IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO. 36012 OF 2024

Foundever CRM India Pvt. Ltd. & Anr. …Petitioners

Versus

Employee State Insurance Corporation & Ors. …Respondents

Mr. Ashish Kamat, Senior Counsel a/w Mr. Rashmin Khandekar, Ms. Shalaka Patil, Ms. Paulomi Mehta, Ms. Shilpa Sengar and Mr. Harsh Khanchandani i/b. Trilegal for the Petitioners.

Mr. Shailesh Pathak with Mr. T.R. Yadav for Respondent ESIC.

CORAM : R.I. CHAGLA J.

Reserved on : 8 May 2025

Pronounced on : 19 September 2025

JUDGMENT :

1. By this Writ Petition, the Petitioners have sought quashing and setting aside of the Demand Notices, Recovery Notices, Prohibitory Orders, Bank Show Cause Notice, Inspection Report and the Further Demand Notices issued by the Respondents ("**the impugned orders**").

2. The 1st Petitioner is a private limited company engaged in the business of providing business process outsourcing services across different industry sectors. The 1st Petitioner has approximately 2000 employees and the Employees State Insurance Act, 1948 ("**ESI Act**") is applicable to it. The 1st Petitioner claims to be compliant of its statutory obligations under the ESI Act and is also responsive to queries and questions from statutory authorities such as the Respondents, which includes the ESI Corporation and its officers.

3. The 1st Petitioner states that towards compliance of its obligations under the ESI Act, for the period from April 2019 to March 2024, the 1st Petitioner had made payment of INR 13,35,45,916 towards dues of contribution under the ESI Act. The Petitioner states that the Respondents' over-broad and unlawful actions arose after the payment of the aforementioned amount when the Respondents initiated visits to the 1st Petitioner's offices from May 3, 2024 to July 1, 2024 for inspection of records and documents maintained by the 1st Petitioner under the ESI Act. During each of these inspection visits, the Petitioners claimed to have been extremely co-operative and provided all the documents which were requested by the ESIC department and available with the 1st Petitioner

Company. On May 13, 2024, even the Petitioner visited the Respondent's office to provide the authorities with any documents / information sought.

4. The Respondent No. 4 - the Social Security Officer had arrived at the findings which were shared with the Petitioners on 15th July 2024 by way of the Inspection Report, which had not offered the Petitioners an opportunity to justify or provide the rationale as to why the said payments could not be considered for the purpose of remitting contributions under the ESI Act nor was any notice or hearing granted. The 1st Petitioner states that during this time when its personnel were in discussions with the Respondents, the Respondents had assured the 1st Petitioner that the details and documents in respect of the Inspection Report workings would be provided and that no coercive steps would be taken.

5. The 1st Petitioner states that without any notice, without granting any hearing opportunity or passing any order whatsoever, to their complete surprise and shock, the Respondents issued demand notices in October 2024 for a cumulative amount of INR 5,20,43,692.

6. The 1st Petitioner states that upon receiving the demand notices, on October 29, 2024, the Petitioner once again visited the Respondents and sought an opportunity for a hearing and a reply submission and were assured by the Respondents and in particular the 4th Respondent that a hearing would be given. During the Petitioners' visit on November 18, 2024 at the offices of the Respondents, the Petitioners sought time for a written reply. Time was given by the Respondents until in or around November 25, 2024 for a reply and then a hearing was also promised.

7. The Petitioners state that they submitted a short, interim letter dated November 21, 2024 on November 22, 2024 ("*Interim Response*") around 11-11:30 a.m. at the offices of the 1st and 2nd Respondents, well in advance of the November 25, 2024 timeline.

8. The Petitioners state that without any application of mind and in a pre-decided manner and without affording any opportunity to be heard, the 3rd Respondent issued the Recovery Notices (on the same date of November 22, 2024) clearly without : (a) even considering the Interim Response; (b) providing no opportunity to put in a detailed response; and (c) providing no

opportunity of an oral hearing to put forward the Petitioners' case on merits. The Recovery Notices were dated 22nd November 2024 and the Petitioners state that they received the same only on 25th November 2024 by courier at approximately 2 p.m..

9. The Petitioners submit that in view of the arbitrary and extremely coercive and prejudicial use of state power, Prohibitory Orders were issued by the 3rd Respondent on 28th November 2024 to HDFC Bank, i.e. the 1st Petitioner's bank. By way of the Demand Notices read with the Prohibitory Orders, on 28th November 2024, (a) the bank accounts of the Petitioners were issued freezing orders and (b) the banks were asked to submit demand drafts / pay orders to the Respondents from the accounts of the Petitioners in order to clear the amounts under the Demand Notices. The Petitioners state that these Prohibitory Orders were not even served upon the Petitioners, and it is the Banks that informed the Petitioners regarding the same.

10. The Petitioners submit that in a further act of highhandedness, the 3rd Respondent issued a Bank Show Cause Notice dated 28th November 2024 to HDFC Bank. A hearing was

scheduled the very next day at 11 am on 29th November 2024. It was claimed in the said Bank Show Cause Notice that HDFC Bank was reluctant to disclose the balances of the Petitioners and therefore, coercive steps were required to be taken against the bank manager declaring them as a deemed defaulter for the aggregate credit balances in the bank accounts of the Petitioners or the amounts mentioned in the said Prohibitory Orders.

11. The Petitioners state that they addressed emails on 28th November 2024 to HDFC, Bank of America, ICICI and Indian Bank to not take precipitative action on the Petitioners' bank accounts. Further, the Petitioners informed the Banks that the Petitioners intend to move this Court to seek protective orders against the Respondents.

