

(1997) 01 MAD CK 0090

In the Madras High Court

Case No : Criminal R.C. No. 339 of 1988 and Criminal R.P. No. 338 of 1988

Inspector, Employees' State Insurance Corpn.

APPELLANT

Vs

Veerappan A.L. and others

RESPONDENT

Date of Decision : 18-01-1997

Acts Referred:

Employees State Insurance Act, 1948 — Section 100, 2(17), 40, 40(1), 85
Factories Act, 1948 — Section 100, 100(2), 2, 40

Citation : (1997) 2 ALT(Cri) 374 : (1997) 1 CTC 676

Hon'ble Judges : N.V. Balasubramanian, J

Bench : Single Bench

Advocate : P. Rajamanickam, for the Appellant; M. Shajahan and T.R. Ravi, for the Respondent

Judgement

1. This Revision is filed by the complainant against the order dated March 2, 1988 in CrI. R.P. No. 11 of 1987 on the file of the Principal Sessions Judge, Madurai which allowed CrI. M.P. No. 3765 of 1986 in S.T.C. No. 256 of 1986, on the file of Judicial First Class Magistrate (II) Madurai. The facts of the case are as follows :

2. The Revision petitioner filed a complaint before the Judicial I Class Magistrate, No. II Madurai against five persons alleging offences u/s 85(a) of the Employees' State Insurance Act, 1948, hereinafter referred to as the Act, punishable u/s 85(i) of the said Act. The respondents herein are the accused 1 to 4 in that complaint and they are respectively the Managing Director and Directors of Sree Cotton Mills, Palanganatham, Madurai. The fifth accused in the complaint is stated to be the Manager of the said Company. The allegation in the complaint is that all the accused in the complaint in their respective capacity as stated above are the principal employers of the Company and in such capacity they have failed to discharge their obligation u/s 40 of the Act, in that they have not deposited the contribution amount recovered by them from their employees together with their contribution, for the period from January, 1986 to June, 1986 (both months

inclusive). Learned Magistrate took the complaint on file and issued summons to all the accused.

3. On receipt of the summons, accused 1 to 4 in the complaint, filed a petition before the trial Court, that they being the Managing Director and Directors respectively of the Company, cannot be made personally liable for any of the defaults committed by the fifth accused in not depositing the Employees' and Employer's contribution, especially in view of the fact that the fifth accused is the person in ultimate control of the affairs of the Company and therefore he alone would be responsible, if at all, there is any liability. Learned Magistrate by order dated December 10, 1986 after hearing the complainant's counsel and the accused counsel dismissed the petition. Learned Magistrate found that the Minutes Book produced by the accused 1 to 4 before him in support of the petition does not show that the fifth accused was in ultimate control of the factory during the relevant time. Aggrieved by this Order, accused 1 to 4 in the private complaint took up the matter in Revision before the learned Sessions Judge, Madurai in Criminal R.P. No. 11 of 1987. Learned Judge, after hearing the parties passed an order on March 2, 1988 holding that the respondents herein (Accused 1 to 4) cannot be held responsible personally for the non-payment of the contribution and allowed the Revision. Learned Appellate Judge for arriving at such a conclusion had followed a Judgment of the Bombay High Court reported in 1984 LIC 1614, to Suresh v. Collector of Bombay, which was quoted with approval in an unreported Judgment of the Court rendered by His Lordship Justice Mr. S. Natarajan, as his Lordship then was in C.A. No. 125 of 1983. It is this Order of the appellate Judge which is being questioned in this Revision by the Department.

