

(2010) 02 MAD CK 0211
In the Madras High Court
Case No : Criminal A. No. 580 of 2002

Employees State Insurance Corporation	APPELLANT
Vs	
Vasam Spinning Mills P. Ltd. and Others	RESPONDENT

Date of Decision : 15-02-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Employees State Insurance Act, 1948 — Section 100, 2, 2(12), 2(17), 45A
Factories Act, 1948 — Section 2
General Clauses Act, 1897 — Section 27
Negotiable Instruments Act, 1881 (NI) — Section 138, 138B, 142

Citation : (2011) 1 RCR(Criminal) 693

Hon'ble Judges : R. Mala, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

R. Mala, J.—The Criminal Appeal arises out of the judgment of acquittal, dated 10.9.2001 in C.C. No. 66 of 1996 on the file of the Court of Judicial Magistrate No. II, Coimbatore, whereby, the first re-spondent-A.1 was acquitted of the offence u/s 86(a) read with Section 85(a) read with Section 85(i)(a)(b) of the Employees' State Insurance Act and the second Respondent- A.2 was acquitted of the offence u/s 85(a) read with Section 85(i)(a)(b) of the Employees' State Insurance Act

2. The case of the Appellant-ESI-complainant is as follows:

(a) The first Respondent-Vasam Spinning, Mills P. Ltd., is a registered Company under the provisions of the Employees' State Insurance Act (for short, "the ESI Act"). On 11.9.1992, P.W.2 Balasubramaniam, Manager of the ESI Corporation and ESI Inspector Krishnamurthy, inspected the first Respondent-Mills and at that time, the Supervisor Shanmugham has given a written statement stating that 15 employees were working there with the help of electricity. Exhibit P-I survey report has been prepared by the ESI Inspector Krishnamurthy, which was

signed by P.W.2 Manager of the ESI. P.W.I another Manager of the ESI, stated that the ESI Code of the first Respondent- Mills is Code No. 56-60788-11.

(b) The first Respondent is a Company and the second Respondent is the Director of the first Respondent-Mills. For the period September 1992 to September 1993, they have not paid the ESI contribution amount of the employees. Hence, on 14.9.1995, order u/s 45-A of the ESI Act was issued under Exhibit P-2, demanding payment of Rs. 12,612/-.

(c) Then, the Appellant-ESI also issued Exhibit P-3 show cause notice, directing them to pay the contributions under the relevant Forms and Exhibit P-4 letter dated 13.2.1995 was also issued, which was also dispatched to the Respondents. The second Respondent received the same and made his signature in local thapal register under Exhibit P-5. P.W.3 Gurumahal-isamy, the U.D.C. of the ESI, maintained the register and through him Exhibits P-7 and P-8 have been marked to show that the Respondents have not paid the ESI contribution amount of the employees.

(d) After the Appellant-ESI obtained permission from the Regional Office under Exhibit P-6, the Appellant-ESI filed the complaint against the Respondents-accused.

3. After examination of the witnesses P. Ws. 1 to 3 and Exhibits P-I to P-9, since the Respondents/A.1 and A.2 denied the charges, they have been permitted to cross examine the witnesses and questions were posed to them u/s 313 Code of Criminal Procedure showing the incriminating materials available against them, to which, they denied. A.2 was examined as D.W.I. After considering the oral and documentary evidence, the trial Court came to the conclusion that the Respondents-accused are not the "principal employers" as defined u/s 2(17) of the ESI Act and they were acquitted of the offences as indicated above. Against the same, the present Criminal Appeal has been preferred by the Appellant-complainant-ESI.

4. Challenging the said judgment of acquittal passed by the trial Court, learned Counsel appearing for the Appellant-ESI would contend that as per Section 2(12) of the ESI Act, the first Respondent is a "factory" and the second Respondent is the Director of the first Respondent-Mills, and they are the "principal employers". The trial Court committed error in acquitting the Respondents-accused. Learned Counsel for the Appellant-ESI further submitted that as per Section 45-A of the ESI Act, the inspection was made and the contribution amount has been determined after the inspection and notice was also issued, which was received and the Respondents have not questioned the same by way of filing any writ petition and till date, the Respondents have not paid the contribution amount of the employees. Hence, the Respondents-accused are guilty of the offences under the provisions of the ESI Act, as indicated above. Learned Counsel for the Appellant-ESI relied upon the decision of the Supreme Court J.K. Industries Ltd. and Others Vs. Chief Inspector of Factories and Boilers and Others, and the

decision of the Gauhati High Court Speed Sales Private Ltd. Vs. Union of India (UOI) and Others, , in support of his contentions.

