

**(2012) 04 PAT CK 0030**  
**In the Patna High Court**  
**Case No : CWJC No. 14747 of 2011**

NTPC Limited

APPELLANT

Vs

Union of India and Others

RESPONDENT

**Date of Decision :** 24-04-2012

**Acts Referred:**

Employees State Insurance Act, 1948 — Section 1, 40, 41, 41(1A), 44

**Citation :** (2013) 1 PLJR 42

**Hon'ble Judges :** Samarendra Pratap Singh, J

**Bench :** Single Bench

**Advocate :** K.D. Chatterjee and Anil Kumar Sinha, for the Appellant; Raghib Ahsan and Mr. Anshuman, for ESI Corporation, for the Respondent

**Final Decision :** Allowed

## **Judgement**

Samarendra Pratap Singh, J.—Heard learned counsel for the parties. The petitioner prays for quashing of the order dated 10.6.2011 passed by Respondent No. 4 as contained in Annexure-8 u/s 45A of the Employees State Insurance Act, 1948 (in short "ESI Act") whereby liability of a sum of Rs. 63,52,775/- for the period March, 2010 to June, 2010 has been fixed upon the petitioner towards the Insurance contribution of the employees of the Contractors and has also ordered to recover the amount under Sections 45C to 45(I) of the ESI Act. The petitioner further prays for issuance of consequential writ restraining the respondents from realizing any future amount in respect of liability of contractor's contribution.

2. The relief has been founded mainly on two grounds; (a) firstly the respondent no. 4 has committed illegality in law by holding that the petitioner's company is liable to pay contribution of Employees State Insurance Corporation (hereinafter referred to as "ESIC") for the employees of the contractors without impleading and requiring the contractors to obtain ESI Code; (b) secondly the respondents failed to appreciate that the petitioner company would not be covered because as per sub-section (4) of Section 1 of ESI Act a factory or establishment belonging to or under the control of the Government whose employees are otherwise in

receipt of benefit substantially similar or superior to the benefits provided under the Act shall not come under the purview of ESI Act.

3. Before I deal with the issues involved in this case, it would be apt to notice the fact and the provisions of law in brief.

4. The petitioner is a public sector undertaking of Government of India registered under the Companies Act, 1956 and seven units of power plant of the total capacity of 2340 MW of Petitioner Company is situated at Kahalgaon in the district of Bhagalpur.

5. The Government of India, Ministry of Labour and Employment issued a notification dated 13.8.2009 by which the provision of ESI has been imposed and made applicable to the areas falling within the limit of Kahalgaon in which the power plant of the petitioner's company is situated. The petitioner from time to time engages the contractors in the activities of power generation and other allied activities through contractor's labourers in order to ensure welfare of the employees employed by the contractors. The petitioner has incorporated a term in the contract agreement that the contractor would be liable to pay the contribution towards the Estate Insurance Scheme in respect of himself and his employees after taking separate code from the ESI. On 1.9.2009, the Inspector of ESI directed the petitioner to furnish the list of contractors alongwith number of workers working with them in the petitioner's establishment. The petitioner gave the required details vide letters dated 24.9.2009 and 7.10.2009. The respondent Corporation vide notice dated, 12.4.2010 required the petitioner to deposit a sum of Rs. 76,53,330/- as ad hoc amount towards the Insurance contribution of the employees of the contractors u/s 40 of the ESI Act for the period 1.9.2009 to 23.2.2010, failing which why an order determining the ESI contributions be not passed u/s 45A of the Act. A copy of the notice dated 12.4.2010 is at Annexure-1. The petitioner company filed a reply that it is saved by sub-section (4) of Section 1 of the ESI Act which would not apply to NTPC units established at Kahalgaon.

