

(2016) 03 SC CK 0056

In the Supreme Court Of India

Case No : Criminal Appeal Nos. 1065-1066 of 2005

Employees State Insurance Corporation

APPELLANT

Vs

A.K. Abdul Samad and Others

RESPONDENT

Date of Decision : 10-03-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 357(1)
Drugs and Cosmetics Act, 1940 — Section 18, Section 27, Section 34
Employees State Insurance Act, 1948 — Section 85
Maritime Zones of India Regulation of Fishing By Foreign Vessels Act, 1981 — Section 13
Penal Code, 1860 (IPC) — Section 302, Section 325

Citation : (2016) AIR(SCW) 1290 : (2016) 2 AIRJharR 208 : (2016) 2 AirKarR 407 : (2016) AIRSC 1290 : (2016) ALLSCRCrI 595 : (2016) 1 AndhLDCriminal 784 : (2016) 2 ApexCourtJudgments(SC) 60 : (2016) 1 BBCJ 620 : (2016) 2 BLJud 144 : (2016) 4 CalCriLR 7 : (2016) 1 CLR

Hon'ble Judges : Dipak Misra and Shiva Kirti Singh, JJ.

Bench : Division Bench

Advocate : Mahesh Srivastava, Vaibhav M. Srivastava and P.N. Puri, Advocates, for the Appellant; P.B. Suresh, Vipin Nair, Udayaditya Banerjee, Prithu Garg, Advocates for Temple Law Firm, for the Respondent

Final Decision : Allowed

Judgement

Shiva Kirti Singh, J.—1. The question of law deserving adjudication in these appeals arises out of Section 85(a)(i)(b) of the Employees' State Insurance Corporation Act (for brevity, "the Act"). The aforesaid statutory provision prescribes punishment for a particular offence as imprisonment which shall not be less than six months and the convict shall also be liable to fine of five thousand rupees. The proviso however empowers the court that it may, "for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term;". The question to be answered is whether the court has been given judicial discretion only to reduce the sentence of imprisonment for any term lesser than six months or whether it also has

discretion to levy no fine or a fine of less than five thousand rupees.

2. The facts of the case lie in a very narrow compass. The case arises out of criminal proceedings initiated by the Appellant - Employees State Insurance Corporation - Under Section 85 of the Act for conviction and punishment of the Respondents for failure to pay contributions required by the Act. Both the Respondents faced trial before the Special Court for Economic Offences, Bangalore and were found guilty and were inflicted with imprisonment till rising of the Court and fine of Rs. 1000/-. According to Appellant, the fine amount could not have been reduced and ought to have been Rs. 5000/- as per mandate of law. Hence the Corporation preferred Revision Petitions before the High Court of Karnataka at Bangalore. By the impugned judgment and order under appeal dated 09th January 2004, the Division Bench of the High Court dismissed Criminal Revision Petition Nos. 1326 and 1327 of 2002 by placing reliance on judgments of Kerala High Court and Patna High Court respectively in the case of Sebastian @ Kunju v. State , 1992 Cri LJ 3642 and Tetar Gope v. Ganauri Gope , AIR 1968 Pat 287 as well as two Supreme Court judgments in the case of Surinder Kumar v. State , (1987) 1 SCC 467 and Palaniappa Gounder v. State of Tamil Nadu , (1977) 2 SCC 634.

3. Before advertng to the submissions and the case law cited by the rival parties, it would be useful to notice relevant part of Section 85 which is as under:

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) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

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 reason to be recorded

in the judgment, impose a sentence of imprisonment for a lesser term;

(ii) ...

4. Learned Counsel for the Appellant has relied upon judgment of this Court in the case of *Zunjarrao Bhikaji Nagarkar v. Union of India*, (1999) 7 SCC 409. In that case not imposing appropriate penalty as required by law was one of the charges against the delinquent employee in a departmental proceeding. In the context of the charge, in paragraphs 37, 38 and 39 of the Report, the judgment of a Single Judge of Patna High Court in the case of *Tetar Gope* (supra) was noticed along with its view that expression "shall also be liable to fine" in Section 325 of the Indian Penal Code does not mean that a sentence of fine must be imposed in every case of conviction for that offence. That view of Patna High Court was noticed and then this Court over-ruled it as incorrect by holding that the language of the Section made the sentence of both, imprisonment and fine imperative and only the extent of fine has been left to the discretion of the Court. For this view, strength was derived from judgment in the case of *Rajasthan Pharmaceutical Laboratory v. State of Karnataka*, (1981) 1 SCC 645 wherein a similar expression - "shall also be liable to fine" used Under Section 34 of the Drugs & Cosmetics Act, 1940 was analysed in the light of Section 27 of the said Act, in paragraph 38 of the Report which is as follows:

38. We do not think that the view expressed by the Patna High Court is correct as it would appear from the language of the section that sentences of both imprisonment and fine are imperative. It is the extent of fine which has been left to the discretion of the court. In *Rajasthan Pharmaceutical Laboratory v. State of Karnataka*, (1981) 1 SCC 645 : 1981 SCC (Cri) 244 this Court has taken the view that imprisonment and fine both are imperative when the expression "shall also be liable to fine" was used Under Section 34 of the Drugs and Cosmetics Act, 1940. In that case, this Court was considering Section 27 of the Drugs and Cosmetics Act, 1940, which enumerates the penalties for illegal manufacture, sale, etc., of drugs and is as under:

