No. 4 had been pre-determined by the Chairman of the Board who successfully manipulated the same by awarding very high marks to him under the various headings and astonishingly high marks under the heading "capability to provide infrastructure and facilities (land, godown, showroom etc.) notwithstanding the fact that up to the date of interview, he had none and at the same time awarding very low marks to the petitioner.

(30) In view of the above discussion, we hold that selection of respondent No.4 for award of distributorship is tainted by arbitrariness, bias and is violative of Article 14 of the Constitution and the same is liable to be quashed.

(31) The submission of Shri Malhotra that the Court may not quash the allotment of distributorship because his client had spent substantial amount merits rejection because acceptance of such an argument would amount to Court's approval an unconstitutional, patently illegal, arbitrary and biased decision of the Board. This would also shake the public confidence in the system of administration of justice.

(32) For the reasons mentioned above, the writ petition is allowed. The selection of respondent No. 4 is declared illegal and quashed with a direction to respondent Nos. 1 to 3 to award distributorship to the petitioner. This shall be done within a period of two months from the date of receipt of certified copy of this order.

S.C.K.

Before G.S. Singhvi & Bakhshish Kaur, JJ

MOHAN LAL —*Petitioner*

versus

REGIONAL PROVIDENT FUND COMMISSIONER & ANOTHER—*Respondents*

C.W.P. No. 8907 of 2000

The 22nd April, 2002

Constitution of India, 1950—Art. 226—Employees Provident Funds and Miscellaneous Provisions Act, 1952—Ss. 2(e), 8&8(b)—Company failed to deposit the employees share of provident fund—Commissioner issuing recovery certificate against the Company—Recovery Officer issuing warrants for attachment of the moveable property of the Managing Director of the Company—Managing Director failing to deposit the arrears even after having given an undertaking to clear the dues of the Company—Whether a Managing Director of the Company can be held personally liable for the arrears of provident fund payable by the Company—Held, yes—Term 'Employer', defined—A Managing Director controlling the affairs of the establishment of the Company falls within the definition of employer—Recovery Officer has power to resort to one or all of the modes specified in S.8.—B(1) for recovery of the arrears—No illegality in adopting the mode specified in Cl. (b) of S.8—B(1) before exhausting other modes of recovery—Writ dismissed.

Held, that the definition of the employer contained in Section 2(e) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 in relation to an establishment other than a factory is totally different and the issue relating to the liability of the manager, managing director etc. would depend on the finding as to whether he is in the control of the affairs of the establishment. The petitioner was in the control of the affairs of the establishment of the firm and the company and, therefore, he falls within the definition of the employer. Therefore, he cannot escape the liability to pay the arrears.

(Para 17)

Further held, that the modes of recovery specified in Clauses (a), (b) and (c) of Section 8-B(1) of the 1952 Act are alternative modes and not exclusive of each other and it is open to the Recovery Officer to resort to one or more of the modes. There is nothing in Section 8-B(1) and other provisions of the Act from which it can be inferred that the Recovery Officer cannot adopt the mode specified in Clause (b) of Section 8- B(1) before exhausting other modes of recovery.

(Para 18)

Shri V.G. Dogra, Advocate, *for the petitioner.*

Shri Rajesh Bindal, Advocate, *for the respondent.*

JUDGMENT

G. S. SINGHVI, J

(1) Whether the arrears of the provident fund and other amounts payable by a private limited company under the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (for short, 'the Act') can be recovered from its Managing Director is the question which arises for determination in this petition filed by Shri Mohan Lal for quashing notices dated 28th January, 2000 (Annexure P5), 5th April, 2000 (Annexure P6) and 15th May, 2000 (Annexure P7) issued by the respondents under section 8-B and 8-C of the Act.