4. To appreciate the legal issue, namely, whether the Directors of the Company can be held to be personally liable, if they have nominated another person to be in ultimate control of the affairs of the Company, the relevant provisions of the Act need to be extracted. The proceedings is under the Employees' State Insurance Act, 1948. Section 40(1) of the 1948 Act imposes a legal obligation on the principal employer that he shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution. The word "Principal Employer" is defined in Section 2(17) of the Act as follows :

(17) "Principal employer" means -

(i) in a factory, 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 (63 of 1948), the person so named;

(ii) in any establishment under the control of 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 definition of "Principal employer" in Section 2(17)(i) includes a person who has been named as the Manager of the Factory under the Factories Act, 1948, hereinafter referred to as the Factories Act, as a person, who would be the owner or occupier. Section 2(n) of the Factories Act, as it stood before the amendment in the year 1987, is as follows :

"2(n) "occupier" of a factory means the person who has ultimate control over the affairs of the factory, and where the said affairs are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory;"

Section 2(n) of the Factories Act prior to the amendment has to be read along with Section 100 of the Act, which is also extracted herein;

"100. Determination of occupier in certain cases - (1) Where the occupier of a factory is a firm or other association of individuals, any one of the individual partners or members thereof may be prosecuted and punished under this Chapter for any offence for which the occupier of the factory is punishable;

Provided that the firm or association may give notice to the Inspector that it has nominated one of its members residing within India to be the occupier of the factory for the purposes of this Chapter and such individual 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 partner or member of the firm or association.

(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, until further notice cancelling his nomination is received by the Inspector or until he ceases to be a director.

Provide further that in the case of a factory belonging to the Central Government or any State Government or any local authority the person or persons appointed to manage the affairs of the factory shall be deemed to be the occupier of that factory for the purpose of this Chapter.

(3) Where the owner of any premises or building referred to in Section 93 is not an individual, the provisions of this Section shall apply to such owner as they apply to occupiers of factories who are not individuals".

By the amendment Act 20 of 1987, Section 100 was omitted and the definition of Occupier in Section 2(n) underwent a change. However, since the default period in this case occurred prior to the amendment Act referred to above, the Factories Act as it stood before the amendment alone would govern the rights of the

parties.

5. As already stated, the short question that falls for consideration in this case is whether the respondents in this Revision Petition, who are the accused 1 to 4 in the complaint and respectively the Managing Director and Directors of the Company, can be made liable for not complying with the requirement of Section 40 of the 1948 Act. I heard Mr. P. N. Prakash, learned counsel appearing for the Revision Petitioner, and Mr. M. Shajahan learned counsel for Respondents No. 1, 2 and 4 and Mr. T. R. Ravi, learned counsel for Respondent No. 3, on this legal ground quite at length. It is reported that Respondent 1 is dead, Mr. Prakash, counsel for the revision petitioners contended that though the law relating to this issue was well settled by a long line of decisions rendered not only by this Court, but also by various other Courts, yet the entire position in law has undergone a complete change by the latest judgment of the Supreme Court reported in the case of J.K. Industries Ltd. and Others Vs. Chief Inspector of Factories and Boilers and Others, . The Supreme Court had considered the scope and ambit of the definition of "Occupier" as found in Section 2(n) of the Factories Act as it stood before the amendment in the year 1987 as well as Section 100 of the Act as it stood then. In considering these two Sections of the Factories Act, the Supreme Court had categorically laid down that the Directors of a Company cannot nominate any person, other than a Director, who is among themselves, to be an occupier and by such nomination they will not be allowed to defeat the very object of the Act. Though the judgment is u/s 2(n) and u/s 100 of the Factories Act, as it stood before the amendment in the year 1987, yet the said judgment applied in all fours to this case. This is because in the 1948 E.S.I. Act, the term "Occupier" is not defined though it is used in Section 2(17)(i) of the said Act. In fact the definition of the Principal Employer in Section 2(17)(i) of the 1948 Act includes a person who is called an occupier and the definition of "Occupier" is stated to be as defined under the Factories Act.

