

(1986) 08 BOM CK 0054

In the Bombay High Court

Case No : Writ Petition No. 2471 of 1982 and 1918 of 1983

Vemly Hotels

APPELLANT

Vs

Kuldeep Singh and Others

RESPONDENT

Date of Decision : 11-08-1986

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(13), 2(17), 3A, 40(1), 93

Citation : (1995) 3 LLJ 761

Hon'ble Judges : Pendse, J

Bench : Single Bench

Advocate : C.J. Shah and V.R. Chhatrapati, for the Appellant; V.V. Tulzapurkar, for Respondent Nos. 1 and 5 and R.B. Masodkar and A.M. Shah, for the Respondent

Final Decision : Partly Allowed

Judgement

Pendse, J.—Both these petitions filed under Article 226 of the Constitution of India can be conveniently disposed of by a common judgment as the facts involved in the two petitions and so also the parties are common. For the sake of convenience, instead of referring the parties as petitioners or respondents, it would be advantageous to refer to them by their titles.

The Trustees of Habib Esmail Memorial Trust are owners of a hotel known as "Hotel Bombay International" situate in the building known as "Dar-ul-Habib" at the junction of Dinshaw Valeria Road and Netaji Subhash Road (Marine Drive), Bombay. By an agreement dated September ,24, 1968, the Trustees allowed Merchant Hotels Private Limited to conduct the hotel for a period of five years from August 1, 1968 with an option of renewal of further five years on the terms and conditions set out in the agreement. Merchant Hotels exercised the option of renewal and accordingly an agreement of renewal dated April 12,1976 was executed. In pursuance of these two agreements, Merchant Hotels conducted the hotel during the period from August 1, 1968 to July 31, 1978. From July 1970, the provisions of the Employees' State Insurance Act, 1948 (hereinafter referred

to as the "Act") applied to the employees of the Merchant Hotels Private Limited on the basis that the Hotel is a "factory" falling under the provisions of Section 2(12) of the Act. The Merchant Hotels Private Limited filed Miscellaneous Petition No. 779 of 1972, in this Court contending that the Act was not applicable and for injunction restraining the authorities from applying the provisions of the Act. The petition was admitted and the interim reliefs were granted restraining the authorities from applying the provisions of the Act or from instituting any recovery proceedings. The Writ Petition was dismissed on February 12, 1982 and it was held that the provisions of the Act apply to the employees of the Hotel.

2. The Trustees executed an agreement dated May 13, 1979 in favour of Vemly Hotels whereby Vemly Hotels were allowed to conduct the hotel from August 1, 1978 to March 31, 1983. On April 28, 1982, the Inspector appointed under the Employees' State Insurance Act visited the Office of Vemly Hotels and demanded the records of the employees during the period from July 1970 to July 1979. Vemly Hotels disclosed the record for the period from August 1, 1978, the date from which Vemly Hotels were appointed to conduct the hotel. On June 30, 1982, the Deputy Regional Director of the Employees' State Insurance Corporation issued show cause notice against the petitioners, inter alia, complaining that the Insurance Inspector was not given inspection of the ledger, cash book payment vouchers, musters, etc. for the period from July 1970 to July 1979. The notice further recites that non-production of record for inspection u/s 45 of the Act is a breach of law punishable with fine and imprisonment. The Vemly Hotels were called upon to show cause why action u/s 85 of the Act should not be taken. The Deputy Regional Director issued Notice dated October 7, 1982 to Merchant Hotels informing that as the Writ Petition filed by them in the High Court was dismissed, the arrears of contribution due from July 1, 1970 shall be paid within 15 days. The Merchant Hotels were also called upon to produce the records for inspection of the Insurance Inspector. A copy of this notice was served on Vemly Hotels and further informed that u/s 93A of the Act, the liability of dues on transfer of establishment is joint and several and hence Vemly Hotels were called upon to arrange for payment of arrears for the period commencing from July 1, 1970 to November 12, 1978. Vemly Hotels were threatened that in case the payment of arrears is not made, then the same shall be assessed on ad hoc basis and action for recovery shall be initiated. On these notices, Vemly Hotels filed Writ Petition No. 2471 of 1982 on November 3, 1982 challenging the threats given by the authorities under the Act to recover the contribution for the period when Vemly Hotels were not on the scene. The petition came before me for admission on December 16, 1982 and Shri Jayakar, learned counsel appearing on behalf of the Corporation, stated that Vemly Hotels would be given hearing and speaking order would be passed u/s 45-A of the Act within a period of two months. The speaking order will, it was assumed, deal with the question of liability of Vemly Hotels. In view of the statement of Shri Jayakar, the admission of the petition was postponed till first week of March 1983.

