
(1996) 09 KL CK 0049
In the High Court Of Kerala
Case No : M.F.A. No. 199 of 1987

Thomas K.C.

APPELLANT

Vs

Regional Director, ESI Corporation

RESPONDENT

Date of Decision : 11-09-1996

Acts Referred:

Employees State Insurance (Amendment) Act, 1965 — Section 93A
Employees State Insurance Act, 1948 — Section 2(13), 2(17)

Citation : (1997) 2 ILR (Ker) 453 : (1997) 1 KLJ 321 : (1998) 2 LLJ 984

Hon'ble Judges : K.K. Usha, J;G. Sivarajan, J

Bench : Division Bench

Advocate : M. Pathrose Mathai and S. Siri Jagan, for the Appellant; T.D. Rajalakshmi and P.N. Mohanan, for the Respondent

Final Decision : Partly Allowed

Judgement

Usha, J.—Appeal is at the instance of applicant in Insurance Case No. 5 of 1984 before the Employees' Insurance Court, Quilon. The original appellant died during the pendency of the appeal and his legal heirs are impleaded as additional appellants.

2. Original appellant was operating a Cashew processing Unit, Kulakkada, Kottarak-kara. According to the appellant, he directly operated the factory till 1975. Thereafter due to non-availability of raw cashew nuts and due to ill-health he stopped running of the factory. From the averments it is seen that from October 11, 1976 to December 1, 1976 the factory was leased out to one Alikunju, from December 1, 1976 to June 18, 1979 the factory remained closed, from June 18, 1979 to December 29, 1980 the factory was again leased out to M/s Eastern Cashew Company and after that M/s. Uma Trading Company took on lease the factory for a period of three years from January 1, 1981. While so, the I respondent E.S.I. Corporation issued orders to the appellant demanding an amount of Rs. 2,73,556.65 as contribution under the Employees' State Insurance Act in respect of the employees in the factory for the periods from

October 11, 1976 to November 29, 1976, October 25, 1979 to March 29, 1980, March 30, 1980 to September 27, 1980, September 28, 1980 to March 28, 1981, March 29, 1981 to September 26, 1981 and September 27, 1981 to March 27, 1982. It is also alleged that the 1st respondent has assessed the contribution amount on the assumption that there were 401 workers in the factory and each of them was drawing salary at the rate of Rs. 350/- p.m. Revenue recovery proceedings were later initiated through 2nd respondent in which the amount recoverable from the appellant was limited to Rs. 2,06,595/- i.e. contribution for the periods ending on November 29, 1976, March 29, 1980, September 27, 1980 and March 28, 1981 together with interest.

3. Aggrieved by the above, the appellant moved the Employees' Insurance Court, Quilon u/s 75 of the Employees' State Insurance Act, 1948 challenging the demand issued by the I respondent. It was contended by the appellant that he was not running the factory during the relevant period and therefore he was not liable to pay contribution. According to the I respondent, the appellant's factory was covered under the E.S.I. Act with effect from October 11, 1976 and that he did not furnish returns or records for verification. It was under these circumstances, the Corporation initiated proceedings u/s 45A of the E.S.I Act for assessing the contribution due from the applicant after issuing notice. The applicant replied to the show cause notice taking the stand that there had been lease arrangements between him and other parties during the relevant period. The Corporation thereupon made enquiries through the Cashew special Officer. The information received from the Cashew Special Officer was to the effect that the applicant was the occupier of the factory from 1975 to 1989 except for 8 months. Thereafter notice was issued to the applicant. On his failure to pay the contribution revenue recovery proceedings were initiated to recover the amount for the contribution period ending 11/76, 3/80, 9/80 and 3/81. For the balance period proceedings were initiated against M/s. Uma Trading Company.

4. The Insurance Court took the view that since it was admitted that there was work in the factory till 1975 even if it is leased out later, the liability of the applicant would continue as an employer by virtue of the provisions contained u/s 93A of the E.S.I. Act. On this basis it took the view that employer's liability never ceased to exist whether the transfer on lease continues or whether it comes to an end. According to the Insurance Court, the lease arrangement is only an internal arrangement between the applicant and lessee and therefore it shall not in any way affect the liability of the applicant, owner of the factory. We do not find any consideration regarding the number of workers to be covered nor any assessment of the quantum of the liability of the applicant in the order.

