

(2012) 11 KL CK 0201

In the High Court Of Kerala

Case No : Criminal Rev. Petition No. 241 of 2002

E.S.I. Corporation

APPELLANT

Vs

Chakrapani

RESPONDENT

Date of Decision : 02-11-2012

Acts Referred:

Employees State Insurance Act, 1948 — Section 72, 73, 85, 85(a), 85(e)

Citation : (2013) 136 FLR 720 : (2013) 1 KLJ 38 : (2013) LabIC 570 : (2013) 1 LLJ 613 : (2013) LLR 372 : (2013) 2 SCT 396

Hon'ble Judges : P.S. Gopinathan, J

Bench : Single Bench

Advocate : Noushad Thottathil Public Prosecutor, P. Sankarankutty Nair, for the Appellant; J. Om Prakash and Sri. Noushad Thottathil Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

P.S. Gopinathan, J.—Revision petitioner is the complainant in C.C. No. 464/1992 on the file of the Judicial Magistrate of the First Class-I,

Thrissur. Originally, the complaint was filed before the Chief Judicial Magistrate, Thrissur as S.T. No. 543/1990 accusing the respondent offence

u/s 85(a) and (e) of the Employees State Insurance Act (herein after referred to as "the Act"). The allegation against the respondent was that he

was the employer of the Toddy Shop bearing No. T.S. 1 and 2 which would come within the purview of the Act and that the respondent was

bound to file half yearly returns and to remit contributions under the Act. But the respondent failed to submit the half yearly returns and to remit the

contribution for the period ended on September, 1989 and March, 1990. The respondent pleaded guilty before the trial court. The learned

Magistrate on accepting the plea of guilty, convicted and sentenced the

respondent to a fine of Rs. 1,000/- with a default sentence of simple imprisonment for one month.

2. Assailing the omission of the trial court to direct the 1st respondent to remit the ESI contribution u/s 85C of the Act, this Revision Petition is preferred.

3. I have heard Adv. Sri. P. Sankarankutty Nair, the learned counsel appearing for the revision petitioner and Sri. Om Prakash, the learned counsel appearing for the respondent.

4. At the time of argument, the learned counsel for the revision petitioner also would submit that Section 85(a) of the Act mandates minimum sentence and the trial court had also gone wrong in awarding a sentence lesser than the minimum sentence mandated by Section 85(a) of the ESI

Act. It is submitted that being a question of law, the revision petitioner can raise the same though not pleaded in the memorandum.

5. For a correct appraisal of the case, a reading of Sections 85 and 85C would be relevant. Section 85 reads as follows:

& quot;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) deducts or attempts to deduct from the wages of an employee the whole or any part of the employer's contribution, or

(c) in contravention of Section 72 reduces the wages or any privileges or benefits admissible to an employee, or

(d) in contravention of Section 73 or any regulation dismisses, discharges, reduces or otherwise punishes an employee, or

(e) fails or refuses to submit any return required by the regulations, or makes a false return, or

(f) obstructs any Inspector or other official of the Corporation in the discharge of his duties, or

(g) is guilty of any contravention of or non-compliance with any of the requirements of this Act or the rules or the regulations in respect of which no

special penalty is provided,

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 reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser

term;

(ii) where he commits an offence under any of the Clauses (b) to (g) (both inclusive), with imprisonment for a term which may extend to one year

or with fine which may extend to four thousand rupees, or with both]

Section 85C reads as follows:

"85C. Power of Court to make orders:-

(1) Where an employer is convicted of an offence for failure to pay any contribution payable under this Act, the Court may, in addition to awarding

any punishment, by order, in writing, require him within a period specified in the order (which the Court may if it thinks fit and on application in that

behalf, from time to time, extend), to pay the amount of contribution in respect of which the offence was committed and to furnish the return

relating to such contributions.

