



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 731 OF 1992

The Employees State Insurance Corporation ) Appellant  
 having its office at ESIC Bhavan, Colaba, )  
 Bombay – 400 005 )

Versus

1(a) Dinendra Ratansi )  
 Residing at Himgiri, Opposite Jaslok Hospital, )  
 Peddar Road, Mumbai )  
 1(b) Krishnakumar Ratansi )  
 Residing at 9/10, Al Sabah Court, )  
 73, Netaji Subhash Road, Mumbai – 400 020 )  
 1(c) Dipak Ratansi )  
 Residing at 9/10, Al Sabah Court, )  
 73, Netaji Subhash Road, )  
 Mumbai – 400 020 )  
 1(d) Usha R. Bhatia )  
 Residing at 9/10, Al Sabah Court, )  
 73, Netaji Subhash Road, Mumbai – 400 020 )  
 2 The Collector of Bombay having its office at )  
 Old Custom House, Fort, Bombay – 400 023 )  
 3 The National Textile Corporation (South )  
 Maharashtra) Ltd. having its office at N.T.C. )  
 House, Ballard Estate, Bombay – 400 038 ) Respondents

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- Mr. Shailesh S. Pathak, Advocate for the Appellant.
- Mr. S. C. Naidu a/w. Mr. Hemang Engineer, Ms. Divya Yajurvedi and Manashree Engineer i/b. M/s. Gordhandas & Fozdar, Advocate for Respondent Nos. 1(a) to 1(d).

CORAM : ARUN R. PEDNEKER, J.

DATED : 10<sup>th</sup> JULY, 2024.

JUDGMENT :

1. Heard Mr. Pathak, learned counsel for the appellant and Mr.

Naidu, learned counsel for Respondent Nos. 1(a) to 1(d).

2. By the present appeal, the appellant – Employees State Insurance Corporation (for short “**ESIC**”) challenges the order passed by the Employees Insurance Court, Mumbai dated 01.08.1988 in ESIC Application No. 130 of 1998, whereby the ESIC Court set aside the Order of ESIC in Form No. C-19, directing the occupier of the factory to pay ESIC dues in his personal capacity.

3. The questions of law that arises for consideration in the present appeal under Section 82 of the ESIC Act is as under :

- (i) Whether the occupier (who is also one of the Directors), is personally liable for payment / recovery of ESIC contributions in case the company defaults in remittance of contribution of E.S.I.?

4. The facts giving rise to the appeal are summarised as under :

- i. Ratansi Mulji, the deceased / original respondent No.1 was a Director of M/s. Gold Mohur Mills Limited (hereinafter referred to as the “Company”) which was an undertaking manufacturing textile fabrics. On account of strikes and disturbances the textile manufacturing closed down. The Textile Undertaking was taken over by National Textile Corporation, South Maharashtra (NTC) on 18.10.1983

under the provisions of Textile Undertakings (taking over of Management) Act, 1983.

- ii.** The Textile Undertaking/ Company was covered under the Employees Insurance Act. Notices were issued on 04.11.1986 to the original respondent No.1 / director occupier of the Factory directing him to personally pay ESI dues for different periods. He was further informed that in case if he fails to do so, dues would be recovered as arrears of Land Revenue. These notices were challenged by the original respondent No.1 in the High Court in Writ Petition No. 3353 of 1987. The same was dismissed. The applicant thereafter preferred appeal being Appeal No. 28 of 1988, in which the respondent- ESI Corporation was given liberty to issue fresh notice to the respondent / director afresh as an occupier of the factory for the period from 01.01.1981 to 18.10.1983. Thereafter, while disposing of the Writ Petition, liberty was granted to respondent No.1/ director of the company / occupier by this Court to file application under Section 75 of the E.S.I.C. Act to challenge the order passed by ESIC under Section 45-A for the notice period 01.01.1981 to 18.10.1983.

