

(1992) 04 CAL CK 0010
In the Calcutta High Court

North Brook Jute Mills Ltd.

APPELLANT

Vs

Balai Chandra Paul

RESPONDENT

Date of Decision : 30-04-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Employees State Insurance Act, 1948 — Section 2, 2(15), 2(16)(iii), 2(17), 2(17)(i)
Factories Act, 1948 — Section 2(n)
Penal Code, 1860 (IPC) — Section 405

Citation : 97 CWN 29

Hon'ble Judges : Gitesh Ranjan Bhattacharjee, J

Bench : Single Bench

Advocate : S.C. Chakraborty, for the Appellant; Subal Maitra, for the Respondent

Final Decision : Dismissed

Judgement

Gitesh Ranjan Bhattacharjee, J.—This is an application u/s 482 Cr.P.C. for quashing the criminal proceeding being proceeding NO. C2182 of 1989 of the court of the Learned Chief Metropolitan Magistrate Calcutta. The said criminal proceeding was started on the basis of a complaint filed by the Inspector Employees State Insurance Act, 1948 (E.S.I. Act, 1948) relating to payment of Co of contribution and submission of return in respect of a factory covered under the said Act. In the petition of complaint the Company M/S. The North Brook Jute Mills Ltd. has been made the accused No. 1 and J.M. Roy who is a Director of the said Company has been made the accused No. 2 is the Manager. This revisional application has been filed by the accused Nos. 1 and 2. It is Contended on behalf of the petitioners that the petition of complaint does not contain any allegation, particularly in respect of the petitioner No. 2, J.M. Roy to show that any offence was at all Cognizance taken by the Learned Chief Metropolitan Magistrate was bad and therefore the Criminal proceeding is liable to be quashed. In paragraph 2 of the petition of Company under the name and style of M/S. The North Broke Jute Mills Ltd. It is also stated therein that the company has got a factory at the address given therein and the said factory is covered under the purview of the

E.S.I. Act. 1948. Accused No. 2, J.M. Roy is stated to be the Director and at all material time responsible to the company for the conduct of its business as well as its factory and the said Director and the Manager including the said company are the principal employers within the meaning of Section 2(17) of the E.S.I. Act 1948 read with Section 86-A of the said Act and are liable for Compliance in respect of their said factory with the provision of the E.S.I. Act and the Regulation framed thereunder. It has been argued on behalf of the petitioners that these averments in the petitions of Complaint are not sufficient to justify taking of Cognizance. The Learned Advocate for the petitioners cited the decision of a Division Bench of this Court in Bhuban Mohan vs. The State, 1990(VI) Crimes 416. That was a case under the Employees provident fund and Miscellaneous Provisions Act, 1952 (E.P.F. & M.P. Act 1952) which came up before this court against the conviction and sentence passed and affirmed by the court below. It was observed in that case that apart from the allegation made in the complaint that the petitioners being employers during the relevant period were in charge of the establishment and were responsible to it for the conduct of its business. No evidence had been adduced as to how the petitioners or any of them in fact participated in the day to day running of the business. In para, of the said decision it was further observed that in the absence of evidence to show that the accused persons were not only such persons who were in charge of the company but they were responsible to the company in the conduct of its day to day business the conviction of the petitioners could not be sustained. The said decision is however not applicable to the present case. In the present case the question is whether the prima facie averments contained in the petition of complaint are sufficient to justify the taking of cognizance by the Chief Metropolitan Magistrate but in the cited decision the question that was considered was whether the evidence that was adduced in the case during trial was sufficient to justify the conviction of the petitioners. In our present case the question of sufficiency of evidence does not arise at this stage.

