(1985) 01 RAJ CK 0071

In the Rajasthan High Court

Case No : Criminal Revision No''s. 165 and 249/79

M.C. Golcha and Another — APPELLANT

Vs

State and Another — RESPONDENT

Date of Decision : 31-01-1985

Acts Referred:
Employees State Insurance Act, 1948 — Section 2, 20, 40, 85, 85A

Citation : (1985) RLW 196 : (1985) 1 WLN 296

Hon'ble Judges : G.K. Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

G.K. Sharma, J.—These two revision petitions are directed against the judgment of the Chief Judicial Magistrate, Jaipur dated 22-2-79 in Criminal Cases Nos. 49/75 and 281/75. As a common question of law is involved in both the revision petitions, they are being disposed of by this common order.

2. In Criminal Revision No. 165-79 the facts of the case are as under: The Leave Reserve Manager filed a complaint in the Court of Chief Judicial Magistrate, Jaipur District, Jaipur alleging that the factory namely, M/s Dharti Dhan (P) Ltd., Udaipur is a factory as defined in Sub-section (12) of Section 2 of the Employees State Insurance Act, 1948 (hereinafter referred to as the Act). The accused persons M.C. Golcha and B.K. Surana are the Managing Director and Manager respectively of this factory, & as such are the principal employers of the aforesaid factory as defined in Clause 17 of Section 2 of the Act. u/s 40(1) of the Act read with Regulation-26 of the Employees State Insurance (General) Regulations, 1950 (hereinafter referred to as the Regulations) every principal employer of a covered factory under the Act is required to submit contribution cards duly affixed with contribution stamps in Sets A, B, and C accompanied with the return of contribution cards in Form 6 within 42 days of the end of contribution period at the Regional Head-quarters of Rajasthan Region of the Employees State Insurance Corporation. It is alleged that accused persons have not made the

following statutory compliance within the statutory time limit:

(A) The contribution cards of Set-A affixed with contribution stamps for the contribution period ending on 27-7-74 which should have been submitted latest by 7-9-74 have not been submitted by the accused within the time limit.

(B) The contribution cards of Set-B affixed with contribution stamps for the contribution period ending on 28-9-74 which should have been submitted latest by 11-11-74 have not been submitted by the accused within the time limit.

3. Thus the accused persons are liable to be prosecuted for the commission of an offence punishable u/s 85(e & g) of the Act.

4. The facts of the Revision Petition No. 249/79 are as under: The Leave Reserve Manager filed a complaint in the Court of Judicial Magistrate, Jaipur District, Jaipur alleging that the factory namely, M/s Dharti Dhan (P) Ltd., Udaipur is a factory as defined in Sub-section (12) of Section 2 of the Act. The accused persons M.C. Golcha and B.K. Suranaarethe Managing Director and Manager respectively of the factory, and as such are the principal employers of the aforesaid factory as defined in Clause 17 of Section 2 of the Act. u/s 40(1) of the Act read with Regulation-26 of the Regulations, every principal employer of a covered factory under the Act is required to submit contribution cards duly affixed with contribution stamps in Sets A, B, and C accompanied with the return of contribution cards in Form-6 within 42 days of the end of contribution period at the Regional Head-quarters of Rajasthan Region of the Employees State Insurance Corporation. It is alleged that accused persons have not made the following statutory compliance within the statutory time limit:

(A) The contribution cards of Set-C affixed with contribution stamps for the consideration period ending on 31-5-75 which should have been submitted latest by 12-7-75 have not been submitted by the accused persons within the time limit. It is thus a violation of Section 40 of the E.S.I. Regulation-26 of the E.S.I. Regulations, 1950.

(B) Contribution cards of Set-A affixed with contribution stamps for the contribution period ending on 26-7-75 which should have been submitted latest by 6-9-75 have not been submitted by the accused persons within the time limit. Thus they violated Section 40 of the Ast and Regulation 26 of the Regulations.

