

(1991) 06 CAL CK 0015

In the Calcutta High Court

Case No : Criminal Appeal No's. 300 and 301 of 1985

E.S.I.C.

APPELLANT

Vs

Smt. Ichraj Devi Chopra and Others

RESPONDENT

Date of Decision : 28-06-1991

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(17), 85
Factories Act, 1948 — Section 2

Citation : (1991) 2 CALLT 275 : (1991) 63 FLR 807 : (1992) 2 LLJ 132

Hon'ble Judges : Ajit Kumar Nayak, J

Bench : Single Bench

Advocate : Debesh Ch. Mukherjee and Subal Moitra, for the Appellant; Sekhar Kr. Basu, Manju Manat and Hiranya Chowdhury, for the Respondent

Final Decision : Dismissed

Judgement

Ajit Kumar Nayak, J.—These appeals by Special Leave u/s 378(4) of the Code of Criminal Procedure, heard analogously, are directed at the instance of Employees' State Insurance Corporation (represented by the Insurance Inspector) against the orders of acquittal dated December 19, 1984, passed by learned Metropolitan Magistrate, 9th Court, Calcutta, acquitting the accused-opposite party in cases brought u/s 85(a) and (g) of the Employees' State Insurance Act, 1948.

2. The aforesaid two cases were brought by the petitioner-Insurance Inspector, Employees' State Insurance Corporation, on two separate complaints before the learned Chief Metropolitan, Calcutta, against the manager and the other directors of a factory namely M/s. Pradeep Automobiles (P) Ltd. 19, Goabagan Street, Calcutta-6, on the accusation that the manager and the directors of the said factory had failed to submit contribution cards in requisite form for the period expiring on September 29, 1973 and November 24, 1973 respectively, for which the said persons including the accused opposite party Smt. Ichraj Devi Chopra as the principal employers were liable to be prosecuted for commission of an

offence punishable u/s 85(g) of the said Act. The learned Magistrate to whom the case was transferred, acquitted the accused-opposite party u/s 255(1) Cr. P.C. holding that the opposite party-respondent although a director of the said firm, she could not be deemed to be the principal employer as defined in Section 2(17) of the said Act.

3. Being aggrieved by the same order of acquittal the petitioner has preferred these two appeals which are being heard analogously for convenience.

4. Undisputedly, the accused-opposite party Smt. Ichraj Devi Chopra was one of the three directors of the factory, namely M/s. Pradeep Automobiles (Pvt.) Ltd., of which Mr. T.K. Sanyal was the manager at the relevant time. It has not also been seriously disputed by defence that the contribution cards for the requisite period expiring on the aforesaid dates had also not been submitted by the employers of the said factory as required under the said Act. The specific defence of the accused-opposite party before the trial court was that she was not the principal employer within the meaning of Section 2(17) of the ESI Act and having nothing to do with the management of the said factory was not as such principally responsible for submission of the said contribution cards. Argument was also advanced on behalf of the accused-opposite party that she being a mere director having not in ultimate control over the affairs of the said factory and there having been no specific averment to that effect in the petition of complaint could not be said to be the principal employer at the material time.

5. The Metropolitan Magistrate accepted such argument advanced on behalf of the accused opposite party and thereby acquitted the accused of the offence u/s 85(g) of the said Act.

6. These orders of acquittal have been assailed mainly on the ground that the accused-opposite party being admittedly director at the material time can be said to be the principal employer within the meaning of Section 2(17) of the Act and that the learned Magistrate committed an error in holding otherwise.

7. It is now a settled position of law that a person who can be prosecuted u/s 85(g) of the ESI Act, for non-submission of the contribution cards as required u/s 40 of the said Act read with Regulation 26 of the Employees' State Insurance Regulations, 1950, is the principal employer as defined in Section 2(17) of the ESI Act.

8. Principal employer in respect of a factory as defined in Section 2(17) of the ESI Act means the owner or occupier of the factory and 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.

