

(2001) 09 CAL CK 0019
In the Calcutta High Court
Case No : Writ Petition No. 7963 (W) of 2001

Pradip Kumar Basu

APPELLANT

Vs

Regional Provident Fund Commissioner and Another

RESPONDENT

Date of Decision : 12-09-2001

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2, 7A, 7D, 8F(5)
Factories Act, 1948 — Section 7

Citation : (2002) 2 LLJ 512

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : Partha Banja Chaudhry, for the Appellant; Vinay Mishra, for the Respondent

Judgement

D.K. Seth, J.

Facts:

1. In a recovery proceeding under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (1952 Act for short), a warrant of arrest having been issued, the petitioner had appeared in the proceedings and gave an undertaking to pay the amount in instalments. Pursuant to such undertaking some instalment was paid. Thereafter, this writ petition has been moved on the ground that the petitioner was a Manager of the Partnership Firm, against which the liability is being sought to be enforced and that the said Partnership firm has since been dissolved.

Submissions:

2. Mr. Mishra, learned Counsel for the authority, contends that after the recovery proceedings is initiated, in view of Section 8D of the 1952 Act, the certificate cannot be questioned before the Recovery Officer. This Court cannot go behind the certificate. He further: contends that the petitioner had never raised the

dispute, which is now being raised in this writ petition. On the other hand, the petitioner had appeared and had given an undertaking. Now he cannot go back on his undertaking. Therefore, this writ petition should fail.

3. Learned Counsel for the petitioner, on the other hand, contended that such undertaking was given under constraint. Inasmuch as, the petitioner had appeared pursuant to a warrant of arrest and had to give an undertaking, in order to save himself from being arrested and sent to prison. Therefore, such undertaking having been given under constraint and not out of his free volition, cannot be enforced against him, unless he is liable in law, to pay the same. According to him, he was a Manager of the Partnership Firm, since dissolved. But as regards the liability that have been fixed upon him, in view of the definition of employer, contained in Section 2(e) of the said Act, the question is dependent on the entrustment of the Management. Unless the management is entrusted, the Manager shall not be an employer, within the meaning of the said Act. He further contends that the Manager could not be treated to be an occupier, as defined in Section 2(k) of the said Act, until and unless he is so nominated by submitting the appropriate forms, within the meaning of the Factories Act, 1948, (1948 Act for short). In the present case, the establishment was a factory and as such the Factories Act is applicable in such case and therefore, without the petitioner's name being notified, in terms of Section 7 of the Factories Act, the petitioner cannot be held liable. According to him, unless the petitioner is liable in law, no amount of admission can make him liable, particularly, when such admission is under constraint. Therefore, the proceedings for recovery against the petitioner should be quashed and may be proceeded against the owners and occupiers, as the case may be. He had also relied on various decisions, to which reference would be made at appropriate stage.

4. Mr. Mishra had also relied on certain decisions, in support of his contention to show that the Manager is liable and cannot escape his liability, apart from the fact that the petitioner had admitted his liability.

5. I have heard the learned Counsel for the respective parties at length.

Admitted facts:

6. In order to appreciate the question, it is necessary to keep in mind the facts behind the question of admission, to which the authority had been banking upon. Admittedly the petitioner was a Manager. Admittedly, the Partnership Firm has since been dissolved and the factory is closed. In this background the question is to be looked into.

Employer: Occupier:

7. In terms of Section 8 of the 1952 Act, the dues can be recovered from the employer. Employer is defined in Section 2(e) of the 1952 Act. The definition in relation to factory means the owner or occupier; and in relation to other establishment, the person in ultimate control of the affairs, or the Manager etc.,