iii. In view of liberty granted by this Court, application was preferred by original respondent No.1/ occupier before the ESI Court challenging the recovery in his personal capacity. The ESI Court framed following issues and their findings are as under :

| Sr. No. | Issues  | Answer                 |
|---------|---|------------------------|
| 1       | Whether Respondent No.1 has correctly determined an amount of Rs.24,65,383.81 Ps. As E.S.I. contribution by the Gold Mohur Mills Ltd. for the period 1 <sup>st</sup> January 1981 to 18 <sup>th</sup> October 1983, If not what amount is payable ? | ... Does not arise     |
| 2       | Whether there was delay and laches on the part of Respondent No.1 in recovering E.S.I. dues from Messrs. Gold Mohur Mills Ltd.? If yes, whether Respondent No.1 can now recover the same ?  | ... Does not arise     |
| 3       | Whether the applicant was principal employer and /or occupier during the relevant period of 1 <sup>st</sup> January 1981 to 18 <sup>th</sup> October 1983 ?   | ... Does not arise     |
| 4       | Whether Shri Bhave the observer appointed by the Bank of India was in complete financial control of the Company Messrs. Gold Mohur Mills Ltd. ?   | ... Does not arise     |
| 5       | Whether the Respondents are entitled to recover E.S.I. Contribution dues of Messrs. Gold Mohur Mills Ltd. personally from the Applicant?  | ... No                 |
| 6       | If so, whether the applicant is entitled to relief claimed in para 20(c) ?  | ... No                 |
| 7       | To what other reliefs, the applicant is entitled to?  | ... No                 |
| 8       | What Order?   | ... As per order below |

The ESIC Court decided the issue Nos. 5 and 6 as the preliminary issues and the Court rendered its findings thereon and held that the ESIC is not entitled to personally recover the ESI dues of M/s. Gold Mohur Mills Ltd. from the occupant of the factory / original respondent No.1 and thus accordingly set aside the order under Section 45-A for payment of dues.

5. Challenging the order passed by the ESI Court in the present Appeal under Section 82 of the ESIC Act, the learned counsel **Mr. Pathak** appearing for the applicant/ESIC submits that following three substantial questions of law arise in the matter :

- (1) Whether Respondent No.1 has correctly determined an amount of Rs.24,65,383.81 Ps. As E.S.I. contribution by the Gold Mohur Mills Ltd. for the period 1<sup>st</sup> January 1981 to 18<sup>th</sup> October 1983, If not what amount is payable ?
- (2) Whether there was delay and laches on the part of Respondent No.1 in recovering E.S.I. dues from Messrs. Gold Mohur Mills Ltd.? If yes, whether Respondent No.1 can now recover the same ?
- (3) Whether the applicant was principal employer and /or occupier during the relevant period of 1<sup>st</sup> January 1981 to 18<sup>th</sup> October 1983 ?

6. **Mr. Pathak**, learned counsel for the applicant submits that the occupier is liable to pay the ESIC contribution in terms of Section 2(17) read with Section 40 of the ESIC Act and Section 2(n) of the Factories Act. The learned counsel submits that the ESIC dues can also be recovered from the legal heirs of the 'Principal Employer' in terms of Section 2(17) and thus it cannot be said that the dues of ESIC cannot be personally recovered

from the occupier personally and the same has to be recovered from the company only.

7. PER CONTRA, Mr. Naidu, learned counsel for respondent Nos. 1 (a) to 1(d) submits that the appeal would not be maintainable in view of the judgment of the Division Bench of this Court between *Dainik Deshdoot and others Vs. The Employees' State Insurance Corporation and others*<sup>1</sup> passed by this Court in Letters Patent Appeal No. 97 of 1985, wherein this Court relying upon the judgment of *Sri Chunilal V. Mehta and Sons Ltd. Vs. The Century Spinning and Manufacturing Co. Ltd.*,<sup>2</sup> has held that the question of law already determined cannot be raised under Section 82. He submits that question of law raised by the applicant stands concluded in view of the judgment of this Court in the case of *Employees State Insurance Corporation and Anr. Vs. G. N. Mathur, Elphinstone Spg. & Wvg. Mills Ltd. & Ors.*<sup>3</sup> in W.P. No. 1933 of 1986 and the Division Bench of this Court in the case of *ESIC and Anr. Vs. G. N. Mathur, Elphinstone Spg. & Wvg. Mills Ltd. & Ors.*<sup>4</sup> in Appeal No. 928 of 1991 dated 07.04.1993.

