

(2025) 07 KL CK 1211

In the High Court Of Kerala

Case No : Insurance Appeal No. 2 Of 2025

M/s House Master Facility Management Services Pvt. Ltd

APPELLANT

Vs

E.S.I Corporation

RESPONDENT

Date of Decision : 14-07-2025

Acts Referred:

Employee's State Insurance Act, 1948 — Section 39, 40, 40(1), 44, 45, 45A, 45A(1), 45AA, 45B, 45(2), 75, 77, 77(1A), 75(2)(a)

Citation : (2025) 07 KL CK 1211

Hon'ble Judges : M.A.Abdul Hakhim, J

Bench : Single Bench

Advocate : R.Muraleedharan, Jimmy George, Dr.Anies George, T.V.Ajayakumar, Kum.Rimju P.H., Jothis Chacko

Final Decision : Allowed

Judgement

M.A.Abdul Hakhim, J

1. Appellant was the Applicant before the Employees Insurance Court, Kozhikode in E.I.C. No.19/2021. The appellant filed the Application under Sections 75 & 77 of the Employees' State Insurance Act, 1948 (for short 'ESI Act'), challenging Ext.P2 Actual notice dated 21.01.2020 and Ext.P3 Recovery Notice dated 22.04.2021 before the E.I. Court. The Applicant is a covered establishment. The Respondent-Corporation issued Ext.P2 notice alleging that the Applicant is liable to pay contribution for the omitted wages for the period from 03.2017 to 05.2018 demanding an amount of Rs.7,88,731/-. In Ext.P2 notice, the Respondent alleged that the total wages for the said period is Rs.1,26,86,776/-, the total contribution payable is Rs.8,24,641/-, the contribution paid is Rs.35,910/- and the balance contribution payable is Rs.7,88,731/-. The Applicant was given an opportunity of hearing to appear on 19.02.2020 at 10.30 a.m. Thereafter, the Respondent issued Ext.P3 C-19 notice to the Recovery Officer of the Respondent to recover Rs.7,88,731/- + interest @ 12% per annum from 21.04.2017 from the Applicant. A copy of the said notice was marked by the

Applicant.

2. The Applicant challenged Exts.P2 & P3 on the ground that the Respondent initiated the proceedings against the Applicant establishment without observing the mandatory provisions under Section 45A of the ESI Act. It is alleged that no opportunity of hearing was granted and Exts.P2 & P3 notices were issued without passing a speaking order as contemplated under Section 45A of the ESI Act.

3. The Respondent defended the Application by contending that Ext.P2 notice was issued demanding contribution of Rs.7,88,731/- for the period from 03.2017 to 05.2018, affording opportunity for personal hearing on 19.02.2020 to raise objection, if any, against the assessment of contribution. But the Applicant neither attended the personal hearing nor submitted any objection to the proposed assessment even after receipt of Ext.P2 notice. The contribution claimed in Ext.P2 was prepared on the basis of salary register in the computer system maintained at the head office of the Applicant; that the contribution payable was not assessed on the basis of assumed wages but assessed on the ESI Actual wages reflected by the salary register maintained by the Applicant and hence there is no need to issue separate order under Section 45A of the ESI Act.

4. The E.I. Court dismissed the Application holding that the Respondent afforded ample opportunity to the Applicant for personal hearing and the same was not availed by the Applicant; that the Applicant has not adduced any reliable evidence to prove their contention with regard to the payment of wages made to their employees at Kozhikode office and that the Applicant has not explained the reasons for their non-appearance in the personal hearing nor for the non-production of documents.

5. This Court formulated the following substantial question of law in this Appeal:

1. Whether the Employees Insurance Court is justified in dismissing the Application filed by the appellant in the absence of a determination order under Section 45A of the Employee's State Insurance Act, 1948.

6. I heard the learned counsel for the appellant, Sri. Muraleedharan R., and the learned counsel for the Respondent, Sri. T.V. Ajayakumar.

7. The learned counsel for the appellant contended that in view of the specific provision under Section 45A of the ESI Act, passing of a determination order is mandatory before issuance of C-18 & C-19 notices. Admittedly, in the present case, the Respondent has not issued any determination order as required under Section 45A of the ESI Act. The evidence would reveal that no effective opportunity of hearing was afforded to the Applicant for providing his objection against the demand of additional contribution alleging omitted wages. Hence, the E.I. Court should have allowed the Application filed by the Applicant setting aside Ext.P2 C-18 notice & Ext.P3 C-19 notice. The learned counsel relied on the decisions of the Bombay High Court in *Employees State Insurance Corporation v. M/s. P.Y.C. Hindu Gymkhana* in First Appeal No.2372/2011 and *Paramount*

Agencies Pvt. Ltd. v. The Deputy Regional Director, E.S.I. Corporation in First Appeal No.651/2003, the Division Bench decision of the Patna High Court in Civil Writ Petition No.6882/2014 and the judgment of the learned Single Judge of this Court in W.P.(C) No.4510/2018 in support of his contentions. Learned Counsel concluded the submissions by praying to allow the appeal, allowing the Application before the E.I. Court and answering the substantial question of law in favour of the appellant.