6. The petitioner next pleaded that as per the agreement it was the responsibility of the contractors, who are the immediate employer, to maintain register of its employees and file returns of employer and employees contributions. The case of the petitioner is that the contractors who are the immediate employer of such employees would act as principle employer and has to comply with the provisions of the Act and as such the contractors are necessary party before determination of liability. The petitioner submits that notwithstanding the aforesaid legal provision, it has deposited a sum of Rs. 46,44,652/- under coercion. The petitioner is aggrieved by order dated 10.6.2011 passed u/s 45A of the ESI Act directing the petitioner to deposit the contribution of employees insurance of the contractors totaling a sum of Rs. 53,52,775/- for the period 3.3.2010 to 6.10.2010, failing which the same will be recovered under Sections 45C to 45(I) of the ESI Act. Apart from taking shelter of the provision of sub-section (4) of Section 1, the petitioner submits that the liability of the contractors has wrongly

been fastened against the petitioner company without impleading the contractors as party.

7. A counter affidavit has been filed on behalf of the respondent nos. 2 to 4, wherein it has been submitted that the petitioner ought to have raised the dispute u/s 75(1)(g) of the ESI Act before the Employees State Insurance Court instead of straightaway moving this court in a writ jurisdiction. The Corporation next contends that u/s 40 of the ESI Act it is the principal employer who is to pay contribution in the first instance and it would be open for the employer to recover the same from the contractor or the immediate employer u/s 41 of the Act. Sections 40 and 41 of the ESI Act is quoted hereinbelow for easy reference:-

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 employees' 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 employees), be entitled to recover from the employee the employee's contribution by deduction 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 employees 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.

41. Recovery of contribution 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.

8. The issue is (a) whether a factory or establishment belonging to or under the control of the Government whose employees are otherwise receipt of benefits substantially similar or superior to benefit would not be covered under the ESI Act in view of exemption under sub-section (4) of Section 1 of the ESI Act?

(b) Whether the respondent Corporation erred in rejecting the prayer of the petitioner to summon the contractor alongwith the details of workers working with them in petitioner's establishment.

(c) Whether the petitioner at this stage of proceeding be asked to move the State Insurance Court u/s 75(1)(g) of the Act?

Ref: Issue No. (c):

9. The matter has already been heard on several occasions and the petitioner has claimed exemption under sub-Section (4) of section 1, from applicability of ESI Act, as it has already provided similar benefits to its employees, if not better benefit, as provided under the Act and ESI (General) Regulations, 1950. Thus at this stage, I am not inclined to relegate the petitioner to move the insurance court.

Ref: Issue No. (b):

10. Issue no. (b) is the main bone of contention between the petitioner and the respondents. The petitioner is being fastened with the liability of employees of the contractors towards ESI contribution. In order to ascertain whether the principal employer is liable to pay the employees contributions of contractors it was necessary to get list of such contract workers engaged by them in order to determine the quantum of the due amount. More or less, similar questions came up for consideration before the Hon'ble Apex Court in the case of Bharat Heavy Electricals Ltd. Vs. ESI Corporation, . In the said case the principal employer, the Bharat Heavy Electricals Limited (in short BHEL) received a notice that it had not deposited the ESI Contribution of the employees of the contractors for the period 19.7.1981 to 30.9.1991, and as such why liability be not determined u/s 45A of the ESI Act. In the show cause notice, the appellant BHEL replied that the workmen concerned had been engaged by the contractors who would be in possession of the relevant records to show whether any contribution is payable or whether the Act was applicable in respect of workmen concerned. A list of the contractors alongwith their addresses was annexed to the show cause with a prayer to summon and implead them as part in a proceeding u/s 45A of the Act.

The prayer of the establishment (BHEL) was rejected by the ESI Corporation. The rejection of the prayer and determination of the liability was challenged before the High Court which matter ultimately travelled up to the Hon''ble Apex Court. The Hon''ble Apex Court after examining the relevant provisions of the Act, negated the stand of the Corporation and decided the issue in favour of the appellant vide paragraphs 20, 21, 22 and 23 of the judgment which are quoted hereinbelow:-

20. We, with respect to the learned Judges, fail to notice any significant difference in the purport and object of both the provisions. The purport and object of both the statutes, for all intent and purport, in our opinion, is the same. In the proceedings initiated u/s 45A of the Act, an immediate employer or principal employer may also show that they are not liable to deposit any contribution on behalf of the employees as the establishment in question did not come within the purview thereof. The purpose of the proceedings, both under the Act as also the Employees Provident Funds Act, is to determine the amount due from any employer in respect of the employees under the statutory schemes. Both the Acts envisage compliance of principles of natural justice. The proviso appended to Section 45A of the Act provides for a statutory mandate of giving a reasonable opportunity of being heard.

