

(2006) 02 BOM CK 0018
In the Bombay High Court
Case No : Writ Petition No. 536 of 1996

Ank Seals

APPELLANT

Vs

Employees" State Insurance Corporation and Others

RESPONDENT

Date of Decision : 21-02-2006

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 17, 2, 8
Employees State Insurance Act, 1948 — Section 2(13), 2(17), 2(9), 40, 40(1)
Income Tax Act, 1961 — Section 45H
State Financial Corporations Act, 1951 — Section 29, 29(2)
Transfer of Property Act, 1882 — Section 2

Citation : (2006) 4 ALLMR 546 : (2006) 111 FLR 268 : (2006) 4 MhLj 796

Hon'ble Judges : J.N. Patel, J;A.H. Joshi, J

Bench : Division Bench

Advocate : Anil Padiyar, for the Appellant; Maldhure for Respondent Nos. 1 and 2 and M.V. Dhareshwar for Respondent Nos. 3 and 4, for the Respondent

Final Decision : Allowed

Judgement

J.N. Patel, J.—The petitioner has challenged the legality, validity and propriety of the order dated 21-10-1995 passed by the respondent No. 2, i.e. Annexure "IT and TV" and the proceedings initiated by respondent No. 2 as per Annexures II and IV by passing order dated 21-10-1995 and 7-12-1995 respectively calling upon the petitioner to clear off the arrears of E.S.I, dues of M/s J. J. Cold Tread, Nagpur, petitioner having purchased land and building of the above employer from Maharashtra State Financial Corporation on the ground that the said transfer is a deemed transfer as per the provisions contained in Section 29(2) of State Financial Corporation Act, 1951 for the purpose of Section 93-A of the E.S.I. Act as amended, otherwise coercive action was contemplated against him in accordance with the provisions contained in Section 45-C, 45-I of E.S.I. Act, 1948 as amended and II Schedule to the Income Tax Act read with Section 45-H of ESI Act, 1948. It is the case of the petitioner that it is a registered firm and

deals with the business of manufacturing hydraulic pneumatic seals and as they were looking out for premises for their business purpose, in response to the auction sale conducted by respondent Nos. 3 and 4, the petitioner purchased plot U-149 in the Nagpur industrial area of MDDC within the limits of village Nildoh, Tq. Hingna, District Nagpur. The petitioner having given the highest offer, the same was accepted by respondent Nos. 3 and 4 and the said plot along with the building was sold by respondent Nos. 3 and 4 in favour of the petitioner through registered sale-deed dated 26-6-1995.

2. It is the case of the petitioner that earlier this property was owned by M/s J.J. Cold Tread, Nagpur who were dealing in the business of remoulding of tyres in the said property. The said M/s. J. J. Cold Tread was a defaulter of respondent Nos. 3 and 4 and, therefore, respondent Nos. 3 and 4 attached and sold their assets for a consideration of Rs. 7,00,000/- by virtue of powers vested in it under the State Financial Corporation Act, 1951 after giving notice u/s 29 of the State Financial Corporation Act, 1951 and following the procedure and, therefore, the petitioner being the highest bidder, they have purchased the said plot along with the building free from all encumbrances by registered sale-deed executed in their favour by respondent Nos. 3 and 4 which is Annexure I to the petition.

3. According to the petitioner, they were surprised to receive the communication dated 21-10-1995 from the respondent No. 2 along with the demand notice issued against the petitioner, i.e. Annexure II that the assets of M/s J.J. Cold Tread, Nagpur have been taken over by the petitioner, as such the arrears of the E.S.I, dues which were outstanding against the said J.J. Cold Tread, Nagpur have to be paid by the petitioner. The petitioner immediately responded to the demand notice and informed the respondent No. 2 that they have purchased the property of M/s J. J. Cold Tread, Nagpur in an auction sale conducted by respondent Nos. 3 and 4 in accordance with the Section 29(2) of the S.F.C. Act, 1951 and M/s J.J. Cold Tread, Nagpur was not privy to the said transfer and, therefore, for the purpose of Section 93-A of the E.S.I. Act, this cannot be considered as a transfer by the previous employer to the petitioner and they cannot be fastened with the liability to pay arrears of ESI dues and the recovery action of which they were threatened in the subsequent notice of demand is uncalled for. This was not accepted by the respondent No. 2 and the respondent No. 2 took coercive action for recovery of the dues against the petitioner and vide their order dated 9-2-1996 informed the petitioner's Bank, i.e. State Bank of India, Ramdaspath, Nagpur prohibiting and restraining the petitioner from operating the account and forward the ESI dues amounting to Rs. 23,255/- to respondent No. 1 and, therefore, the petitioner being left with no remedy have approached this Court.

