IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.6882 of 2014

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1. M/S Electronic Net Through Its Partner-Sanjev Kumar, Son Of Brajkishore Prasad Sinha Sheikhpura House, Near J.D. Women'S College, Sheikhpura, P.S.- Shastrinagar, District- Patna

.... Petitioner/s

Versus

1. The Union Of India Through Regional Director, Employees State Insurance Corporation, Regional Office, Bihar, Panchdeep Bhawan, Jawahar Lal Nehru Marg, Patna- 800001
2. The Deputy Director (Authorized Officer), Employees State Insurance Corporation, Regional Office, Bihar, Panchdeep Bhawan, Jawahar Lal Nehru Marg, Patna- 800001
3. The Deputy Director (Recovery Officer), Employees State Insurance Corporation, Regional Office, Bihar, Panchdeep Bhawan, Jawahar Lal Nehru Marg, Patna- 800001
4. The Bihar State Electronics Development Corporation Ltd., Beltron Bhawan, Bailey Road, Shastrinagar, Patna- 800001 Through Its Managing Director

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Harsh Singh, Adv.
Mr. Ravi Shankar Chaudhary, Adv.
Mr. Anshul Agarwal, Adv.

For the Respondent/s : Mr. Sheo Narayan Singh, Adv.

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 12-10-2017

Heard Mr. Harsh Singh, learned counsel for the petitioner and Mr. S.N. Singh, learned counsel appearing for the respondent Employees State Insurance Corporation.

2. The reliefs prayed for by the petitioner in the present writ petition are as under :-

> "(i) For quashing/setting aside the letter (Form C-18) bearing no. P/4200-012813-000-1019/6770/21692/12/12/13 dated 11.12.2013 issued by the Deputy Director, Employees State Insurance Corporation, Regional Office, Bihar (Respondent

no.2) whereby and whereunder the respondent no.2 without carrying out any quasi-judicial proceeding under Section 45A of the Employees State Insurance Act, 1948 (hereinafter for brevity referred to as 'the ESI Act') and without passing any order of assessment as statutorily required by sub-section (1) of Section 45A of 'the ESI Act' straight away demanded payment of alleged ESI contribution dues to the tune of Rs.9713612/- for the period 01.12.2010 to 31.03.2012 and directed the petitioner to pay the same within 15 days thereof failing which the respondent no.2 threatened to coercively recover the same under Section 45C to 45I of 'the ESI Act' and,

(ii) For quashing/setting aside the letter (Form C-19) bearing no. 42001281300010 19/1920/41231/7605/ 23246/22/1/14 dated 13.01.2014 issued by the Deputy Director (Authorized Officer), Employees State Insurance Corporation, Regional Office, Bihar, (Respondent no.2) in favour of the Recovery Officer, Employees State Insurance Corporation, Patna (Respondent no.3) directing him to recover the impugned amount of Rs.9713612/- plus interest of Rs.2732058/-, totaling to Rs.12445670/- from the petitioner and; the notice of demand bearing no. 4200128130001019/CP/54768 dated 27.01.2014 issued by the Deputy Director (Recovery Officer), Employees State Insurance Corporation, Patna (Respondent no.3) to the petitioner by which the respondent no.3 instituted Certificate Case No. 6329 and directed the petitioner to pay the impugned amount and,

(iii) For quashing/setting aside the prohibitory order contained in letter bearing Reference No. 4200128130001019/ CP/53787 dated 13.02.2014 issued by the Deputy Director (Recovery Officer), Employees State Insurance Corporation, Regional Office, Bihar, (Respondent no.3) to the Senior Branch Manager, Indian Overseas Bank, Shastrinagar, Patna by which the respondent no.3 attached the Bank Account of the petitioner bearing CA-A/c. No.151202000000114 and directed the Bank to remit the impugned amount with interest to the tune of Rs.12562669/- and,

(iv) For directing the respondent Employees State Insurance authorities to refund the amount of Rs.2751118/- with interest which the Deputy Director (Recovery Officer), Employees State Insurance Corporation, Patna (Respondent no.3) has coercively recovered from the Bank Account of the petitioner existing with Indian Overseas Bank, Shastrinagar, Patna and,

(v) For grant of such other relief or relief(s) which the petitioner may be found entitled to."