where the affairs are entrusted to such Manager etc. Occupier is defined in Section 2(k) of the 1952 Act. It defines Occupier as the person in ultimate control over the affairs of the factory or the managing agent where the affairs are entrusted to such agent. The definition of occupier defined in Section 2(n) of the Factories Act has since been borrowed in Section 2(k) of the 1952 Act without any change. Thus, an occupier defined in Section 2(k) cannot be interpreted to mean someone, who could not be an occupier within the meaning of the Factories Act. Under the Factories Act, 1948, Section 7 requires giving of a notice by the occupier as to the name of the Manager. No such notice was alleged to have been given in this case, notifying the name of the petitioner as Manager. A person can be treated as occupier, (a) who alone has the right for the purpose, for which it is controlled and worked; (b) who has the right of regulating and controlling it; (c) who is in pre-dominant possession and general superintendence over it. The clear meaning of the word "occupier" indicates a person, who is in actual possession and control. It may be an individual or a firm, Unless notice is given, notifying the name of an individual of a firm, all the members of the firm, are to be liable. Under the definition of Occupier, a manager cannot be included, even if he resides in a part of the factory premises, as was held in *Emperor v. Ram Pratap Magniram* 7 Bom. LR 454 . Even if it is shown by the owner or occupier that the entire control is left to the manager, still then the owner and not the manager would be liable. A Manager of a factory is not a managing agent and, therefore, he cannot be the occupier (*The Public Prosecutor Vs. S. Pappanna and Others*, . Admittedly, in the present case, the petitioner was not the managing agent. Therefore, until the name of the petitioner was mentioned in the notice u/s 7 as occupier, he cannot be held liable as employer, from whom recovery can be effected. Section 2(e) in Clause (i) includes a Manager, where a notice under Clause (f) of Section 7(1) of the Factories Act has been given, naming any person as Manager. Unless the name of the Manager is mentioned in a notice u/s 7 of the 1948 Act, he will not come under the definition of employer, in terms of Clause (i) of Section 2(e) of the 1952 Act. It is contended by the petitioner that u/s 7 of the Factories Act, 1948, the petitioner's name was never mentioned as occupier. Therefore, he cannot be treated as occupier, in terms of Section 2(k) of the 1952 Act. The only question that is to be gone into now is, whether the petitioner comes within the definition of section 2(e)(ii) of the 1952 Act.

Can Writ Court go behind certificate: Section 8F:

8. Before the said question is examined, other points with regard to the question of going behind the certificate can be gone into. In terms of Section 8F of the 1952 Act, the Recovery Officer cannot go behind the certificate. In fact, it is in relation to recovery proceedings. But it does not preclude the High Court, in exercise of writ jurisdiction, from looking into the invalidity of the certificate. Therefore, in writ jurisdiction, such question can, very well, be gone into and be examined, as to whether the recovery proceedings can be proceeded against a person, against whom it is sought to be proceeded.

When undertaking binds:

9. Unless, in Law, liability can be fixed on the petitioner, no amount of admission, can make him liable, particularly, when such admission is made under the threat of arrest in default of payment. Therefore, such undertaking, given under constraint, does not bind a person, unless he is legally liable for it.

Can liability be fixed on the petitioner:

10. Therefore, it is to be seen, whether the liability can be fixed on the petitioner, in law. Admittedly, liability can be fixed on the petitioner if he can be brought within the purview of Section 2(e) or 2(k) of the 1952 Act. It is contended, by Mr. Mishra, that the petitioner, as manager, was an employer within the meaning of Section 2(e) of the 1952 Act. As such, he is liable for the dues. Admittedly, the petitioner was a Manager. But there is nothing to show that he was entrusted with the management as Manager. This question was not determined as against the petitioner. When some liability is fixed against a person, he must be given opportunity of hearing. Without any opportunity of hearing, no one can be compelled to face civil consequence or penal consequence, as the case may be. In the present case, admittedly, before imposing such liability on the petitioner, no hearing was given to him. It was only when warrant of arrest was issued against him, he had to appear and give such undertaking in respect of fixation of liability, without giving him an opportunity of hearing. Thus, such liability can be fixed upon him, only after he is given opportunity of hearing. There is nothing on record to show, conclusively, that the petitioner, as Manager, was entrusted with the management of the establishment. No notice u/s 7 of the Factories Act, 1948, nominating the petitioner as occupier, having been served on the basis of the materials now before this Court, he cannot be brought within the purview of Section 2(k) of the 1952 Act. He can also not be brought within the purview of Section 2(e) of the 1952 Act as employer, having regard to the materials now before this Court. Now, admittedly, the factory is closed. The entrustment, used in Clause (ii) of Section 2(e) of the 1952 Act, makes the Manager liable, when the affairs of the establishment are entrusted to the Manager. Unless there is anything to show that there was entrustment, liability on the Manager cannot be fixed. It is also a question whether the entrustment continues after the factory is closed.

Recovery to be made from employer or his property:

11. Be that as it may, the owners or the erstwhile partners, are also known to the authority concerned. The authority concerned has not proceeded against them and their properties. Sub-section (5) of Section 8F of the 1952 Act provides for recovery of the dues from an employer or occupier or as the case may be, from the establishment by distraint and sale of his or its moveable properties. In view of specific mode of recovery having been provided for, in Section 8-F(5) of the 1952 Act, the recovery cannot proceed de hors the procedure laid down therein viz: against any one else other than the employer or occupier. The

liability on the Manager can be fixed, only when it can be established that he is an employer, within the meaning of Section 2(e) of the 1952 Act. But, there is nothing to show that any such determination was ever made in this case. The provisions of sub-section (5) of Section 8F of the 1952 Act can be utilized against a person, only when liability can be fixed upon him legally. In the circumstances, unless there is a determination that the petitioner, as such Manager, was an employer within the meaning of Section 2(e) of the 1952 Act, no liability can be fixed upon him, particularly, when the erstwhile partners are still available. Such determination can be made, only after giving an opportunity of hearing to him.

