(1986) 12 MAD CK 0046

In the Madras High Court

Case No : Criminal M.P. No. 10566 of 1986

R. Subramaniam, Proprietor, Leo Mercantile Corporation — APPELLANT

Vs

State — RESPONDENT

Date of Decision : 09-12-1986

Acts Referred:
Employees State Insurance Act, 1948 — Section 40

Citation : (1986) 12 MAD CK 0046

Hon'ble Judges : Nntaraian, J

Bench : Single Bench

Advocate : Ramasubramaniam for M/s. Ram and Ram, for the Appellant; P. Rajamanickam, Central Government Publie Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Nntaraian, J.—The accused in C.C. No. 2810 of 1986 on the file of the Metropolitan Magistrate, Saidapet, has preferred this petition under S. 482. Crl. P.C., to quash the said proceeding against him. The respondent, namely, Employees'' State Insurance Corporation, Madras, filed a complaint against the petitioner under S. 85(a) of the Employed State Insurance Act, 1948. The allegations stated In the complaint are that the petitioner herein is liable to pay under S. 40 of the Employees? State Insurance Act both the contribution; namely, employer''s share of contribution and employees'' contribution in respect of every employee in the first instance, that he is required to submit to the Corporation the returns and particulars and that he is to maintain Registers as per S.44 of the ESI Act read with various provisions of the Employees'' State Insurance (General) Regulations, 1930. It is further alleged that every such contribution is payable under the Act within 21 days from the expiry of the ''Wage period'' in which the contribution fell due or within the stipulated period as laid down in the order issued by the competent authority under S. 45A of the Act. Since the petitioner accused failed to comply with the statutory obligation, the complainant, namely, the respondent, determined the contribution payable for the period from 1st April, 1977 to 3/84 as Rs. 7,411.50 by its order dated 6th November, 1985. The accused failed to comply with the statutory order dated 6th November, 1985 issued under the provisions of S. 45A of the Act and that he has committed an offence under S. 85(a) of the Act punishable under S. 85(i) of the Act. After obtaining sanction from the Regional Director, the said complaint is filed.

2. The contention of the petitioner in this petition is that as per S. 86(3) of the Employees'' State Insurance Act, 1948, no court shall take cognizance of any offence under this Act except on a complaint made in writing in respect thereof within six months of the date from which the offence is alleged to have been committed. In the instant case, the allegation is that the contribution 19 payable for the period 1st April, 1977 to March, 1984, for which the complaint was filed only on 5th May, 1986. Since the complaint as filed after a period of two years from the date of occurance, it is barred by limitation. Further, the amount due for each ''wage period'' has not been mentioned and the complaint is vague on material particulars.'' On the other hand, Mr. P. Rajamanickam, the Learned Counsel for the respondent, submitted that since the petitioner failed to furnish the returns, the amount was determined under S. 45A only on 6th November, 1985, that the petitioner was asked to pay the amount within 15 days of the service of the notice, that this complaint as filed within six months thereafter and that, hence, the complaint is in time.

3. For proper appreciation of the respective contentions, it is worthwhile to extract the relevant provisions of the Employees'' State Insurance Act, 1948, (hereinafter referred to as the Act). S. 85(a) reads as follows:

Punishment for failure to pay contributions, etc. In any person :

(a) fails to pay any contribution which under this Act he is liable to pay or......

he shall be punishable

where he commits an offence under CI.(a) with imprisonment for a term which may extend to six months but;

(a) which shall not be less than three months in case of failure to pay employee''s contribution, which has been deducted by him from the employee''s wages;

(b) which shall not be less than one month, if any other case, and shall also be liable to fine which may extend to two thousand rupees, provided that the court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser terms or of fine only in lieu of imprisonment.

4. Time for payment of contribution is provided under Regulation 31 framed under the Employees'' State Insurance (General) Regulations, 1950 which reads as follows:

An employer who is liable to pay contribution in respect of any employee, shall pay those contributions within the following periods;

a. within 21 days of the last day of wage period in which the contribution falls due;

b. within 14 days of the termination of employment, irrespective of whether the employment is terminated with or without notice;

c. within 21 days after the termination of the contribution period in respect of every employee whichever period is earlier;

provided that......

Explanation ; For the purpose of this regulation the expression ''wage-period'' shall have the meaning assigned to it in Sch.I to the Act.

5. The period for which the petitioner failed to pay contribution to the Employees? State Insurance Corporation is from 1.4.1977 to 3/84. S.40 deals with the payment of contribution in the first instance by the principal employer. It is not in dispute that every such contribution is payable under the Act by remitting the employer''s and employees? share of contribution within 21 days from the expiry of the wage-period in which the contribution fell due as mentioned in para 7 of the complaint. Admittedly this complaint it filed after a lapse of two years from the wage period. In this connection, the Learned Counsel for the petitioner drew my attention to the decision of this Court reported in V. Seetha Vs. Employees'' State Insurance Corporation, , where Cokulakrishnan J., (as he then was) held:

Non-payment of contribution has to be calculated with reference to each particular wage-period and it cannot be construed as a continuing offence. Crl. M.P. No. 7835 of 1976, dated 22-7-1977 (Madras) relied on.

A complaint for non-payment combined contribution for sets ended 31-7-1976 was filed on 18-1-1977.

Held, that the complaint has neither determined the amount of contribution payable in accordance with the act, nor has it made clear as to whether it is in respect of the wage-period ending or of the sets ending on a particular date. Thus the complaint itself is vague apart from the fact that except for the last wage period or atleast only after 27.6.1976, the claim for non-payment of contributions prior to 27.6.1/76 are barred by limitation. Proceedings quashed.

