(2001) 09 CAL CK 0012

In the Calcutta High Court

Case No : Writ Petition No. 18297 (W) of 1998

Biswanath Chowdhury APPELLANT

Vs

State of West Bengal and Others RESPONDENT

Date of Decision : 28-09-2001

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14A, 14B, 2

Citation : (2002) 1 LLJ 997

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : Basudev Ghosh, for the Appellant; Vinoy Mishra, for the Respondent

Judgement

D.K. Seth, J.—It is pointed out from the Recovery Certificate contained in Annexure ''C'' that the dues that were sought to be recovered were for the period October, 1989 till February, 1992. In respect of these dues the Provident Fund Authority had purported to proceed against the petitioner on the ground that he was the Chairman of the Establishment. From the: resolution contained in Annexure ''A'' it is pointed out that the petitioner was not the Chairman but the Managing Director of the Establishment and that one Mr. Arindam Kar was appointed Managing Director of the company with effect from October 18, 1989 and the petitioner ceased to be the Managing Director of the company with effect from October 18, 1989. The dues for the month of October, 1989, was payable on November 15, 1989. Thus it is contended that the petitioner cannot be held responsible for payment of contribution of the Provident Fund dues for the period in respect whereof recovery is being sought for and during which the said Mr. Kar was the Managing Director.

2. It is also contended that the petitioner was not the occupier as defined in the said Act and liable for payment therefore in the absence of any notice served under the Factories Act. Therefore, proceedings cannot be proceeded against the petitioner.

3. It is further contended that for the self-same dues a criminal proceeding have, since been initiated against the petitioner which also cannot be proceeded with, as against him.

4. Mr. Mishra, learned counsel for the respondents, on the other hand, contends that the fact of initiation of criminal proceeding is not brought on record as such, no relief can be granted. This is being replied by the learned counsel for the petitioner, relying on the prayer for apprehension against initiation of any criminal proceeding. The learned counsel had also produced an order dated October 18, 2000 pointing out to the last paragraph to contend that warrant of arrest was proposed to be issued against his client alongwith Mr. Kar for detaining him in prison for the dues. Relying on this order, Mr. Mishra points out that it includes the dues from January, 1989, that is the period during which the petitioner was admittedly the Managing Director. Therefore, no relief can be had at all.

5. After having heard the learned counsel for the parties, it appears that the facts are not being disputed to the extent that the petitioner ceased to be the Managing Director since October 18, 1989 in terms of resolution contained in Annexure ''A''. Therefore, the recovery of the dues for the period October, 1989 till February 2, 1992 cannot be proceeded against the petitioner. It can well be proceeded against Mr. Kar or the petitioner until he ceased to be the Managing Director or otherwise than what is evident from the resolution contained in Annexure ''A''.

6. In order to find out how far the petitioner is responsible for the default, or in other words how far the recovery can be made from him and how far he is liable for the criminal offence, the scheme of the Act may be examined. Section 6 of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 provides for contribution to the Fund by the employer. Paragraph 30 of the Employees'' Provident Funds Scheme imposes the liability on the employer to pay both employers'' contribution and the employees contribution. u/s 8 any amount due is to be recovered from the employer in the manner specified in Sections 8-B to 8-G. As provided in Section 8B recovery is to be made from the establishment or the employer in any one or more of the modes provided therein. Section 14(1-A) provides for "penalty on the employer in default in compliance of Sections 6(a), 6C or Sections 17(3), 17(3-A)(a) of the Act in relation to inspection charge or Paragraph 38 of the Scheme in relation to administrative charge as the case may be. If the employer is a company then every person in charge of the company or responsible to the company for the conduct of the business of the company as well as the company are liable to be proceeded against for the offence as provided in Section 14A. Section 14B provides for recovery of damage from the employer for default of the employer in payment of contribution to the fund. Paragraphs 35 and 36 of the Scheme casts a liability upon the employer to prepare contribution card and submit return to the commissioner. Paragraph 38 mandates the employer to deduct employees'' contribution from the wages and

pay the same together with its own contribution to the Fund within 15 days from the close of the month.

7. Thus we find that the liability is that of the employer, both in respect of recovery of dues or damages as the case may be and the offences as well. When the employer is a company the person in charge of or liable to the company for its conduct of business can be proceeded against, inasmuch as a company is juristic but artificial person. It functions through its officers: The State Vs. S.P. Bhadani and Others, . In the present case the employer is admittedly a company. It is therefore necessary to examine whether the petitioner could be held to be such officer or in other words he can be brought within the term employer having regard to Section 14A of the Act.

