

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

THURSDAY, THE 15TH DAY OF JANUARY 2015/25TH POUSHA, 1936

Ins.APP.No. 41 of 2011 ()

AGAINST THE ORDER IN EIC 29/2003 of EMPLOYEES' INSURANCE COURT, KOZHIKODE
DATED 19-01-2010

APPELLANTS/RESPONDENTS:

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1. THE REGIONAL DIRECTOR, E.S.I.CORPORATION
SWARAJ ROUND NORTH, THRISSUR 680020.
 2. THE AUTHORISED OFFICER,
E.S.I.CORPORATION, SWARAJ ROUND NORTH
THRISSUR 682020.
 3. THE RECOVERY OFFICER, E.S.I.CORPORATION,
SWARAJ ROUND NORTH, THRISSUR 680020.

BY ADV. SMT.T.D.RAJALAKSHMY, SC, ESI CORPN.

RESPONDENT/APPLICANT :

VAZHAYIL NIYAS, S/O.LATE ASOO, SUBAIDA MANZIL
KASANAKOTTA, KANNUR

R BY ADV. SRI.K. RAJESH SUKUMARAN

THIS INSURANCE APPEAL HAVING COME UP FOR ADMISSION ON 15-01-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.B.SURESH KUMAR, J.
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Ins. Appeal No.41 of 2011
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Dated this the 15th day of January, 2015

JUDGMENT

The order passed by the Employees' Insurance Court, Kozhikode on E.I.C.No.29 of 2003 dated 19.1.2010 is under challenge in this appeal. The Regional Director of the Employees' State Insurance Corporation ("the Corporation" for short) and two other officers of the Corporation are the appellants.

2. The respondent instituted the proceeding referred to above for a declaration that he is not the employer of Taj Timber and Saw Mills after 1.8.1993 and that he is not liable to pay contributions in respect of the employees of the said establishment under the Employees' State Insurance Act, 1948 ("the Act" for short). The case of the respondent before the Insurance Court was that his father, late C.P.Assoo, owned the establishment referred to above and on his death, on 11.7.1990, the establishment devolved on him and the other legal representatives of his father. According to him, for a short period thereafter, from 1.8.1993 to 11.9.1994, the establishment was leased out to one Sri.A.Haridasan and there was no operation of the establishment after the expiry of the said

lease period. It is the further case of the respondent that on 4.10.1997, the establishment was again leased out to two persons namely Sri.K.P.Valsaraj and Sri.K.Mashood and they have been running the establishment all along thereafter. According to the respondent, as per the terms and conditions in the agreement entered into by him with the said lessees, the lessees are liable to pay contributions payable under the Act. It is his case that on 19.3.2003, he was issued with a demand notice by the Recovery Officer of the Corporation directing him to pay a sum of Rs.1,27,734/- towards arrears of contribution for the period from 2.9.1997 to 30.5.2002. It was at that point of time, the respondent had approached the Insurance Court with the petition referred to above for the reliefs aforesaid.

3. The application was opposed by the Corporation by filing a written objection contending inter alia that the establishment of the respondent was earlier covered under the Act for the period upto 6.1.1986 and subsequently since the total number of employees in the establishment became less than 10, the provisions of the Act ceased to have application over the said establishment. It is stated in the written objection that later in order to examine the feasibility of re-coverage of the establishment with effect from 1.4.1997, the

Area Inspector of the Corporation visited the establishment on 2.9.1997 and at that point of time, it was noticed that 12 persons were engaged in the establishment. On the basis of the report submitted by the said Inspector of the Corporation, the establishment was again brought under the Act with effect from 2.9.1997. According to the Corporation, though the respondent was informed of the re-coverage of the establishment and requested to comply with the provisions of the Act, he did not comply with the requirements of the Act. Thereafter, according to the Corporation, after issuing a show cause notice to the respondent, the liability of the respondent for the period after 2.9.1997 was determined and proceedings have been initiated for recovery of the same.

