Reserved On : 12/08/2026
Pronounced On : 01/09/2026

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 1972 of 2004

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J. C. DOSHI

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Approved for Reporting	Yes	No
	Yes	

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REGIONAL DIRECTOR
Versus
M/S. RUBI COACH BUILDERS PVT. LTD & ANR.

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Appearance:
MS DIMPLE A THAKER(6838) for the Appellant(s) No. 1
MR CS NAIDU(1218) for the Defendant(s) No. 1
MR DIPAK R DAVE(1232) for the Defendant(s) No. 1
RULE SERVED for the Defendant(s) No. 2

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CORAM:**HONOURABLE MR. JUSTICE J. C. DOSHI**

CAV JUDGMENT

1. By way of this appeal, the Employees' State Insurance Corporation (for short **"ESIC")** has challenged judgment and order dated 31.12.2003 passed by ESI Court, Ahmedabad in ESI Application No.43 of 1989, whereby application of the respondent herein – original petitioner – M/s. Rubi Coach Builders Pvt. Ltd. filed under section 75 of the ESI Act, 1948 was allowed and it was declared that ESI Corporation is not entitled to recover contribution amount of Rs.46,472/- plus interest and surcharge amount, total amount of Rs.63,107/- from the respondent company. Consequently, recovery proceedings

initiated by ESI Corporation vide C-18 dated 13.08.1986 for recovery of Rs.46,471.40 ps. and letter written to Collector dated 05.04.1989 (C-19) and subsequent letter written by Mamltadar to the petitioner dated 24.04.1989 to recover amount of contribution as arrears is declared illegal and unjust. Some additional order was also passed.

2. For convenience, parties are referred as per their status before the learned Trial Court.

3. Original petitioner – M/s. Rubi Coach Builders Private Limited, filed the application under Section 75 of the ESI Act, 1948, challenging the order passed by ESI Corporation on 05.04.1989 and consequently by Mamlatdar on 24.04.1989 to recover the amount of contribution as arrears of land revenue. The petitioner company had been allotted ESI Code No. 37-6947-74 by the ESI Corporation. Insurance Inspector visited the petitioner company and checked the record. The application was tendered pursuant to the checking that the petitioner company has paid its contribution, and consequently two previous cases were closed. Some factual aspect in regards to travelling allowance and transport charges were found. They, according to petitioner, were limited to reimbursement.

3.1. On 07.04.1983, the petitioner addressed a representation to the ESI Corporation clarifying that payments disbursed towards traveling allowances and overtime do not fall within the ambit of "wages" as defined under Section 2(22) of the ESI Act, and therefore, any demand for contributions thereon is arbitrary and unlawful. However, without adjudicating upon the core dispute, the ESI Corporation issued a recovery warrant under Section 45B of the ESI Act on 05.04.1989, demanding an aggregate sum of Rs. 63,107/- inclusive of contributions, surcharges, and interest. The petitioner wrote letter on 14.04.1989 to the ESI Corporation that they are not liable to pay any amount, yet, without considering the written submission, recovery proceedings were started under 45B of ESI Act, and Mamlatdar issued a notice to recover the amount of alleged contribution plus amount of surcharge and interest on 24.4.1989 vide Annexure-E.

3.2. Mainly upon aforesaid contention, the petitioner company approached the ESI Court under Section 75 of the ESI Act for setting aside that recovery proceedings.

4. In reply (Exhibit 17), the ESI Corporation denied the averment made by the petitioner, with a further contention that Corporation had rightly assessed and demanded the contribution based on the inspection report which assessed the total salary and allowances at Rs. 8,59,448/-. It was further contended that the petitioner's contention regarding the payment of Rs. 2,10,518/- made to R.K. Contractor for building construction not falling within the definition of wages cannot be accepted. Additionally, the Corporation maintained that allowances paid towards overtime and traveling expenses fall

squarely within the statutory definition of wages. All these aspects were thoroughly examined by the Insurance Inspector while preparing the report, thereby justifying the initiation of the recovery proceedings as legal and proper.

4.1. In line of this contention, it was prayed to dismiss the petition.

5. Learned ESI Court, after taking into consideration the definition of the "wages", the various authoritative pronouncement as well as considering the fact that amount of Rs. 2,10,518/- paid by the petitioner to RK Construction for construction of new building do not fall within definition of wages, held that the said amount could not be subjected to contribution, and accordingly passed the judgment in the aforementioned terms.