8. The term employer is defined in Section 2(c) of the Act. According to the definition the term ''employer'' shall mean: (i) if the establishment is a factory (a) the owner or occupier or its agent, (b) legal representative of the deceased owner or occupier, (c) the person named as manager of the factory u/s 7(1)(f) of the Factories Act, 1948; (ii) in relation to any establishment other than a factory (a) the person or authority having ultimate control over the affairs of the establishment, (b) the manager, managing director or managing agent where the affairs are entrusted to such manager, managing director or managing agent, as the case may be.

9. The word ''occupier of a factory'' defined in Section 2(k) means (a) the person having ultimate control over the affairs of the factory and (b) the managing agent where the affairs are entrusted to such agent.

10. Admittedly the petitioner was not a managing agent upon whom the affairs were entrusted as such agent, he is also not the legal representative of the owner or occupier, he has also not been named as manager u/s 7(1)(f) of the Factories Act, 1948, he is also not the owner. Now it is to be examined whether he is the occupier of the factory or he had the ultimate control over the factory or he had the ultimate control over the affairs of the establishment. The term ''occupier'' of the factory has been defined in Section 2(k) of the Act. This definition is independent of the definition of occupier defined in Section 2(n) of the Factories Act. Admittedly he was the managing director till October 18, 1989. He was replaced by one Sri Kar by a resolution. His appointment as such was controlled by some other authority. Thus from the facts it appears that he did not have the ultimate control over the affairs of the establishment except in the capacity of managing director, when it was so entrusted to him. Thus he cannot come within the term of occupier. In either case, whether the establishment is a factory or an establishment other than a factory the petitioner comes within the term employer to shoulder all liabilities of the employer only as managing director.

11. As such managing director he is exposed to all the liabilities of the employer subject to Sections 8-B and 14B as well as, Sections 14(1-A) and (1-B) of the

Act. He will be so liable during the period when the affairs of the company was so entrusted to him or in other words, during the period he held the post of managing director. Admittedly he has replaced as such managing director by one Mr. Kar on and from October 18, 1989. He will remain liable as such for the period till September 1989. He cannot be made liable for any period thereafter until he is re-elected, subsequently. The liability accrues on the close of the month and is payable within 15 days from such close of the month under Paragraph 38 of the Scheme. Therefore, the dues for the month of September, 1989 was due on October 15, 1989. The dues of the month of October, 1989 was payable on November 15, 1989. He is not the managing director either at the close of the month of October, 1989 or on 15 days thereafter when the dues were payable. Therefore, he cannot be made liable for any period after he ceased to be the managing director. Inasmuch as he does not come within the definition of employer for the period involved in this case.

12. As such, in the facts and circumstances of the case, the recovery of the PF dues for the period October, 1989 till February, 1992 cannot be proceeded against petitioner, unless he is shown to be the managing director at any point of time during this period or he is the owner or occupier.

13. Therefore, the proceedings would stand quashed as against him as managing director for the period during which he was not the managing director. Similarly the criminal proceeding can also not be proceeded against him as such managing director for the same reason as above.

14. In the circumstances the respondents shall be free to proceed against the establishment or Mr. Kar and other persons either as Managing Director or owner or occupier, as the case may be, in respect of the dues for the period October, 1989 till February, 1992. So far as the petitioner is concerned, for the selfsame dues he cannot be proceeded against. Similarly, the respondents shall also take steps for withdrawal of the prosecution for the said period as against the petitioner from the criminal Court. But this order will not prevent the respondents from initiating any proceeding for recovery of dues for any period during which the petitioner was the Managing Director till September, 1989 or on any earlier or subsequent period, if he is found to be the Managing Director or the owner or occupier of the company, as the case may be. With these observations, this writ application is disposed of.

15. The respondents shall not give any effect to the order dated October 18, 2000 so far as the petitioner is concerned in respect of the dues for the period October, 1989 till February, 1992.

16. It will be open to the petitioner to appear before the Criminal Court and point out that he is not responsible as observed above and obtain proper order for discharge of the criminal case as against him.

17. There will be no order as to costs.

18. The allegation made in the petition are deemed to have been admitted.

19. Urgent xerox certified copy of this order, if applied, be supplied within 7 days.