(2) The petitioner and one of the five partners of M/s Picks Auto Industries, Ludhiana (hereinafter described as the Firm) which was engaged in the manufacture of automobile parts, auto bolts etc. The Firm was brought within the purview of the Act with effect from 1st April, 1980. After 10 years, the petitioner and five members of his family, four of whom were partners of the Firm, got incorporated a private limited company under the Companies Act, 1956 under the name and style of Picks Auto Industries Private Limited (hereinafter described as the Company). The main object of the Company was to take over the running concern M/s Picks Auto Industries, Ludhiana alongwith its assets and liabilities and to carry on the business as manufacturers, importers, exporters, dealers, repairers, buyers, sellers, engineers, fabricating and forging of all types of automobile parts, auto bolts, implements, guages tools, accessories etc. After its incorporation, the Company continued to be covered by the provisions of the Act. In July, 1996, Area Enforcement Officer submited a report to the Regional Provident Fund Commissioner, Ludhiana (respondent No. 1) that the Company had failed to deposit the employees share of provident fund under the Employees Provident Fund Schemes, 1952, 1971 and 1995 and Deposit linked Insurance Scheme, 1976 for different periods. Respondent No. 1 issued notice dated 28th July, 1997 to the Company under Section 7-A of the Act for determination of its liability under the Act and after hearing the representatives of the Company and the department, he passed order dated 23rd

December, 1997 (Annexure P2) holding the Company liable to pay Rs. 1,73,129 with a direction to deposit the amount within 15 days. After about five months, he issued recovery certificate Annexure P3 dated 6th May, 1998 and directed Recovery Officer, Ludhiana (respondent No. 2) to recover the amount specified in Annexure P2 as arrerars of land revenue in accordance with Section 8-B to 8-G of the Act. Respondent No. 2 sent notice of demand dated 26th May, 1998 (Annexure P4) to the petitioner under section 8-B(2) with an indication that he will also be liable to pay interest in terms of section 7-Q of the Act and costs etc. This was followed by notice No. Rcy Cell/Peon/ 5945/5358 dated 23rd September, 1999,—*vide* which respondent No. 2 asked the petitioner to appear before him on 13th September, 1999 and to show cause as to why he may not be committed to civil prison in connection with the recovery of outstanding amount. The petitioner did not respond to either of the two notices. However, instead of sending him to prison, respondent No. 2 issued notice dated 28th January, 2000 (Annexure P5) to the petitioner and gave him final opportunity to deposit the amount of Rs. 2,11,371 which included interest and costs within seven days. The petitioner ignored this notice as well leaving respondent No. 2 with no choice except to take more harsh steps for recovery of the dues. This he did by issuing warrant for attachment of the petitioners movable property. As soon as, the warrant was served upon the petitioner, he submitted application dated 22nd March, 2000 and promised to clear the arrears within one month. He also deposited a sum of Rs. 28,000 to show that he was genuinely interrested in clearing the arrears. For the sake of reference, the relevant extracts of letter Annexure R2 are reporoduced below :—

> "Reference to the attachment warrants issued by you served upon me today by 22nd March, 2000 for attachment of movable property against PF arrears due from my M/S Picks Auto Ind. (P) Ltd.
>
> In this connection, it is requested that warrant may not be executed and despite my poor financial position, I promise to clear the arrears at the earliest and in any case within a month without fail. In case I fail to honour this my commitment then you may proceed as per law.
>
> In token of my this commitment I am tendering an amount of Rs. 28,000 towards the arrears amount. I shall try

to deposit more amount as far as possible in this month. I shall be highly thankful to you."

(3) After having succeeded in avoiding the consequences of attachment of his movable property, the petitioner reverted to his old stance and did not pay a single penny over and above what was tendered with application Annexure R2. Therefore, respondent No. 2 issued notice dated 15th May, 2000 (Annexure P7) to him to appear on 30th May, 2000 and show cause as to why he may not be committed to civil prison in execution of the certificate of recovery issued by respondent No. 1. The petitioner filed reply dated 30th May, 2000 (Annexure P8) to contest the notice by asserting that he was not liable to pay the arrears due from the Company and the respondents were unnecessarily harassing him. Soon thereafter, he filed the present petition and succeeded in persuading the Court to stay the execution of Annexure P7.

(4) Before proceeding further, we deem it proper to mention that during the pendency of the proceedings of recovery, respondent No. 1 had sent letter dated 5th April, 2000 (Annexure P6) to the Company that due to mistake in the calculation, Rs. 1,063 were not included in the total amount due and called upon it to pay Rs. 1,64,192 which were outstanding as on that date.