The Deputy Regional Director thereafter heard the Trustees and Vemly Hotels

and passed a speaking order on February 22, 1983 holding that contribution amounting to Rs. 3,60,782.75 is due for the period from July 1, 1970 to November 11, 1978 alongwith interest amounting to Rs. 1,74,082.51 upto the date of order and the trustees as principal employer alongwith Vemly Hotels and Merchant Hotels as agents are liable to pay the said amount with further interest at the rate of 6% for each day of default till the recovery.

The Trustees filed Writ Petition No. 1918 of 1983 in this Court under Article 226 of the Constitution of India to challenge the legality of the speaking order and this petition was lodged on August 17, 1983. On August 29, 1983, the petition filed by the Trustees was admitted and on September 10, 1984, the petition filed by Vemly Hotels was admitted. Now, both the petitions are placed before me for final hearing.

3. Shri Bharucha, learned counsel appearing on behalf of Vemly Hotels, submitted that Vemly Hotels started conducting the hotel with effect from August 1, 1978 and the liability to pay contribution from that day is not disputed. The learned counsel submitted that Vemly Hotels cannot be foisted with liability to pay the dues in respect of the period when Merchant Hotels were conducting the hotel. The issue, therefore, which falls for determination is whether Vemly Hotels are responsible for payment of dues for the period prior to August 1, 1978. Shri Tulzapurkar, learned counsel appearing on behalf of the Employees' State Insurance Corporation, submitted that Vemly Hotels are responsible even in respect of the period prior to their taking over the Hotel in view of the provisions of Section 93-A of the Act. This Section was inserted by Employees' State Insurance (Amendment) Act, 1975 and reads as under:

"Liability in case 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 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 transferee shall be limited to the value of the assets obtained by him by such transfer."

The plain reading of this Section makes it clear that the amendment was carried out by the Legislature with an object that the liability in respect of payment of any contribution under the Act is not defeated by transfer of any interest in the factory or the establishment to which the provisions of the Act apply. The Section prescribes that the transferee shall jointly and severally be liable to pay the amount along with the employer. The proviso to this Section restricts the liability of the transferee to the value of the assets obtained by such transfer. Shri Bharucha did not dispute that in view of the enactment of Section 93-A of the Act, Vemly Hotels would be liable along with the Trustees for the amount due in

respect of contribution payable under the Act but urged that such liability will have to be limited to the value of the assets and Vemly Hotels, in fact, have not received any assets by agreement of conducting executed by the Trustees on May 13, 1979. In support of this submission, learned counsel relied upon Clause 21 of the agreement which, inter alia, prescribes that Vemly Hotels shall not under the agreement of conducting the Hotel, pledge the credit of its assets or its name. Shri Bharucha submits, and in my judgment, with considerable merit that reading of various clauses of the agreement leaves no matter of doubt that the entire property and the assets in the establishment continue to vest in the trustees and the right which is created in favour of Vemly Hotels is merely for conducting and Vemly Hotels has agreed to pay consideration of Rs. 2,76,500/- per month for enjoyment of this right. Shri Bharucha urged that by agreement of conducting, the trustees had not really transferred any assets and, therefore, Section 93A of the Act may not come into picture. It is not possible to accept the larger submission advanced by the learned counsel because the ambit of Section 93A of the Act is very wide and takes into its sweep transfer by sale, lease or licence, or in any other manner whatsoever. It is necessary to bear in mind that expression "transfer" in this Section should not be confused with the concept of expression "transfer" appearing under the Transfer of Property Act. The expression "transfer" u/s 93A of the Act means creation of any rights and the mode may be by sale, gift or any other manner whatsoever. Once this aspect is borne in mind, then it is obvious that the submission of Shri Bharucha that by agreement of conducting the trustees had not transferred the establishment or the factory in favour of Vemly Hotels would lose its force. The object of enactment of Section 93A is to avoid the mischief by the employer by executing agreements, whereby the dominance over the factory or the establishment is retained, while a right to enjoy the factory or establishment is created in favour of a third party. By an agreement of conducting, the trustees have not given up the dominance over the hotel, but a right is created in favour of Vemly Hotels to run the hotel and make profits. Even in respect of such transaction, it will have to be concluded that the trustees have transferred the interest by creation of a right in favour of Vemly Hotels and, therefore, Vemly Hotels would be jointly and severally liable to pay the amount due in respect of contribution under the Act.

