

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO No. 284/2011**

% **17th January, 2014**

EMPLOYEES STATE INSURANCE CORPORATION Appellant

**Through: Mr. K.P.Mavi, Advocate and Mr.
B.P.Sharma, Advocate.**

VERSUS

SIR GANGA RAM TRUST SOCIETY Respondent

**Through: Mr. Harvinder Singh and Ms. Alka ,
Advocates.**

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? Yes

VALMIKI J. MEHTA, J (ORAL)

1. This appeal is filed by the Employees State Insurance (ESI) department impugning the judgment of the ESI court dated 4.3.2011. By the impugned judgment the ESI court has allowed the petition under Section 75 of the Employees State Insurance Act, 1948 (ESI Act) filed before the ESI court by the respondent herein. By means of the petition under Section 75 of the Act, the respondent herein had sought the quashing of the order dated 31.12.2007 passed by the appellant under Section 45-A of the ESI Act determining the contribution amount payable by the respondent herein for the period from 23.8.2004 to 28.2.2007 at Rs. 2,05,643/-.

2. The facts of the case are that the respondent is a society which is running a hospital. The departments of the hospital also include two departments of maintenance and kitchen. The appellant wanted to include these two departments under the ESI Act on the ground that these two departments were factories as per Section 2(12) of the ESI Act and because an individual department can be taken as factory as per Section 2(12) under the ESI Act and it is not necessary that the hospital as a whole has to be covered under the ESI Act.

3. The issue in question was squarely covered in favour of the appellant in view of the ratio of the judgment of the Supreme Court in the case of *Christian Medical College Vs. Employees' State Insurance Corporation (2001) 1 SCC 256*. Paras 2 to 6 and 17 to 19 of the said judgment read as under:-

“2. Briefly stated the facts are as follows:

The Appellant is a Hospital which is part of a Medical College. The Appellant has a department, which is called the Equipment Maintenance Department. This department maintains the equipment in the hospital such as X-ray, ECG and Radiation equipment, kidney dialysis, heart and lung machine, operating table equipment etc. In effect this department, inter alia, repairs the equipment which is being used in the hospital. Admittedly, in this department there are 45 persons working.

3. In 1978 the Respondent issued a notice to the Appellant stating that the Equipment Maintenance Department fell within the purview of Section [2\(12\)](#) of the Employees State Insurance Act, 1948 (hereinafter referred to as the Employees Insurance Act) and that the Appellant should comply with the provisions of the Act with retrospective effect. The Appellant represented that the Employees Insurance Act would not apply to the Equipment Maintenance Department, inter alia, on the ground that this department was part and parcel of the Appellant College. The Respondent did not accept this explanation and threatened the Appellant with legal action. The Appellant filed a Petition under Section [75](#) of the Employees Insurance Act before the District Court, Vellore. By a Judgment dated 4th May, 1985 the District Judge held that the Equipment Maintenance Department was not separate and distinct from the Appellant Hospital and that it was just a limb of the hospital. It was held that the Equipment Maintenance Department was not amenable to the provisions of the Employees Insurance Act and that the Respondent was not entitled to apply the provisions of the Employees Insurance Act or to demand any contribution.

4. The respondent filed an Appeal before the High Court. That Appeal came to be dismissed on 27th June, 1994. The learned single Judge held that the Equipment Maintenance Department was just a limb of the Medical College and it could not be separated from the main Institution. It was held that the primary and paramount character of the Appellant Institution was to teach medicines to the students. It was held that this department was merely maintained for proper functioning of the main institution and it, therefore, could not be considered to be a factory, even assuming manufacturing process was carried on there.