8. Per contra, the learned counsel for the Respondent-Corporation contended that a determination order under Section 45A of the ESI Act is not required in all cases where contribution is demanded. The learned counsel pointed out that Section 45A was incorporated in the ESI Act by the Amendment Act of 1966. The heading of the Section itself would reveal that it is the determination of contributions only in certain cases. The determination under Section 45A of the ESI Act is required only in case the conditions in the said provision are attracted. There is no need to pass a determination order when the contribution is assessed on an actual basis by issuing C-18 (Actual) Notice relying on the records maintained by the employer himself. The determination of contribution is required only in the case of C-18 Adhoc notice. The learned counsel relied on the decisions of the Hon'ble Supreme Court in ESI Corporation v. Hotel Kalpaka International [1993 (1) KLT 281] and E.S.I.C. v. C.C. Santhakumar [(2007) 1 SCC 584], the decisions of the Punjab and Haryana High Court in Narula Enterprises, Ludhiana v. Employees' State Insurance Corporation, Chandigarh [F.A.F.O. No.176/1980] and Employees State Insurance Corporation, Chandigarh v. T.C. Vermani [1984 LIC 1406], the decision of the Madras High Court in The Regional Director of Employees State Insurance Corporation v. Amalgamation Repco Ltd. [1982 2 MLJ 126], the Division Bench decision of this Court in Regional Director, E.S.I. Corporation v. Fashion Fabrics [1990 (2) KLT 713], the decision of the High Court of Delhi in Bombay Ammonia Private Limited v. Employees State Insurance Corporation [1995 (3) LLJ 848] and the decision of the High Court of Andhra Pradesh in Hind Metal Industries, Hyderabad v. Employees' State Insurance Corporation, Hyderabad [CMA No.219/1992] in support of his contentions. The learned counsel contended that the decision of the learned Single Judge of this Court in W.P. (C) No.4510/2018 was rendered without considering the binding decisions of the Hon'ble Supreme Court on the point. The learned counsel concluded the argument, praying to dismiss the appeal, answering the substantial question of law in favour of the Respondent – Corporation.

9. I have considered the rival contentions.

10. It is a pure question of law which is to be decided in this appeal with reference to Section 45A of the ESI Act.

11. Let me first examine the precedents cited by the counsel on either side.

12. In P.Y.C. Hindu Gymkhana (supra), the Bombay High Court upheld the finding

of the Trial Court that in the absence of any order under Section 45A of the ESI Act, recovery proceedings cannot be issued; that Section 45A of the ESI Act provides for a reasonable opportunity of being heard before passing an order under Section 45A of the ESI Act and that admittedly there is no order passed under Section 45A of the ESI Act and therefore no recovery could have been issued. In *Paramount Agencies Pvt. Ltd. (supra)*, the Bombay High Court held that it is the ESI Corporation that has to give an opportunity of hearing as contemplated in Section 45A of the ESI Act while determining the amount of contribution in respect of conveyance allowance. The learned counsel contended that the said decision also mandates a determination under Section 45A of the ESI Act. In *Civil Writ Petition No.6882/2014 (supra)*, the Division of the Patna High Court considered whether determination of the amounts due as contributions under the ESI Act, as per Section 45A of the ESI Act would be required mandatorily in circumstances where the Social Security Officer had conducted an inspection in the premises of the employer and proceeded on the basis of admitted record maintained by the employer. The learned Single Judge of the Patna High Court decreed the recovery proceedings without determination of contribution under Section 45A, which admittedly was not preceded by any opportunity of hearing to the Applicant. The Division Bench of the Patna High Court dismissed the appeal against the judgment of the Single Bench, finding that the statutory requirement has not been complied with. After referring to the Revenue Manual issued strictly for official use by the headquarters of the Employees State Insurance Corporation which provided for Form C-18 (Adhoc) notice and Form C-18 (Actual) Notice, it is held that whether the notice is on adhoc or on actual basis, there should be a well-reasoned speaking order under Section 45A of the ESI Act preceded by the mandatory requirement affording employer a reasonable opportunity of being heard as per the Manual itself. In *W.P. (C) No.4510/2018*, the learned Single Judge of this Court considered the challenge against the recovery of short payment of contributions on the ground that unpaid/short-paid contributions have to be determined under Section 45A, which contemplates an order passed by the Corporation for unpaid/short-paid contributions and allowed the Writ Petition remitting the matter back to the ESI Corporation for passing order under Section 45A for the alleged short payment of contribution holding that on proper construction of Section 45A and 45AA, it may be said that the payable contribution has to be determined only by an order passed under Section 45A and the Corporation cannot say that on the basis of the documents submitted by the employer of a factory or establishment, the amount has been arrived at for payable contribution; that payable contribution would include short payment of the contribution besides the non-payment of the contribution; and that if there is short payment or non-payment of the contribution, that amount has to be determined under Section 45A by an order passed by the Corporation/competent authority.

