
(2008) 01 DEL CK 0068

In the Delhi High Court

Case No : Writ Petition (C) No. 1786 of 1989

Srimohan Tayal

APPELLANT

Vs

The Regional Provident Fund Commissioner and Another

RESPONDENT

Date of Decision : 30-01-2008

Acts Referred:

Citation : (2008) 147 DLT 506 : (2008) 117 FLR 79 : (2008) 2 LLJ 606

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : Amitabh Narayan, for the Appellant; Nemo, for the Respondent

Final Decision : Allowed

Judgement

Anil Kumar, J.—The petitioner has impugned the demand raised by respondent No. 1 against the petitioner relating to contribution towards the provident fund on the ground that the petitioner is not an employer as contemplated u/s 2 of the Employees Provident Fund Act, 1952 and merely being a director of the private limited company, the petitioner has not become liable for the demands raised by the respondent No. 1.

2. The brief facts relevant for the adjudication of this petition are that a notice dated 4th May, 1989 bearing No. 549/PF/38/7435 was issued in the name of the petitioner directing the petitioner to appear before the respondent No. 2 and to pay a sum of Rs. 18,012.75/- on account of dues of the firm M/s. National Offset Works.

3. The contention of the petitioner is that M/s. National Offset Works is only a trade name in which the business was carried on by M/s Allahabad Law Journal Company Ltd which is a company incorporated under the Companies Act. According to the petitioner the trading name is owned by the company which is being wholly looked after and the business is exclusively run by Mr. Krishan Mohan Tayal.

4. Petitioner averred that he had at all times only 20 preference shares of face value of Rs. 50/- each and that will not make him liable for the liability of the private limited company.

5. According to the petitioner the authorized capital of the company was Rs. 10,00,000/- divided into 4000 preference shares of Rs. 50/- each and 80,000 equity shares of face value of Rs. 10/each. The issue and subscribed capital is 4000 preference shares of Rs. 50/- each amounting to Rs. 2,00,000/- and 34,000 equity shares of the face value of Rs. 10/- each amounting to Rs. 3,40,000/- and thus the subscribed capital of the company is Rs. 5,40,000/- out of which the petitioner has only 20 preference shares of the value of Rs. 1,000/- only. The petitioner categorically averred that there have been three directors of the said company during the years 1973 up to the middle of June, 1977 namely Mr. Krishan Mohan Tayal, Mr. Vinod Tayal and Sh. Sri Mohan Tayal (petitioner). It is contended that consequently the dues of the companies were to be paid by the company and not by the petitioner and no action can be taken against the petitioner for nonpayment of contribution of employees provident fund by the company and its managing director or the persons who were in control of the company at the relevant times. According to the petitioner he is not an employer nor can he be constituted to be an employer u/s 2(e) of the Act which is as under:

(e) "employer" in relation to a factory means the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and, where a person has been named as a manager of the factory under Clause (f) of Sub-section (1) of Section 7 of the Factories Act, 1948 (LXIII of 1948), the person so named;

6. The petitioner has also averred that he was dissatisfied with the management of the company and, Therefore, he had tendered his resignation as a Director of the company during the year 1977 and in the circumstances there is no personal liability of the petitioner as an employer as contemplated under the provisions of the said Act.

7. The petitioner in the circumstances has sought quashing of the notice dated 4th May, 1989 issued to the petitioner for payment of Rs. 18,012.75/- and to appear before respondent No. 2 on 15th May, 1989.

8. The petition is contested by the respondents and a counter affidavit dated 25th August, 1989 was filed contending that this Court is not to sit in appeal over the decision and the matter involves questions of fact which cannot be raised in the writ petition. It has also been averred that the petitioner had been one of the Directors of the petitioner company for the relevant period during which the company had been in default in provident fund contribution. The emphasis was laid by the respondents that in case there was any change in the employers/ Directors/partners such change had to be intimated to the Regional Provident Fund Commissioner by a registered post within 15 days of the change and no

such change as has been alleged by the petitioner that he resigned from the company in 1977 was ever intimated to the respondents. According to the respondents the petitioner continued to be a Director of the company in terms of Form 5-A and consequently the petitioner is liable and the claim that he has been absolved of his liability is not sustainable as even in terms of return of ownership available with the respondent No. 1, the petitioner continues to be a director.