9. The whole controversy arises if the director or for the matter of that all the directors of a firm or a company owning the factory can be said to be the principal employer within the meaning of Section 2(17) of the Act so as to be

fastened with the liability of non-submission of the contribution cards and for the purpose of prosecution u/s 85(g) of the Act. Argument has been advanced by Mr. Mukherjee, the senior Advocate appearing on behalf of the appellant, that director or directors of a firm or company can be said to be the "owners" as well as "occupiers" of such firm or company and as such the principal employer within the meaning of Section 2(17) of the Act. Reliance has been placed in this connection upon three decisions of this Court reported in B.M. Chatterjee Vs. The State of West Bengal and Another, and two other decisions reported in 1978 CHN page 444 (Bidyut Kumar Sett and Anr. v. Satyesh Chandra Bagchi and Ors.) and in 1979 (1) CHN 208 (Arup Kumar Pal Chowdhury v. Satyesh Chandra Bagchi). In the first decision it was held by K.K. Mitra, J, that the director of a limited company is the owner (and as such the principal employer); and if there are several directors, all are liable for contravention of provisions of the Act, and the Employees' State Insurance Regulations framed thereunder. This view of K.K. Mitra, J. has however not been endorsed in so many words by the Division Bench decision reported in 1978 CHN 444 (supra). On the other hand the Bench decision has held that a director of a company, however, can be brought within the meaning of "occupier" as mentioned in Section 2(17) of the Act and also according to Section 2(n) of the Factories Act, as the person who like a director has ultimate control over the affairs of the factory. In other words, an extended meaning to the expression "occupier" was given in such a case to bring within its fold a director particularly in a case where no managing agent has been appointed or any manager has been named as it so happened in that case. "Occupier" within the meaning of Section 2(17) of the Act was held to be wide enough to include a director where no managing agent has been appointed or any manager is named. So such extended meaning of the word "occupier" can only be given in a case where a managing agent has not been appointed or any manager has been named. Indirectly thereby this decision goes to support a view that where a managing agent has been appointed or a manager is named, they will be treated to be the principal employer within the meaning of Section 2(17) of the Act, being the person, managing the affairs of the factory if not in ultimate control over the affairs of the factory. In the decision reported in 1979 (I) CHN page 208 (supra) Justice B.N. Mitra, J, no doubt has supported the view that the expression "principal employer" is wide enough to include the director as principal employer but has not gone to the extent of saying that the principal employer within the meaning of Section 2(17) of the Act. Rather, according to him being the person primarily responsible, as the director is, he is the principal employer. Moreover, the view expressed by B.N. Moitra, J. to show that even in a case where a manager or managing agent has been appointed, they will be treated to be the principal employer of the factory within the meaning of Section 2(17)(i) of the Act along with the director simultaneously as such expression is not disjunctive in respect of a manager or director. The opinion expressed in this Single Bench decision has, however, not been accepted by Lilamoy Ghosh, J. in his decision reported in 1988 C. Cr. LR page 253, wherein the manager named in the petition of the complaint has been held to be liable alone as principal

employer for non-submission of contribution cards in respect of a factory under this Act. The Division Bench view reported in 1978 CHN 444 (supra) holding that director as "occupier" can be said to be the principal employer within the meaning of Section 2(17) of the Act under the circumstances as stated there, has, however, found wider acceptance in the subsequent decisions of this Court as well as other courts. This view also finds support from the definition of the expression "occupier" as given in Section 2(n) of the Factories Act. An "occupier" of a factory according to Section 2(15) of the ESI Act is to have the same meaning as assigned to it in the Factories Act, 1948. Section 2(n) of the Factories Act provides that occupier of a factory means the person who has ultimate control over the affairs of the factory. Where the said affairs are entrusted to managing agent, such agent shall be deemed to be the occupier of the factory. So, the plain meaning of the "principal employer" in respect of a factory boils down to a person having actual control over the affairs of the factory at the material time.

10. Viewed in the light of the discussion made above, a company owning the factory is the owner of such factory and thereby is the principal employer in respect of such factory as defined in Section 2(17) of the ESI Act. A director in that sense cannot be said to be the owner and as such the principal employer within the meaning of Section 2(17) of the Act, and the view expressed otherwise to that effect in the decision reported in B.M. Chatterjee Vs. The State of West Bengal and Another, is respectfully distinguished and dissented from in this case. The view that the directors as owners can be said to be the principal employer within the meaning of Section 2(17) of the Act also does not find support in the subsequent decisions of this Court reported in 1985(1) CHN 113 and 1986 2 CHN 128. In the latter decision Shamsuddin Ahmed, J, however, held that directors of a company owning a factory can be taken to be the principal employer as an "occupier" within the meaning of Section 2(n) of the Factories Act, as a person having ultimate control over the affairs of a factory and as such is wide enough to bring a director within the definition of Section 2(17) of the Act. Both these decisions however do not support the view as advanced by Mr. Mukherjee.

