

(1999) 09 KL CK 0062

In the High Court Of Kerala

Case No : Criminal R.P. No. 115 of 1994

Employees" State Insurance Corporation

APPELLANT

Vs

K.A. Vijayan and Another

RESPONDENT

Date of Decision : 01-09-1999

Acts Referred:

Employees State Insurance Act, 1948 — Section 86A

Citation : (2000) 99 CompCas 31

Hon'ble Judges : K.A. Mohamed Shafi, J

Bench : Single Bench

Advocate : T.P.M. Ibrahim Khan, for the Appellant; V.V. Surendran, for the Respondent

Judgement

K.A. Mohamed Shafi, J.—The complainant in C. C. No, 499 of 1992 on the file of the Judicial First Class Magistrate's Court-I, Thrissur, is the revision petitioner. The revision is directed against the judgment dated July 29, 1993, discharging the accused u/s 245(1) of the Criminal Procedure Code, 1973.

2. The respondents were prosecuted for the offences punishable u/s 85(a) and (c) of the Employees" State Insurance Act, 1948, alleging that the respondents who are the principal employers of Cheruvan-nur Ceramics at Feroke failed to submit the return regarding the Employees" State insurance contribution in Form No. VI in respect of their employees and failed to pay the Employees" State Insurance contribution in time for the period from April 1, 1990, to September 30, 1990, as provided u/s 40 of the Act read with regulations 29 and 31 of the Employees" State Insurance (General) Regulations, 1950. The lower court after trial found that the complainant has failed to prove that the accused are the principal employers of the company and unless the company is an accused, the managing director and the director cannot be prosecuted.

3. There is no dispute that the respondents were the managing director and one of the directors of the company in question during the relevant time. The complaint is filed against the respondents alleging that they being the principal

employers of the company failed to submit the return of contribution in respect of their employees in Form No. VI for the period ended on September 30, 1990, within the time stipulated and failed to pay the Employees' State Insurance contribution in time for the period from April 1, 1990, to September 30, 1990.

4. The revision petitioner has contended that P. W.-I has clearly deposed that the respondents were the managing director and director of the company and they were responsible for the supervision and control of the factory during the relevant time and overlooking that evidence the lower court has found that the revision petitioner has failed to prove that the respondents were responsible to the company for the conduct of its business at the time the offence was committed.

5. It has to be noted that by no stretch of imagination the managing director of a company can contend that he was not in charge of or responsible to the company for the conduct of its business at the time the offence was committed. If such a contention is put forward by him, he has to adduce positive evidence to prove that he was not in charge of or responsible for the conduct of the business of the company during the relevant time. The question whether the director will come within the ambit of the principal employer or the person in charge of or responsible for the conduct of the business of the company, is a matter of evidence.

Section 86A of the Employees' State Insurance Act deals with offences by companies which reads as follows :

"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 association 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."

6. Under Sub-section (1) of Section 86A of the Employees' State Insurance Act any 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 guilty of the offence. Under the proviso to Sub-section (1), such person will not be guilty if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. Under Sub-section (2), if an offence under the Act is committed with the consent or connivance of, or due to any negligence on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

7. Counsel for the respondents submitted that in view of the decision in U. P. Pollution Control Board v. Modi Distillery [1988] 63 Comp Cas 77 ; : AIR 1988 SC 1128, the chairman, vice-chairman, managing director and members of the board of directors of a company cannot be prosecuted unless the company itself is prosecuted for the offence. But the revision petitioner relying upon the decision in Sheoratan Agarwal and Another Vs. State of Madhya Pradesh, and the decision of this court in Alex v. Vijayan [1993] 2 KLT 224 : [1994] 81 CompCas 910 contended that the prosecution against the person in charge of and responsible to the company for the conduct of the business of the company can be prosecuted even without the company being proceeded against as an accused.

8. In the decision reported in Sheoratan Agarwal and Another Vs. State of Madhya Pradesh, the question that arose before the Supreme Court was whether the persons or officers of the company can be prosecuted for the offence punishable u/s 10 of the Essential Commodities Act without prosecuting the company itself for the offence. Section 10 of the Essential Commodities Act is identical to Section 86A of the Employees' State Insurance Act, which reads as follows :

"(1) If the person contravening an order made u/s 3 is a company, every person who, at the time the contravention 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 contravention and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in Sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also 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,--

(a) "company" means any body corporate, and includes a firm or other association of individuals ; and

(b) "director" in relation to a firm means a partner in the firm."