4. The crucial question which requires determination is whether Vemly Hotels can be made liable for payment of the dues in respect of period prior to the date of the execution of the agreement of conducting. Shri Tulzapurkar submitted that the liability is personal on the transferee and, therefore, Vemly Hotels would be jointly and severally liable in respect of dues. It is not possible to accept the submission of the learned counsel because the proviso to the Section clearly limits the liability of Vemly Hotels to the value of the assets obtained by the transfer. In absence of the proviso, the liability of Vemly Hotels may have been a personal liability, but the Legislature obviously did not intend to foist such liability on the transferee in respect of period prior to the date of transfer. By enacting the proviso, the Legislature provided that the liability will be restricted only in

respect of the value of the assets secured by the transferee. The question which then immediately falls for determination is what is the value of the assets secured by Vemly Hotels. The plain reading of the agreement between the trustees and the Vemly Hotels makes it clear that all the assets of the Hotel continue to remain vested in the trustees and what was granted to the Vemly Hotels was merely permission to enjoy the assets on payment of fixed consideration. Shri Tulzapurkar submitted that the Court should hold that the entire assets were transferred in favour of Vemly Hotels and, therefore, the value of the entire assets should be treated for determining the liability of Vemly Hotels.

It is impossible to accede to this submission as the agreement between the trustees and the Vemly Hotels does not provide for transfer of the assets in favour of Vemly Hotels and the ownership is retained by the trustees. Realising the infirmity in the submission, Shri Tulzapurkar urged that in any event the income which Vemly Hotels have earned in pursuance of the agreement of conducting should be treated as the value of the assets obtained by transfer. The submission can be well accepted, but unfortunately for Shri Tulzapurkar, the authorities did not enquire as to what was the income secured by Vemly Hotels under the agreement of conducting. Shri Tulzapurkar urged that it will be extremely difficult for the Corporation to ascertain the income or the profits made by Vemly Hotels in pursuance of the agreement of conducting and, therefore, in the instant case, the compensation agreed to be paid by Vemly Hotels to the trustees should be taken as profits made by Vemly Hotels and that amount should be treated as the value of the assets obtained by transfer. It is not possible to accept the submission of the learned counsel because it is difficult to imagine that the officers of the Corporation cannot ascertain the income or the profit made by Vemly Hotels by conducting the Hotel. It would have been extremely easy for the authorities to find out from the Income Tax Returns filed by Vemly Hotels as to what was the Income earned, apart from the fact that the records and the accounts of Vemly Hotels would have thrown ample light on this aspect. The contention that amount of compensation paid by Vemly Hotels to the trustees should be considered as profits by Vemly Hotels and, therefore, the value of the assets obtained by transfer is wholly misconceived. The liability to pay monthly compensation is irrespective of the fact whether any income or profit is derived by Vemly Hotels. It may be very well that the Hotel would remain closed due to the strike of employees and the Vemly Hotels would not make any profit or derive any advantage under the agreement, and still the liability to pay the monthly compensation is not wiped out. It is, therefore, obvious that payment of monthly compensation has no nexus whatsoever to the advantage secured by Vemly Hotels by entering into an agreement with the Trustees. It is, therefore, not possible in the present case to determine what was the value of assets obtained by Vemly Hotels by transfer directed by Trustees by agreement of conducting. It is, therefore, obvious that the Corporation cannot foist the liability in respect of dues of contribution for period prior to the date on which Vemly Hotels took over the Hotel for conducting on behalf of the Trustees.

Vemly Hotels commenced conducting their Hotel from August 1, 1978 and the liability of Vemly Hotels would arise only from that date.