9. I have heard the learned Counsel for the petitioner. No one has appeared on behalf of respondent No. 1. Perusal of Section 2 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 reflects that every Director is not an employer as contemplated in the said provision. To be liable on behalf of the company, one has to be an employer and it has to be established that the control over the affairs of the establishment was with the Director or a manager or a Managing Director or the Managing Agent.

10. This cannot be disputed that the partners of a partnership firm and directors of a Limited company cannot be held to be liable on account of being employer merely on account of being partners or director of a company. In (1981) Lab I.C. 538, Annatharamaiah Woolen Factory, Bangalore-26 and Ors. v. State, a complaint u/s 14(1-B) and Section 14(A) of the Provident Fund Act was filed against the firm and its four partners. The partners sought discharge on the ground that they were not the ?employer? of the factory in terms of Section 2(e) (i) of the Act and Therefore not liable for prosecution. The Court in terms of Section 2(e) of the Act held the prosecution against the partners was not proper as only those partners who had ultimate control of the affairs and business of the establishment were liable to be prosecuted. The Court held as under:

8. ...Thus it is clear that ordinarily not all the partners are liable to be punished, but only the person who has ultimate control over the affairs of the establishment or the manager, managing director or managing agent who has ultimate control over the affairs of the establishment, is liable to be prosecuted both under Sections 14(1-A) and 14(1-B). so also, in cases where the Act, the scheme, the Family pension scheme or the Insurance Scheme, is a company as provided under Sub-section(1) of Section 14A, it is not all the person but the person who at the time of committing of the offence was in charge and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offences and shall be liable to be prosecuted against and punished accordingly.

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10. But, it is not in all cases irrespective of the fact whether all the persons or partners of the firm or establishment are necessarily to be indicted for such offence committed by the company establishment. Only such manager, secretary or other officer of the company or establishment who is in charge of such management or the affairs of the establishment or contributes to the commission of the offence by consent or connivance or neglect is liable to be prosecuted.

11. Similarly in 1991 Lab I.C. 2017, Transport Corporation of India Limited and Ors. v. R.M. Gandhi and Ors., it was held relying on Annatharamaiah Woolen Factory's case (supra) that not all or any Director, can be prosecuted under the provisions of the Provident funds act, unless he is the in charge of the establishment. Quoting Section 2 of the Provident Fund Act, it was held as under:

22. The intention of the legislature in making elaborate provisions, reproduced hereinabove, is to ensure that at all given times there is readily available a person/persons who is/are directly responsible for implementation of the provisions of the act, in the establishment and, conversely, answerable for breach of the provisions thereof. In the face of these provisions, it would be futile to vaguely aver in the complaint that all the directors named in the complaint are in charge of the establishment and responsible for the conduct of its business.

Thus what flows from the aforesaid judgments is that only those directors who are in charge of the management or the affairs of the establishment or contributes to the commission of the offence by consent or connivance or neglect are liable to be prosecuted.

12. The petitioner has categorically averred that he had only 20 preference shares of Rs. 50/- each amounting to Rs. 1,000/- only out of the subscribed capital of Rs. 5,40,000/-. The categorical averment of the petitioner that Sh. Krishan Mohan Tayal, s/o. Late Sh. Dev Raj Tayal was looking after and managing the affairs of the company has not been specifically denied by the respondent No. 1. The other facts disclosed by the petitioner regarding the authorized capital and subscribed capital of the company have also not been categorically refuted by the respondent except the bald denial. A director of the company does not become an employer under the act unless it is established that the director is in control of the affairs of the private limited company.

13. In the circumstances the inevitable inference is that the petitioner could not be termed as an employer in respect of M/s Allahabad Law Journal Ltd which was carrying on business under the trading name M/s. National Offset Works so as to be liable under the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 on default of the company to pay the contribution of the provident fund.

14. Though the petitioner has alleged that he had resigned from the company as director in 1977 but nothing has been produced by the petitioner that he had resigned from the company. In any case whether the petitioner had resigned from the company or not, will be material only in case it is established that prior to his resignation, he was in control of the affairs of the company. If the petitioner was not in control of the affairs of the company whether he resigned or not, will not be very material.

15. The petitioner Sh. Srimohan Tayal has also died during the pendency of the writ petition on 21st November, 1997 and after his demise the legal representatives of Late Sh. Srimohan Tayal were substituted in his place. If the

petitioner Late Sh. Srimohan Tayal was not an employer as contemplated under the Act as he was neither in control of the company nor it has been established that he was exercising such powers so as to manage the affairs of the company, it cannot be inferred that there was liability of the petitioner. Therefore, if there was no liability of the petitioner for the contribution under the Employees Provident Fund Act on behalf of the company, the liability shall not be inherited by the legal representatives, the present petitioners who have been substituted after the demise of Late Sh. Srimohan Tayal.