(5) The petitioner has challenged notices dated 28th January, 2000 and 15th May, 2000 mainly on the ground that he cannot be held personally liable for the arrears of provident fund payable by the company simply because he was its Managing Director. In support of this plea, he has relied on the following decisions :—

(1) ***Suresh Tulsidas Kilachand and others*** *versus* ***Collector of Bombay and others.(1)***

(2) ***Mansingh L. Bhakta and others*** versus ***State of Maharashtra and others(2).***

(3) ***Employees State Insurance Corporation, Chandigarh*** versus ***Gurdial Singh and others.(3).***

(1) 64 F.J.R. 399
(2) 80 F.J.R. 331
(3) 1991 Lab. I.C. 52

(6) In the written statement filed on behalf of the respondents, it has been averred that in his capacity as Managing Partner of the Firm, the petitioner was declared as employer against whom action could be taken in the case of default and this continued to be the position even after in corporation of the Company and its taking over the business of the Firm. The respodnents have placed on record a copy of the inspection report (Annexure R1) to show that the petitioner was treated as the employer for the purpose of the Act. They have also relied on application dated 22nd March, 2000 submitted by the petitioner to respondent No. 2 and have averred that after having undertaken to clear the dues of the Company, the petitioner cannot avoid his liability under the Act.

(7) Shri V.G. Dogra argued that the petitioner cannot be personally held liable to pay the arrears of provident fund dues of the Company and recovery, if any, should be effected from the properties of the Company. He further argued that the petitioner does not fall within the definition of term employer and, therefore, he cannot be proceeded against for the recovery of arrears of provident fund payable by the Company. He then argued that even if the petitioner is treated as employer within the meaning of Section 2(e) of the Act, the mode of recovery specified in Section 8-B(1) (b) cannot be resorted to unless all other modes of recovery are exhausted.

(8) Shri Rajesh Bindal defended the proceedings initiated by the respondents for recovery of the arrears of provident fund from the petitioner by arguing that he is covered by the definition of the term employer under section 2(e) of the Act. Shri Bindal submitted that the petitioner was throughout controllng the affairs of the establishment of the Company and, therefore, he cannot escape the liability to clear the dues of provident fund payable by the Company. Learned counsel then argued that the Recovery Officer has the choice to adopt one or more of the three modes specified in Clauses (a) to (c) of sub-section (1) of Section 8-B of the Act for recovery of arrears of provident fund etc. and no illegality was committed by respondent No. 2 by requiring the petitioner to pay the arrears of provident fund. He submitted that the rider contained in the proviso to Section 8-B (1) is not applicable to the petitioner's case and, therefore, he cannot seek invalidation of the impugned notices. Shri Bindal produced the original file maintained by the office of respondent No. 1 to show that till 1990, the name of

the petitioner was shown as Managing partner in the Column 19 of the Inspection Reports and thereafter, his name was entered in the said column in his capacity as Managing Director of the Company. He submitted that the petitioner had never objected to this and deposited the amount specified in the inspection reports and, therefore, he is estopped from challenging the impugned notices.

(9) We have given serious thought to the respective arguments and have gone through the record of the case including the file produced by Shri Bindal.

(10) For the prupose of deciding the issue raised in the petition, it will be useful to notice Sections 2(e), 8 and 8-B of the Act. The same read as under :—

"2. Definitions.—In this Act, unless the context otherwise requires,—

(a) to (d) xx xx xx xx xx xx xx

(e) "employer" means—

(i) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and, where a person has been named as a manager of the factory under clause (f) of sub-section (1) of Section 7 of the Factories Act, 1948 (63 of 1948), the person so named; and

(ii) in relation to any other establishment, 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:

8. Mode of recovery of moneys due from employers— Any amount due—

(a) from the employer in relation to an establishment to which any Scheme or the Insurance Scheme applies in

respect of any contribution payable to the Fund or, as the case may be, the Insurance Fund damages recoverable under section 14B, accumulations required to be transferred under sub-section (2) of Section 15 or under sub-section (5) of Section 17, or any charges payable by him under any other provision of this Act or of any provision of the Scheme or the Insurance Scheme; or

(b) from the employer in relation to an exempted establishment in respect of any damages recoverable under section 14B or any charges payable by him to the appropriate Government under any provision of this Act or under any of the conditions specified under section 17 or in respect of the contribution payable by him towards the Pension Scheme under the said Section 17.

may, if the amount is in arrears, be recovered by the Central Provident Fund Commissioner or such other officer as may be authorised by him, by notification in the Official Gazette, in this behalf in the same manner as an arrear of land revenue."

