(2006) 12 KAR CK 0006

In the Karnataka High Court

Case No : Criminal Appeal No''s. 808 to 811 of 2002

Employees State Insurance Corporation — APPELLANT

Vs

Rakesh Kulkarni, Manager and Cosmos Leather Exports Ltd. — RESPONDENT

Date of Decision : 18-12-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 378 (4)
Employees Provident Fund and Miscellaneous Provisions Act, 1952 — Section 14 AC
Employees State Insurance Act, 1948 — Section 2 (17), 8 (1) (a), 85 (1) (a), 93
Penal Code, 1860 (IPC) — Section 21

Citation : (2008) 119 FLR 1003 : (2008) 6 KarLJ 266

Hon'ble Judges : K. Ramanna, J

Bench : Single Bench

Advocate : Geetha Devi M.P, for the Appellant; J. Kanikaraj, for R-1, for the Respondent

Final Decision : Dismissed

Judgement

K. Ramanna, J.—All these four criminal appeals are filed by the Deputy Director of E.S.I. Corporation, Bangalore, against the judgment and order of acquittal passed by the Presiding Officer, Special Court for Economic Offences, Bangalore, on 21.1.2002 in C.C. Nos. 582/98, 570/98, 569/98 and 581/98 respectively, whereby the Court below acquitted the respondents in all the aforesaid four cases for an offence punishable u/s 85(1)(a) of the E.S.I. Act.

2. Since the appellants and the respondents in all these four appeals are one and same even though allegations made in the complaint by the appellant/ complainant against the respondents 1 and 2 is for a different purpose and so also the question of fact and law involved in these cases are same, therefore, in order to avoid repetition of facts and law, they were taken up together, heard and being disposed of by this common judgment

3. The case of the appellant/E.S.I. Corporation is that the respondent/Accused No. 2 M/s.Cosmos Leather Exports Ltd., is covered under E.S.I. Act with effect

from 16.2.1994 and on the basis of Form No. 01 dated 25.2.1995 a Code No. 53-13101-23 was allotted. Respondent No. 1/Rakesh Kulkarni was the Manager and principal employer of the said factory i.e., Accused No. 2 in terms of Section 2(17) of the E.S.I. Act. The respondent/Accused No. 1 had tailed to pay the contribution collected from its employer along with its contribution in accordance with Section 39 of the E.S.I. Act for the period from 1.9.1997 to 31.12.97. Since no amount of contribution for the aforesaid period was paid by the respondents, notice in Form No.C-18 was issued on 20.4.1998 to the said factory, which was duly served on the factory and also on respondent No. 1 a show-cause notice was issued as to why action should not be taken u/s 25 of the E.S.I. Act, As the contribution for the period from 31.10.1997 to 31.12.1997 has not been assessed by the Insurance Inspector on 3.3.1998. Inspite of the notice, the contribution has not been deposited or paid. Therefore, respondent No. 1 being the Principal employer (Manager) of the respondent No. 2/Factory has violated the Regulation 31 r/w 39 and 40 of the General Regulation of 1950 and the provisions of the E.S.I. Act. Therefore, a private complaint came to be tiled u/s 200 of Cr.P.C. against respondents 1 and 2. After recording the evidence, the trial Court acquitted the respondents on the ground that respondent No. 1 is not the principal employer and no prior notice was served on him to file a private complaint u/s 200 of Cr.P.C. for an offence punishable u/s 85(1)(a) of the E.S.I. Act. Likewise, other three criminal cases came to be filed for non payment of the ESI contribution for the period from January 1997 to March 1997, October 1996 to December 1996 and September 1997 to December 1997. Hence, these appeals.

4. Heard the arguments of the learned Counsel Smt. Geetha M.P. appearing for the appellant/E.S.I. Corporation and Sri J. Kanikaraj, learned Counsel appearing for the respondent No. 1.