In the above quoted case, P.R. Gokulakrishnan, J. (as he then was) considered the scope and applicability of S.86(3) as default committed to the payment of contribution with reference to ''wage period?. The Learned Counsel for the respondent submitted that since the accused failed to comply with the statutory obligation, the respondent exercising the power conferred! under S.45A of the Act, determined the contribution only on 6.11.1985 and the said order was communicated to the petitioner with a direction to comply within the time limit stipulated therein i.e., within 15 days of the communication of the order and that that should betaken into consideration in computing the period of limitation.

6. S.45A deals with determination of contribution in certain cases. It reads as follows:

45A determination of contributions or in certain eases:

1. Wherein respect of a factory or establishment no returns, particulars, register or records are; submitted, furnished or maintained in accordance'' with the provisions of S.44 or any inspector or other official of the Corporation referred to in sub S.(2) of S.45 is obstructed by the principal or immediate employer or any other person, in exercising his functions or discharging his duties Under S.45, the corporation may, On the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment.

2. An order made by the corporation under sub-S.(1) shall be sufficient proof of the claim of the corporation under S.75 or for recovery of the amount determined by such order as an arrear of land revenue under S.45B.

S.45B reads as follows:

45B. Recovery of contributions : Any contributions payable under this Act may be recovered as an arrear of land revenue.

7. S.75 deals with matters to be decided by Employees? Insurance Court, S.44 directs the employees to furnish returns and maintain registers in certain cases. It is provided as follows:

Every principal and immediate employer, shall submit to the corporation or to such officer of the corporation as it may direct such returns in such form and containing such particulars relating to the persons employed by him or to any factory or establishment in respect of which he is the principal or immediate employer as may be specified in regulations made in this behalf.

2. Where in respect of any factory or establishment the corporation, has reason to believe that a return should have been submitted Under sub-S. (1) but has not been so submitted, the Corporation may require any person in charge of the factory or establishment to furnish such particulars as it may consider necessary for the purpose of enabling the corporation to decide whether the factory or establishment is a factory or establishment to which this act applies.

3. Every principal and immediate employer shall maintain such registers or records in respect of his factory establishment as may be required by regulations made in this behalf.

S. 45 deals with the functions and duties of the inspectors. On a careful perusal of these provisions it is seen that in cases where the employer failed to furnish returns for the purpose of enabling the corporation to decide whether the factory or establishment to which this act applies and information regarding the determination of the amount which is payable in respect of the employees of the factory or establishment, the amount determined under S. 45A is recoverable as arrears of land revenue and the same can be enforced by the Employees'' Insurance Court as provided under S. 75, but not where it is provided that the limitation starts from the date of the order of determination passed as per S. 45A of the Act. It is the duty of the corporation to determine the amount within the period of limitation and even then if the employer fails to pay he can institute proceedings. Now the present prosecution is for failure to pay the contribution within 21 days of the expiry of the wage period as contemplated under regulation 31 of the Employees'' State Insurance (''General) Regulations, 1950. Having failed to prosecute the petitioner herein within the statutory period of limitation i.e., within 6 months of the date of which he committed default in payment it cannot be said that after two years the amount was determined for the entire period of 1st April, 1977 to 3/84 and that the petitioner failed to pay the same within the period of 15 days from the date of the order and hence he can be proceeded under S. 85(a) of the Act. If the respondent has not instituted the proceedings within the statutory period of limitation, the remedy is only to proceed under S. 45B to recover as arrear of land revenue and to cake such other actions open to him. But the employer cannot be prosecuted after a lapse of so many years. The Teamed counsel for the respondent Mr. P. Rajamanickam is unable to convince me as to how he is entitled to prosecute the petitioner for the nonpayment of contribution within 21 days from the date of expiry of wage-period, from the date of the order passed under S. 45A, that too after the expiry of six months period of limitation prescribed under S.86(3) of the Act. It is clear from S.86(3) that no court shall take cognizance of any offence under this Act except on a complaint made in writing in respect thereof, within six months of the date on which the offence is alleged to have been committed. The offence alleged in this case is the failure to pay the contribution within the period i.e., within 21 days of the wage-period and not for disobeying the order Under S. 45A. It cannot be said that the amount can be determined under S.45A at any time and the limitation starts only from the date of determination under S.45A. On a careful reading of the relevant provisions of the Act, I am of the view that the limitation starts from the default committed by the petitioner for not paying the contribution within 21 days of the wage period and not from the date of determination under S. 45A of the Act. It is to be noted that since the period of limitation is prescribed as six months, the authority ought to have determined the amount for each period and then prosecute him within the said period of limitation. They cannot sleep for a period of two years and then file a complaint contending that the limitation starts only from the order of determination passed by them. There is no scope for such interpretation from S. 45A read with Ss. 85(a) and 86(3) of the Act coupled with Regulation 31 framed under the said Act. For all these reasons, I am of the view that the prosecution against the petitioner is clearly barred by limitation and as such it is liable to be quashed.

8. In the result, the petition is allowed and the prosecution against the petitioner in C.C. No 2810/86 on the file of the XI Metropolitan Magistrate, Saidapet, is hereby quashed. However, it is open to the respondent to proceed against the petitioner for recovery of the amount determined as if it is an arrear of land revenue and also through other appropriate actions open to the corporation under law.