Monday, the 11th August 1986

5. Turning to the order dated February 22, 1983 passed by the Deputy Regional Director, it appears that the liability was foisted on Vemly Hotels by furnishing two reasons: (1) that Vemly Hotels were the immediate employers and, therefore, are jointly and severally responsible to pay the amount due towards contribution and, (b) by agreement between Merchant Hotels Private Limited and Vemly Hotels, the liability arising out of the employment in respect of all the workers has been taken over by Vemly Hotels. Both the reasons are totally inaccurate and insufficient to foist the liability on Vemly Hotels in respect of period prior to August 1, 1978. Vemly Hotels became immediate employers only from August 1, 1978 and, therefore, it is futile to suggest that Vemly Hotels would be responsible as immediate employer for a period prior to that date for payment of contribution. The second reason furnished by the Deputy Regional Director is factually incorrect. Shri Tulzapurkar conceded that no such agreement between Merchant Hotels and Vemly Hotels whereby Vemly Hotels took over the liability of Merchant Hotels was produced before the Deputy Regional Director. It is, therefore, obvious that the authority has proceeded to impose liability on Vemly Hotels in respect of period prior to August 1, 1978 without any reason or justification, and, therefore, that order cannot be sustained. It hardly requires to be stated and indeed Shri Bharucha did not dispute that position, that Vemly Hotels would be liable jointly and severally with the trustees for payment of contribution due from August 1, 1978.

6. Writ Petition No. 1918 of 1983 is filed by the Trustees to challenge the legality of order passed by the Deputy Regional Director holding the trustees liable for payment of contribution for the period commencing from July 1, 1970 to Nov. 11, 1978. Shri Shah, learned counsel appearing on behalf of the Trustees, submitted that the trustees are not liable as the trustees could not be treated as employers for the purpose of the Act. The submission proceeds on the basis that as the Hotel was given for conducting initially to Merchant Hotels and subsequently to Vemly Hotels, those concerns who were conducting the hotel are responsible for payment of contribution under the provisions of the Act and not the trustees. In support of this submission, reliance was placed on Clauses 25 and 39 of the agreement dated September 24, 1968 between the trustees and Merchant Hotels Private Ltd. Clause 25 of this agreement, inter alia, prescribes that servants; workmen and other employees for the purpose of running and conducting the Hotel will be employed by the Agent on its own account and shall be deemed to be the employee of the Agent and not the trustees. It further prescribes that the trustees are not bound to continue the service of any such employee on expiry of agreement and in respect of all claims of such employees, agent must indemnify the trustees. Clause 39 of the agreement prescribes that the Agent shall have a free hand in running and conducting the Hotel Business and is not required to

render accounts to the trustees. It further prescribes that the Agent shall indemnify the owners against all claims, demands, sanctions and expenses suffered or incurred by the trustees on account of any act, deed, or matter relating to the agreement. Identical clauses are found in the agreement which the trustees have entered with Vemly Hotels. Relying on the clauses, it was submitted by Shri Shah that the concerns which have taken over the Hotel for conducting are liable for payment of contribution under the Act, as the employees were engaged by such concerns. Shri Shah urged that the trustees were to receive only fixed compensation every month and are not liable to pay any contribution in respect of the employees taken in service by Merchant Hotels or Vemly Hotels. Shah also urged that Section 93A of the Act prescribes that an employer shall be jointly and severally liable to pay the amount in respect of any contribution payable under the Act alongwith the transferee but the trustees cannot be considered as employers and, therefore, the liability arising u/s 93A of the Act cannot be enforced. It is not possible to accede to the submission of the learned counsel. It is undoubtedly true that the agreement between the trustees and Merchant Hotels and Vemly Hotels prescribed that the employees would be appointed by the concern which had to conduct Hotel business on payment of fixed amount of compensation, but that fact would not enable the trustees to claim that they are not employer in respect of the establishment. It must be clearly borne in mind that the liability to pay contribution under the provisions of the Act is in respect of factory or establishment and the principal employer is a person who owns such factory or establishment, while the immediate employer is one who conducts such factory or establishment. Shri Shah urged that expression "employer" is not defined under the Act, but overlooks that the import of that expression can be well gathered from the definition of other terms defined u/s 2 of the Act, Section 2(9) of the Act defines "employee" and means any person employed for wages in connection of the work of a factory or establishment to which the Act applies and who is directly employed by the principal employer or through an immediate employer on the premises of the factory or establishment. The expression "immediate employer" is defined u/s 2(13) of the Act and in relation to employees means a person who has undertaken the execution on the premises of factory or establishment to which the Act applies or who under, the supervision of the principal employer carries on work at the factory or establishment. The term "principal employer" is defined u/s 2(17) of the Act and means in a factory, the owner or occupier of the factory and in the establishment any person responsible for supervision and control of the establishment. The perusal of this definition would make it clear that the expression "employer" u/s 93A of the Act really means the owner of the factory or the establishment "who is entitled to transfer such establishment. The trustees continue to be the owner of the Hotel all along and various terms of the agreement entered into by the trustees with Merchant Hotels or Vemly Hotels make it crystal clear that the dominance or the ownership over the factory or establishment was never transferred or parted with by the Trustees. The trustees made it repeatedly clear by various clauses" of the agreement that the Trustees continue to be the owner