5. The respondent then filed a Letters Patent Appeal which was allowed by the impugned Judgment dated 27th July, 1997. The learned Judges of the High Court relied upon the decision of this Court in the case of Andhra University v. [R.P.F. Commissioner of A.P. reported in MANU/SC/0206/1985](#) : (1986)ILLJ155SC . In this case the question was whether the Departments of Publication and Press run by the Andhra University and the Osmania University were liable for coverage under the Employees'

Provident Funds and Miscellaneous Provisions Act. Relying upon Section [2-A](#) of that Act it had been submitted that for the purposes of determining the applicability of the Act the entire University must be treated as an establishment. It had been submitted that if the University cannot be said to be a factory, then a Department of that University could not also be covered by the Act. This Court held as follows:

“7. We are unable to see how this provision is of any assistance to the appellants. Section [2-A](#) was inserted in the Act merely for the purposes of clarifying the position that the Act applies to composite factories. It is not the intendment of the section to lay down even by remotest implication that an establishment, which is a factory engaged in an industry specified in Schedule I will not be liable for coverage under the Act merely because it is part of a larger organisation carrying on some other activities also which may not fall within the scope of the Act. In construing the provisions of the Act, we have to bear in mind that it is a beneficent piece of social welfare legislation aimed at promoting and securing the well-being of the employees and the Court will not adopt a narrow interpretation which will have the effect of defeating the very object and purpose of the Act. Once it is found that there is an establishment which is a 'factory' engaged in an 'industry' specified in Schedule I and employing 20 or more persons, the provisions of the Act will get attracted to the case and it makes no difference to this legal position that the establishment is run by a larger organisation which may be carrying on other additional activities falling outside the Act.

8. Our attention was drawn to a decision of a learned Single Judge of the Calcutta High Court in *Visva Bharati v. [Regional Provident Fund Commissioner, W.B.](#)* [MANU/WB/0382/1982](#) : (1983)ILLJ332Cal , wherein it was held that the provisions of the Act were inapplicable in respect of a "Silpa Sadan", Agricultural Farm and a Hospital run by the Visva Bharati University. The learned Judge was of the view that "if the University as an establishment does not come under the provisions and or the purview of the Act, the different branches or departments of the University which the University is empowered and or entitled to maintain under the provision of

the Visva Bharati Act cannot be brought within the mischief of the Act." We have no hesitation to hold that the aforesaid view expressed by the learned Judge is not correct or sound and that the said decision does not lay down correct law.

9. As already indicated, the true tests to be applied is whether there is an establishment which is a 'factory' engaged in any of the scheduled industries and whether 20 or more persons are employed in the said establishment. If the answer is in the affirmative, the provisions of the Act are clearly attracted.

10. In the cases before us there cannot be any doubt that the establishments namely, the Departments of Publications and press are 'factories' as defined in Clause (g) of Section 2 of the Act. Under the said definition factory means any premises in any part of which any manufacturing process is being carried on. The printing of textbooks, journals, registers, forms and various items of stationary clearly constitutes 'manufacture' within the meaning of the said expression as defined in Clause (i-c) of Section 2 of the Act. That printing is one of the industries specified in the Schedule is not in dispute. It is also not disputed that much more than 20 persons are employed in the concerned establishments of the two Universities. Thus all the requirements of Clause (a) of Section 1(3) of the Act are fully satisfied in these cases and hence the conclusion recorded by the High Court that the establishments in question are liable for coverage under the Act is perfectly correct and justified."

6. In the case of *Osmania University v. Regional Director E.S.I.C. reported in MANU/SC/0225/1985* : (1986)ILLJ136SC , this Court has on above mentioned principles, held that the Employees Insurance Act also applied to Department of Publication and Press of the Osmania University.

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17. We are unable to accept any of the submissions made by Mr. Divan. It is to be seen that all the cases relied upon by him are cases where the question was whether the entire undertaking or both the undertakings would be covered by the provisions of the various Act referred to therein. The question was whether the

entire undertaking was to be covered because a department or some other industry run by that Company was covered. In such cases the test of dominant nature is applied. **In this case the question is not whether the Appellant Hospital gets covered by reason of the fact that the Employees Insurance Act applies to the Equipment Maintenance Department. Here the question is only whether the Equipment Maintenance Department is covered. For that one has only to see whether this department is a "factory" within the meaning of the term as defined in the Employees Insurance Act.** Section [2\(12\)](#) of the Employees Insurance Act defines a "factory":

“2(12) "factory" means any premises including the precincts thereof -

(a) whereon ten or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on, or

(b) whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power or is ordinarily so carried on. but does not include a mine subject to the operation of the Mines Act, 1952 or a railway running shed.”

