EMPLOYEES STATE INSURANCE CORPORATION AND ORS. A

v.

JARDINE HENDERSON STAFF ASSOCIATION AND ORS.

JULY 25, 2006

[DR. AR. LAKSHMANAN AND LOKESHWAR SINGH PANTA, JJ.] B

Employees State Insurance Act, 1948:

Section 2(9)(b); Employees State Insurance (Central) Rules, 1950, Rules 50, 51 and 54—Writ petition challenging Notification amending Rules 50, 51 and 54 by which the wage limit for coverage of an employee under the Act enhanced from Rs.3000 to Rs.6500—By interim order, High Court restrained employers from deducting ESI contribution, however, directed them to provide medical facilities—High Court upheld the validity of Notification—Further directed employers to enforce Notification from date of judgment—Justification of, challenged on the ground that enforcement of Notification ought to be from date of Notification—Held: High Court's direction for enforcement of Notification w.e.f. the date of judgment is perfectly justified, fair and judicious considering the facts and equity and hence calls for no interference under Article 136—Employers-Companies have spent large amount of money on employees in providing medical facilities, it would cause extreme and grave hardship to them if they are required to pay contribution for the past several years for no fault of their own—This apart, employee-union included workmen who have left or expired and hence deduction of their contribution from salary is not workable—Constitution of India, 1950, Articles 226, 136, 142. C D E

Employees State Insurance (Central) Rules, 1950 : F

Rules 50, 51 and 54—Amendment of Rules 50, 51 and 54 enhancing wage limit—For coverage of employees under the Act—From Rs.3000 to Rs.6500 —Held: Is not **ultravires***—Employees State Insurance Act, 1948—Section 2(9)(b).* G

Equity :

Act of court should not prejudice any party—No party to suffer because

 H

A *of the orders of the Court if duly complied with.*

Maxim:

lex non cogit ad impossibilia--*Applicability of.*

B Pursuant to the issuance of Notification dated 23.12.1996, Rules 50, 51 and 54 of the Employees State Insurance (Central) Rules, 1950, were amended by virtue of which the wage limit for coverage of an employee u/s. 2(9)(b) of the Employees State Insurance Act, 1948 was enhanced from Rs.3000/- to Rs.6500/-. Various Employees Unions challenged the *vires* of the Notification by filing Writ Petitions before High Court. By an interim C order, High Court restrained employers from deducting the ESI contributions required to be deposited with the Corporation but continue to provide existing medical facilities to the employees till the disposal of Writ petitions.

D The Single Judge of High Court disposed of all the Writ Petitions by quashing the amendment of the Rules of 1950. Corporation and Union of India filed appeals against that part of Order by which amendment was quashed. On 16.3.2004, Division Bench allowed the appeals holding that the enhancement could not be termed as *ultra vires* for the purpose of the Act and that all interim orders passed in this connection staying the E operation of the said enhancement are vacated. The High Court further directed that the employers who had stay order in their favour, will implement the amendment only from the date of the impugned judgment of the High Court dated 16.03.2004 though the amendment came into operation w.e.f. 01.01.1997. The said interim order was not appealed or challenged by the Corporation nor was it stayed during the pendency of F the appeal before the Division Bench. Hence these appeals by Corporation.

Appellant-Corporation contended that once the Notification is enforced, the applicability of the same will be from the date of Notification and not from any future date.

G Dismissing the appeals, the Court

HELD: 1. The respondent-Companies have spent large amount of money on the employees and provided medical facilities in view of the order of the High Court granting stay/injunction etc. If the High Court H had not passed the order of injunction, the respondent-companies would

have contributed the ESI contribution instead of spending monies on the medical facilities and allowances. In these circumstances, it will cause extreme and grave hardship to the employer if they are required to pay contribution for the past several years for no fault of their own. No party much less the respondents should suffer because of the orders of the Court if duly complied with. [49-C-E]

Rajesh D. Darbar & Ors. v. *Narasingrao Krishnaji Kulkari & Ors.*, [2003] 7 SCC 219; *Mohammed Gazi* v. *State of M.P.*, [2000] 4 SCC 342; *Somaiya Organics (India) Ltd. & Anr.* v. *State of U.P. & Anr.*, [2001] 5 SCC 519; *Harsh Dhingra* v. *State of Haryana & Ors.*, [2001] 9 SCC 550; *Raymond Ltd.* v. *M.P. Electricity Board*, [2001] 1 SCC 534; *Ashok Kr. Gupta* v. *State of U.P.*, [1997] 5 SCC 201; *Sarwar Kumar* v. *M. Agarwal*, [2002] 4 SCC 147; *Shree Cement* v. *State of Rajasthan*, [2000] 1 SCC 765; *British Physical Lab India Ltd.* v. *State of Karnataka*, [1999] 1 SCC 170; *West Bengal Hosiery Association* v. *State of Bihar & Ors.*, [1998] 4 SCC 134; *Council of Scientific and Industrial Research* v. *K.G.S. Bhatt*, [1989] 4 SCC 635; *ONGC* v. *Sendhabhai Vastram Patel*, [2005] 6 SCC 454; *SBP & Co.* v. *Patel Engineering Ltd.*, [2005] 8 SCC 618; *Union of India & Anr.* v. *Murugan Talkies*, [1996] 1 SCC 504 and *Municipal Corporation of Faridabad* v. *Siri Niwas*, [2004] 8 SCC 195, referred to.

2. The High Court was fully justified in passing the judicious order after considering the equities by directing the employer and the employees to make ESIC 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 ESIC 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 meets the ends of justice and does not require interference by this Court under Article 136 of the Constitution of India. [49-F-G]

3. 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, 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 is perfectly justified. This apart, the members of the union

A 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. [49-H; 50-A-C]

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4.1. The High Court under Article 226 and this Court under Article 136 read with Article 142 of the Constitution of India have the power to mould the relief in the facts of the case. [51-H]

C *Employees' State Insurance Corpn.* v. *Kerala State Handloom Development Corpn. Employees Union (CITU), Kannur, Dist. Kannur, Kerala and Ors.*, [1994] 1 SCC 268; *I.C. Golak Nath & Ors.* v. *State of Punjab & Anr.*, [1967] 2 SCR 762; *Managing Director, ECIL, Hyderabad and Ors.* v. *B. Karunakar and Ors.*, [1993] 4 SCC 727; *Gasket Radiators Pvt. Ltd.* v. *Employees' State Insurance Corporation and Anr.*, [1985] 2 SCC 68; D *Employees' State Insurance Corporation* v. *Hotel Kalpaka International*, [1993] 2 SCC 9; *Mafatlal Industries Ltd. and Ors.* v. *Union of India and Ors.*, [1997] 5 SCC 536 and *Bharagath Engineering* v. *R.Ranganayaki and Anr.*, (2003) 2 SCC 138, held inapplicable.