4. The petitioners have joined the Employees State Insurance Corporation and the Recovery Officer as parties and so also the Maharashtra State Financial Corporation respondent Nos. 3 and 4. On behalf of respondent Nos. 1 and 2, a return on affidavit has been filed and they have raised a preliminary issue that the petitioner has alternative remedy of taking recourse to Section 75 of the ESI

Act and otherwise also this Court should not entertain Writ Petition under Articles 226 and 227 of the Constitution of India as the subject-matter of the dispute involves questions of fact and law which can be examined by the ESI Court which is constituted u/s 74 of the said Act being a dispute between the employer and the respondent Corporation. It is also contended that the fate of the Writ Petition filed by the petitioner mainly hinges on the provisions of Section 93-A of the Act which lays down liability in case of transfer of establishment. Thus, in view of the fact that an alternative legal remedy is available u/s 75 of the ESI Act, the petition deserves to be dismissed.

5. It is the contention of the respondent Nos. 1 and 2 that for all purposes, the transfer effected by the Maharashtra State Financial Corporation is a deemed transfer as per the provisions contained in Section 29(2) of the S.F.C. Act, 1961 and for the purposes of provisions of Section 93-A of the ESI Act, 1948 and hence, the petitioners are liable to pay the dues of E.S.I, which have not been paid by the employer of the said establishment. It is the contention of the petitioner that M/s JJ. Cold Tread, Nagpur was covered under the ESI Act and owe to ESI Corporation an amount of Rs. 23,255/-. Therefore, the said liability of M/s J. J. Cold Tread, Nagpur is rightly enforceable against the petitioners in view of provisions of Section 93-A of the ESI Act, 1948 and, therefore, the petition deserves to be dismissed.

6. Respondent Nos. 3 and 4 have chosen not to contest the petition probably as the dispute raised by the petitioner does not affect their rights.

7. At the time this Court heard the petition for admission, by its order dated 20-11-1997 it issued Rule and granted interim relief in terms of prayer Clause (H) in favour of the petitioner subject to deposit of Rs. 15,000/- by the petitioner in this Court which was accordingly complied with.

8. Mr. Anil Padiyar, learned Counsel for petitioner, submitted that Section 93-A of the ESI Act which has been inserted by the Amendment Act 38 of 1975 vide Section 6 with effect from 1-9-1975 applies only in case where an employer in whole or in part, by sale, gift, lease or licence or any other manner whatsoever transfers the factory or establishment, the person to whom such assets are transferred shall be jointly and severally liable to pay the amount due in respect of any contribution or any other amount payable under this Act in respect of the periods upto the date of transfer and that there is a proviso to the said Act that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer. Therefore, according to Mr. Padiyar, the learned Counsel for the petitioner, purchase of the assets of the defaulter employer by the petitioner in an auction sale conducted by MSFC would not come within the ambit of the transfer of establishment as contemplated u/s 93-A of the ESI Act of 1948. It is submitted that as there is no direct or indirect relationship between the transferee and the employer in the transaction, the liability to pay the dues of respondent Nos. 1 and 2 cannot be fastened upon the petitioner. In support of his contention, Mr. Padiyar has referred to a decision in the case of Suburban Ply

and Panels (P) Ltd. v. Regional Provident Fund Commissioner and Ors. 2004 Lab. I.C. 1190. He submitted that the provisions of Section 17-B of the Employees Provident Fund Act are pari materia to that of the ESI Act and this was a case where the petitioner had purchased the property from the State Financial Corporation and the High Court on examining the case came to the conclusion that such transfer would not come within the mischief of Section 17-B and held as under in para 6 of the reported judgment:

