

(1995) 12 BOM CK 0030
In the Bombay High Court
Case No : Criminal W.P. No. 1345 of 1987

Bharatkumar R. Ruia and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 06-12-1995

Acts Referred:

Employees State Insurance Act, 1948 — Section 40(1)

Citation : (1996) 74 FLR 2259 : (1997) 3 LLJ 212 : (1996) 2 MhLj 331

Hon'ble Judges : R.G. Vaidyanatha, J

Bench : Single Bench

Judgement

R.G. Vaidyanatha, J.—This is Criminal Writ Petition for quashing certain criminal proceedings. Heard both the sides.

2. The concerned Officer under the Employees' State Insurance Act filed the complaint in the Court below alleging that the petitioners have committed an offence of criminal breach of trust in not depositing the Employees' State Insurance contribution collected from the employees with the Department and thereby committed an offence punishable u/s 406 of the Indian Penal Code.

On the basis of two complaints criminal cases are registered by the learned Magistrate which are mentioned in the petition.

3. Being aggrieved by the initiation of the criminal proceedings, the petitioners have filed this Criminal Writ Petition challenging the validity and continuation of the prosecution against them. Two arguments were urged in support of the petition. One is that the petitioners are not the principal employers or occupier of the company in question and therefore, they are not personally liable to be proceeded against if there is any violation of the Employees' State Insurance Act and Rules. The other ground is that the prosecution is not sustainable for want of sanction by the Commissioner under the Act.

On the other hand, the learned Counsel appearing for the Employees' State Insurance Corporation controverted these two arguments and contended that the

prosecution against the petitioners is perfectly maintainable and there is no merit in the petition.

4. The petitioners are Directors of a Public Limited Company namely, the Phoenix Mills Limited.

In the two complaints which are subject matter of the prosecution of the petitioners, the names of accused persons are shown. In the complaint dated 28-5-1985, Ashokkumar Radhakrishna Ruia is shown as occupier. In the other complaint dated 5-5-1984 Ashokkumar Radhakrishna Ruia is shown as a Managing Director. We must notice that this Ashokkumar Ruia is not a party to this case. Hence, we are not concerned about the issue of process or continuation of criminal case against Ashokkumar Ruia. What I am trying to point out is that on complainant's own showing he is shown as "occupier" in one case and as "Managing Director" in the other case. The petitioners have also placed on record that they have sent the intimation under the Factories Act in Form No. 3 showing the name and address of the occupier (Col. No. 6) as Shri Ashokkumar Radhakrishna Ruia and the name of Manager as P.K. Basu. A.R. Ruia means Ashokkumar Radhakrishna Ruia.

Therefore, it is common ground that Ashokkumar Radhakrishna Ruia was the occupier as mentioned in one of the complaints and as intimated by the petitioners under the Factories Act.

5. Section 40(1) of the Employees' State Insurance Act, 1948 (ESI Act) provides that it is the principal employer who is responsible for contribution under the Act. He is responsible to deduct the amount from the wages of the employees and then put the share of the employer and credit the same to the Department.

Then the question is as to who is the principal employer.

Section 2(17)(i) of the ESI Act provides that in case of a factory, employer means the owner or occupier of the factory and includes the managing agent of such owner or occupier.

As far as the word "occupier" is concerned, it is defined in section 2(15) of the ESI Act to have the same meaning as in the Factories Act.

In the Factories Act, the "occupier" is defined u/s 2(n) to mean the person who has ultimate control over the affairs of the factory. Then there is a proviso to say that in the case of a company, any one of the director shall be deemed to be the occupier.

In the present case admittedly, Mr. Ashokkumar Radhakrishna Ruia has been managing as an occupier of the Company and it has been accepted in one of the complaints which is the subject matter of the present petition. If Ashokkumar Radhakrishna Ruia is an "occupier" then he alone will be responsible as a principal employer for the contribution under the Act.

6. The question is no longer res integra and is covered by a Division Bench

decision of this Court.

In *Suresh Tulsidas v. Collector of Bombay* 1984 M.L.J. 117, it is observed that a Director of a public limited company is not responsible individually to pay contribution. The liability is on the company as principal employer to make contribution. It is further pointed out that where in a company one of the directors is specifically notified to the authorities as an occupier, then that Director as an occupier is liable for contribution under the Act. Therefore, the rule laid down in this case is either the company as the owner or the named occupier who are responsible for the contribution under the Act. Individual directors are not responsible for the said contribution under the Act.