12. The Petitioners submit that after issuance of the impugned notices, the Respondents continued their actions in violation of the ESI Act and principles of natural justice. Without granting any hearing or passing any order, the Respondents took coercive steps and visited the 1st Petitioner's banks, particularly Bank of America and HDFC Bank on the evening of 28th November 2024,

seeking immediate demand drafts / pay orders to be issued from the bank accounts of the Petitioners towards alleged recoveries of the amounts demanded under the Demand Notices on November 28, 2024. This was again done without the presence of the Petitioners or even notice to the Petitioners in gross violation of natural justice. On 28th November 2024 evening an amount of INR 5,20,43,692 was taken by the 4th Respondent by way of Demand Draft and debited from the Petitioners' account on 28th November 2024.

13. The Petitioners state that they became aware only at around 7:15 p.m. on 28th November 2024 that they had been presented with a fait accompli. Upon the Petitioners checking their account status on the Bank of America web portal, the Petitioners saw that an amount of INR 5,20,43,692 had been debited from the bank account of the Petitioners at 4:56 p.m..

14. The Petitioners state that as soon as the 1st Petitioner became aware of the debit from the Bank of America account, the 1st Petitioner carried out a further check on the web portal of each of the other banks being, ICICI Bank, Indian Bank and HDFC Bank for the online status of its accounts. It is upon checking

that the Petitioner No. 1 realized that its account in HDFC Bank was also reflecting a negative hold with a lien being marked on it for the recovery of the total amount of INR 5,20,43,692. The Petitioners state that the consequence of negative hold would be that even after the entire amount was debited by a demand draft from Bank of America, if the 1st Petitioner were to deposit any amount in HDFC Bank, those additional amounts would also be debited and applied towards the Prohibitory Orders based on the orders of the Respondents.

15. The Petitioners state that in an attempt to halt the Respondents' coercive actions, the 1st Petitioner wrote emails dated 28th November 2024 to ICICI, Indian Bank and HDFC informing them that the amount of INR 5,20,43,692 had been debited from the Bank of America and that the banks should not take any precipitative action since the Petitioners would be urgently moving this Court for urgent protective orders.

16. The Petitioners submit that what shows further pre-determination on the part of the Respondents is that while the Recovery Notices were being acted upon by the Respondents, further

Demand Notices dated 19th November 2024 were issued again without a hearing opportunity to the 1st Petitioner and received only on 28th November 2024. These Further Demand Notices dated 19th November 2024 were not even provided to the Petitioners when the Recovery Notices were issued or indeed all the subsequent coercive actions outlined above occurred.

17. The Petitioners submit that the actions of the Respondents had put a complete halt on the day-to-day operations of the Petitioners. In light of the excessive actions of the Respondents, the Petitioners were compelled to file the present Writ Petition in the early hours of 29th November 2024 to seek urgent protective orders.

18. By an Order dated 29th November 2024, this Court after being apprised of the facts directed the Respondents to not take coercive steps and/or encash the demand draft until the next date of listing. Subsequently, the matter was listed on 2nd December 2024, for the Respondents to update this Court on the status of the deposit and encashment of the Demand Draft dated 29th November 2024. However, the learned Counsel representing the Respondents informed this Court that he was still awaiting

instructions.

19. Despite the earlier Order dated 29th November 2024, directing no encashment, the Respondents informed this Court on 4th December 2024, that the demand draft dated 28th November 2024, had already been deposited on 29th November 2024, and encashed on 30th November 2024.

20. Accordingly, this Court by its Order dated 4th December 2024 directed the Respondents to deposit the amount of INR 5,20,43,692 into the Court on or before 13th December 2024. Pursuant to the said orders, the amount of INR 5,20,43,692 was deposited into Court.

21. Mr. Ashish Kamat, the learned Senior Counsel for the Petitioners has submitted that the present case is governed by the provisions of Section 45A of the ESI Act. He has submitted that this provision contemplates that a hearing must be given before any order has been passed thereunder. He has submitted that in the present matter, no such hearing has been afforded. It is trite that in such circumstances, the order is *ex facie* in violation of the statutory

mandate and is therefore, unsustainable.

22. Mr. Kamat has in support of the above contention relied upon **Affine Analytics Pvt. Ltd. Vs. Deputy Director, ESIC & Anr.**[1] **("Affine")**. He has submitted that in **Affine**, it was held that the Corporation is statutorily bound to issue notice, grant a hearing and pass a reasoned order. He has submitted that the proviso to Section 45A of the ESI Act explicitly states that no order shall be passed without affording the principal employer or person in charge of the establishment a reasonable opportunity of being heard.

23. Mr. Kamat has submitted that in **Affine**, the learned Single Judge of the Karnataka High Court was deciding the question whether adequate hearing opportunity was granted to the employer under Section 45A of the ESI Act. In that case, the Corporation had passed an order under Section 45A and thereafter, served a notice of demand to the Petitioner's old registered office, which was then hand delivered to the Petitioner's current address. Only on becoming aware of the demand notice served at the current address, the Petitioner appeared before the Corporation seeking

1 **Writ Petition No. 28396 / 2023 (L-ESI) paragraphs 10, 14 and 18**

opportunity to be heard, which was refused by the Corporation. In the meantime, an amount of INR 2,00,18,100 was recovered from the HDFC Bank where the Petitioner held an account. Thereafter, the Petitioner filed a Writ Petition against the action of the Corporation complaining that the Corporation served notices on the Petitioner's old address which premises were vacated in 2018, because of which the Petitioners were denied any opportunity of hearing under Section 45A in violation of the principles of natural justice. The Counsel appearing for the Corporation made two contentions: (i) that the Petitioner did not notify the change of address and having failed to do so the Petitioner cannot contend that a hearing opportunity was not granted; and (ii) as an order under Section 45A of the ESI Act is passed, the Petitioner has a remedy under Section 45AA or Section 75 of the ESI Act and hence, the Writ Petition is not maintainable.

