

# O.M.Shahul Hameed vs The Employees State Insurance ... on 13 October, 2020

**Author: T.Raja**

**Bench: T.Raja**

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.10.2020

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A.No.1221 of 2020

O.M.Shahul Hameed

Versus

- 1.The Employees State Insurance Corporation,  
Rep. By its Regional Director,  
No.143, Sterling Road,  
Nungambakkam, Chennai – 34.
- 2.The Recovery Officer,  
E.S.I.Corporation,  
No.143, Sterling Road,  
Nungambakkam, Chennai – 34.

Prayer: Civil Miscellaneous Appeal has been filed under Section 82 of the Employees State Insurance Act, 1948 (Act 34 of 1948), against the order and decree dated 16.10.2006 in E.I.O.P.No.91 of 2006 passed by the learned Judge, Principal Labour Court (Employees State Insurance Court), Chennai.

For Appellant : Mr.D.Abdullah

For Respondents : Mr.S.P.Srinivas

JUDGMENT

Heard Mr.Abdullah, learned counsel appearing for the appellant, and Mr.S.P.Srinivasan, learned Standing counsel for the respondents/ESI Corporation, through Video Conferencing, due to COVID-19 pandemic.

<http://www.judis.nic.in>

2. This Civil Miscellaneous Appeal is directed against the impugned order dated 16.03.2018 passed in E.I.O.P.No.91 of 2006, by the learned Principal Labour Court (Employees' Insurance Court), Chennai, holding that the claim made against the appellant is legal and enforceable.

3. Mr.D.Abdullah, learned counsel appearing for the appellant submitted that the appellant is a partner in the partnership firm known as Deluxe Plastic Products and the said firm was earlier functioning from No.282, Thambu Chetty Street, George Town, Chennai, but, later-on, it has purchased the premises at No.24, Nelson Manickam Road, Mehta Nagar, Chennai, from one Mr.T.Sadasiva Mehta and others vide sale deed dated 22.04.1960. Thereafter, the said firm has been engaged in the manufacture of plastics products and is being covered under the Employees' State Insurance Act, 1948 (in short "ESI Act") under the Code No.51-18387-34. Earlier, the appellant was one of the Directors in the Company called Oyem Plastics Private Limited and the said Company was managed by a Board of Directors comprising four Directors including the appellant and one Mr.O.M.Syed Ahamed as its Managing Director and it has its register office at No.24, Nelson Manickam Road, Mehta Nagar, Chennai, taken on rent from M/s.Deluxe Products vide Rental Agreement dated 01.11.1989 on a monthly rent of Rs.500/-. Whiles, the said Oyem Plastic Private Limited stopped the manufacturing activity in October, 1994, and sold the factory, including the land, building and other infrastructure facilities, etc., to M/s.Precision Packaging under the sale deed dated 31.12.1996 bearing Document No.1582 <http://www.judis.nic.in> of 1997. Thereafter, M/s.Oyem Plastics Private Limited did not revive its factory and they have filed an application for striking off the name of the company from the Registrar of Companies as they have become non-operative for about 10 long years due to financial calamities.

4. While the matter stood as above, the appellant received a summon from the Recovery Officer, ESI Corporation, Chennai / second respondent herein to appear before him on 02.03.2006 with reference to an alleged ESI CP-1 communication dated 06.02.2003 for recovery of Rs.3,98,365/-. Immediately, the appellant replied to the said communication vide letter dated 01.03.2006 stating that the said M/s.Oyem Plastics Private Limited was closed in the year 1996 and the affairs of the company was looked after by Mr.O.M.Syed Ahamed, who was the Managing Director of the Company since incorporation and therefore, the appellant had no knowledge about the day to day affairs of the company. But, instead of accepting the letter dated 01.03.2006 of the appellant, the respondent/ESI Corporation had wrongly proceeded against him ordering sale of the property viz., land, building and superstructure, for no reason whatsoever. Therefore, when M/s.Oyem Plastics Private Limited was closed down in the year 1996, besides selling its property, land, etc., under sale deed dated 31.12.1996 to M/s.Precision Packagings Private Limited, the second respondent herein, without even addressing any letter to the said Company, has wrongly chosen the appellant on the ground that he was one of the Directors of M/s.Oyem Plastics Private Limited.