4.2. This Court under Article 142 of the Constitution of India is E empowered to pass such orders as would do complete justice between the parties. This Court is also empowered to mould the relief in such a manner so that it is not only just but also equitable even while declaring the law. It is also permissible in law to prospectively overrule the judgment. If the respondent is now allowed to recover from the erstwhile covered F employees, it would severely affect industrial relations. Reversal of the impugned order would lead to prosecution, penalty and also interest against the respondent without any fault of the respondent. [52-E, F]

Employees' State Insurance Corpn. v. *All India ITDC Employees' Union and Ors.*, [2006] 4 SCC 257, distinguished.

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ONGC Ltd. v. *Sendhabhai Vastram Patel and Ors.*, [2005] 6 SCC 454; *Raj Kumar and Ors.* v. *Union of India and Anr.*, [2006] 1 SCC 737 and *SBP Co.* v. *Patel Engineering Ltd.*, [2005] 8 SCC 618, relied on.

5.1. The maxim of equity which is founded upon justice and good H sense is applied as well as other maxim: *lex non cogit ad impossibilia* (i.e.

the law does not compel a man to do what he cannot possibly perform). [53-B]

Raj Kumar Dey and Ors. **v.** *Tarapada Dey and Ors.*, **[1987] 4 SCC 398 and** *Gursharan Singh and Ors.* **v.** *New Delhi Municipal Committee and Ors.*, **[1996] 2 SCC 459, relied on.**

5.2. The act of Court can prejudice no party either the ESI or the respondent-companies. The respondents are therefore relieved from making any contributions for the period in question and are directed to make the contribution as directed by the Division Bench of the High Court. [53-E-F]

Employees State Insurance Corporation **v.** *Distilleries & Chemical Mazdoor Union & Ors.*, **(2006) 6 JT 443 and** *Chandra Singh and Ors.* **v.** *State of Rajasthan and Anr.*, **[2003] 6 SCC 545, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1726 of 2005.

From the Judgment and Order and dated 16.3.2004 of the High Court of Calcutta, in A.P.O. No. 124/2001 from W.P. No. 248/1997.

WITH

C.A. Nos. 3132, 3133, 3134, 3135, 3136, 3137, 3138, 3139, 3140, 3142, 3143, 3144, 3145, 3146, 3147, 3148, 3149, 3150 of 2006.

C.S. Rajan, R. Venkatramani, V.J. Francis, Jenis V. Francis, Anupam Mishra, Anjali K. Verma, Niraj Gupta, Meera Mathur, S.B. Upadhyay and Shiv Mangal Sharma for the Appellants.

Gaurab Kumar Banerjee, Pradip Ghosh, Kailash Vasdev, Anil Divan, B.C. Sharma, N.P. Agarwalla, P.H. Parekh, Sameer Parekh, Sumeet Lall, Shakun Sharma, Mary Mita for (P.H. Parekh & Co.), Gaurav Agarwal, Ajit Bhattacharjee, Pinaky Addy, Chiranjan Addy, Chanchal Kumar Ganguli, Vaibhav Gaggar, E.C. Agrawala, S.S. Jauhar, K.V. Vishwanathan, Rahul Ray, S. Rakshit for (Khaitan & Co.), Rauf Rahim, Mohammad Iqbal, Prashant Kumar, Suresh Kumar, Dinesh Verma, Nand Lal, Satish Pandey, Medhavi Kumar, A.P. Mohanty, Dr. Sumeet Bhardwaj, Mridula Ray Bhardwaj, Vipin Gogia, Jaspreet Gogia, Maninder Singh, Pratibha M. Singh, Gaurav Sharma, Rahul Ajatshatru, Tejveer S. Bhatia, Meera Mathur, Deepak Sabharwal, Vikrant Yadav, B.R. Sabharwal, S. Rajappa, Jay Savla, Corporate Law Group, Raj Kumar Gupta, Sheo Kumar Gupta, Bhanu Pratap Gupta, Rakhi Banerjee,

A A.N. Bardiyar, Rajindra Dhawan, Sefali Dhawan, Parmanand Gaur, P.N. Jha, Anitha Shenoy, Dhruv Mehta, Harshvardhan Jha, Yashraj Singh Deora, K.L. Mehta & Co., A. Bhattacharya, Rana Mukherjee, Siddharth Gambhir, Goodwill Indeevar, Arun Kumar Sinha, Mukesh Kumar Sinha, K.V. Mohan, Krishnendu Datta, Nitin Jain, Kumud Lata Das, Kishan Datta, Sushil Kumar Jain, Sarad Singhaniya, H.D. Thawri, Puneet Jain, Rani Maheshwari, Bharat Sangal, R.R.
B Kumar, Samyadip Chatterji, L. Roshmani, Jatin Zaveri, Pradeep Misra, Shalini Kumar, Vairav Gaggar, Rikusarma, Ghanshyam Joshi, Partha Gil, Mahesh Agarwal and Rishi Agarwal for the Respondents.

The Judgment of the Court was delivered by

C **DR. AR. LAKSHMANAN, J.** Leave granted in the special leave petitions.

Civil Appeal Nos. 1726 of 2005 and 119 special leave petitions (now civil appeals) have been filed by the Employees State Insurance Corporation
D (in short the "Corporation") against the common final judgment and order dated 16.03.2004 passed by the Division Bench of High Court at Calcutta in APO No. 124 of 2001.

Civil Appeal No. 1726 of 2005 arises out of the writ petition filed by Jardine Henderson Staff Association and Others wherein they challenged the
E Notification dated 23.12.1996. The Notification was issued by the Union of India by which the Central Government amended Rules 50, 51 and 54 of the Employees State Insurance (Central) Rules, 1950, pursuant to which the wage limit for coverage of an employee under Section 2(9)(b) of the Employees State Insurance Act (in short 'the Act') was enhanced from Rs.3,000/- to Rs.6,500/- instead of the existing wage ceiling of Rs.3,000/- p.m. Various
F Employees Associations challenged the Notification. They prayed for quashing the Notification and also, in some of the appeals, for declaring the Amended Rules as *ultra vires*. Petitions were filed mostly by the Employees Union both in the original side and the appellate side of the High Court at Calcutta.

