

(2018) 03 GAU CK 0077
In the Gauhati High Court
Case No : MFA 58 of 2006

THE REGIONAL DIRECTOR STATE INSURANCE CORP. LTD.
and ANR

APPELLANT

Vs

RESPONDENT

Date of Decision : 23-03-2018

Acts Referred:

Employees' State Insurance Act, 1948 — Section 1(4), 39, 40, 44, 45A, 45B, 45C, 45I, 45(2), 75(1), 77, 82, 90

Citation : (2018) 03 GAU CK 0077

Hon'ble Judges : KALYAN RAI SURANA

Bench : Single Bench

Final Decision : Allowed

Judgement

1. Heard Mr. K.K. Nandi, the learned Counsel for the appellants. Also heard Mr.S.N. Sarma, the learned Senior Counsel, assisted by Mr. A. Zahid

and Ms. T. Deuri, the learned counsel for the respondents.

2. By this appeal under Section 82 of the Employees' State Insurance Act, 1948 (hereinafter referred to as "ESI Act"), the appellants have

challenged the judgment and order dated 31.12.2005, passed by the learned Employees' State Insurance Court, Dibrugarh (hereinafter referred to

as "ESI Court") in ESI Case No.1/2004.

3. The respondents were the petitioners before the learned ESI Court. The respondents had filed an application under Section 75 of the ESI Act, inter-

alia, with the prayers that the factory and establishment of the respondent No.1 does not come/ fall under the provisions of ESI Act and the Rules

framed thereunder, for setting aside the demand for ESI contribution for the period of April, 2001 to December, 2001. The respondents had also

prayed that the show-cause notice was illegal, void, inoperative in law, and for declaring that the CFT Case No. 43-1554 dated 11.03.2003, for

recovery of Rs.60,955/- was invalid and illegal.

4. The case of the respondents before the learned ESI Court in brief was that the respondent No.1, which is a public sector undertaking under the

control of Government of India, was engaged in the manufacture or production of petroleum products from its oil refinery situated at Digboi and those

products were being distributed throughout the Country. For the said purpose, the respondents had a terminal depot at Tinsukia, which is controlled by

the respondent No.2. It was stated that the respondents had engaged more than 2000 workers including contract labourers for its purpose. It was

stated that the factory and establishment was within the provisions of Section 1(4) of the ESI Act and as it had its own 200 bedded hospital with

modern facilities at Digboi along with a well equipped dispensary at Tinsukia wherein the respondents catered to the medical needs of its employees

including the contractorsâ?? labourers without any discrimination, it had no obligation to pay ESI contribution as per the ESI Act because the

provisions of Section 40 read with section 39 of the ESI Act was not applicable on the respondents.

5. It was stated that although the provisions of ESI Act were not applicable for the factory and establishment of the respondents, yet the appellant

No.1 i.e. the Regional Director of Employeeâ??s State Insurance Corporation (hereinafter referred to as ESIC), with a view to implement the said

ESI Act on the respondents, vide his letter dated 04.08.1999, expressed his desire to have a discussion with the respondent No.2 on 17.08.1999.

However, the appellant No.1 did not turn up for such discussion. Thereafter, the Inspector of ESIC by his letter dated 16.03.2000, expressed his desire

to inspect the establishment of the respondent on 24.03.2000 and carried out his inspection. Thereafter, by letter dated 05.05.2000, the Deputy

Director of ESIC requested the respondents to send a list of contractors, etc. working under them to determine the feasibility of

implementation/coverage of the respondent No.1. The respondents supplied the required information by their letter dated 22.05.2000. The Inspector of

the appellants again inspected the establishment of the respondents on 20.06.2000. Once again the appellant No.1 expressed his desire to visit the

respondents on 31.08.2000 to discuss about the introduction of ESI Scheme, but, the said authority did not visit the establishment of the respondents.

