(1991) 02 BOM CK 0075

In the Bombay High Court

Case No : Writ Petition No. 1933 of 1986

Employees State Insurance Corporation and another APPELLANT

Vs

G.N. Mathur and others RESPONDENT

Date of Decision : 07-02-1991

Acts Referred:

Constitution of India, 1950 — Article 226
Employees State Insurance Act, 1948 — Section 2, 40, 75
Factories Act, 1948 — Section 2

Citation : (1991) 3 BomCR 436 : (1991) 63 FLR 115 : (1992) 2 LLJ 689

Hon'ble Judges : S.M. Daud, J

Bench : Single Bench

Judgement

1. A somewhat difficult question arises inn this petition under Article 226 of the Constitution vis-a-vis the liability of a Technical Director designed as an "occupier" under the Factories Act 1948, but sought to be made personally liable for recovery of the employer''s share of contributions payable u/s 40 of the Employees State Insurance Act, 1948 - hereinafter referred to as the ''ESI Act''.

2. Respondent No. 1 G. N. Mathur was the Technical Director of a company doing business in the name and style of Elphinstone Spinning and Weaving Mills Ltd. which is respondent no. 11 to the present petition. The other Directors of the company were respondent nos. 4 to 10. The employer''s contribution under the ESI Act had not been remitted by the company for the period January 1977 to September 1983 - both inclusive. For that reason the 1st petitioner - hereinafter referred to as ''the Corporation'' - gave notices to Mathur and respondent nos. 4 and 7 to 10 to remote in unpaid contributions at once. In the meantime the company came to be taken over and now vest in the 3rd respondent being the National Textile Corporation. The company questioned the take over and has succeeded in this Court. An appeal against this Court''s decision has been admitted and is pending before the Apex Court at Delhi. Respondents 4 and 7 to 10 preferred Writ Petition Nos. 19 to 22 and 228 all of 1985 respectively questioning the notices issued to them. Those partitions were heard together and

decided under a common judgment by Mr. Justice Dudhat on October 26, 1990. Therein an affidavit came to be filed by petitioner no. 2, Achar. The stand taken by Achar was that Mathur though designated as an "occupier" was not empowered to deal with the financial matters. The financial control was retained entirely in the hands of respondent no. 4. This was to off-set the attempt of the petitioners in the five petitions mentioned above to absolve themselves on the pleas that the ''occupier'' had been designated and for that reason they could not be proceeded against. The aforementioned petitions of respondents nos, 4 and 7 to 10 succeeded and the notices issued against them were quashed. So far as Mathur is concerned the move made by him was to approach the E.S.I. Court by means of an application u/s 75 of the E.S.I. Act. He sought a declaration that he was not liable to pay any part of the amount due from the company as the employer''s share of the contribution. The application was opposed by the petitioners who contended that Mathur at any rate was personally liable fore the employer''s share of contribution by virtue of his being an ''occupier'' under the provisions of the Factories Act and the liability cast upon such an ''occupier by the E.S.I. Act vis-a-vis Section 2(17) of the latter Act. The Court presided over by the 2nd respondent sustained the contention advanced by Mathur and that is why the petitioner have come to this court.

3. The stand taken by the petitioner is that the E.S.I. Act renders ''a principal employer'' liable to remit the contributions payable by the employer as also employees. This liability is cast upon the principal employer u/s 40 of the E.S.I. Act. The expression ''principal employer'' means in the case of a factory the ''owner'' or ''occupier'' of the factory. An ''occupier'' under the Factories Act, 1948 means ''the person who has ultimate control over the affairs of the factory''. Mathur was designated as such ''occupier'' and would therefore be a principal employer. Consequently, he had been rightly proceeded against and the 2nd respondent was in error in quashing the notices issued to Mathur. Mathur has the support of respondents nos. 4 to 11 and the stand taken by all of them is that Mathur was a mere Technical Director. He was designated as an ''occupier'' under the Factories Act, 1948 to ensure compliance with the requirements of that Act is no far as the provisions thereof related to the responsibility and accountability of the management to ensure industrial safety and penalties specified for the mishaps where the same had occurred on account of any lapse on the port of the management. This did not render the ''occupier'' principally liable for remitting contributions under the E.S.I. Act 1948. In any case, Mathur was a Technical Director for the very short period of May 1980 to October 31, 1983. For the period prior and subsequent to these months he could not be held accountable. The 2nd respondent has come to the right conclusion and the petition was without merit.

4. Learned Counsel for the parties have been heard. Mr. Mehta representing the petitioners submits that an unduly restricted view of the relevant provisions of the ESI Act has been taken by the 2nd respondent. The expression ''principal employer'' has been extended to cover the case of an ''occupier'' of factories.