G A learned Single Judge of the High Court disposed off all the writ petitions by a common judgment and order, by quashing the amendment of the Rules of 1950 with the result that there was no enhancement of wage ceiling. About 63 appeals were filed by the Corporation as well as by the Union of India against that part of the order by which the amendment was quashed. No appeals and/or cross appeals were filed by any of the writ
H petitioners. Therefore, the Division Bench of the High Court, by the impugned

common judgment, allowed the appeals and set aside the judgment of the learned Single Judge of the High Court. The High Court held that the enhancement could not be termed as *ultra vires* for the purpose of the Act or being inconsistent therewith as held by the learned Single Judge. The High Court further held that all interim orders passed in this connection, *inter alia*, staying the operation of the said enhancement are vacated. However, the High Court did not stop at that, but, proceeded to direct that the employers who had stay order in their favour, will implement the amendment only from the date of the impugned judgment of the High Court dated 16.03.2004 though the amendment came into operation w.e.f. 01.01.1997.

The Corporation, being aggrieved of this direction of the High Court giving liberty to the employers to comply with the Notification on and from 16.03.2004, preferred the above civil appeals. The High Court also gave liberty to the employers to apply for exemption and directed the State Government to dispose off the same within two months.

Mr. C.S. Rajan, learned senior counsel ably assisted by Mr. V.J. Francis, learned counsel argued the case on behalf of the Corporation.

Mr. Rajan submitted that the condition imposed by the Division Bench of the High Court is not proper for the reason that once the Notification is enforced, the applicability of the same will be from the date of Notification and not from any future date. This submission, according to him, was upheld by this Court in the case of *Employees' State Insurance Corpn.* v. *Kerala State Handloom Development Corpn. Employees Union (CITU), Kannur, Dist. Kannur, Kerala and Ors.*, [1994] 1 SCC 268 and that the interim orders passed at different stages will not have any effect on the applicability and enforceability.

Mr. Rajan further argued that the principle of prospective overruling was laid down for the first time by this Court in the case of *I.C. Golak Nath & Ors.* v. *State of Punjab & Anr.*, [1967] 2 SCR 762 and applied by this Court in a series of decisions till now, will not be applicable to the present case coming under the Act for various reasons. Another Constitution Bench of this Court reiterating the above principles has also observed in the case of *Managing Director, ECIL, Hyderabad and Ors.* v. *B. Karunakar and Ors.*, [1993] 4 SCC 727 as under:

> "It is now well settled that the courts can make the law laid down by them prospective in operation to prevent unsettlement of the settled

A positions, to prevent administrative chaos and to meet the ends of justice"

According to Mr. Rajan, the law is well settled in this case i.e. the upward revision from Rs. 400/- p.m. in the ceiling of wages has been upheld by various High Courts and also by this Court inasmuch as that with the B upward revision more employees will be eligible to the benefits under the Act and they will have to make a little contribution @ 1.75% from their wages every month. The employees share is to the extent of 4.75% p.m. under Rule 51 of the Employees State Insurance (Central) Rules, 1950. The law is also settled to the effect that once interim stay is granted with regard C to the operation of the new law, and the writ petition is dismissed subsequently, the operation of the law will relate back to the original date of enforcement and, therefore, there is nothing in this case to unsettle the settled law which would have effect on past transactions and, therefore, it is not necessary to bring in the principle. Moreover, in this case, the Act is made applicable for giving medical benefits to all those employees only, whose wages do not D exceed the prescribed limit notified by the Central Government as stated above. In this case, there was no dispute about the applicability of the Act but the question was about the ceiling limit. The reason, as pointed out above, is to give benefits to more number of employees. The employees will not get benefit unless the proper machinery are set up for the purpose. That E cannot be done overnight but over a period of years.

In this context, the observations made by this Court in *Gasket Radiators Pvt. Ltd.* v. *Employees' State Insurance Corporation and Anr.*, [1985] 2 SCC 68 was relied on as relevant. Learned senior counsel relies upon the following observations from that case:

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> "In fact, it may often happen that the rendering of a service or the conferment of a benefit may only follow after the consolidation of a fund from the fee levied. Hospitals, for instance, cannot be built in a day nor medical facilities provided right from the day of the commencement of the scheme. It is only after a sufficient nucleus is G available that one may reasonably expect a compensating return."
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> "Therefore, whether the special contribution is to be viewed as a tax, fee or neither it has sufficient constitutional protection."

H While replying to the arguments advanced by learned counsel for the

respondents that many employees have retired from service or have left the company or organisation, as according to Mr. Rajan, has no relevance because the liability under the Act continues till the date of employment of the employee concerned, or till the closure of the establishment. This is also settled by this Court in the case of *Employees' State Insurance Corporation* v. *Hotel Kalpaka International,* [1993] 2 SCC 9.

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The Division Bench has also noticed that the Corporation has to spend approximately Rs.800/- p.a. for each insured employee who has to be given the benefit. Naturally, therefore, once the machinery is set up it must keep going and its functioning cannot be stopped merely because some employees approach the High Court and has obtained stay against extending the benefits to more employees.

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While answering the complaint of efficiency of the ESIC Health System as not up to the mark comparing it with other large hospitals in the country, Mr. Rajan submitted that large hospitals are not available in every part of the country and it is at that moment the need of an ESI Hospital comes into picture. It can never be said at that time that the ESI machinery will not be useful. It is also well known that the ESI Hospital which is run in a remote area also makes reference of a serious case to a big hospital at the cost of the Corporation and for that purpose a share from the wages of the employees is not deducted and for this purpose there is no limit with regard to the wages earned by the insured employees.

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Mr. Rajan also made reference to the principles laid down by this Court in the case of *Employees' State Insurance Corpn.* v. *All India ITDC Employees' Union and Ors.,* [2006] 4 SCC 257 wherein this Court had accepted, on principle, the submission of the Corporation that it is not open to the High Court that the Notification has to operate prospectively. It is submitted that the law in this respect has been reiterated by this Court in the said ruling of this Court and the appellant also relies on the said ruling which is the latest judgment.

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According to Mr. Rajan the amounts that are collected by the Corporation goes into the fund maintained under Section 26 of the Act and the same is utilized as contemplated under Section 28 of the Act. It is laid down in the case of *Hotel Kalpaka International* (supra) as under:

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> "Under Section 26 of the Act all contributions are paid into a common fund. Such a fund will have to be administered for the purposes of

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A the Act as indicated under Section 28. Therefore, the employer cannot contend that he did not collect the employees' contribution and hence, he cannot be called upon to pay".

He also submitted that the principle of unjust enrichment as enunciated by this Court in the case of *Mafatlal Industries Ltd. and Ors.* v. *Union of* B *India and Ors.*, [1997] 5 SCC 536 will not be applicable to this case because this is not a case where there has been any illegal collection of any levy on the basis of an enhancement, which was declared unconstitutional and illegal by the Courts due to which the party who collected the amount had to refund the amount or otherwise it would have become an unjust enrichment.