24. Mr. Kamat has submitted that the Karnataka High Court, on a reading of Section 45A of the ESI Act, was not convinced with the Corporation's arguments. He has placed reliance upon paragraphs 10, 14 and 18 of **Affine** in this context. The Karnataka High Court has held that it could be seen that Section 45A of the ESI Act is in the nature of a best judgment on the basis of the information

collected by the inspector and if a determination is to be given, the person concerned against whom any adverse order is to be made, he or she must be heard.

25. Mr. Kamat has submitted that in a judgment of this Court in **SBI General Insurance Company Ltd. Vs. Employees' State Insurance Corporation & Anr.**[2] **("SBI General")**, this Court allowed the Writ Petition as it concluded that the grounds for maintainability described in the decision of **Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & Ors**.[3] were made out. He has submitted that in the *SBI General* case, the Corporation had passed an order under Section 45A of the ESI Act and the same was served on the Petitioner. However, the order under Section 45A of the ESI Act was made on the basis of two interim reports made by the Social Security Officer; but these interim reports were not served and the Petitioner got knowledge of them only when the order under Section 45A of the ESI Act was served. It was submitted therein that this is a clear violation of natural justice. The Corporation contended that the Petitioner has an alternative remedy under Section 45AA or Section

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2 Writ Petition No. 3796 of 2024 paragraphs 7 and 14

3 (1998) 8 SCC 1

75 of the ESI Act and the Writ Petition ought to be dismissed. This Court found merit in the Petitioner's argument. He has placed reliance upon paragraph 7 and 14 of the SBI General case.

26. Mr. Kamat has submitted that this Court in **SBI General** (supra) held that the principles of natural justice have been clearly violated. In the fact of that case the impugned order had been passed *inter alia* by taking into consideration the interim reports, copies of which had not been supplied to the Petitioner and Petitioner's say had not been called.

27. Mr. Kamat has submitted that the Respondents' own Revenue manual specifically contemplates the requirement of granting a hearing prior to the passing of any order under Section 45A of the ESI Act. The failure to provide such a hearing, as evidenced in the present case, therefore, not only contravenes the statute, but also breaches the Respondents' own procedural framework.

28. Mr. Kamat has submitted that it is equally well settled that a Writ Petition is maintainable in cases where (i) a

fundamental right is violated; (ii) the principles of natural justice are disregarded; or (iii) the impugned order is passed wholly without jurisdiction. He has submitted that in the present case, in view of the facts outlined above and the nature of the impugned order, there can be no doubt that there has been a clear and egregious violation of the principles of natural justice. In this context, he has placed reliance upon the judgment of the Supreme Court in **Whirlpool Corporation** (supra) – paragraphs 14 and 15, where the Supreme Court has held that the existence of an alternative remedy does not preclude this Court from exercising writ jurisdiction in cases where (i) a fundamental right is violated; (ii) principles of natural justice are disregarded; or (iii) an order is wholly without jurisdiction.

29. Mr. Kamat has submitted that in the present case, the Petitioner has established that the Corporation acted in flagrant disregard of natural justice by issuing a demand notice and proceeding with coercive recovery without first passing an order. In doing so the Corporation has acted without jurisdiction. He has submitted that this brings the case squarely within the two exceptions of the **Whirlpool** case, making the Writ Petition maintainable.

30. Mr. Kamat has submitted that it has been contended by the Respondents that the Petitioner has an alternate remedy by way of an Appeal, and therefore, the Writ Petition ought not to be entertained. He has submitted that this assertion by the Corporation is fundamentally misconceived. It is well settled that a hearing at the appellate stage cannot cure a violation of the principles of natural justice that ought to have been observed at the primary stage. Moreover, the absence of reasons in the impugned order further compounds the breach, rendering the order unsustainable in law.

31. Mr. Kamat has in this context, placed reliance upon the judgment of the Supreme Court in **Institute of Chartered Accountants of India Vs. L.K. Ratna and Ors.**[4] (**LK Ratna**"), where the Supreme Court was dealing with the question of whether violation of natural justice can be cured at the appellate stage. In the said decision, the Institute of Chartered Accountants of India ("**ICAI**") had initiated disciplinary proceedings against LK Ratna, the partner of accounting firm AF Ferguson & Co. for distributing brochures of its consulting practice to clients. The ICAI comprised a disciplinary

4 **(1986) 4 SCC 537 paragraphs 18**

committee above which was a council. Two council members were *ex-officio* members of the disciplinary committee. The disciplinary committee after granting a hearing to Ratna submitted its Report to the council wherein it was found that Ratna was guilty of misconduct. Thereafter, the council at its meeting considered the Report of the disciplinary committee, and without calling Ratna for a hearing found him guilty of his conduct. Ratna filed a Writ Petition challenging the aforementioned decisions. Both the Single Judge and Division Bench ruled in favour of Ratna. The ICAI then approached the Supreme Court with one of the contentions being that in the absence of hearing before the council, the Appeal provision under Section 22-A of the Chartered Accountants Act, 1949 is a complete safeguard against any insufficiency in the original proceedings. The Supreme Court dismissed the Appeals by finding no merit in this argument. He has placed reliance upon paragraph 18 of LK Ratna in this context.