of the building as well as of other paraphernalia which is used for the purpose of running the hotel. The title or the ownership of Hotel was never transferred but continued to remain vested in the trustees and the trustees merely permitted the conductor to run the hotel on behalf of the trustees and as their agent. It is, therefore, obvious that the trustees were the principal employer and in that capacity their liability to make contribution under the Act never ceased. Section 40 of the Act is a charging section and provides that the principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution. In view of Sub-section (1) of Section 40 the trustees cannot divest their liability by executing agreements permitting the Agents to conduct the hotel. In my judgment the Deputy Regional Director was perfectly justified in holding that the trustees were responsible for payment of the contribution.

7. The contention that the provisions of Section 93A of the Act are not attracted because the trustees are not the employers and, therefore, it cannot be held that they have transferred the interest in favour of Merchant Hotels or Vemly Hotels is not correct. The expression " employer" u/s 93A of the Act has to be construed with reference to the definition of "principal employer" u/s 2(17) of the Act and what Legislature meant by the use of term "employer" u/s 93A of the Act is the owner of the factory or establishment. The expression "employer" must be equated with the owner because a factory or establishment can be transferred only by the person who owns it or has a title to it. The mode of transfer set out under this Section is by way of sale, gift, lease or licence or in any other manner whatsoever and these transfers can be effected only by the person who is the owner of the factory or establishment. The trustees are the owners of the hotels all along and the trustees have, therefore, transferred the interest of conducting the hotel initially in favour of Merchant Hotels Private Limited and subsequently in favour of Vemly Hotels. The liability of the trustees, therefore, is squarely attracted under the provisions of Section 93A of the Act and the trustees and the person conducting the hotel is obviously jointly and severally liable to pay the amount in respect of the contribution. The joint and several liability of the trustees for the period from July 1, 1970 to July 31, 1978 is with the agent, Merchant Hotels Private Limited and subsequent to that date, i.e., from August 1, 1978 onwards is with Vemly Hotels. The order of Deputy Regional Director holding that the Trustees are liable for the entire period is correct and suffers from no infirmity and the petition filed by the trustees must fail.

8. Accordingly, Writ Petition No. 1918 of 1983 filed by the trustees fails and rule is discharged without any order as to costs. Writ Petition No. 2471 of 1982, filed by Vemly Hotels partially succeeds and it is declared that Vemly Hotels are jointly and severally responsible to pay the amount of contribution due under the Act for the period commencing from August 1 1978 onwards. The Deputy Regional Director is directed to ascertain the amount payable by Vemly Hotels in the light of this judgment and only for the period from August 1, 1978 onwards and

recover the same. In the circumstances of the case, there will be no order as to costs.

9. At this stage, Shri Shah submits that the trustees should be given reasonable installments for making payment of the dues. The learned counsel urged that Vemly Hotels have paid or are willing to pay the dues from August 1, 1978 onwards but no amount could be recovered from the Merchant Hotels and, therefore, the trustees would be liable to pay the contribution for the period commencing from July 1, 1970 to July 31, 1978. Shri Shah submits that the amount for the said duration comes to about Rs. 6,00,000/-and the trustees are also required to pay interest on the said amount as per the order of the Deputy Regional Director. Shri Shah points out that the Trust is not in a position to pay immediately such a large amount and the Trust which has been set up for charitable purpose is now required to discharge the liability which really ought to have been borne by the Merchant" Hotels. Taking all these facts into consideration, in my judgment, it would be proper if the Trustees are directed to pay the dues for the period from July 1, 1970 to July 31, 1978 by monthly installment of Rs. 30,000/-. The first installment should be paid on or before September 15, 1986 and the subsequent installments on or before 15th of every recurring month. In case of any two defaults, the Deputy Regional Director is at liberty to recover the entire balance forthwith. Shri Shah states that this payment would be made to the Deputy Regional Director without prejudice to the right of the trustees to recover the same from Merchant Hotels Private Limited.