5. Learned Senior Counsel appearing for the Respondents-accused would contend that no notice under the provisions of the ESI Act, was issued to the Respondents. He further submitted that the Appellant-ESI failed to prove that the first Respondent-Mills, is a "factory" as defined u/s 2(12) of the ESI Act. In the inspection report which was submitted at the time of inspection, Shanmugham has furnished the list of employees working in the first Respondent-Mills, but their names and fathers' names alone have been given and other particulars were not furnished and as per the decision of the Karnataka High Court E.S.I. Corporation Vs. Subbaraya Adiga, :, the particulars must be furnished. Learned Senior Counsel appearing for the Respondents-accused further submitted that as per Section 27 of the General Clauses Act, show-cause notice has not been issued to the correct address and to substantiate this contention, learned Senior Counsel for the Respondents-accused also relied upon the decision of the Supreme Court Indo Automobiles Vs. Jai Durga Enterprises and Others, . He further submitted that the Appellant-ESI has miserably failed to prove that the first Respondent-Mills is a "factory" as defined u/s 2(12) of the ESI Act. Since the first Respondent- Mills is not a "factory", it is not coming under the purview of the provisions of the ESI Act. The trial Court has considered all aspects in proper perspective and the impugned judgment of acquittal passed by the trial Court does not warrant any interference. Learned Senior Counsel appearing for the Respondents-accused prayed for dismissal of the Criminal Appeal.

6. It is pertinent to note that the Appellant-ESI has passed an order u/s 45-A of the ESI Act. They relied upon the survey report and since it is the contention of the Appellant-ESI that the Respondents-accused have not questioned the same, they are not entitled to dispute the contribution amount to be paid to the ESI.

7. At this juncture, it is to be noted that the provisions of the ESI Act would be applicable only to the "factory" as defined u/s 2(12) of the ESI Act.

8. Section 2(12) of the ESI Act reads as follows:

Section 2: Definitions. - In this Act, unless there is anything repugnant in the subject or con-text,-

....

(12) "factory" means any premises including the precincts thereof-

(a) whereon ten or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on, or

(b) whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a

manufacturing process is being carried on without the aid of power or is ordinarily so carried on,

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952) or a railway running shed;

9. From the definition of Section 2(12) relating to "factory", it is clear that in the "factory", ten or more persons should be employed for manufacturing process with the aid of power or ordinarily so carried on, and the persons should be employed for wages on any day of the preceding 12 months. There should be document to prove the same at the time of inspection. While perusing the report submitted by one Shanmugham, Supervisor of the Mills, as seen from page 3 5 of the records, it mentions only 13 names and two persons under monthly salary, but their names and their father's names only have been given, without any other particulars.

10. At this juncture, it is appropriate to consider the decision of the Karnataka High Court *ESI Corporation v. Subbaraya Adiga*(supra), relied on by the learned Senior Counsel appearing for the Respondents-accused, in which, the Karnataka High Court held as follows.:

A list of employees prepared by the E.S.I. Inspector in the course of his visit to an establishment, in order to find out whether the provisions of the E.S.I. Act are attracted to it, must contain the name, father's name, place from which the employee hails, the designation, the length of service, emoluments and the signature or thumb impression of the employee, as the case may be, if at that time other persons other than the employees are present, the names and addresses of atleast two of them with their signatures and also the signature of the Proprietor or Manager or the person in-charge of the establishment should be obtained at the end of the list and a copy of which be furnished to the establishment.

The evidence of the E.S.I. Inspector and the list of employees prepared by him, if acceptable, is sufficient to record conviction. It all depends upon the facts and circumstances of each case and the nature of the evidence of the E.S.I. Inspector and the extent of the information the list of employees prepared by him (ESI Inspector) contains.