C It is also pointed out that this Court has noticed in the case of *Bharagath Engineering* v. *R.Ranganayaki and Anr.*, [2003] 2 SCC 138 that even after the death of the insured employee who survived for a day, and even before the registration with the Corporation, his dependants are entitled to receive the benefit under the Act. Therefore, it is submitted that the benefits that are D granted under the Act are unique. Moreover, if any employee or employer makes a claim that they are giving better benefits, then it is open to that party to apply to the appropriate Government for exemption under any of the provisions of Chapter-VIII of the Act, i.e. Sections 87 to 91A. That only means that the liability of both the employee and the employer under the Act continue till the law takes its course as provided under the Act.

E Mr. Rajan, therefore, submitted that all the 120 appeals filed by the Corporation against the common judgment of the High Court are fit to be allowed with such directions as this Court may be inclined to give which will have the effect under Article 141 of the Constitutional of India.

F On behalf of the respondents, we heard the arguments of Mr. Gaurab Kumar Banerjee, learned senior counsel, Mr. P.H. Parekh, Mr. Gaurav Agrawal, Mr. Avijit Bhattacharjee learned counsel, Mr. Pradip Ghosh, Mr. Kailash Vasdev, learned Senior counsel, Mr. E.C. Agrawala, Mr. K.V. Viswanathan, Mr. Rauf Rahim, Mr. Suresh Kumar, Dr. Sumeet Bhardwaj, G Mr. Vipin Gogia, Mr. Maninder Singh, Ms. Meera Mathur, Mr. Deepak Sabharwal, Mr. Chiraranjan Addey, Mr. Rajindra Dhawan, Ms. Anitha Shenoy, Mr. A. Bhattacharya, Mr. Rana Mukherjee, Mr. Arun Kumar Sinha, Mr. K.V. Mohan, Ms. Kumud Lata Das, Mr. Sushil Kumar Jain, Mr. Bharat Sangal, Mr. Jatin Zaveri, Mr. Pradeep Misra, Mr. Vairav Gaggar, Mr. Ghanshyam Joshi, learned counsel and Mr. R. Venkatramani, learned senior counsel for H their respective parties.

M/s Jardine Henderson Ltd. submitted a statement of expenditure for medical expenses incurred by the Company on the staff, during the period from the year 2001-2004. Likewise, other respondents have also filed statement of submissions in the form of affidavit on behalf of their parties.

Lagan Jute Machinery Company Limited - respondent No. 14 in SLP (Civil) No. 19454 of 2004 in APO No. 80 of 2001 submitted its submissions. It was submitted by learned counsel for the said Company that the Company was prevented by orders of Court from making deductions for ESI contribution from wages and salaries of the employees. These orders were passed in writ petitions filed by the Employees Unions and in view of the injunction order dated 22.05.1997 passed by the Calcutta High Court, the Company was prevented from deducting ESI contribution and thus was prevented from making any payment to ESI. In order to provide medical facilities and benefits to the employees, the Company entered into a Settlement Agreement with the Employees Union under which the company has incurred a total expense of Rs.97,06,000/- for the period 1997-2004 till the time of passing of the impugned order. It is submitted that in the event the respondent-Company was liable to pay ESI contribution, the total payment would have been approximate at Rs. 33 lacs. Therefore, as against a total expenditure of Rs.33 lacs under the ESI, the respondent has incurred an expense of Rs. 97 lacs for providing medical facilities. After the impugned judgment in the year 2004, the respondent-Company is making payment of ESI contribution. In these circumstances, it is submitted by learned counsel that the respondent should not be made liable to make payment from the period 1997-2004 to the Corporation and that the order passed by the Calcutta High Court is just and fair in the facts and circumstances of the case.

M/s Philips India Limited - respondent Nos. 8 & 9 (arising out of APO No. 82 of 2001) also filed their statement. Mr. Jay Savla, learned counsel submitted that in the year 1999, a Memorandum of Settlement was arrived at between this Company and the Workmen Union and by virtue of the said Memorandum, benefits extended to the employees were far superior in comparison to the medical benefits extended under the said Act. The Memorandum of Settlement has also been annexed as Annexure-R2 with the counter affidavit filed by them. The said settlement was amended in the year 2000 and thereafter in 2002 (Annexure-R3). He made the following legal submissions:

(a) the Division Bench while upholding the Notification has held that

A the same would apply from the date of the judgment. The said observation, according to the learned counsel, is justified in view of the following legal submissions:

(i) *Principles of Actus Curiae Neminem Gravabit - No party shall be prejudiced for the act of Court.*

B

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 C 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:

D "*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

E (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"

In view of interim stay order which continued for almost seven years, the employers were restrained from making any deduction. Whereas, the employers F 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.

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

In the matter of *Rajesh D. Darbar & Ors.* v. *Narasingrao Krishnaji Kulkari & Ors.*, [2003] 7 SCC 219, this Court held that where the nature of relief, as originally sought, has become obsolete or unserviceable on account H of developments subsequent to the suit or even during appellate stage, it is

unfair that the relief is moulded, varied or reshaped in the light of the updated facts. A

In the matter of *Mohammed Gazi* v. *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. B

The maxim of equity which is founded upon justice and good sense was applied as well as other maxim "*lex non cogit ad 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* v. *Tarapada Dey* (supra) and *Gursharan Singh* v. *New Delhi Municipal Committee* (supra). C

(ii) *Prospective applicability/ overruling of the Judgment:* It is well settled that declaration of law can be made prospective i.e. operative from the date of the judgment. This Court in several decisions has laid down the law and declared it to be operative only prospectively. The Constitution Bench of this Court in the matter of *Somaiya Organics (India) Ltd. & Anr.* v. *State of U.P. & Anr.*, reported in [2001] 5 SCC 519 has discussed at length the principles of Prospective over-ruling which are enunciated in the following paras:-" D E

> 27. In the ultimate analysis, prospective overruling, despite the terminology, is only a recognition of the principle that the court moulds the reliefs claimed to meet the justice of the case - justice not in its logical but in its equitable sense. As far as this country is concerned, the power has been expressly conferred by Article 142 of the Constitution which allows this Court to "pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it." In exercise of this power, this Court has often denied the relief claimed despite holding in the claimants' favour in order to do "complete justice." F G
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> 28. Given this constitutional discretion, it was perhaps unnecessary to resort to any principle of prospective overruling, a view which was expressed in *Narayanibai* v. *State of Maharastra* at p. 470 and in H

A *Ashok Kumar Gupta* v. *State of U.P.* In the latter case, while dealing with the "doctrine of prospective overruling", this Court said that it was a method evolved by the courts to adjust competing rights of parties so as to save transactions "whether statutory or otherwise, that were effected by the earlier law". According to this Court, it was a rule.

