence for which no specific provision is made in these rules, the provisions of the CPC Code, 1908 (V of 1908), including the Rules made thereunder and the Indian Evidence Act, 1872 (I of 1872), shall so far as may be, apply to proceedings under the Act.

5. Considering the said Rules framed by the State Government, it cannot be disputed that the provisions of C.P.C. 1908 would be applicable in cases in which no specific provisions are made in the rules the provisions of CPC shall so far as

may apply to the proceedings under the Act. As such, the contention of the learned Counsel appearing for the appellant that the provisions of Order VII Rule 11 of C.P.C. are not applicable to the proceedings under the ESI Code, cannot be accepted in the facts of the present case.

6. With regard to the contention of the appellant to the effect that the order passed in the year 2002 cannot be said to be time barred, I find that in view of the provisions of section 77 (1-A)(b) of the said Act, the cause of action to challenge the demand for the contribution of the amount is within three years from the date when the demand has been made. In the present case, the demand was made in the year 1996 and consequently the question of contending that the challenge to the recovery issued u/s 45-C can be independently challenged in the present case cannot be accepted. Section 45-C of the said Act clearly provides that only recovery certificate is to be issued for the purpose of recovery payable by the employer of the factory. In the present case, the demand was already made in the year 1996 and consequently, the question of disputing the said amount by challenging the recovery in the year 2002 cannot be accepted. It is not the case of the appellants in the present case that they had any independent grounds to challenge the recovery issued u/s 45-C of the said Act which would require consideration. It is also to be noted that the order u/s 45-A of the said Act was issued after an opportunity for personal hearing to the appellants. The learned ESI Court has rightly considered the material on record and has come to the conclusion that the claim put forward by the appellants is time barred. The judgment relied upon by the learned Counsel appearing for the appellants in the circumstances are not applicable to the facts of the present case. In view of the above, I find no merit in the above appeal. The substantial question of law framed is answered accordingly in favour of the respondent Nos. 1 and 2. Appeal stands accordingly dismissed.