

(1997) 08 CAL CK 0030
In the Calcutta High Court
Case No : Criminal R. No. 2339 of 1991

Nathani H.P. and Others

APPELLANT

Vs

Employees" State Insurance Corporation

RESPONDENT

Date of Decision : 21-08-1997

Acts Referred:

Constitution of India, 1950 — Article 20(1)
Criminal Procedure Code, 1973 (CrPC) — Section 211(7)
Employees State Insurance Act, 1948 — Section 2(17), 85A, 86A(1)

Citation : (1998) 79 FLR 426 : (1998) 1 LLJ 922

Hon'ble Judges : Dibyendu Bhusan Dutta, J

Bench : Single Bench

Advocate : Subal Moitra, Subrata Bose, Dipak Roy and Amitava Ganguly, for the Appellant;

Final Decision : Dismissed

Judgement

Dibyendu Bhusan Dutta, J.—The instant revisional application under Sections 401 and 482 of the Criminal Procedure Code is for quashing of the criminal proceeding in Case No. C/1227/1991 pending in the Court of Chief Metropolitan Magistrate, Calcutta.

2. The impugned proceeding was instituted under the Employees" State Insurance Act, 1948 on the basis of a written complaint lodged by a State Insurance Inspector against a company namely M/s. Shiva Glass Works Company Ltd. and three of its Directors including the Managing Director and Manager of its factory at 128, B.T.Road, Calcutta.

3. The provisions of the Employees" State Insurance Act and the regulations framed thereunder are applicable to the said factory. Under the Act and the regulations, every principal employer is required to pay contributions in respect of every employee within 21 days of the last day of the month in which the contribution falls due and to submit return of contributions in form 6 in quadruplicate along with the receipted copies of challans for the amounts

deposited with the bank within 42 days from the date of expiry of each contribution period.

4. The complainant's case is that there was failure to pay contributions and to submit relevant returns in respect of the employees working under the above company for the period of contribution from July 1990 to September 1990 expiring with the month of September 1990 as required under the provisions of ESI Act and the regulations. The three Directors and Manager of the Company against whom the complaint was tiled were in charge of and responsible to the Company for the conduct of the business of the Company as well as its factory and that the Company as well as the said Directors and Manager were the principal employers within the meaning of Sub-section (17) of Section 2 of the ESI Act in respect of the factory of the Company. The Company as well as the said Directors and Manager committed the offences punishable under Sections 85(a), (e) and (g) of the ESI Act. It is the further case of the complainant that the Managing Director of the Company against whom the present complaint has been filed was previously convicted u/s 85(g) on January 21, 1976 by the Court of Metropolitan Magistrate, Calcutta for the default in submission of contribution cards for the contribution periods expiring on January 25, 1975 and March 29, 1975 and as such, the said Managing Director is liable for the enhanced punishment u/s 85A of the Act.

5. The learned. Magistrate took cognizance upon this complaint and issued process against the Company, its Directors and the Manager of the factory.

6. Only the three Directors have come up in the instant revision for quashing the above prosecution.

7. Mr. Subrata Bose, appearing for the revisionists, made the following points: First, it was contended that the impugned prosecution is not at all maintainable in law in view of the un-reported decision of Justice Ajit Kr. Nayek, as His Lordship then was, pronounced on April 3, 1991 in Criminal Revision No. 1200 of 1985. In elaborating this point, Mr. Bose contended that a similar prosecution in case No. C/1696 of 1980 was launched at the instance of Employees' State Insurance Corporation against the two Directors of the Company, Shiva Glass Works Company Ltd. and the then Manager of its factory on the allegation that the said two Directors and the Manager as principal employers failed to submit contribution cards for the period from November 24, 1979 to January 26, 1980 expiring on January 5, 1980 and March 7, 1980 and made themselves liable for prosecution u/s 85(g) of the ESI Act. The defence was that the accused persons were not principal employers in respect of the factory and, as such, were not liable for the acts and omissions for which the prosecution was launched. The trying Magistrate was of the view that they were principal employers and accordingly, found them guilty of the offence and convicted and sentenced them accordingly. The matter was brought before the appellate Court in the Appeal No. 34 of 1984 in the Court of Chief Judge, City Civil Court, Calcutta. The appellate Court upheld the conviction and the two Directors then preferred the relevant

criminal revision before this Court. In the revision, His Lordship was pleased to hold that whenever there is a Manager for the factory of a Company, the Directors could not be principal employers and the order of conviction was accordingly set aside in the said revision. Mr. Bose accordingly relies on the said decision and argues that in view of this decision, the petitioners being Directors of the Company cannot be termed as principal employers within the meaning of Section 2(17) of the ESI Act particularly when it is also the complainant's case here that there is a Manager of the factory and as such, the impugned prosecution is liable to be quashed as against the petitioners.