2. The decision that was next relied upon by the Learned advocate for the petitioners is a decision of a Division Bench of this Court in K.N. Genda vs. The state 982 (II) C.H.N. 223 one of the two cases under consideration in that decision was a prosecution under the E.S.I. Act and the other was a prosecution under the E.P.F. and M.P. Act in the case under the E.S.I. Act the petition of complaint it seems contained an averment in paragraph 2 that the accused persons were the principal employers of M/S. Calco Engineering works (vide page 227). There was also an averment in paragraph 3 that the principal employers were required to pay the employees share of contribution. In paragraph 4 it was stated that the accused persons had committed criminal breach of trust within the meaning of explanation 2 of Section 405 of the Indian Penal Code. In view of this state of affairs when there was nothing more in the petition of complaint than the statement that the accused persons were principal employers of the establishment the Division Bench held that there was no sufficient averment in the complaint to connect the accused with the alleged offence and on this ground

the proceeding was liable to be quashed. In the case under the E.P.F. and M.P. Act, it seems, it was stated in paragraph 3 of the complaint simply that the accused Nos. 2 to 5 at all material time were the persons in charge of the establishment and were responsible to it for the conduct of its business (vide Page 232). These averments were however held to be not sufficient to connect the accused with the alleged offence and the proceeding was quashed. It does not appear that any of the two complaints contained any averment that the concerned accused were directors. The position, of a director as occupier of factory with reference to the definition of principal employer therefore did not fall for consideration in that reported decision.

3. The learned Advocate for the petitioners also relied on as single Bench decision of this Court reported in 1990 C Cr.LR (Cal) 44 (Vidyasagar Kejriwal Vs. E.S.I. Corporation). That was also a prosecution under the Employees State Insurance Act 1948. There it was stated in the complaint that M/S Bharat Udyog were an establishment as defined in the E.S.I. Act and the accused persons being its partners were the principal employers as defined in Clause (17) of Section 2 of the said Act in respect of the said establishment. There is no doubt, one who being a principal employer fails to comply with the relevant provisions of the E.S.I. Act will be liable to prosecution and punishment under the said Act. The term "principal employer" has been defined in three different ways in Section 2(17) of the E.S.I. Act. The definition u/s 2(17) (i) relates to a factory, that u/s 2(17) (ii) relates to an establishment under the control of any Government department; and the third one u/s 2(17) (iii) relates to any other establishment. M/S. Bharat Udyog was a partnership firm and not a factory. It was also not an establishment under the control of any Government department. Therefore the definition of "principal employer" as contained in Section 2(17) (iii) was applicable to the establishment. "Principal employer" as defined in said Section 2(17) (iii) means "any person responsible for the supervision and control of the establishment". In that back-ground the single Bench made the following observation in the said decision in Vidyasagar Kejriwal vs. E.S.I. Corporation (Supra) at page 251:-

Or in other words to proceed against the principal employers falling in the category of Section 2(16) (iii) it has got to be alleged that those persons are responsible for the supervision and control of the establishment. Without making such allegations in the petition of complaint, the principal employers of the aforesaid category cannot be proceeded against. In the instant case the accused persons were proceeded against as principal employers simply because they are the partners of the said establishment i.e. M/S. Bharat Udyog. It has not been alleged therein that the accused persons were responsible for the supervision and control of the establishment. In absence of such allegations in the petition of complaint, the Learned Judicial Magistrate was not justified in taking cognizance against the accused persons.

4. As we have already seen in our present case the establishment is a factory

and consequently the definition of "principal employer" as contained in Section 2(17) (i) is applicable to this case and not the one contained in Section 2(17)(iii) which was the subject matter of consideration in the said reported decision. The said decision is therefore not applicable to the facts of the present case.

