

(2016) 09 CAL CK 0046
In the Calcutta High Court
Case No : C.R.R. No.3445 of 2007

Biresb Bhattacharjee

APPELLANT

Vs

The Employees State Insurance Corporation

RESPONDENT

Date of Decision : 06-09-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Employees State Insurance Act, 1948 — Section 2(17), 85(g)

Citation : (2017) 1 CLR 119 : (2016) 151 FLR 882 : (2017) LabLR 174 : (2016) 4 LLJ 88

Hon'ble Judges : Mr. Indrajit Chatterjee, J.

Bench : Single Bench

Advocate : Mr. Sandipan Ganguly, Advocate, for the Petitioner; Mr. Tarun Kumar Chatterjee, Advocate, for the Opposite Party

Final Decision : Allowed

Judgement

Indrajit Chatterjee, J.—In this application under Section 482 of the Code of Criminal Procedure the accused-persons who are admittedly the Directors of M/s. People Engineering and Motor Works Limited having its registered office at No.12, J.N. Mukherjee Road, Howrah, have assailed the prosecution filed by the opposite party/ the Employees State Insurance Corporation for contravention of Section 85(g) of the Employers State Insurance Act, 1948 (hereinafter being referred to as Act of 1948). This offence was committed in the year 1983 and Complaint Case No.C-406 of 1984 was registered and the said case is pending before the Metropolitan Magistrate, 15th Court at Calcutta, under Section 85(g) of the said Act of 1948.

2. The fact relevant for the consideration of this criminal revision can be stated in brief thus:

That it was claimed by the complainant that it was detected by the complainant party that even though the accused persons being the principal employers? as defined in Section 2(17) of the Act of 1948 did not deposit both the employers?

and employees? contribution which was deducted from the salaries of the employees did not deposit the same within the prescribed period and thereby this revisionists/petitioners were prosecuted under Section 85 g read with Section 4(i)(b) of the Employees? State Insurance Amendment Act, 1975. The said complaint was registered as Complaint Case No.406 of 1984 which is now pending before the learned Metropolitan Magistrate 5th Court Calcutta. The accused persons made a prayer before the said court for their acquittal on the ground that they are not the principal employers under Section 2(17) of the said Act of 1948. I get from the order dated 30.08.2006 passed by the learned said Metropolitan Magistrate that this petitioners had already paid Rs.66,000/- pursuant to the order of this Court dated 16.07.1982 in C.O. No.7203 (W) of 1982 and FMAT No.2192 of 1982 dated 15.09.1982 and that this matter came up before this Hon?ble court in CRR No.2165 of 2001 under Section 482 of the CR.P.C and that was disposed of by this Court directing the petitioners to appear before the learned Magistrate to raise the points as mentioned in the revisional application. The learned Metropolitan Magistrate as per the order referred to above held that to decide wither the accused persons are liable for contravention is a matter of trial and that cannot be decided at this stage. This order has been assailed in this revisional application vide paragraph no.11 of the application.

3. Mr. Ganguly, learned Advocate appearing on behalf of the petitioners, has relied upon the judgement of the Hon?ble Apex Court as reported in 1998 C. Cr. LR (SC) 396, Employees State Insurance Corporation v. S.K. Aggarwal & Ors. wherein the Apex Court took into consideration Section 2(17) and 40 of the said Act of 1948 and held in paragraph-9 that the definition of ?Principal Employer? under the said Act of 1948 cannot cover the Directors of the Company and actually, the Company is responsible and can be treated as Principal Employer, if the Company is the owner of the factory.

4. He also took me to the definition of Section 2(17) of the Act of 1948 to convince this Court that when the owner of the factory is the Principal Employer, there is no need to examine who is the ?occupier? and the owner will be the ? Principal Employer? under Section 40 as decided by the Apex Court in S.K. Aggarwal (Supra) in paragraph-3 of the said judgment.

5. He further submitted that 86A of the Act of 1948 came into existence on 20th October, 1989 and this prosecution relates to 1984 and as such said provision cannot apply in the instant case. Alternatively, he argued that even if Section 86A is made applicable in this case, then his clients are saved by the decision of the Apex Court as reported in (2012) 2 C. Cr. LR (SC) 278, Aneeta Hada v. Godfather Travels & Tours Pvt. Ltd. as it was specifically held by a Three Judges? Bench of the Apex Court that when the Directors are made liable then the Company must be made a party.

6. In counter to all these, Mr. Chatterjee, learned Advocate, appearing on behalf of the opposite party submitted by taking me to the decision of the Apex Court in S.K. Aggarwal (Supra) to show that actually the said decision was under Section