(2) Where an order is made under subsection (1), the employer shall not be liable under this Act in respect of the continuation of the offence during

the period or extended period, if any, allowed by the Court, but if, on the expiry of such period or extended period, as the case may be, the order

of the Court has not been fully complied with, the employer shall be deemed to have committed a further offence and shall be punishable with

imprisonment in respect thereof u/s 85 and shall also be liable to pay fine which may extend to one thousand rupees for every day after such expiry

on which the order has not been complied with.";

6. Going by the above provision, I find that when an employer is convicted u/s 85(a)(i)(b), unless special reasons are recorded in the judgment, the

sentence shall not be less than six months and a fine of Rs. 5,000/-. As rightly argued by the learned counsel for the revision petitioner, the trial

court has not shown any reason for deviating from the minimum sentence.

Therefore, the sentence awarded is not in accordance with the law and liable to be interfered.

7. Section 85C quoted above would show that when an employer is convicted for an offence under the Act for failure to pay contribution payable under the Act, it is quite mandatory that the court shall order the convicted person to pay the amount of contribution within a time frame. Order to remit compensation is the rule. There also, the trial court failed. It is reported that more than Rs. 32,000/- is the due amount. In such a case if an employer can avoid remitting contribution by remitting a fine of Rs. 1,000/- employer would prefer prosecution rather than remitting the contribution. Such an attitude would defeat the welfare legislation. While disposing cases of this nature, trial courts shall not overlook the legislative intention. Trial court should have imbibed the legislative intention. In cases like this, if a small fine, that too deviating from the minimum, is imposed and the employer is let off, the deterring effect of punishment itself would be lost. Prosecution under the Act is with a target to enforce the legislation. If such prosecutions are disposed with small fine enforcement of welfare legislation would become rather difficult. Criminal courts should bear in mind that generally the people respect the law not because of the respect to the law but because of the fear of penal consequences. If the penal consequences are simpler than the consequences in complying the statutory provisions, option would always be in favour of breach. There is such a human tendency. Therefore, criminal courts, while imposing sentence shall bear in mind the deterring effect of sentence. Sentence shall always be in proportion to the offence and should be of deterring nature to the extent possible. When the statute provides for minimum sentence, it should be complied unless there are good reasons to be recorded. So also when the statute provides for issuing direction to a convicted employer to comply with the statutory provisions, it shall be issued. Or else, the result would be defeating the legislation.

8. The learned counsel for the respondent fairly conceded the legal position. It was further submitted that the 1st respondent is now aged 62 years and that the trial court has shown a mercy and this Court shall not interfere in exercise of the revision powers. It was also submitted that the respondent filed an insolvency petition as I.P. No. 18/1994 before the

Subordinate Judge, Alappuzha and that the said petition was allowed.

However, the certified copy of the order is not produced. In the above circumstance, I am not going into the merit of the plea of solvency or

insolvency of the respondent. However, I find that the submission that the respondent had become insolvent is a special reason to deviate from the

minimum substantial sentence. Such circumstance may not be a criteria for determining the fine or from not directing the respondent to pay the ESI

contribution as contemplated u/s 85C of the Act. Taking into account of the entire facts and circumstances, I find that the sentence under challenge

requires interference in revision and that sentence of imprisonment till the rising of the court and a fine of Rs. 5000/- u/s 85(a); and a fine of Rs.

4,000/- u/s 85(e) of the Act with a direction to pay a sum of Rs. 35,000/- as compensation to the revision petitioner would meet the ends of

justice. In the result, this Revision Petition is allowed. While modifying the sentence impugned, the respondent is sentenced to imprisonment till the

rising of the court and to pay a fine of Rs. 5000/- u/s 85(a); and a fine of Rs. 4,000/- u/s 85(e) of the Act. The 1st respondent is further directed to

pay Rs. 35,000/- u/s 85C to the revision petitioner as compensation. In default of non-payment of fine and compensation, the respondent shall

undergo simple imprisonment for three months and six months respectively. The respondent is directed to surrender before the trial court which

shall see the execution of sentence and report compliance. The respondent is granted three months time to remit the compensation.