21. The quantum of amount due has to be determined in respect of all contract workers engaged by the contractors. The principal employer would be entitled to recover the contributions from the contractor; they being the immediate employers. Whereas under the Provident Funds Act, the principal employer is statutorily liable in terms of the provisions of the Act to comply with the provisions therein; in terms of the Act, the principal employer is entitled to recover the amount of contribution payable by the immediate employer for them.

22. Section 45A of the Act enables the appropriate authority to recover such dues both from the principal as also the immediate employer. It provides for an opportunity of hearing to both of them.

23. Apart from Section 41(1A), Regulation 32 of the Employees' State Insurance (General) Regulations, 1950 mandates an immediate employers to maintain registers in the prescribed form(s). An order passed u/s 45A of the Act has a serious civil and/or financial consequence as the amount so determined is liable to be recovered as arrears of land revenue. Section 44 of the Act, not only mandates the principal employer, but also the immediate employer to file its reports and maintain registers. Under sub-section (2) of Section 44, when such reports are not submitted either by the principal employer or by the immediate employers, the Corporation may require the person in charge of the factory or establishment to furnish such particulars as it may consider necessary for the purpose of enabling the Corporation to decide whether the factory or establishment is a factory or establishment to which this Act applies. Sub-section (3) of Section 44 of the Act enjoins upon the principal as also the immediate employers to maintain registers or records as may be required by regulations.

Section 45 also empowers the Inspector of Corporation to require an immediate or principal employer to furnish to him such information as he may consider necessary in regard to the compliance of the provisions of the Act by them. The Act, therefore, recognizes the existence of an immediate employer.

11. It is evident from the order of the Hon''ble Apex Court that the object of the ESI Act is to ensure the contribution for all the employees whether they are employees of the principal employer or immediate employer so that none of them may be disadvantaged.

12. In order to achieve such object, it would be in the interest of justice to provide an opportunity of hearing to both of them whether or not any contribution is payable or whether the Act was applicable in respect of workmen concerned. Furthermore, in case of Food Corporation of India Vs. Provident Fund Commissioner and Others, , the Hon''ble Apex Court was examining similar provisions under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (in short EPF Act). In the aforesaid case, the Commissioner who is statutory authority under the EPF Act has exercised authority u/s 7A without giving notice to the contractors nor making them parties to the proceedings nor summoning them to produce the lists of workers despite a plea for the same by the establishment. The Hon''ble Apex Court while not approving the action of Commission was of the view that where the principal employer engages the employees for performing some of the similar work of the larger contract, it would be necessary to issue notice to the contractors to decide and determine the actual figure for payment of dues and other dues by indicating such work. Para 9 of the aforesaid judgment is quoted hereinbelow:-

It will be seen from the above provisions that the Commissioner is authorized to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. The Commissioner should exercise all his powers to collect all evidence and collect all material before coming to proper conclusion. This is the legal duty of the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person.

13. In the backdrop of the aforesaid discussions, I hold that the Corporation ought to have issued notice to the contractors to furnish details of the employees and the nature of work performed by them in order to determine the quantum of contribution payable or whether the Act was applicable in respect of all such workmen engaged. A conjoint reading of Sections 40 and 41 of the Act leans in favour of issuance of notice to the contractors/immediate employment to settle the dispute with a finality and exactitude. The Corporation cannot abdicate obligation and take cut short path of fastening the liability straightaway on the principal employer for the employees of the immediate employer, instead of

issuing notice to the contractors and calling for the relevant records. In the result, this writ application is allowed and the impugned order dated 10.6.2011 passed by Respondent No. 4 as contained in Annexure-8 is set aside. It would be open for the petitioner to challenge any other notice issued on similar grounds.