6. In this case, admittedly the respondents, are the Directors of the Company and their liability u/s 40 of the 1948 Act is in question. However, in this Revision, whether they are liable or not on merits is not the question involved, since the learned Appellate Judge had held, even at the threshold of the trial, that they cannot be made personally liable. Therefore, the question whether the Directors of the Company are guilty of violating Section 40 of the 1948 Act or not is still at large and it has to be decided by the learned trial Magistrate on evidence. The Supreme Court in the judgment above referred to has held as follows :

"..... Where the factory is owned or run by a company, it would be that company which would be the occupier of the factory. u/s 100, as it stood originally, where the occupier of the factory was a Company, any one of the directors may be prosecuted and punished and the Company could give a notice identifying such a director. It was, therefore, as already noticed, optional for the company to notify a director as the occupier"

"..... Where it is the company which owns or runs such a factory, it is the

company which has the ultimate control over the affairs of the factory and, therefore it would be the company which would be the occupier of that factory. However, since a company is a legal abstraction, it can act only through its agents who in fact control and determine the management and are the centre of its personality. Such agents are generally called the directors being the "directing mind and will" of the company. The deeming fiction under proviso (ii), therefore, only clarified the position where company is the occupier of the factory. The legislature by providing the deeming fiction under proviso (ii) did not detract from the generality of the main provision u/s 2(n) but only clarified it. The directors are not the employees or servants of the company. They manage, control and direct the business of the company as "owners" (Section 291 of the Companies Act). The Directors are often referred to as the "alter ego" of the company. Where, the company owns or runs a factory, it is the company which is in the ultimate control of the affairs of the factory through its Directors. An employee or officer of the factory or of the company, even if authorised by the Board of Directors by a resolution to be a person "in the ultimate control of the affairs of the factory" cannot be so. Such an employee only carries out orders from above and it makes no difference that he has been given some measure of discretion also and has supervisory control. He can at best be treated to be in the immediate control of the affairs of the factory or having day to day control over the affairs of the factory, the ultimate control being retained by the company itself. The legislature did not designedly use the expression immediate or day to day or supervisory control instead of ultimate control in the main provision of Section 2(n)."

19. The word "ultimate" in common parlance means last or final. The Oxford Advanced Learners' Dictionary of Current English Encyclopedic to Edition (1992), defines the word "ultimate" to mean;

"beyond which no other exists or is possible last or final; from which everything is derived; basic or fundamental; that cannot be surpassed or improved upon, greatest etc."

20. According to Collins Dictionary of the English Language the word "ultimate" has been defined as :

"last; final; elemental; fundamental; basic or essential; highest; further or greatest thing.

"According to Black's Law Dictionary (Sixth Edition), the word "ultimate" means :

"at last, finally or at the end"

21. There is a vast difference between a person having the ultimate control of the affairs of a factory and the one who had immediate or day to day control over the affairs of the factory. In the case of a company, the ultimate control of the factory, where the company is the owner of the factory, always vests in the company, through its Board of Directors. The Manager or any other employee, of

whatever status, can be nominated by the Board of Directors of the owner Company to have immediate or day to day or even supervisory control over the affairs of the factory. Even where the resolution of the Board of Directors says that an officer or employees, other than one of the directors, shall have the ultimate control over the affairs of the factory, it would only be a camouflage or an artful circumvention because the ultimate control cannot be transferred from that of the company, to one of its employees or officers, except where there is a complete transfer of the control of the affairs of the factory. Mechanical recitation of the words of Section 2(b), as a Mantra, in a resolution nominating an employee or an officer as the occupier by stating that he shall have "ultimate control over the affairs of the factory", cannot be permitted to defeat the object of the amendment. The provisions of the Act have to be construed in a manner which would promote its object, prevent its subtle evasion and foil its artful circumvention to suppress the mischief. Though, the expression ultimate control was used in Section 2(n) even prior to the 1987 amendment also but read with the proviso to Section 100(2), it gave an opportunity to the companies owning the factory to dilute the rigour of the provision by notifying one of its directors to be the occupier and instead nominating some employee or the other to be the "Occupier" for purposes of punishment and penalty. The ultimate control which vests in an owner and in the case of a company in the Board of Directors cannot be vested in anyone else without completely transferring the control over the factory to that other person. The law does not countenance duality of ultimate control. If the transfer of the control to another person is not complete, meaning thereby that the transferor retains its control over the affairs of the factory, the transferee, whosoever he may be, (except a director of the company, or a partner in a partnership firm) cannot be considered to be the person having ultimate control over the affairs of the factory notwithstanding what the resolution of the Board States. The litmus test, therefore, is who has the "ultimate" control over the affairs of the factory.