5. Hence both the accused persons are liable to be prosecuted for commission of the offence punishable u/s 85(A) of the Act.

6. In both the cases before the trial Magistrate, the accused B.K. Surana pleaded guilty and he was punished with a fine of Rs. 100/- for contravention of provisions of the Act. No revision has been preferred by B.K. Surana against his conviction.

7. The learned Chief Judicial Magistrate also found accused M.C. Golcha guilty for the contravention of Section 85(e & g) of the Act and punished him with a fine of

Rs. 100/- in both the cases. Aggrieved by the judgment of the Chief Judicial Magistrate, M.C. Golcha has filed these revision petitions in both the cases.

8. Mr. M.R. Singhvi learned Counsel for the petitioner has argued that in both the revision petitions there is a technical point and on proper construction of Section 40 and Section 2(17) of the Act, the petitioner is not covered within the definition of principal employer. The learned C.J.M. has erred in holding that the petitioner is the employer and is liable for the contravention of Section 85(e & g) of the Act read with Regulation 26 of the Regulations.

9. Section 85 of the Act provides punishment for failure to pay contribution etc. Clauses (e) and (g) of this Section read as under:

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

10. This Section 85 provides punishment for the person who violates the provisions of the Act as well as the regulations. Thus main point as to who is responsible for the violation of these provisions has to be decided.

11. Mr. Singhvi contends that the petitioner is not liable to be punished for violation of the Act and regulation-26 of the Regulations.

12. Section 20 of the Act reads as under:

20. Meeting of Corporation, Standing Committee and Medical Benefit Council. Subject to any rules made under this Act, the Corporation, the Standing Committee and the Medical Benefit Council shall meet at such times and places and shall observe such rules or procedure in regard to transaction of business at their meetings as may be specified in the regulations made in this behalf.

13. The ''Principal Employer'' is defined in Section 2(17) of the Act, which reads as under:

(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, 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.

14. Regulation 26 of the Regulations, reads as under:

26. Contribution cards to be sent to appropriate office.-An employer being in possession of a contribution card in respect of any person, shall send it by registered post or messenger, together with a return in duplicate in Form 6 to the appropriate office.

(a) within 7 days of the date on which he comes to know of the death of such person;

(b) within 7 days of the date of receipt of requisition in that behalf from the appropriate office;

(c) within 42 days of the termination of contribution period to which it relates;

(d) within 28 days of the date of permanent closure of the factory.

15. Thus the imprisonment aspect is that the employer is always made liable for sending the required information and sending the contribution cards to the region of the E.S.I. Corporation. The liability is fastened on the person who is an employer incharge of the company. Another important aspect is that the employer who is in possession of the contribution cards has been made responsible to comply with the provisions of the Act and the Regulations.

16. The point to be seen is, whether the Managing Director is the principal employer, who is supposed to be in possession of the contribution cards and responsible for the management of the Concern as also responsible for sending the contribution cards according to the provisions of the Act & the Regulations. It is not disputed that B.K. Surana is the Manager of the factory and occupier of the limited Company. Managing Director is the person who frames the policy and looks after the initial business and future prospects of the Company. But the Manager executes the orders of the Board of Directors and carries out the policy framed by them. He is the only principal employer as defined in Section 2(17) of the Act. The Managing Director who frames the policy is not supposed to keep the contribution cards in his possession. They are kept in the office which is under the control of the Manager and he is actually in possession of the contribution cards. Similarly, the Manager is the principal employer as defined in Section 40 of the Act and not the Director or the Managing Director. The Manager being the immediate employer is responsible for the persons directly employed by him & also responsible for the contribution made by the employees and the employer. So, the Managing Director or the Director is not even covered by the definition "principal employer" as defined in Section 2(17) and Section 40 of the Act.

17. Mr. Singhvi argued that in the complaint itself it has not been pleaded that the Managing Director Shri Golcha was in possession of the contribution cards and was in any way responsible for maintaining the cards. According to him, the Manager is the person who is in possession of the contribution cards and is responsible for complying with the provisions of the Act. At the relevant time, Mr.