A conjoint reading of the provisions of Sections 2, 8 and 17B of the EPF Act as quoted above gives a clear picture that the liability to pay contribution and other sums due from the employer on transfer of an establishment is specifically provided in Section 17B of the EPF Act. The principle behind it is that the employer, who is liable to pay u/s 6 of the Act the contribution and other sums, cannot by reason of its owning or occupying the establishment on transfer be permitted to avoid such liability and, therefore, provision is made u/s 17B of the Act, that the employer as well as the transferee shall be jointly and severally liable to pay the contribution and other sums up to the date of transfer. This speaks that by reason of the transfer, the liability on the employer would not cease, but would continue to exist and would also be fastened upon the transferee, though limited to the value of the assets obtained by the transferee by such transfer. The transfer by the employer of the establishment contemplated u/s 17B is an act by the employer. Here is a case where the transfer has not been made by the employer but after seizure of the unit/establishment, the same was transferred by the OSFC to the present petitioner. There is no indication that Section 17B contemplates transfers otherwise than by an employer as defined in the EPF Act in relation to an establishment. By a Court sale or otherwise a transfer takes place by operation of law and not by any transaction inter vivos. In that sense, it is an involuntary sale against the wishes of the person whose property is sold. That can hardly be called a transfer, as ordinarily understood, which connotes a voluntary transaction entered into between two parties. In this connection it has also to be remembered that the provisions of the Transfer of Property Act generally dealing kinds of transfers do not affect transfer by operation of law, or by or in execution of a decree or order of a Court of competent jurisdiction u/s 2(d) of the Transfer of Property Act.

It is submitted that this is an identical case where the petitioner has not purchased the property from the defaulter of respondent Nos. 1 and 2 but it has purchased the property in auction sale conducted by respondent Nos. 3 and 4 in recovery of their dues from respondent Nos. 1 and 2 and, therefore, it cannot be said to be a transfer made by respondent Nos. 1 and 2 in favour of the petitioner.

9. In reply to this, Mrs. Maldhure, learned Counsel appearing for respondent Nos. 1 and 2, placed reliance on the decision of the learned Single Judge of this Court in the case of Vemly Hotels v. Kuldeep Singh and Ors 1987(55) F.L.R. 183 According to Mrs. Maldhure, this Court has held in the said decision that the expression of "employer" u/s 93-A of the ESI Act means owner of factory or

establishment who is entitled to transfer such establishment and though the said transfer has been made through MSFC, ultimately it is assets of the owner which have passed on to the petitioner and, therefore, they are liable to pay the dues of the principal employer towards contribution of the employer. It is submitted that in *Vemly Hotels*" case, it was held as under :

It must be clearly borne in mind that the liability to pay contribution under the provisions of the Act is in respect of factory or establishment and the principal employer is a person who owns such factory or establishment, while the immediate employer is one who conducts such factory or establishment. Shri Shah urged that expression "employer" is not defined under the Act, but overlooks that the import of that expression can be well gathered from the definition of other terms defined u/s 2 of the Act. Section 2(9) of the Act defines "employee" and means any person employed for wages in connection of the work of a factory or establishment to which the Act applies and who is directly employed by the principal employer or through an immediate employer on the premises of the factory or establishment. The expression "immediate employer" is defined u/s 2(13) of the Act and in relation to employees means a person who has undertaken the execution on the premises of a factory or establishment to which the Act applies or who under the supervision of the principal employer carries on work at the factory or establishment. The term "principal employer" is defined u/s 2(17) of the Act and means in a factory, the owner or occupier of the factory and in the establishment any person responsible for supervision and control of the establishment. The perusal of this definition would make it clear that the expression "employer" u/s 93A of the Act really means the owner of the factory or the establishment who is entitled to transfer such establishment. The trustees continue to be the owner of the Hotel all along and various terms of the agreement entered into by the trustees with Merchant Hotels or Vemly Hotels make it crystal clear that the dominance or the ownership over the factory or establishment was never transferred or parted with by the Trustees. The trustees made it repeatedly clear by various clauses of the agreement that the Trustees continue to be the owner of the building as well as of other paraphernalia which is used for the purpose of running the hotel. The title or the ownership of Hotel was never transferred but continued to remain rested in the trustees and the trustees merely permitted the conductor to run the hotel on behalf of the trustees and as their agent. It is, therefore, obvious that the trustees were the principal employer and in that capacity their liability to make contribution under the Act never ceased. Section 40 of the Act is a charging Section and provides that the principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution. In view of Sub-section (1) of Section 40 the trustees cannot divest their liability by executing agreements permitting the Agents to conduct the hotel. In my judgment, the Deputy Regional Director was perfectly justified in holding that the trustees were responsible for payment of the contribution