27. Whoever himself or by any other person on his behalf manufactures for sale, sells, stocks or exhibits for sale or distributes-

(a) any drug-

(i) ***

(ii) without a valid licence as required under Clause (c) of Section 18,

shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to ten years and shall also be liable to fine:

Provided that the court may, for any special reasons to be recorded in writing, impose a sentence of imprisonment of less than one year;

In view of language of Section 27(a)(ii) it was held that award of imprisonment and fine, both are imperative. The proviso to aforesaid Section 27 is similar in tone and tenor as the proviso to Section 85(i)(b) of the Act. In both the provisos there is no discretion vested in the Court to do away with the fine. Additionally, under the Act, a minimum fine is mandated by an explicit and specific provision.

5. In the case of *Chern Taong Shang v. S.D. Baijal*, (1988) 1 SCC 507 this Court had the occasion to consider the meaning and implication of a clause - "shall also be liable to confiscation", occurring in Section 13 of Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981. Looking at the legislative intent to provide deterrent punishment with a view of prohibit illegal fishing in exclusive economic zones of India, Section 13 was held to be mandatory and therefore conviction had to follow penalty of confiscation once the offence was established.

6. Per contra, learned Counsel for the Respondents has supported the impugned judgment which has held in favour of availability of judicial discretion to impose a fine of even less than Rupees five thousand in view of several judgments dealing with cases under the Indian Penal Code wherein the word "shall" has been interpreted as an equivalent of the word "may". The submission is that if "shall" is read as "may" then the clause "and shall also be liable to fine of five thousand rupees" will evidently be directory in nature and shall vest judicial discretion in the court to levy or not to levy fine which at the maximum can be Rupees five thousand. In support of this stand reliance has been placed upon two judgments of this Court arising out of convictions Under Section 302 of the Indian Penal Code. In the case of *Palaniappa Gounder* (supra) the Court was called upon to decide the propriety of a particular quantum of fine in the context of Section 357(1)(c) of the Code of Criminal Procedure providing for compensation to the victim of a crime. In the case of *Surinder Kumar* (supra) this Court again had the occasion to consider the propriety of imposition of fine in a case of conviction Under Section 302 of the Indian Penal Code. In the facts of that case the Court affirmed the conviction and imprisonment for life but set aside the fine of Rs. 500/-.

7. As noticed earlier, the interpretation given by Patna High Court in the case of *Tetar Gope* (supra), on which learned Counsel for the Respondents has placed reliance has already been over-ruled by this Court in the case of *Zunjarrao Bhikaji Nagarkar* (supra). The remaining judgment in the case of *Sebastian @ Kunju* (supra) also arose out of conviction Under Section 302 of the Indian Penal Code. In paragraph 11 of that judgment, the Kerala High Court has placed reliance upon judgment of Patna High Court in the case of *Tetar Gope* (supra).

8. In our considered view, the clause "shall also be liable to fine", in the context of Indian Penal Code may be capable of being treated as directory and thus conferring on the court a discretion to impose sentence of fine also in addition to imprisonment although such discretion stands somewhat impaired as per the view taken by this Court in the case of *Zunjarrao Bhikaji Nagarkar* (supra). But

clearly no minimum fine is prescribed for the offences under the Indian Penal Code nor that Act was enacted with the special purpose of preventing economic offences as was the case in *Chern Taong Shang* (supra). The object of creating offence and penalty under the Employees' State Insurance Act, 1948 is clearly to create deterrence against violation of provisions of the Act which are beneficial for the employees. Non-payment of contributions is an economic offence and therefore the Legislature has not only fixed a minimum term of imprisonment but also a fixed amount of fine of five thousand rupees Under Section 85(a)(i)(b) of the Act. There is no discretion of awarding less than the specified fee, under the main provision. It is only the proviso which is in the nature of an exception whereunder the court is vested with discretion limited to imposition of imprisonment for a lesser term. Conspicuously, no words are found in the proviso for imposing a lesser fine than that of five thousand rupees. In such a situation the intention of the Legislature is clear and brooks no interpretation. The law is well settled that when the wordings of the Statute are clear, no interpretation is required unless there is a requirement of saving the provisions from vice of unconstitutionality or absurdity. Neither of the twin situations is attracted herein.

9. Hence the question is answered in favour of the Appellant and it is held that the amount of fine has to be Rupees five thousand and the courts have no discretion to reduce the same once the offence has been established. The discretion as per proviso is confined only in respect of term of imprisonment.

10. Accordingly the appeals are allowed. The Respondents shall now be required to pay a fine of Rupees five thousand. If they have already paid the earlier imposed fine of Rs. 1000/-, they shall pay the balance or otherwise the entire fine of Rs. 5000/- within six weeks and in default the fine shall be realised expeditiously in accordance with law by taking recourse to all the available machinery.