3. The petitioner is a registered partnership firm. Its case is that it entered into a Manpower Supply Agreement with the Bihar State Electronics Development Corporation Limited (for short 'BELTRON') effective for the period 30.11.2010 to 30.11.2013. The agreement was entered pursuant to a notice inviting tender issued by BELTRON in the year 2010. As per the said agreement, the petitioner supplies manpower in the form of Stenographers, Data Entry Operators and IT Boys to BELTRON, who further deploys them to various offices and Government Departments as per their requirement. The BELTRON pays to the petitioner as per the agreed rate for supply of manpower in which the quantum of ESI contribution and PF contribution per manpower is also clearly specified. After receiving payment from BELTRON for the number of manpower supplied, the petitioner pays the statutory dues of ESI to the Employees State Insurance Corporation (for short 'Corporation'), as received from

BELTRON. During the period 01.12.2010 to 31.03.2012, the petitioner received Rs.21,00,900/- from BELTRON towards ESI contribution for a total number of manpower supplied by the petitioner to BELTRON, which the petitioner deposited with the Corporation.

4. Its further case is that the Deputy Director of the Corporation vide letter dated 11.12.2013 without carrying out any quasi judicial proceeding and without passing any order of assessment as statutorily required by sub-section (1) of Section 45-A of the ESI Act, straight away demanded the petitioner to pay additional amount of Rs. 97,13,612/- towards ESI dues for the period 01.12.2010 to 31.03.2012 failing which he threatened to recover the same under Sections 45-C to 45-I of the ESI Act. After receiving a copy of the letter dated 11.12.2013, the petitioner duly replied to the same by letter dated 06.02.2014 in which it requested the respondent Deputy Director to initiate a proper proceeding under Section 45-A of the ESI Act by making the principal employer BELTRON also a party in the said proceeding. It also submitted that in absence of the assessment order under Section 45-A of the ESI Act, no recovery proceeding could be legally initiated under Sections 45-C to 45-I of the ESI Act. In the aforesaid reply dated 06.02.2014, the petitioner also stated that whatever amount of ESI contribution it received from BELTRON it

immediately deposited the same to the Corporation and if any amount is found payable, then it is the liability of the principal employer BELTRON to pay the same.

5. It is the case of the petitioner that without there being an assessment order under Section 45-A(1) of the ESI Act, the Authorized Officer proceeded ahead and vide letter dated 13.01.2014 authorized the Recovery Officer to recover the impugned amount from the petitioner by arbitrarily exercising power under Sections 45-C to 45-I of the ESI Act. The Recovery Officer, thereafter, instituted a certificate case and issued notice of demand dated 27.01.2014 to the petitioner directing it to pay the impugned amount with interest. After receiving the aforesaid notice of demand, the petitioner immediately replied by its letter dated 24.02.2014 addressed to the Authorized Officer with a copy to the Recovery Officer stating therein that without a proceeding under Section 45-A of the ESI Act, resort to recovery proceedings is illegal and improper. Despite specific request made by the petitioner to initiate a proceeding under Section 45-A of the ESI Act after making the principal employer BELTRON as party, no such proceeding was carried out and no assessment under Section 45-A(1) of the ESI Act was ever passed and straightway the Recovery Officer issued prohibitory order vide letter dated 13.02.2014 to the Senior Branch Manager, Indian Overseas Bank, Shastrinagar, Patna to

attach the Bank Account of the petitioner and remit the impugned amount. Thereafter, the Senior Branch Manager, Indian Overseas Bank, Shastrinagar, Patna carried out the order of the Recovery Officer and remitted Rs.27,51,118/- on 28.02.2014 to the Recovery Officer, which was lying in the bank account of the petitioner.

6. Mr. Harsh Singh, learned counsel for the petitioner submitted that in view of the nature of function being discharged by the petitioner, it qualifies squarely as immediate employer within the meaning of Section 2(13) of the ESI Act and BELTRON qualifies as the principal employer within the meaning of Section 2(17) of the ESI Act. He contended that the Authorized Officer in his letter dated 11.12.2013 could not have raised the demand by treating the petitioner as the principal employer. He submitted that the proceeding for recovery of any amount under Sections 45-B, 45-C to 45-I of the ESI Act was subject to an assessment order under sub-section (1) of Section 45-A of the ESI Act. Without there being any assessment order under Section 45-A(1) of the ESI Act, no power could have been exercised under Sections 45-B, 45-C to 45-I of the ESI Act. He contended that the demand made vide letter dated 11.12.2013 and the subsequent proceeding of recovery carried out leading to recovery of Rs.27,51,118/- and continued attachment of the bank account of the petitioner are all completely illegal, without jurisdiction and void ab

initio because there does not exist any formal order of assessment passed under sub-section (1) of Section 45-A of the ESI Act. In support of his submission, he has placed reliance on the decision of the Supreme Court in ***Bharat Heavy Electricals Ltd Vs. The Employees State Insurance Corporation [(2008) 3 SCC 247].***