32. Mr. Kamat has submitted that in the case of **Oryx Fisheries Pvt. Ltd. Vs. Union of India and Ors.**[5] (“**Oryx Case**”), the Supreme Court was faced with the question of following natural

5 **(2010) 13 SCC 427 paragraphs 27, 41 and 43**

justice when a quasi-judicial body issues a show cause notice and whether an Appellate Authority can at all rectify the violation of natural justice by the lower Authority. In the Oryx Case, Oryx had exported several MT of shrimp from Mumbai to a company called Cascade in Sharjah. Although the customs health department found the consignment to be fit for human consumption, Cascade took possession after 10 days and alleged that the shrimp was of very poor quality. In the circumstances, Cascade issued a notice to Oryx asking it to pay USD 83,104. Cascade also wrote to the Chairman, Marine Products Export Development Authority ("**MPEDA**") about Oryx's poor quality consignment. MPEDA in turn issued a show cause notice to Oryx for cancellation of Oryx's registration. Oryx responded to the show cause notice and refuted the allegations therein. However, without giving Oryx an opportunity for hearing on the show cause notice, MPEDA passed an order cancelling Oryx's registration. The Appellate Authority also upheld the cancellation order. When Oryx filed a Writ Petition before this Court, this Court found no error in the orders and dismissed the Writ Petition.

33. Mr. Kamat has referred to the SLP filed by Oryx in the Supreme Court against this Court's order. The Supreme Court

found that MPEDA and the Appellate Authority had acted in violation of principles of natural justice. He has placed reliance upon the findings in paragraphs 27, 41 and 43 of Oryx case. He has submitted that the Supreme Court held that once a quasi-judicial authority issues a show cause notice, a fair hearing opportunity ought to be granted, and an order passed thereon cannot be the outcome of a made up mind. The lower authority has disregarded natural justice, and hence, coercive action cannot be taken at the appellate stage.

34. Mr. Kamat has submitted that even in cases where a statute does not expressly provide for a hearing, the principles of natural justice must nonetheless be read into the statutory scheme particularly where the consequences involved the imposition of a significant civil liability. He has submitted that in the present case, the ESI Act itself contemplates a hearing, yet without affording the Petitioner a fair opportunity to present its case, the coercive recovery undertaken by the Corporation is arbitrary, illegal, and unsustainable in law.

35. Mr. Kamat has relied upon the judgment of the

Patna High Court in **Union of India Vs. Electronic Net**[6] ("**Electronic Net case**"). In the Electronic Net case, the issue was whether a Section 45A order is mandatory even if the Social Security Officer had conducted an inspection and proceeded based on the admitted record of the Assessee. The Court held that even if the argument of the learned Counsel is accepted, that contributions were remitted as per returns and on inspection of the premises of the assessee, the records revealed short fall of contributions paid; then necessarily the particulars in the returns filed relating to the persons employed by the employer is not in accordance with Section 44, in which event Section 45 A would be applicable. The Court further observed that it is clearly indicated in the ESIC's Revenue Manual Section L. 12.5, that whether the notice is on an ad-hoc or actual basis, there should be a well reasoned speaking order under Section 45A of the ESI Act preceded by the mandatory requirement of affording the employer a reasonable opportunity of being heard.

36. Mr. Kamat has distinguished the judgments relied upon by the Respondents including the three additional judgments, forming part of the written arguments of the Respondents filed

6 **LPA No. 1611/2017 Pat HC (2024) paragraphs 10 and 15**

before this Court on 5th May 2025, though neither cited nor relied upon during course of oral submissions. He has submitted that these judgment are passed in the facts that arose for determination therein. The present case is clearly distinguishable on facts and law and the reliance on these judgments are wholly misplaced and inapplicable to the present case.

37. Mr. Shailesh Pathak, the learned Counsel for the Respondents has submitted that the issue before this Court is When the claim for recovery of contribution, finalized / crystalised by ESI Corp., from the employer, whether the employer can seek direction of hearing as contemplated under Section 45A of the ESI Act? OR When the claim for recovery of contribution is finalized / crystalised by ESI Corp. from the employer, whether the proceedings are required to be challenged before the Employees' Insurance Court under Section 75(2)(a) of the ESI Act?.

38. Mr. Pathak has submitted that the ESI Act is basically a social welfare legislation and deals in respect of medical assistance required to be given to the employees who are drawing less than Rs.21,000/- salary. The medical benefits are not only

limited to the employee, but also to his family and parents.

39. Mr. Pathak has submitted that in the present matter, it is an admitted fact that the inspection was carried on at the Petitioners' establishment with prior intimation on several dates. The visit notes were handed over to the Petitioners' authority on each date of which inspection was carried on and not disputed and/or challenged. From 3rd May 2024 when inspection was carried till 21st November 2024 when the claim for recovery of contribution was made, the Petitioners not even bothered to write a single letter disputing the claim.

40. Mr. Pathak has submitted that from the disputed question of fact and law, it is required to interpret Section 45A and Section 75(2)(a) of the ESI Act as to which Section has to be invoked in such a given situation. He has placed reliance upon Section 45A of the ESI Act. He has submitted that the powers under Section 45A of the ESI Act can be invoked only in 2 circumstances viz.

> *(a) 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

(b) 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 :- *(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).*

41. Mr. Pathak has submitted that from a reading of the Section 45A of the ESI Act, it is crystal clear that the Section 45A contemplates reasonable opportunity of being heard arises only when the above two circumstances are being faced with by the parties to the dispute i.e. no production of records and another non co-operation with the ESI Authorities. He has submitted that admittedly

these two circumstances are not present in this Petition. Rather the ESI Corporation has claimed the recovery of contribution by finalizing / assessing the short payment. He has submitted that this Court will appreciate that while interpreting the statute no other further meaning can be given by adding or modifying words in the said Section when the language of the Section is plain and simple, being part of a legislative statute.

42. Mr. Pathak has submitted that in statutory interpretation, Courts cannot introduce a meaning beyond what the statute explicitly states. The goal is to determine the legislature's intention, as expressed in the language, and avoid adding or modifying words to change the statute's original meaning. The rule *"expressio unis est exclusion alterius"* means that, the express mention of one thing is to the exclusion of other. Where things are specifically included in the list and others have been excluded it means that all others have been excluded. The general meaning of *"expression of one thing is the exclusion of another"* is also known as the negative implication rule. This rule assumes that the legislature intentionally specified one set of criteria as opposed to the other. Therefore, if the issue to be decided addresses an item not

specifically named in the statute, it must be assumed that the statute does not apply to that item.

