

(2009) 07 KL CK 0025
In the High Court Of Kerala
Case No : Ins. App. No. 2 of 2008

Regional Director, ESI Corporation and Another	APPELLANT
Vs	
B. Mohanachandran Nair	RESPONDENT

Date of Decision : 08-07-2009

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(17), 40, 41, 75, 76

Citation : (2009) 123 FLR 414 : (2009) 3 ILR (Ker) 355 : (2009) 3 KLT 909 : (2010) 1 LLJ 195

Hon'ble Judges : V. Ramkumar, J

Bench : Single Bench

Advocate : T.D. Rajalakshmy, SC, for the Appellant; Santhan V. Nair, for the Respondent

Judgement

V. Ramkumar, J.

Whether the transferee including lessee of a factory is liable for the arrears of contribution due on the date of transfer from the transferor and if so whether such liability should subsist even on the date when steps for recovery are taken?

1. This is the question coming up for judicial resolution. In this appeal filed u/s 82(2) of the Employees State Insurance Act, 1948 (hereinafter referred to as "the Act" for short), the appellants namely Regional Director, E.S.I. Corporation, Thrissur and its recovery officer challenge the order dated May 30, 2007 passed by the Employees' Insurance Court, Kollam (hereinafter referred to as "the E.I. Court" for short). As per the impugned order the E..I. Court allowed the application (I.C. No. 23/2003) filed by the respondent herein namely B. Mohanachandran Nair, Proprietor of Prasanthi Cashew Company, Kollam seeking a declaration that Exhibit P8 garnishee order dated May 28, 2003 issued by the E.S.I. Corporation for the recovery of a sum of Rs. 42,158/- was unsustainable. The Court below further directed refund of Rs. 10,550/- deposited by the respondent herein before the Court below on June 11, 2003.

2. The facts leading to the impugned order are as follows:

Prasanthi Cashew Company at Mankadu, Kollam carries on the business of processing and export of cashew. It belongs to one Jamaludheen, Kanakavila Puthen Veedu, Beach North Ward, Kollam. As per Exhibit P1 lease agreement dated September 12, 1997 the factory was leased by the said Jamaludheen to the respondent Mohanachandran Nair from September 12, 1997 to December 31, 2000. According to the respondent lessee he took possession of the factory on September 15, 1997. For realisation of a sum of Rs. 42,158/- by way of contribution due from the factory for the period from March 12, 1993 to September 14, 1997 the appellant E.S.I. Corporation issued Exhibit P8 garnishee order dated May 28, 2003 against the Manager, Vysiya Bank, Chinnakkada, Kollam for the said amount standing to the credit of the respondent and calling upon the Vysiya Bank to pay the said amount to the Corporation by way of dues pending against the respondent. The respondent herein, thereupon, filed I.C. 23 of 12003 before the E.S.I. Court u/s 75 to 77 of the Act seeking the following relief:

to declare that the Corporation is not entitled to collect the said amount from the applicant/respondent by resort to Exhibit P8 garnishee proceedings.

The said application was opposed by the Corporation and the Court below as per the impugned order dated June 30, 2007 allowed I.C. 23/2003 as mentioned above. Hence, this appeal by the Corporation.

3. The following substantial question of law has been formulated at page 3 of the memorandum of appeal:

Whether the E.I. Court was right in concluding that u/s 93-A the transferor is not liable to pay the arrears pending while the applicant took over the establishment ?

4. I heard Advocate Smt. T.D. Rajalekshmi, the learned Counsel appearing for the appellants and Adv. Sri. Santhan V. Nair, the learned Counsel appearing for the respondent.

5. The learned Counsel appearing for the respondent made the following submissions before me in support of the impugned order:

Even though the factory was taken on lease by the respondent herein from September 12, 1997 to December 31, 2000 he had surrendered the factory to the lessor, Jamaludheen on November 30, 1999 and had intimated the said fact to the Corporation as per Exhibit P-2 letter dated January 14, 2000. Admittedly, the contribution period was from March 12, 1993 to September 14, 1997. Admittedly the respondent has paid all dues during the lease period when he was the occupier of the factory. The respondent lessee is proceeded against not for any arrears due from him during the period of lease but for the period immediately before the lease in his favour. On May 28, 2003 when the appellant Corporation issued Exhibit P-8 garnishee order to the respondent's bank the

respondent had absolutely nothing to do with the factory. The liability to pay the amount by virtue of Section 40 of the Act is on the principal employer Jamaludheen. As per the statutory Scheme of the Act the principal employer after paying the contribution can resort to Section 41 of the Act to recover the dues from the immediate employer. Since Jamaludheen, the owner of the factory was the principal employer as defined u/s 2(17) of the Act, the Corporation was not entitled to issue Exhibit P8 garnishee order. The respondent relies on the decision of a Division Bench of the Kerala High Court in Thomas K.C. v. Regional Director E.S.I.C. 1998 II LLJ 984.