7. A counter affidavit has been filed on behalf of the respondent nos.1 to 3. A preliminary objection has been raised in the counter affidavit regarding maintainability of the writ petition. The relevant portion of para 6 of the counter affidavit reads as under :-

> "6.… the petitioner should have first approached & filed a case before the Employees Insurance Court, Patna U/S-75(1(g) of ESI Act, 1948 for the redressal of his grievances where petitioner has remedy under the "Act". It is stated and submitted that without exhausting the remedy available to him under 'the Act', petitioner has filed the instant writ petition here and therefore instant writ application is premature and thus fit to be dismissed out right on this ground alone."

8. Raising the preliminary objection in para 10 of the counter affidavit, the respondents have stated as under :-

> "10. That respondents further humbly state & submit that Section-75(2B) of ESI Act, 1948 stats-Section-75(2B) of ESI Act 1948:- "No matter which is in dispute between a principal employer and the Corporation in respect of any contribution or any other dues shall be raised by the principal employer in The Employees' Insurance Court unless he has deposited with the court 50% of the amount due from him as claimed by the Corporation."

9. In para 11 of the counter affidavit, the respondents have averred as under :-

> "11. That respondents crave leave before this Hon'ble Court for passing appropriate order directing petitioner to make compliance of mandatory provisions of Section-75(2B) of ESI Act, 1948 prior to raise his any grievances even before this Hon'ble Court. It is stated & submitted that mandatorily the applicant is not supposed even to participate in the proceedings of this case without making compliance of the mandatory provisions of Section-75(2B) of ESI Act 1948 and hence applicant may be directed by this Hon'ble Court to deposit 50% of the amount demanded by the respondents. It is stated and submitted further that in compliance of the mandatory provisions of Section-75(2B) of ESI Act 1948, this Hon'ble Court may be pleased to direct the applicant to deposit fifty percent of the amount demanded by the ESIC by way of Bank Draft or/he may deposit the same in the Account No.1 of the ESIC maintained at State Bank of India Patna Main Branch Gandhi Maidan Patna who shall hold the same in trust and ultimate appropriation thereof shall abide by the final decision of the case or in whatever manner this Hon'ble Court may think proper for complying the provisions of Section-75(2B) of ESI Act 1948 & then only instant writ petition filed by petitioner shall be allowed to be heard and thereafter in default instant writ petition may kindly be dismissed in default by this Hon'ble Court."

10. It is also contended in the counter affidavit that the Social Security Officer visited the establishment of the petitioner on 25th, 28th & 29th October, 2013 and inspected the records of salary statements of employees with effect from December, 2010 to March, 2012 produced

before him by the petitioner and he found Rs.1,18,14,512/- as payable contribution. As the petitioner paid advance contribution of Rs.21,00,900/-, the balance contribution amount, which came to Rs,97,13,612/-, was demanded through notice in Form-C-18 (Actual) on 11.12.2013. The stand of the respondents, as argued by the learned counsel for the respondents, is that in such cases opportunity of personal hearing is not provided within the provisions of the ESI Act. As the details of salaries of the employees have been provided by the petitioner, which was duly signed, there was no need to provide opportunity for personal hearing.

11. Learned counsel for the respondents contended that as the petitioner is the principal employer and it failed to deposit the contribution within fifteen days granted to it, the Authorized Officer had no option but to issue Form-C-19 to the Recovery Officer on 13.01.2014 to recover the dues of contribution amount under Sections 45-C to 45-I of the ESI Act. He contended that the demand made for recovery of dues of actual amount of contribution is based on salary sheet of the employees which had been provided by the employer itself. He further contended that in the instant case there was no application of Section 45-A of the ESI Act and hence reliance placed upon it by the petitioner is misplaced and erroneous. According to him, BELTRON was not the necessary party and thus, it was not

noticed before raising claim against the petitioner.

12. In reply, learned counsel for the petitioner submitted that if the Corporation disputed the fact of BELTRON being the principal employer, the dispute ought to have been taken by them to the Employees Insurance Court (for short 'EI Court'). He contended that in a case where the records are produced, the assessment has to be made under Section 75(2A) of the ESI Act by the EI Court and the respondents could not have themselves determined the liability of the petitioner and proceeded for recovery of the contribution. In this regard, he has placed reliance on a decision of the Supreme Court in ***ESI Corporation Vs. C.C.Santhakumar [(2007) 1 SCC 584].*** He submitted that from the notice sent by the respondent Corporation on 09.10.2013, as contained in Annexure-2 to the present writ petition, to the BELTRON it would be manifest that the Corporation has itself recognized the BELTRON as principal employer.