43. Mr. Pathak has placed reliance upon the Full Bench decision of this Court (Nagpur Bench) in **Pankaj Bhallaji Atram Vs. State of Maharashtra and Others**[7]. He has submitted that from the above decision, once the claim for recovery is made, hearing under Section 45A of the ESI Act is not contemplated and it is the Employees' Insurance Court which has jurisdiction to hear the dispute under Section 75(2)(a) of the ESI Act. He has submitted that the Petitioner is not helpless and has a remedy under Section 75(2)(a) of the ESI Act.

44. Mr. Pathak has relied upon the judgment of the Supreme Court in **Qazi Noorul, H.H.H. Petrol Pump & Anr Vs. Department Director, ESIC**[8]. This is in the context of the Literal Rule of Interpretation, which means that the Court should go simply by the wording of the Statute and nothing else and there is no scope for applying any other Rule of Interpretation.

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7 **2017 (2) Mh LJ 707 (NAGPUR BENCH) (F.B.) paragraphs 17 and 18**

8 **(2009) 15 SCC 30 para 9 & 10**

45. Mr. Pathak has referred to Section 75(2)(a) of the ESI Act. He has submitted that after issuance of notices of recovery of contribution by the Respondent Corporation, in the present case on 22nd November 2024, the disputes which arise, shall be referred to and decided by the Employees' Insurance Court under Section 75(2)(a) of the ESI Act, which provides for settling claim for the recovery of contribution from the principal employer.

46. Mr. Pathak has submitted that in view of Section 75(2)(a) of the ESI Act, read with Section 75(2) of the ESI Act, the legislature in its wisdom has incorporated matters to be decided by the Employees' Insurance Court. He has referred to Sectuion 75 and in particular, : (1) If any question or dispute arises as to (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.

47. Mr. Pathak has submitted that in the above petition it is an admitted fact that the Petitioners are challenging the claim of recovery of contribution and therefore, the powers to decide the said dispute in respect of recovery of contribution are entrusted /

given to the Employees' Insurance Court under Section 75(2)(a) of the ESI Act and not under Section 45A of the ESI Act. This is in view of there being a specific provision to deal with the claim of recovery of contribution. The jurisdiction to decide the said dispute has to be referred under the said Section i.e 75(2)(a) of the ESI Act and not under Section 45A of the ESI Act.

48. Mr. Pathak has submitted that if such powers or jurisdiction to decide the dispute is handed over to the Authority under Section 45A of the ESI Act, which is no where near a *"Court"* constituted under Act, it will make the provision of Section 75(2)(a) of the ESI Act redundant and infructuous, which is not the legislative purpose. He has placed reliance upon the judgment of the Supreme Court in **E.S.I.C Vs C.C. Santhakumar**[9], where the Supreme Court has held that where the records are produced, the assessment has to be made under Section 75(2)(a) of the ESI Act.

49. Mr. Pathak has submitted that in the present case the records are produced and there is co-operation with the Authorities, who have assessed and crystalised the contribution and

9 **2007(1) SCC 584 at para 16**

when the disputes arise regarding the claim of recovery of contribution it is only under Section 75(2)(a) of the ESI Act, that the dsipute can be agitated.

50. Mr. Pathak has submitted that the manual referred to by the Petitioners being the ESIC Revenue Recovery Manual are administrative guidelines which cannot override the provisions of law. He has submitted that the said guidelines also contemplate that during the course of hearing of C-18 (actual) and before the recovery of contribution is made by the Respondent Corporation, if there is any representation pending, then only hearing be granted. He has submitted that in the present case, it is an admitted fact that from the date of inspection i.e visit note starting from 3rd May 2024 till 22nd October 2024, there is not a single letter of representation raising any objection. He has submitted that the claim for recovery of contribution has been already crystalised by ESI Corp. In view of the same the Petitioners cannot take shelter of the said manual. He has submitted that it has been held in several matters that if there is any conflict between an executive instruction and rules framed under law, the rules shall prevail over the other. He has in this context placed reliance upon the judgment of the Supreme

Court in **Kerala Financial Corpn. Vs. Comissioner of Income Tax**[10].

51. Mr. Pathak has submitted that even otherwise there is a serious dispute about which provision of Act is to be invoked and who has the jurisdiction to decide the dispute. Accordingly, the Manual and the Circulars cannot be a determining factor. It is only upon interpretation of Statute / Section the legislative intention has to be arrived at. The Manual cannot be a determining factor as the same are only for administrative purpose to carry out day to day activities.

52. Mr. Pathak has dealt with the case law relied upon by the Petitioner. He has submitted that in **SBI General Insurance Company Ltd.** (supra), the enquiry was conducted under Section 45A of the ESI Act, in which amount was required to be determined whereas in the present Petition the amount has already been ascertained / assessed and there is no determination. Hence, this judgment is not applicable.

53. Mr. Pathak has also referred to the judgment

10 **1994 (4) SCC 375 paragraph 14**

relied upon by the Petitioner reported in the *Electronic Net case* (supra). He has submitted that in this judgment, there is no discussion of Section 75(2)(a) of the ESI Act which gives power to Employees' Insurance Court to decide the matters in respect of recovery of contribution and hence, this judgment cannot be of relevance as the Respondents have submitted that the Authority under Section 45A of the ESI Act will have no jurisdiction in respect where there is a claim for recovery of contribution and it would only be Employees' Insurance Court.