and, therefore, the petitioner cannot escape the liability by taking a stand that merely because a property was purchased through M.S.F.C., the petitioner can disown its liability to pay the dues of the employer whose property has been purchased by the petitioner as the liability to pay the dues will pass with the property/assets which are transferred in favour of the third party.

10. Mr. Padiyar, learned Counsel for the petitioner, submitted that Vemly Hotels" case was considered by the Division Bench of the Allahabad High Court in the case of Swadeshi Cotton Mills Vs. Regional Director, ESIC, and this decision almost covers the issue as to the liability of a purchaser to whom the property is not transferred by the original employer and has placed reliance on the finding in the said case recorded in paragraphs 6, 7 and 9 of the reported judgment in which it was observed as under:

6. Counsel for the respondent relying on Section 93-A of the Act, 1948, argued that both the employer and the person to whom the establishment was transferred, shall jointly and severally be liable to pay the amount due in respect of any contribution or any other amount payable under this Act. Section 93-A relates to the cases involving transfer of the factory or establishment from one person to another. If a factory is transferred either in whole or part by an employer by sale, gift, lease or licence or in any other manner whatsoever, then by virtue of Section 93-A the employer or the transferee to whom the factory is so transferred shall jointly and severally be liable to pay the amount due in respect of any contribution payable under this Act in respect of the periods upto the date of such transfer, (emphasis supplied by us). Relying on the delineated portion occurring in Section 93-A, the Counsel for the respondent submitted that the National Textile Corporation, whom the textile undertakings stood transferred and in whom they stood vested, is jointly and severally liable to pay the demand raised under the impugned notice (Annexure 2 to the writ petition). Section 93-A can be invoked by the respondent only when there was transfer of undertaking. Admittedly, the undertakings in question had been acquired by the Central Government under the Act of 1986. The question is whether acquisition amounts to transfer? For convenient appreciation, Section 93-A of the Act of 1986 is reproduced below :

Where an employer, in relation to a factory or establishment, transfers that factory or establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the factory or establishment is so transferred shall jointly and severally be liable to pay the amount due in respect of any contribution or any other amount payable under this Act in respect of the periods upto the date of such transfer:

Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.

7. The undertakings in question were not transferred to the Central Government by way of sale, gift, lease or licence. The submission of the Counsel for the

respondent is that the expression "in any manner" occurring in Section 93-A, is wide enough to take "acquisition by Central Government" within its sweep. We do not agree with this submission. The phrase "in any other manner" applying the principle of ejusdem generis will take its shade or colour from the preceding words, namely, sale, gift, lease or licence. Transfer by sale, gift, lease or licence is always voluntary and that element is missing in acquisition. The expression "in any other manner" appearing in Section 93-A, cannot be applied to a mode of transfer which is not voluntary. Acquisition is always done in public interest by Government and in acquisition the element of compulsion is more dominant than consent, or willingness. We are therefore, of the considered view that the expression "in any other manner" occurring in Section 93-A of the Act of 1986, cannot take within its sweep the transfer, which is a consequence of acquisition. The Counsel for the respondent made a queer argument before us that the Act of 1986 itself uses the term "transfer" in Section 3 and elsewhere. An Act has to be interpreted in totality and not by picking up solitary words. The entire Act of 1986 is aimed at acquisition and that does not refer to a transfer by way of sale, gift, lease or licence or in the like manner.