13. I have heard learned counsel for the parties and carefully perused the record.

14. In order to appreciate the contentions raised, a few relevant provisions of the ESI Act may be looked into.

15. Sub-section (9) of Section 2 of the ESI Act defines "employee" as under :-

> "2(9) "employee" means any person employed for wages in or in connection with the work of a factory

or establishment to which this Act applies and —

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere ; or

(ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service ;

and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment or any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), and includes such person engaged as apprentice whose training period is extended to any length of time but does not include—

(a) any member of the Indian naval, military or air forces ; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government :

Provided that an employee whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period"

16. Sub-section (13) of Section 2 defines the term "immediate employer" as under :-

> "2(13) "immediate employer" in relation to employees employed by or through him, means a person who has undertaken the execution on the premises of a factory or an establishment to which this Act applies or under the supervision of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer and includes a contractor.

17. Sub-section (17) of Section 2 defines the term "principal employer" as under :-

> "2(17) "principal employer" means —
>
> (i) in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the Factories Act, 1948 (63 of 1948), the person so named;
>
> (ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the head of the department ;
>
> (iii) in any other establishment, any person responsible for the supervision and control of the establishment."

18. Sub-section (4) of Section 2 provides the meaning of the

term “contribution” under the ESI Act, which reads as under :-

> “2(4) “contribution” means the sum of money payable to the Corporation by the principal employer in respect of an employee and includes any amount payable by or on behalf of the employee in accordance with the provisions of this Act”

19. Chapter IV of the ESI Act is in relation to contribution to the ESI fund. Section 39 of the ESI Act provides that the contribution payable under this Act in respect of an employee shall comprise contribution payable by the employer and contribution payable by the employee and shall be paid to the Corporation. Under sub-section (5) Clause (a) of Section 39 provides that if any contribution payable under this Act is not paid by the principal employer on the date on which such contribution has become due, he shall be liable to pay simple interest at the rate of twelve per cent per annum or as is prescribed under clause (b), which can be recovered as land revenue or under Section 45-C to Section 45-I of the ESI Act.

20. Section 40 of the ESI Act provides for payment of contribution in the first instance by the principal employer, which reads as under :-

> **“40. Principal employer to pay contributions in the first instance.** — (1) The principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer’s contribution and the employee’s contribution.
>
> (2) Notwithstanding anything contained in any other enactment but subject to the provisions of this

> Act and the regulations, if any, made thereunder, the principal employer shall, in the case of an employee directly employed by him (not being an exempted employee), be entitled to recover from the employee the employee's contribution by reduction from his wages and not otherwise :
>
> Provided that no such deduction shall be made from any wages other than such as relate to the period or part of the period in respect of which the contribution is payable] or in excess of the sum representing the employee's contribution for the period.
>
> (3) Notwithstanding any contract to the contrary, neither the principal employer nor the immediate employer shall be entitled to deduct the employer's contribution from any wages payable to an employee or otherwise to recover it from him.
>
> (4) Any sum deducted by the principal employer from wages under this Act shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted.
>
> (5) The principal employer shall bear the expenses of remitting the contributions to the Corporation."

21. Section 41 of the ESI Act specifically empowers the principal employer, who has paid contribution in respect of an employee employed by or through an immediate employer, to recover the amount of the contribution from the immediate employer either by deduction from any amount payable to him by the principal employer under any contract, or as a debt payable by the immediate employer. Section 41 of the ESI Act reads as under :-

> **"41. Recovery of contributions from immediate employer.**— (1) A principal employer, who has paid

contribution in respect of an employee employed by or through an immediate employer, shall be entitled to recover the amount of the contribution so paid (that is to say the employer's contribution as well as the employee's contribution, if any,) from the immediate employer, either by deduction from any amount payable to him by the principal employer under any contract, or as a debt payable by the immediate employer.

(1-A) The immediate employer shall maintain a register of employees employed by or through him as provided in the regulations and submit the same to the principal employer before the settlement of any amount payable under sub-section (1).

(2) In the case referred to in sub-section (1), the immediate employer shall be entitled to recover the employee's contribution from the employee employed by or through him by deduction from wages and not otherwise, subject to the conditions specified in the proviso to sub-section (2) of section 40."

