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IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

WPO/3082/1993

UMESH KHEMKA
VS
THE VICTORIA JUTE CO.LTD.

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date : 24th February, 2023.

Appearance :

Mr. Shantanu Mishra, Adv.
Mr. Arun Kumar Mishra, Adv.
…for the petitioner

Mr. Mainak Bose, Adv.
Mr. R. Karnani, Adv.
..for respondent no.1.

Mr. Sakya Sen, Adv.
..for Special Officer

Mr. Debjit Mukherjee, Adv.
Ms. Susmita Chatterjee, Adv.
..for the State

Mr. Shiv Chandra Prasad, Adv.
..for the PF authority

The Court : Learned counsel for the petitioner argues that the petitioner was merely an accountant of the company against which allegations have been levelled by the respondent authorities under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (in short ‘1952 Act’).

It is contended, by placing reliance on the averments made in paragraph 20 of the petition, that the petitioner, even at the time of joining the company as an accountant and being given the designation 'Manager (Finance)', such nomenclature was a misnomer according to the job entrusted. He was thereafter re-designated as 'Chief Accounts & Audit Officer'. The petitioner was allegedly given to understand that the service of the petitioner is in the nature of accountant only and/or its allied works to be done as per direction of the Board of Directors and the petitioner is only an employee of the company as such accountant who is entitled to wages/ salaries from the company, it being his master.

By placing reliance of the provisions of Section 2(e) and Section 7A of the 1952 Act, learned counsel submits that the petitioner, being a Chartered Accountant of the company, is not liable to be indicted in any allegation under the 1952 Act levelled against the company.

Learned counsel places reliance on a judgment of Supreme Court reported at ***(2008) 5 Supreme Court Case 662 (S.K. Alagh versus State of Uttar Pradesh And Others)*** and argues that in the said case, it was observed that as admittedly drafts were drawn in the name of the Company, even if the Appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of an Indian Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a Company or an employee cannot be held to be vicariously liable for any offence committed by the Company itself.

Learned counsel for the petitioner next places its reliance on a Co-ordinate Bench judgment reported in **(2019) 4 Cal LT 481 (*Malhati Tea & Industries***

***Ltd. and Others versus State of West Bengal and Another*),** wherein it was held, inter alia, by placing reliance on a judgment of the Supreme Court as indicated above, that the question which was required to be considered was that whether the directors of a company can be termed as the owners of a company and /or fastened with criminal liability for non-deposit of provident fund dues of the authorities. In paragraph 25 thereof, the decision of S. K. Alagh (Supra) was also considered and followed by the Co-ordinate Bench.

Learned counsel next cites another Co-ordinate Bench Judgment of this High Court delivered in ***(K.V.Kamath and Labour Enforcement Officer (Central), Kolkata, and another),*** wherein a similar proposition had been reiterated. It was observed in paragraph 13 thereof that Sub-clause (iii) of Section 2 of the Payment of Gratuity Act, which regulated the said case, speaks that in relation to any other establishment, the person who or the authority which has the ultimate control over the affairs of the establishment shall be treated as the employer, and further where the said affairs are entrusted to any other person, whether Manager, Managing Director or called by any other name, such Manager, Managing Director or such designated person shall be treated as the employer. In other words, in the absence of any entrustment to other person called Manager or Managing Director, etc., the person who or authority which has ultimate control over the affairs of the establishment will be treated as employer.

Drawing an analogy with the language of Section 7A of the 1952 Act, learned counsel submits that in the present case as well, since the petitioner was merely an accountant in the company and never discharged any duty which could tantamount to having ultimate control of the company, the notice under Section 7A of the Act to him was misconceived.

Lastly, learned counsel places reliance on several correspondences authored by the Chairman, President and other senior Officials of the company-in-question, whereby liability of the accountants, including the petitioner, in the issue were sought to be mitigated.

As such, it is argued that the notice under Section 7A of the 1952 Act ought to be set aside insofar as it pertains to the petitioner.

Learned counsel appearing for the respondent authorities submits that the exact role of the petitioner in the alleged non-payment of the Provident Fund dues cannot be ascertained at this stage.

Learned senior counsel appearing for the private respondents/company contends that in view of the scope of Section 2(e) and Section 7A of the 1952 Act, the notice issued to the petitioner, who was merely an accountant of the company, was without prejudice. It is further submitted that there were subsequent proceedings wherein a scheme was approved and affirmed up to the Supreme Court, despite being challenged by the respondent authorities. As such, it is submitted that the notice ought to be quashed.

