

(1988) 08 MP CK 0048

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 35 of 1983

E.S.I. Corpn.

APPELLANT

Vs

Kailashchandra and Others

RESPONDENT

Date of Decision : 12-08-1988

Acts Referred:

Employees State Insurance (General) Regulations, 1950 — Regulation 10(B), 26, 27, 28, 29
Employees State Insurance Act, 1948 — Section 100, 2(17), 39, 40
Factories Act, 1948 — Section 40(1)

Citation : (1988) JLJ 647 : (1990) 1 LLJ 486 : (1988) MPJR 135

Hon'ble Judges : S.K. Dubey, J; P.D. Mulye, J

Bench : Division Bench

Advocate : N.C. Behal, for the Appellant; V.S. Kakje and S.L. Jain, for the Respondent

Final Decision : Dismissed

Judgement

Dubey, J.

This appeal u/s 82 of the Employees' State Insurance Act, 1948 (for short "the Act"), shall also govern the disposal of Misc. Appeal No. 36/83 (Employees State Insurance Corporation v. Shri Kailash Chandra S/o Shri Bhavarlalji and Ors.).

2-3. The short facts leading to these appeals: that M/s. Binod Steel Limited was a registered limited company incorporated under the Companies Act, 1956, which owned a factory situated at 68/77, Industrial Estate, Indore, engaged in manufacture and sale of steel. It employed about 52 employees. The principal employer did not pay the employees' and employer's contribution in respect of the employees employed by the factory for the period 29th July, 1972, 25th November 1972 to 27th September, 1975, and up to 28th January, 1976. A revenue recovery certificate was issued for recovery of Rs. 94,998.01 and interest up to 28th January, 1976 thereon amounting to Rs. 6684.05 against the principal employer, i.e. the respondent No. 1. The respondent No. 1, after the

receipt of the notice of recovery, presented two applications u/s 75 of the Act on 15th April, 1977 before the Employees' Insurance Court at Indore (for short "E.I.Court"), wherein the respondent No. 1, who was the Managing Director up to 13-14th March, 1975, contended that he was not the principal employer" nor was an occupier of the factory. The employer was the Company. Hence, no personal liability of the Managing Director arises. The Company being the employer was and is liable and/or responsible for payment of contributions. Recovery cannot be made from his personal properties. The reason assigned for nonpayment was that the factory and/or Industrial Establishment had to undergo financial stringency and labour troubles.

The appellant, Employees' State Insurance Corporation (for short "Corporation"), in its written statement contended that u/s 2(17) of the Act, at the relevant time as the respondent was the principal employer as Managing Director and as the employees' contribution was deducted by the employer but the employees' and employer's contributions were not deposited in time by the employer, hence, after issuing notices, the determination of contributions was arrived at by way of best judgment assessment u/s 45A of the Act and, thereafter u/s 45B of the Act, the amount of contributions and interest payable under the Act was being recovered as arrears of land revenue from the personal properties of the respondent, being the "principal employer" at the relevant time.

After recording of parties' evidence, the E.I. Court held that at the relevant time the respondent was the Managing Director and was acting as an : agent of the Company, as such no personal liability can be fastened, and the recovery cannot be made from the personal properties of the respondent. Aggrieved of this order, the Corporation has come in appeal u/s 82 of the Act before this Court.

On behalf of the appellant Corporation, Shri N.C. Behal, learned counsel, raised an important and substantial question of law that definition of "principal employer" u/s 2(17) of the Act is an inclusive definition, which includes a Director and/or Managing Director of the Company or the occupier, and in case employer makes default in deposit of the statutory contributions or dues, in respect of each employee, each such default is a distinct default and the "principal employer" becomes liable for punishment. The default so made terminates only when the deposit is made. On the basis of the said analogy, and relying upon the definition of "principal employer", the provisions of Section 39 and Section 40 of the Act and Regulations 10-B, 26 to 31 of the Employees' State Insurance (General) Regulations, 1950 (for short "Regulations") and the provisions of Section 100 of the Factories Act, 1948, Shri Behal contended that it is the principal employer, who is liable for deposit of the contributions and in case of failure to deposit the contributions, the amount of contributions can be recovered from a person, who falls within definition of "principal employer". The E.I. Court in applying the provisions of the Companies Act, erred in holding that though the respondent was the Managing Director, but was acting as an agent of the owner, i.e. the Company. Shri Behal in support of his contentions, relied upon

Bidyut Kumar Seth v. Satyees Chandra Bagchi 1978 Lab IC 1332 (Cal), B.M. Chatterjee Vs. The State of West Bengal and Another, : Bombay Metal Works Pvt. Ltd. Ludhiana v. Regional Director, Employees" State Insurance Corporation Chandigarh 1985 lab IC 1318 (Punj & Har) and S. Gurdial Singh and Others Vs. The Regional Director, Employees" State Insurance Corporation and Others, , Learned Counsel also relied upon the case of the Apex Court in Organo Chemical Industries v. Union of India (1979 II LLJ 416), and submitted that the Act is a social welfare legislation, the definition of the "principal employer" should be interpreted in the way that it reconciles as far as possible and is most appropriate in order to realise the aim and achieve object of the treaty. Learned counsel also referred to the Explanation I to Section 405 of the Indian Penal Code, which was inserted by the Act No. 40 of 1973, whereas from 1st November, 1973, which calls for no exception and the liability of the employer is absolute.