5. On the other hand, the Learned Advocate for the respondent has relied upon certain decisions which are discussed hereafter. It has been held by the Supreme Court in *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, that proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are, without adding or subtracting any thing, if no offence is made out then the High Court will be justified in quashing the proceedings. That case was in connection with a prosecution started on the basis of a complaint failed for violation of the provisions of the prevention of Food adulteration Act in respect of "Morton Toffees" manufactured by the company M/s. Upper Ganges sugar Mills. In the complaint it was stated that the accused No. 3 was the Manager of the accused company and the accused Nos. 4 to 7 were the Directors and as such they were in charge of and responsible for the conduct of the business of the accused No. 2 at the time of sampling. The question arose whether taking the complaint as a whole it could not be said that no offence was made out or that the facts in the complaint did not constitute any offence against some of the accused persons. So far as the Manager (accused No. 2) was concerned the Supreme Court observed at page 70 that it was not and could not be reasonably argued that no case was made out against him because from the very nature of his duties, it was manifest that he must be in the knowledge about the affairs of the sale and manufacture of the disputed sample. The Supreme Court did not approve of quashing of the proceeding against the Manager of the Company as the Court was of the view that the accused concerned who was the Manager of the company and therefore directly in charge of its affairs, could not fall in the same category as the Directors". It was further observed by the Supreme Court that So far as the Manager is concerned we are satisfied that from the very nature of his duties it can be safely inferred that he would undoubtedly be vicariously liable for the offence, vicarious liability being an incident of an offence under that Act". As regards the Directors there was no clear averment of the fact that the Directors were really in charge of the manufacture and responsible for the conduct of business but the words "as such used in the complaint in that connection (as earlier stated) indicated that the complainant had merely presumed that the Directors of the company must be guilty because they were holding a particular office. The Supreme Court did not endorse such presumption in the case of Directors, unlike in the case of Manager, and held that no case against the Directors had been made out ex facie on the allegations made in the complaint and the proceedings against them were held to have been rightly quashed.

6. The decision of the Supreme Court in *Kanwal Sood vs. Nawal Kishore* AIR 183

SC 158 was however different in view of the difference in allegations. That was also a prosecution under the prevention of Food Adulteration Act on the basis of a complaint. There the complaint contained averment that such and such accused were the Chairman, Managing Director and Directors respectively of the concerned Company and they were in charge of and responsible to the company for the conduct of its business at the time of commission of offence. It was held by the Supreme Court that a clear averment had (thus) been made regarding the active role played by the accused-respondents and the extent of their liability and therefore it was not a fit case for quashing the proceeding. The distinction between the said two decisions of the Supreme Court was that in the latter case the averment was made by way of a concrete and independent fact that the concerned accused persons were in charge of and responsible to the company for the conduct of its business whereas in the former case such averment was made not by way of any concrete and independent fact but by way of an unwarranted presumption drawn from the fact that the persons concerned were Directors and "as such" they were in charge of and responsible for the conduct of the business. While in the case of Directors such presumption was found to be unwarranted. In the case of Manager the presumption was rather found maintainable. In none of those two decisions however the Supreme Court was, as this Court in this case has been called upon, to consider whether a Director of a company would fall within the meaning of "principal employer" in respect of its factory in view of the specific provisions of the E.S.I. Act.

7. The next case relied upon on behalf of the respondent is a Single Bench decision of this Court reported in 1979 (1) CHN 208 (Amp Pal Choudhury vs. Satyes Bagchi). That was also a prosecution under the E.S.I. Act. It was observed in that decision that Section 2(17) (i) of the E.S.I. Act shows that the principal employer of the factory means the owner or occupier of the factory and includes the Manager and the Managing Agent as well and that, the expression is wide enough to make the Director principal employer within the meaning of Section 2(17)(i). According to the said decision the appointment of a Manager does not affect the status of the Director as principal employer. In that connection it was observed in that decision that such expression is not disjunctive in respect of a Manager or Director and so, if the Managing Agent and a Manager had been appointed, then all of them would simultaneously be the principal employer within the meaning of Section 2(17) of the Act. So we find that according to this decision a Director is an occupier of a factory and is therefore a principal employer in terms of Section 2(17) of the E.S.I. Act.