6. Being aggrieved, ESI Corporation has preferred this appeal under Section 82(2) of the ESI Act.

7. Vide order dated 13.07.2005, the Co-ordinate Bench admitted the first appeal, framing following question as substantial question of law:

> *"(i)Whether an amount paid to a suspended employee by the employer by way of subsistence allowance would be included in term "wages" as defined under Sections 2(22) of the ESI Act?*

> *(ii) Whether over-time wages and special allowance can be included in the definition of term "wages" as envisaged under Section 2(22) of the ESI Act?*
>
> *(iii) Whether travelling allowance or transport charges paid to employee by way of reimbursement can be included in definition of term "wages" under Section 2(22) of the ESI Act?"*

8. Learned advocate Ms.Dimple Thaker, appearing for the Appellant - ESI Corporation tendered written submission, which is taken on record. In her written submission, learned advocate Ms.Thaker referred to the report of the Insurance Inspector and mainly submitted that the exclusion of the overtime allowance from the "wages" by ESI Court is contrary to the judgment of Supreme Court in **[Indian Drugs and Pharmaceuticals Limited versus Employees' State Insurance Corporation [1997 (9) SCC 71]**, particularly para 5 and 9 thereof.

8.1. Learned advocate Ms. Dimple Thacker further argued that in light of aforesaid judgment it has been categorically held that held that overtime wages fall within the ambit of "wages" under Section 2(22) of the Employees' State Insurance Act, 1948, and liable for ESI contribution. To that extent, she submitted, the finding of the learned ESI Court is legally not sustainable and requires interference. Secondly, she would submit that exclusion of an amount of Rs.2,10,878/- by the ESI Court paid by the petitioner company to RK Construction Work towards building work along with other payment towards pipe fitting, repairs, machinery work, are also erroneous. She further submitted that the vouchers of this payment are placed on record at page

No.123 of the paper-book (Exhibit 56). Therefore, learned advocate Ms.Thaker submits that the issue deserves consideration in light of the judgment of Hon'ble Supreme Court in case of **[Employees' State Insurance Corporation versus Harrison Malayalam Private Limited, 1993 (4) SCC 361]**, wherein, Hon'ble Supreme Court held that the employees of a contractor engaged by the principal employer are covered by the ESI Act and that the statutory obligation to pay contribution arise once the establishment is covered by the Act.

8.2. Learned advocate Ms. Dimple Thaker thirdly, would submit that petitioner-company disbursed special allowance, conveyance allowance, and washing allowance to its employees, which were erroneously excluded from the computation of ESI contributions. She would submit that the relevant calculations based on the inspection material, including the C-18 notice dated 07.10.1985, had been duly placed before the learned Trial Court. She further argued that while the petitioner-company who claims such payments as mere reimbursement of expenses, failed to discharge the burden of proving this contention; moreover, such allowances do not fall within any of the specific statutory exclusions contained under Section 2(22) of the Employees' State Insurance Act, 1948. It is submitted that it is actual nature and character of the payment that determines whether it constitutes 'wages'. She refereed and placed reliance on a judgment of a Co-ordinate Bench of this Hon'ble Court in ***Regional Director, Employees' State Insurance Corporation v. Jamnagar Vegetable Product Unit*** **[2016 (1) CLR 620]**, whereby, this Court categorically held that washing allowance forms part of 'wages' under Section 2(22) of the Act, and contribution upon such allowance is payable. Therefore, it is submitted that exclusion of the special allowance, conveyance allowance, and washing allowance from the purview of ESI contribution is erroneous finding of learned Trial Court. Lastly, learned advocate Ms.Thaker submitted that the disputed amounts were identified from the petitioner-company's own wage registers and books of account during the inspection and it revealed contribution liability under the disputed heads amounting to Rs.46,471.40, along with applicable interest and surcharge.

8.3. In line of the aforesaid argument, learned advocate Ms. Dimple Thacker submitted that the finding of learned ESI Court is bad in law, erroneous, and unjust, and required interference by allowing this appeal.

8.4. Upon above submission, learned advocate Ms.Thaker submitted to allow this appeal and to quash and set aside the impugned judgment and order, and to sustain the recovery proceeding initiated against the petitioner company.