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"of judicial craftsmanship with pragmatism and judicial statesmanship as a useful outline to bring about smooth transition of the operation of law without unduly affecting the rights of the people who acted upon the law operated prior to the date of the judgment overruling the previous law."

C

Ultimately, it is a question of this Court's discretion and is, for this reason, relatable directly to the words of the Court granting the relief."

In the matter of *Harsh Dhingra* v. *State of Haryana & Ors.*, [2001] 9 SCC 550, this Court held as follows:

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"7. Prospective declaration of law is a device innovated by this Court to avoid reopening of settled issues and to prevent multiplicity of proceedings. It is also a device adopted to avoid uncertainty and avoidable litigation. By the very object of prospective declaration of law it is deemed that all actions taken contrary to the declaration of

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law, prior to the date of the declaration are validated. This is done in larger public interest."

This proposition of prospective overruling has been followed in several other decisions as well.

F (iii) *Undue Hardship:*

It is submitted that if the order of the Division Bench is not held to be operative prospectively, the same would cause grave and undue hardship to the employers including M/s Philips India Ltd. Philips India Ltd. have not

G only extended medical benefits by spending huge amount but have further not deducted any amount statutorily required from the salary of the employees in view of interim prohibition order. To direct the deposit of monies, for this period would amount to undue and grave hardship and would be inequitable to the employer.

H Mr. Chiraranjan Addey, who is the counsel for respondent No.3 in civil

appeal (arising out SLP (C) Nos. 19447-451/2004 made the following submissions: A

According to the learned counsel, the Company had spent by way of medical benefits for such employees who came outside the purview of the Act pursuant to stay order granted by the Court is estimated for the three establishments a sum of Rs. 30 lacs upto 16.03.2004 and that the employees B who have retired from the respondent-Organisation during this period of 7 years when the stay order of the Court was in operation had also availed of the benefit and, therefore, if the liability of the respondent-Company towards payment of ESI contribution is made retrospective, the employer will not be able to recover the contributions from the concerned employees and the C employer will have to make both the employer's and the employees' contribution retrospectively, notwithstanding the fact that the company has incurred huge expenditure for granting liberal medical benefits as coverage of such employees was stayed.

It is also pointed out that the employers were not the petitioners in the D writ court and the order was imposed upon them and the management was compelled to abide by the same and so far as the Corporation is concerned, they are in the most enviable position. The Corporation took full advantage of the interim order and did not provide any benefit to the employees at all nor did they move to get the order vacated and yet now they are claiming the E contributions for the past period which was covered by the said interim order of the learned Single Judge. That will be an unjust enrichment by the Corporation at the cost of the employers. Learned counsel also cited the following decisions for invoking the doctrine of prospective overruling: *Raymond Ltd.* v. *M.P. Electricity Board,* [2001] 1 SCC 534.

F

Managing Director, ECIL v. *B. Karunakar,* [1993] 4 SCC 727 (supra).

Ashok Kr. Gupta v. *State of U.P.,* [1997] 5 SCC 201.

Somaiya Organics Ltd. v. *State of U.P.,* [2001] 5 SCC 519 (supra),

G

Sarwar Kumar v. *M. Agarwal,* [2002] 4 SCC 147.

In the light of the principles laid down in the aforesaid decisions with regard to the innovative concept of prospective overruling which are applicable also in matters arising out of statutory interpretation for the purpose of substantial justice in the exigencies of peculiar fact situations, the counsel H

A requested this Court to uphold the decision of the Division Bench of the Calcutta High Court and that this Court in any event under Article 142 of the Constitution may make such order as may be warranted in the peculiar facts and circumstances of this case for doing complete justice.

M/s. Gaurav Agrawal, E.C. Aggarwala, Jay Salve, C.R. Addy, A.N. B Bardiayar and M/s P.H. Parekh and Co. counsel for the appellants respectively made their submissions in SLP (Civil) Nos. 20855-64, 19453-57 etc. they reiterated the submissions made in their special leave petitions and submitted that, asking the respondent to pay the contribution now will cause undue hardship by citing the decisions in *Shree Cement* v. *State of Rajasthan,* [2000] C 1 SCC 765 and *British Physical Lab India Ltd.* v. *State of Karnataka,* [1999] 1 SCC 170.

Mr. K.V. Viswanathan, learned counsel on behalf of respondent No.1/ CESC Ltd. in SLP (Civil) No. 19466-19470 made lengthy submissions both on facts and on law. A written submission was also made with details of the D amounts paid and spent by the management on various items. According to him, around 14,000 employees of the Company availed the benefits each year during the period from 1996-2003 and an amount of Rs.55.30 crores was incurred by CESC Ltd. in providing such benefits *vis-a-vis* the cost incurred for providing such benefits was also furnished. It is submitted that, as a matter of fact, that on 03.08.2004 the appropriate authority had exempted E CESC under Section 87 of the Act pursuant to the application filed in February, 1997 and in the proforma prescribed as on 18.11.1997. It is stated that the delay in disposal of the application was solely due to the inaction on the part of the Appropriate Authority. In fact as can be seen from the exemption order the Assistant Director, CESC had himself reported that CESC Ltd. has been F providing free medical treatment domiciliary, round the clock emergency treatment, ambulatory facility, hospitalisation facilities irrespective of the cost involved to all the permanent employees including employees termed as apprentices/trainees. It was also noted that M/s CESC Ltd. has tie up arrangements with 40 different reputed hospitals/nursing homes in Kolkata and Howrah and that the organization runs as many as 24 dispensaries with G 28 appointed doctors at the factory locations and has tie-up arrangements with 36 investigation centres and 42 chemist shops. The Assistant Director, in his report, has indicated that 98 specialists in and around Kolkata are empanelled for medical care of CESC employees. The cost of spectacles, cervical collars, hearing aid etc. are also reimbursed to the employees. After H noticing this report that the prayer for granting of exemption under Section

87 of the Act for the permanent employee was granted and that this order has also been accepted by the Corporation. A

The factual situation that emerges according to Mr. K.V. Viswanathan, therefore, are as under:

(1) Today CESC Ltd. pursuant to the application dated 03.02.1997 stands exempted by order dated 03.08.2004 under Section 87 of the Act; B

(2) During the period from 1997-2003 because of operation of the injunction order, it was not able to deduct contribution and pay its contribution. Moreover, it extended medical facilities as directed by the interim order; C

(3) In the exemption application (page 86 of the paper-book at page 88) the medical benefits given by the company are set out.