B.K. Surana was the Manager and he was also prosecuted and he pleaded guilty. He admitted that he was working as Manager of the company, was keeping the contribution cards and was responsible for sending the cards according to Regulation 26. So, in face of the fact that B.K. Surana was the manager and was responsible for keeping the cards, Mr. Golcha Managing Director cannot be said to be the person responsible for keeping the cards in his possession. I agree with this contention of Mr. Singhvi. Mr. Surana being the Manager was prosecuted and punished against which no revision has been preferred.

18. Mr. Singhvi in support of his contention has cited the case of S. Gurdial Singh and Others Vs. The Regional Director, Employees'' State Insurance Corporation and Others, In this case the petitioners were Managing Director and Director of the Company. The factory was owned by a private limited Company under the Companies Act. Since the amount of contribution was not paid by the Company, proceedings for its recovery as arrears of land revenue were taken against the petitioners. In that petition it was argued that the petitioners were not the principal employer of the factory as defined in Section 2(17) of the Act. It was also objected that they were not the occupier of the factory. After mentioning the detention of "principal employer and occupier" it was observed as under:

From these definitions, it is quite clear that the petitioners are not covered by the definitions of ''principal employer'' or ''occupier''. The owner of the factory is the Company namely, the Hindustan Embroidery Mills Private Limited, Chheherta (Amritsar). Inder Singh was appointed as the Manager of the Company for the purposes of the Factories Act and he was, therefore, the occupier of the factory for all purposes. The petitioners cannot be said to be the persons who have ultimate control over the affairs of the factory. That control vests in the Company. It has not been shown that the affairs of the factory had been or are entrusted to any of the petitioners. The liability for the payment of contribution to the Employees State Insurance Corporation is that of the principal employer u/s 40 of the Act. As the petitioners cannot be termed as ''principal employer'' no recovery can be made from them.

It is stated on behalf of the petitioners that the amount can be easily recovered from the assets of the factory which can be attached and sold. That procedure, for reasons best known to the respondents, is not being followed. It will be for the respondents to recover the amount from the Company or the occupier of the factory in any manner permissible under the law. The petitioners cannot be personally held liable for the same.

19. Suresh Tulsidas v. Collector of Bombay (Lab. I.C. 1984 p. 1614) is also case where the point involved was about the employer''s contribution and the liability of the Director of the Company u/s 40 and Section 2(17) of the Act. It has been observed by their Lordships as under:

The Director of a company, by virtue of being a Director, is not ''principal employer'' contemplated by Section 2(17) of the Employees State Insurance Act.

He is not personally liable to pay employer''s contribution under the Act.

20. After giving thoughtful consideration to the above citations and the arguments advanced by Mr. Singhvi, I am of the opinion that the Managing Director or the Director are not the ''principal employer'' as defined in Section 2(17) and Section 40 of the Act. It cannot be said that by virtue of being Managing Director he had the ultimate control over the affairs of the factory, which is owned by the Company. Actually the Manager of the Company has complete control over the affairs and he is the person who recovers contribution from the employees. He is also responsible for keeping the contribution cards and for sending them to the E.S.I. Corporation as required under Regulation-26 of the Regulations. The Managing Director, therefore, cannot be said to be the principal employer as defined in Section 2(17) and Section 40 of the Act and he cannot be prosecuted for the violation of Section 40 of the Act and Regulation-26 of the Regulations. The conviction of the petitioner, therefore, is not correct and the order of the learned Chief Judicial Magistrate cannot be maintained.

21. The result is that the revision petition are accepted, the conviction of the petitioner in both the cases No. 49/75 and 281/75 is set aside, and he "is acquitted from the charge levelled against him. Fine, if paid, shall be refunded in both the cases. The petitioner is on bail and he need not surrender to the bail bonds. The bail bonds are hereby cancelled.