9. Learned advocate Mr.Dipak Dave on the other side referred to judgment of Supreme Court in case of **ESI Corporation v/s. C.C. Santhakumar [2007 (1) SCC 584]**, and the recent judgment of Supreme Court in case of **M/s. Carborundum Universal Limited v/s. ESI Corporation [2025 LiveLaw (SC)**

1232], and submitted that the statutory scheme of the Employees' State Insurance Act, 1948, demands that under exceptional exigencies or eventualities, the ESI Corporation must first pass a determination order under Section 45A of the Act; only upon non-compliance with such an order, recovery proceedings under Section 45B can be initiated. He further submitted that any demand for contribution must first be legally adjudicated under Section 45A, which empowers the Corporation to exercise summary determination only in specific instances where an employer either fails to furnish the requisite particulars/records or completely refrains from participating in the hearing. Learned advocate Mr. Dave submitted that in the present case, the ESI Corporation bypassed the mandatory procedure established under Section 45A and straightaway issued a C-19 demand notice (page No.29 of the paper-book) under Section 45B to recover the contribution, along with interest and surcharge. It is submitted that such action on the part of the ESI Corporation is completely arbitrary and cannot sustain in the eyes of the law. Therefore, learned advocate Mr. Deepak Dave submit that this appeal should be dismissed solely on this ground.

9.1. Learned advocate Mr. Deepak Dave further submitted that when the ESI Corporation itself did not follow the process laid down in the ESI Act, it cannot raise any demand towards the contribution on the pretext of it being legitimate. In absence of following the mandatory provision of ESI Act and without judicially adjudicating the liability, the Corporation cannot invoke the drastic recovery powers vested under Section 45B to recover the amount of contribution.

9.2. In light of the aforesaid submission, learned advocate Mr. Deepak Dave submits that even without entering into the factual aspect of the case, the appeal deserves to be dismissed, and therefore, he submitted to dismiss the appeal.

10. Regard being had to the rival submission of the learned advocate for both the side, let me examine the scheme of the ESI Act. Section 45A and 45B of the ESI Act reads as under :-

> ***"45A. Determination of contributions in certain cases.***
>
> *(1)Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 or any Social Security Officer or other official of the Corporation referred to in sub-section (2) of section 45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment:*
>
> *Provided that no such order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard:*
>
> *Provided further that no such order shall be passed by the Corporation in respect of the period beyond five years from the date on which the contribution shall become payable.*
>
> *(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."

45B. Recovery of contributions.

—Any contribution payable under this Act may be recovered as an arrear of land revenue.

11. Plain reading of the aforesaid provision indicates that before invocation of summary power to determine the contribution under Section 45A, two conditions are essential: first, where the principal or immediate employer fails to submit the requisite returns or particulars, or fails to maintain the registers or records in accordance with the mandates of Section 44; or second, where the Social Security Officer is obstructed or prevented from exercising his functions or discharging his duties under Section 45(2) by the principal employer, immediate employer, or any other person. It is only upon the fulfillment of these statutory preconditions that the ESI Corporation is empowered to summarily determine the amount of contribution payable in respect of the employees of the factory or establishment, on the basis of the information available to it, invoking section 45A of the Act.

12. The proviso to Section 45A also demands that no such summary determination shall be made without giving a reasonable opportunity of being heard to the immediate employer or principal employer or person in charge of the factory or establishment. The statute also prescribes a period of

limitation, stipulating that the ESI Corporation is barred from determining contributions under Section 45A after the expiry of five years from the date on which the said contributions became payable. In contradistinction, Section 45B specifically governs the recovery of the contributions so determined.

13. In case of ***C.C. Santhakumar (supra)***, the Supreme Court examined the contours of Section 45A, 45B, 75, and 77 of the ESI Act, and on combined reading of the aforesaid provision, the Supreme Court observed that no claim shall be made by the Corporation beyond five years to which the claim relates. The Hon'ble Supreme Court observed as under:

> *"15. Section 45A provides for determination of contributions in certain cases. When the records are not produced by the establishment before the Corporation and when there is no cooperation, the Corporation has got the power to make assessment and determine the amount under Section 45A and recover the said amount as arrears of land revenue under Section 45B of the Act. This is in the nature of a best judgment assessment as is known in taxing statutes. 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. But, where the records are produced, the assessment has to be made under Section 75(2)(a) of the Act. Section 45A (2) provides that the order under Section 45A(1) shall be used as sufficient proof of the claim of the Corporation under Section 75 or for recovery of the amount determined by such order as arrears of land revenue under Section 45B. In other words, when there is a failure in production of records and when there is no*