11. As seen from the above said decision of the Kar-nataka High Court, it is clear that the Inspector in the present case, ought to have received the particulars of the names, the father's names, places from where the employees hail, their designation, the length of service, emoluments and the signatures or thumb impressions of the employees, as the case may be, if at the time of inspection other persons other than the employees are present, the names and addresses of at least two of them with their signatures and also the signature of the Proprietor or Manager or the person in-charge of the establishment, should be obtained at the end of the list and a copy of which be furnished to the establishment.

12. In the present case, as seen from the records, from page 35, except the list of alleged employees and their father's names, nothing has been given. In such circumstances, learned Senior Counsel appearing for the Respondents- accused would contend that the ESI Inspector has not followed the procedures to find out whether the first Respondent-Mills would attract the provisions of the ESI Act. So, I am forced to accept the argument advanced by the learned Senior Counsel appearing for the Respondents-accused that the Appellant-ESI has failed to prove that the first Respondent is a "factory" as defined u/s 2(12) of the ESI Act. Furthermore, no one has been examined to show that with the aid of electricity power, manufacturing process was carried on in the first Respondent-Mills.

13. Learned Counsel for the Appellant-ESI would rely upon the decision of the Supreme Court *J.K. Industries Ltd. v. Chief Inspr. of Factories* (supra) and submit that the Respondents-accused are the "principal employers". In the said decision, the Supreme Court dealt with the persons having "ultimate control over the affairs of the factory" and held as follows *J.K. Industries Ltd. and Others Vs. Chief Inspector of Factories and Boilers and Others*, :

21. There is a vast difference between a person having the ultimate control of the affairs of a factory and the one who has immediate or day to day control over the affairs of the factory. In the case of a company, the ultimate control of the factory, where the Company is the owner of the factory, always vests in the company, through its Board of Directors. The Manager or any other employee, of whatever status, can be nominated by the Board of Directors of the owner company to have immediate or day to day or even supervisory control over the affairs of the factory. Even where the resolution of the Board of Directors says that an officer or employee, other than one of the Directors, shall have the "ultimate" control over the affairs of the factory, it would only be a camouflage or an artful circumvention because the "ultimate control" cannot be transferred from that of the company, to one of its employees or officers, except where there is a complete transfer of the control of the affairs of the factory. Mechanical recitation of the words of Section 2(n) of Factories Act, 1948 as a Mantra, in a resolution nominating an employee or an officer as the occupier by stating that he shall have "ultimate control over the affairs of the factory", cannot be permitted to defeat the object of the amendment. The provisions of the Factories Act have to be construed in a manner which would promote its object, prevent its subtle evasion and foil its artful circumvention to suppress the mischief. Though, the expression "Ultimate control" was used in Section 2(n) even prior to the 1987 amendment also but read with proviso to Section 100(2), it gave an opportunity to the Companies owning the factory to dilute the rigour of the provision by not notifying one of its Directors to be the occupier and instead nominating some employee or the other to be the "occupier" for purposes of punishment and penalty. The ultimate control which vests in an owner and in the case of a Company in the Board of Directors cannot be vested in anyone else without completely transferring the control over the factory to that other person. The law does not countenance duality of ultimate control. If the transfer of the

control to another person is not complete, meaning thereby that the transferor retains its control over the affairs of the factory, the transferee, whosoever he may be, cannot be considered to be the person having ultimate control over the affairs of the factory notwithstanding what the resolution of the Board states. The litmus test, therefore, is who has the "ultimate" control over the affairs of the factory.

14. In this connection, it is appropriate to consider Section 2(17) of the ESI Act, which defines the "principal employer". Section 2(17) of the ESI Act reads as follows:

Section 2. Definitions. - In this Act, unless there is anything repugnant in the subject or con-text,-

....

(17) "Principal Employer" means -(i) in a factory, the owner or occupier of the factory 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 in 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.

15. It is true that the first Respondent is Vasam Spinning Mills P. Ltd. and the second Respondent is the Director of the first Respondent-Mills.