Decisions cited on behalf of the Petitioner:

12. Mr. Chowdhury, learned Counsel for the petitioner, had relied on the decision in the case of John Donald Mackenzie and Another Vs. The Chief Inspector of Factories, Bihar, Ranchi and Others, , where the Apex Court had occasion to deal with the definition of occupier in the Factories Act and Mr. Mackenzie, who was one of the Directors, was held not to be occupier, in view of the fact that he was not named in the notice u/s 7 of the Factories Act, 1948, which is to be given in the form prescribed under the said Act. The above decision supports the contention of Mr. Chowdhury to the extent, in the present case, that the petitioner was never named as occupier in any notice u/s 7 of the 1948 Act. He then relied on the decision in the case of Srikanta Datta Narasimharaja Wodiyar Vs. Enforcement Officer, Mysore, . The said decision had dealt with the contention, as is contended here by Mr. Chowdhury, in order to ascertain the extent of the definition of employer given in Section 2(e) of the said Act vis-a-vis the occupier as contemplated to be notified u/s 7(1)(f) of the Factories Act, 1948. The liability can be fixed, only when it is found that there was entrustment or charging with the affairs. In the absence of such entrustment of charging with the affairs, such liability cannot be fixed, as was held in the said decision, which supports the contention of Mr. Chowdhury.

Mr. Chowdhury had also relied on the decision in the case of J.K. Industries Ltd. and Others Vs. Chief Inspector of Factories and Boilers and Others, In the said decision, it was held that it is only one of the Directors, who can be notified, as occupier and the Company cannot engage any other employees to be occupier of the factory. In the present case, the petitioner is an employee. He having not been named, he cannot be treated as occupier, having regard to the ratio laid down in the case of J.K. Industries Ltd. (supra).

Decisions cited on behalf of the Respondents:

13. Mr. Mishra, on the other hand, had relied on the decision in Regional Provident Fund Commissioner And Ors. v. Janapriya Finance & Industrial Investment (1) Ltd., being MAT. 1919 of 2000, disposed of by this Court on November 3, 2000, wherein it was held that the definition of the employer as contained in Section 2(e) of the said Act is of wide amplitude, which includes the Manager. But the said decision proceeded on the basis that the Manager had full

control over the affairs of the establishment and that he was entrusted with the management of the affairs of the establishment. But, in the present case, no such material is available on record. As such the ratio of the said decision cannot be applied in the present case. Mr. Mishra had also relied on the decision in Binod Kumar v. Regional Provident Fund Organisation And Anr., being W.P. No. 1642 (W) of 2000 disposed of on January 21, 2000, 2001-I-LLJ-305 (Cal) by this Court, where similar view was taken. The said ratio also cannot be applied in the present case, until it is determined that the petitioner fulfills the condition laid down in Section 2(e) of the 1952 Act, for holding him liable as employer. It has not been decided in the present case. Mr. Mishra further relied on the decision in Binod Kumar v. Regional Provident Fund Organisation (supra), being MAT. 239 of 2000, disposed of on February 9, 2000, by the Division Bench of this Court, which had taken the same view in respect of Section 2(e) of the said Act. On the same analogy, as hereinbefore, the ratio laid down therein also cannot be attracted in the present case.

The Decision:

14. In the circumstances, the proceedings, as against the petitioner, shall remain in abeyance, until the authority, u/s 7A of the 1952 Act, decides the liability of the petitioner as Manager, after giving him an opportunity of hearing. In case, in the said proceedings, after giving him opportunity, it is held that the petitioner was an employer, within the meaning of Section 2(e) of the 1952 Act, in that event the proceedings shall be proceeded against him, in view of the undertaking given by him in the recovery proceedings, in terms of Section 8 of the 1952 Act. However, the recovery proceedings may proceed or be proceeded against the establishment or the employer being the erstwhile partners or their properties for recovery, in terms of sub-section (5) of Section 8F of the said Act, in the mean time, i. e., till the decision against the petitioner is taken by the respondent authority.

15. The respondent authority shall determine this question in the light of the observation made above, as early as possible and preferably within a period of three months from the date of communication of this order, after giving notice to the petitioner. It will also be open to the respondent authority to give notice to the erstwhile partners as well.

16. This writ petition is thus allowed and disposed of. There will be no order as to costs. Since no affidavit has been used, the allegations made in the writ petition are not admitted by the respondents.

17. Xerox certified copy of this order, if applied for, be given at the earliest.