6.I am afraid that I cannot agree with the above submissions made on behalf of the respondent herein. There is no dispute that the sum of Rs. 42, 158/- was due for the period from March 12, 1993 to September 14, 1997. There is also no dispute that as per Exhibit P-I lease agreement dated September 12, 1997 the factory was leased out to the respondent Mohanachandran Nair by Jamaludheen the owner for the period from September 12, 1997 to December 31, 2000. Section 93(A) of the Act reads as follows:

93. A Liability in case of transfer of establishment: Where an employer, in relation to a factory or establishment, transfers that factory or establishment in whole or in part, by sale, gift, lease or license or in any other manner whatsoever, the employer and the person to whom the factory or establishment is so transferred shall jointly and severally be liable to pay the amount due in respect of any contribution or any other amount payable under this Act in respect of the periods up to the date of such transfer. Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.

(emphasis supplied)

Thus, in a case where the factory or establishment has been transferred by way of lease, both the employer in respect of the factory or establishment as well as the lessee shall be jointly and severally be liable to pay the amounts due in respect of any contribution or any other amount under the Act in respect of the periods up to the date of such transfer. Hence, with regard to the amounts due for the period up to the date of transfer both the employer as well as the transferee are jointly and severally liable to pay the amount. The argument that from September 12, 1997 till the termination of the lease period, since the respondent was not the "principal employer" as defined u/s 2(17) of the Act he cannot be proceeded against for the dues accrued prior to the lease period ignores the fact that Section 93-A of the Act is a special provision which makes the employer and the transferee jointly and severally responsible for the contribution due prior to the transfer. When the transferee is also expressly made liable for the dues by this special provision, then it is unnecessary to consider whether he is a "principal employer" as defined in Section 2(17) of the Act for the purpose of Section 40 of the Act. Section 93-A of the Act is an independent provision which has a separate existence de hors Section 40 of the Act. That

apart, the definition clause which defines various expressions itself indicates that the meaning assigned to each expression will hold good unless there is anything repugnant in the context. Even otherwise, the definition of "principal employer" also takes in the occupier of the factory. It is therefore futile for the respondent to contend that he was not liable for the arrears of contribution. The respondent cannot take up the plea that it was Jamaludheen the owner of the factory who was the "principal employer" and that he alone was solely liable for the contribution.

7. The further contention of the respondent that the amount could be recovered from him only when he continued to be the occupier of the premises on the date of the garnishee order namely May 28, 2003 is also equally untenable. If u/s 93-A of the Act both the owner as well as the lessee are jointly and severally responsible for the dues payable in respect of the factory up to the date of the lease, merely because the garnishee order is issued long thereafter does not in any way affect the liability of the lessee. The Corporation was thus fully justified in realising the dues by issuing Exhibit P-8 garnishee order dated May 28, 2003. The view taken by the E.I. Court that since the claim related to the period from March 12, 1993 to September 14, 1997 during which period the respondent was not the occupier of the factory and that he had nothing to do with the factory on the date of issue of the garnishee order, the respondent cannot be proceeded against for the contribution is clearly unsustainable. He was certainly the occupier of the cashew factory during the lease period commencing from September 12, 1997. The respondent claims to have come into possession of the factory on September 15, 1997. The contribution period was from March 12, 1993 to September 14, 1997. So, he will be deemed to be the occupier of the factory on the strength of Exhibit P-1 agreement. In any view of the matter, he was liable for the contribution u/s 93-A of the Act. The law does not insist that such lessee should continue to hold the status of a transferee even on the date of initiation of proceedings for the realisation of the dues. Reliance placed by the learned Counsel on the decision of the Division Bench of this Court in *Thomas K.C. v. Regional Director, E.S.I. Corporation* (supra) is of no avail since in that case the question was as to whether for the amounts which fell due during the period of transfer, instead of the transferee, the transferor could be proceeded against by the Corporation. The Division Bench answered the question in the negative and rightly so because Section 93-A of the Act would not apply to such a situation.

The result of the foregoing discussion is that the substantial question of law based on Section 93-A of the Act is liable to be answered in favour of the appellants and I do so. Consequently, the order passed by the E.I. Court is set aside. Exhibit P-8 garnishee order is upheld. The refund ordered by the Court below will also stand set aside. No costs.