5. It is argued by the learned Counsel for the appellant/E.S.I. Corporation in all these appeals that as on the date of inspection, respondent was working as a Manager i.e., principal employer and he failed to contribute the subscription amount collected out of the wages of its employees to the Department. When the Inspector of Insurance inspected the factory on 3.3.1998, found that though E.S.I contribution was deducted out of the salary of its employees tailed to deposit the same along with its contribution. Therefore, a private complaint came to be tiled after complying with the mandatory provisions by issuing show-cause notice to respondent Nos. 1 and 2. It is argued by the learned Counsel for the appellant that before filing the charge sheet, necessary sanction has been obtained from the competent authority i.e. The Joint Regional Director of E.S.I, by the Corporation to sanction to prosecute in terms of Section 8(1)(a) of the E.S.I. Act. Therefore, the Insurance Inspector of the Corporation is also a public servant in terras of Section 21 of I.P.C. r/w Section 93 of the E.S.I. Act. The Insurance Inspector was duly authorized to act, appear, make an application and to institute a criminal proceedings on behalf of the corporation and to represent it before the Court. Inspite of the notice issued, respondents 1 and 2 failed to

deposit the contribution collected out of the salary of the employees along with its contribution. Hence, the respondents I and 2 have committed an offence punishable u/s 85(1)(a) of the E.S.I. Act.

6. It is also argued by the learned Counsel for the appellant that u/s 2(17) of the E.S.I. Act, respondent No. 1 was working as a Manager of respondent No. 2 being the principal employer and he is liable to be convicted for an offence u/s 85(1)(a) of the E.S.I. Act. and Section 2(17) of E.S.I. Act, which reads thus:

"Principal employer" means

(i) in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupies, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the said Act.

7. Therefore, as on the date of commission of an offence, respondent No. 2 was working as the principal employer. Therefore, the findings recorded by the trial Court that respondent No. 2 was not the principal employer and he was a paid servant is totally incorrect. Alter service of show-cause notice, a private complaint came to be filed for violation of Section 85(1)(a) of the E.S.I Act. It is argued that the trial Court has not properly appreciated the evidence placed on record through respondents 1 and 2 and the documents marked as Exs. P.1 to P.13.

8. In this behalf, learned Counsel for the appellant relied upon a decision of the Supreme Court reported in case of Sheoratan Agarwal and Another Vs. State of Madhya Pradesh, wherein, it has been held thus:

Essential Commodities Act (10 off 1955), Sections 3, 10-Offences by companies - Separate prosecution of person-in-charge or officer of company without prosecuting company -Is permissible.

9. It is argued that the person in-charge of the factory shall be prosecuted and notice issued to the respondents was duly served. Hence, the findings recorded by the trial Court in acquitting the respondents in the aforesaid four cases is liable to be set aside and respondent No. 1 be convicted for the aforesaid offences.

10. On the other hand, learned Counsel appearing for respondents 1 and 2 submitted that respondent No. 1 is a public servant during the relevant period and he was working as a Manager and he is a paid servant Therefore, he will not become the principal employee or the owner of the factory. Therefore, even if any contribution has been deducted out of the wages paid to the employees working in the 2nd respondent/company, the Manager is not responsible for not depositing the ESI contribution deducted out of the salary of the employees along with its contribution. It is argued that no show-cause notice was served on the respondent No. 1. As per Ex. P.5/Inspection report, one R.S. Khan is shown as the occupier and Manager is shown as Irshad Ahemed Khan. The name of

respondent No. 1 has not been written in Ex. P.5. The trial Court is right in coming to the conclusion that respondent No. 1 was neither an occupier nor a Manager. Therefore, the order of acquittal passed by the trial Court after appreciation of the entire evidence placed on record does not require any interference, The corporation was well aware that one Irshad Ahemed Khan was the Manager but no notice was issued to him and it was issued in respect of one Rudolph Mascarenhas and the name of Director is shown as S.B. Shetty. It is also stated that notice has teen issued to the company but not to the above said persons. Since respondent No. 1 is a paid servant he is not liable to answer the charges levelled against him ibr an offence punishable u/s 85(1)(a) of the E.S.I. Act.