22. Section 45 of the ESI Act stipulates functions and duties of the Social Security Officers. It reads as under :-

"45. Social Security Officers, their functions and duties. — (1) The Corporation may appoint such persons as Social Security Officers, as it thinks fit, for the purposes of this Act, within such local limits as it may assign to them.

(2) Any Social Security Officer appointed by the Corporation under sub-section (1) (hereinafter referred to as Social Security Officer), or other official of the Corporation authorized in this behalf by it may, for the purposes of enquiring into the correctness of any of the particulars stated in any return referred to in section 44 or for the purpose of ascertaining whether any of the provisions of this Act has been complied with —

(a) require any principal or immediate employer to furnish to him such information as he may consider necessary for the purposes of this Act;

or

(b) at any reasonable time enter any office, establishment, factory or other premises occupied by such principal or immediate employer and require any person found in charge thereof to produce to such Social Security Officer or other official and allow him to examine such accounts, books and other documents relating to the employment of persons and payment of wages or to furnish to him such information as he may consider necessary ; or

(c) examine, with respect to any matter relevant to the purposes aforesaid, the principal or immediate employer, his agent or servant, or any person found in such factory, establishment, office or other premises, or any person whom the said Social Security Officer or other official has reasonable cause to believe to be or to have been an employee;

(d) make copies of, or take extracts from, any register, account book or other document maintained in such factory, establishment, office or other premises ;

(e) exercise such other powers as may be prescribed.

(3) A Social Security Officer shall exercise such functions and perform such duties as may be authorized by the Corporation or as may be specified in the regulations.

(4) Any officer of the Corporation authorized in this behalf by it may, carry out re-inspection or test inspection of the records and returns submitted under section 44 for the purpose of verifying the correctness and quality of the inspection carried out by a Social Security Officer."

23. Section 45-A of the ESI Act prescribes the procedure regarding determination of contributions in certain cases. It reads as under :-

"45-A. Determination of contributions in certain

> **cases.** — (1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 or any Social Security Officer or other official of the Corporation referred to in sub-section (2) of section 45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment.
>
> Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard.
>
> Provided further that no such order shall be passed by the Corporation in respect of the period beyond five years from the date on which the contribution shall become payable.
>
> (2) An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation under section 75 or for recovery of the amount determined by such order as an arrear of land revenue under section 45-B or the recovery under section 45-C to section 45-I."

24. Section 45-B of the ESI Act stipulates that any contribution payable under this Act may be recovered as an arrear of land revenue.

25. Section 45-C of the ESI Act stipulates that the authorized officer shall issue certificate under his signature for recovery of the amount of arrear and the recovery officer shall have to recover the

amount specified thereunder. The provisions prescribed under Section 45-C read as under :-

> **"45-C. Issue of certificate to the Recovery Officer.** — (1) Where any amount is in arrear under this Act, the authorized officer may issue, to the Recovery Officer, a certificate under his signature specifying the amount of arrears and the Recovery Officer, on receipt of such certificate, shall proceed to recover the amount specified therein from the factory or establishment or, as the case may be, the principal or immediate employer by one or more of the modes mentioned below : —
>
> (a) attachment and sale of the movable or immovable property of the factory or establishment or, as the case may be, the principal or immediate employer ;
>
> (b) arrest of the employer and his detention in prison ;
>
> (c) appointing a receiver for the management of the movable or immovable properties of the factory or establishment, or, as the case may be, the employer :
>
> Provided that the attachment and sale of any property under this section shall first be effected against the properties of the factory or establishment and where such attachment and sale is insufficient for recovering the whole of the amount of arrears specified in the 18 certificate, the Recovery Officer may take such proceedings against the property of the employer for recovery of the whole or any part of such arrears.
>
> (2) The authorized officer may issue a certificate under sub-section (1) notwithstanding that proceedings for recovery of the arrears by any other mode have been taken."

26. The provisions prescribed under Sections 45-D and 45-I of the ESI Act read as under :-

"45-D. Recovery officer to whom certificate is to be forwarded. — (1) The authorized officer may forward the certificate referred to in section 45-C to the Recovery Officer within whose jurisdiction the employer —

(a) carries on his business or profession or within whose jurisdiction the principal place of his factory or establishment is situate ; or

(b) resides or any movable or immovable property of the factory or establishment or the principal or immediate employer is situate.

