

(2014) 01 KL CK 0086
In the High Court Of Kerala
Case No : Criminal M.C. No. 835 of 2013

Biju Ramesh

APPELLANT

Vs

Employees State Insurance Corporation

RESPONDENT

Date of Decision : 10-01-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Employees State Insurance Act, 1948 — Section 2(17) 40 44(1) 85(a) 85(e)

Citation : (2014) CriLJ 2136 : (2014) 141 FLR 343 : (2014) 2 ILR 784 : (2014) 1 KHC 418 : (2014) 1 KLJ 649 : (2014) 1 KLT 614 : (2014) 2 LLJ 101 : (2014) 2 LLN 474 : (2014) LLR 359

Hon'ble Judges : A. Hariprasad, J

Bench : Single Bench

Advocate : P. Ramakrishnan and Pratap Abraham Varghese, for the Appellant;
T.P.M. Ibrahim Khan, K.M. Abdul Majeed and Bindu Gopinath, Public Prosecutor,
for the Respondent

Judgement

A. Hariprasad, J.—Petition filed under S. 482 Cr.P.C. Petitioner is called up by the court below to answer charges under S. 85(a) and (e) of the Employees' State Insurance Act, 1948 (in short, "the Act"). Document No. 5 annexed is the complaint Brief facts relevant for our purpose are as follows:

E.S.I. Corporation alleged against the petitioner that he, as the principal employer of an establishment known as M/s. Windsor, Rajadhani, Kowdiar, Trivandrum, failed to pay the contribution, payable under the Act, within the prescribed time, for the period from November 2010 to March 2011. Relevant stipulations are provided in S. 40 of the Act r/w Regs. 29 and 31 of the E.S.I. (General) Regulations, 1950. The establishment admittedly is a hotel. The amount of contribution, which the petitioner defaulted to pay in respect of the period cited above, was Rs. 61,669/-. It is averred in the complaint that the amount consisted of the employees' and the employer's shares of contribution. Hence, it is alleged that the petitioner committed an offence punishable under S. 85(a) of the Act. Yet another accusation is that the petitioner failed to submit

return in Form No. 6 in time as stipulated in S. 44(1) of the Act also. Therefore, the petitioner is guilty of an offence under S. 85(e) of the Act. The learned counsel for the petitioner contended that factually and legally no offence is attracted against him and the prosecution is totally unwarranted.

2. Heard the learned counsel for the petitioner and the learned counsel for the first respondent.

3. Section 85(a) and (e) of the Act reads as follows:

85. Punishment for failure to pay contributions, etc.- If any person -

(a) fails to pay any contribution which under this Act he is liable to pay, or

(b) x x x x

(c) x x x x

(d) x x x x

(e) fails or refuses to submit any return required by the regulations, or makes a false return, or

(f) x x x x

(g) x x x x

he shall be punishable -

(i) where he commits an offence under clause (a), with imprisonment for a term which may extend to three years but -

(a) which shall not be less than one year, in case of failure to pay the employee's contribution which has been deducted by him from the employee's wages and shall also be liable to fine of ten thousand rupees;

(b) which shall not be less than six months, in any other case and shall also be liable to fine of five thousand rupees:

Provided that the Court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term;

(ii) where he commits an offence under any of the clauses (b) to (g) (both inclusive), with imprisonment for a term which may extend to one year or with fine which may extend to four thousand rupees, or with both.

4. Section 40 of the Act says that the "principal employer" shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both employer's contribution and employees' contribution. According to the averments in the complaint, the petitioner has committed breach in this legal obligation.

5. Learned counsel for the petitioner contended that the petitioner is not the

"principal employer" as defined in S. 2(17) of the Act, which reads as follows:

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.

6. It is contended that the establishment in question will fall only in category (iii) mentioned above. Learned counsel for the petitioner submitted that the business concern in question is a hotel owned by a limited company. Petitioner is the Managing Director of the company. Averments in the complaint would show that the prosecution is launched as if the petitioner is the owner of the establishment. He is not the person responsible for the supervision and control of the establishment. There are managers engaged for the same. Complainant did not verify any of these facts, contended the petitioner. Therefore, it is argued that he cannot be termed as the "principal employer" who has the liability under S. 40 of the Act to pay contribution in the first instance. To buttress this contention, learned counsel for the petitioner relied on Employees' State Insurance Corporation Chandigarh Vs. Gurdial Singh and Others, The Supreme Court, after considering the facts therein, found that Directors of a company cannot be personally held liable to meet the demand of contribution. It is the case of the petitioner that day-to-day affairs of the company are being looked after by managers at various levels. It is pertinent to note that if the establishment is an incorporated company, then the prosecution should have been initiated under S. 86A of the Act. It reads as under:

S. 86A. Offences by companies.- (1) If the person committing an offence under this Act is a company, every person, who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director or manager, secretary or

other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.- For the purposes of this section,-

(i) "company" means any body corporate and includes a firm and other associations of individuals; and

(ii) "director" in relation to -

(a) a company, other than a firm, means the managing director or a whole-time director;

(b) a firm means a partner in the firm.