Mr. K.V. Viswanathan submitted that once a party is injuncted, then violating the order would result in party being hauled up for contempt. CESC Ltd., the respondent No.1 herein obeyed the orders and granted its own medical facilities. Order of injunction was passed since workers Union had obtained reliefs in similar writ petitions. CESC Ltd. did not get any interim order from which it benefited. In fact it was an order of injunction against CESC Ltd. and not an order of Stay in its favour. The Corporation did not take any steps to vacate such injunction order which was passed on 17.04.1997. In fact, the CESC Ltd. was incurring huge expenditure on medical benefits and the employees were happy with such arrangement and as of today also the employees are not aggrieved. Permitting the Corporation to recover contribution for the year 1996 to 2003, under such circumstances, would apart from resulting in undue hardship to CESC Ltd. would also result in unjustly enriching the Corporation. As rightly held by the Division Bench of the High Court in impugned judgment, undue hardship will be caused to the CESC Limited if the arrears are asked to be paid as the employees would have to pay arrear contribution although they did not enjoy any benefits during the said period. This is a *fortiori* in a case like the present, wherein now the CESC Ltd. has been exempted under Section 87 of the Act on the ground that its medical benefits are far superior to the medical benefits as provided by the Corporation. D E F G

Mr. K.V. Viswanathan cited the following two decisions on the principles of justice, equity and good conscience. By citing the same, he submitted that H

A this Court has the power to relieve a party from undue hardship.

1. *West Bengal Hosiery Association* v. *State of Bihar & Ors.*, [1998] 4 SCC 134 and 2. *Sree Cement Ltd. and Anr.* v. *State of Rajasthan & Ors.*, [2001] 1 SCC 765

B He next submitted that the act of Court can prejudice no party. He said the maxim "*actus curiae neminum gravebit*" fully applies to the present case as pointed out in *Mohammed Gazi* v. *State of Madhya Pradesh and Ors.*, [2000] 4 SCC 342.

According to the learned counsel, the judgment cited by the counsel for
C the Corporation in All India ITDC Employees Union case (supra) has no application to the facts of the present case. This is for the reason that the nature of relief sought by the Petitioner in the said case was different and also the interim order as passed in the said case was different from the present case. In the said case relied by the Corporation, the prayer in the Writ Petition
D was for exemption on the ground that the employer was the Government of India undertaking and employee stood covered under Section 1(4) of the Act. Furthermore in the said case there was no positive direction injuncting the employer from making contributions and deductions and the only order in that case was an order of stay. This can be distinguished from the present case as despite being an order of stay, the employer could have made
E contributions and deductions in the said case, however in the present case since there was a specific order injuncting the CESC Ltd. from making contributions and deductions such contributions and deductions could not have been made by the Respondent No.1. Moreover none of the circumstances which have been set out herein above were present in the said case as cited
F by the Corporation.

Concluding his submission, learned counsel submitted that no case has been made out by the Corporation which warrants interference by this Court.

Mr. Gaurab Kumar Banerjee, learned senior counsel appearing on behalf
G of respondent Nos. 6 & 7 in civil appeals (arising out of SLP (Civil) Nos. 20841-47 of 2004) Hindustan Lever Ltd submitted that, during the 7 years period under dispute and as a result of the High Court's order, the Company has spent far greater amount on the medical facilities to the 39 covered employees who would otherwise have been covered by the Corporation and the Corporation would have had to provide the medical benefits. Learned
H senior counsel submitted that this Court will not interfere with an order

simply because it is lawful to do so even if it has legal errors, if the impugned order results in substantial justice. He relied on *Council of Scientific and Industrial Research* v. *K.G.S. Bhatt,* [1989] 4 SCC 635 (para 12) and para 23 of *ONGC* v. *Sendhabhai Vastram Patel,* [2005] 6 SCC 454. He submitted that under Article 142 of the Constitution, this Court is empowered to pass such orders as would do complete justice between the parties. It was also submitted that it is permissible in law to prospectively overrule a judgment as has been done recently in the case of *SBP & Co.* v. *Patel Engineering Ltd.,* [2005] 8 SCC 618. According to the learned senior counsel, the decision of this Court in All *India ITDC Employees Union* (supra) is clearly distinguishable as unlike in the present case. In that case, the High Court did not give any positive directions and the decision of the High Court was not reversed by this Court. Concluding his argument, the counsel submitted that if the respondent now starts recovering from the erstwhile employees, it would severely affect industrial relations.

M/s K.L. Mehta & Co. advocates argued for respondent No.2 BOC India Limited. Learned counsel also submitted that the principle of '*actus curiae neminem gravabit*' i.e. the act of Court shall prejudice no man is fully applicable and, therefore, the Division Bench *qua* the respondent directed the said Notification to operate prospectively. Referring to the decision in *Union of India & Anr.* v. *Murugan Talkies,* [1996] 1 SCC 504, learned counsel submitted that this Court has also applied the above principle in several decisions including [1988] 2 SCC 602 and in [1996] 1 SCC 504 and observed as follows:

> "3. It is contended for the respondents that the High Court has granted the relief taking into consideration that some workmen had retired and it would be inequitable to deduct from the meagre wages of existing employees with retrospective period. Therefore, the High Court directed deduction of their share from the date of the judgment. It is needless to mention that since some of the workmen have already retired and from some existing workmen deduction from date of enforcement of the notification would cause great hardship to them, so it cannot be made to bear the burden of their contribution with retrospective effect from the date of the notification towards their share of contribution.
>
> 4. To that extent, the order of the High Court is upheld....".

Learned counsel further submitted that because of the interim/final order

A passed by the High Court, the Corporation has not rendered any service like medical benefits to the employees whose wages were above Rs.3.000/- but less than Rs.6,500/- p.m. Therefore, in absence of any quid pro quo for the said period of 7 years, no contribution can be claimed by the ESI either from the respondent-Company or from the employees especially, when no service/ benefit was rendered to the concerned employees.

B

Mr. Gaurab Banerji, learned senior counsel also made submissions on behalf of respondent No.4 Modern Food Industries Ltd. in SLP (Civil) No. 20861of 2004. He made similar submissions and cited the same authorities as others did.

C

Mr. Rana Mukherjee, learned counsel appearing on behalf of respondent No.5, Engel India Machines & Tools (1987) Limited made the following submissions.

He submitted that various labour Unions of different industries including
D that of respondent No.5 challenged the said Notification by filing separate writ petitions in the Calcutta High Court and the High Court by different orders from time to time granted injunction with regard to the said Notification. The said injunction was extended from time to time which, in effect, injuncted the Management from either collecting or making any contributions towards the Corporation. Such injunctions were extended and continued from time to
E time. On 30.06.1997, by judgment and order, the learned Single Judge of the High Court declared the said amendments as *ultra vires*. Being aggrieved by the said order, the appellant-Corporation filed 120 appeals before the Division Bench of the High Court which stood disposed off by the impugned judgment and order on 16.03.2004. It is submitted that respondent No.5 by way of
F abundant caution had also in the meantime applied for exemption for the said period of 1997-2004 i.e. the date of the impugned judgment and order under Section 87 of the Act of 1948 which is still pending before the appropriate Government. Learned counsel has also annexed certificates, details of expenditure and extracts from the annual report. It is submitted that the respondent should not be proceeded against by the Corporation under Section
G 68 of 1948 inasmuch as the contributions towards ESI fund had not been made during the period since the Company was prevented by an order of injunction of the Calcutta High Court and that the said directions, therefore, require no interference by this Court and this Court may exercise its powers under Article 142 of the Constitution of India to do complete justice to the
H respondent No.5-herein.