54. Mr. Pathak has submitted that as regards the other case laws relied upon by the Petitioner, the same are based on principles of natural justice. He has submitted that since the subject matter and jurisdiction of hearing falls under Section 75(2)(a) of the ESI Act before the Employees' Insurance Court, there is no question of referring and giving hearing under Section 45A of the ESI Act. Hence, these judgments are of no relevance.

55. Mr. Pathak has relied upon the judgments of the Supreme Court and this Court in support of his submission that when an alternate remedy is available, the party cannot file a Writ Petition.

These are as under :-

(1) **The State of Maharashtra & Ors. Vs. Greatship (India) Ltd**. reported in **Civil Appeal No. 4956 of 2022 (S.C.)** at paras 6, 7, 8, 9 and 10.

(2) **M/s. ATC (Clearing & Shipping) Pvt. Ltd. Vs. Employees' State Insurance Corporation** reported in **Writ Petition No.1570 of 2004 (Bom.H.C.)**.

(3) **Smt. Tarabai Ganpati Aadayprabhu Vs. Employees State Insurance Corpn. & Anr**. reported in **Writ Petition No.9580 of 2013 (Bom.H.C.)**

(4) **United Labour Union Vs. Air India Ltd. & Others** reported in **2016 III CLR 682 (Bom.H.C.)** at paras 6, 7 and 8.

(5) **Property Guards Security Services Pvt. Ltd. Vs. State of Maharashtra & Anr**. reported in **Writ Petition No.3176 of 2021 (Bom.H.C.)**

(6) **Property Guards Security Services Pvt. Ltd. Vs. Union**

of India & Others reported in **Writ Petition No.8794 of 2021 (Bom.H.C.)**

(7) **E.S.I.C Vs. C.C. Santhakumar** reported in **2007 (1) SCC 584** at Para 16

(8) **The Deputy Director, ESI Corp Vs. The Management of SRTC Tech Solutions Private Limited** reported in **W.A. No.2171 of 2023 Madras HC** at paras 10, 11, 12, 13 and 14.

56. Mr. Pathak has submitted that having interpreted Section 45-A and Section 75(2)(a) of the ESI Act, the Petitioners who are challenging the claim of recovery of contribution made by the ESI Corporation cannot seek remedy to hear the matter under Section 45A of the ESI Act, as the same does not incorporate the issues involved in the Petition. The subject matter of claim of recovery of contribution can be dealt only by the Employees' Insurance Court, which stands on a much higher pedestal. He has submitted that the claim for recovery of contribution cannot be heard by the authorities under Section 45-A of the ESI Act which is only restricted to give a hearing in the aforesaid two instances.

57. Mr. Pathak has submitted that if the submissions made by the Petitioner are appreciated and accepted by this Court, namely to grant hearing in respect of claim for recovery of contribution, then this Court will enlarge this limited scope of Section 45-A of the ESI Act by giving unlimited powers to the Authorities under Section 45-A of the ESI Act which is not the purpose of the said Section and thereby making Section 75(2)(a) of the ESI Act redundant.

58. Mr. Pathak has submitted that the reason for the Petitioners not raising the disputes before the Employees' Insurance Court is that the Petitioner wants to avoid the pre-deposit which Section 75(2)(a) contemplates, i.e. prior to the consideration of the Appeal. He has submitted that therefore insisting for the disputes to be heard under Section 45A of the ESI Act is an attempt to misinterpret the Section. He has submitted that when an alternate remedy is available, this Court may not entertain the said Petition.

59. Mr. Pathak has submitted that Courts cannot introduce a meaning beyond what the statute explicitly states. The goal is to determine the legislature's intention, as expressed in the

law's language, and avoid adding or modifying words to change the statute's original meaning. He has submitted that the general meaning "*the expression of one thing is the exclusion of another*" is also known as the negative implication rule. This rule assumes that the legislature intentionally specified one set of criteria as opposed to the other. Therefore, if the issue to be decided addresses an item not specifically named in the statute, it must be assumed that the statute does not apply to that item.

60. Mr. Pathak has submitted that there is no substance and merit in the above Petition and hence, this Court be pleased to dismiss the Petition with costs.

61. I have considered the submissions. The interpretation of Section 45A of the ESI Act falls for determination. It is the contention of the Respondents that Section 45A of the ESI Act may be invoked only in the aforesaid two instances including where no records are furnished at all. I find this contention to be misplaced. It is evident from a plain language of Section 45A of the ESI Act that this provision is not confined to situations where no records are furnished at all, rather it equally applies where the records submitted

are incomplete, inadequate, or selectively disclosed whether in relation to specific categories of employees or particular contribution periods. The wording of that provision is "Where in respect of a factory of establishment, no returns, particulars, registers or records are submitted, furnished or maintained ……". The contention of the Respondents that Section 45A(1) is confined to a situation where no records are furnished at all, would disregard the word "maintained". Further, the last line of Sub-Section (1) of Section 45A, it is provided that "…*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*." confirms that this provision is not confined to in a situation of complete absence of records.

62. Accordingly, I am of the view that the Respondents' attempt to limit the applicability of Section 45A of the ESI Act solely to a case of total non-submission of records is untenable.

63. The further contention of the Respondents that Setion 45A of the ESI Act applies only to adhoc assessments due to

non-production of records and does not apply to actual assessments is misconceived. This contention is contingent upon an artificial and unsupported distinction between "C-18 (Ad-hoc)" and "C-18 (Actual)" notices, both being instruments issued by the Corporation under its internal ESIC Revenue Manual. From a reading of the said Manual, in particular Section L. 12.5, it is evident that this distinction between "actual" and "ad-hoc" finds no recognition. Such a distinction is also not found in the ESI Act itself.