Apparently, Section 2(e)(ii) of 1952 Act indicates that the definition of "employer" includes in relation to any other establishment than a factory, the person who, or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a Manager, Managing Director or Managing Agent, such Manager, Managing Director or Managing Agent.

On the other hand, Section 7A (2) indicates that the officer conducting the inquiry under sub-section (l) shall, for the purpose of such inquiry, have the same powers as are vested in a court under the Code of Civil Procedure, 1908(5 of 1908), with regard to the manager as situated therein and any such inquiry shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, and for the purpose of Section 196 of the Indian Penal Code.

It is further provided in sub-Section (3A) of Section 7A that where the employer, employee or any other person required to attend the inquiry under sub-section (l) fails to attend such inquiry without assigning any valid reason or fails to produce any document or to file any report or return when called upon to do so, the officer conducting the inquiry may decide the applicability of the Act or determine the amount due from any employer, as the case may be, on the basis of the evidence adduced during such inquiry and other documents available on record.

It is clear from the definition provided in Section 2(e)(ii) of 1952 Act that the term “employer” with regard to the 1952 Act is not merely restricted to any person or authority which has ultimate control over the affairs of the establishment but is also extended, where the said affairs are entrusted to a Manager, Managing Director or managing agent, to such Manager, Managing Director or managing agent as well.

In the present case, although it has been pleaded by the petitioner in paragraph 20 of the writ petition that the petitioner was acting merely in the capacity of an ordinary accountant in the company despite being designated as Manager Finance essentially and then re-designated as Chief Accounts & Audit Officer, such averment prima facie does not establish the fact that the petitioner was, in fact, not a manager or a managing director or managing agent within the contemplation of Section 2(e)(ii) of 1952 Act.

In fact, since the petitioner has virtually admitted in paragraph 20 of the writ petition that his initial designation was that of a Manager (Finance) and subsequently Chief Accounts & Audit Officer of the company, there is sufficient prima facie presumption to the effect that the petitioner fell within the category of employer as described under Section 2(e)(ii) of the 1952 Act.

In such view of the matter, there cannot be any doubt that the notice under Section 7A of the 1952 Act, which contemplates notice to an employer, was validly given to the petitioner.

Inasmuch as the judgments cited by the petitioner are concerned, S. K. Alagh (supra) merely specifies that the provisions of Section 406 of the Penal Code may not apply to an employee merely because he was the Managing Director of the company.

However, it was observed in the said case that admittedly drafts were drawn in the name of the company, even if the Appellant was its Managing Director. Hence, it was held that he could not be said to have committed an offence under Section 406 of the Penal Code.

There are certain points to ponder here. First, the present case is not an adjudication under Section 406 of the Penal Code, which is different in scope of operation than Section 7A of the 1952 Act and secondly, the factual circumstances of the present case are not yet clear, since it would be pre-mature at the notice stage to observe as to the exact extent and contour of the liabilities of the present petitioner with regard to non-payment of Provident Fund as alleged.

Inasmuch as the judgments of the learned Co-ordinate Benches of this Court are concerned, those merely follow the proposition laid down in S. K. Alagh (supra). However, the facts and circumstances of the said cases, as reflected from the orders themselves, do not tally exactly with the present case. Inasmuch as K.V. Kamath (supra) is concerned, in the said case, the learned Single Judge was dealing with the provisions of sub-section (iii) of Section 2 of the Payment of Gratuity Act and the definitions given therein, although there is parity between definition of the 'employer' in the said Act and the present Act.

In view of the above discussions, it cannot be said that the expression 'employer' in the 1952 Act merely envisages a person or authority who has ultimate control over the affairs of the establishment, where the entrustment was with a Manager or Managing Director, called by whatever name.

In view of the designations enjoyed by the petitioner in the hierarchy of the accused company, there was sufficient justification for the respondent authorities to issue the impugned notices in the name of the petitioner in the capacity of

Manager (Finance) of the accused company. Hence, there is no scope of interference in the present writ petition.

Accordingly WPO/3082/1993 is dismissed on contest without any order as to costs.

However, it is made clear that the merits of the allegations sought to be levelled against the petitioner have not been gone into by this Court and nothing in this order shall prejudice the rights and contentions of any of the parties herein in any of the pending proceedings before any Court of Law/Forum in any manner whatsoever.

(SABYASACHI BHATTACHARYYA, J.)

D.Ghosh