> *cooperation, the Corporation can determine the amount and recover the same as arrears of land revenue under Section 45B. But, on the other hand, if the records are produced and if there is cooperation, the assessment has to be made and it can be used as a sufficient proof of the claim of the Corporation under Section 75 before the E.S.I. Court. So, the limitation of three years for filing an application before the Court, introduced by Act 44 of 1966, can only relate to the application under Section 75 read with 77(1A). The order under Section 45A need not be executed by the Corporation before the E.S.I. Court under Section 77. As such, the amendment to Section 77(1A)(b) proviso by Act 29 of 1989 providing five year limitation has no relevance so far as orders passed by the Corporation under Section 45A are concerned."*

14. In the case of ***Carborundum Universal Limited (supra)***, the Supreme Court examined the scope of Section 45 of the ESI Act, and in para 18, 18.1 to 24 observed as under:

> *"18. The scope and ambit of Section 45A of the Act came up for consideration before the Delhi High Court in Masco (Private) Ltd. In that case, appellant had challenged the demand raised by the corporation under Section 45A of the Act on the ground that the appellant had requested the corporation on a number of occasions to inspect the records of the appellant but officials of the corporation declined to inspect the relevant records. In the factual backdrop of that case, the question which came up for consideration before the Delhi High Court was whether, having regard to its true meaning and correct interpretation, the resort by the corporation to the provisions of Section 45A of the Act for the purpose of an adhoc determination of the special contribution and the employees contribution payable by the appellant was justified? After analyzing the provisions of Section 45A, Delhi High Court observed that the materials on record did not justify the conclusion that the first condition was satisfied. Section 45A provides for an exception and*

deals with a situation in which none of the records provided in the various other provisions of the Act are available to the corporation and lays down an extraordinary procedure for the determination of contribution on the basis of material that may be available with the corporation in the absence of any returns, particulars, registers or records. Delhi High Court held that the first condition of Section 45A would be satisfied only if the employer neither submitted the returns nor furnished the particulars nor maintained registers or records required by law. It went on to declare that it would be equally difficult to hold that even after the returns, particulars, registers or records were submitted, furnished or maintained but did not conform strictly to the norms or were incorrect or incomplete or mere discrepant or otherwise unreliable, the first condition of Section 45A would still be attracted.

18.1. Explaining further, Delhi High Court held that application of Section 45A would depend on if either of the two conditions envisaged by it have been satisfied. The first condition relates to failure to submit, furnish or maintain returns, particulars, registers or records as required under Section 44 and the other relates to obstruction to any officer in exercising his functions or discharging his duties under Section 45 of the Act. The satisfaction of either of the conditions involves a question of fact. In one case, whether there has been any failure to submit, furnish or maintain the returns, particulars, registers or records and in the other where the employer caused any obstruction to the officers of the corporation. The two pre-conditions have been explained by the Delhi High Court as under:

33. .... While Section 44 obliges an employer to submit such returns as may be prescribed and where returns had not been filed, to furnish such particulars as the corporation may requisition and to maintain certain registers or records, Section 45 empowers the Inspector or any other officer specially authorized in that behalf to require an employer to furnish information, to enter any office or establishment, to produce records to examine the employer or any employee, to make copies of or take extracts from the records and to exercise other powers as may be prescribed if such official considers that such a direction is necessary for the purpose *of enquiring into the correctness of any of the particulars stated in any returns or for the purpose of ascertaining whether any provisions of the Act had been complied with. The two parts of sub-section (1) of Section 45A, therefore, operate in distinct spheres and do not overlap. It further appears that while mere failure to submit, furnish or maintain returns, particulars, registers or records may attract the application of sub-section (1) of Section 45-A of the Act, the other alternative condition requires that the Inspector or the other official must have been obstructed in exercising his functions or discharging his duties under Section 45 of the Act and if the intention of the Legislature by using the expression "obstructed" was to make the second condition applicable even if there was a mere failure to comply with the direction that may be made by the officer pursuant to his powers under sub-section (2) of Section 45 of the Act as distinct from causing a physical obstruction or placing a deliberate hurdle, there was nothing to prevent the Legislature from using in relation to the direction under Section 45 of the Act the same phraseology as was used in relation to the first condition. The only reasonable way to explain the distinguishable phraseology used in the two parts of sub-section (1) of S. 45A is to construe the expression "obstructed" so as to confine it to cases of physical obstacle, use of force, or threatened use of force and as excluding a mere failure to comply with any direction.*