18. Section [2\(14AA\)](#) of the Employees Insurance Act provides that the term "manufacturing process" shall have the meaning assigned to it in the Factories Act. Section [2\(k\)](#) of the Factories Act defines the term "manufacturing process" as follows: “2(k) "manufacturing process" means any process for -

(i) making, altering, repairing ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to use, sale, transport, delivery or disposal, or

(ii) pumping oil, water, sewage or any other substance; or

(iii) generating, transforming or transmitting power, or

(iv) composing types for printing, printing by letter-press, lithography, photogravure or other similar process or book-binding; or

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels, or

(vi) preserving or storing any article in cold-storage.”

19. Thus, under this definition, amongst other things, if any repairing takes place with a view to use the equipment then it amounts to manufacturing process. It is the Appellant's own case that the Equipment Maintenance Department maintains and repairs their equipment for the efficient use of the equipment in the hospital. Therefore, this department is clearly covered by the term "factory" under the Employees Insurance Act. Once, it squarely falls within this term the provisions of the Act become applicable to this department. No question Arises of applying the test of dominant nature. The test of dominant nature would have become applicable only if on the basis of this department falling within the definition of the term "factory" the Respondent had sought to make the Appellant Hospital also amenable to the provisions of the Employees Insurance Act. As that is not the case here no question arises of applying the dominant nature test. In this case the ratio laid down in Andhra University and Osmania University cases (supra) squarely applies. We see no conflict between the principles laid down in those cases and the principles laid down in the cases cited by Mr. Divan. They apply to different situations and are thus not conflicting. We also see no substance in submission that decision in Andhra University and Osmania University cases was based on fact that the Departments of Publication and Press were independent and/or that they catered to third parties also. A plain reading of these judgments shows that they are based on the principle that if the Departments are covered by the provisions of the Acts then they cannot be excluded.”

(underlining is mine)

4. The facts of the case show that respondent was served with

notices by the appellant for producing the relevant record for determining

the contribution payable by the respondent to the appellant. These notices have been filed and proved by the respondent itself in the ESI court as Ex.PW1/5 and Ex.PW1/9 (which refers to the notice dated 29.5.2007 which is also on record of the ESI Court). The replies/ responses given by the respondent to the appellant include letters dated 30.11.2006, 9.11.2006 (Ex.PW1/6, colly). The main notice for passing of an order under Section 45-A of the appellant is dated 17.7.2007 and has been exhibited as Ex.PW1/7 by this notice contribution payable by the respondent was decided at Rs. 2,05,643/-. This notice in paras 2(ii) &(iii) refers to the aspect of respondent not filing the relevant records.

5. There are three aspects which are called for determination in the present appeal. First is as to whether it is necessary that the hospital as a whole should be covered under the ESI Act or it is sufficient if a department of the hospital can be treated as a factory under Section 2(12) of the ESI Act. The second aspect is what is the effect of the respondent herein failing to produce the relevant records before the appellant in spite of repeated notices. Thirdly, whether the ESI court can remand the matter although the ESI court was fully competent to decide under Section 75 the liability of the respondent and the obligation to be performed by the appellant to demand

contribution from the respondent under the relevant provision of the ESI Act.

6. So far as the first aspect is concerned, I find that the ESI court has grossly mis-directed itself, to say the least, in ignoring the ratio of the judgment of the Supreme Court in the case of *Christian Medical College (supra)*. ESI court has surprisingly not referred to the relevant paras of the Supreme Court judgment in the case of *Christian Medical College (supra)* which I have reproduced above and which show that it is not necessary that dominant nature test be applied and it is enough if a department in a hospital is covered in the definition of a factory as per Section 2(12) of the ESI Act. It was not open to the ESI court to simply gloss over the judgment of the Supreme Court in the case of *Christian Medical College (supra)* without referring to the specific paras containing the ratio of the same. Therefore, the argument urged on behalf of the respondent before the appellant as also before the ESI court that since the respondent-hospital as a whole could not be covered under the ESI Act, and therefore, its maintenance and kitchen departments could also not be covered, was a wrong argument and ought not to have been accepted by the ESI court. This finding of the ESI court is set aside on account of the same being against the direct ratio of the judgment of

the Supreme Court in the case of *Christian Medical College (supra)*. In order to appreciate the perversity in the order of the ESI court, I reproduce the only relevant paragraph of the impugned judgment dated 4.3.2011, passed by the ESI court being para 8, which reads as under:-