9. The Counsel for the respondent then relied on *Vemly Hotels v. Kuldeep Singh and Ors.* In this case "Hotel Bombay International" belonged to a trust. By agreement dated 24-9-1968, the trustees allowed Merchant Hotels Private Limited to conduct the hotel for a period of five years from 1-8-1968. The hotel was then conducted by Merchant Hotels Private limited. The trustees executed another agreement dated 13-5-1979 in favour of Vemly Hotels, whereby Vemly Hotels were allowed to conduct the hotel from 1-8-1978 to 31-3-1983. The question was whether Merchant Hotels Private Limited and Vemly Hotels were liable to pay contribution. On these facts, the Bombay High Court held that there was not transfer of ownership in favour of trustees. It was held that the trustees continued to be the owners of the hotel all along and the trustees simply transferred the interest of conducting the hotel initially in favour of Merchant Hotels Private Limited and subsequently in favour of Vemly Hotels. Taking such a view, it was held that the liability of the trustees is squarely attracted under the provisions of Section 93-A of the Act and the trustees and the person conducting the hotel is obviously jointly and severally liable to pay the amount in respect of the contribution. The Bombay High Court took this view taking cognizance of the fact that Section 93-A was inserted with effect from 1-9-1975 with an object that the liability in respect of payment of any contribution under the Act is not defeated by transfer of any interest in the factory or establishment to which the provision of the Act apply. The trustees, no doubt, being the owners were employers and their agents, namely, Merchant Hotels Private Limited and Vemly Hotels were immediate employers and were, therefore, liable to pay contribution. In this authority no question was involved whether acquisition amounts to transfer u/s 93-A of the Act and hence it is misplaced.

11. Insofar as the facts are concerned, it is not in dispute that the petitioner has purchased the property in an auction sale conducted by respondent Nos. 3 and 4

under the deed of assignment and sale dated 26-6-1995 which is Annexure I which clearly records that M/s J. J. Cold Tread, Nagpur was a partnership firm doing business and had mortgaged their property, i.e. all that land, hereditaments and premises situated at Plot No. U-149, admeasuring 1000 sq. meters in the Nagpur Industrial Area of MIDC within village limits of Nildoh in the Taluka and Registration Sub-District Hingna and District Nagpur with the consent of MIDC. The said firm borrowed a sum of Rs. 6,75,000/- and thereafter further amount of Rs. 25,000/- i.e. in all a sum of Rs. 7,00,000/- by mortgaging their property in favour of respondent Nos. 3 and 4 but having failed to repay the same, respondent Nos. 3 and 4 on 20-1-1994 took over possession of the said property u/s 29 of the S.F.C. Act, 1951 and thereafter advertised the said property for sale by calling sealed tenders from the public and as the petitioners were the highest bidder, the property has been conveyed in their favour. In Clause 6 of the said lease, it is made clear that the parties have agreed and declared that all the liabilities as to rights, rents, rates, taxes and dues in respect of the said assets, if any which may be due or which may hereinafter fall due and the MIDC charges, G.P. taxes, local cess, if any, outstanding upto this date and transfer fees as may be demanded by MIDC and of the MSEB shall be paid and satisfied by the purchasers and the Corporation shall not be in any way liable to make good the expenses incurred by the purchasers on any account.

12. Except for this liability, the petitioners have not taken over any liability of the establishment which was registered under ESI Act with respondent Nos. 1 and 2. There is no doubt that liability for payment of contributions u/s 40 of the ESI Act is on the principal employer. u/s 41 the principal employer has to recover the contributions in respect of an employee from the immediate employer and Act imposes obligation on the employer to pay both the contributions, i.e. employer's contribution and employee's contribution, in the first instance subject to a right of reimbursement from employee or the employees concerned in regard to his or their portion or portions of the same. That being so, even if the employer has not deducted the employees' contributions from their wages, he can be made liable for the same. Therefore, it is employer's primary liability to pay the employer's as well as employees' contribution and harmonious construction of Sections 41 and 42 conclusively lays down that a principal employer can recover from the immediate employer only such and no other amounts which the principal employer had paid strictly in accordance with Section 42(2) of the ESI Act.