11. In support of his contention, learned Counsel for the respondents relied upon a decision reported in case of Employees'' State Insurance Corporation, Chandigarh 1991 SCC (L&S) 833 wherein, it has been held thus:

Principal employer Private limited company having its factory - Occupier of the factory duly named - Factory also having a manger - Held, Clause (i) applicable and residuary Clause (iii) thereby excluded - Directors of the company not covered by Clause (i) and hence not personally liable to meet demand of contribution Liability was of the company and in the event of there being an occupier, such occupier liable to meet the demand.

12. He also relied upon another decision reported in case of Municipal Corporation of Delhi Vs. Amrit Lal, wherein, it has been held thus:

Appeal against acquittal by Municipality in a case tiled on its behalf Limitation Municipal Corporation is not public servant u/s 21, I.P.C. - Not entitled to benefit of extended limitation of 6 months u/s 378(5).

13. He has also relied upon a decision of the Delhi High Court reported in case of Regional Provident Fund Commissioner v. Sardari Lal Criminal Appeal No. 4/1980 wherein, it has been held as under:

Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 - Section 14-AC-Code Of Criminal Procedure, 1973 - Section 378(4) - Present application appeal against acquittal not having been filed by complainant, i.e., Inspector appointed u/s 13 of the Act, is not maintainable.

14. Having heard the arguments of the learned Counsel appearing on both sides, now I proceed to see whether the finding recorded by the Court below acquitting the respondents for an offence punishable u/s 85(1)(a) of the E.S.I. Act is perverse, incorrect or illegal?

15. No doubt, the prosecution witnesses have deposed before the Court that as on the date of inspection, respondent No. 1 was working as a Manager and he was responsible for the day-to-day affairs of the company. Ex. P.1 i.e., account number allotted to the factory is not in dispute. But the respondent No. 1 being the Manager of the factory though deducted the contribution from its employees,

failed to deposit the same for the period from October 1996 to August 1997 amounting to Rs. 95,416.90 and failed to submit the quarterly returns. Ex. P.2 is form No. 2 renewal of licence in favour of respondent No. 2 and Ex. P.3 is the contribution deducted out of the wages paid to the employees from October 1996 to December 1997. Ex. P.5 is the observation made by the Inspector that he inspected the factory on 3.3.1998. Ex. P.5 is the inspection report wherein, it has been clearly mentioned that one R.S. Khan is shown as the occupier of the respondent No. 2 and one Irshad Ahmed Khan is shown as the Manager. Whereas, Ex. P.6 is the Employees'' Registration Form issued by the Director of E.S.I. wherein, the name of the respondent is mentioned as Manager. As could be seen from the records, notice was not issued to respondent No. 1 but it was issued to one Rudolph Mascarenhas. Therefore, as on the date of the inspection, respondent No. 1 was not an occupier and he was a paid servant. The name of respondent No. 1 is not written in Ex. P.1 as admitted by P.W.2 who deposed before the Court that Accused No. 1 was the principal employer of A-2/Company. In view of the fact that in Ex. P.5 name of the occupier is shown as R.S. Khan and name of the Manager is shown as Irshan Ahamed Khan and assuming for the sake of argument, respondent No. 1 was the Manager responsible for the contribution of the E.S.I. amount along with its contribution but no show-cause notice has been issued to him, but it was issued to some other person i.e., Rudolph Mascarenhas. Therefore, the trial Court is right in coming to the consideration that the complaint filed against respondent No. 1 the then Manager of A-2/factory is not at all maintainable. The evidence placed on record discloses that respondent NO.2 failed to pay contribution which was deducted out of the salary of its employees but the complaint filed against respondent No. 1 is not at all maintainable in view of the admitted facts that as on the date of filing of the complaint up to the date of inspection, the respondent No, 1 was not the Manager of the Accused No. 2/factory and therefore, no notice has been served to the respondent No. 1. Considering the fact that no prior notice has been served on respondent No. 1 but it was served on the occupier and the respondent No. 2, the appeal is not at all maintainable and the same is liable to be dismissed.

16. Hence, viewed from any angle, 1 do not find any good reasons to interfere with the order passed by "the trial Court or to reverse the findings recorded by the trial Court. Accordingly, all these appeals are dismissed.