However, the Inspector of the appellants once again carried out an inspection of the establishment of the respondent 03.09.2002 and once again

verified the records from April, 2001 to December, 2001. Thereafter, by letter dated 16.10.2002, the appellant No.1 informed the respondents that

their establishment was covered under the provisions of ESI Act with effect from April, 2001. It is stated that the said coverage was done in violation

of the provisions of section 45-A of the ESI Act. Thereafter, by a notice dated 21.02.2003, a demand for Rs.60,902/- was made by the appellant No.2

against the respondents towards ESI contribution for a period from April, 2001 to December, 2001 together with cost and interest. Thus on

09.02.2004, the respondents had filed the above mentioned case before the learned ESI Court by stating that the cause of action arose on 04.08.1999

and on subsequent dates when correspondence and inspections were made. The said case was registered as ESI Case No.1/2004.

6. The appellants herein had contested the case by filing their written statement. It was stated that the application was barred under Section 77 of the

ESI Act and that the respondents had not sought for any exemption from the appropriate Govt. under section 90 of the ESI Act and that no exemption

was granted. Thus, the respondents were well covered under the ESI Act and were liable to pay their due contribution. It was submitted that as the

respondents had not paid their contribution, there was no irregularity or infirmity in demanding such contribution or for recovery of such dues. Hence,

the appellants had prayed for dismissal of their case.

7. In support of their case, the respondents examined the respondent No.2 as PW-1. The following documents were marked as exhibits, viz., (i) letter

dated 04.08.1999 (Ext.1), (ii) the E.S.I. (Ext.2), (iii) letter dated 16.03.2000 regarding information that inspection would be done on 24.03.2000 (Ext.3),

(iv) inspection report (Ext.4), (v) list of contractors and their labourers (Ext.5), (vi) enclosures [Ext.6, and Ext. 6(1) to 6(4)], (vii) Observation slip

relating to the inspection carried out at Digboi establishment of the respondent on 23.06.2000 (Ext.7), (viii) Letter from Employeesâ?? State

Insurance Corporation (Ext.8), (ix) Observation slip relating to inspection carried out at Tinsukia establishment of the respondent on 03.09.2002

(Ext.9), (x) Demand notices [Ext. 10 and Ext. 10(1)], (xi) Notice of demand dated 21.02.2003 (Ext.11). The appellants had examined one Abdul

Hoque as OPW-1 and had exhibited four documents, being (i) ESI letter No.43-1554-42 dated 17.01.1988 (sic. ought to be 17.01.1968) (Ext.A), (ii)

ESI letter dated 12.04.1988 (Ext.B), (iii) ESI letter dated 25.10.1990 (Ext.C), and (iv) Inspection report dated 11.12.2004 (Ext.D).

8. The learned ESI Court, after discussing the evidence on record, held that the appellant No.1 by intentionally avoiding twice to meet the respondents

had instructed the ESI Inspector to realize contribution and, as such, he had violated the provision of section 45A of the ESI Act, which required that

no such order shall be passed by the ESIC unless the Principal or the Immediate Employer or the person in charge of the factory or establishment has

been given a reasonable opportunity of being heard. It was held that the appellant No.1 had deprived the respondents from making any submission and

that the ESI Inspector without making any proper inquiry had imposed the contribution by denying hearing to the respondents. The learned ESI Court

had also held that the factory and establishment of the respondents did not come under the provisions of ESI Act and also held that the demand for

contribution was illegal, void and inoperative in law. Accordingly, the notice of recovery was also held to be illegal and inoperative.

9. The learned counsel for the appellant has pressed all the grounds of appeal. By referring to the list of employees engaged by various contractors,

which is appended to the respondentsâ?? letter dated 22.05.2000 [Ext.6(1)], it is submitted that huge number of labourers were found to be working

in the establishment of the respondents and, as such, the provisions of ESI Act was squarely applicable on the respondents. It is submitted that the

provisions of the ESI Act had been brought into force in the State of Assam and, as such, the factory and establishment of the respondent was

covered under the said ESI Act. By referring to the letter dated 17.01.1968 (Ext.A), the appellants had informed the Indian Oil Corporation Limited