8. The next point that was urged by Mr. Bose was that the provisions of enhanced punishment u/s 85A for the Managing Director, that is to say, the Petitioner No. 1 by reason of his previous conviction on January 21, 1976 in complaint case No. C/1174 of 1975 for the contribution periods expiring on January 25, 1975 and March 29, 1975 cannot be invoked here for framing charge thereunder against the Petitioner No. 1 in view of the prohibition contained in Clause (1) of Article 20 of the Constitution because of the fact that this section was inserted by Act 38 of 1975 with effect from September 1, 1975 long after the expiry of the relevant contribution periods on January 25, 1975 and March 29, 1975.

8-A. Mr. Subal Moitra, appearing for the complainant opposite party, submitted that the unreported decision relied on by Mr. Bose will be of no avail to the petitioners in view of the change of law effected by incorporation of Section 86A in the ESI Act. It is further submitted by Mr. Moitra that the present case is distinguishable from the case covered by the unreported decision on other facts as well apart from the question of change of law by virtue of Section 86A of the Act. As regards the question of framing of charge u/s 85A against the petitioner No. 1, Mr. Moitra contended that in the facts and circumstances of this case, there is no scope for the question of enhanced punishment u/s 85A as against the petitioner No. 1 being hit by the mischief of Article 20.

9. Clause (a) of Section 85 of the Employees' State Insurance Act, 1948 provides for punishment for failure by any person to pay any contribution which under the Act he is liable to pay, while Clause (e) provides for punishment for failure or refusal by any person to submit any return required by the regulations. Clause (g) of Section 85, on the other hand, is attracted whenever there is 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.

Section 39 requires the contribution payable under this Act in respect of an employee to be paid to the Corporation and provides that the contributions shall fall due on such date as may be specified in the regulations. Section 40 makes the principal employer liable to pay the contributions. Section 42 makes the contribution payable by the principal employer for each wage period. Section 44 makes it obligatory on the part of every principal employer to submit to the Corporation such returns in such forms containing such particulars relating to

persons employed by him or to any factory in respect of which he is the principal employer as may be specified in the regulations made in this behalf. Regulation No. 26 of the ESI (General) Regulations, 1950 requires every employer to send a return of contributions in Form 6 in quadruplicate along with the receipted copies or challans for the amounts deposited with the bank to the appropriate office by registered post or messenger, in respect of all employees for whom contributions were payable in a contribution period, so as to reach that office within 42 days of the termination of contribution period to which it relates, while under Regulation 31 of the said Regulations, an employer who is liable to pay contributions in respect of any employee shall pay those contributions within 21 days of the last day of the calendar month in which the contributions fall due.

10. The impugned prosecution is evidently for contravention of Regulations 26 and 31 of the ESI (General) Regulations, 1950. The expression "employer" appearing in the said two Regulations is defined in clause (g) of Regulation 2 of these Regulations and according to the said definition, "employer" means the principal employer as defined in the Act. The principal employer is defined in the Act in Section 2(17). According to Section 2(17), "principal employer" means 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 a manager of the factory under the Factories Act, the person so named". On a plain reading of Clause (1) of Sub-section (17) of Section 2 of the Employees' State Insurance Act, 1948, it becomes clear that the expression "principal employer" in relation to a factory, comprises four categories of persons namely (i) the owner or occupier of the factory, (ii) the managing agent of such owner or occupier, (iii) the legal representatives of a deceased owner or occupier, and (iv) the manager of the factory, where a person has been so named. According to Sub-section (15) of Section 2 of the Act, "occupier of the factory" shall have the meaning assigned to it in the Factories Act, 1948. In the Factories Act, the meaning of the term "occupier of a factory" has been defined in Clause (n) of Section 2 of the Act. According to Section 2(n), the occupier of the factory means a person who has ultimate control over the affairs of the factory. A proviso was added by Amendment of 1987 and according to Clause (ii) of this proviso, in the case of a company, any one of the Directors shall be deemed to be the occupier. In other words, the plain meaning of the term "occupier of a factory" would at once suggest that any person who has ultimate control over the affairs of the factory is an occupier of the factory and that in the case of a company, each of its Directors is also occupier of its factory by deeming fiction.

