

(2007) 02 DEL CK 0139

In the Delhi High Court

Case No : Criminal Rev. Petition: 54 of 2005

Employees State Insurance Corp.

APPELLANT

Vs

M/s Kanti Moulding Machine and Another

RESPONDENT

Date of Decision : 26-02-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 401
Employees State Insurance Act, 1948 — Section 85, 85(a), 85(e), 86, 86(3)
Evidence Act, 1872 — Section 64, 65, 74

Citation : (2007) 1 ILR Delhi 1010

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : R.P. Kaushik, for the Appellant; Ved Prakash Trikha, for the Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.—The petitioner Corporation invokes revisions jurisdiction of the Court u/s 397/401 of the Code of Criminal Procedure, against the order dated 25.10.04, which rejected its complaint and discharged the respondents. The complainant Corporation alleged that the respondents, an establishment governed by the provisions of the Employees State Insurance Act (hereafter "the Act") was obliged to pay contributions and file necessary returns under the provisions of law. It, alleged that the respondent failed to file the return and deposit contributions for the period ending September 1996-March 1997 September 1997-March 1998. It was also alleged that respondent/accused failed to pay the contributions for the period 10.06.96 and 21.12.98 and were guilty of offences under Sections 85 (a) and 85 (e) of the Act, besides violating several regulations.

2. The Corporation alleges that a show cause notice was issued on 15.01.99, to the respondent/accused but the latter did not comply with it. Accordingly, the Joint Director of the Corporation, exercised his power under the Act, and

sanctioned the prosecution of the respondents/complaint.

3. The petitioner/complaint produced a copy of the report of survey said to have take place on 10.06.96, in respect of the respondent/accused Corporation. However, the original of that document was not produced along with the complaint. The only other document produced was the sanction order empowering the filing of the complaint. The ESI examined two witnesses, who sought to put exhibit marks on the photostat copies of the survey reports.

4. The respondent/accused denied having any link with M/s. Kanti Moulding Machines and also that the persons said to be his employees, as per the document (purporting to be the survey report) were ever employed by him. Besides, he questioned the veracity of the report and objected that it was neither in proper form nor was its original produced.

5. By the impugned order, learned Magistrate held as follows:

On 17.09.2004, the Id. Counsel for ESI argued that the inspection report was duly signed by the accused and the said inspection report was not placed on record. Id. Counsel for ESI stated that the inspection report duly signed by the accused person was not required by law/rules to be placed on record and hence this duly signed report was available in the file of the Id. Counsel.

This arguments of the Id. counsel for ESI is rather incomprehensible. At present there is no cogent evidence linking the offence alleged and the offender produced before the Court. Only one alleged piece of evidence is available in the file of the Id. Counsel. It is very difficult for this Court to understand if the evidence linking the offence and the offender is not required to be placed on record then what else would be required to be place on record. This is for the prosecuting department to look into this matter from an angle argued by the Id. Counsel.

At present the court is confronted with the following technical problem. The ESI has presented the aforesaid complaint and the Id. Predecessor was pleased to summon the accused u/s. 85 (e) of the ESI Act. At this was a warrant triable case, therefore, thereafter the precharge evidence was led. The ESI examined two witnesses who in their statements put exhibit marks on the photostat copies of some documents which were never produced before the Court.

On perusal of the documents relied upon by the ESI, it is found that extent Ex. PW-1/B i.e., sanction by the Joint Director of the prosecuting department, no other document was produced before the court in its original form. Section 64 of the Evidence Act reads as under:-

proof of documents by primary evidence, - documents must be proved by primary evidence except in the case hereinafter mentioned.

The only exceptions to section 64 Evidence Act is the language of Section 65 of Evidence Act which provides the exception of this rule of primary evidence. Neither in the complaint nor in the precharge evidence the ESI has relied upon in

pleading nor has argued that the present complaint deserves an exception u/s. 65 of Evidence Act and hence primary/prays evidence was not required in these proceedings. It is also not a case of the ESI that the documents referred to in the complaint and relied upon by the prosecution were the public documents within the meaning of section 74 Evidence Act.