16. It is appropriate to consider the evidence of D.W. 1 (second Respondent-A-2). In his evidence, D.W. 1 has stated that before he joined the first Respondent-Mills as a Director, he was in the Military. He further stated that as an Engineer, he purchased the defective machineries and rectified the defects and to carry out the work, he appointed only temporary workers and only four or five persons were working under him. He further stated that he has not registered the first Respondent-Mills under the ESI Act. He further stated that since only four members are working, the first Respondent-Mills is not coming under the purview of the ESI Act. D.W.I further stated that before filing the complaint, he has not received any notice. He also stated that the documents filed by the Appellant-ESI before Court did not contain D. Ws. 1 signature.

17. Learned Counsel for the Appellant-ESI also relied upon the decision of Gauhati High Court Speed Sales Private Ltd. v. U.O.I(supra), wherein, the Gauhati High Court held as follows:

Present writ petition preferred by the Petitioner aggrieved against the order of the Provident Fund Commissioner holding that the Petitioner"s firm is covered

under the EPF Act.

Held, the spot verification/inspection was conducted in the premises of the Petitioner Company and not in any other place as such the Petitioner- Company or its representative was present at the time of completion of the inspection. The persons concerned were found to be physically working in the establishment. All these questions are findings of fact and cannot be interfered in writ jurisdiction. No illegality in accepting the Directors and the Managing Director of the Company towards the total number of employees necessarily to be included under the provisions of the Act. Affidavits sworn in by two persons to show that they were not employees after passing of the impugned order would not affect the decision of the spot verification or inspection conducted by the Authorities."

Ratio decidendi: "When the Directors and the Managing Director of the Company were paid remuneration and house rent allowance and the balance sheet disclosed that the same was paid as salary and not as stipend/sitting fee or as any other payment, it is difficult to hold that the Authorities committed any illegality in accepting those persons towards the total number of employees necessarily to be included under the provisions of the Act.

18. As already discussed in paragraph 12 of this judgment, the Appellant-ESI has not proved that the first Respondent-Mills is a "factory" as defined u/s 2(12) of the ESI Act. The first Respondent-Mills would not attract the provisions of the ESI Act. So, it is immaterial to decide as to whether the Respondents-accused are the "principal employers" as defined u/s 2(17) of the ESI Act.

19. Learned Senior Counsel appearing for the Respondents-accused would contend that the show cause notice and the assessment order u/s 45-A of the ESI Act, have not been issued to the Respondents. He disputed the service of notice, by pointing out Exhibit P-9 (returned postal covers) and Exhibit P-5 (copy of the tapal register). In this regard, learned Senior Counsel appearing for the Respondents-accused would rely upon a decision of the Supreme Court *Indo Automobiles v. Jai Durga Enterprises and Ors.* (supra), in which the Supreme Court held as follows:

8. Admittedly, notice u/s 138-B of the Negotiable Instruments Act was sent to the Respondents through registered post and under a certificate of posting on the correct address of the Respondents. The High Court had quashed proceeding on the ground that although notice through Registered Post and also under Certificate of Posting were sent by the Appellant/complainant to the Respondents but because of the endorsement of the postal peon, the service could not be said to have been effected. In our view, the High Court was not justified in holding that service of notice could not be found to be valid. In *K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another*, , it has been held that the Context of Section 138-B of the Negotiable Instruments Act invites a liberal interpretation favouring the person who has the Statutory obligation to give notice under the Act because he must be presumed to be the loser in the transaction and

provision itself has been made in his interest and if a strict interpretation is asked for that would give a handle to the trickster cheque drawer. It is also well settled that once notice has been sent by Registered Post with acknowledgement due in a correct address, it must be presumed that the service has been made effective. We do not find from the endorsement of the postal peon that the postal peon was at all examined. In *V. Raja Kumari Vs. P. Subbarama Naidu and Another*, , again this Court reiterated the same principle and held that the statutory notice under Sections 138 and 142 of the Negotiable Instruments Act, 1881 sent to the correct address of the drawer but returning with the endorsement must be presumed to be served to the drawer and the burden to show that the accused drawee had managed to get an incorrect postal endorsement letter on the complainant and affixed thereof have to be considered during trial on the background facts of the case.

