**(1993) 04 BOM CK 0040**

**In the Bombay High Court**

**Case No :** Appeal No. 928 of 1991 in Writ Petition No. 1933 of 1986

Employees'' State Insurance Corporation and Another — APPELLANT

Vs

G.N. Mathur and Others — RESPONDENT

**Date of Decision :** 07-04-1993

**Acts Referred:**

Employees State Insurance Act, 1948 — Section 2(15), 2(17), 40(1), 75
Factories Act, 1948 — Section 100, 100(2), 2, 92

**Citation :** (1993) 3 BomCR 351 : (1993) 95 BOMLR 740 : (1993) 67 FLR 964 : (1993) LabIC 1867 : (1994) 2 LLJ 138 : (1994) MhLj 855

**Hon'ble Judges :** M.L. Pendse, J;A.A. Cazi, J

**Bench :** Division Bench

## Judgement

M.L. Pendse, J.—A short but interesting question falls for determination in this appeal preferred by Employees'' State Insurance Corporation against judgment dated February 7, 1991, delivered by learned single Judge in Writ Petition No. 1933 of 1986. The facts which give rise to the judgment are as follows :

The appellants-Corporation is constituted under the provisions of The Employees'' State Insurance Act, 1948 (hereinafter referred to as "the Act") and Elphinstone Spinning and Weaving Mills Limited was an establishment'' contemplated under the Act and was required to deposit employers'' contribution with the Corporation under the provisions of the Act. Respondents Nos. 4 to 10 are Directors of Elphinstone Spinning and Weaving Mills, which is respondent No. 11. Respondent No. 11 was taken over by Respondent No. 3 National Textile Corporation after the Ordinance dated October 18, 1983 was promulgated and which was subsequently made into Act known as Textile Undertaking (Taking Over the Management) Act, 1983. Prior to the date of take over Respondent No. 1 was appointed as Technical Director and was nominated as an ''occupier'' of the Mills for the period commencing from May 3, 1980 and ending with November 1, 1983.

The employers'' contribution for the period commencing from January 1977 and ending with September 1983 was not remitted by the Mills and thereupon the

 

Corporation served notices dated November 28, 1984 upon respondent No. 1 and respondents Nos. 4 to 10 to remit unpaid contribution. After service of notice, the Mills was taken over and the proceedings instituted by the Company to challenge taking over of the Mills are still pending before the Supreme Court.

2. Respondent No. 4 and Respondents Nos. 7 to 10 preferred Writ Petitions Nos. 19 to 22 and 228 of 1985 on the Original Side of this Court under Article 226 of the Constitution complaining that the Corporation cannot demand contribution from the Directors as the Directors are not liable under the provisions of the Act. The claim of the Directors was upheld by the learned single Judge by judgment dated October 26, 1990. The appeal preferred by Corporation before the Division Bench ended in dismissal and SLP filed in the Supreme Court is pending disposal. After notices issued against Directors were quashed by this Court, respondent No. 1 approached the Employees'' State Insurance Court by filing an application u/s 75 of the Act for a declaration that he was not liable to pay any part of the amount. The application was resisted by the Corporation claiming that Respondent No. 1 was personally liable for the employers'' share of contribution by virtue of being an ''occupier'' and covered by provisions of Section 2(17) of the Act. The contention raised by respondent No. 1 was upheld by the Employees'' State Insurance Court by order dated April 23, 1986 and it was held that respondent No. 1 is not liable to pay the amount of Rs. 9,48,805.50 or any other amount which was due as employers'' contribution.