“8. Issue No. 1. Whether the demand of Rs. 2, 05, 643/- as raised by the defendant is illegal and unjustified? OPP:-

The respondent has based his claim on the basis of one judgment namely *AIR 2001 Supreme court page 373 Christian Medical College Vs ESIC* and whole of the hospital was made liable to pay the ESIC contribution and was covered under the provisions of ESIC. The same has been assailed by petitioner on the ground that test of dominant nature should have become applicable and whole of the hospital was not liable to be covered and has relied upon *Division Bench Judgment of Hon'ble High Court of Delhi Indraprastha Medical Corporation Ltd. VS NCT of Delhi 2006- II –LLJ page 231* wherein it has been held by Hon'ble High court that *only the main activity of hospital has to be seen and hospital is not industrial establishment falling within section 2(e) of 1946 Act*. The witness produced by respondent has stated that whole of the hospital was covered under ESI Act. RW-2 has not inspected the premises himself but admitted that whole of the hospital was covered. The ESI tried to find support from one judgment of Hon'ble High Court of Calcutta High Court *ESIC VS Duncun Gleneagles Hospital Ltd. 2005-iii-LLJ page 174* that *Pathological Diagnostic Centre attached to hospital cannot be held to be factory* but after going through this judgment also it can be made out that this judgment is not going to help ESI on two counts. Firstly, facts of the present case are different then in the present case as herein, whole of the hospital is sought to be covered but therein only department of Pathlab was sought to be covered. Secondly, it was mentioned in the same judgment that pathlab or blood

bank attached to hospital catering to the needs of the patients admitted in the hospital would not attract provisions of ESI Act but if it is established that it caters to the needs of outsiders other than patients admitted in hospital then ESIC Act applies and accordingly whole of the hospital can not be covered as finding of Hon'ble High court in 2006- II- LLJ page 231 are relevant for decision of the matter in controversy. Herein this evidence altogether is missing on the record that departments were catering to the needs of the same other then outsiders. The next question involved is regarding coverage of other employees working in separate department on which also the evidence was required on the question as to whether the some contractors were employed, what was the nature of their job, were they on the pay rolls of the hospital or the other food services provided by any other outlet was itself covered under ESI Act having separate identity from the hospital and having different ESIC No.. Further the representation made by Sir Ganga Ram Hospital was not considered by ESIC and was not explained in the court also wherein it was specifically mentioned and answered that diagnostic centres MRI, CT and Nuclear medicine were run by private concerns. Canteen was also run by some separate and independent person. Work of laundry was also effect through outside agency. Evidence on all these facts are missing from record. Further the establishment has mentioned that some of the employees were drawing the salary of Rs.7,500/- or more and thus the employees were not within the definition of employees liable to be covered but this fact was also not considered by ESIC. Unless all these facts were verified by the ESIC, individual department could not have been saddled with any liability. Some of the work of department like washing, cleaning, preserving articles in cold storage are already held to be incidental to main work by Division Bench Judgment Supra of Hon'ble High Court. So these departments are beyond the scope of ESIC Act. The different number of employees have been shown in different department but there basis of calculation is not made out. It is not made out as to whether electricity was being used or they were working under generator supply or whether electricity