8. Mr. Naidu, learned counsel appearing for the respondent No.1 further submits that this Court in identical situation in the case of *G. N. Mathur, Elphinstone Spg. & Wvg. Mills Ltd. & Ors.* (*supra*) has already

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1 (1995) 70 FLR 863

2 AIR 1979 SC 798

3 (1991) I CLR 740

4 1994-II-LLJ-138

held that the occupier is not personally liable for the ESIC dues unless the property of the company is in the hands of the occupier. In the instant case, the company is functional and in the hands of the Government and the dues can be recovered from the assets of the company. The respondent cannot be held personally liable for the dues of the company.

9. Having heard the rival submissions of the parties, the question that arises for consideration of the Court is as noted in paragraph No.1 above is, **“whether the Director of a company who is also the occupier of the factory is personally liable to pay the ESIC dues of the company?”**

10. At the outset, it is necessary to quote the relevant provision of the ESIC and the Factories Act.

**ESIC Act :**

**Section 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;

**Section 2(15) :** “occupier” of the factory shall have the meaning assigned to it in the Factories Act, 1948 (63 of 1948);

**Section 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 employer's contribution and 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 employee's contribution by reduction 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 employee's contribution for the period.

(3) Notwithstanding any contract to the contrary, neither the principal employer nor the immediate employer shall be entitled to deduct the employer's contribution from any wages payable to an employee or otherwise to recover it from him.

(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 principal employer shall bear the expenses of remitting the contributions to the Corporation.

**Factories Act :**

**“Section 2(n) :** “Occupier” of a factory means the person who has ultimate control over the affairs of the factory and where the said affairs are entrusted to a managing agent, such agent should be demand to be the occupier of the factory.”

**Sections 45B and 45C are relevant and quoted below:**

**“45B. Recovery of contributions :** Any contribution payable under this Act may be recovered as an arrear of land revenue.

**45C. Issue of certificate to the Recovery Officer :**

(1) Where any amount is in arrears under this Act, the authorised officer may issue, to the Recovery Officer, a certificate under his signature specifying the amount of arrears and the Recovery Officer, on receipt of such certificate, shall proceed to recover the amount specified therein from the factory or establishment or, as the case may be, the principal or immediate employer by one or more of the modes mentioned below:

- (a) attachment and sale of the movable or immovable property of the factory or establishment or, as the case may be, the principal, or immediate employer;
- (b) arrest of the employer and his detention in prison;
- (c) appointing a receiver for the management of the movable or immovable properties of the factory or establishment or, as the case may be, the employer:

PROVIDED that the attachment and sale of any property under this section shall first be effected against the properties of the factory or establishment and where such attachment and sale is insufficient for recovering the whole of the amount of arrears specified in the certificate, the Recovery Officer may take such proceedings against the property of the employer for recovery of the whole or any part of such arrears.

- (2) The authorised officer may issue a certificate under sub-section (1) notwithstanding that proceedings for recovery of the arrears by any other mode have been taken.

The recovery of ESIC contribution is as provided under Section 45B and Section 45C which is inserted with effect from 01.01.1991. Under Section 45B the contribution payable under the ESIC Act can be recovered as arrears of land revenue whereas, Section 45C provides for the recovery to be made from the factory or the establishment or, the principal or immediate employer by one or more modes mentioned in Clause (a) to (c). Provided that, the attachment and sale of any property under Section 45C shall first be effected against the properties of the factory or establishment and where such an attachment and sale is insufficient for recovering the whole of the amount of arrears specified in the certificate, the Recovery Officer may take such proceedings against the property of the employer. Thus even under Section 45C which is introduced w.e.f. 01.01.1991, the dues have to be first recovered by attaching property of the factory or the

establishment. Prior to insertion of Section 45C on 01.01.1991, the only mode of recovery of ESI dues was under Section 45B to be recovered as arrears of land revenue, but Section 45B does not mention as to from whom the dues are to be recovered. The Single Judge Judgment of this Court in the case of ***G.N.Mathur (supra)*** deals with the issue of recovery of ESI dues.