19. The Andhra Pradesh High Court in EID Parry (India) Ltd. examined the provisions of Section 77 (1A) of the Act to consider as to whether the appellant was not liable to pay the contribution demanded. Adverting to the proviso to the Explanation to sub-section (1A) of Section 77 of the Act, Andhra Pradesh High Court held as under:

11. ……..By the proviso to Explanation to sub- section (1A) of Section 77 of the Act, incorporated in the Act by Act 29 of 1989, an embargo is placed on the corporation for making a claim after five years of the period to which the claim relates. The intention of the Parliament probably is to arrest the corporation reviving stale claims. As urged by the learned counsel for respondents it is no doubt true that Section 45B of the Act lays down that contribution payable can be *recovered as arrears of land revenue. But that does not mean as contended by the learned counsel for respondent that respondent at anytime can enforce the claim without reference to limitation. The phrase: "Contribution payable under this Act" used in Section 45B of the Act means the "contribution as determined under Section 45-A" of the Act. Sub- section (2) of Section 45-A of the Act lays down that order made under sub-section (1) is sufficient proof of the claim under Section 75 of the Act, which relates to the matters to be decided by the Employees' Insurance Court. Sub-section (1A) of Section 77 of the Act lays down that application before Employees' State Insurance Court (under Section 75 of the Act) has to be made within three years from the date on which the cause of action arose. Clause (b) to Explanation to sub-section (1A) of Section 77 of the Act says that cause of action would be deemed to have arisen on the day on which the claim was made by the corporation. So, it is clear that the person from whom the demand is made has to move the Employees' Insurance Court within three years from the date of demand. For what period such demand can be made by the corporation is laid down by the proviso to clause (b) of Explanation to sub-section (1A) of Section 77 of the Act.*

19.1. Thereafter, the High Court concluded as under:

11. ....Therefore, it is clear that the corporation can make a claim in respect of arrears due only for a period of five years prior to the date of demand, and those arrears only can be recovered as amounts of land revenue under Section 45-B of the Act.

19.2. In the facts of that case, it was held that claim for contribution from the appellant was unsustainable, and, was accordingly, set aside.

20. The question as to whether the proviso to Section 77(1A)(b) of the Act providing limitation of five years for claiming contribution, debar the corporation from recovering the contribution arrears as arrears of land revenue under Section 45B in pursuance of the order under Section 45A of the Act confronted the Madras High Court in Cosmopolitan Club. The High Court observed that from a reading of Chapter IV of the Act which includes Sections 45A and 45B, it is clear that there is no limitation prescribed. The purpose *of introduction of these sections is to curb default by the employers by providing for an efficient method of recovery but where the records are produced, the assessment has to be made under Section 75(2) of the Act. Only when there is a failure in production of records or when there is no cooperation, the corporation can determine the amount due under Section 45A and recover the same as arrears of land revenue under Section 45B. But if the records are produced and if there is cooperation, the assessment has to be made under Section 75(2)(a) It was held thus:*

28. Section 45A of the Employees State Insurance Act would provide for determination of contributions in certain cases. A reading of the above section would reveal that when the records are not produced by the establishment to the corporation and when there is no cooperation, the corporation has got the power to make assessment and determine the amount under Section 45A and recover the said amount as arrears of land revenue under Section 45B of the Act. When the corporation passed 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 indulged in preventing 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. But, where the records are produced, the assessment has to be made under Section 75(2)(a) of the Act. Section 45A(2) would provide that the order under Section 45A(1) shall be used as sufficient proof of the claim of the corporation under Section 75 or for recovery of the amount determined by such order as arrears of land revenue under Section 45B. In other words, when there is a failure in production of records and when there is no co-operation, the corporation can determine the amount and recover the same as arrears of land revenue under Section 45B. But, on the other hand, if the records are produced and if there is cooperation, the assessment has to be made and it can be used as a sufficient proof of the claim of the corporation under Section 75 before the E.S.I. Court. So, the limitation of three years for filing an application before the Court, introduced by Act 44 of 1966, would relate only to the application under Section 75 read with 77(1A). The order under Section 45A need not be executed by the *corporation before the E.S.I. Court under Section 77. As such, the amendment to Section 77(1A)(b) proviso by Act 29 of 1989 providing five year limitation has no impact on the orders passed by the corporation under Section 45A.*

