

(1998) 11 BOM CK 0038

In the Bombay High Court

Case No : Criminal Writ Petition No. 1464 of 1991

C.K. Gupta and another

APPELLANT

Vs

Employees State Insurance Corporation and others

RESPONDENT

Date of Decision : 24-11-1998

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 482
Employees State Insurance Act, 1948 — Section 86
Factories Act, 1948 — Section 2

Citation : (1999) 5 BomCR 330 : (1999) BomCR(Cri) 330 : (1999) CriLJ 2566 : (1999) 82 FLR 488 : (1999) 2 LLJ 457 : (1999) 1 MhLj 717 : (1999) 4 RCR(Criminal) 49

Hon'ble Judges : T.K. Chandrashekhara Das, J

Bench : Single Bench

Advocate : M.P. Wamorkar, for the Appellant; H.V. Mehta and Mrs. Usha Kejriwal, Assistant Public Prosecutor, for the Respondent

Judgement

T.K. Chandrashekhara Das, J.—The petitioner No. 1 is Director of the petitioner No. 2 which is a company incorporated under the Companies Act having registered office at Old Anjirwadi, Mazgaon, Bombay 400 009. Petitioner No. 2 company is having factory situated at village Manda, (Titwala), District Thane at the relevant time. The said company has since 7-11-1981 appointed a Manager namely Shri. K.A. Pawar for looking after day today affairs of the factory. Said Shri K.A. Pawar, was also a Manager within the meaning of section 2(n) of the Factories Act and his name was registered with the office of Registrar of the Factories under the provisions of the said Act. Respondent No. 3 filed complaint on 22-6-1983 in the Court of Metropolitan Magistrate, Mazgaon Bombay bearing Case No. 635 of 1983. The said complaint thereafter was transferred to Metropolitan Magistrate, 25th Court, Mazgaon being Case No. 90/ESIC/87 which is again transferred to Metropolitan Magistrate, 6th Court, Mazgaon, Bombay and pending as Case No. 40/ESIC/91 for violation of the provisions of E.S.I. Act as he has failed to pay the contribution under the Act within 21 days of the last date of

the wage period for the period ended on 27-11-1982 and 8-1-1983.

2. The learned Magistrate has issued summons against petitioners on the basis of the aforesaid complaint. The petitioners then filed application on 6th July, 1990 for discharge on the ground that the complaint does not disclose an offence. The said application was rejected by the Magistrate as per Exh. "G". Aggrieved by this order, the petitioner filed this writ petition.

3. Heard Counsel for the petitioner, Shri H.V. Mehta appearing for respondent Nos. 1, 2 and 3 and Mrs. Usha Kejriwal appearing for the State of Maharashtra.

4. The main contention of the petitioner is that even though there is violation of the provisions of E.S.I. Act, the petitioners are not liable to be prosecuted particularly when the Manager has been appointed for carrying out the provisions of E.S.I. Act

5. I have examined the complaint. There is no allegation in the complaint that the first petitioner was responsible for the violation of the Act except the presumption drawn that reasonable inference can be drawn that he can also be liable being the Director of the Company. There is no allegation in the complaint that the first petitioner has committed any offence. It has been held by the Supreme Court in *Employees' State Insurance Corporation Chandigarh Vs. Gurdial Singh and Others*, based the definition u/s 2(17) of the Act as follows :

"Principal employer" means :

(i) in a factory, the owner or occupier 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 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."

6. In view of the definition Clause the aforesaid decision has clearly laid down that in the absence of anything more, Director cannot be treated as owner of the factory in order to attract the penal provisions under the E.S.I. Act. In short, if the Manager is appointed for carrying out provisions of the Act, no Director can be implicated for the violation of the provisions of the Act, the Supreme Court in Para 2 has observed thus :

"Admittedly the company had a factory and it is not in dispute that the occupier of the factory had been duly named. It is also not in dispute that it had a Manager too. In view of the clear terms in the definition, we are of the view that Director did not come within Clause (i) but the occupier being there, Clause (i) applied and in that view of the matter, Clause (iii) could have no application."

7. The Supreme Court has held those Clauses in the definition will not conjointly apply for prosecution, but the Clause can be applied only alternatively. If in given Clause (1) applies all other Clauses will be excluded. Therefore, where a Manager is appointed for carrying out provisions of the Act, a Director of the company will be excluded from the definition Clause. In view of the above proposition of law, as laid down by the Supreme Court, I find no justification for the prosecution of the first petitioner for the violation of the provisions of E.S.I. Act. Moreover, it has been reported that all the amount due to E.S.I. Corporation has already been remitted by the petitioner company. This is an added circumstance in favour of the petitioner to avoid prosecution.

8. In the result, writ petition is allowed.

Rule is made absolute in terms of Prayer Clause (a).

No order as to costs.

Prayer Clause (a):

"That this Hon'ble Court may be pleased to exercise its jurisdiction and power under Article 227 of the Constitution of India and u/s 482 of the Criminal Procedure Code by issuing a writ of certiorari any other order or direction or any other appropriate writ direction or order in the nature of writ of certiorari and call for record and proceedings of the Case No. 40/ESIC/91 on the file of the Metropolitan Magistrate, 6th Court, Mazagaon, Bombay and scrutinize the same for its legality and validity."

9. Petition allowed.