Ms. Mridula Ray Bhardwaj, learned counsel for the respondent in Civil appeal arising out of SLP 20882-20891 of 2004 etc. submitted repeatedly the same arguments on behalf of respondent No.5 Westinghouse Saxby Farmer Limited. An application in the prescribed Proforma-A for exemption from the provisions of the Act as per and after the Calcutta High Court's direction passed in this order dated 07.06.2004 in writ petition No. 8791 of 2004. On 03.08.2004, the Company further submitted another set of application in Proforma-A as asked for by the West Bengal Labour Department's letter dated 22.07.2004. Thereafter, pursuant to the Government of West Bengal Labour Department's notice dated 30.08.2004, 29.10.2004, 16.11.2004 and 26.11.2004, the Company's representative duly attended the hearing in connection with the Company's exemption application. It is stated that the Company has submitted the Comparative Table of Benefits given by the Company to its employees and benefits under the ESI scheme etc. However, no order has yet been passed or communicated by the Labour Department in regard to the respondent-Company's application for exemption. Learned counsel has also furnished the amount of medical expenses paid by the respondent-Company to its employees since 1996-97.

Mr. C.K. Ganguli, learned counsel for the respondent in civil appeal (arising out of SLP (Civil) Nos. 20933-20939 of 2004 made submissions on behalf of Hahnemann Publishing Company Ltd. The learned counsel furnished the details about the medical allowances given to the employees and submitted that if the liability is made retrospective, the employer will not be able to recover the contributions from the concerned employees and the employer will have to make both employers and employees contribution. Notwithstanding the fact that the company has incurred huge expenditure for granting liberal medical benefits as coverage of such employees since the notification was stayed.

The Central Inland Water Transport Corporation, respondent No. 21 through Mr. S.D. Gupta who is the Head of the Central Inland Water Transport Corporation Ltd. filed an affidavit. It is stated that some employees/workers Union/Associations in CIWIC filed a writ petition in the High Court praying for their exemption from the provisions of the ESI Act, 1948. That pursuant to an order dated 07.09.2004 passed by the High Court, the Government of India, Ministry of Labour and Employment issued a notice dated 16.02.2005 informing that in connection with exemption from provisions of the Act it has been decided that hearing would be held on 04.03.2005 in the said Ministry and all the concerned parties were requested to attend the hearing

A and make their submissions. The representative of CIWIC Ltd. attended the aforesaid hearing on 04.03.2005 and made his submissions. As decided in the said meeting, CIWIC under cover of its letter dated 23.03.2005 submitted two separate applications both dated 22.03.2005 for exemption from the provisions of the ESI Act as amended upto date in respect of its factory establishments which were covered under the provisions of the said Act. That B due consideration of the aforesaid appeal and the two applications dated 22.03.2005, the Ministry of labour and Employment issued a notification S-38014/6/2005-SSS-I dated 05.01.2006 thereby granting exemption to CIWIC Ltd. From the operation of the ESI Act, 1948 for the period from 01.01.1997 to 30.09. The order reads as follows:-

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> "In exercise of the power conferred by section 88 read with section 91-A of the Employees' State Insurance Act, 1948 (34 of 1948) the Central Government hereby exempts the regular employees in respect of two units of M/s Central Inland Water Transport Corporation Limited i.e. M/s. Marine Workshop and M/s Rajabagan Dock yard D both in Kolkata, West Bengal from the operation of the said Act for the period from 01.01.1997 to 30.09.2006"

A copy of the said Notification has also been annexed and marked as R-4.

E It is submitted that in view of the above, CIWIC has been exempted from the provisions and operations of the ESI Act, 1948 for the relevant period from 01.01.1997 to 15.03.2004 for which the special leave petition has been filed by the Corporation. It is also further submitted that the Corporation has also been granted exemption from the operation of the ESI Act for further period upto September, 2006. In view of the above, learned F counsel submitted that the special leave petition Nos. 20938 and 39 of 2004 be dismissed against respondent No. 21.

Mr. P. Gaur, learned counsel for respondent No.4 in S.L.P. No. 20840 of 2004 (Siemens Workers Union & Others) submitted that this Court will be G reluctant to interfere with the discretion exercised by the High Court. In this connection, he cited *Municipal Corporation of Faridabad* v. *Siri Niwas,* [2004] 8 SCC 195. He also submitted that it is not the case of the Corporation that the said exercise of jurisdiction is irrational.

In *Union of India* v. *Murugan Talkies* (supra) similar relief granted by H the High Court was not interfered with by this Court. Therefore, he submitted

that the discretion exercised by the High Court is justified in view of various facts and circumstances and thus prayed that the appeal filed by the Corporation be dismissed. A

We have given our thoughtful consideration to the questions and issues involved in this matter. We have also perused the pleadings, the order passed by the learned Single Judge and the orders passed by the Division Bench and the written submissions made by the respective parties along with the annexures filed therein. B

We have already noticed that the respondent-Companies have spent large amount of money on the employees and provided medical facilities in view of the order of the High Court granting stay/injunction etc. If the High Court had not passed the order of injunction, the respondent-companies would have contributed the ESI contribution instead of spending monies on the medical facilities and allowances. In these circumstances, the submissions made by learned senior counsel appearing for the respondents that it would be unfair and unjust to make the employer to pay contribution towards ESIC since in lieu of the contribution to ESIC, the employer provided better medical facilities, in our view holds water and it would cause extreme and grave hardship to the employer if they are required to pay contribution for the past several years for no fault of their own. In our view, no party much less the respondents should suffer because of the orders of the Court if duly complied with. C D E

We see much force, substance and merit in the submissions made by the learned senior counsel appearing for the respective respondents and as duly adopted by the other learned counsel appearing for other civil appeals.

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 ESIC 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 ESIC 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. F G

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 H

A 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 B 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 C 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.

The High Court, in our opinion, while disposing of the matter has taken D 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 ESIC and the employer had provided medical facilities to the workmen as per the Court orders and E in view of the interim order also had paid medical allowances.