20.1. Section 45A contemplates a summary method to determine contribution in case of deliberate default on the part of the employer or there is no co-operation by the employer. There is no doubt that the area and the field covered by Section 45A and Section 75 are quite different. Section 45A is a special provision for expeditious action against an employer who commits default. This special provision has been enacted only in order to weed out unscrupulous employers committing default in the maintenance of the records and submission of correct returns for payment of contributions. If the period of limitation prescribed under the proviso to Clause (b) of Section 77(1A) is read into provisions of Section 45A, it would defeat the very purpose of Sections 45A and 45B. The prescription of limitation under Section 77(1A)(b) of the Act is deliberately not made applicable to the adjudication proceedings under Section 45A by the legislature since such a restriction would restrict the right of the corporation to determine the claims under Section 45A and the right of recovery under Section 45B. Thus, Section 45A does not prescribe any period of limitation. Finally, Madras High Court declared as under:

Having regard to the scheme and object of the Act, while interpreting the provisions so as to advance the remedy and not to defeat and also in keeping with the principles enunciated in the decisions rendered by the Supreme Court, we are of the considered opinion, that the period of limitation, prescribed under Section 77(1A)(b) of the Employees' State Insurance Act, 1948, would not apply to the recovery proceedings under S.45B of the Act, in pursuance of an order under Section 45A.

21. In C.C. Santhakumar, this Court examined the contours of Sections 45A, 45B, 75 and 77 of the Act and on a combined reading of the aforesaid provisions, it is observed that no claim shall be made by the corporation beyond five years to which the claim relates as per the proviso to clause (b) of Section 77(1A). On the other hand, a reading of Chapter IV as a whole makes it clear that there is no *limitation prescribed. Explaining the difference between Section 45A and Section 77(1A), this Court held as under:*

15. Section 45A provides for determination of contributions in certain cases. When the records are not produced by the establishment before the corporation and when there is no co-operation, the corporation has got the power to make assessment and determine the amount under Section 45A and recover the said amount as arrears of land revenue under Section 45B of the Act. This is in the nature of a best-judgment assessment as is known in taxing statutes. 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. But, where the records are produced, the assessment has to be made under Section 75(2)(a) of the Act. Section 45A(2) provides that the order under Section 45A(1) shall be used as sufficient proof of the claim of the corporation under Section 75 or for recovery of the amount determined by such order as arrears of land revenue under Section 45B. In other words, when there is a failure in production of records and when there is no cooperation, the corporation can determine the amount and recover the same as arrears of land revenue under Section 45B. But, on the other hand, if the records are produced and if there is cooperation, the assessment has to be made and it can be used as a sufficient proof of the claim of the corporation under Section 75 before the ESI Court. So, the limitation of three years for filing an application before the court, introduced by Act 44 of 1966, can only relate to the application under Section 75 read with Section 77(1A). The order under Section 45A need not be executed by the corporation before the ESI Court under Section 77. As such, the amendment to Section 77(1A)(b) proviso by Act 29 of 1989 providing five-year limitation has no relevance so far as orders passed by the corporation under Section 45A are concerned.

22. Thus as noticed supra, Sections 45A and 45B on the one hand and Sections 75 and 77 on the other hand operate in *different fields. There cannot be any doubt that the area and the scope and ambit of Sections 45A and 75 are quite different. We have already discussed about the pre-conditions which are required to be satisfied before the jurisdiction under Section 45A can be invoked. Subject to fulfillment of the above pre- conditions, an order passed under Section 45A is final. It need not be executed by the corporation by filing an application under Section 77 before the Employees Insurance Court. Section 45A therefore does not prescribe any period of limitation and the limitation prescribed under Section 77 does not get attracted. As noticed supra, there is a reason for this. A defaulting employer or an obstructionist employer should not be allowed to avoid contributions required to be paid by them. However, where an order is passed under Section 45-A, it is for the employer to approach the Employees Insurance Court if he wants to challenge the same. In such an eventuality, the limitation prescribed is three years. On the other hand, ordinarily if the corporation disputes any contribution of the employer, it has to take recourse to Section 75 in which event, it has to move the Employees Insurance Court for recovery of the amounts due. For that, corporation has to invoke Section 77 for initiation of proceedings before the Employees Insurance Court. However, to ensure that stale claims are not agitated, legislature has prescribed a limitation of five years for raising of such claims or disputes by the corporation. The limitation for institution of claims by the corporation before the Employees Insurance Court, as noticed supra, is prescribed under the proviso to Section 77(1A)(b) which mandates that no claim shall be made by the corporation after five years of the period to which the claim relates.*

23. As explained in Santhakumar the limitation prescribed in the proviso to Section 77(1A)(b) applies only to claims made by the corporation before the Employees' Insurance Court and not to proceedings undertaken under Section 45A. It has been explained that if the five- year bar is read into Section 45A, it would defeat the very purpose for which Sections 45A and 45B were enacted, since such a restriction would curtail the corporation's authority to make a best-judgment determination in cases of non-production of records or obstruction to inspection and would undeservedly benefit employers who evade statutory obligations.