405 and as regards explanation 2 of the said section of the Indian Penal Code and as such, that decision cannot be made applicable in the present case. He cited one unreported decision of this court as delivered on 14-02-2007 C.R.R. 3498 of 2006 with C.R.R. 3499 of 2006, Deb Kishore Sen v. State of West Bengal & Anr. wherein the Hon'ble Single Bench of this court held by taking recourse to Section 85 of the Act of 1948 and also the meaning of the principal employer as defined in Section 2(17) of the said Act. He further submitted by taking me to Section 85 of the Act of 1948 to convince this court that as per that Section any person may be liable for failure to pay contribution etc. He also referred to Section 2(n) of the Factories Act, 1948 to say that any Director may be prosecuted if he is found to be in charge of the day to day affairs of the factory regarding the not impleading the company as a party. Mr. Chatterjee submitted that the Directors being liable for the management of the company, there was no reason to implead the company as a party. He took me to internal page no. 7 of the judgement of the Single Bench of this court as passed in C.R.R. 3498 of 2006 to convince this court that in that decision the Hon'ble Single Judge took into consideration the decision of this court as passed in Howrah Motors Co. Ltd. & Ors. v. Samir Kumar Das, as reported in 2004(4) CHN 291. He also took me to Section 2(n) of the Factories Act of 1948 to show that the person who has ultimate control over the affairs of the company is the person responsible. He ended his argument by saying that it can only be ascertain after recording evidence and this proceeding cannot be quashed by exercising power granted to this court under Section 482 of the Code of Criminal Procedure which is to be exercised in rarest of the rare cases in response to the demands of justice.

7. In reply, Mr. Ganguly submitted that in the judgement referred to by Mr. Chatterjee in C.R.R. 3498 of 2006, the judgement of the Apex Court as passed in S.K. Aggarwal (Supra) was not taken into consideration and in that case before the Hon'ble single Judge the offence was for the period from July, 2000 to September, 2000 and as Section 86(A) came into force in October, 1989, naturally that court took into consideration the provision of Section 86A of the said Act of 1948. He contended that in the instant case before the floor of this court as the offence was allegedly committed in the year 1983, there is no question of application of Section 86A of the Act of 1988 and as such the judgement delivered in C.R.R. 3498 of 2006 cannot apply.

8. Supplementary affidavit is filed. The same be taken on record.

9. Thus, on hearing the argument advanced by the learned advocates appearing on behalf of parties this Court is satisfied that only point involved in this case is as to whether these accused persons/petitioners are the principal employers? as per the provisions of Section 2(17) of the act of 1948. I have gone through the decisions referred to by the learned advocates about which I have already referred. The decision of the Supreme Court in S.K. Agarwal has categorically ruled that Section 2(17) and Section 40 of both of the Act of 1948 cannot rope these accused persons as they were not the principal employers as per those

sections. It may be noted that this offence relates to 1984 Section 86 (a) was introduced in the year 1989 and as such that amendment cannot guide the decision of this court. The decision of the Apex Court as passed in S.K. Agarwal (supra) was delivered on 31st July, 1998 when already Section 86 (a) was incorporated in the said Act. The Apex Court in that decision in Paragraph 3 of the judgment categorically held:-

"Section 2(17) of the Employees' State Insurance Act however defines the principal employer as either owner or occupier taken care of all eventualities. When the owner of the factory is the principal employers there is no need to examine who is occupier. The owner will be the principal employer under Section 40".

10. In that decision the Apex Court relied upon the Division Bench decision of Bombay High Court as reported in (1984)17 Labour and Industrial Cases 1614, Suresh Tulsider Kilachand and Others v. Collector of Bombay and Others. wherein the said Division Bench also held that a director of a company by virtue of being a director is not principal employer contemplated by Section 2(17) of the said Act and he is not personally liable to pay employers' contribution under the Act.

11. The Apex Court in that decision further held that under Section 40 of the Act the words 'owner' and 'occupier' have been used disjunctively and therefore, when the owner of a factory is a company it is the company which is the principal employer and not the director.

12. The Madhya Pradesh High Court also considered this issue in Employees' State Insurance Corporation, Indore v. Kallashchandra and Others, (1989) 22 Lab.IC 76 wherein the court held that when there is default in payment of contribution by the company the managing director or other directors cannot be made liable and the contribution can be recovered from the company as the principal employer. The Apex Court in its decision as reported in (1991) 24 Lab.IC 52, Employees' State Insurance Corporation, Chandigarh v. Gurdial Singh and Others held that where a private limited company was the owner of the factory the directors will not come within the definition of Clause 1 of Section 2(17) of the said act of 1948.

13. This court is not unmindful of the fact that the Mr. Chatterjee appearing on behalf of the complainant has cited the decision of this court as passed in CRR No.3498 of 2006 but unfortunately in that case all these decisions referred to above were not taken into consideration and as such the decision cannot be of any help to the complainant/opposite party.

14. This court is also not unmindful of the decision of Aneeta Hada (supra) wherein the Apex Court categorically held that when the directors of the company have been roped in a criminal offence then the company must be made a party. Unfortunately in this case the said private limited company was not made a party when the complaint was lodge.

15. Thus, this court is satisfied that the prosecution of the directors of the said private limited company without making the company as an accused is not maintainable. This court further reiterates that in view of the decision of the Apex Court in S.K. Agarwal (supra) the directors cannot be said to be the principal employer as per the definition of Section 2(17) of the Act of 1948. Thus the proceeding pending before the Metropolitan Magistrate 5th Court, Calcutta being C. Case No.406 of 1984 is hereby quashed. The Employees' State Insurance Corporation can very well recover the amount from the People Engineering Motor Works Limited.

16. Thus, this revisional application under Section 482 of the Code of Criminal Procedure is allowed on contest. There will be no order as to costs.

17. Office is directed to transmit a copy of this order to the said Metropolitan Magistrate Court, Calcutta for information and necessary action.

18. Certified copy of this order, if applied for, be given to the parties as per rules on priority basis.