5. The learned counsel appearing on behalf of the appellant would contend that the Employees' Insurance Court has committed a grave error in interpreting Section 93A as to make the owner of the factory liable for the contribution during the period in which the lessee was operating the factory. He also submitted that the Tribunal had abdicated its function in not assessing the number of workers

and computing the amount of contribution. According to the learned counsel for the appellant, there is no basis in the assumption that there were 400 workers and they were being paid at the rate of Rs. 350/-p.m.

6. The learned counsel appearing on behalf of the corporation submitted that the appellant is the principal employer and therefore it is his liability to pay the employees' contribution even during the period when the factory was run by his lessees. She pointed out the provisions contained under Sections 39, 40 and 41 as also the definition of the term principal employer u/s 2(17) of the Employees' State Insurance Act, 1948 in support of her contention. Section 39(1) provides that contribution payable under the Act in respect of an employee shall comprise contribution payable by the employer and contribution payable by the employees and shall be paid to the Corporation at such rates as may be prescribed by the Central Government. It is also provided that if any contribution payable under the Act is not paid by the principal employer on the date on which it became due, he shall be liable to pay interest also. Section 40 mandates that the "principal employer" shall pay employer's contribution and employees' contribution in respect of every employee whether directly employed by him or by or through an immediate employer. Section 41 provides that a principal employer shall be entitled to recover the amount of the contribution which he had paid in respect of an employee employed by or through an immediate employer, either by deducting from any amount payable to the immediate employer by the principal employer under any contract or as a debt payable by the immediate employer. The endeavour of the learned counsel was to show that the Statute expects the principle employer to make the payment, even when the immediate employer fails to pay contribution. The terms "principle employer" is defined u/s 2(17) as follows:

2(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 any 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.

7. The learned standing counsel for the Corporation contended that the appellant being the owner of the factory would be treated as "principal employer" and even if the lessees do not pay the contribution, it is open to the Corporation to realise the contribution from the appellant/owner as principal employer. Reliance was also placed by the learned counsel on the provisions contained u/s 93A. She contended that when the period of lease or licence is over there is a re-transfer

of the right in the property to the owner who is referred as employer in Section 93A and in such circumstances he can be taken as the transferee and the licensee as the transferor. If that be so, according to the learned counsel, the liability of the lessee will have to be taken on by the owner by virtue of the provisions contained u/s 93A.

8. We will first examine the contention raised by the learned counsel for the Corporation on the basis of Sections 39, 40 and 41. Section 39 only provides for two different types of contribution i.e., employees' and employer's contribution and it also provides that non-payment of contribution by the principal employer would make him liable to pay interest. Section 40 of course provides that the principal employer shall pay contribution not only when employees are directly employed by him but also by or through an "immediate employer. Section 41 is a provision for enabling the principal employer to realise the contribution which he had paid on behalf of the immediate employer. But then the question would arise whether a lessee of a factory would come within the term "immediate employer" which term is defined under

Section 2(13) as follows:

"immediate employer", in relation to employees employed by or through him, means a person who has undertaken the execution, on the premises of a factory or an establishment to which this Act applies or under the supervision of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment, and includes a person by whom, the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer (and includes a contractor)".

The above provision would clearly show that the term "principal employer" has got a different connotation than lessor of a factory. The "immediate employer" has no independent proprietary right in the factory, he is only executing certain work for and on behalf of the "principal employer". The contractor would come within the term "immediate employer". The character of an immediate employer is further evident from the definition of the term "employee" u/s 2(9). Clause (ii) provides that a person who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment." This would also show that whenever persons who are employed through immediate employer the principal employer continues to be the occupier of the factory. But in the case of lease the position is entirely different. The right to run the factory is transferred to the lessee who therefore gets a proprietary right in the property viz., factory. The licence to run the factory has to be taken in his name and he will be occupier

for the factory. Therefore, the position is when the owner himself is running the factory he will be the principal employer. But if a lessee is running the factory the lessee will be the occupier and therefore the principal employer. We are of the view that there cannot be two principal employers in respect of a factory at the same time, namely, the owner and the occupier, even though wording of the definition of principal employer would show that the principal employer can be either the owner or occupier of the factory. In the light of the above, we reject the contention taken by the learned counsel for the I respondent that in the present case the appellant has to be taken as the principal employer even when the factory was leased out and it was being run by a lessee.