4. The Insurance Court, on an elaborate consideration of the materials on record, found that the lessees were running the establishment from 1.8.1993 onwards by engaging their own workmen. After holding that the lessees were in occupation of the establishment, relying on the decision of this Court in **Thomas K.C. v. Regional Director, ESI Corporation** [1998-II-LLJ-166], the Insurance Court found that the respondent cannot therefore, be treated as the principal employer for the purpose of the provisions of the Act and consequently allowed the application, as per the

order impugned in this appeal, holding that (1) the respondent was not the principal employer in respect of the said establishment after 1.8.1993 and (2) the respondent is not liable to pay any amount as ESI Contribution for the period from 2.9.1997 to 30.5.2002. It was made clear in the order that the Corporation can initiate appropriate action for enforcement of the coverage under the Act against the principal employer (lessees), after affording them an opportunity of hearing. It is aggrieved by the said decision of the Insurance Court that the Corporation has come up in this appeal.

5. The following is the substantial question of law framed in the appeal :-

(1) Whether the Lessor is not liable under Sec. 93-A of the ESI Act for the dues of lessee in case where the establishment was put under lease or not?

6. Heard the learned counsel for the appellants as also the learned counsel for the respondent.

7. The learned counsel for the appellants contended, relying on Section 93A of the Act that when an employer in relation to an establishment transfers that establishment in whole or in part by lease, that employer and the person to whom the establishment so transferred, shall jointly and severally be liable to pay the amount due in respect of any contribution or any other amount payable

under the Act in respect of the employees in the establishment. He has also contended that despite the fact that the establishment was leased out to the lessees, the respondent continued to be the licensee of the premises and since the lessees carried on operations in the establishment on the strength of the licence obtained by the respondent, the respondent alone can be treated as the principal employer of the establishment.

8. It is not disputed that during the relevant period, the establishment was under occupation of the lessees of the respondent. The question therefore is whether the conduct of the respondent in leasing out the establishment to third parties would absolve him from the liability to pay contributions under the Act. Section 93A of the Act, which is relied on by the learned counsel for the appellant, reads thus:

"93A. 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 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."

The said provision was introduced in the statute with effect from

1.9.1975 by virtue of Act 38 of 1975. A bare reading of the said provision would indicate that the section deals only with the liability in respect of the amounts payable under the Act for the period up to the date of transfer. In other words, what is provided for under section 93A of the Act is only that the employer cannot get himself absolved from the liability by transferring his establishment by way of sale, gift, lease or licence and notwithstanding the transfer, the employer will continue to be liable for the contributions payable under the Act up to the date of transfer. Section 93A also provides that if an establishment is transferred as contemplated therein, then even the transferee is liable for the contributions payable under the Act up to the date of transfer. Section 93A of the Act gives an indication that if an establishment is transferred by way of lease, the lessor is not liable to pay the contributions payable under the Act after the lease. In ***Thomas K.C. v. Regional Director, ESI Corporation*** [supra], a Division Bench of this Court has considered the effect of the provisions in Section 93A of the Act and held that the language of Section 93A would not in any manner justify an interpretation making the transferor liable for the dues of the transferee. It was also held in that case that when there is transfer by way of lease, the transferee will be the principal employer of the

establishment and that after the transfer, the transferor cannot be treated as the principal employer for the purpose of assessing the liability under the Act. The relevant passage of the said judgment reads thus:-

"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."

In the light of the said decision of the Division Bench of this Court, there is no substance in the argument raised by the learned counsel for the appellants based on Section 93A of the Act.

9. Coming to the contention of the learned counsel for the appellants that since the licence of the establishment continues to be in the name of the respondent, he alone can be treated as the principal employer is also unsustainable. The expression 'principal employer' has been defined in section 2(17) of the Act. Section 2 (17) of the Act reads thus:-

"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."*

Going by the scheme of the Act, especially the definition of the 'principal employer', only the person responsible for the supervision and control of the establishment can be regarded as the principal employer of the establishment. As such, the argument of the learned counsel for the appellant that since the licence of the establishment continued to be in the name of the respondent, he alone can be treated as the principal employer cannot be accepted, especially in the light of the observation made by this Court in ***Thomas K.C. v. Regional Director, ESI Corporation*** (supra) that when an establishment is transferred by way of a lease, and when the lessee runs the establishment, he alone can be treated as the

principal employer. True, if the licence of the premises continues to be in the name of the respondent, the activity of the lessees in the premises may not be lawful, but that does not mean that merely on account of that reason, the respondent can be treated as the principal employer of the establishment for the purpose of complying with the provisions of the Act.

In the circumstances, I do not find any infirmity in the impugned order and the appeal is, accordingly, dismissed.

Sd/-

**P.B.SURESH KUMAR
JUDGE**

/true copy/

P.A. To Judge

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