13. Learned Counsel for the Respondent cited the decision of the Hon'ble Supreme Court in *Hotel Kalpaka International (supra)* to contend that payment of

contribution is statutory and hence the employer has to pay the contribution even without any notice or order. It is held in the said decision that notice calling upon to pay the contribution is only a reminder to the employer to discharge his statutory obligation. The said decision does not specifically deal with the question whether determination order under Section 45A is required for initiating recovery proceedings. In *Santhakumar (supra)*, the Hon'ble Supreme Court was considering the question of limitation provided in the Proviso to Explanation (b) of Section 77(1A) of the ESI Act. The learned counsel for the Respondent is relying on certain observations of the Hon'ble Supreme Court in the said decision to contend that the order under Section 45A is required only in certain cases mentioned therein and not in all cases. It is observed in the said decision that Section 45A of the ESI Act contemplates a summary method to determine contribution in case of deliberate default on the part of the employer. Section 45A provides for determination of contributions in certain cases; that 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 45A and recover the said amount as arrears of land revenue under Section 45B of the ESI Act; that where the records are produced, the assessment has to be made under Section 75(2)(a) of the ESI Act; that 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 ESI Court. This decision also is not an answer to the question involved in this Appeal as to whether a determination order is required in all cases of recovery of contributions on omitted wages. But the finding that if the records are produced and if there is cooperation, the assessment has to be made and it can be used as sufficient proof of the claim of the Corporation would indicate that in such a case, the determination order under Section 45A is not required. In *Narula Enterprises (supra)*, the Punjab and Haryana High Court considered the decisions of various High Courts and held that even without receiving demand notice, the Applicant was under a statutory duty to deposit the employer's as well as employees' contribution under Sections 39 and 40 of the ESI Act. In *T.C. Vermani (supra)*, the Punjab and Haryana High Court held that there is no provision under the ESI Act which enjoin the duty on the Corporation to keep on informing the factory owners that they are covered under the ESI Act; that the Corporation is not their advisor; that the duty is enjoined on the principal employer of the factory the moment it stands covered by the provisions of the ESI Act and for that matter to deduct the employees' contributions from their pay and send the same to the Corporation along with the employers' contribution; that if the employer fails to deduct the employees' contribution, no fault can be found with the Corporation; and that Section 40 of the ESI Act places responsibility to pay the contributions on the principal employer. These decisions of the Punjab and Haryana High Court deal with payment of regular

contribution and do not deal with the demand of additional contribution by the ESI Corporation over and above the contributions paid by the employer. In *Amalgamation* (supra), the Madras High Court held that contribution under Employees' State Insurance is leviable under Section 39 of the ESI Act by which the management is liable to contribute on its own accord and such payment is not made conditional on any demand by the Employees' State Insurance Corporation. In *Fashion Fabrics* (supra), the Division Bench of this Court held that the liability to pay the entire contribution under Section 39 is with the employer; that the mandatory obligation fastened by the ESI Act under Section 39 read with Section 40; that Section 40(1) of the ESI Act says that 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 and that the circumstances that it was not detected at the appropriate time by the ESI Corporation will not absolve the employer from its liability to pay the contribution. In *Hind Metal Industries* (supra), the High Court of Andhra Pradesh held that to expect that every time if any due is found from an employer liable to contribute to determine the contribution under Section 45A of the ESI Act appears to be totally alien to the provisions therein and if such argument is accepted, it may mean that the persons liable to contribute may keep quiet and every time the corporation should determine the amount to recover and every time some dispute is raised, there must be some allegation or determination under Section 77 of the ESI Act and that cannot be real scope of the ESI Act.