was not at all used. On the basis of answer to this question, the strength of employees could have been taken into consideration. The employee's strength of whole of the hospital could not be considered as whole of the hospital could not have been covered as dominant nature test was to be applied. The primary work of the hospital was to provide medical help to the patients and even if Christian Medical College judgment is applied, still it is clearly observed in the judgment that individual department could have been assessed but not whole of the hospital. The survey report itself is defective as is devoid of the points mentioned above. It is not made out as to how strength has been taken into consideration as there is no physical verification. The ESI was bound to assess whether any manufacturing process was involved or not or some new item has come into existence. No evidence has been produced by the respondent and the statement of the petitioner witness has remained unchallenged and unrebutted. Rather the petitioner has stated that they are providing free medical facilities to the employees and certainly facilities provided by Ganga Ram Hospital will be more beneficial than provided by ESIC. Nothing material has come out in the cross examination. Thus, petitioner on all these counts has been able to prove his case and demand as such raised by respondent cannot be allowed to stand. Issue No. 1 is decided in favour of the petitioner and against the respondent and coverage of the petitioner vide notice 31.8.07/ order dated 31.12.07 u/s 45-A demanding an amount of Rs. 2,05,643/- is hereby quashed. In these circumstances, it is further held that the whole of the hospital cannot be covered and respondent is at liberty to go through the records on the points mentioned above and to re-assess the liability, if any of the individual department strictly in the light of observations made above. The petitioner will show its records as and when demanded. Thus, this issue is decided in favour of the petitioner and against the respondent accordingly.”

7. So far as the second aspect of respondent failing to produce the relevant employment records of the employees working in the maintenance and kitchen departments are concerned, it is noted that the record of the ESI court shows that the regular notices were issued by the appellant to the respondent for filing of requisite records in order to determine the contribution by the respondent and some such notices are dated 3.10.2006 (Ex.PW1/5) and 31.8.2007 (Ex.PW1/9) and latter of which refers to the similar notice dated 29.5.2007 which is also filed before the ESI court. If the respondent is recalcitrant, the appellant was fully justified under Section 45-A to arrive at a conclusion on its own because respondent cannot take advantage of its own wrong by failing to file the necessary employment records. Self serving statements given in the replies with respect to number of employees or their salaries thus could have been rightly disbelieved by the appellant. Therefore, there is no illegality in the order passed under Section 45-A dated 31.12.2007 determining the contribution of the respondent herein at Rs. 2,05,643/- for the period from 23.08.2004 to 28.2.2007. After all it bears note that some adverse consequence must flow to the respondent in view of the fact of failing to file the record. After all, respondent is not prejudiced for all times to come because the demand is only for a specific limited period and for a later period it will always be open

to the respondent to get a correct contribution determined, assuming the present determination is not correct, by filing all the relevant employment records.

8. So far as the third aspect requiring determination it is noted, the ESI court has remanded the matter back for decision to the concerned authorities of the appellant, although, the ESI court itself could have, nay ought to have, determined the issue of liability and other aspects as per Section 75 of the ESI Act. The ESI court by the impugned judgment has thus committed a clear cut illegality in remanding the matter, more so because, though the respondent even before the ESI court could have but yet it did not deliberately file any records of employment of employees of the maintenance and kitchen departments. If surely records could have been and had been filed, the merits of the matter as to the liability of the respondent could have been decided by the ESI court. I may note that the effect of unnecessarily remanding the matters before the competent authority of the appellant results illegally prolonging the demand process in a fresh round of litigation, and which must be eschewed because ESI court itself could have and ought to have decided even the merits of the matter in view of Section 75 of the ESI Act.

9. Counsel for the respondent argued before this Court the following aspects:-

(i) The impugned order passed under Section 45-A is for the whole hospital and not only for the maintenance and kitchen departments and therefore the same is illegal.

(ii) In the present case, before the ESI court only the respondent had led evidence and no evidence was led by the appellant, and consequently, the case as set up by the respondent ought to have been accepted.

(iii) It is then argued that in the cross-examination of the witness of the respondent before the ESI court since there is no suggestion of non-cooperation by the respondent by non-production of the records, therefore, it has to be held that it has not been proved by the appellant that there was non-cooperation by the respondent.

(iv) The order which is passed under Section 45-A is not a speaking order specifying as to what are the number of employees, what are their salaries and how such employees are covered under the Act and therefore such a non-speaking order is illegal and ought to be set aside.

(v) The notices which were issued in this case were to the hospital and not to the individual departments which were sought to be included under the ESI Act namely the maintenance and kitchen departments. Therefore, it is argued that the endeavour of the appellant was to include the hospital as a whole.

I may note that this argument in fact is an extension of the first argument which says that the impugned order under Section 45-A is with respect to the whole hospital and not only for the maintenance and the kitchen departments of the respondent.