The Supreme Court considering and interpreting Section 10 of the Essential Commodities Act, observed as follows (page 1825 of AIR) :

"The section appears to our mind to be plain enough. If the contravention of the order made u/s 3 is by a company, the persons who may be held guilty and punished are (1) the company itself, (2) every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company whom for short we shall describe as the person-in-charge of the company, and (3) any director, manager, secretary or other officer of the company with whose consent or connivance or because of neglect attributable to whom the offence has been committed, whom for short we shall describe as an officer of the company. Any one or more or all of them may be prosecuted and punished. The company alone may be prosecuted, The person-in-charge only may be prosecuted. The conniving officer may individually be prosecuted. One, some or all may be prosecuted. There is no statutory compulsion that the person-in-charge or an officer of the company may not be prosecuted unless he be ranged alongside the company itself. Section 10 indicates the persons who may be prosecuted where the contravention is made by the company. It does not lay down any condition that the person-in-charge or an officer of the company may not be separately prosecuted if the company itself is not prosecuted. Each or any of them may be separately prosecuted or along with the company."

9. The provisions of Section 47 of the Water (Prevention and Control of Pollution) Act referred to in the decision in U. P. Pollution Control Board v. Modi Distillery [1988] 63 Comp Cas 77 ; : AIR 1988 SC 1128, are also similar to the provisions of Section 10 of the Essential Commodities Act and Section 86A of the Employees' State Insurance Act. In that judgment the Supreme Court has observed as follows (page 82 of 63 Comp Cas) :

"Although as a pure proposition of law in the abstract the learned single judge's view that there can be no vicarious liability of the chairman, vice-chairman, managing director and members of the board of directors under Sub-section (1)

or (2) of Section 47 of the Act unless there was a prosecution against Modi Industries Limited, the company owning the industrial unit, can be termed as correct, the objection raised by the petitioners before the High Court ought to have been viewed not in isolation or vacuum but in the conspectus of facts and events not in vacuum."

10. In that judgment, it was held that the technical flaw in not describing the name of the company as accused can be rectified subsequently.

11. In the decision in Alex v. Vijayan [1993] 2 KIT 224 : [1994] 81 CompCas 910 a single judge of this court after elaborate consideration of both the above judgments has found that the Supreme Court in U. P. Pollution Control Board v. Modi Distillery : AIR 1988 SC 1128:[1988] 63 Comp Cas 77) made the observations on the facts of that case and those observations cannot be regarded as settling a point of law. The learned judge also found that in the decision reported in Sheoratan Agarwal and Another Vs. State of Madhya Pradesh, the question of law on the point has been elaborately considered and laid down. The question that arose in Alex v. Vijayan [1993] 2 KLT 224 : [1994] 81 CompCas 910 was whether the prosecution against the person-in-charge of the firm or company is maintainable in spite of the firm or company being not proceeded against as an accused u/s 138 of the Negotiable Instruments Act. Section 141 of the Negotiable Instruments Act which deals with offences by companies is also identical to Section 86A of the Employees' State Insurance Act. In that judgment this court followed the judgment of the Supreme Court in Sheoratan Agarwal v. State of Madhya Pradesh [1984] 4 SCC 352. In that judgment this court has quoted the observations of the Supreme Court quoted by me in the preceding paragraph in this order. I am in respectful agreement with the distinction made by the learned judge between the two judgments of the Supreme Court referred to above and acceptance of the judgment passed by the Supreme Court in Sheoratan Agarwal and Another Vs. State of Madhya Pradesh, as laying down the law on this aspect.

12. Therefore, in view of the fact that the law on this aspect is settled by the Supreme Court as noted above, the person who was in charge of and responsible to the company for the conduct of its business at the time when the offence was committed, can be prosecuted without the company being prosecuted under the provisions of the Act. Therefore, the impugned judgment passed by the lower court discharging the accused is not sustainable. The lower court has to consider the prosecution launched by the revision petitioner against the respondents on the merits and to pass appropriate orders.

13. Therefore, the impugned judgment passed by the lower court is set aside and the matter is remitted to the lower court for fresh disposal in accordance with law after giving opportunity to both the sides to adduce further evidence. The parties will appear before the lower court on September 27, 1999.