14. Out of the decisions cited before me, the decision of the Bombay High Court in *P.Y.C. Hindu Gymkhana* (supra), the Division Bench decision of the Patna High Court in Civil Writ Petition No.6882/2014 (supra) and the decision of the learned Single Judge of this Court in W.P(C) No.4510/2018 are directly on the point. The Decisions cited by the learned counsel for the Respondent is not directly on the point. Even though the learned counsel for the Respondent contended that the decision of the learned Single Judge of this Court in W.P(C) No.4510/2018 is rendered without considering the binding decision of the Hon'ble Supreme Court, I do not find any decision of the Hon'ble Supreme Court directly on the point, which was omitted to be considered by the learned Single Judge in W.P(C) No.4510/2018. The Respondent has no case that the said decision in W.P(C) No.4510/2018 is varied or modified in appeal. All these decisions say that a determination order under Section 45A of the ESI Act is necessary before recovery.

15. The decisions of the various High Courts cited by the learned counsel for the Respondent relate to the payment of regular contribution by the employer. The payment of contribution is statutory under Sections 39 and 40 of the ESI Act. Once the establishment is covered under the ESI Act, the employer shall submit regular returns as required under Section 44 and should pay contributions as per the returns even without any notice, demand or order from the ESI Corporation. But the situation is different when the ESI Corporation initiates action on the

basis of an Inspection Report of the Social Security Officer under Section 45. If an Authority acts on the basis of an Inspection Report to fix any liability on any person, it is elementary that the Authority shall give opportunity to such person to represent against the proposed action after providing copy of the inspection report and thereafter pass a speaking order considering the representation, if any, made by such person. If the authority arrives at a conclusion based on the inspection report without providing an opportunity of hearing to the affected party, the proceedings will be in violation of the principles of natural justice. It is quite unreasonable to hold that no order is to be passed after providing an opportunity of hearing to the affected party. Opportunity of hearing is provided to the affected party to present their case against the proposed action, and in such a case, the authority is bound to pass an order expressing its decision on the case presented by the affected party. If no order is to be passed after providing the opportunity of hearing, the opportunity of hearing would be of futile exercise. Of course, the determination order under Section 45A is not required in cases where the ESI Corporation demands contribution on the basis of records admitted and provided by the employer. Section 45A mandates the passing of a determination order in certain cases covered by the said Section. Section 45A(1) of the ESI Act is extracted hereunder for easy reference.

"45A. 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."

16. An order under Section 45A of the ESI Act is required only under two situations.

1. When no returns, particulars, registers or records are submitted, furnished or maintained by the employer in accordance with the provisions of Section 44.

2. When an Officer 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.

17. When an inspection is conducted by the Social Security Officer under Section 45 and he obtains any record, it is a case of non-production of relevant records by the employer and the same would attract the first limb of Section 45A as there is no voluntary submission of particulars, registers or records by the employer. Section 45 does not authorise the Social Security Officer to pass any order or to issue any demand. The further proceedings on the basis of the inspection reports are to be taken under Section 45A of the ESI Act. In such a case, a determination order under Section 45A is mandatory. For such determination, a reasonable opportunity of being heard is mandatory in view of the first Proviso to Section 45A(1). Even in the absence of the Proviso, the principles of natural justice demand to provide a reasonable opportunity of being heard before passing any determination order under Section 45A, resulting in adverse civil consequences on the employer.

18. In the case on hand, as per Ext.P2 C-18 Notice, the Applicant was given an opportunity of hearing. But at the same time, demand is made to pay the contribution within 30 days, which would make the opportunity of hearing meaningless. It is quite unreasonable to assume that no order is to be passed after giving an opportunity of hearing. Even if the Applicant does not appear, the Respondent has to pass a determination order recording the refusal of the Applicant to avail the opportunity of hearing and based on the materials before it. The Respondent has no case that the challenge against C-18 Notice and C-19 Notice is not maintainable before the Court under Section 75 of the ESI Act. The EI Court will not be able to understand the basis for the demand from such Notices. Section 45AA of the ESI Act provides for an appeal against the order passed under Section 45A to the Appellate Authority. Only if the Respondent passes a reasoned order under Section 45A, the Appellate Authority will be able to adjudicate the legality of the demand, considering the reasons stated in the order. A reasoned order under Section 45A is mandated on this ground also.

19. Since in the present case, the Respondent is demanding additional contribution on the allegation of omitted wages found out in the inspection of the Social Security Officer, an order under Section 45A of the ESI Act is mandatory after providing the copies of the Inspection Reports to the Applicant and after giving an opportunity of hearing to the Applicant.

20. Accordingly, I set aside the impugned order of the EI Court and allow the Application filed by the Applicant before the EI Court setting aside Ext.P2 C-18 Notice and Ext.P3 C-19 Notice and direct the Respondent to pass an Order under Section 45A of the ESI Act after giving copies of the Inspection Reports to the Applicant and after giving an opportunity of hearing to the Applicant.