(vi) The ESI court framed only an issue of demand being illegal and therefore, it should not be held against the respondent that ESI court ought to have in fact determined the merits of the matter and the liability of the respondent under Section 75 of the ESI Act.

(vii) Finally it is argued that appeal lies to this court under Section 82 only if there is a substantial question of law, and that in the present case there is no substantial question of law and consequently this Court should not entertain this appeal.

10. The first and the fifth arguments which are urged on behalf of the respondent before me that the order has been passed and the assessment has been done for the whole hospital and not only for the maintenance and kitchen departments, if I say so with respect, is an argument like an ostrich with its head in the sand. This I say so because it is implicit in this argument as if the respondent is taken by surprise and respondent was actually of the opinion and the impression that the hospital as a whole was covered by the impugned proceedings under the ESI Act and not only the maintenance and kitchen departments. However, this argument of the respondent is clearly misconceived and nothing can be further from the truth because the notices which are filed by the respondent itself before the ESI court, and including the notices dated 3.10.2006 (Ex.PW1/5) and 29.5.2007, clearly shows that the issues which were raised and demand which was to be raised for contribution by the appellant was with respect to only the maintenance and kitchen departments of the respondent-hospital and the respondent all along also responded and defended accordingly. Also, there is no doubt whatsoever in this regard that the argument raised on behalf of the respondent is misconceived because it is clear from the replies of the respondent dated 9.8.2007, 6.8.2007 and 1.8.2007 is given to the appellant, which are filed as Ex.PW1/8 (colly), in which the respondent herein is only

replying to the appellant with respect to the maintenance and kitchen departments only. Respondent therefore has all along been aware of the issue being only with respect to kitchen and maintenance departments, for which not only notices were issued to the respondent but also the respondent accordingly replied. In replies the basic defence of the respondent is actually a legal defence that the hospital is not covered, and therefore, the maintenance and kitchen departments cannot be covered. I therefore, refuse to accede to the argument that the impugned order and the notices which were issued were for the hospital as a whole and not qua the maintenance and kitchen departments. Besides the above reasoning, I also note that the argument of the respondent is hyper technical one and that too without any legs to stand upon, because, a notice being addressed to the hospital which runs the maintenance and kitchen departments is not in any manner illegal because the legal entity which is running the kitchen and maintenance departments is surely the hospital. Therefore, nothing turns on the facts that the notices in question are addressed not individually to the kitchen and maintenance departments, but have been issued to the respondent-hospital.

11. So far as the argument urged on behalf of the respondent that it is only the respondent which led evidence, and which should accordingly be

believed is concerned, this argument is clearly fallacious because even if evidence is led only by the respondent, surely the legal position is that ESI court surely can, as per that evidence which comes on record, arrive at on the basis of such evidence, appropriate findings and conclusions. The record of the ESI court shows that the relevant notices of the appellant department were filed and proved by the respondent itself. Replies of the respondent were also filed and proved by the respondent. I have already referred to these notices and replies while dealing with the first and fifth arguments urged on behalf of the respondent above. Therefore, it is not the law that merely because evidence was given by one party, that evidence automatically should result in accepting the case as set up by that party, inasmuch as, the law is that whatever evidence is on record has to be seen, and thereafter, necessary findings have to be given. Accordingly, I reject the argument that merely because the respondent has led evidence, and the appellant has not led evidence, the petition filed by the respondent under Section 75 of the ESI Act has been rightly allowed by the ESI court. I would also at this stage like to note the fact that after all what was the other evidence which the appellant would have led. In this case, the evidence which would have been led has necessarily to be the record of respondent with respect to the number of employees and their salaries etc, and who were

working in the kitchen and maintenance departments of the respondent-hospital. It has already been noted that in spite of repeated notices no record was filed by the respondent with respect to the employees and their salaries and other aspects of employment. Accordingly, the appellant could have led no factual evidence, and evidence which is led is always factual evidence inasmuch as, on a legal argument no factual evidence is required and a legal argument is put forth only by means of an argument and not by leading of evidence. This argument urged on behalf of the respondent that the case of respondent was rightly allowed by the ESI court as only respondent led evidence is misconceived and is accordingly rejected.