Sub-section (1) above makes it clear that every person, who at the time the offence was committed, in charge of, and was responsible to, the company for the conduct of its business, as well as the company shall be deemed to be guilty of the offence. It thereby indicates that the liability of the person in charge of and who was responsible to the company for the conduct of its business and that of the company are joint and several. This court in E.S.I. Corporation Vs. K.A. Vijayan and Others, took a view that the person who was in charge of and responsible to the company for the conduct of business at the material time can be prosecuted without the junction of the company. Here, the nature of the establishment had not been ascertained before launching the prosecution. There is no averment in the complaint that the petitioner was in charge of and was responsible to the company for the conduct of business. In the absence of any such details, the prosecution under S. 85(a) of the Act is not legally maintainable.

7. The petitioner also contended that the amounts in question were paid off and the liability had already been discharged before initiation of the criminal action. Learned counsel for the E.S.I. Corporation/first respondent contended that there cannot be any dispute that there was default on the part of the establishment in remitting the contribution as and when it fell due. If at all any amount was subsequently paid, it will not absolve the criminal liability of the person concerned cast under S. 85(a) of the Act. To reinforce this contention, a decision rendered by Karnataka High Court in Sub-Regional Office, ESI Corporation Vs. Sri Krishchand Shetty and Another, is relied on. Learned counsel for the petitioner highlighted the fact that the complaint in this case was filed on 29.2.2012. The counsel would then contend that the entire amount with interest and damages, payable under Regulation Nos. 31A and 31C respectively, have been paid and receipts obtained on 17.2.2012. Hence it is contended that on the date of complaint, there was no subsisting liability and so no offence was attracted for taking cognizance. The facts in Krishchand Shetty's case (supra) show that the payment was made after lodging the complaint Karnataka High Court, in the facts and circumstances of the case, found that once the offence is committed by belated payment, the offence which envisage the launching of prosecution does

not stop. The court has to record evidence and proceed with the matter. But in this case, well before the date of complaint, the entire amount had been paid by the petitioner's business concern. This is the definite case of the petitioner. The Corporation has no case that there is any shortfall in the amount paid by the petitioner. To argue a proposition that no offence will be attracted in a case when the amount due is paid off before filing a complaint, a decision rendered by the Madras High Court in Employees' State Insurance Corporation Vs. P.N.P. Padmanabhan, is cited. It is to be noted in this context that the facts therein are completely different.

8. Let us examine the legality of the contention raised by the petitioner that when the amount of contribution due under the Act had been paid before initiation of a criminal action, no prosecution will lie. To appreciate this contention, the scheme of the Act and Regulations will have to be scrutinized. As mentioned above, S. 40 of the Act casts a liability on the "principal employer" to pay contribution. Punishment under S. 85(a) of the Act can be mulcted only if any person liable under the Act fails to pay contribution as mandated by the Act. S. 97 of the Act enumerates the power of the Corporation to make Regulations. Regulation of 1950 was made by virtue of this power. Regulation 31 fixes the time for payment of contribution. If anyone takes a view that the offence under S. 85(a) of the Act will be attracted for non-payment of contribution immediately when the time fixed under Regulation 31 is elapsed, then Regs. 31A and 31C will become otiose. In other words, above stated Regulations permit belated payments, subject, of course, to the condition of paying interest, damages etc. Therefore, I am of the view that before institution of a complaint by the authorized officer, the principal employer can pay off the liability under the Act and in that event no offence under S. 85(a) of the Act will be attracted. Hence, this point is found in favour of the petitioner. Relating to the charge under S. 85(e) of the Act, the learned counsel for the petitioner submitted that returns were also filed before launching the prosecution. Hence, on that score also the prosecution is not maintainable. Considering the above said facts and legal provisions, I hold that the allegation that the petitioner is guilty of the aforementioned offences is not legally sustainable. Continuance of the prosecution is only an unwanted exercise. In the interest of justice, the petition is to be allowed.

In the result, the Crl.M.C is allowed.

The complaint and all proceedings thereunder are hereby quashed.

All pending Interlocutory Applications will stand dismissed.