9. Now coming to the argument based on the provisions contained u/s 93A we note that the above Section was added in the Statute by way of an amendment under Employees' State Insurance (Amendment) Act, 1965. Section 93A 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 licence or in any other manner whatsoever, the employer and the persons 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 upto the date of such transfer."

A mere reading of the above Section would clearly show that it was incorporated in the Statute to rope in the transferee of a factory to bear the liability of the transferor as the employer under the Act. In the statement of objects and reasons to the amendment referring to Section 93A it is stated as follows:

" It is proposed to provide that the buyer or transferee of an establishment in respect of which dues payable under the Act are pending shall also be liable to pay those dues."

The language of the section would not in any way justify the interpretation given by the Employees' Insurance Court so as to make the transferor liable for the dues from transferee. So also the theory of retransfer on the expiry of the period of the lease and thereby making the owner/transferor a transferee for the purpose of Section 93A also cannot be accepted. When the lease is for a definite period and when the period expires the lease automatically gets terminated. There is no question of re-transfer to the owner. In view of the above, we cannot agree with the finding of the Employees' Insurance Court that the appellant will continue to be liable for the dues under the Act even when the factory was leased out to the third party and the lessee was operating the factory as its occupier.

10. But this will not solve the issue involved in this case. As mentioned earlier, it is the case of the appellant that for different periods from September 11, 1976 onwards different persons were operating the factory as lessees and for certain

period it was completely closed down. From Ext. D1 a letter to the Asst. Regional Director, E.S.I. Corporation by the Special Officer for Cashew Industry it is seen that the factory was occupied by M/s. Easter Cashew Company, Quilon from March 18, 1977 to November 17, 1977 and the appellant was the occupier from November 18, 1977 to December 17, 1980. Thereafter from December 17, 1980 onwards it was in the possession of M/s. Uma Trading Company. But when the Cashew Special Officer was examined he was not in a position to give clear evidence on this aspect. We find that since the Employees' Insurance Court took the view that the appellant is liable u/s 93A even for the period during which lessees were operating the factory, it did not go into the details of these contentions put forward by both sides. We are of the view that the case has to go back to the Employees' Insurance Court for a detailed consideration on the factual position as to who was actually operating the factory during the period from November 10, 1976 onwards and whether for any period it was closed down without doing any work. It is open to both sides to adduce further evidence on this aspect. Even if there had been any lease arrangement between the appellant and third party unless the lessee is shown as the occupier of the factory in accordance with the provisions of the Factories Act, it will not be open to the appellant to contend that third party was operating the factory.

11. We find merit in the complaint of the appellant that there had not been any consideration as to whether the appellant's factory can be brought under the coverage of the provisions of the Employees' State Insurance Act and if so, what would be the number of workers and the quantum of contribution. The Employees' Insurance Court is directed to consider these aspects also before entering a finding of liability either on the appellant or on the lessees. It is open to the parties to adduce evidence on this aspect also. During the pendency of this appeal the appellant died and his legal heirs are impleaded as Addl. respondents 2 to 9 in the appeal. The Employees' Insurance Court will treat the above mentioned appellants 2 to 9 as additional applicants before it. Pursuant to an interim order passed by this Court in C.M.P. No. 7192/1987 on March 31, 1987 the appellant was directed to furnish security to the satisfaction of the Regional Director, E.S.I. Corporation, Thrissur for the amount demanded. We directed that the above security shall be kept in force till the matter is finally decided by the Employees' Insurance Court.

The appeal stands partly allowed with the above directions but in the circumstances there will be no order as to costs.

Since the counsel wanted to address further arguments, we posted the case on December 16, 1996 for to be spoken to again and permitted the counsel to address their arguments. After appreciating their arguments we took the view that there is no need to revise the conclusion which we had already arrived at and the judgment pronounced on September 11, 1996. The parties will appear before the Employees' Insurance Court, Kollam on March 17, 1997.