3. The Corporation preferred Writ Petition No. 1933 of 1986 under Article 226 of the Constitution on the Original Side of this Court to challenge the legality of order passed by the Employees'' State Insurance Court, inspite of the fact that an appeal is provided to this Court against the said order. The reason for not filing the appeal but a writ petition is not for to seek because the Corporation joined not only respondent No. 1 to the petition but the Directors Elphinstone Mills as party respondents and sought relief against respondent No. 1, as well as other Directors in respect of unmerited contribution. The trial Judge by impugned order dismissed the petition holding that the declaration given by the Employees'' State Insurance Court was in accordance with law and the Corporation could not seek any relief in the writ petition against the Directors of Elphinstone Mills in view of the earlier proceedings adopted by the Directors and decisions of this Court. The judgment of the learned single Judge is under challenge.

4. Mr. Mehta learned counsel appearing on behalf of the Corporation, at the outset, stated that the Corporation could not seek any relief against respondents Nos. 4 to 11 while challenging the order of the Employees'' State Insurance Court against Respondent No. 1. Mr. Mehta submitted that as the notice issued against the Directors fro recovery of employers'' contribution was struck down by this Court, it is not open for the Corporation to demand the identical claim in the present appeal. Mr. Mehta restricted his submission only in respect of the declaration granted by the Employees'' State Insurance Court in favour of the Respondent No. 1. Mr. Mehta submitted that respondent No. 1 was an ''occupier''

 

of the factory for the period commencing from May 1980 and ending with October 1983 and was, therefore, principal employer and liable to deposit contribution u/s 40(1) of the Act. Section 40(1) provides that the principal employer shall pay in respect of every employee both the employer''s contribution and the employees'' contribution. The expression "principal employer" is defined u/s 2(17) of the Act and means -

(i) in a factory, the owner or occupier of the factory includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under (the Factories Act, 1948), the person so named;

(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the head of the Department;

(iii) in any other establishment, any person responsible for the supervision and control of the establishment;

The expression "occupier" is defined u/s 2(15) of the Act and provides that the ''occupier'' of the Factory shall have the meaning assigned to it in the Factories Act, 1948.

The expression "occupier" under the Factories Act prior to its amendment in the year 1987 means the person who has ultimate control over the affairs of the factory and when the said affairs are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory. It is not necessary to refer to the amendment of the Section in the year 1987 save and except mentioning that the word "occupier" even after amendment means the person who has ultimate control over the affairs of the factory. Chapter-X of the Factories Act deals with subject of penalties and procedure and Section 92, inter alia, provides that in respect of any contravention of any of the provisions of the Act or the rules, the occupier and manager of the factory shall each be guilty of offence of contravention and punishable with imprisonment and fine. Section 100 which was on the statute book prior to year 1987, provided for determination of ''occupier'' in certain cases and Sub-section (2) of Section 100 reads as under :

(2) Where the occupier of a factory is a company, any one of the directors thereof, ***** may be prosecuted and punished under this Chapter for any offence for which the occupier of the factory is punishable :

Provided that the company may give notice to the Inspector that it has nominated (a Director, who is resident within India) to be the occupier of the factory for the purposes of this Chapter, and (such Director) shall, so long as he is so resident, be deemed to be the occupier of the factory for the purposes of this Chapter until further notice cancelling his nomination is received by the Inspector or until he (ceases to be a Director).

The plain reading of Sub-section (2) makes it clear that the company may nominate a Director to be the occupier of the factory for the purpose of Chapter X and such nominee shall be deemed to be the occupier of the factory for the purpose of Chapter X only.

5. Mr. Mehta submitted that respondent No. 1 was nominated as a Technical Director under Sub-section (2) of Section 100 of the Factories Act for the period commencing from May 1980 and ending with October 31, 1983. The learned counsel urged that once a respondent No. 1 was nominated as an occupier then respondent No. 1 becomes a principal employer as defined u/s 2(17) (I) of the Act and is liable to deposit employer''s contribution u/s 40(1) of the Act. Mr. Talsania, learned counsel appearing on behalf of the respondent No. 1, on the other hand, submitted that respondent No. 1 was nominated as occupier under Sub-section (2) of Section 100 of the Factories Act and such nomination was only for the purpose of Chapter X of the Factories Act and such nominee cannot be treated as an occupier because respondent No. 1 is not established to be a person who has ultimate control over the affairs of the factory as required u/s 2(n) of the Factories Act. In other words, the submission is that respondent No. 1 is not occupier u/s 2(n) of the Factories Act but was only deemed to be an occupier for the purpose of Chapter X on nomination under Sub-section (2) of Section 100 of the Factories Act. Mr. Talsania also referred to the fact that the Corporation in the proceedings instituted by the Directors to challenge service of notice for payment of employers'' contribution has stated on affidavit that respondent No. 1 was not empowered to deal with financial matters. The learned counsel urged that in these circumstances, respondent No. 1 cannot be held to be a principal employer u/s 2(17)(i) of the Act and consequently declaration of the Employees'' State Insurance Court cannot be faulted.