(2) Where a factory or an establishment or the principal or immediate employer has property within the jurisdiction of more than one Recovery Officer and the Recovery Officer to whom a certificate is sent by the authorized officer —

(a) is not able to recover the entire amount by the sale of the property, movable or immovable, within his jurisdiction ; or

(b) is of the opinion that, for the purpose of expediting or securing the recovery of the whole or any part of the amount, it is necessary so to do, he may send the certificate or, where only a part of the amount is to be recovered, a copy of the certificate certified in the manner prescribed by the Central Government and specifying the amount to be recovered to the Recovery Officer within whose jurisdiction the factory or establishment or the principal or immediate employer has property or the employer resides, and thereupon that Recovery Officer shall also proceed to recover the amount due under this section as if the certificate or the copy thereof had been the certificate sent to him by the authorized officer."

"45-I. Definitions.— For the purposes of sections 45-C to 45-H, —

(a) "authorized officer" means the Director-General, Insurance Commissioner, Joint Insurance Commissioner, Regional Director or such other officer as may be authorized by the Central

> Government, by notification in the Official Gazette ;
>
> (b) "Recovery Officer" means any officer of the Central Government, State Government or the Corporation, who may be authorized by the Central Government, by notification in the Official Gazette, to exercise the powers of a Recovery Officer under this Act."

27. In case of any question or dispute under certain circumstances enumerated in Section 45 of the ESI Act, the matter has to be decided by the EI Court under the provisions of Section 75 of the ESI Act, which reads as under :-

> "***75. Matters to be decided by the Employees' Insurance Court.*** — (1) If any question or dispute arises as to —
>
> (a) whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution, or
>
> (b) the rate of wages or average daily wages of an employee for the purposes of this Act, or
>
> (c) the rate of contribution payable by a principal employer in respect of any employee, or
>
> (d) the person who is or was the principal employer in respect of any employee, or
>
> (e) the right of any person to any benefit and as to the amount and duration thereof, or
>
> (ee) any direction issued by the Corporation under section 55-A on a review of any payment of dependants' benefits, or]
>
> (f) * * *
>
> (g) any other matter which is in dispute between a principal employer and the Corporation, or between a principal employer and an immediate employer, or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or

other dues payable or recoverable under this Act, or any other matter required to be or which may be decided by the Employees' Insurance Court under this Act,

such question or dispute subject to the provisions of sub-section (2A) shall be decided by the Employees' Insurance Court in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (2A), the following claims shall be decided by the Employees' Insurance Court, namely : —

(a) claim for the recovery of contribution from the principal employer ;

(b) claim by a principal employer to recover contributions from any immediate employer ;

(c) * * *

(d) claim against a principal employer under section 68 ;

(e) claim under section 70 for the recovery of the value or amount of the benefits received by a person when he is not lawfully entitled thereto ; and

(f) If any claim for the recovery of any benefit admissible under this Act."

28. Having noticed the different statutory provisions, I find that Section 45-A is a part of Chapter IV of the ESI Act while Section 75 falls under Chapter VI of the ESI Act. Chapter IV of the ESI Act contains the provisions with regard to contribution by the employer and recovery thereof whereas Chapter VI contains the provision for adjudication of disputes and claims by the EI Court. There is no link between Chapter IV and Chapter VI of the ESI Act. Section 45-A provides for determination of contribution in the circumstances that

records are not produced by the establishment before the Corporation or when there is no cooperation, and in that event the Corporation is vested with power to make assessment and determine the amount under Section 45-A and recover it as arrears of land revenue under Section 45-B of the ESI Act. Section 45-A of the ESI Act itself contemplates a summary method to determine contribution in case of deliberate default on the part of the employer. By amendment Act 29 of 1989, Sections 45-C to 45-I were inserted in the Principal Act, for the purpose of effecting recovery of arrears by attachment and sale of movable and immovable properties or establishment of the principal employer or immediate employer, without having recourse to law or EI Court. Where an order is passed under Section 45A, it is the duty of the employer and not the Corporation to approach the EI Court. The non-payment of contribution is a continuing cause, which would be manifest from the fact that the employer is required to pay the interest under Section 39(5)(A), which was introduced by Act 29 of 1989, until the date of its actual payment. However, where the records are produced and the assessment is not made under Section 45-A, the assessment has to be made under Section 75 of the ESI Act.