12. The next argument which is argued on behalf of the respondent is that since there is no suggestion which is given to the witness of the respondent in cross-examination of non-cooperation, it should be held that there is no non-cooperation by the respondent. This argument, in my opinion, is specious to say the least, because, as already stated above, the respondent in spite of repeated notices did not produce relevant records of the kitchen and maintenance departments. Therefore, no purpose would have been served by putting a question in cross-examination to the witness of the respondent of non-cooperation inasmuch as, non-cooperation stood otherwise established

on record by the notices given by the appellant to produce the records and the receipt of those notices by the respondent and the respondent not filing the relevant records before the appellant. As already stated above, on the ground that in the respondent's opinion, the hospital as a whole could be covered or could not be covered and not the individual departments and hence the records were not filed. I also therefore reject this argument which is urged on behalf of the respondent.

13(i). The next issue which is raised before this Court is that the impugned order dated 31.12.2007 is illegal because the same does not refer to the number of employees, what are their salaries, report of the inspector of inspection of the kitchen and maintenance departments for showing the number of employees and their salaries, and therefore, once no details are given of the employees and their salaries etc for being covered under the ESI Act, the impugned 'non-speaking' order is liable to fail. Reliance for this purpose is placed on behalf of the respondent on two judgments. First judgment is of the Division Bench of Karnataka High Court in the case of *Employees' State Insurance Corporation Vs. Karnataka Asbestos Cement Products 79, FJR 188* and the second is of the Supreme Court in the case of *Bharat Heavy Electricals Ltd. Vs. ESI Corporation 2008 LLR 562* .

(ii) When we refer to the facts in the case of *Karnataka Asbestos Cement (supra)* of the Division Bench of Karnataka High Court, all that is held in the said judgment is that when an inspector's report is relied upon for passing of an order under Section 75, it is necessary that the inspector's report must contain the names of employees and their salaries and other facts so as to pass an appropriate orders under Section 45-A. In the present case, this judgment relied upon in my opinion, has no application, because, the appellant is not relying upon any inspector's report, but has based its order under Section 45-A on the aspect of non-cooperation and non-compliance by the respondent in spite of notices to produce the relevant records of the kitchen and maintenance departments, and which record if produced, would have shown the number of employees working in these two departments of the respondent-hospital and what were their salaries. I have already noted above that the show cause notice dated 17.7.2007 (Ex.PW1/7) issued by the appellant, in its paras 2(ii) & (iii), specifically refers to non-compliance by the respondent of directions to produce the records. The show cause notice dated 17.7.2007 is preceded by the notices dated 3.10.2006 and 29.5.2007. Surely, on account of non-production of the records, the appellant could have been able to do nothing more, and therefore, it is enough in such circumstances on the basis of adverse presumptions drawn against the

respondent of failing to produce the record with the stand taken in the notices of a particular amount of contribution, the appellant's demand should be believed. After all what more can the appellant do in the facts of this case except stating as to a particular amount of contribution is due on best judgment assessment when the employer deliberately conceals the relevant records. Accordingly, I cannot accept the argument urged on behalf of the respondent that the impugned order does not refer to the report of the inspector containing the details of the employees, and therefore, the impugned order under Section 45-A must fall.

(iii) Besides the judgment of a Division Bench of Karnataka High Court being distinguishable on facts, I would like to state that it cannot be the law that although there is deliberate concealment of the records or in any case at least it can be said that there is non-production of the relevant records before the competent authority of the appellant and even before the ESI court, yet, the contribution which is asked for by means of the notices and the impugned order should not be taken as being correct.

(iv) Reliance placed on behalf of the respondent upon the judgment of the Supreme Court in the case of *Bharat Heavy Electricals Ltd. (supra)* is also misconceived because para-3 of the judgment itself shows that the

judgment in that case was passed in relation to a principal employer and the contractor who supplied the employees, when in the facts of that case the record was in the possession not of the principal employer who was being assessed but with the contractor. In the present case, the records are with the respondent itself, and therefore, the judgment of *Bharat Heavy Electricals Ltd. (supra)* has no application.