(Marketing Division), Noonmati, Guwahati that ESI was brought into force from 24.02.1952 as well as Notification dated 20.08.1963, bringing into

force the provisions of Chapter IV and V of the said ESI Act with effect from 01.09.1963 and that their establishment was provisionally covered

under the ESI Act with effect from 03.03.1967 and was allotted code No.43-1552-42. Hence, it is submitted that as the respondents were already

covered under the ESI Act, there was no need to issue any notice to show cause or to grant any opportunity of hearing to the respondents as

envisaged under section 45A of the ESI Act. By further referring to the ESI letter dated 12.04.1988 (Ext.B) it is submitted that the Indian Oil

Corporation Limited, Noonmati as well as the Tinsukia Depot of the Indian Oil Corporation Limited (Marketing Division), Tinsukia were informed

about their coverage under the ESI Act. Hence, pursuant to such coverage, by a notice dated 25.10.1990 (Ext.C), a demand for Rs.735/- was raised

for a period from April, 1988 to October, 1988 plus interest aggregating to Rs.792/- and that the Tinsukia office of the respondents had deposited a

sum of Rs.744.75 vide challan dated 03.05.1990, which shows that the respondents, had previously paid their contribution and were squarely covered

by the provision of the ESI Act, for which there was no requirement to issue any more notice or any opportunity of hearing before recovering

contribution from the respondents. Therefore, it is submitted that as all the employees working in the factory and establishment of the respondents

were not found to be getting the benefits of the said beneficial legislation, enacted for the welfare of the employees, the actions taken by the appellant

was fully justified. In support of his argument the learned counsel for the appellant has placed reliance on the following case citations:

a. C.E.S.E. Limited Vs. Subhash Chandra Bose and ors., AIR 1992 SC 573.

b. Royal Talkies, Hyderabad and others Vs. Employeesâ?? State Insurance Corporation, AIR 1978 SC 1478.

c. B.M. Lakshmanamurthy Vs. The Employeesâ?? State Insurance Corporation, AIR 1974 SC 759.

10. Per contra, the learned Senior Counsel for the respondents has submitted that the appellants were not only guilty of suppression of material facts,

but the appellants were also guilty of making false averments before this Court, which is not expected from an statutory authority constituted under

ESI Act. By referring to the various correspondences between the appellants and the respondents, as well as on the Inspection memos (i.e. Ext.1 to

Ext.11), it is submitted that each and every correspondence or inspection were in connection with Indian Oil Corporation (Assam Oil Division).

However, the learned Senior Counsel for the respondents have urged that for the reasons best known to the appellants, they had produced and relied

upon letters dated 17.01.1968 (Ext.A), letter dated 12.04.1988 (Ext.B), and letter 25.10.1998 (Ext.C), which were all addressed to Indian Oil

Corporation Limited (Marketing Division), which according to the learned Senior Counsel for the respondents, is a separate entity and are under

different management hierarchy. It is submitted that the parent company of both units is Indian Oil Corporation, having its Head Office at Mumbai, but

the ESI recognized every factory and establishment even of one party as a separate unit and collected its due contribution separately. In support of the

above, it is submitted that if the Indian Oil Corporation (Marketing Division) was under ESI coverage, there was no requirement for the appellants to

demand separate contribution from Indian Oil Corpn. Ltd. (Assam Oil Division). Therefore, it is submitted that this shows that the appellants had an

intention to mislead this Court, otherwise, the appellants could not have projected that payment of contribution by IOCL (Marketing Division) would

mean that ESI was covered also for IOCL (Assam Oil Division). It is submitted that the appellants wanted the appellants to be covered by ESI

coverage and that with such aim and objective, the Regional Director i.e. the appellant No.1 wanted to meet the respondent No.2 to explain the

benefits of ESI, notwithstanding that the respondents had their own bedded hospital at Digboi as well as a fully equipped dispensary at Tinsukia. It is

submitted that thus, the appellants were misleading this Court with false projections.