A similar view was taken by us in the case of *Employees State Insurance Corporation* v. *Distilleries & Chemical Mazdoor Union & Ors.* in Civil Appeal Nos. 1727 of 2005, 3002 and 3003 of 2006 by the very same Bench comprising of Dr. AR. Lakshmanan and Lokeshwar Singh Panta, JJ. We have also F considered the submissions both factual and legal made by Mr. C.S.Rajan, learned senior counsel appearing on behalf of the ESI Corporation. In our opinion, his argument has no merits in the facts and circumstances of this case and the interim orders passed by the High Court which prevented employer and employee from making any contribution towards ESI.

G In the present case, the law as well as the facts are in favour of the respondents. The High Court has correctly appreciated the tremendous hardship that will be caused if arrears are sought to be paid and nobody stands to gain, neither the employer nor the employee under the circumstances. Even assuming that the law is in favour of the ESI, keeping in view the special facts and circumstances of the present case, relief can be denied under Article 136 of H

the Constitution of India. In view of the judgment reported in *Chandra Singh and Ors.* v. *State of Rajasthan and Anr.*, [2003] 6 SCC 545 (Three Judges Bench), Dr. AR. Lakshmanan, J speaking for the Bench held as follows:- A

> "42. In any event, even assuming that there is some force in the contention of the appellants, this Court will be justified in following *Taherakhatoon* v. *Salambin Mohammad,* [1999] 2 SCC 635 wherein this Court declared that even if the appellants contention is right in law having regard to the overall circumstances of the case, this Court would be justified in declining to grant relief under Article 136 while declaring the law in favour of the appellants. B
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> 43. Issuance of a writ of *Certiorari* is a discretionary remedy. [See *Champalal Binani* v. *CIT, West Bengal,* AIR (1970) SC 645. The High Court and consequently this Court while exercising their extraordinary jurisdiction under Article 226 or 32 of the Constitution of India may not strike down an illegal order although it would be lawful to do so. In a given case, the High Court or this Court may refuse to extend the benefit of a discretionary relief to the applicant. Furthermore, this Court exercised its discretionary jurisdiction under Article 136 of the Constitution of India which need not be exercised in a case where the impugned judgment is found to be erroneous if by reason thereof substantial justice is being done. [See *S.D.S. Shipping Pvt. Ltd.* v. *Jay Container Services Co. Pvt. Ltd. & Ors.*, (2003) 4 Supreme 44]. Such a relief can be denied, *inter alia*, when it would be opposed to public policy or in a case where quashing of an illegal order would revive another illegal one. This Court also in exercise of its jurisdiction under Article 142 of the Constitution of India is entitled to pass such order which will do complete justice to the parties. C D E F
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> 44.....
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> 45. This Court said that this principle applies to all kinds of appeals admitted by special leave under Article 136, irrespective of the nature of the subject-matter. So even after the appeal is admitted and special leave is granted, the appellant must show that exceptional and special circumstances exist, and that, if there is no interference, substantial and grave injustice will result and that the case has features of sufficient gravity to warrant a review of the decision appealed against on merits. So this Court may declare the law or point out the lower courts' error, still it may not interfere if special circumstances are not shown to G H

A exist and the justice of the case on facts does not require interference or if it feels the relief could be moulded in a different fashion.

46. The observations made in paras 15-20 of the *Taherakhatoon* (supra) can be usefully applied to the facts and circumstances of the case on hand.

B

47. In the instant case, we are dealing with the higher judicial officers. We have already noticed the observations made by the committee of three Judges. The nature of judicial service is such that it cannot afford to suffer continuance in service of persons of doubtful integrity or who have lost their utility.

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49. We, therefore, would although dismiss the appeals, but we would direct the High Court and the State government to pay all retiral benefits to the appellants herein as expeditiously as possible preferably

D within a period of three months from the date of communication of this order. No Costs."

This Court under Article 142 of the Constitution of India is empowered to pass such orders as would do complete justice between the parties. This Court is also empowered to mould the relief in such a manner so that it is

E not only just but also equitable even while declaring the law as observed in para 25 of *ONGC Ltd.* v. *Sendhabhai Vastram Patel and Ors.*, [2005] 6 SCC 454 and *Raj Kumar and Ors.* v. *Union of India and Anr.*, [2006] 1 SCC 737. It is also permissible in law to prospectively overrule the judgment as has been done recently in the case of *SBP Co.* v. *Patel Engineering Ltd.*, [2005]

F 8 SCC 618. If the respondent is now allowed to recover from the erstwhile covered employees, it would severely affect industrial relations. Reversal of the impugned order would lead to prosecution, penalty and also interest against the respondent without any fault of the respondent. The decision of this Court in *ITDC Employees Union* (supra) is clearly distinguishable as unlike in the present case. In that case, the High Court did not give any

G positive direction. The decision of the High Court was not reversed by this Court.

The High Court under Article 226 and this Court under Article 136 read with Article 142 of the Constitution of India have the power to mould the relief in the facts of the case.

H

Likewise, the judgment cited by learned counsel for the appellant-Corporation are in a different context altogether and the ratio of the said cases are not applicable to the present case. A

This apart the maxim of equity which is founded upon justice and good sense was applied as well as other maxim: *lex non cogit ad impossibilia* (i.e. 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 and Ors.* v. *Tarapada Dey and Ors.*, [1987] 4 SCC 398 and *Gursharan Singh and Ors.* v. *New Delhi Municipal Committee and Ors.*, [1996] 2 SCC 459. B

The ESI Act has enacted to provide for certain benefits to employees in case of sickness, maternity and employment injury. Under the scheme of the Act, function of the ESI Corporation is to derive insurance fund from the contribution from employees and workmen. The employer is entitled to recover workmen's share from the wages of the workmen concerned. It was argued by the respondent that the employer is providing better medical facilities to the workmen and, therefore, the object and purpose of the Act has been fully satisfied. It is pertinent to notice that none of the employees of the Union have complained about medical services provided by the employer since the object is otherwise fulfilled. No further direction, in our opinion, is required to be passed. C D

The act of Court can prejudice no party either the ESI or the respondent-companies. We, therefore, relieve the respondents from making any contributions for the period in question and direct them to make the contribution as directed by the Division Bench of the High Court. It is stated that some of the respondents have already filed exemption applications and that the appellant-Corporation has also granted them necessary relief. We also permit the other respondents who have not filed any exemption application may now file the same and if such application for exemption is filed, it is for the authorities to consider the same on merits and in accordance with law. E F

For the foregoing reasons, we dismiss all the appeals filed by the appellant-Corporation in the peculiar facts and circumstances of the cases. The High Court while upholding the Notification has held that the same would apply from the date of the judgment. The said observation is justified in view of the facts and circumstances and the legal submissions made and considered in paragraphs supra. No costs. G

D.G. Appeals dismissed. H