In our judgment, the contention urged on behalf of respondent No. 1 deserves acceptance. The plain reading of Sub-section (2) of Section 100 of the Factories Act makes it clear that the person nominated shall be deemed to be an occupier for the purpose of Chapter X only and this Chapter deals with the subject of penalties and procedure. In other words, a person nominated under Sub-section (2) would be required to face prosecution and punishment in respect of any contravention of the provisions of the Factories Act or rules framed thereunder. Such nomination which treats the nominee as a deemed occupier and only for Chapter X can by no stretch of imagination, be extended beyond the limited purpose for which the nomination was made. The person nominated as an occupier under Sub-section (2) of Section 100 cannot be treated as occupier u/s 2(n) of the Factories Act, unless such nominee has ultimate control over the affairs of the factory. It is possible that a person having ultimate control over the affairs of the factory may be nominated under Sub-section (2) of Section 100 but it is necessary that the nominee under Sub-section (2) must necessarily have the ultimate control over the affairs of the factory. Once this aspect is clear then it is obvious that Respondent No. 1 who was nominated under Sub-section (2) of Section 100 cannot be treated as an occupier unless it is established by the Corporation that respondent No. 1 had ultimate control over the affairs of the factory. Mr. Mehta found it extremely difficult to contend that respondent No. 1 had ultimate control over the affairs of Elphinstone Spinning and Weaving Mills. The learned counsel conceded that respondent No. 1 was not empowered to deal with the financial matters and nothing was produced before the Employers'' State Insurance Court to indicate that respondent No. 1 had ultimate control over the affairs of the Mills.

6. The expression ''ultimate control'' connotes that the person must have right to take policy decision in respect of running of the Mills. Respondent No. 1 was an employee who was merely designated as Technical Director, obviously for the purpose of nomination under Sub-section (2) of Section 100 and consequently can never be considered as an occupier u/s 2(n) of the Factories Act and, therefore, was not ''principal employer'' as contemplated u/s 2(17)(i) of the Act. It also cannot be overlooked that notice served upon respondent No. 1 demands employers'' contribution for the period commencing from January 1977 and ending with September 1983 and in any event, respondent No. 1 was not even a Technical Director for the entire period. Respondent No. 1 was Technical Director from May 1980 to October 31, 1983. The Employees'' State Insurance Court rightly pointed out the Corporations'' claim in the affidavit filed in petitions filed by the Directors in this Court that Ashokkumar Jalan, Director of the Company was in overall charge of the affairs of the Company and not respondent No. 1. The assertion of the Corporation clearly establishes that respondent No. 1 was not occupier u/s 2(n) of the Factories Act and consequently not the principal employer u/s 2(17)(i) of the Act. A faint effort was made by Mr. Mehta to suggest that respondent No. 1 can be treated as principal employer u/s 2(17)(iii) of the Act but the submission is misconceived as the Corporation failed to produce any material to establish that respondent No. 1 was responsible for supervision and control over the establishment. In our judgment, the declaration given by the Employees'' State Insurance Court does not suffer from any infirmity and the learned Judge was right in dismissing the petition.

7. Accordingly, appeal fails and is dismissed with costs.

8. Appeal dismissed.

 