11. The learned Senior counsel for the respondents has submitted that the respondent No.1 provides for a better health facility than the ESI hospital

because the respondent has 200 bedded hospital which caters to both the employees of the respondents as well as to all the workers engaged by their

contractors in the factory and establishment of their respondents without any discrimination between their own employees and the labourers engaged

by their contractors. In this connection by referring to the cross-examination of the appellants witness i.e. OPW-1, it is submitted that the Inspector

who had carried out the inspection in the factory and establishment of the respondents had done his duty mechanically with all imperfections and in a

perfunctory manner, which was exposed during the cross-examination of the said witness. It is submitted that the OPW-1 had admitted that the

respondents had a hospital. But he was not aware if the respondents had a dispensary at Tinsukia. He had further deposed in his cross-examination as

follows. I do not need to know that the temporary employees are not given medical benefits. The (Hospital) at Digboi does not cover the second

level employees. Former Inspector Biswasi had, after visiting the I.O.C. (A.O.D) prepared Exbts. 4 and 7, the reports. We have submitted Ext.C

today. By submitting that there are no second level employees in the establishment and factory of the appellants, the learned Senior Counsel

for the appellants has doubted the nature of inspection carried out by the Inspectors of the ESIC. For the clarification to the query of this Court, it is

submitted that the labourers, by the nature of their respective employment can be said to be labourers working under the direct control and supervision

of the respondents and that there are other sets of labourers, who are employed by the various contractors engaged by the respondents.

12. By referring to the list of employees engaged by the respondent No.1 through various contractors [Ext.6(1)], it is submitted that several

contractors had engaged less than 10 employees for various works in various departments of the respondents. It is submitted that it was quite possible

that for many workers, the respondents may not be immediate employer and that is why as per the scheme of Section 45A of the ESI Act it was

envisaged under that before any specific liability is determined, the immediate employer be given an opportunity of being heard. Hence, it is submitted

that the action of the appellants in determining contribution without hearing the appellants as well as their engaged contractors had vitiated the

demands and had also vitiated the liability imposed on the appellants, which was in violation of the provision of 45A of the ESI Act.

13. It is submitted that the appellant No.1 was discharging a sovereign function as provided under the ESI Act. The said authority had intimated the

respondents by his letters dated 04.08.1999 (Ext.1), letter dated 16.08.1999 (Ext.2) and letter dated 16.08.2000 (Ext.8) that he had wanted to discuss

about implementation of the ESI Scheme to the Respondent No.1, i.e. Indian Oil Corpn. Ltd., (Assam Oil Division), Digboi and Tinsukia. It is

submitted that while the said letters were prima facie proof that ESI Act was not applicable on the respondents, there was evidence by the appellants

to prove that there existed any notification by the appropriate Government for implementing the ESI Act on the factory and establishment of the

respondents, as such, there was no infirmity in the judgment impugned in this appeal.

14. In support of his contention, the learned Senior respondents has relied on the following case citations:-

- a. Bharat Heavy Electricals Limited Vs. Employees' Counsel for the State Insurance Corporation, (2008) 3 SCC 247;
- b. Srinivasa Rice Mill Vs. Employees' State Insurance Corporation, (2007) 1 SCC 705.

15. Upon hearing the learned counsels for both sides, and on perusal of the pleadings and evidence on record, the following points of determination

arise for consideration in this appeal:-

- a. Whether the factory and establishment of the respondents, i.e. IOCL (AOD) was having previous coverage under ESI Act as IOCL (Marketing Division)?
- b. Whether the demand was vitiated under Section 45A for non compliance of natural justice by not granting any opportunity to the respondents for being heard?
- c. Whether the impugned judgment is sustainable on facts and in law?

16. Point of Determination No. (a) is taken up first.

a. It is seen from the various exhibits on record that the various correspondences between the appellant and the respondents as well as the Inspection memos (Ext.1 to Ext.11), were in relation to the respondent No.1, i.e. Indian Oil Corporation (Assam Oil Division). However, the appellants have

placed relied upon letters dated 17.01.1968 (Ext.A), 12.04.1988 (Ext.B) and 25.10.1998 (Ext.C), which were all addressed to Indian Oil Corporation

Limited (Marketing Division). The OPW-1 had not stated in his deposition that both the Divisions/ units are one and the same. It is also not the case of

the appellants that previously the IOCL had a unit called (Marketing Division), which has since been renamed as Assam Oil Division so as to attract

the provisions of Sec.1(5) of the ESI Act. Therefore, it must be presumed that IOCL (Marketing Division) and IOCL (Assam Oil Division) are not the

two names of one and the same factory or establishment, otherwise, there was no need for the appellants to issue by his letters dated 04.08.1999