Shri V.S. Kokje, learned counsel appearing for the respondent No. 1, submitted that the E.I. Court has rightly declared and held that a Managing Director or a Director, who acts as an agent of the Company, cannot be made personally liable for making the payment of the contributions or statutory dues nor his personal properties can be attached. He further contended that though, as the case was decided in his favour, he could not file an appeal or cross-objections, but under the provisions of Order 41, Rule 22 of the Civil P.C. he is entitled to challenge the findings of the Court in respect of the holding of the Court that the appellant was the principal employer at the relevant time. Shri Kokje relied upon a decision of the Division bench of the Bombay High Court reported in Suresh Tulsidas Kilachan v. Collector of Bombay 1984 Lab IC 1614.

The crucial and important point in this case for our determination is whether a Director and/or a Managing Director of the Company can be held personally liable for payment of contributions as a "principal employer" u/s 40 of the Act Exactly similar question arose before the Bombay High Court in Suresh Tulsidas's case (supra), The Bombay High Court, after considering the various provisions of the Act, scheme and the definitions held that the Director of a Company, by virtue of being a Director is not principal employer and is not personally liable to pay employer's contribution under the Act. The expression "occupier" used in Section 2(17) has to be read from Section 2(15) of the Act, which states that occupier shall have the meaning assigned to it under Factories Act, 1948 Section 2(n) of the Factories Act defines "occupier" as a person who has got an ultimate control over the affairs of the factory. The "principal employer" in Section 2(17) of the Act, in a factory refers to owner or occupier of the factory and includes the Managing Director, Agent of such owner or occupier and, where a person has been named as Manager of the factory under the Factories Act, the person so named, though the definition is an inclusive definition, with an intention to cover all types of contingencies but if we see the definition of occupier in Section 2(n) of the Factories Act, 1948, and penal Section 100 of the said Act, which abundantly makes it clear that a Company can also be an occupier of the factory.

If the definition of occupier in Section 2(n) of the Factories Act is considered along with the provisions of Section 100 of Factories Act, it is obvious that the legislature clearly contemplated that person referred to in the definition of "occupier" can not only be a natural person, it can also be a company or a legal entity. So the occupier can be anyone i.e. owner, individual, whether firm or company or an agent or employee of the owner. It is clear from the above that where the owner or occupier of a Factory is Company, the Directors of a Company cannot automatically be called as "occupiers" merely by virtue of their being Directors unless any one of them is notified so under the provisions of the Factories Act.

For making a Director or Managing Director personally responsible, and liable for statutory contributions, we have to look to the Scheme and provisions of the Act and Regulations also. Section 39 is really a charging provision, which merely refers to the two types of contributions (which) shall be paid to Corporation as specified in the First Schedule of the Act. It does not specify who shall pay these contributions, Section 40 specifies this. At the first instance, the liability is fastened on the "principal employer" u/s 40 Sub-clause (1) of the Act, that the "principal employer" shall pay the contributions in respect of every employee whether directly employed by him or through an immediate employer. Section 40 also does not contemplate three employers i.e. the owner or occupier, and the immediate employer. It relates to the employer and to the immediate employer u/s 40 of the Act. "Principal employer" u/s 40(1) of the Act, in our opinion, refers to owner or occupier of a Factory depending on the facts of each case, but the words owner or occupier cannot be read (as) owner and occupier and are to be read disjunctively, otherwise it will create uncertainty in fastening of the obligations to deduct and pay the contributions. When the owner is a Limited Company, it is the Company, who as employer is liable to pay or deposit the contributions and not the Directors. The position will be entirely different if an employer is nominated as an occupier.

The Division Bench of this Court in Inayat Hussain Vs. Employees State Insurance Corporation and Others, while considering the liability of owner in respect of contributions payable u/s 40 of the Act, considered the definition of the "principal employer", as defined in the Act and it was held therein that the "principal employer" includes an owner and consequently his property and his interest could be attached or sold for the realisation of the employers' and employees' contribution payable u/s 40 of the Act. In that case, it was held that it was not correct to say that the owner is not liable to pay the contribution although he is the owner, as he was not having control over the Factory and was not managing the affairs of the Establishment.

The expression "employer" has also been used u/s 93A of the Act, which also lays down the liability of the employer to pay contributions in cases of transfer of factory or establishment. There also "employer" has to be construed with reference to the definition of "principal employer". u/s 2(17) of the Act, all that

the legislature meant by the use of the term "employer" u/s 93A of the Act, is an owner of the Factory or Establishment. The expression "employer" in this section has to be equated with the owner because a Factory or Establishment can be transferred only by the person who owns it or has title to it, and such employer has been made liable to pay the amount due in respect of any contribution or any amount payable under this Act in respect of the periods, upto the date of such transfer.

