(1982) 08 KL CK 0010

In the High Court Of Kerala

Case No : Criminal Appeal No''s. 152/80 and 208 to 213 of 1981

The Employees Provident Fund Inspector — APPELLANT

Vs

South India Saw Mills (P) Ltd. and Others — RESPONDENT

Date of Decision : 20-08-1982

Acts Referred:

Companies Act, 1956 — Section 446
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14, 14A, 2, 5, 6
Factories Act, 1948 — Section 7(1)

Citation : (1982) 08 KL CK 0010

Hon'ble Judges : T. Chandrasekhara Menon, J

Bench : Single Bench

Advocate : P.C. Chacko, for Central Government, for the Appellant; P. Ramakrishnan Nair, for the Respondent

Final Decision : Dismissed

Judgement

Chandrasekhara Menon, J.—In these criminal appeals which arrives out of proceedings under the Employees Provident Funds and Miscellaneous Provisions Act, 1952, hereinafter called the Act, the scope and ambit of Section 14A arise for consideration. It is better that Criminal Appeal No. 152 of 1980 be Heard separately and others together.

2. In Criminal Appeal No. 152 of 1980, the Chief Judicial Magistrate of Kozikode had acquitted the accused on the ground that under the Act, the liability to pay the contribution is with the employer and where there is a Manager appointed for the firm he alone can be considered as the employer. Further the court said that the prosecution had failed to prove that the second accused in that case who is the Secretary and Director of the first Respondent Company is the employer who is liable to pay contributions and who can be successfully prosecuted.

3. Shri P.C. Chacko, learned Central Government Standing Counsel, who appeared for the Appellant-complainant namely the Provident Fund Inspector,

Kozhikode, strongly contended that while the order of acquittal in the circumstances may not be wrong as such, the grounds for acquittal cannot be sustained. It is also contended that the interpretation given to Section 14A by the court is clearly erroneous because as per that Section both the company and the person responsible for running the company are liable.

4. It will be useful in this connection to refer to the definition of the term ''employer'' in the Act. u/s 2(e) ''employer'' means--

(i) In relation to an establishment which is a factory, 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 (63 of 1948), the person so named; and

(ii) In relation to any other establishment, the person, who or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a Manager, Managing Director or Managing Agent, such Manager, Managing Director or Managing Agent.

It might be noted that the definition is an inclusive one which takes in the owner or occupier of the factory, the agent of such owner or occupier or where a person has been named that person in relation to the establishment, or the authority which has the ultimate control over the affairs of the establishment and where the said affairs are entrusted to the Manager, Managing Director or Managing Agent. Therefore, the owner or occupier could be proceeded against. As far as the present contentions are concerned, the matter is made very clear by Section 14A, which is as follows:--

14A. Offences by companies.--If the person committing an offence under this Act, the Scheme or the Family Pension Scheme or the Insurance Scheme is a company, every person who at the time the offence was committed was in charge of, 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 offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this Sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in Sub-section (1) where an offence under this Act, (the Scheme or the Family Pension Scheme or the Insurance Scheme) has been committed by a company and it is proved that the offence has been committed with the consent or connivances of, or is attributable to any neglect on the part of, any Director or Manager, Secretary or other Officer of the company such Director, Manager, Secretary or other Officer shall be deemed to be guilty of that offences and shall be liable to be proceeded against and

punished accordingly.

This indicates that every person who at the time of the offence was in charge or was responsible for the conduct of the business of the company shall be deemed to be liable to be proceeded against. No doubt, the proviso to the Section makes it clear that nothing contained in the Section shall render any such person liable to any punishment, if he proves that the offences was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. The prosecution will have to prove that the person concerned was in charge of, and was responsible to the company for the conduct of the business of the company. Such person also cannot be deemed to be guilty unless the prosecution further establishes that the offence was committed with the consent or connivances of any Director, Manager, Secretary or another officer of the company. The learned Chief Judicial Magistrate is therefore clearly wrong in stating that when the manager is appointed he alone can be considered as an employer. However, the acquittal has to be sustained because the Prosecution has failed to prove in the nature of the evidence in the case that the officer concerned--2nd Respondent herein--was responsible for the conduct of the business of the company. As regards the company, it is now in liquidation. Once the company is in liquidation u/s 446 of the Companies Act, when a winding up order has been made or the official Liquidator has been appointed as provisional Liquidator, no suit or other legal proceeding shall be commenced, or when pending on the date of the winding up order, shall be proceeded with, against the company, except by leave of the court and subject to such terms as the court may impose. In this case, the proceedings could not have been conducted against the company. Hence, subject to the observations made above the Criminal Appeal is dismissed.

5. In regard to the other appeals, where the same company is concerned, in view of the winding up order and what have been stated there could have been no proceedings conducted against the company. As regards the Secretary and Manager who are the other accused in the case, the prosecution has failed to prove that they where responsible for the conduct of the business of the company. However, there is some observation in the judgment of the lower court which this Court has to consider. It is stated therein that the company alone is responsible for remitting the dues if at all any collected towards the fund from the employees for which also there is no evidence. It would appear from this that the liability of the company for its officers will arise only if there is any collection from the employees in respect of their contribution. Section 6 of the Act provides that the contribution which shall be paid by the employer to the fund shall be 6? percent of the basic wages, dearness allowances and retaining allowances. u/s 14, the employer who contravenes, or makes default in complying with the provisions of Section 6 becomes liable for being imposed the penalty provided in the Section.

6. In Clause 30 of the employees Provident Funds Scheme, which is framed in

exercise of the powers conferred by Section 5 of the Act, the employer shall in the first instance, pay both the contribution payable by himself and also on behalf of the member employed by him directly or through a contractor, the contribution payable by such member and it is also provided therein that it is the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges. Therefore, even if no contribution is collected from the employees, the employer''s liability will not in any way be restricted. These criminal appeals are also dismissed subject to the observation made.