(Ext.1), letter dated 16.08.1999 (Ext.2) and letter dated 16.08.2000 (Ext.8) by which the appellant No.1 had wanted meet the officers of respondent

No.1 to discuss about implementation of the ESI Scheme to the Respondent No.1, i.e. Indian Oil Corpn. Ltd., (Assam Oil Division), Digboi and

Tinsukia.

b. In this connection, it would be relevant to refer to various provisions of the EST Act as narrated below:-

i. Sec.1(4): It shall apply, in the first instance, to all factories (including factories belonging to the Government) other than seasonal factories: Provided

that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the Government whose

employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act;

ii. Sec.1(5): "The appropriate Government" may, in consultation with the corporation and where the appropriate Government is a State

Government, with the approval of the Central Government, after giving one month's notice of its intention of so doing by notification in the Official

Gazette, extend the provisions of this Act or any of them, to any other establishment or class of establishments, industrial, commercial, agricultural or

otherwise: Provided that where the provisions of this Act have been brought into force in any part of a State, the said provisions shall stand extended

to any such establishment or class of establishments within that part if the provisions have already been extended to similar establishment or class of

establishments in another part of that State;

iii. Sec.1(6): A factory or an establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of

persons employed therein at any time falls below the limit specified by or under this Act or the manufacturing process therein ceases to be carried on

with the aid of power;

iv. Sec.2(1): "appropriate Government" means, in respect of establishments under the control of the Central Government or a railway

administration or a major port or oilfield, the Central Government and in all other cases, the State Government;

v. Sec.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;

vi. Sec.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;

vii. Sec.45-A. Determination of contributions in certain cases.

(i) 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 45B or the recovery under sections 45C to 45-I.

c. The appellants did not lead any evidence to prove the existence of any

notification from the appropriate Govt., by which the factory and establishment of the respondents were covered within the ambit of ESI Act. No material has been produced to show that if any particular establishment is held to be covered by ESI Act, like for example Indian Oil Corpn. Ltd., all its Branches, units, depots, hospitals, etc., come within the purview of ESI Act, if that be so, then by implementing ESI Act on the Head Office, all its units, anywhere in the Country would stand covered by ESI Act, however, this is not the position in the present case in hand.

d. In the petition filed before the learned ESI Court, the specific stand of the respondents was that the factory and establishment of the respondents was covered by the provisions of Section 1(4) of the ESI Act and as it had its own 200 bedded hospital with modern facilities at Digboi along with a well equipped dispensary at Tinsukia wherein the respondents catered to the medical needs of its employees including the contractorsâ?? labourers without any discrimination, and this position could not be dislodged. Rather, the OPW-1 had stated in his cross examination that he did not need to know that the temporary employees are not given medical benefits. Thus, it is apparent that the officers under the respondents did not act fairly because the respondents did not make any inspection of the hospital and dispensary to satisfy itself whether or not the employees engaged by the immediate employer were offered any medical facilities by the respondents. Moreover, no dispute was raised by the appellants that the respondents did not have any 200 bedded hospital at Digboi and a dispensary at Tinsukia or that the medical facilities that the respondents were providing were better than one offered by the respondents. Thus, a presumption can be drawn that the employees engaged in the factory and/or establishment of the respondents were getting similar to the benefits provided under the ESI Act as provided under Sec.1(4) of the said ESI Act.

e. Thus, the appellants have not been able to prove that the factory and establishment of the respondents, i.e. IOCL (AOD) was having previous coverage under ESI Act as IOCL (Marketing Division). Rather, by issuing by letters dated 04.08.1999 (Ext.1), letter dated 16.08.1999 (Ext.2) and letter dated 16.08.2000 (Ext.8), the appellant No.1 had wanted meet the officers of respondent No.1 to discuss about implementation of the ESI Scheme to the Respondent No.1, i.e. Indian Oil Corpn. Ltd., (Assam Oil Division),

Digboi and Tinsukia. This evidence of the respondents has not been demolished in course of cross examination of PW-1, which proves that prior to the said letters, the particulars two units of the respondents at Digboi and Tinsukia were not covered by ESI Scheme prior to the demand which raised by the appellants.

f. Accordingly, the point of determination No. (a) is decided against the appellant and in favour of the respondents by holding that the appellants have not been able to prove that the factory and establishment of the respondents, i.e. IOCL (AOD) were having coverage under ESI Act as IOCL (Marketing Division) even prior to the demand made by the appellants.