Similarly, if we look to the Regulations also, Regulations 26, 27 and 31, prescribe the manner of sending of the contributions. In these Regulations, the word "employer" used is important, who has to send these contributions in the manner prescribed, may be through occupier, agent or manager, but the ultimate liability remains that of the employer i.e. the owner. The Regulations nowhere lay down that the liability shall be that of the owner and occupier.

Israni, J. of the Rajasthan High Court in *Employees' State Insurance Corporation, Jaipur v. M.P. Roongta* (1988) 56 Fac LR 115, while considering the case of Criminal Complaint against the provisions of the Act, considered the definition of "principal employer" in Section 2(17) of the Act and held that the Chairman and Managing Director of a particular factory or Corporation merely because they sign letters or make correspondence or sit in the factory premises, cannot be considered to mean the "principal employer" as defined under the provisions of the Act. For bringing such a person into the definition of a "principal employer", it is necessary that it should be proved that he was in possession of the contribution cards and was responsible for sending all the contribution cards according to the provisions of the Act and Regulations. The Chairman and the Managing Director of a "particular factory or Corporation are usually responsible for laying down the policy and implementation of the same is left in the hands of the Manager or such other persons, who are made responsible.

In the present case there is no material on record placed by the Corporation that respondent No. 1 was nominated as an occupier of the factory. A casual reference was made in the cross-examination of the respondent No. 1, wherein he stated that he might have been notified as an occupier. The Corporation, to fasten the liability, could have proved by producing the evidence, particularly, a nomination form u/s 7 of the Factories Act, to prove the fact that the respondent, who was the director was specifically notified to the authority as the occupier for the purposes of Factories Act. If that would have been proved, the respondent No. 1 would have become an occupier not on account of the fact that he is a Director but because he was nominated as an occupier for the purposes of the Factories Act. A person notified, styled or described as an occupier, is one who must have ultimate control over the affairs of the factory. This is a question of fact, which is to be proved by evidence, but the Corporation failed to prove the same. When the Company is the principal employer, as the owner, the question as to whether the Directors are the occupiers or not is wholly irrelevant. Hence, the proceedings for recovery of the amount due on account of the contributions,

would be against the company alone and not against the Directors and no question as to whether the Directors were occupiers can arise in such cases. In this case, it is not the case of the Corporation, that the liability which is being enforced against the respondent No. 1, is to the extent of the assets of the company in the hands of the respondents. The Corporation is certainly entitled to attach the assets of the Company, which are in the hands of the Director, Managing Director or occupier.

From the above discussion, the scheme and the provisions of the Act, it is abundantly clear that a Managing Director or a Director of the Company cannot be made personally liable for the payment of the contributions either of the employers or "employees" u/s 40 of the Act. The authorities relied upon by the learned counsel for the appellant, relate to the prosecution in criminal complaints against the Director or Managing Director for contraventions of the provisions of the Act. We are not dealing with a case of criminal liability to hold that a person when he holds an office and falls within the definition of the "principal employer" is liable to be prosecuted or not for the statutory contraventions and can also be prosecuted u/s 405 of the IPC and Explanation I to Section 405 IPC, which leaves no exception to fasten such criminal liability.

The Directors generally are honorary or they have got their limited share or they are nominated. Their civil liability remains only to the extent as provided under the provisions of the Companies Act, and will not exceed any further only by virtue of holding the office as Director, even (if) they fall within the definition of the "principal employer". The case of the Apex Court, *Organo Chemical Industries*, (supra), is also of no help to the appellant. While considering the provisions of Section 14B and other provisions of the Provident Funds Act, the Apex Court, while considering the concept of "damages" in its content in the social setting of the Act observed that the Court must interpret in a way to achieve the purpose, aim and object of statute, which is a piece of social welfare legislation. But the definition of "principal employer" cannot be so interpreted so as to make an agent or servant or an employee, as a Director of a Company who is an "occupier" liable for making the payment of the contributions personally. When the employer is in existence, may be a company, no personal liability on any Director can be fastened. If the contributions have not been paid even by the occupier, the same can be recovered from the assets of the Director or Managing Director or the occupier by making them personally liable and their personal property cannot be attached or sold for realisation of contributions except any property of the Company in the hands of the Director or Managing Director or occupier, it certainly can be attached and the amount can be realised from the same.

The result of the above discussion is that the Employees' Insurance Court rightly held that the respondent No. 1, who was the Managing Director and/or agent of the Company cannot be held personally liable to make the payment of contributions and the recovery proceedings against the respondent No. 1, were

rightly ordered to be quashed. Consequently, both the appeals, one in relation to the employers' contribution and another in relation to the employees' contribution, fail and are dismissed with no order as to costs.