29. The contribution payable to the Corporation as defined under sub-section (4) of Section 2 of the ESI Act is the sum of money payable by the principal employer in respect of an employee, which

includes the amount payable by or on behalf of the employee also. The principal employer is required under Section 40 of the ESI Act to pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution. Where the principal employer pays the contribution in respect of an employee employed by him or through immediate employer, he is entitled to recover the amount so paid from the immediate employer in view of the provisions prescribed under Section 41 of the ESI Act. Sub-section (1) of Section 44 of the ESI Act requires every principal employer and immediate employer to submit to the Corporation or to such officer of the Corporation as it may direct such returns in such form and containing such particulars relating to persons employed by him or to any factory or establishment in respect of which he is the principal or immediate employer as may be specified in regulations made in this behalf. Thus, it is well settled position in law that the contribution has to be first remitted to the Corporation by the principal employer, which he is entitled to recover from the immediate employer.

30. In the present case, the admitted case of the respondents is that the Social Security Officer visited the establishment of the petitioner on 25/28&29.10.2013 and inspected the records of salary statements of employees with effect from December, 2010 to March,

2012 produced before him by the petitioner and he found Rs.1,18,14,512/- as payable contribution. As the petitioner paid advance contribution of Rs.21,00,900/-, the balance contribution amount, which came to Rs,97,13,612/-, was demanded through notice in Form-C-18 (Actual) on 11.12.2013 and since the petitioner failed to deposit the contribution as demanded by the Authorized Officer within 15 days granted to it, the Authorized Officer had no option but to issue Form-C-19 to the Recovery Officer on 13.01.2014 whereas the case of the petitioner is that the Authorized Officer could not have asked for payment of the balance contribution through demand notice. Its case is that immediately after receiving notice, the petitioner responded vide its reply dated 06.02.2014 highlighting the fact that it is the service provider/contractor of BELTRON, hence, in the interest of justice before deciding the amount of contribution the principal employer BELTRON may be made party and the case be decided under Section 45-A of the ESI Act, as it is not liable to pay the contribution amount. It also reiterated that the notice issued in Form-C-18 (Actual) is patently illegal and against the provisions of law and also without any basis. Hence, in the interest of justice, the assessment of contribution be made only after noticing the principal employer BELTRON.

31. At this stage, it would be relevant to notice certain facts

of the case in ***Bharat Heavy Electricals Ltd Vs. The Employees State Insurance Corporation*** (Supra). In that case, the appellant Bharat Heavy Electricals Limited had received a notice on 03.09.1992 under Section 45-A of the ESI Act on the premise that it had not deposited the ESI contribution for the period 19.07.1981 to 30.09.1991. In response to the notice issued by the respondents, a prayer was made by the appellant before the Corporation to implead the contractors as parties in the proceedings under Section 45-A of the ESI Act as 'immediate employers'. The said prayer was rejected. When the matter was challenged before the High Court, it held that in accordance with the provisions of Section 44 of the ESI Act the Corporation is within its powers to determine the contribution payable in respect of contract employees against the principal employer without looking for the immediate employer. The appellant challenged the order passed by the High Court in appeal before the Supreme Court. The Supreme Court while allowing the appeal and remitting the matter to the Corporation, held that the determination of the exact liability on the part of the contractors is necessary keeping in view the fact that they or some of them may not be under the control of the principal employer having regard to the fact that the contract has come to an end. It further held that the principal employer has a statutory right to recover the dues from the contractors/immediate employers. It held that in a proceeding under Section 45-A of the ESI Act, not only the applicability of the ESI Act but also the quantum thereof which may be held to be payable may be the subject matter of determination.

32. In ***ESI Corporation Vs. C.C.Santhakumar*** (Supra), the Supreme Court observed : "*Section 45-A provides for determination of contributions in certain cases. When the records are not produced by the establishment before the Corporation and when there is no cooperation, the Corporation has got the power to make assessment and determine the amount under Section 45-A and recover the said amount as arrears of land revenue under Section 45-B of 'the Act'. This is in the nature of a best judgment assessment as is known in taxing statutes. When the Corporation passes an order under Section 45-A, the said order is final as far as the Corporation is concerned. Under Section 45-A(1), the Corporation, by an order, can determine the amount of contributions payable in respect of the employees where the employer prevents the Corporation from exercising its functions or discharging its duties under Section 45, on the basis of the material available to it, after giving reasonable opportunity. But, where the records are produced, the assessment has to be made under Section 75(2)(a) of 'the Act'. Section 45-A (2) provides that the order under Section 45-A(1) shall be used as sufficient proof of the*

claim of the Corporation under Section 75 or for recovery of the amount determined by such order as arrears of land revenue under Section 45-B. In other words, when there is a failure in production of records and when there is no cooperation, the Corporation can determine the amount and recover the same as arrears of land revenue under Section 45B. ***But, on the other hand, if the records are produced and if there is cooperation, the assessment has to be made and it can be used as a sufficient proof of the claim of the Corporation under Section 75 before the E.S.I. Court.*"** (emphasis mine)