11. The unreported decision cited by Mr. Bose arose out of the case No. C/1696 of the year 1980. The failure to submit the contribution cards, in that case, related to the periods expiring on November 25, 1979 and January 26, 1980 and the relevant dates for compliance in relation to the said contribution periods expired on January 5, 1980 and March 7, 1980 respectively. It is significant to point out here that the offences involved in the prosecution in that case

(C/1696/1980) were committed in the year 1980, long before the incorporation of the aforesaid proviso to Section 2(n) of the Factories Act so as to include the directors within the meaning of occupier of the factory by deeming fiction. In other words, no Director, at the material point of time could be deemed to be an occupier of a factory merely because he is a Director of the company owning the factory until and unless he had ultimate control over the affairs of the factory. The question as to whether a person has ultimate control over the affairs of a factory is undoubtedly a question of fact to be decided on the facts and circumstances of each particular case. In the unreported decision cited by Mr. Bose, a Division Bench decision of our High Court reported in 1978 CHN 444, Bidyut Kr. Seth v. Sattesh Ch. Bagchi was relied upon. The said Division Bench decision was pronounced in the year 1978 when the 1987 amendment incorporating the proviso to Section 2(n) of the Factories Act was yet to be brought into effect. But in our case, the contribution periods related to a time when the said proviso had already been made a part of the Section 2(n) of the Factories Act. This is one reason which sufficiently distinguishes the unreported decision from our case and makes it inapplicable for the purpose of ascertaining whether a Director of a company as such is an occupier of a factory within the meaning of Section 2(n) of the Factories Act so as to be termed as a principal employer within the meaning of Section 2(17) of the ESI Act.

12. There are other reasons as well for which this decision can be of no avail to the present petitioners. A copy of the relevant petition of complaint which gave rise to the case No. C1696 of 1980 out of which the unreported decision arose was filed by Mr. Moitra and it was not disputed on behalf of the petitioners that the said copy represented the true copy of the complaint that was filed in that case. If we go by this complaint, we will find that in the said case, unlike our case, it was not at all averred in the petition of complaint that the Directors complained against were, in charge of and were in any way, responsible to the company for the conduct of its business. There was also no allegation in the said complaint to the effect that the concerned Directors were having any control over the affairs of the factory so as to bring them within the meaning of the term occupier of a factory", as it then stood. Then again, in the earlier complaint case, there was a full-fledged trial which culminated in the conviction of the concerned Directors and it will be revealed from the certified copy of the unreported decision in criminal revision 1200 of 1985 that there was no evidence on record in that case to suggest as to who were the persons in ultimate control over the affairs of the factory and that the absence of any such evidence as also of any specific averment on the point in the complaint did constitute a factor that weighed with His Lordship in holding that the concerned Directors were not principal employers within the meaning of Section 2(17) of the ESI Act.

The impugned case with which we are presently concerned in the instant revision is at its preliminary stage and is yet to reach the stage when the trial is to begin. So the question, of any evidence being led by either party has not yet arisen. Moreover, the offence involved here can be said to have been committed by a

company because it is the company which owns the factory and is a principal employer within the meaning of Section 2(17) of the ESI Act. Sub-section (1) of Section 86A provides that if the person committed an offence under the Act is a company, every person, who at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The Section was inserted by Act 29 of 1989 w.e.f. October 20, 1989 and is applicable to the present case and not to the earlier case on which Mr. Bose places his reliance. In the present complaint, it has been categorically averred that the petitioners were at all material times persons in charge of and were responsible to the company for the conduct of the business of the company and as such, were principal employers in respect of the factory of the company within the meaning of Section 2(17) of the Act. Thus, the allegations made in the complaint, ex facie make the Directors of the company liable to be proceeded against by virtue of Section 86A of the Act. The question whether they were really in charge of and responsible to the company for the conduct of the business of the company is a question of fact which is to be gone into only during the trial when the evidence is led by the parties.

