

(1991) 01 BOM CK 0047
In the Bombay High Court
Case No : Criminal W.P. No. 1092 of 1986

E.S.I.C.

APPELLANT

Vs

S.K. Agarwal and others

RESPONDENT

Date of Decision : 18-01-1991

Acts Referred:

Employees State Insurance Act, 1948 — Section 85, 85A

Citation : (1991) 2 BomCR 88 : (1991) 63 FLR 923 : (1992) 2 LLJ 115 : (1991) 1 MhLj 935

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Judgement

1. This is a petition filed by the Employees' State Insurance Corporation and raises an issue of a considerable importance touching the manner in which some of the trial Courts have been disposing of prosecutions under the Employers' State Insurance Act. The present case is a classic instance of the manner in which judicial indiscretion has unfortunately been used, to show misplaced sympathy to certain accused persons, that too, almost in defiance of specific directions earlier issued by this very Court, the end result being a total miscarriage of justice.

2. The respondents Nos. 1 to 3 to this petition were prosecuted for offence u/s 85(a) of the Employees' State Act, 1948 and had been convicted by the Court on June 21, 1978 on which occasion, they had been find a paltry amount of Rs. 100/-. The accused No. 3 is the firm whereas accused Nos. 1 and 2 are the partners of the firm. Unfortunately, in these prosecutions, the attitude of the trial Courts and the sentences handed down have been so inconsequential, that the accused have been induced or almost encouraged to repeat those offences with impunity. The Legislature has formulated the E.S.I. Schemes for purposes of enhancing the welfare of low-paid employees. The contributions required to be made by an employer are extremely small and any act of non-compliance with these measures is nothing short of anti-social activity. It is only an unscrupulous

employer, devoid of honesty and social obligation who will attempt evasion of these statutory provisions and in such cases the Court, as of necessity, must enforce the law ruthlessly. Whereas such offences call for deterrent punishment, if the offender is dealt with leniently, he will undoubtedly consider it more profitable to break the law rather than to abide by it. The psychology of a trader which view all equations from the aspect of personal gain alone needs to be corrected by the Courts handling these cases, whose sacred commitment is to ensure that the rightful dues of poor employees are secured and that breaches of any type will not be pardoned. The Legislature, with good reason, has through a series of amendments, been stepping up the quantum of punishment and has also prescribed, that the punishment shall not be less than the prescribed minimum jail sentence. In dealing with a situation of the present type, Krishna Iyer, J. (as he then was) in the case of *Organo Chemical Industries and Another Vs. Union of India (UOI) and Others*, has observed in paragraph 3 as follows (P. 418) :

"3. The pragmatics of situation is that if the stream of contributions were frozen by employers" defaults after due deduction from the wages and diversion for their own purposes, the scheme would be damnified by traumatic starvation of the fund, public frustration from the failure of the project and psychic demoralisation of the miserable beneficiaries when they find their wages deducted and the employer gets away with it even after default in his own contribution and malversation of the workers" share. "Damages have a wider socially semantic connotation than pecuniary loss of interest on non-payment when a social welfare scheme suffers mayhem on account of the injury. Law expands concepts to embrace social needs so as to become functionally effectual."

3. It appears that after the earlier conviction, the petitioners in this case repeated the offence whereupon they came to be prosecuted once again for the same charge and the learned Magistrate on this occasion, disposed of the proceeding by imposing a paltry fine of Rs. 110/- i.e. marginally higher than the earlier fine. The department carried the matter in revision principally on the ground that this was a second offence and that the Court had erred in not having applied the provisions of Section 85-A of the Act, which prescribed a minimum of three months" imprisonment and a fine upto Rs. 4,000/-. Then learned Session Judge dismissed the revision whereupon, the department moved this Court by way of a Criminal Application bearing No. 1031 of 1981. This petition came to be disposed of by my learned brother Pendse, J. on March 3, 1982 and this Court upheld the department"s contention and remanded the matter to the learned Magistrate with the specific direction that an appropriate sentence as provided u/s 85-A of the Act must be imposed on the accused. The accused had appeared before this Court and had not disputed the fact that they had earlier been convicted. The only reason for the remand was because the High Court took the view that the enhancement of sentence should not be done at the High Court level and that the trial Court was the appropriate authority to correct the order that

had been earlier passed.

4. Unfortunately, after remand, the learned Magistrate, instead of enhancing the sentence has reduced it. It is not as though the learned Magistrate was not conscious of the directions of the High Court, but the learned Magistrate has passed a very lengthy order, in the course of which, he has held that the accused are entitled to sympathetic consideration and furthermore that they are entitled to the benefit under the Probation of Offenders Act and that consequently, the only sentence imposed on them was that they should sign a bond for good behavior in the sum of Rs. 5,000/-. Effectively, the learned Magistrate set aside the earlier order of fine and let off the accused without any punishment whatsoever. The order is so manifestly incorrect that the operative part of the order state that the accused No. 3 also, which, incidentally, is a firm is released on a bond of good behavior. Thereafter there is a statement to the effect that the accused No. 3 is directed to pay a fine of Rs. 110/-, which has already been recovered and consequently, adjusted against the sentence. Whereas the law requires stepping up of punishment for the second offence which at that time meant a minimum jail sentence of three months, the learned Magistrate has scaled it down and let off the accused more leniently on the second occasion. That the learned Magistrate had acted in rank disregard of the High Court directions is an understatement. The Registrar shall forward a copy of this judgment to the learned Magistrate concerned and call for his explanation within a period of one month, and put up this matter for further orders.

5. Against the order of the learned Magistrate, the department carried the matter in appeal and it is sad to say, that the learned Additional Sessions Judge, Pune, on the basis of reliance placed on certain authorities, has upheld the contentions of the learned Magistrate. The effect of these two orders is that the provisions of Section 85-A of the Act have virtually been set at naught. The department has, therefore, moved this Court once again.

6. At the hearing of this petition, Mr. Mehta, learned counsel appearing on behalf of the petitioner has pointed out that the learned Magistrate was in error in so far as he has not followed the directions of the High Court and that, in any event, the order of the learned Magistrate is without jurisdiction in so far as where there is a mandatory provision u/s 85-A of the Act and where the High Court having beard the matter has come to the conclusion on the earlier occasion, that this provision will apply to the present case, that the learned Magistrate could not have thereafter imposed any lesser sentence, in this view of the matter, it is the submission of Mr. Mehta that the learned Magistrate is wholly incorrect and that the order of Sessions Court confirming that order will also have to be set aside.

7. I have heard Mr. Patil, learned Additional Government Pleader, who submits that if the Legislature, with good reason and as a deterrent for purposes of ensuring that offences of the present type are not repeated, has prescribed certain minimum norms of punishment, that no discretion is left with the courts to show sympathy thereafter and impose lesser sentence. I am wholly in

agreement with the submission made by Mr. Patel and consequently, the petition is allowed and the orders passed by the lower Courts are set aside.

8. Since the respondents have appeared before this Court even though served it will be necessary to remand this case to the trial Magistrate once again with the specific direction that he shall secure the attendance of the respondents i.e. the accused before the trial Court and that he shall strictly comply with the directions of this Court contained in the judgment of Pendse, J. viz., that the provisions of Section 85-A of the Act shall be strictly applied. With this direction, the petition is allowed and the proceedings are remanded to the trial Court. The trial Magistrate shall dispose of this case within a period of 30 days from the receipt of this order and shall forward a copy of the order passed to this Court. Registrar shall act in accordance with directions contained in paragraph 4.