
(2008) 01 MAD CK 0221
In the Madras High Court
Case No : C.O.P. No. 1765 of 2005

Pon Venkatesh K. and Another	Vs	APPELLANT
Employees' State Insurance Corporation		RESPONDENT

Date of Decision : 08-01-2008

Acts Referred:

Employees State Insurance Act, 1948 — Section 40, 45A, 85

Citation : (2009) 2 LLJ 675

Hon'ble Judges : S. Nagamuthu, J

Bench : Single Bench

Advocate : S. Alagar Raja, for the Appellant; J.S. Murali, for the Respondent

Final Decision : Allowed

Judgement

S. Nagamuthu, J.—The petitioners are the accused in C.C. No. 484/2004 on the file of the learned Judicial Magistrate No. VI, Madurai. The respondent is the complainant in the said case and he has laid the private complaint against the petitioners for an alleged offence, said to have committed by the petitioners punishable u/s 85(a) of the Employees' State Insurance Act, 1948. The petitioners have approached this Court seeking to quash the said proceedings.

According to the allegations in the complaint, the second petitioner, factory is covered under the provisions of the Employees State Insurance Act; u/s 40 of the Act, the petitioners being the principal employer of the second petitioner, establishment is liable to pay both employer's contribution and employees' contribution. But the same was not done in time. Now a sum of Rs. 87, 838 (Rupees Eighty Seven Thousand Eight Hundred and Thirty Eight only) is due from the petitioners. Their failure to pay the contribution within the prescribed period is an offence punishable u/s 85 of the said Act. On these allegations, the respondent has filed the private complaint.

2. The case of the petitioners is that they never employed or more persons at any point of time and their establishment will not come under the provisions of

the Employees" State Insurance Act. Though a detailed representation was made to the said effect by the petitioners, the respondent passed an order u/s 45-A of the Act, holding that the second petitioner is covered under the Act and fixed the contribution.

3. Challenging the said order, the petitioners have filed E.S.I.O.P. No. 22 of 2003 before the Employees Insurance Court, Madurai and the same is pending. In an interlocutory application moved by the petitioners in I.A. No. 45/2003, the employees" Insurance Court granted stay of the order of the respondent. Though the stay order was granted on July 23, 2003, the respondent has laid the private complaint subsequently that was on March 23, 2003. When the stay order granted by the Court is in force, it is not legal for the respondent to have laid the private complaint and it is also not within the competence of the learned Judicial Magistrate to take cognisance on the said complaint. Mainly on these grounds, the petitioners have come forward with this petition.

4. I have heard, the learned Counsel appearing for the petitioners, the learned Counsel appearing for the respondent and perused the records thoroughly.

5. Admittedly, the order of the respondent made u/s 45-A of the Act has been stayed by the competent Employees" Insurance Court in I.A. No. 45/2003 by order, dated July 25, 2003, and the same is still in force. When there is such an order of stay, the order made u/s 45-A of the Act is inoperative and unenforceable under law.

6. When that be so, the petitioners are not liable to pay the contribution. In this case, though, admittedly the petitioners have not paid the contribution as directed in the order passed u/s 45-A of the Act, in my considered opinion, it cannot be held to be a failure or a violation, so as to attract an offence u/s 85 of the Act. Here, the non-payment of the contribution as directed in the order u/s 45-A of the Act is pursuant to the order of stay granted by a competent Court and when that be so, the non-payment of contribution by the petitioners would not make out any offence under the Act, so as to warrant a trial. It is not proper on the part of the respondent to file the private complaint without getting the order of stay vacated by the Employees" Insurance Court.

7. However, the learned Counsel appearing for the respondent would rely on a judgment of this Court in Jayamohan v. Manager, Employees" State Insurance Corporation FJR Vol. 93 and submit that in a similar case, where also an interim stay passed by the Employees" Insurance Court was in force, this Court has held that the criminal proceedings against the employer for non-payment can be proceeded with. The relevant portion of the judgment is as follows:

While such being the case of the respondent in C.C. No. 124/1995, the revision petitioners has challenged the determination of the quantum of contribution payable by him to the Employees" State Insurance Corporation, and that is why he has filed E.S.O.P. No. 2/1995 before the District Judge, Kanyakumari District at Nagercoil, u/s 45-A of the Employees" State Insurance Act. Therefore, the

questions involved in the civil matter in E.S.O.P. No. 2/1995 are not identical proceedings in C.C. No. 124/1995 are not identical and they are distinct and different questions to be answered by different Courts of law. A mere obtaining of interim stay by the revision petition in I.A. No. 447/1995 in E.S.O.P. No. 2/1995 will not prevent the criminal Court from proceeding with the case in C.C. No. 124/1995 for the simple reason that the criminal Court or the Magistrate's Court cannot be bound by the order passed by the Civil Court, much more so when the criminal Court is not a party to the stay proceedings in I.A. No. 447/1995 in E.S.O.P. No. 2/1995 or the obtaining of interim stay in I.A. No. 447/1995 is not a bar to prosecute or to continue the criminal proceedings in C.C. No. 124/1995.

8. The view expressed in the above judgment is not applicable to the facts of the present case. In the reported case, on the date when the prosecution was launched, there was no stay order granted by the competent Employees' Insurance Court. Though, there was no stay, the employer did not pay the contribution in time. Therefore, prosecution was launched and cognisance was taken. The learned Judge, therefore, held that there was nothing illegal in taking cognisance on the, private complaint filed, since the stay order granted was only subsequent to the launching of the prosecution. In that view of the matter, the learned judge was of the view that the prosecution can go on. But, in the case on hand, the very operation of the order made u/s 45-A of the Act was stayed even before the launching of the private complainant. Thus, when there is such an order of stay granted by a competent Court, it shall go without saying that the order is not operative and therefore, the petitioners are not liable to pay contribution and thus their failure to pay the contribution is not an offence.

9. The learned Counsel appearing for the respondent would rely on an unreported judgment of this Court in Crl. O.P. Nos. 20253 to 20256/2001, wherein a learned single Judge of this Court has expressed that:

Since the prosecution was launched by the Inspector of Insurance before the competent Court, that cannot be stayed merely because the accused approached the Employees' Insurance Court for a declaration; later is more or less a civil proceeding and it cannot prevent the prosecution nor can it postpone the prosecution.

I have gone through the said judgment carefully. But, the said view is not applicable to the facts of the present case for the reason that in the said case, there was no stay granted by the Employees' Insurance Court as it has been done in the case on hand. Since, the order made u/s 45-A of the Act was still in force in the said case, the learned Judge has expressed the view that prosecution is maintainable, since the failure of the accused in that case to pay the contribution amounts to an offence.

10. As narrated above, in this case, stay order was granted by the Employees Insurance Court on July 23, 2003, and the sanction order to prosecute the

petitioners itself, was issued only on February 26, 2004 and the prosecution was launched much later on April 12, 2004. Thus, in my considered opinion, there is no prima facie case warranting a trial against the petitioners and so the entire proceeding is liable to be quashed.

11. In the result, this criminal original petition is allowed and the case in C.C. No. 484/2004 on the file of the learned Judicial Magistrate VI, Madurai is hereby quashed.

However, it is made clear that this order will not preclude the respondent from launching a fresh prosecution in the event of the stay order granted by the Employees' Insurance Court is vacated.