16. In a matter Regional Provident Fund Commissioner and Another Vs. Dharamsi Morarji Chemical Co. Ltd., , it was held that unless there is clear evidence to show that there was any supervisory, financial or managerial control, it cannot be said that one is the branch of the other. In this case two entities were separately registered under the Factories Act. They were separately registered under the Central Sales Tax Act and the Employees State Insurance Act and it was also found that there was total independence of the two units and in the circumstances it was held that the learned Single Judge and the Division Bench were right in their conclusion that the respondent was not a branch of M/s. Continental Exporters. Though this was a case u/s 2A of the act, however, the similar yardstick has to be applied to ascertain whether a person is an employer or not as contemplated u/s 2(e) of the Act. Therefore, unless it is clearly shown that there was any supervisory financial or managerial control, it could not be inferred that the petitioner was an employer and was liable on behalf of the company for non contribution of the funds. Merely because in the form 5A relied on by the respondent a copy of which is filed showing the name of the petitioner as one of the Directors, it could not be inferred that the petitioner was in supervisory financial or managerial control. The petitioner has categorically given the authorized capital and paid up capital of the company and his shareholding of the preferential shares of the company. To refute these facts the respondents have relied on a copy of the return of ownership which was sent to the Regional Commissioner, Delhi, a copy of which is annexed with the counter affidavit. In the said return, petitioner is not shown as occupier. In para 9, the name of the occupier is given as Shri. K.M. Tayal. Para 10 regarding name of the Managing agent is blank. Under para 11, the names of directors and their postal address, the name of the petitioner is mentioned along with other directors, Shri. Vinod Tayal; Shri K.M. Tayal; Shri Shiv Raj Gupta and Shri Babu Lal Jaipuria. The name of the manager as given in para 13 is Shri H.K. Jain and the name of person in-charge and responsible for the conduct of business of establishment in para 14 is given as Shri H.K. Jain. Therefore, even according to the document relied on by the respondents, the petitioner is neither occupier nor managing agent nor manager nor in-charge and responsible for the conduct of business. Merely because the petitioner is one of the directors of the company along with other directors whose names are given, the liability cannot be fasten on the petitioner.

17. The plea of the respondent that the writ petition involves substantial disputed question of facts and the writ petition will not be maintainable cannot be

accepted in the present facts and circumstances of the case. The Court can go into disputed question of facts also in exercise of jurisdiction under Article 226 of the Constitution of India. In *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, it was observed by the Supreme Court that in certain cases even a disputed question of fact can be gone into by the court entertaining a petition under Article 226 of the Constitution, holding: (SCC p.572, para 28)

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See *Whirlpool Corporation v. Registrar of Trade Marks*¹³.) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.

18. In *Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others*, , relying upon upon *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others*, it was held that in appropriate cases, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the virus of an Act is challenged. However, there cannot be any doubt whatsoever that the question as to when such a discretionary jurisdiction is to be exercised or refused to be exercised by the High Court has to be determined having regard to the facts and circumstances of each case and no hard-and-fast rule can be laid down.

19. A three-Judge Bench of this Court in *Gujarat Ambuja Cement Ltd.* (2005) 6 SCC 499 referring to *Harbanslal Sahnia* (supra) held: (SCC pp. 517-18, paras 22-23)

22[24]. There are two well-recognised exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of

law the High Court in an appropriate case can entertain a writ petition.

23[25]. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute.

20. In the facts and circumstances, it will not be appropriate not to exercise jurisdiction under Article 226 of the Constitution of India and relegating the petitioner (legal representative), who has also since deceased, to another forum. In the absence of any plea that the petitioner was in financial and managerial control of the company, it cannot be inferred that the petitioner as a director who had only 20 preferential shares of Rs. 50 each had been exercising financial and managerial control over the company which defaulted in payment of the contributions of the provident fund so as to become liable for the same.

21. Consequently, the inevitable inference is that the respondents could not recover an amount of Rs. 18,012.75/- from the petitioner and, Therefore, the notice dated 4th May, 1989 bearing No. 549/PF/3/7435 demanding an amount of Rs. 18,012.75/- from the petitioner is set aside and the writ petition is allowed. The parties are, however, left to bear their own cost in the facts and circumstances.