14. It was further argued on behalf of the respondent that the impugned order cannot stand because the impugned order under Section 45-A is a non-speaking order. At the first blush I found this argument to have some merit, however, I note that this argument does not seem to have been pressed by the respondent before the ESI court because the impugned judgment does not refer to the order under Section 45-A as being bad on account of the same being a non-speaking order. This conclusion of mine is buttressed by the fact that the respondent if it wanted to so argue in this appeal, could have at least filed a reply, and which would be in the nature of cross objections or a defence for contending that the impugned order under Section 45-A should also be set aside on the ground that the order is a non-speaking order, however, there is no reply filed in this appeal taking up such a stand. Therefore, I would in the peculiar facts of this present case not like to set

aside the proceedings initiated under Section 45-A on the ground that order passed is a non-speaking order. What really persuaded me in the facts of the present case, not to set aside the impugned demand or the judgment on the ground that the order under Section 45-A as a non-speaking one in that legal sense of the term, because, really the issue which was the only issue which was to be adjudicated as urged in the replies given to the department by the respondent (Ex.PW1/8 (colly) before the ESI court) was with respect to the hospital as a whole not being covered i.e the issues raised were really the legal issues and did not pertain to any factual issues requiring for passing of a speaking order of giving factual discussion as to how the kitchen and maintenance departments are covered by having a particular number of employees and they are having a particular amount of salary, taken alongwith the reasoning/discussion as already stated above, that once the respondent has not filed the relevant employment records of the employees of the kitchen and maintenance departments either with the appellant in the departmental proceedings or before the ESI court which passed the impugned judgment, I do not think it is open to the respondent at this stage to raise and pursue the argument with respect to the impugned order being a non-speaking order of not discussing the facts of number of employees etc.

Once the issue is only a legal issue of covering the departments under the

ESI Act, when taken with the fact that the order under Section 45-A dated 31.12.2007 refers to the earlier notices given by the department and the replies thereto given, in the facts of the present case, the order cannot be said to be 'a non-speaking order' for any prejudice to be caused to the respondent who has all along being aware that the only issue which was raised by it was a legal issue of the hospital as a whole to be covered or not to be covered under the ESI Act i.e departments of kitchen and maintenance should not be covered individually and that these are the only aspects which are stated in the replies given by the respondent to the competent authorities dated 31.8.2007, 9.8.2007 and 1.8.2007, Ex.PW1/8(colly).

15. The next argument urged on behalf of the respondent that the only issue framed could not allow the ESI court to determine the aspects as required under Section 75 of the liability of the respondent, is rejected because even a cursory reading of the issue framed showed that the same was a comprehensive single issue including all aspects of both the parties with respect to the respondent being liable or not.

16. Finally, it is argued on behalf of the respondent that this appeal is not maintainable as there is no substantial question of law. I cannot agree. Once the ESI court had the power to determine the case on merits under

Section 75, failure to determine the case on merits, results in arising of a substantial question of law. Also, the impugned order is clearly against the settled law of the Supreme Court in the case of *Christian Medical College (supra)* that the individual departments can be covered by the ESI department as being a factory under Section 2(12) of the Act, and ignoring by the ESI court of this ratio of the direct judgment of the Supreme Court in the case of *Christian Medical College (supra)*, in my opinion, also does raise a substantial question of law for this appeal to be maintainable.

17. In view of the above, the appeal is accepted. The impugned order dated 4.3.2011 passed by the ESI court is set aside. The order which is passed by the appellant dated 31.12.2007 under Section 45-A of the ESI court is upheld by which contribution of Rs. 2,05,643/- has been rightly demanded from the respondent for the period from 23.8.2004 to 28.2.2007. I have otherwise noted in this judgment that for a different/later/subsequent period the amount of contribution payable by the respondent will be as per the records which the respondent will file/show before the competent authorities of the appellant, and for that period if there is any aspect as to the number of employees, their salaries etc., then the same will be a subject matter of separate/different proceedings. Appellant in view of the

persistent/obduracy of the respondent in failing to file the employment records will also be entitled to costs of Rs. 25,000/- for this appeal and which shall be paid within a period of four weeks from today.

JANUARY 17, 2014
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VALMIKI J. MEHTA, J.