Similarly in 1991 (2) CLR 586 *Mansinnh L. Bhakta v. State of Mah.*, it is held that company is the principal employer which is responsible for the E.S.I. contribution and the individual directors are not responsible. It is further pointed out that when one of the Directors has been nominated by the company as an occupier, he alone will be liable.

In *Employees' State Insurance Corporation Chandigarh Vs. Gurdial Singh and Others*, the question was as to who is the principal employer. An occupier had been named for the factory and the company also had a manager, then they are principal occupiers and the individual directors are not responsible for the E.S.I. contribution.

7. It is therefore, seen that the present petitioners who are Directors of the company cannot be held liable for any default to pay the E.S.I. contribution under the Act. It is the company which should be mainly responsible as a principal occupier within the meaning of the Act and "occupier" is also liable as per the ESI Act and the Factories Act since Ashokkumar Ruia has been nominated as occupier he alone will be responsible for the contribution to E.S.I. contribution. Hence, in my view, the petitioner who are connected with Company in the capacity as Directors of the company cannot be made liable for E.S.I. contribution and therefore, the prosecution against them for default in the payment of contribution under the Act is not sustainable and liable to be quashed.

8. Another argument on behalf of the petitioners is that they cannot be prosecuted for want of sanction but at the time of argument, the learned Counsel for E.S.I. Corporation produced before the Court Xerox copy of the sanction order issued by Respondent No. 3. Whether the sanction is validly issued is not a question which could arise for consideration at this stage. The validity of the sanction is a question of fact which should have to be decided at the time of trial. Once there is a sanction prima facie authorising the inspector to file a complaint, it is sufficient at this stage. But however, we need not go into this question in detail since on merit, I have held that the prosecution against the petitioners is liable to be quashed. We are not concerned with one of the accused namely Ashokkumar Radhakrishna Ruia who is not before the Court and he has not challenged the issue of process against him.

There was also an argument that of the two complaints, the second complaint is barred by limitation. It was argued that at the time when the complaint was filed, the law was that it should be filed within six months from the date of default. But the learned Counsel for the Corporation contended that subsequently the Act has been amended by deleting the clause regarding limitation and therefore, there is no bar in continuing the old prosecution after the amendment. We may have to consider the question of limitation from another point of view. Here the alleged offences are not under the Act but are for an offence under the Indian Penal Code. Anyhow these matters need not be considered at this stage since the petitioners cannot be held liable for default in payment of contribution under the Act and therefore, prosecution is liable to be quashed. The learned Counsel for the Employees' State Insurance Corporation pointed out that the petition challenges the issue of process in two independent criminal cases and it is not permissible in law and that the petitioners should have filed separate petitions regarding the two separate cases. It is true that normally two separate petitions should be filed to quash the process issued in two separate criminal cases. This objection should have been taken at the stage of admission of the petition. Rightly or wrongly, the Court had admitted this petition in 1987. Now 8 years have elapsed. It is too late in the day now to reject the petition on the ground of misjoinder of causes of action.

It is now well settled that Court should do substantial justice to the parties notwithstanding technicalities. The petitioners are common to both the petitions. The Company is the same namely, the Phoenix Mills Ltd. The question of law and facts considered by me are same to both the petitioners. Hence I do not want to entertain this technical argument about the maintainability of the one petition challenging issue of processes in two cases at this late stage.

9. It was argued that in the petition it is mentioned as to who is the occupier of the factory. It may be so. But it is admitted in the complaint by the complainant himself that Ashokkumar Radhakrishna Ruia is the occupier of the factory. Now at the time of hearing, the copy of the intimation sent in Form No. 3 under the Factories Act is produced which also shows that Ashokkumar Radhakrishna Ruia is the occupier.

Some of the minor contentions urged by both the sides do not bear scrutiny since on merits I have reached the conclusion that petitioners are not principal employers and hence cannot be proceeded against for the violation of E.S.I. Act.

10. In the result, the Petition is allowed. The issue of process against the petitioners in Criminal cases mentioned in the petition are hereby quashed. Rule made absolute in terms of prayer Clauses (a), (b) and (c) of the petition. However, this Order will not come in the way of continuation of prosecution against Ashokkumar Radhakrishna Ruia according to law.

11. Petition allowed.