22. The observations of this Court in Mackenzie's case (supra) that the "ultimate control" over the factory must necessarily be with an owner unless the owner has completely transferred that control to another person are significant. Where, a company has "completely transferred" that control to another person, it would be that other person, who would have the ultimate control over the affairs of the factory to the exclusion of the transferor-company and would be its occupier. The High Courts taking the view that in the case of a company, any person nominated by the Board of Directors to be in the ultimate control of the affairs of the factory would be an occupier, whether or not he is a Director of the Company have relied upon the following observations of this Court in John Donald Mackenzie and Another Vs. The Chief Inspector of Factories, Bihar, Ranchi and Others, .

"Undoubtedly the expression "occupier" is not to be equated with owner. But it must be borne in mind that the ultimate control over the factory must necessarily be with an owner unless the owner has completely transferred that control to another person. Whether that was done in the present case would be a

question of fact. It was for the petitioners to contend that Petitioner No. 1 was the manager of the factory and had the ultimate control thereof to lay before the Chief Inspector of Factories the necessary material for showing that the company had in same manner transferred the entire control of the factory to Petitioner No. 1".

and from these observations, those High Courts have concluded that the law laid down by this Court in John Donald Mackenzie's case (supra) is that the occupier of the factory need not necessarily be a director and that any person to whom control has been transferred and who has been given the entire control over the affairs of the factory by the company through a resolution can be the occupier, even if he is not a director. In our opinion, this is not a correct reading of that judgment, which even otherwise was concerned with the pre-amendment provisions. A brief reference to the facts of that case is, therefore, necessary at this stage. Mackenzie, who was Petitioner No. 1 in the writ petition, had described himself as the Manager and occupier of Bata Shoe Company's factory at Dhiga in Bihar while seeking renewal of the licence of the factory. The Chief Inspector of Factories enquired from the factory whether Mackenzie was one of the Directors of the Company and pointed out that if he was not a Director, then a fresh application seeking renewal of the factory's licence signed by the occupier should be submitted. The Chief Secretary of Bata Shoe Company sent a reply to the Chief Inspector of Factories stating therein that Mackenzie was the person who had been nominated to have the ultimate control of the affairs of the factory and therefore he was an occupier within the meaning of Section 2(n) of the Act and, thus, competent to make an application for seeking renewal of the licence. The Chief Inspector, however, returned the application stating that if Mackenzie was not a Director, then a fresh application signed by the Director is required to be submitted. The Company, thereupon, moved the High Court at Patna for quashing the direction of the Chief Inspector of Factories requiring a director only to make the application for renewal of the licence. That petition was dismissed by the High Court. The company then filed an appeal by special leave to this Court. This Court after setting out the definition of an occupier u/s 2(n) of the Factories Act went on to consider the correspondence that had been exchanged between the company and the Chief Inspector of Factories, which revealed that Mackenzie had been declared to be an occupier without his being a director of the company and held :

"In the circumstances, therefore, the Chief Inspector of Factories was perfectly right in refusing to act on the application signed by Mackenzie and in requiring the factory to file a proper application for renewal of the licence.