64. The Respondents in the present case, have passed the impugned order without affording an opportunity of hearing to the Petitioners. This in my considered view is in violation of the express mandate of Section 45A of the ESI Act. It is well settled that any determination under this provision, whether based on full, partial or no records must be preceded by a fair hearing. During the hearing, this Court had posed a pointed query to the Respondent Corporation regarding the applicable statutory provision in the event of shortfall in contributions. The Respondent Corporation was unable to provide any clear or concrete response. Thus, the Respondent Corporation by not affording a hearing to the Petitioners is seeking to bypass the procedural safeguards under Section 45A of the ESI Act by

invoking internal classifications or relying on distinctions that have no statutory basis.

65. The judgments relied upon by the Petitioners viz. **Affine** (supra) and **SBI General** (supra) are applicable in the present case. These judgments have affirmed that Section 45A of the ESI Act is not confined to situations where no records are available. Further, its invocation must be strictly in accordance with the principles of natural justice. The Courts have held that a reasoned order must be passed only after affording the employer a fair and reasonable opportunity of being heard. In my view, the Respondents have not being successful in distinguishing the aforementioned judgments.

66. The Respondents have contended that all records were made available by the Petitioners. I find from the facts and documents on record that this assertion of the Respondents is misplaced. The copy of the Social Security Officer's visit note at Exh.W7 of the Writ Petition shows that the Inspection Report did not consider the entire workforce of the Petitioners. The statutory scheme under Section 45A of the ESI Act specifically contemplates its invocation in situations where the Respondent Corporation is unable

to determine contributions due to the lack of complete and accurate data. Therefore, the case put forward by the Respondents that all records were available is not only factually incorrect, but also misinterprets the scope of Section 45A of the ESI Act.

67. I find much merit in the submission of the Petitioner that before any coercive recovery action is undertaken by the Respondent Corporation, a speaking order that is preceded by a reasonable opportunity of being heard under the provisions of Section 45-A of the ESI Act is mandatory, irrespective of whether the proceedings are initiated by issuing notices under C18 (actual) or C18 (ad-hoc). In the present case, neither requirement has been met. Although, the ESIC Revenue manual was brought to the attention of the Respondent Corporation during the arguments of the Petitioners, this was met with an entirely unsatisfactory response of the Respondent Corporation suggesting that the manual is merely a "guideline" and, as such, need not be followed. The Respondent Corporation is required to be guided by its own manual and cannot disregard the same.

68. The Respondents had contended that during the

inspection proceedings, no objections were raised by the Petitioners. This is contrary to the documents on record, in particular the letter dated 21st November 2024 submitted by the Petitioners and delivered to the offices of the 1st and 2nd Respondents on 22nd November 2024 raising an objections and this is raised well before the stated timeline of 25th November 2024 and which letter records the Petitioners' concern regarding the ongoing proceedings.

69. Insofar as the Respondents' contention that the Petitioners statutory remedy lies in initiating proceedings under Section 45AA of the ESI Act before the Employees' Insurance Court is concerned, I find such contention to be misconceived. The Respondents have failed to address the contention raised by the Petitioners that any breach of the principles of natural justice at the original stage vitiates the proceedings and cannot be cured in appeal. The Petitioners have placed reliance upon **LK Ratna** and the **Oryx** cases. In the present case, the main grievance of the Petitioners is with regard to the denial of an opportunity of hearing prior to the issuance of the impugned order under Section 45-A of the ESI Act. The Respondents have rather than addressing this grievance suggested recourse to either Section 45AA or 75 of the ESI Act. I am

of the considered view that the failure to provide an opportunity of hearing strikes at the root of the adjudicatory process itself. Section 45AA or 75 do not address this issue as it presumes the validity of the impugned order, which is precisely under challenge in these proceedings. Further, Section 75 does not apply in the present case absent an appropriate hearing prior to the impugned order being passed.

70. The contention of the Respondents that the denial of a personal hearing has not materially affected the outcome, as the determination is based on records already submitted by the Petitioner, is untenable. It is settled law that the principles of natural justice as contemplated under Section 45A of the ESI Act are not contingent upon the presumed outcome of a proceeding. The denial of such an opportunity renders the proceedings inherently flawed and in violation of the statutory mandate of fair hearing.

71. It is pertinent to note that the Respondents have conceded in open Court that both the C-18 (Ad-hoc) and D-18 notices contemplated a hearing under Section 45A of the ESI Act. It is the Respondents' own admission, and therefore, renders

unsustainable any attempt on their part to justify the issuance of the impugned C-18 (Actual) notice without affording the Petitioner a hearing. Further, there is no recognition of a distinction between C-18 (Ad-hoc) and C-18 (Actual) notices, both being instruments issued by the Respondent Corporation under its internal ESIC Revenue Manual. There is also no recognition in the Act of any such distinction.

72. The Respondents have relied upon **SRTC Tech Solutions Private Limited** (supra) in support of their contention that Section 45A of the ESI Act applies only in cases where the employer fails to produce revenue records, necessitating an ad hoc assessment.

73. The reliance placed by the Respondents on the said judgment, in my view, misplaced. This judgment has been departed from by a coordinate bench of the Patna High Court in *Electronic Net case* (supra). The Patna High Court has held that invocation of Section 45A of the ESI Act is not confined merely to cases of non-production of records. This would apply, even where records are furnished and inspected, and where such records are not in compliance with the requirements under Section 44 or disclose

underpayment of contributions, the authorities are entitled to invoke Section 45A. The Court clarified that mere production of records does not bar the application of Section 45A in cases where contribution shortfalls are found. Further, the Court held that C-18 (Actual) and C-18 (Ad hoc) notices are not statutory forms, but are issued under internal ESIC guidelines, and cannot limit the applicability of the ESI Act.