13. Insofar as the dues of respondent Nos. 1 and 2 are concerned, they were admittedly against M/s J.J. Cold Tread, a partnership concern of Shri Jagjitsingh s/o Diwansingh Bedi, Shri Jitinderpalsingh s/o Avtarsingh Watta and Shri Gurinderpalsingh s/o Avtarsingh Watta.

14. It is interesting to note that the respondent Nos. 1 and 2 have not placed on record any efforts on their part to recover the said dues from them and only after their property came to be sold in auction by respondent Nos. 3 and 4 that they

have tried to enforce their right to recover dues by invoking provisions of Section 93-A against the petitioner.

15. Plain reading of Section 93-A also makes it clear that the word "transfer" in Section 93-A has a different connotation than "transfer" under the Transfer of Property Act; it means creation of rights whether by sale or gift or any other manner whatsoever; the Section seeks to avoid the employer's mischief by executing agreements of transfer in favour of a third party and yet retaining his dominance over the factory. It is this principle which was highlighted by the decision of this Court between Vemly Hotels and Kuldeep Singh and Ors.. Such is not the case insofar as the petitioners are concerned and as rightly submitted by Mr. Padiyar, the petitioner cannot be fastened with the liability to pay dues as in the first place he has not accepted the liability to pay the dues of respondent Nos. 1 and 2 and secondly, he has purchased the property not by virtue of transfer effected by employer but by intervening secured creditor, i.e. respondent Nos. 3 and 4 and, therefore, in the facts of the case, the decision of the Bombay High Court in Vemly Hotels" case does not in any manner assist the respondent Nos. 1 and 2. On the other hand, the cases of Suburban Ply and Panels (P) Ltd. v. Regional Provident Fund Commissioner and Ors 2004 Lab.I.C. 1190 and Swadeshi Cotton Mills Vs. Regional Director, ESIC, squarely apply to the case of the petitioner.

16. In the case of ESI Corporation v. Balaraman 2001 (1) CLR 617 the Division Bench of High Court of Kerala was required to examine an identical issue. In the said decision, the Kerala High Court observed in para 2 as under :

2. The main contention taken up before this Court is that u/s 93A of the Employees' State Insurance Act, when transferee received the factory by sale, lease or gift, he is liable to pay the contribution. Section 93-A of the ESI Act reads as follows :

93.A. Liability in case of transfer of establishment Where an employer, in relation to a factory or establishment, transfers that factory or establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the factory or establishment is so transferred shall jointly and severally be liable to pay the amount due in respect of any contribution or any other amount payable under this Act in respect of the periods upto the date of such transfer.

Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.

As stated in Section 93A the above Section will be applicable when the employer transfers the establishment in whole or part by sale, gift, lease or licence or in any other manner. Therefore, it is very clear that the Section will be applicable only when the employer transfers the establishment. Here the respondent bought the establishment from the Court Receiver free from such liabilities and not from the previous employer. Therefore, Section 93A is not applicable in this

case. Hence, for the prior period before the respondent took the factory on lease or purchased the factory from the Court Receiver, respondent cannot be made liable for the arrears of contribution.

17. Therefore, we have no hesitation to hold that the impugned notice and order issued by the respondent Nos. 1 and 2 deserve to be quashed and set aside as the petitioner cannot be made to pay the dues of the original employer whose property came to be auctioned by respondent Nos. 3 and 4 for their failure to discharge their liability towards loan obtained from respondent Nos. 3 and 4 and it cannot be said to be a transfer made in favour of the petitioner of the establishment by the original/principal employer. Therefore, we are inclined to allow the petition.

18. In the result, the writ petition is allowed. Rule is made absolute in terms of prayer Clause (1).

Needless to say that if the respondents wish to proceed against the erstwhile owners of the establishment, they may do so in accordance with law as it does not prevent them from recovering the amount from the erstwhile employer.

In view of the fact that the petitioner succeeds in the petition he is entitled to withdraw the sum deposited in terms of the order dated 20-11-1996. On petitioner's making application, Additional Registrar (as was earlier designated) would pay the amount deposited by the petitioner along with interest accrued thereon to the petitioner. Rule is made absolute in above terms with no order as to costs.