<http://www.judis.nic.in>

5. Adding further, learned counsel for the appellant argued that the letter dated 01.03.2006 addressed to the second respondent was produced before the learned Court below and this was marked as Ex.P7 and in the said letter, it is stated that M/s.Oyem Plastics Private Limited was closed in the year 1996 and therefore, the appellant cannot be held responsible of the said Company as he is not covered as per Section 2(17) of the ESI Act. Besides, he has also produced Ex.P1-sale deed dated 22.04.1960; Ex.P2-rental agreement dated 01.11.1989 between Oyem Plastics Private Limited and Deluxe Plastics Products; Ex.P3-sale deed dated 01.02.1990; and Ex.P.4-sale deed dated 31.12.1996. But, the learned Court neither considered any of the documents nor made a mention in the impugned order, however, on the other hand, learned Court below has restated the averments of the counter affidavit filed by the respondents and has wrongly passed the impugned order directing the appellant to pay the contribution, which reflects the total non-application of mind, hence, the same is liable to be set aside.

6. In support of his submissions, learned counsel has relied on the judgment of the Hon'ble Apex Court in the case of Employees State Insurance Corporation, Chandigarh, Vs. Gurdial Singh & others reported in 1991-II-LLJ-425 SC, for a proposition that the Directors would not come within the definition of Clause (i) of sub-section 17 of Section 2 of the Employees State Insurance Act, 1948.

<http://www.judis.nic.in>

7. Again referring to another judgment of the Hon'ble Apex Court in the case of Employees State Insurance Corporation Vs. S.K.Aggarwal and others reported in [1998 6 SCC 288], learned counsel argued that the Hon'ble Apex Court, while considering its various judgments including the judgment of Madhya Pradesh High Court in Employees' State Insurance Corporation, Indore Vs. Kailashchandra and Others [1989 (22) Labour and Industrial Cases 760], held 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 light of Section 2(17) of the ESI Act.

8. He has also relied on yet another judgment of the Bombay High Court in the case of Suresh Tulsidas Kilachand and Others Vs. Collector of Bombay and others [1984 (17) Labour and Industrial Cases 1614], whereby it is held that a director of a company by virtue of being a director is not principal employer contemplated by Section 2(17) of the ESI Act. Therefore, in the context of Section 2(17) read with Section 2(15), the Bombay High 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. But, in the case on hand, the said exercise has not been done. Thus, he argued, as per the ratio of the Hon'ble Apex Court in the case of S.K.Agarwal (cited supra), the appellant cannot be held responsible, for, he is not covered by the definition of principal employer under the ESI Act, therefore, on this count, the impugned order passed by the learned Court below is liable to go. <http://www.judis.nic.in>

9. Per contra, learned counsel appearing for the respondents/ESI Corporation argued that when ESI contributions were to be made by the employer for the periods from June, 1993 to September, 2001,

and from October, 2001 to March, 2002 and from April, 2002 to March, 2003, no contribution whatsoever has been made. Admittedly, Mr.O.M.Shahul Hameed/appellant here was one of the Directors of M/s.Oyem Plastics Private Limited. Therefore, when he was one of the Directors of M/s.Oyem Plastics Private Limited managed by a Board of Directors comprising four Directors including the petitioner and Mr.O.M.Syed Ahamed as its Managing Director, the Recovery Officer/second respondent herein, left with no other option, proceeded against the appellant under Section 45-A of the ESI Act and passed the order dated 27.03.2006 pointing out the appellant's factory non- cooperation in the production of records and confirmed the arrears of contribution statutorily due under the provisions of the ESI Act. Therefore, when the Authorized Officer issued the certificate of recovery in Form C-19 dated 06.01.2003 and 06.02.2003, again Mr.Syed Ahamed, Managing Director, failed to settle the issue. Since the appellant also has shown disinclination in payment of dues of the M/s.Oyem Plastics Private Limited where he held the position of Directorship, again, the Authorized Officer issued another certificate of recovery in Form C-19 dated 04.05.2004 for recovery of Rs.33,750/- for the period from 04/2002 to 03/2003 under Section 45-A read with 45-C of the ESI Act. Thereafter, the respondent Recovery Officer went ahead with the recovery procedure under the provisions of the ESI Act by issuing notice of demand to the defaulter. <http://www.judis.nic.in>