Under the factories Act, an ''Occupier'' is deafened as a person having ultimate control over the affairs of the factory. Therefore, whoever is designed as such ''occupier'' must be deemed to have the ultimate control of over the affairs of the factory contemplated by the Factories Act, 1948 and is therefore a principal employer under the E.S.I. Act. Being an ''occupier'' and therefore a principal employer. Mathur became liable to collect and remit the employer''s contributions, payable under the E.S.I. Act. The 2nd respondent''s reliance upon the judgments in Suresh Tulsidas Kilachand v. Collector of Bombay reported in 1984 Mah. L.J. Page 117, was unwarranted. That case dealt only with the case of persons on the Board of Directors of a company who were not ''occupiers''. Therefore, the ratio of that decision had no application to the case of Mathur, who had been proceeded against in his capacity as an ''occupier'' which expression was covered by the definition of ''principle employer'' under the ESI Act. There is an element of plausibility in this submission advanced by Mr. Mehta. But the decision in the aforementioned case really excludes all Directors even those designated as ''occupiers'' from the liability to be proceeded against when there has been a lapse on the part of a company in respect of remittances of the employer''s and employees'' share of contribution under the ESI Act. At page 122 of the judgment the question that arose before the Division Bench has been set out in these words :-

"The definition of ''principle employer'' refers to the ''occupier of the factory'' and u/s 2(15) of the Act, it is expressly provided that the occupier of the factory shall have the same meaning assigned to it in the Factories Act, 1948. It is therefore, necessary to refer to the definition of there term ''occupier'' in the Factories Act which is to be found in Section 2(n) of that Act and which, so far as it is material for our purpose reads as follows :-

''.......''

We are really concerned only with the first part of the definition and it is obvious on a plain reading of that definition that for ascertaining whether a person is an occupier or not, it has to be ascertained whether he is in ultimate control of the factory."

Proceeding further the Bench goes on to reproduce the contention advanced on behalf of the Directors before it, and this, in these words :-

"The further argument .... is that in the case of a factory it is owners by a Company and the Mills in all the three appeals are admittedly owned by public limited companies who are the owners and, therefore, the principal employers. The further arguments is that where the Company is owner of a factory, notwithstanding the fact that the occupier of the factory is also the principal employer as defined in Section 2(17) of the Act, the directors of the Company can never be occupiers individually, because according to the learned Counsel, no individual director exercised ultimate control over the affairs of the factory .... It is also pointed court that it could not have been in the contemplation of the

Parliament that any person who is an occupier or who exercised control would be personally liable for the dues which were required to be deposited by the Company, because in a given case a person who is an occupier may not have anything to do with the financial affairs of the Company and as the argument was put, he cannot even have the authority to sign a cheque for his own salary ...... Mr. Setalvad has contended that the Parliament has made a special provision in so far as penalties under the Factories Act are concerned and the provisions of Section 8100, according to the learned counsel, indicate that a company or a firm or other association of individuals can be an occupier, but for the purpose of facilitating taking penalty proceedings the legislature has statutorily identified certain person who can be prosecuted. The argument is that there is no such express provision under the Act passing on the liability of the company to a director of the company personally by artificially making a director an occupier for the purpose of the Factories Act where the company is the owner of the factory ... It may be pointed out that the definition of ''occupier'' in Section 2(n) of the Factories Act refers to the person ''who has ultimate control over the affairs of the factory'' and not ''affairs of the company''. But even under the Companies act so far as the affairs of the company are concerned, the ultimate control of the company will not lie with any particular director at all. The directors act collectively and they function collectively as a Board of Directors .... The proposition that each individual director must be held to be in control of a factory belonging to a company is therefore wholly inconsistent with the general provision of the Company law where are directors function as a board or body and not an individuals ...... Having considered the arguments advanced we are unable to agree with the learned Single Judge, when he held that the directors are occupiers by virtue of being directors. In the instant case, the notices which have been issued to the petitioners are merely on the footing that they were directors of the companies. We have also pointed out that sat one point of time there can be only one principal employer, and really speaking, if a company is a principal employer the question as to whether the directors are occupiers or not is wholly irrelevant. The only proceedings which would have been taken for the recovery of the amount due on account of the employer''s contribution would be against the company alone and not against the directors personally and no question as to whether the directors were occupiers can arise in these cases."

5. From the above, the conclusions emerging are (i) that in the case of a public limited company as was respondent no. 11, the ownership vests not in the Board of Directors irrespective of whether they be technical or otherwise, but the company; as whole, i.e. the general body of share-holders inclusive of the Directors, assuming that they hold any shares; (ii) the Directors as such as this includes even those designed as ''occupier'' for the purpose of the Factories Act, 1948, would not be personally liable for the dues owing by a company under the E.S.I. Act; and (iii) the E.S.I. Act when including an ''occupier'' in the definition of ''principle employer'' does not thereby render the ''occupier'' personally liable for the employer''s share of the contribution. A question may arise as to why an

''occupier'' of the factory has been included in the definition of ''principal employer'' in the E.S.I. Act. The limited purpose for which an ''occupier'' has to be designated under the Factories Act, 1948, is to enable the accountable person liable for prosecution under the various sections of that enactment. This question was considered in S. Gupta v. State reported in the Indian Factories Journal, Vol. 49, 1976, Page 420. Under the E.S.I. Act the designation may be for a person to be addressed in case the company defaults in the remittance of contributions. In any cases, there is no specific provision permitting the initiation of recovery proceeding again an ''occupier'' in his personal capacity for the failure of the company to remit contributions under the enactment. For that reason, the notices issued to Mathur were uncalled for and the declaration given by the 2nd respondent has to be affirmed. So affirming, I discharge the rule issued in this case, leaving parties to bear their own costs.