8. The last case cited on behalf of the respondent is a Division Bench decision of this Court reported in 1978 CHN 444 (Bidyut Kumar Sett vs. Satyes Chandra Bagchi). That was also a prosecution under the E.S.I. Act for noncompliance in respect of a factory. It was held by the Division Bench in that decision that a Director of a company can be brought within the meaning of the word "occupier" as mentioned in Section 2(17) of the Act, as according to Section 2(n) of the Factories Act occupier is a person who like a Director has ultimate control over

the affairs of the factory.

9. We thus find that both the decision of this court reported in 1978 CHN 444 (supra) and 1979 (1) CHN 208 (Supra) upheld the maintainability of prosecution of a Director of a company as "occupier" in respect of its factory, on the ground that occupier of a factory falls within the definition of "principal employer" as contained in Section 2(17) of the E.S.I. Act. The definition of "principal employer" in respect of a factory as contained in Section 2(17) (i) of the E.S.I. Act is thus:-

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.

10. Therefore the occupier of a factory is principal employer in respect of the factory. Section 2(15) of the E.S.I. Act says that the "occupier" of the factory shall have the meaning assigned to it in the Factories Act, 1948; (63 of 1948). Therefore the question whether a person is occupier of a factory so as to fall within the definition of "principal employer" u/s 2(17) of the E.S.I. Act has to be decided by the test of the definition of "occupier" as contained in Section 2(n) of the Factories Act, 1948 the relevant portion of which runs thus: -

(n) "occupier" of a factory means the person, who has ultimate control over the affairs of the factory, provided that -***

(ii) in the case of a company any one of the directors shall be deemed to be the occupier.

Therefore in terms of the said definition a director of the company is, by legislative mandate, deemed to be the occupier of the factory.

11. It may be interesting to note that at the time when the aforesaid two decisions of this court were rendered, namely, the decisions reported in 1978 CHN 444 (Supra) and 1979 (1) CHN 208 (Supra), the definition of "occupier" in sec. 2(n) of the Factories Act, 1984 was not exactly the same as it is now. At that time the definition of "occupier" of a factory in Sec. 2(n) of the Factories Act, 1948 was this :-

Occupier" of a factory means the person, who has ultimate control over the affairs of the factory, and where the said affairs are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory.

12. It may be noticed that the said definition did not expressly speak of director. Even it was held in the above mentioned two decisions of this court that a director of the company would come within the definition of "principal employer" u/s 2(17) (i) of the E.S.I. Act. The said definition of "occupier" of a factory in Section 2(n) of the Factories Act, 1948 has been however modified by the Act 20

of 1987 with effect from 1-12-87 and the relevant portion of the modified text of the said definition which now prevails has already been reproduced earlier. As we have seen the prevailing definition after such modification specifically makes the director the occupier of the factory by the legislative insertion of a deeming provision in the definition of "occupier" of a factory in Section 2(n) of the Factories Act, 1948. In the petition of complaint there is the averment that the company has got a factory at the given address and the factory is covered under the E.S.I. Act. There is also an averment that the petitioner No. 2 accused No. 2 is the Director and at all material time responsible to the company for the conduct of its business as well as its factory and all the accused persons as "principal employer" are liable for compliance in respect of the said factory with the provisions of the E.S.I. Act and Regulations framed thereunder. These averments read in the light of the provisions of Section 2(17) (i) of the E.S.I. Act and the definition of "occupier" of a factory as given in Section 2(n) of the Factories Act, 1948 and in the light of the decisions of this Court reported in 1978 CHN 444 (Supra) and 1979 (1) CHN 108 (supra) prima facie make out a case for proceeding against the petitioner No. 2/accused No. 2 as "principal employer falling within the definition of the term as given in Section 2(17) (i) of the E.S.I. Act read with the definition of "occupier" as given in Section 2(n) ii) of the Factories Act, 1948. The Criminal Revision is, therefore, dismissed.