17. Point of determination No.(b):

a. In the case in hand, the period for demand of ESI contribution is from the month of April, 2001 to December, 2001.

b. From the contents of letter dated 05.05.2000 (Ext.5) issued to the respondent, the Deputy Director (Ins) of the appellants had demanded to send them the list of contractors, mentioning therein the number of labourers, workers under direct control and supervision of the IOC(AOD), Digboi to

determine the feasibility of the coverage aspect of the respondent. The said letter again appears to be a proof of the fact that there was no coverage

of ESI at the establishment of the respondent at Digboi. Similarly, appellant's letter dated 16.08.2000 (Ext.8) also shows that the Regional Director

of the appellant had an intention to hold a discussion with the Personnel Manager of the respondent for implementation of ESI Scheme at the establishment of the respondent.

c. In response to letter dated 05.05.2000 (Ext.5), the respondent by their letter dated 22.05.2000 (Ext.6), had handed over to the appellant, a list of

contractors with number of workers engaged by them. This list does not indicate whether the workers were working independently under the

contractor for various works or the said workers were working under the direct supervision of the respondent.

d. The observation slip relating to the inspection carried out at Digboi establishment of the respondent on 23.06.2000 (Ext.7) as well as observation slip

relating to inspection carried out at Tinsukia establishment of the respondent on 03.09.2002 (Ext.9) also do not indicate whether any employee

engaged by the contractors were working under direct supervision of the

respondent.

e. From the inspection memos and/or Observation Slips marked as Ext.7, Ext.9 and Ext.D, the appellants had not been able to prove that the ESIC

was offering benefits better than the IOCL (AOD) so as to justify coverage of the respondents under ESI Act. Moreover, as per the contents of

Inspection Report (Ext.D), the same is for the period of April, 2006 to March, 2001. Similarly, date of inspection vide Observation Slip of inspection

(Ext.7) was on 23.06.2000. Only the Observation Slip (Ext.9) has the entry that the inspection was carried out at Tinsukia for the period from April,

2001 to December, 2001. Thus, the inspection/ observation slips cannot form a basis for demanding contribution for the period from April, 2001 to

December, 2001 for the establishment of the respondents at Digboi and Tinsukia.

f. Under such circumstances, if a notice as envisaged under Section 45-A of ESI Act is issued, it would definitely enable an immediate employer or

the principal employer to show before the appellant that they are not liable to deposit any contribution on behalf of the employees as the establishment

did not come within the purview of the ESI Act.

g. In the opinion of this Court, the purpose of proceedings under the ESI Act is to determine the amount due from any employer in respect of

employees under the statutory schemes. Therefore, in this backdrop, the paramount legislative intention of the provisions of Section 45-A of the ESI

Act is to ensure compliance with the principles of natural justice. In the opinion of this Court, the proviso appended to Section 45-A of ESI Act

mandates the appellant to provide a reasonable opportunity of hearing to the respondent.

h. Moreover, as held earlier, the appellants were issuing letters to the respondents wanting to discuss implementation of the ESI Act on the

respondents. Therefore, if the ESI Act is to be implemented on the respondents, it was incumbent on the appellants to first decide the jurisdictional

facts. In this regard, this Court finds support from the case of Srinivasa Rice Mills (supra).

i. In the opinion of this Court, if the appellant complies with the provision of hearing the concerned party, then the principal employer would be entitled

to inform the concerned contractors about the scheme as well as of the contribution due and be able to recover the contributions from the contractors

concerned. The provisions of Section 45-A appears to empower the appellant to recover contribution dues from the principal employer and also from

the immediate employer, however, as mentioned herein before, the proviso to Section 45-A envisages providing for an opportunity of hearing to both

the principal as well as immediate employer.

j. In this connection, the learned Senior Counsel had placed reliance on the case of Bharat Heavy Electricals Ltd. (supra). The relevant extract of the

said judgment is quoted below: **Conclusion:**

17. 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 will bear repetition to state that the principal

employers have a statutory right to recover the dues from the contractors/ immediate employers.