20. Learned Senior Counsel appearing for the Respondents-accused submitted that admittedly, notice has been alleged to have been sent to "S. Kas-thuri Swamy, Vasam Spinning Mills (P) Ltd., Shop No. 3, SIDCO Ind. Estate, Kurichy, Coimbatore-21" and that has been redirected by the Postal Department to "No. 444, Patel Road, Ram Nagar, Coimbatore" and it returned with endorsement "not claimed", as seen from Exhibit P-9. At this juncture, learned Senior Counsel appearing for the Respondents-accused relied upon the decision of the Supreme Court *Indo Automobiles v. Jai Durga Enterprises and Ors.* (supra) and submitted that as per Section 27 of the General Clauses Act, three ingredients have to be proved by the Appellant-ESI for service of notice, namely, (i) properly addressed, (ii) appropriate stamps affixed and (iii) posted. But, in the present case, the notice has been sent by Registered Post with Acknowledgement Due and the correct address has not been furnished, and hence, it returned with endorsement "not claimed." In such circumstances, it is appropriate to consider the evidence of D.W. 1 (A.2). D.W. 1 in his evidence has denied that he was residing at No. 444, Patel Road, Ram Nagar, Coimbatore. Hence, the show-cause notice and the order issued u/s 45-A of the ESI Act, have not been proved by the prosecution beyond reasonable doubt.

21. The records in the Criminal Appeal clearly prove that notice has not been issued to the correct address by the Appellant-ESI. Even though Exhibit P-5 (copy of the Tapal Register) has been marked to show that in the local Tapal, notice has been issued, and in that, the name "S. Kasthurisamy" has been mentioned, who received the same on 7.4.1995. During cross examination of D.W. 1, a suggestion was posed to D.W. 1 that he received the local Tapal, which was denied by him. In such circumstances, it is the duty of the Appellant-ESI to prove that the notice was served on the Respondents-accused in accordance with the provisions of the ESI Act. While perusing Exhibit P-4 notice dated 13.2.1995, it was alleged to have been issued and served through the local delivery on 7.4.1995 and in that, it was stated that the second Respondent was directed to appear before the Sub-Regional Office (Coimbatore), ESI Corporation, on 8.3.1995 at 11.15 a.m. at No. 333, Cross Cut Road, "Singapore Plaza", 4th Floor,

Coimbatore and it was alleged to have been served only on 7.4.1995.

22. In the above circumstances, I am of the view that the Appellant-ESI has not served Exhibit P-1 survey report, Exhibit P-2 order u/s 45-A of the ESI Act, Exhibit P-3 show cause notice and Exhibit P-4 notice dated 13.2.1995. The trial Court has considered the documents in proper perspective and came to the correct conclusion that the Respondents-accused have not received the documents.

23. The trial Court, in paragraph 29 of its judgment, came to the conclusion that Exhibits P-2 and P-3 (order/notice) were not served on the Respondents-accused and so, no notice was given to them and the Appellant-ESI has not followed the principles of natural justice while filing the complaint, which is against law. The trial Court, relied upon various decisions and in paragraphs 30 and 31, further held that the Respondents-accused are not the "principal employers" as defined u/s 2(17) of the ESI Act and acquitted the Respondents-accused from the offences.

24. While considering the impugned judgment of the trial Court, I am of the view that the trial Court has considered all aspects in proper perspective and acquitted the Respondents-accused. The Appellant-ESI has not proved its case that the Respondents-accused have not paid the contribution amount of the employees in time and not filed relevant documents to show that the first Respondent-Mills is a "factory" under the provisions of the ESI Act and they have not issued notice to the correct address, thereby, the Appellant-ESI has not given opportunity to the Respondents before prosecuting them. I do not find any infirmity or illegality in the impugned judgment of acquittal passed by the trial Court. I concur with the findings of the trial Court.

25. In fine,

(a) the criminal appeal filed by the Appellant-ESI is dismissed.

(b) The impugned judgment of acquittal is confirmed.

(c) The Respondents/A.1 and A.2 are acquitted of the offences.