11. Mr. Mukherjee, in advancing his argument further, has sought to emphasise with reference to Maxwell's Interpretation of Statutes, that in a case of this nature relating to the application of a beneficial legislation like the ESI Act, the aim and object should be kept in mind, to give a harmonious interpretation of the different provisions of the Act and further that the definition of Section 2(17) of this Act and Section 2(n) of the Factories Act should be construed liberally so as to fix the responsibility upon the directors for contravention of the provisions of this Act. He has also referred in this connection to a decision of this Court reported in 1982 (II) Calcutta Law Journal, page 248 and 269 (Parbartak Jute Mill Case). Even, bearing in mind the argument so advanced by Mr. Mukherjee, it can be said that the specific statutory provisions as also interpreted and expressed in the overwhelming majority of the decisions referred to above leave

no manner of doubt that not all the directors of a company or a firm owning a factory can be said to be principal employer within the meaning of Section 2(17) (i) of the ESI Act.

12. The question whether all the directors along with the managing agent or for the matter of that, manager as named can all be simultaneously prosecuted together as "principal employer" within the meaning of Section 2(17) of the Act for the alleged offence is not free from doubt altogether. This is more so in view of the meaning of the word "occupier" as defined in Section 2(n) of the Factories Act, 1948, showing thereby the person who has ultimate control over the affairs of the factory. Proviso (ii) to Clause (n) of Section 2 of the Factories Act lays down that not all the directors shall be deemed to be the occupier but only the one who has the ultimate control over the affairs of the company. So, the primary objective in all these provisions is the fixing of responsibility or liability upon a person who has the ultimate control over the affairs of the company. Manager being such a person named and as his designation itself shows managing the affairs of the factory, he can be said to be the person in actual control of the routine affairs of the factory. The position is therefore clear that in a case where no managing director is there managing the affairs of the factory and in ultimate control over the affairs of the factory, it can be said that none of the directors can ever be regarded as the principal employer within the meaning of Section 2(17) of the ESI Act. There can be no difference of opinion to the view so expressed by A.M. Sinha, J. in a recent decision in Criminal Revision No. 1582 of 1983 (*B.K. Sampat v. Employees' State Insurance Corporation*). In such decision Sinha, J. rightly has not subscribed to the view that a director can never be prosecuted for an offence as the principal employer u/s 85(g) of the ESI Act. But by this it cannot be said that director or for the matter of that, all the directors can be prosecuted irrespective of any other consideration or under all circumstances.

13. It has been argued on behalf of the appellant that the definition of "occupier" as given in the amended provision control over the affairs of the factory cannot be made applicable to the facts of the instant case, as because the contravention of the Act for non-submission of cards took place in the year 1972-73 i.e., long before the amendment of the Factories Act, 1987. Fact remains however that even the un-amended provisions is not of much help to the appellant in this regard in view of the facts and circumstances of this case. The petitions of complaint in these two cases simply show the manager and the directors including accused No. 3 Smt. Ichraj Devi Chopra as the principal employers in respect of the factory named as defined in Section 2(17) of the ESI Act.

14. We find further from the evidence on record that of the witnesses examined by the complainant P.W. 2, the Inspector of the ESI Corporation himself stated in his evidence that he did not mention in his report as to who was responsible for depositing the contribution cards and that he came to know further that husband of one of the directors of the company had been managing the day-to-day affairs

and that a manager was also there. We find from the statement of the accused Smt. Ichraj Devi Chopra that although she was a director at the relevant time, she had no knowledge about ESI matters and that she never visited factory and that the same was managed by the manager and others. This is supported by D.W.1 an employee of ESI Corporation and finds further support from the evidence of P.Ws. 1 and 2. Therefore in the absence of concrete evidence that Smt. Ichraj Devi Chopra was in actual and ultimate control over the affairs of the factory at the relevant time and further in the absence of any specific averment to that effect in the petition of complaint and also in view of the concrete evidence on record that a manager was managing the affairs of the factory along with others, it cannot be said that the accused Smt. Ichraj Devi Chopra although a director at the relevant time was in any way connected with the management of such factory, far less in ultimate control over the affairs of the factory. The accused petitioner before the trial court therefore being a lady and not having been in ultimate control over the affairs of the factory at the relevant time cannot be said to be liable in any way for the commission of offence as alleged.

15. Rightly therefore the learned Magistrate acquitted the accused Smt. Ichraj Devi Chopra u/s 255(1) Cr. P.C. holding that she was not the principal employer of the factory in question as defined in Section 2(17) of the ESI Act. Let it be made clear that this will not in any way affect the position of the manager and the other directors to be prosecuted under this Act.

16. The net result is that the appeals fail and are dismissed and the orders passed by the learned Trying Magistrate dated December 19, 1984 are hereby upheld. This order shall govern both the criminal appeals No. 300 of 1985 and No. 301 of 1985.