8B. Issue of certificate to the Recovery Officer—(1) Where any amount is in arrear under section 8, 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 establishment or, as the case may be, the employer by one or more of the modes mentioned below:—

(a) attachment and sale of the movable or immovable property of the establishment or, as the case may be, the 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 establishment or, as the case may be, the employer:

Providing that the attachament and sale of any property under this section shall first be effected against the properties of the 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."

(11) An analysis of Section 2(e) shows that where the establishment is a factory, its owner or occupier including the agent of such owner or occupier, legal representative of the deceased owner or occupier falls within the definition of employer. In relation to any other establishment, the person or authority having ultimate control over the affairs of the establishment falls within the definition of the employer. Where the affairs of the establishment are entrusted to a Manager, Managing Director or Managing Agent, then such Manager, Managing Director, Managing Agent falls within the definition of employer. Section 8 provides for recovery of money due from the employer as arrears of land revenue. Section 8-B(1) lays down the modes of recovery. It empowers the Recovery Officer to effect the recovery from the establishment or the employer by attachment or sale of movable or immovable property of the establishment or the employer, arrest of the employer and his detention in prison or by appointing a Receiver for the management of the movable or immovable properties of the establishment or employer. Proviso to Section 8-B (1) lays down that if the Recovery Officer intends to resort to the mode of attachment and sale of property, then it should be first qua the properties of the establishment and the properties of the employer shall be touched only if the amount collected from the sale of properties of the establishment is not sufficient for recoverying the whole of the arrears.

(12) In view of the above analysis of the relevant provisions and the facts found, it is not possible to accept the argument of Shri Dogra that his client cannot be proceeded against the recovery of the

arrears of provident fund and other amounts due under the Act. The petitioner has not disputed the fact that he was the Managing Partner of the Firm and Managing Director of the Company. He has also not controverted the fact that for almost 16 years, he had controlled the affairs of the establishment in his capacity as Managing Partner and then as Managing Director of the Company. Therefore, it is no longer open to him to contest his liability under the Act as an employer, moreso when he had given unequivocal undertaking vide Annexure R2 dated 22nd March, 2000 to clear the arrears due from the company at the earliest and latest within a period of one month.

(13) The decisions relied upon by the petitioner to avoid his liability under the Act do not have any bearing on the present case because in those cases, Bombay High Court and the Supreme Court had dealt with the provisions of the Employees State Insurance Act, 1948 (for short, the 1948 Act) which are substantially different from the provisions of the Act. Sections 2(17), 40(1) & (4) and 45-G (1), (2), (3)(i) & (ix), (4) and (5) of the 1948 Act which were considered in the aforementioned cases, read as under:—

"2. Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

(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 name;

(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."

40. Principal employer to pay contribution 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.

(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.

45G. Other modes of recovery—(1) Notwithstanding the issue of a certificate to the Recovery Officer under section 45C, the Director General or any other officer authorised by the Corporation may recover the amount by any one or more of the modes provided in this section.

(2) If any amount is due from any person to any factory or establishment or, as the case may be, the principal or immediate employer who is in arrears, the Director General or any other officer authorised by the Corporation in this behalf may require such person to deduct from the said amount the arrears due from such factory or establishment or, as the case may be, the principal or immediate employer under this Act and such person shall comply with any such requisition and shall pay the sum so deducted to the credit of the Corporation:

(3) (i) The Director General or any other officer authorised by the Corporation in this behalf may, at any time or from time to time, by notice in writing require any person from whom money is due or may become due to the factory or establishment or, as the case may be, the principal or immediate employer or any person who holds or may subsequently hold money for or on account of the factory or establishment or, as the case may be, the principal or immediate employer, to pay to the Director General either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is

sufficient to pay the amount due from the factory or establishment or, as the case may be, the principal or immediate employer in respect of arrears or the whole of the money when it is equal to or less than that amount.

(ix) Any person discharging any liability to the principal or immediate employer after the receipt of a notice under this sub-section shall be personally liable to the Director General or the officer so authorised to the extent of his own liability to the principal or immediate employer's liability for any sum due under this Act, whichever is less.

(4) The Director General or the officer so authorised by the Corporation in this behalf may apply to the court in whose custody there is money belonging to the principal or immediate employer for payment to him of the entire amount of such money, or if it is more than the amount due, an amount sufficient to discharge the amount due.