33. The Supreme Court further held : "*Prior to the incorporation of Section 45-A under Act 44 of 1966, the only resort available to the Corporation was Section 75, for recovery of contribution through the Court. Since this procedure was found to be impracticable and delayed process involved, a special provision was contemplated whereunder adjudication is to be made by the Corporation itself. By reason of incorporation of Section 45-A with effect from 17.06.1967, it became possible for the Corporation to have determination of the question, binding on the 'principal employer', without resorting to the E.S.I. Court. In regard to the order under Section 45-A, the same is enforced, as envisaged under Section 45-B, which was similarly brought into 'the Act', by which the*

contribution may be recovered as arrears of land revenue. With regard to the decision reached by the E.S.I. Court in the application under Section 75, the said decision is enforced, as envisaged in sub-section (4) of Section 75 as if it is a civil court. The mode of recovery under Section 45-B of the Corporation and the mode of recovery as per Section 75(4) by the E.S.I. Court as the civil court are entirely different as both Sections 45 and 75 operate in different spheres".

34. Coming back to the facts of the present case, the case of the respondent Corporation is that the Social Security Officer was provided with the records and documents by the employer in course of inspection on the basis of which assessment was made and amount was determined. Its stand is that since the demand was made through notice in Form C-18 (Actual), no opportunity of personal hearing was required as per the provisions of the ESI Act.

35. Having seen the provisions of the ESI Act, in the opinion of this Court, the stand of the respondent Corporation is not justified. The petitioner had disputed its liability as the principal employer. It had requested that the principal employer BELTRON be added as a party and a notice be also issued to it and only after hearing all concerned, the liability of contribution should be determined. As the petitioner has disputed its liability as principal employer, the dispute ought to have been decided under Section 45-A of the ESI Act after

impleading BELTRON as party in the said proceeding in the light of the ratio laid down by the Supreme Court in ***Bharat Heavy Electricals Ltd Vs. The Employees State Insurance Corporation*** (Supra) or in the alternative the dispute ought to have been decided under Section 75 of the ESI Act and assessment could have been made thereafter by the EI Court in the light of the ratio laid down by the Supreme Court in ***ESI Corporation Vs. C.C.Santhakumar*** (Supra).

36. In view of the discussions made above, as also in view of the statutory provisions prescribed under Section 45-A(2) of the ESI Act, which clearly provides that recovery under Section 45-B, 45-C to 45-I of the ESI Act can only be made if it is preceded by an order of assessment under sub-section (1) of Section 45-A of the ESI Act, the impugned demand made by the Authorized Officer vide letter dated 11.12.2013 regarding payment of alleged ESI contribution to the tune of Rs.97,13,612/- for the period 01.12.2010 to 31.03.2012, the impugned letter dated 13.01.2014 issued by the Authorized Officer in favour of the Recovery Officer directing him to recover the impugned amount plus interest from the petitioner and the notice of demand dated 27.01.2014 by which the Recovery Officer instituted Certificate Case No.6329 and directed the petitioner to pay the impugned amount and the prohibitory order dated 13.02.2014 issued by the Recovery Officer to the Senior Branch Manager, Indian Overseas Bank,

Shastrinagar, Patna by which the account of the petitioner has been attached and the Bank has been directed to remit the amount cannot be sustained. They are accordingly set aside. The respondent nos. 1 to 3 are directed to refund the amount of Rs.27,51,118/-, which has been coercively recovered from the bank account of the petitioner, within one month from the date of receipt/production of a copy of this order.

37. Before I part with this judgment, I must observe that if the respondents propose, they shall be at liberty to initiate a proceeding under Section 45-A(1) of the ESI Act by impleading BELTRON as a party and determine the contribution by a speaking order after affording the petitioner and the BELTRON a reasonable opportunity of being heard or in the alternative to approach the EI Court for adjudication of the dispute and claim for recovery of contribution from the petitioner or from any third party.

38. With the aforesaid observations and direction, the writ petition stands allowed.

(Ashwani Kumar Singh, J)

Pradeep/-

AFR/NAFR	NAFR
CAV DATE	N.A.
Uploading Date	17-10-2017
Transmission Date	