In the identical facts situation, this Court (Single Judge) considered the question raised in present appeal as to the personal liability of ‘occupier’ to pay ESI dues in the case of ***G. N. Mathur, Elphinstone Spg. & Wvg. Mills Ltd. & Ors. (supra)*** wherein this Court has held as under:-

“Under the ESIC Act, the designation may be for a person to be addressed in case the company defaults in the remittance of contributions. In any case, there is no specific provision permitting the initiation of recovery proceedings against an ‘occupier’ in his personal capacity for the failure of the company to remit contributions under the enactment”.

In the appeal filed against the above Judgment in the case of ***G.N.Mathur (supra)*** in the case of ***Employees State Insurance Corporation Vs. G. N. Mathur, (supra)***, the Division Bench upheld the Judgment of the Single Bench and the Division Bench held as under :

“7. In our judgment, the contention urged on behalf of respondent No. 1 deserves acceptance. The plain reading of sub- section (2) of Section 100 of the Factories Act makes it clear that the person nominated shall be deemed to be an occupier for the purpose of Chapter X only and this Chapter deals with the subject of penalties and procedure. In other words, a person nominated under subsection (2) would be required to face prosecution and punishment in respect of any contravention of the provisions of the Factories Act or rules framed thereunder. Such nomination which treats the nominee as a deemed and only for Chapter 10 can, by no

stretch of imagination, be extended beyond the limited purpose for which the nomination was made. The person nominated as an occupier under sub-section (2) of Section 100 cannot be treated as occupier under Section 2(n) of the Factories Act, unless such nominee has ultimate control over the affairs of the factory. It is possible that a person having ultimate control over the affairs of the factory may be nominated under sub-section (2) of Section 100 but it is not necessary that the nominee under sub-section (2) must necessarily have the ultimate control over the affairs of the factory. Once this aspect is clear then it is obvious that respondent No. 1 who was nominated under sub-section (2) of Section 100 cannot be treated as an occupier unless it is established by the Corporation that respondent No. 1 had ultimate control over the affairs of the factory. Mr. Mehta found it extremely difficult to contend that respondent No. 1 had ultimate control over the affairs of Elphinstone Spinning and Weaving Mills. The learned counsel conceded that respondent No. 1 was not empowered to deal with the financial matters and nothing was produced before the Employees' State Insurance Court to indicate that respondent No. 1 had ultimate control over the affairs of the Mills.”

11. It is also worthwhile to note the judgments of the Punjab and Haryana Court and by the Hon'ble Supreme Court, in this regard. The Judgment of Punjab and Haryana Court in the case of *Employees' State Insurance Corporation Vs. S. Gurdial Singh and Others*<sup>5</sup>, wherein the single judge considered the submission on behalf of the Petitioners that they are not the “principal employer” of the factory as defined in Section 2(17) of the Act. The single judge was considering the case of the Directors where the ESIC notice was issued to the Directors of the company for recovery of the ESIC dues of the company. One of the Director was also an ‘occupier’ of the factory as designated under Section 2(15) of the ESIC Act. The Court having considered the submission of the petitioners therein held that the occupier of a factory means the person who has ultimate control over

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<sup>5</sup> AIR 1974 SCC OnLine P & H 204

the affairs of the factory and when the said affairs are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory. It was held that the petitioners who were the Directors cannot be said to be persons who have personally ultimate control over the factory and that control is based in the company and that there was no evidence to show that the affairs of the factory being entrusted to any of the petitioners and held that the petitioner therein cannot be termed as principal employer. However, the Hon'ble Judge finally observed as under :

“It will be for the respondents to recover the amount from the company or the occupier of the factory in any manner permissible under the law.”

