

**(2010) 12 MAD CK 0321**

**In the Madras High Court**

**Case No :** Writ Petition No's. 18866 and 24881 of 2005, 49937 of 2006 and 22064 of 2007 and W.P.M.P. No's. 27241 and 24881 of 2005 and M.P. No. 1 of 2007 in Writ Petition No. 22064 of 2007

Makeish Kumar Mills

APPELLANT

Vs

The Deputy Director Employees State Insurance Corporation  
Sub Regional Office <BR>Kaleen Corporation Vs The Deputy  
Director Regional Office (Tamilnadu) Employees State  
Insurance Corporation <BR>Shri Usha Knit Wears Vs The  
Assistant Director Employees State Insurance Corporation  
Sub regional Office

RESPONDENT

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**Date of Decision :** 15-12-2010

**Acts Referred:**

Employees State Insurance Act, 1948 — Section 2(9), 44, 45A, 45B, 75

**Citation :** (2010) 12 MAD CK 0321

**Hon'ble Judges :** K. Chandru, J

**Bench :** Single Bench

**Advocate :** R. Mahadevan, for the Appellant; K.C. Ramalingam, for the Respondent

**Final Decision :** Dismissed

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**Judgement**

K. Chandru, J.—The Petitioners are the establishments covered by the provisions of the ESI Act. Challenging the orders issued u/s 45-A of the ESI Act dated 26.4.2005, 12.07.2005, 28.12.2004 and 8.8.2006 respectively, the Writ Petitions came to be filed.

2. The Writ Petitions were admitted. Pending the Writ Petitions, this Court granted conditional stay. It is now claimed that the condition has been complied with.

3. The impugned order u/s 45-A of the ESI Act was issued on the ground of the Petitioners' outsourcing, namely Bleaching and Dyeing charges, calendaring charges, fabrication charges etc., which had escaped from the contribution being

paid. According to the Petitioners, the job work done is not covered by the Act. The Petitioners cannot mulct to the liability.

4. The learned Counsel for the Petitioners placed reliance upon the judgment of the Full Bench of this Court in E.S.I. Corporation Vs. Bethall Engineering Company, . The Full Bench of this Court has held in paragraph 7 as follows:

7. It is thus clear from the dicta of the Supreme Court that where the job work is entrusted to a third party contractor and such third party contractor has engaged independent workers, the fact that the principal employer has power to reject the end product manufactured by the contractor, does not constitute an element of supervision within the meaning of Section 2(9) of the Act. The judgment of the Division Bench in Poonam Easwardas, Proprietrix, M/s. Kaleel Corporation v. Employees' State Insurance Corporation 2003 (1) LW 685 (SUPRA) relied upon by the Appellant Corporation is concerned with the direct employees of the establishment and has no application to the facts of the instant case which is about the contract employees.

5. However, in the impugned orders, the stand of the Department was that some other units, for which the Petitioner paid payment are covered by the ESI Act and in those cases, there is no necessity to pay contribution. But, in respect of the uncovered units, where job work is done, they are liable to pay the amounts. As to whether the particular work was done as a job work or done by outsourcing is essentially a question of fact. If an order is passed u/s 45-A of the ESI Act, in the absence of such order being challenged, by taking recourse to Section 75 of the ESI Act, it can be final so far as the Department is concerned and recovery proceedings can also be initiated.

6. The Supreme Court in E.S.I.C. Vs. C.C. Santhakumar, held in paragraphs 17, 25, 28, 30 and 31 of the said judgment as follows:

17. 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 where under adjudication is to be made by the Corporation itself. By reason of incorporation of Section 45-A with effect from 17-6-1967, it became possible for the Corporation to have determination of the question, binding on the principal employer, without resorting to the ESI Court. In regard to the order u/s 45-A, the same is enforced, as envisaged u/s 45-B, which was similarly brought in to the Act, by which the contribution may be recovered as arrears of land revenue. With regard to the decision reached by the ESI Court in the application u/s 75, the said decision is enforced, as envisaged in subsection (4) of Section 75 as if it is a civil court. The mode of recovery u/s 45-B of the Corporation and the mode of recovery as per Section 75(4) by the ESI Court as the civil court are entirely different as both Sections 45 and 75 operate in different spheres.

25. Section 45-A of the Act 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, 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 or immediate employer, without having recourse to law or the ESI Court. Therefore, it cannot be said that a proceeding for recovery as arrears of land revenue by issuing a certificate could be equated to either a suit, appeal or application in the court. u/s 68(2) and Sections 45-C to 45-I, after determination of contribution, recovery can be made straight away. If the employer disputes the correctness of the order u/s 45-A, he could challenge the same u/s 75 of the Act before the ESI Court.

28. What Section 75(2) empowers is not only the recovery of the amounts due to the Corporation from the employer by recourse to the ESI Court, but also the settlement of the dispute of a claim by the corporation against the employer. While this is so, there is no impediment for the Corporation also to apply to the ESI Court to determine a dispute against an employer where it is satisfied that such a dispute exists. If there is no dispute in the determination either u/s 45-A(1) or u/s 68, the Corporation can straightaway go for recovery of the arrears.

30. The legislature has provided for a special remedy to deal with special cases. The determination of the claim is left to the Corporation, which is based on the information available to it. It shows whether information is sufficient or not or the Corporation is able to get information from the employer or not, on the available records, the Corporation could determine the arrears. So, the non-availability of the records after five years, as per the Regulations, would not debar the Corporation to determine the amount of arrears. Therefore, if the provisions of Section 45-A are read with Section 45-B of the Act, then, the determination made by the Corporation is concerned. It may not be final so far as the employer is concerned, if he chooses to challenge it by filing an application u/s 75 of the Act. If the employer fails to challenge the said determination u/s 75 of the Act before the Court, then the determination u/s 45-A becomes final against the employer as well. As such, there is no hurdle for recovery of the amount determined u/s 45-B of the Act, by invoking the mode of recovery, as contemplated in Sections 45-C to 45-I.

31. In *ESI Corpn. v. F. Fibre Bangalore (P)Ltd.* it was observed that it is not necessary for the Corporation to seek a resolution of the dispute before the ESI Court, while the order was passed u/s 45-A. Such a claim is recoverable as arrears of land revenue. If the employer disputes the claim, it is for him to move the ESI Court for relief. In other cases, other than cases where determination of the amount of contributions u/s 45-A is made by the Corporation, if the claim is disputed by the employer, then, it may seek adjudication of the dispute before the ESI Court, before enforcing recovery.

7. In the light of the above, no case is made out. Accordingly, all the Writ Petitions stand dismissed. No costs. Consequently, the connected Miscellaneous

Petitions stand closed.