10. Again, referring to Section 2(17) of the ESI Act, he has pleaded that the Principal Employer means the owner or occupier of the factory and includes the managing agent or any other person responsible for supervision and control of the establishment. Since the work of a private limited company is carried out by the Director and Managing Director, they would come within the definition of the Principal Employer. Therefore, in the case on hand, since the appellant was one of the Directors of the defaulted company, namely, M/s.Oyem Plastics Private Limited, and that at present he is one of the Directors of existing company M/s.Deluxe Plastic Products, Recovery Officer came to the conclusion that both Mr.O.M.Syed Ahamed and Mr.O.M.Shahul Amaed are not only family members owning the companies but also be treated as composite defaulters in payment of arrears outstanding due under certification. Hence, the Recovery Officer issued a notice dated 27.03.2006 for proclamation of sale. This was questioned before the learned ESI Court and the learned ESI Court, by taking note of the fact that the appellant herein has failed to settle the issues and that he has shown disinclination in payment of dues of the factory, dismissed the EIOP filed by him, hence, no interference is called for, he pleaded.

11. Having heard the parties, this Court could see that although the appellant has has pleaded that he was nowhere connected for payment of contribution for the periods from June, 1993 to September, 2001, and October, 2001 to March, 2002 and April, 2002 to March, 2003, on the basis of various documents which are stated below; <http://www.judis.nic.in>

(i) Ex.P7 – letter dated 01.03.2006 of the appellant in reply to the summon dated 27.02.2006 stating that the Company M/s.Oyem Plastics Private Limited was closed down in the year 1996 and that the affairs of the said company was looked after by Mr.O.M.Syed Ahamed who was the Managing Director since incorporation and therefore, he has no knowledge of the day to day affairs of the company which became sick in the year 1996;

- (ii) Ex.P1 – Copy of Sale Deed dated 22.04.1960 executed in favour of M/s.Deluxe Plastics Products;
- (iii) Ex.P2 – Copy of Rental Agreement dated 01.11.1989 between M/s.Oyem Plastics Private Limited and M/s.Deluxe Plastic Products;
- (iv) Ex.P3 – Copy of Sale Deed 01.02.1990 in respect of the factory land in Maduravoyal purchased by M/s.Oyem Plastics Products; and
- (v) Ex.P4 – Copy of Sale Deed dated 31.12.1996 executed in favour M/s.Precision Packaging by M/s.Oyem Plastics Private Limited;

it is not known why the learned Court below has not considered either of these documents placed by the appellant herein, but, on the contrary, it has placed reliance on the documents relied on by the respondent ESI Corporation.

12. Moreover, the Hon'ble Apex Court, in the case of S.K.Aggarwal (cited supra), while dealing with Section 2(17) of the ESI Act, held thus:-

“The term "principal employer" has been defined in Section 2 (17) of the Employees' State Insurance Act, 1948 as follows:-

<http://www.judis.nic.in> "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 decide whether a director of a <http://www.judis.nic.in> 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 <http://www.judis.nic.in> 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.” <http://www.judis.nic.in>

13. A mere perusal of the above observation shows that when there is a default in payment of contribution by the company, the managing director, or other directors cannot be made personally liable and the contribution can be recovered from the company as the principal employer. However, in the case on hand, learned Court below, without even referring to Section 2(17) of the ESI Act and also the documents relied on by the appellant as stated above, has wrongly non-suited the appellant. Therefore, on this score, the impugned order passed by the learned Principal Labour Court (Employees' Insurance Court), Chennai, is set aside. Consequently, the matter is remanded back to the learned Court below to decide the claim of the appellant afresh in accordance with law after hearing both parties.

14. In fine, for the reasons stated above, the Civil Miscellaneous Appeal is allowed. No Costs.

13.10.2020 rkm <http://www.judis.nic.in> To

1.Regional Director, The Employees State Insurance Corporation, No.143, Sterling Road, Nungambakkam, Chennai – 34.

2.The Recovery Officer, E.S.I.Corporation, No.143, Sterling Road, Nungambakkam, Chennai – 34.

<http://www.judis.nic.in> T.RAJA, J.

rkm 13.10.2020 <http://www.judis.nic.in>