(5) The Director General or any officer of the Corporation may, if so authorised by the Central Government by general or special order, recover any arrears of amount due from a factory or any establishment or, as the case may be, from the principal or immediate employer by distraint and sale of its or his movable property in the manner laid down in the Third Schedule to the Income-Tax, Act, 1961 (43 of 1961)."

(14) In ***Suresh Tulsidas Kilachand*** versus ***Collector of Bombay (supra),*** a Division Bench of the Bombay High Court considered the question as to whether individual director or a company cannot be held to be in control of the factory belonging to the company unless he has been notified as occupier for the purposes of the Factories Act, 1948 and, therefore, he cannot be personally held liable to clear the arrears under the 1948 Act.

(15) In ***Man Singh L. Bhakta and others*** versus ***State of Maharashtra and others (supra),*** a learned Single Judge of Bombay High Court took the same view and held that the director of the

company cannot be held personally liable for recovery of arrears under the 1948 Act.

(16) In ***Employees State Insurance Corporation, Chandigarh*** versus ***Gurdial Singh and others*** (supra), their Lordships of the Supreme Court held that directors do not come within Clause (i) of Section 2(17) of the 1948 Act.

(17) In our opinion, the ratio of these decisions cannot be applied to the case in hand because the definition of the employer contained in Section 2(e) of the Act in relation to an establishment other than a factory is totally different and the issue relating to the liability of the manager, managing director etc. would depend on the finding as to whether he is in the control of the affairs of the establishment. In the present case, we have found that the petitioner was in the control of the affairs of the establishment of the Firm and the Company and, therefore, he falls within the definiton of the employer. Therefore, he cannot escape the liability to pay the arrears.

(18) We are further of the view that the modes of recovery specified in Clauses (a), (b) and (c) of Section 8-B(1) of the Act are alternative modes and not exclusive of each other and it is open to the Recovery Officer to resort to one or more of the modes. The use of the expression "by one or more of the modes mentioned below" in the substantive part of Section 8-B(1) makes it clear that the Legislature has, with a view to ensure that the dues payable under the Act are recovered, empowered the Recovery Officer to resort to one or all of the modes for recovery of the arrears. The only rider placed on the exercise of power by the Recovery Officer is that in the case of attachment and sale of any property, he must first do so *qua* the properties of the establishment and take proceedings against the properties of the employer for recovery of the whole or any part of the arrears only where the attachment and sale of properties of the establishment is insufficient for recovery of the whole amount specified in the certificate. However, there is nothing in Section 8-B(1) and other provisions of the Act from which it can be inferred that the Recovery Officer cannot adopt the mode specified in Clause (b) of Section 8-B(1) before exhausting other modes of recovery.

(19) A similar question was considered by this Court in ***Sobhag Textile Ltd.*** versus ***The Regional Provident Fund*** **Commissioner,** ***Haryana and another (4)*** and answered in the following words :—

> "Sub-section (1) of Section 8-B of the 1952 Act prescribes alternative modes of recovery of the arrears on the basis of certificate issued by the authorised officer. Attachment or sale of moveable or immovable property of the establishment or, as the case may be, and arrest of the employer and his detention in prison are two of the three modes which can be adopted by the Recovery Officer. Proviso appearing below clause (c) of Section 8-B(1) of the 1952 Act lays down that attachment and sale of any property under Section 8-B shall first be effected against the properties of the establishment and proceedngs against the property of the employer can be taken only if the amount due cannot be recovered from the properties of the establishment. However, there is nothing in the said proviso from which it can be inferred that respondent No. 2 is not entitled to have recourse to the mode prescribed in clause (b) of Section 8-B(1) before taking recoruse in the sale of property under section 8-B (1) (a) and in the absence of any such embargo, it is not possible to agree with Shri Grover that the notice issued by respondent No. 2 should be declared illegal, arbitrary and unjustified."

(20) In view of the above discussion, we hold that the impugned notices do not suffer from any legal infirmity and the writ petition is liable to be dismissed ordered accordingly. The petitioner shall pay costs of Rs. 5,000 to the respondents.

(21) The interim order passed by the Court on 17th July, 2000 is vacated.

R.N.R.

(4) 2000 (3) RSJ 178

2635/HC—Govt. Press, U.T., Chd.