The judgment of the Single Judge was taken in appeal in the case of *Employee's State Insurance Corporation Vs. S. Gurdial Singh and Ors.* (supra), wherein the Division Bench has held as under :

“The appellant did not produce any document or any other evidence on the file to show that the affairs of the company had been or are entrusted to any of the petitioners -respondents. The liability for the payment of contribution to the Employees' State Insurance Corporation is that of the principal employer under section 40 of the Act and not of the petitioners-respondents. **The appellant can recover the amount in dispute from the assets of the factory which can be attached and sold, but this procedure has not been followed by the appellant. The petitioners (respondents 1 to 4) are not personally liable for this amount.**”

The judgment of the Division Bench of the Punjab and Haryana High Court was carried in appeal and the Hon'ble Supreme Court in the case of *Employee's State Insurance Corporation Vs. S. Gurdial Singh and*

*Ors.*<sup>6</sup> held as under :

“Section 2(17) 'Principal employer' means :

(i) in a factory, the owner or occupier 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 of 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.

2. There is no dispute that Clause (ii) does not apply. What is relevant to consider is whether the liability of Director is covered under Clause (i) and if it is, Clause (iii) being residuary would not apply and in case it is not covered by Clause (i), the matter would be regulated by Clause (iii). Admittedly the company had a factory and it is not in dispute that the occupier of the factory had been duly named. It is also not in dispute that it had a manager too. In view of the clear terms in the definition, we are of the view that Director did not come within Clause (i) but the occupier being there, Clause (i) applied and in that view of the matter, Clause (iii) could have no application.

3. Learned Counsel for the appellant relied upon two decisions as precedents. In the case of the Bombay High Court in Suresh Tulsidas Kalichand v. Collector of Bombay (1980) 2 Lab LJ 81, the Court found liability by relying upon Clause (ii) of the definition without first ascertaining whether the matter was covered by Clause (i). Now on our finding in the instant case that Clause (i) applied, we do not have to go to Clause (iii) where the liability is of the person who is responsible for the supervision and control of the establishment. The other decision on which reliance has been placed is in the case of B.M. Chatterjee v. State of West Bengal. That was a case where a learned single Judge proceeded on the footing that the Directors

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6 AIR 1991 SCC 1741

were owners of the company. We called upon the learned Counsel for the appellant to substantiate the proposition that Directors in the absence of anything more would have to be treated owners of the; company and he has candidly accepted the position that in the absence of facts and proof of actual position, Directors cannot be treated ipso factor as owners. Thus no support is available from the precedents. We are of the view that the High Court was right in its conclusion that the liability was of the company and in the event of their being an occupier, he was liable to meet the demand.

The law discussed in the above noted judgments summarised as under:

The Division Bench of this High Court in the case of *G. N. Mathur (supra)* has held that the occupier nominated under Section 2(n) of the Factories Act has to have ultimate control over the affairs of the factory to be liable to pay the ESIC dues of the company. However, the Division Bench of this High Court has not decided whether the occupier who has ultimate control over the affairs of the factory is personally liable for the ESIC dues of the company. The Division Bench of Punjab and Haryana High Court in the case of *ESIC V/s. S. Gurdial Singh (supra)*, has held that ESI dues can be recovered from the assets of the factory and not from the directors personally although one of the director was also nominated as occupier. The Judgment of Division Bench of Punjab and Haryana High Court is upheld by Supreme Court in *ESIC V/s. S. Gurdial Singh (supra)*. The Supreme Court has held that the liability to pay the dues is of the company and in the event of there being an “occupier” he

was liable to meet the demand, meaning thereby that the occupier who has the ultimate control over the affairs of the factory has to make the payment. However, the Supreme Court in the case of *ESIC V/s. Gurdial Singh (supra)* has not observed as regards the personal liability of the “occupier” and has also upheld the Judgment of Division Bench, wherein it is held that all the directors (one of them being an occupiers) are not personally liable. The Single Judge Judgment of this Court in the case of *G.N. Mathur (supra)* has clear held that the liability to pay ESIC dues of the occupier is not personal.

**12.** From the above discussed judgment following position of law emerges as regards the recovery of dues of ESIC.

(a) The liability to pay ESI dues is of the company and in the event of there being an occupier who has ultimate control over the affairs of the factory, he is liable to meet the demand. However, the liability of the occupier is not personal.

(b) If the dues of ESIC are of the company the same can be recovered from the company or from the assets of the company

**13.** The question of law raise is answered against the appellant and the appeal is accordingly dismissed.

**14.** In view of dismissal of the appeal, pending applications, if any, also disposed of.

**(ARUN R. PEDNEKER)**

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