74. The ESIC Revenue Manual, in particular Section L. 12.5, explicitly mandate that any order under Section 45A must be a well reasoned speaking order and must be preceded by affording the employer a reasonable opportunity of being heard. In L. 12.9 of the said Manual, requires that prior to issuing a Section 45A order against C 18 (Adhoc) and C 18 (Actual) notices, the Authority must ascertain whether any representation from the employer is pending, and in all cases, allow a minimum period of 30 days for the employer to appear for a personal hearing or submit a written representation. These procedural safeguards, which are integral to ensuring fairness in quasi judicial proceedings under ESI Act, were not addressed or considered in the *SRTC Tech Solutions Private Limited* (supra), thereby limiting its applicability and diminishing its precedential

value.

75. The Respondents have also placed reliance on the judgment in **E.S.I.C Vs C.C. Santhakumar** (supra) in support of their contention that the invocation of Section 45A of the ESI Act is conditional and can be resorted to only where the employer fails to submit the requisite returns, particulars or records. I find that the said judgment in fact fortifies the Petitioner's case by affirming that the exercise of powers under Section 45A of the ESI Act must be preceded by a reasonable opportunity of hearing and must be based on the entirety of the material available on record. The Supreme Court has held that Section 45A is intended to be invoked only in situations where the employer obstructs or fails to furnish the requisite records, thereby preventing the Corporation from performing its duties under Section 45. In such circumstances, the Authority is obliged to issue a notice and afford a fair hearing before passing a determination order. Paragraph 15 of the **E.S.I.C Vs C.C. Santhakumar** (supra) judgment reads as under:-

> "*15. When the Corporation passes an order under Section 45A, the said order is final as far as the Corporation is*

concerned. Under Section 45A(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."

76. The Respondents have relied upon the judgment of the Supreme Court in **The State of Maharashtra & Ors. Vs. Greatship (India) Ltd**. (supra) in support of their contention that the High Court should not entertain a Writ Petition under Article 226 of the Constitution wherein effective and efficacious remedy is available. There are other judgments relied upon by the Respondents in support of this contention passed by both the Supreme Court and as well as this Court. However, the reliance placed by the Respondents on these judgments is wholly misplaced and inapplicable to the present case. In the present case, the Petitioners have been denied a reasonable opportunity of hearing, which is a mandatory procedural safeguards under proviso to Section 45A of the ESI Act. The impugned action in the present case was undertaken prior to the passing of any lawful or reasoned order. Thus, rendering

the action wholly without jurisdiction and clear violation of the principles of natural justice. The Petitioners are not merely bypassing an appellate forum, but are challenging the very legality and procedural fairness of the primary action itself, making these judgments which are on effective and efficacious statutory remedy being available, inapplicable. The judgment of the Supreme Court in **Whirlpool** (supra) relied upon by the Petitioners will apply in the present case.

77. The Respondents have placed reliance on the judgment of this Court in **Property Guards Security Services Pvt. Ltd. Vs. State of Maharashtra & Anr**. (supra) to emphasize that statutory remedy is available under Section 45AA of the ESI Act. In that case, this Court reiterated that Section 45AA provides for an appellate remedy to an employer aggrieved by an order passed under Section 45A of the ESI Act. In the said case, there was no issue raised on the interpretation of Section 45A and consequently there is no finding or interpretation of Section 45A and therefore, this case is clearly distinguishable from the present case.

78. In view of the finding that Section 45A of the ESI

Act must be preceded by a reasonable opportunity of hearing and must be based on the entirety of material available on record, the impugned demand notices, recovery notices, prohibitory orders, bank show cause notice, inspection report and further demand notices (as particularly set out in **Annexure A**) are required to be quashed and set aside.

79. Accordingly, the Petition is made absolute in terms of prayer clauses (A) to (E) which read thus :

> "*A. For a writ of mandamus or any other writ, direction or order in the nature of mandamus under Article 226 of the Constitution of India declaring that the Impugned Orders (as particularly set out in **Annexure A**) are illegal, ultra vires the Constitution of India and the provisions of the ESI Act;*
>
> *B. For an order of injunction restraining any person(s) authorized by the Respondents from taking any steps and / or acting in furtherance of the Impugned Orders (as particularly set out in **Annexure A**);*
>
> *C. For an order directing the Respondents to issue communications recalling the Impugned Orders (as particularly set out in **Annexure A**);*

D. For a writ of certiorari or any other writ, direction or order in the nature of certiorari under Article 226 of the Constitution of India quashing the Impugned Orders (as particularly set out in ***Annexure A****);*

E. For a writ of mandamus or a writ or order or direction in the nature thereof remanding the Inspection Report, Demand Letters, Recovery Notices and the Further Demand Letters as particularized in ***Annexure A*** *to the Respondent No. 1 for fresh adjudication after providing the Petitioners reasonable time to submit their detailed response and the opportunity to make oral submissions during a personal hearing.*"

80. The Respondents shall within a period of four weeks from this judgment and order, issue communication recalling the impugned orders. The Respondents shall carry out the fresh adjudication after issuance of requisite notice to the Petitioners affording them opportunity to submit detailed response and the opportunity to make oral submissions during personal hearing and pass reasoned speaking order within a period of six weeks from the recall of the impugned orders.

81. The Writ Petition is accordingly disposed of in the above terms. There shall be no order as to costs.

[R.I. CHAGLA J.]

82. After this judgment and order is pronounced, the learned Counsel for the Respondents has sought for stay of this judgment and order.

83. Considering that by the said judgment and order, the Respondents have been given time of four weeks to issue communication recalling the impugned orders, the application for stay is rejected.

84. The amount, which has been deposited by the Respondents in this Court from the account of the Petitioners, shall be returned to the Petitioners by the Prothonotary & Senior Master of this Court within a period of four weeks from today.

[R.I. CHAGLA J.]