13. Thus, for the reasons stated above, the interpretation that was made by His Lordship in the unreported decision referred to above on the question as to whether or not the then Directors of the company at the material point of time were principal employers within the meaning of Section 2(17) of the ESI Act cannot hold good in relation to the present prosecution against the Directors of the Company. In other words, the unreported decision in Criminal Revision 1200 of 1985 cannot be of any avail whatsoever for the petitioners in assailing the maintainability of the present prosecution.

14. Mr. Bose wanted to argue that Sub-section (1) of Section 86A will not render the petitioners liable for this prosecution in view of the proviso to Sub-section (1) of Section 86A. The said proviso constitutes an exception to what is provided for in Sub-section (1) of Section 86A and this exception will be attracted only when the person liable to be proceeded against under Sub-section (1) proves that the offence is committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. Mr. Bose argued that the unreported decision cited by him constitutes the proof of the exception as contemplated under the said proviso. I do not really find any merit in such an argument. The exception contemplated under the proviso to Sub-section(1) of Section 86A will come into operation only when the petitioners prove that the offence was committed without their knowledge or that they exercised all due diligence to prevent the commission of the offences for which the present prosecution has been launched. What is required to be proved for bringing into operation the exception in favour of the accused petitioners is purely a question of fact which is to be proved by leading evidence during the trial and it is really not understood how it can be argued that the said fact stands already proved by virtue of the

unreported decision pronounced on April 3, 1991. I have already observed that Section 86A was yet to be incorporated in the Act at the time when the prosecution to which the unreported decision related was launched. So, in the unreported case, there could be no scope or occasion to prove or to decide the fact as envisaged by the proviso to Sub-section (1) of Section 86A. There is thus no scope for arguing at this stage that the present case falls within the exception as provided for in the proviso to Sub-section (1) of Section 86A of the Act.

15. Clause (1) of Article 20 provides for prohibition against retrospective criminal law. What is prohibited under Clause (1) is only conviction or sentence under an ex-post-facto law. It provides for two safeguards namely, first, that no one shall be punished for an act which was not an offence under the law in force when it was committed and secondly, that no one shall be subjected to a greater penalty for an offence than what was provided under the law in force when the offence was committed. Section 85A which was inserted in the ESI Act by Act 38 of 1975 w.e.f. September 1, 1975 provides for enhanced punishment for a person who having been convicted by a Court of an offence punishable under this Act commits the same offence again. The petitioner No. 1 is alleged to have been previously convicted on January 21, 1976 of an offence punishable u/s 85(g) of the ESI Act for the default in submission of contribution cards for the contribution periods that expired on January 25, 1975 and March 29, 1975. The previous offence of which the petitioner No. 1 was already convicted on January 21, 1976 might have related to a period prior to the coming into operation of Section 85A, but then it related to a period when the particular law namely Section 85(g) of the ESI Act which created the offence was very much in force. The subsequent offence for the commission of which provisions of enhanced punishment as laid down in Section 85A, are sought to be pressed into service on behalf of the prosecution as against the petitioner No. 1, was committed at a time when Section 85A, was already in force. As such, it is really not understood how invocation of Section 85A, in the present case could be hit by the mischief of Article 20(1) of the Constitution as canvassed by Mr. Bose.

16. Sub-section (7) of Section 211 of the Code of Criminal Procedure provides that if the accused having been previously convicted of any offence is liable, by reason of such conviction, to enhanced punishment, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge and if such statement has been omitted, the Court may add it at any time before such sentence is passed. The charge in the instant case is yet to be framed and as such, the question of compliance with the provisions of this sub-section will arise only at the appropriate time.

17. Going by the petition of complainant, on the basis of which the impugned prosecution has been launched against the petitioners and the petitioners were summoned by the learned Magistrate, I do not find any ground whatsoever to

interfere with the impugned prosecution. In the result, the revisional application fails miserably.

18. The revisional application is accordingly dismissed. The ad interim stay granted by order dated November 20, 1991 is hereby vacated. Let this order be communicated to the Court below forthwith so that the impugned criminal proceedings could be proceeded with by the Court below in accordance with law as expeditiously as possible.