Employees State Insurance Corporation vs S.K. Aggarwal And Ors on 31 July, 1998

Equivalent citations: AIR 1998 SUPREME COURT 2676, 1998 (6) SCC 288, 1998 AIR SCW 2717, 1999 (2) SERVLJ 119 SC, 1999 (2) SRJ 268, (1998) 4 ALLMR 389 (SC), (1998) 3 CRIMES 102, 1998 (5) ADSC 588, 1998 LABLR 806, 1998 (4) ALL MR 389, 1998 CALCRILR 396, 1998 (4) SCALE 328, (1998) 5 JT 233 (SC), (1998) 74 DLT 524, (1998) 46 DRJ 520, (1998) 3 CURCRIR 383, (1998) 2 EASTCRIC 957, (1998) 93 FJR 435, (1998) 80 FACLR 199, (1998) 2 LABLJ 794, (1998) 3 LAB LN 920, (1999) 1 MAH LJ 443, (1999) 1 MAHLR 322, (1999) 1 MPLJ 155, (1999) 1 SCT 182, (1998) 3 RECCRIR 642, (1998) 3 CURCRIR 135, (1998) 5 SERVLR 679, (1998) 30 CORLA 300, (1998) 6 SUPREME 197, (1998) 4 SCALE 328, (1998) 3 CHANDCRIC 28, (1998) 94 COMCAS 75, (1998) 2 CURLR 518, 1998 SCC (L&S) 1480, 1998 (2) ANDHLT(CRI) 316 SC, 1998 (2) KLT SN 39 (SC)

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Bench: M.M. Punchhi, Sujata V. Manohar

PETITIONER:
EMPLOYEES STATE INSURANCE CORPORATION

Vs.

RESPONDENT:
S.K. AGGARWAL AND ORS.

DATE OF JUDGMENT: 31/07/1998

BENCH:
M.M. PUNCHHI, SUJATA V. MANOHAR

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T Mrs. Sujata V. Manohar, J.

The respondents were, at the material time, directors of a company M/s. Indo Japan Steel Ltd. The company has a factory and head office at calcutta. Under the provisions of Section 40 of the Employees State Insurance Act, 1948, the "principal employer" is required to pay, in respect of every employee, whether directly employer, both the employer's contribution and the employee's contribution. Under sub- section (2) of section 40 the principal employer, in the case of an employee directly employed by him, is entitled to recover from the employee the employee's contribution by deduction from his wages. Under sub-section (4) any sum deducted by the principal employer from wages under this Act shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted. The complainant who is the appellant before us inspected the head office of the company and found that the company had deducted a sum of Rs. 2,223.50 as employees share of contribution from their wages during the period February 1981 to September 1981. The employer, however, had failed to deposit the said amount in the Employees' State Insurance Fund within the specified time.

Thereupon the appellant lodged a complaint against the respondents of criminal breach of trust under Section 405 Explanation 2 of the Indian Penal Code read with Section 406 of the Indian Penal Code. On the basis of this complaint the learned Magistrate took cognizance and issued summons against the respondents to stand trial. The learned Magistrate also issued a search warrant for seizure of certain records of the company as prayed for by the complainant. Aggrieved thereby, the respondents filed an application under Section 401/482 of the Criminal Procedure code for quashing the proceedings in the said case. The High Court by its impugned judgment has quashed the proceedings on the ground that the respondents cannot be considered as 'employers' within the meaning of Explanation 2 to Section 405 read with Section 406 of the Indian Penal Code. Hence they were not liable for prosecution under Section 406. From this judgment the present appeal has been filed by the original complainant.

Section 405 Explanation 2 is as follows:-

> "405: Criminal breach of trust:
>
> Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

Explanation 1:.....

Explanation 2: A person, being an employer, who deducts the employees' contribution from the wages payable, to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees State Insurance Act, 1948, shall be deemed to have been entrusted

with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid."

Explanation 2 was inserted by the Employees' State Insurance Amendment Act 38 of 1975. Explanation 2 makes "a person being an employer" who deducts the employee's contribution from the wages payable to the employee liable for criminal breach of trust if he commits a default in the payment of such contribution to the Employees' State Insurance Fund. Under Section 11 of the Indian Penal Code the word "person" includes any company or association or body of person whether incorporated or not. The High Court has held that the term "a person being an employer" in Explanation 2 to Section 405 of the Indian Penal Code can refer only to the company who had employed the employees in question. The directors of that company could not be considered as employers under Explanation 2 to Section 405 of the Indian Penal Code. The complainant, however, contends that Explanation 2 to Section 405 of the Indian Penal Code should be read in the light of the employees' State Insurance Act, 1948. Under Section 40 of the employees' State Insurance Act the obligation to pay contribution in the Employees' State Insurance Fund has been cast on the principal employer. The relevant provisions of Section 40 are as follows:-

