

(1984) 02 CAL CK 0009
In the Calcutta High Court
Case No : Criminal Rev. No. 899 of 1981

Benoy Roy

APPELLANT

Vs

E.S.I. Corporation

RESPONDENT

Date of Decision : 13-02-1984

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 401, 482
Employees State Insurance Act, 1948 — Section 4(i)(b), 40, 85
Penal Code, 1860 (IPC) — Section 2(12), 2(17), 406, 85

Citation : 88 CWN 412

Hon'ble Judges : N.G. Chaudhuri, J

Bench : Single Bench

Advocate : S.C. Chakraborty, for the Appellant; J. Goswami and Krishna Ghosh, for the Respondent

Judgement

N.G. Chaudhuri, J.—In this revision case u/s 401 read with section 482 of the Cr.P.C. the point for decision is whether or not a person on account of his being the Chairman of the Board of Directors of an "establishment" can be prosecuted as "principal employer" u/s 85 read with section 40 of the Employees State Insurance Act, 1948 (hereinafter to be referred to as the Act). The question has arisen in the manner stated below. An Inspector under the Act with necessary sanction filed a complaint against the present petitioner describing him as Chairman of the Board of Directors and another gentleman described as Manager and as such principal employer of the establishment M/s- Dacca Ayurvediya Pharmacy Ltd. In paragraph 2 of the complaint it was alleged that M/s. Dacca Ayurvediya Pharmacy Ltd. had its establishment at 195, Prince Anwar Shah Road and was allotted a Code number mentioned in the said paragraph. The basis of culpability of the accused was given in paragraph 6 of the petition of complaint as follows :- That the accused persons have failed to submit such contribution cards in Set-A for the contribution period expired on 31.7.76 which should have been submitted by them on or before 11.9.76, and for such default the. accused persons as principal employer are liable to be prosecuted for commission of an

offence " punishable u/s 85(a) and (g) of the E.S.I. Act, 1948, read with section 4(i) (b) of the E.S.I. (Amendment) Act, 1975, and thus failed to pay contribution as requisite under the E.S.I.

2. After summons was served the petitioner appeared before the learned Magistrate, four witnesses including the complainant were examined by the prosecution and the petitioner was also examined u/s 513 of the Code. At that stage the petitioner came up before this Court to challenge the propriety of the prosecution in so far as he is concerned. It is emphasized that Dacca Ayurvediya Pharmacy of which the petitioner happens to be the Chairman of the Board of Directors has been described as an "establishment, Paragraph 2 of the petition of complaint and the sanction for prosecution dated 9. 12. 76 granted by the Regional Director indicate that the petitioner is being prosecuted simply on account of his being a principal employer. It is added that there is no averment in the petition of complaint that the petitioner is in any way responsible for the supervision and control of the establishment in question. On the basis of the facts noted above relying on the Division Bench decision of this Court in K.N. Genda v. State reported in 1982 LAB. IC 1777, it is contended on behalf of the petitioner that in the present case there is no sufficient averment to connect the accused with the alleged offence and on this ground the proceeding is liable to be quashed. In this connection it is pointed out that there is no material to show that the petitioner was in charge of the business or over all control of day to day business of the company.

3. Mr. Moitra, the learned advocate for the opposite party E.S.I., places reliance on the Division Bench decision in Bidyut Kumar Set vs. Satyesh Chandra Bagchi, reported in 1978 LAB, IC, 1332 and contends that complaint against a Director for an offence u/s 85 read with section 2(17) may be made and there is no need of a specific pleading in the complaint that he was in ultimate control over the affairs of the Company. Mr. Moitra also places reliance on the case of Arup Kumar Pal Chowdhury vs. Satyesh Chandra Bagchi reported in 1979 (I) Cal High Court Notes wherein B.N. Moitra, J. followed the decision given in the case of Bidyut vs. Satyesh cited above.

4. The three cases cited have very little relevance or applicability to the facts of the present case. The case of K.N. Genda was for prosecution of a principal employer for an offence u/s 406 I.P.C. on the basis of a complaint made by an Insurance Inspector of the Employees State Insurance Corporation. In the aforesaid case there was no prosecution for violation of Section 85 of the Act. The principal point considered was, for commission of offences in those cases where a company can be prosecuted, if, vicariously a person in charge of the company can also be prosecuted as principal employer, and if such a person is liable to be prosecuted what kind of averment is necessary in the petition of complaint. We are confronted with the different type of question in the present case. The decisions cited by Mr. Moitra do not appear to be of any help to us. In the case of Bidyut vs. Satyesh a question arose if Directors of a Company having

a factory could be brought within the meaning of the word "occupier" as mentioned in the definition of principal employer in section 2 (17) of the Act and the question was answered in the affirmative. In the case of Arup Kumar vs. Satyesh, Directors of a Company having a factory were prosecuted as principal employers without any averment in the petition of complaint that they were responsible for supervision and control of the company and on that ground the prosecution was challenged. It was held that the expression principal employer is wide enough to make the Director of the Company a principal employer within the meaning of section 22 (17) of the Act. It is to be noted that in the present case existence of a factory has not been referred to either in the petition of complaint or in evidence. That fact makes the decisions cited by Mr. Moitra inapplicable to the instant case.

5. It is clear from section 1 of the Act that under Sub-section (4) the Act was to apply in the first instance to all factories; and subsequently under sub-section (5) the Act could be extended to any other establishment or class of establishments. It is, thus clear that the framers of the Act had two distinct concepts in their mind, namely, "factories" and "establishments" and treated them differently. The term "factory" has been defined in section 2 (12) of the Act, but the term "establishment" has not been defined. Still the two expressions were not treated as synonymous. This will be evident from the definition of "principal employer" as given in section 2(17) of the Act which is quoted below :

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;

6. We are not concerned with clause (i) quoted above as no reference has been made to a factory in the instant case; nor are we concerned with clause (ii) as no reference has been made to an establishment of the category contemplated in this clause. We come to the residuary clause (iii) which denned "principal employer" in relation to any other establishment as a person responsible for supervision and control of the said establishment. The plain and simple interpretation of this clause is that in relation to such an establishment any person responsible for supervision and control thereof may in consideration of the above fact be treated as "principal employer". In order to fasten on a person the liabilities and responsibilities of the "principal employer" under the Act, it follows accordingly, an allegation is required to be made in the petition of

complaint that such a person was responsible for supervision and control of the establishment at the relevant time. In the petition of complaint in the present case there is no such allegation namely allegation that the petitioner as Chairman of the Board of Directors of Dacca Ayurvedya Pharmacy Ltd. was responsible for the supervision and control of the establishment. The conclusion is therefore inescapable that the learned Magistrate had no material to take cognizance of the offence alleged against the petitioner. The question posed at the outset is thus answered in the negative and the revisional application succeeds. The Rule issued is made absolute and proceedings in case No. 5725 of 1976 u/s 85 of the E.S.I. Act, 1948 in the 9th Court of the Metropolitan Magistrate, Calcutta be quashed in so far as the present petitioner is concerned. The records be sent down to the court below.