24. Thus, Section 45A is designed as a mechanism which the corporation may employ only when there is a default qua Section 44 or when statutory inspection under Section 45 becomes impossible on account of the conduct of the employer. The foundation for exercise of the power under Section 45A, as explained in Santhakumar, is either non-production of records or absence of cooperation or obstruction of inspection. The power is conceived as a best judgment determination akin to similar provisions in taxing statutes. What is equally significant is the clear statement of law that when records are produced and cooperation is forthcoming, assessment must be carried out under Section 75(2)(a) and not under Section 45A. The distinction drawn is therefore fundamental to the statutory architecture. Section 45 A is not meant to be an alternative mode of computation at the option of the corporation. It is a residuary power available only when the employer makes a default under Section 44 or disables the corporation from carrying out inspection under Section 45."

15. Thus, for foundation of the recovery under Section 45B, there should be an order under Section 45A or under Section 75. As observed herein-above, to invoke the summary power under Section 45A, presence of certain essentials as stated in the Section 45A of the ESI Act are needed to be established, and while doing so, the ESI Corporation is required to afford opportunity of hearing to the principal or immediate employer or the person in charge of the factory or establishment before any action of recovery proceeding under Section 45B is initiated. In the absence of the essential conditions qualifying under Section 45A, the ESI Corporation in order to determine any disputed liability concerning contributions payable by a principal employer in respect of any employee must approach the Employees' Insurance Court under Section 75(1)(c) of the Act for

judicial adjudication.

16. In the present case, the recovery proceeding started with the recovery order under Section 45B (page No.29 of the paper-book), whereby the Regional Office of the ESI Corporation directed the Collector to recover the amount of Rs.63,107.00 from one Mr. Dhirajlal Kapasi, the person in charge of the petitioner company, and consequently, on 09.04.1989, the Alien Recovery Mamlatdar Office initiated the recovery proceedings (page No.35 of paper book) to recover the amount of contribution as arrears of land revenue.

17. During the course of hearing, it was asked to the learned advocate Ms. Dimple Thacker appearing for the ESI Corporation as to whether any order under Section 45A of the ESI Act has been passed. Consequently, to that effect the order was also passed on 05.08.2026, which reads as under:

> *"The oral arguments are concluded.*
>
> *Learned Advocate Ms. Dimple A Thaker for the appellant is permitted to file the written submissions in the Registry for the limited purpose that whether order under Section 45A of the ESI Act, 1948 has been passed by the concerned Officer or not.*
>
> *Registry to accept the same.*
>
> *Upon request of learned Advocate Ms. Dimple Thaker, the matter is adjourned."*

18. In reply, learned advocate Ms. Dimple Thaker submits that despite efforts she was unable to trace out any order passed

under Section 45A of the ESI Act from the record. Nonetheless no such order is placed before the learned ESI Court during the proceeding before it. Even there is no reference of such order under Section 45A in the written submission filed by learned advocate Ms. Dimple Thaker.

19. In the aforesaid circumstances, this Court finds that the recovery proceedings initiated by the ESI Corporation was in exercise of the totalitarian and dictatorial power, and cannot sustain. Although the learned Employees' Insurance Court below interfered with the recovery proceedings on other grounds, this Court, upon examination of the statutory scheme and purport of the ESI Act, particularly, Sections 45A, 45B, and 75, is of the considered view that initiating recovery proceedings without prior adjudication is unjust, arbitrary, perverse, and against the law settled by the Hon'ble Supreme Court in the aforesaid judgments cited hereinabove.

20. In view of above, the impugned judgment and order does not deserve any interference. The Appeal being devoid of merits, is accordingly dismissed. Interim relief granted earlier, if any, stands discontinued. Record and proceedings, if any, be send back to learned Trial Court concerned.

(J. C. DOSHI,J)

SATISH