> "40: Principal employer to pay contributions in the first instance:
>
> (1) The principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employee's contribution.
>
> (2) Notwithstanding anything contained in any other enactment but subject to the provisions of this Act and the regulations, if any, made thereunder, the principal employer shall, in the case of an employee directly employed by him (not being an exempted employee), be entitled to recover from the employee the employees' contribution by deduction from his wages and not otherwise:
>
> Provided that no such deduction shall be made from any wages other than such as relate to the period or part of the period in respect of which the contribution is payable, or in excess of the sum representing the employees' contribution for the period. (3).....
>
> (4) Any sum deducted by the principal employer from wages under this Act shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted.
>
> (5)....." The term "principal employer" has been defined in Section 2 (17) of the Employees' State Insurance Act, 1948 as follows:-
>
> "2(17): Principal employer" means:-

(i) in a factory, the owner or occupier of the factory 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 Factories Act, 1948] (63 of 1948); the person so named;

(ii).....

(iii) in any other establishment, any person responsible for the supervision and control of the establishment."

Section 2(17) defines the "principal employer" in a factory as the owner or occupier of the factory. "Occupier" of a factory is defined in Section 2(15) as having the same meaning assigned to it in the Factories Act, 1948. Section 2(n) of the Factories Act, 1948 as it stood at the relevant times, defined an "Occupier" to mean the person who has ultimate control over the affairs of the factory. Section 100 of the Factories Act dealt with the determination of occupier in certain cases. Under sub-section (2) where the occupier was a company, any directors thereof could be prosecuted and punished for any offence for which the occupier was liable.

Section 2(17) of the Employees' State Insurance Act, however, defines the principal employer as either owner or occupier - taking care of all eventualities. when the owner of the factory is the principal employer, there is no need to examine who is occupier. The owner will be the principal employer under Section 40.

The Employees' State Insurance Act does not define the term "employer" although under Sections 85B and 850 of that Act the term "employer" is used.

The provisions of Section 40 in the light of these definitions have been considered by various High Courts in order to decided whether a director of a limited company can be considered as the principal employer liable to pay contribution under Section 40. A division Bench of the Bombay High Court in the case Suresh Tulsidas Kilachand and Ors. etc. v. collector of Bombay and Ors. etc. (1984 [17] Labour and Industrial cases 1614) held that a director of a company by virtue of being a director is not principal employer contemplated by Section 2(17) of the Employees' State Insurance Act. He is not personally liable to pay employer's contribution under the Act. In the context of Section 2(17) read with Section 2(15) the Court held that whether a person is occupier or not has to be ascertained with reference to whether he is in ultimate control over the factory. When the definition of principal employer in Section 2(17) refers to the "owner" or "occupier" of a factory, the principal employer can be either the owner or the occupier depending upon the facts of each case. when there is an owner of the factory that owner must be considered as the principal employer liable for contribution.

Under Section 40 the words "owner" and "occupier" have been used disjunctively. The Court also referred to Section 100 of the Factories Act and said that even under the Factories Act, 1948, the Legislature has clearly contemplated that in the case of a factory, a company can be the "occupier". Therefore, when the owner of a factory is a company it is the company which is the principal

employer and not its director. The Bombay High Court overruled the judgment of the single Judge of the Bombay High Court in so deciding.

The same view has been taken by the Madhya Pradesh High Court in the case of Employees' State Insurance Corporation, Indore v. Kailashchandra and Ors. (1989 [22] Labour and Industrial Cases 760). The Madhya Pradesh High Court also said that when there is a default in payment of contribution by the company, the managing director, or other directors cannot be made personally liable. The contribution can be recovered from the company as the principal employer.

In the case of Employees' State Insurance corporation, chandigarh v. Gurdial singh and Ors. (1991 [24] Labour and Industrial Cases 52), this court held that the directors of a private limited company were not personally liable to pay contributions under the employees' state Insurance Act, 1948. The Court was considering a case where a private limited company was the owner of the factory and the occupier of the factory had been dully named under the Factories Act, 1948. The court said that the directors did not come within the definition of clause 1 of section 2(17) of the Employees' State Insurance Act. This Court also disapproved of the decision of a Single Judge of the Bombay High Court which has been subsequently overruled by the Division Bench of the Bombay High Court in the case of suresh Tulsidas Kilachand and Ors. etc. v. Collector of Bombay and Ors. etc. (supra).

Therefore, even if we read the definition of "principal employer" under the employees' State Insurance Act, 1948 in Explanation 2 to section 405 of the Indian Penal Code, the directors of the company, in the present case, would not be covered by the definition of "principal employer" when the company itself owns the factory and is also the employer of its employees at the head office.

In any event, in the absence of any express provision in the Indian Penal code incorporating the definition of "principal employer" in Explanation 2 to Section 405, this definition cannot be held to apply to the term "employer" in Explanation 2. As the High Court has observed, the term "employer" in Explanation 2 must be understood as in ordinary parlance. In ordinary parlance it is the company which is the employer and not its directors either singly or collectively.

In the premises we do not see any reason to interfere with the impugned judgment of the Calcutta High Court. The appeal is, therefore, dismissed.