18. It appears that the determining authority did not give an opportunity of hearing to the petitioner in regard to the names and other particulars of the

contractors. The impugned judgment, therefore, cannot be sustained. It is set aside accordingly. The appeal is allowed and the matter is remitted to the

ESI Corporation/determination authority for considering the matter afresh. The authority shall either implead the contractors as parties and/or summon

them for producing necessary records for the said purpose. In the facts and circumstances of the case, there shall be no order as to costs.â??

k. In view of the discussions above, this Court is of the considered opinion that the impugned demand vide notice No. 48.1554 dated 29.01.2004 for the

period from April, 2001 to December, 2001 was vitiated by non- compliance of the principles of natural justice by not granting any opportunity to the

respondents for being heard as per the mandate of the proviso to Section 45A of the ESI Act.

19. Discussions on the cases cited by the learned counsel for the appellant: The learned counsel for the appellant has placed reliance on the case of (i)

Royal Talkies (supra), (ii) B.M. Lakshmanamurthy (supra) and (iii) C.E.S.C Limited (supra). All these cases are on the point of coverage of

establishment under ESI Act. However, in the opinion of this Court, there is no dispute with regard to the ratio laid down in these three cases. The

issue in the present case is distinguishable on facts because in the present case,

the various letters by the officials of ESI, referred herein before are indicative of the fact that there was no coverage of ESI in the establishment and/or factory of the respondent at Digboi and Tinsukia. Therefore, the officials of the appellant had in writing expressed their keenness to meet the management to as to implement the ESI Scheme in the establishment/factory of the respondent, however, for the reasons best known to them, they kept postponing their visits and without prior information to the respondents, implemented the ESI Act on the respondents without affording any opportunity of hearing them. It has been held herein before that the establishment of IOC (AOD) is different from IOC (Marketing Division). Moreover, it was the projected case of the respondents that their factory and/or establishment was covered within the provisions of Section 1(4) of the ESI Act because it had its own 200 bedded hospital with modern facilities at Digboi along with a well equipped dispensary at Tinsukia wherein the respondents were catering to the medical needs of its employees including the contractorsâ?? labourers without any discrimination. Thus, in this case, it was required of the appellant to comply with the statutory requirement of Proviso to Section 45-A of ESI Act before implementing ESI Act on the respondents. Thus, the ratio of the three cases cited by the learned counsel for the appellant is found to have no application under the distinguishable facts of this case.

20. Point of determination No. (c): In view of the discussions above on point of determination No.(a) and (b), this court does not find any infirmity with the judgment and order impugned in this appeal. This Court is unable to find any infirmity in the finding by the learned ESI court to the effect that the appellants had deprived the respondent from making any submissions before implementing the said ESI Act on the respondents. Further, there is no infirmity in the finding by the learned ESI Court that the that right of hearing was denied to the respondents. No infirmity is also found in respect of the finding that in this case, the recourse to the revenue recovery was not possible and available to the appellant. Further, no infirmity is found in respect of the finding that the factory and establishment of the respondents did not come under the provisions of ESI Act. Moreover, no infirmity is found in respect of the finding that the demand for ESI contribution for the period from April, 2001 to December, 2001 was illegal void and inoperative in law

and that the action of the appellant is found to have been rightly set aside. Similarly, no infirmity is found in respect of the finding that the respondents were not liable for payment of any ESI contribution for the said period to the appellant.

21. Accordingly, the present appeal fails. The impugned judgment and order dated 31.12.2005, passed by the learned Employeesâ?? State Insurance Court, Dibrugarh in ESI Case No.1/2004 is hereby upheld.

22. The parties are left to bear their own cost of this appeal.

22. Let the LCR be returned back.