23. The appeal was consequently dismissed and the direction of the Chief Inspector of Factories was maintained. This Court, thus, did not hold that a company can nominate any of its employee as an occupier of the factory, even if he is not a Director of the Company. The judgment in Mackenzie's case, therefore, has to be understood in the context in which it was given as otherwise

the decision of the Chief Inspector of Factories calling upon Mackenzie (who had been nominated as the occupier having "ultimate control over the affairs of the factory") but was not himself a director, to have a fresh application signed by the Director submitted for renewal of the licence, would not have been sustained by this Court. It is not fair or proper to read a sentence from the judgment of this Court, divorced from the complete context in which it was given and to build up a case treating as if that sentence is the complete law on the subject. Judgments of this Court are not to be read in that manner".

7. In the light of the judgment of the Supreme Court, if the order impugned in this Criminal Revision Petition is tested, then, I have no other option except to say that it is illegal. Even in the latest judgment referred to above, the Supreme Court had categorically laid down that the law on this point was already declared by that Court in the judgment reported in the case of John Donald Mackenzie v. Chief Inspector of Factories, Bihar (supra). Even assuming for a moment without admitting that Accused has been nominated in this case, as put forward by accused 1 to 4, yet in view of the categories in the pronouncement of the Supreme Court referred to earlier, he cannot be said to be in ultimate control over the affairs of the Company, since he is not a Director. Section 2(n) of the Factories Act, 1948 as it stood before the amendment in the year 1987 lays emphasis on the words "who has ultimate control over the affairs". Therefore, the point taken by the accused 1 to 4 before the trial Court that they having nominated the fifth accused as a person in charge of the affairs of the Company, he alone should be prosecuted and not them, cannot be sustained.

8. In this context, Mr. Shajahan, counsel for some of the respondents fairly conceded that prior to the judgment of the Supreme Court referred to earlier, view of this Court and other High Courts were in his favour and that he may have difficulty in sustaining the earlier view of this Court and other Courts and in view of the latest pronouncement of the Supreme Court in the year 1996, which is referred to earlier. He brought to my notice two judgments of this Court, one is that of His Lordships Justice Mr. T. S. Arunachalam, as His Lordship then was, in the case of G. Ramaswamy Moopnar v. Employees' State Insurance Corporation reported in 1990 LW (CrI) 414 and another judgment of Justice Mr. M. Karpagavinayagam, in the case of Employees' State Insurance Corporation represented by the Insurance Inspector (Legal), Madurai v. Alagasundaram Chettiar reported in 1996 (1) MWN (Cr) 304. Karpagavinayagam, J. had followed the earlier referred to judgment of His Lordship Mr. Justice T. S. Arunachalam. The judgment of the Supreme Court in J. K. Industries case (supra) was pronounced some time in September 1996 long after the judgment of Karpagavinayagam, J. In the former judgment, learned Judge had taken note of the Judgment of the Supreme Court reported in John Donald Mackenzie v. The Chief Inspector of Factories, Bihar (supra) and yet held that the Directors of the Company cannot be personally made liable if they have nominated some other person to be in charge of the affairs of the Company. The Supreme Court in its Judgment reported in J.K. Industries Ltd. and Others Vs. Chief Inspector of

Factories and Boilers and Others, in paragraph 22 had categorically held that the reported judgment in John Donald Mackenzie and Another Vs. The Chief Inspector of Factories, Bihar, Ranchi and Others, was not correctly read by the High Courts. Under these circumstances, I am unable to persuade myself to accept the arguments of Mr. Shajahan, counsel for some of the respondents and Mr. Ravi, counsel for the third respondent that the law laid down by this Court, as referred to earlier, still holds good. In view of the latest pronouncement of the Supreme Court, since the issue involved in the present case revolves round the liability of the Directors u/s 40 of the E.S.I. Act and not with reference to any other type of owners or occupiers, I have to say that law laid down by this Court and referred to earlier in this judgment, so far as it relates to the liability of the Directors of the Company u/s 40 of the Employees' State Insurance Act, is not correct. Under these circumstances, the revision Petition is allowed. The case is remitted back to the Trial Magistrate with a direction to take it on file and proceed in accordance with law against all the five accused and dispose it of as expeditiously as possible and make a report to this Court.