In Chintaman and another Vs. State of Maharashtra and another, the Hon''ble Supreme Court was pleased to hold that in absence of the original documents of a Sale Deed or the certified copy of the same mere oral evidence of transaction could not be relied upon in support of the claim.

In the present case, the accused is denying any of his link with the offending unit M/s. Kanti Moulding Machines, therefore, it is not the circumstances where a document or its photostate has been "placed" by one party and was not objected to by the other party.

Further it is a well settled proposition of law that mere marking exhibit marks on a piece of papers does not render them admissible in law if these are inadmissible otherwise.

This Court is of the view that the present complaint of the complaint against the accused is only an oral complaint and is not supported by the documents, though, it talks of the documents on the basis of which it was filed before the court.

This Court is also of the view that the documents which have been referred to in the complaint have not been produced before the court as per law and hence this court deems it fit to draw an adverse presumption that if those documents would have been produced before the court the same would have not supported the prosecution case.

In the light of the aforesaid discussion and for the reasons recorded above, this court considers that no case against the accused has been made out which if rebutted, would warrant the conviction of the accused and hence the accused is hereby discharged. File be consigned to record room.

6. Learned counsel for the Corporation submits that the trial Court fell into error in not noticing that the complaint was perfectly in order, and conformed to the requirements of Section 86(3) of the Employees State Insurance Act, 1948. He submitted that the only stipulation of law is that complaint under the Act had to be in writing; the petitioner complained to the trial court in writing. In these circumstances, the Court could not have declined to entertain the proceeding on grounds of un-availability of documents.

7. Counsel also urged that the prosecution was lodged on the specific sanction, accorded by the Joint Director of the Corporation who is empowered to launch prosecutions for violation of provisions of the Act. It was submitted that the sanction was displayed along with the complaint. Counsel laid great emphasis on the submission that the absence of documents or materials, did not vitiate the

proceedings, and that the stage for appreciation of the materials, was at the trial.

8. Counsel for the respondent urged that the order of the trial court was unexceptionable, as it considered all the materials, and concluded that no documents, including valid survey report were produced, disclosing that inspection had been carried out, as stipulated, or the particulars of the employees, their salaries, father's names, addresses designations, etc. In the absence of these essential particulars, a photocopy of a document sought to be marked as an Exhibit, could not be relied upon; the trial court was justified in rejecting the complaint.

9. Section 85, in so far as it prescribes penalties, creates offence, as it enacts minimum punishment, in the even of default in the deposit of contributions, and filing of returns. The offences in that sense are serious. Although the Act is a special and benevolent one, yet, I am not impressed with the submission that the complaint corporation fulfilled its duty in merely preferring a complaint in writing, as per Section 86. The Act, in so far as it creates a special offence, is distinct; however, the procedure to be followed for trial of such offence is necessarily guided by the Criminal Procedure Code. Such complaints are to be dealt with under Sections 200-205. At the stage of taking cognizance in complaint proceedings, the court has to be satisfied that the materials, and material averments, makes out a prima facie case for issuance of process and summons.

10. In *Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others*, the Supreme Court held as follows:

Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations otherwise and then examine if any offence is prima facie committed by all or any of the accused.

11. If the court were to keep the above position in mind, it becomes apparent that the magistrate was duty bound to satisfy himself that some material, apart from pleadings, existed, to indicate the involvement of the respondent accused, i.e. its establishment, existence of the requisite number of employees, etc. The complainant corporation, however did not place any material worthy of credence,

on record. In these circumstances, the court exercised its discretion- which it was entitled to do- and rejected the complaint.

12. In order to satisfy myself, I went through the records of the court below. Apart from the complaint, and the original of a sanction order, the complainant has not placed any documents or material on record to impel the court to take cognizance. The documents are photocopies of show cause notices issued to the respondent; no other showing the names of the employees of the concern, their number, description, addresses, etc were placed on record. In these circumstances the approach and order of the trial court cannot be termed unreasonable, or warrant interference. For the foregoing reasons, this petition has to fail; it is dismissed as unmerited, without any order as to costs.