

(1997) 06 MAD CK 0041

In the Madras High Court

Case No : Criminal Appeal No. 362 of 1988

Regional Director, Employees' State Insurance Corpn., Madras	APPELLANT
Vs	
Balasundaram and another	RESPONDENT

Date of Decision : 14-06-1997

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(17), 85, 86(1)
Factories Act, 1948 — Section 100, 2

Citation : (1997) 3 CTC 153

Hon'ble Judges : V. Kanagaraj, J

Bench : Single Bench

Advocate : P. Rajamanickam, Spl. P.P, for the Appellant;

Judgement

1. The above appeal has been preferred by the Employees' State Insurance Corporation, Madras represented by its Regional Director u/s 378 of the Code of Criminal Procedure against the judgment delivered by the Court of Second Metropolitan Magistrate, Egmore Madras-8 u/s 255(1) of Cr. P.C. in C.C. No. 11971 of 1986 dated December 31, 1987, acquitting the accused for offences charged and tried u/s 85(e) and (g) of the E.S.I. Act, 1948.

2. The facts of the case, as put by the appellant before the lower Court are that the two accused therein were the Directors of a concern called M/s. Mesral Engineering Pvt. Ltd., the factory of which is located at Aerodrome Road, Singanallur, Coimbatore-5 and the same would come under the purview of the E.S.I Act and that the said company should have submitted the Returns for the period ending with March 31, 1986 on or before April 30, 1986 to the office of the E.S.I Corporation, Madras Region, but the accused failed to submit the same resulting in the appellant Corporation preferring their complaint against the respondent/accused for an offence punishable u/s 85(e) and (g) of the said Act.

3. On being questioned, the respondent/accused having denied the offence and pleaded not guilty, trial was held by the lower Court in which, on the part of the complainant, 3 witnesses were examined as P.Ws. 1 to 3 and 2 documents were

marked as Exhibits P1 and P2 and on the part of the respondent, no witnesses got examined, nor any document marked.

4. On examination P.W. 1, Kittusamy, who had worked as Inspector of E.S.I. Corporation at Ondipudur, Coimbatore, at the relevant point of time in 1985, would depose to the effect that the Code number of the said industrial establishment was 51-7162-56, and that on September 16, 1985 he inspected the said establishment when he found that 110 employees working there and that the factory was operated by power and that the said establishment failed to submit the Returns for the period ending with March 31, 1986, which should have been submitted before the Corporation Authorities on or before April 30, 1986 and since the same had not been submitted, the case got registered by him under Exhibit P-1, the plaint.

5. P.W. 2 one M. S. Rajagopal, would adduce evidence to the effect that he was working as the Head Clerk in the Madras Regional Office of the E.S.I. Corporation, and had the accused submitted the Returns in time, he would put entries into the concerned register and since the accused did not submit the returns, he was not able to put proper entries into the register and submitted the said register before the Court which got marked as Exhibit P-2.

6. One, Ramanujam, working as Inspector in the Regional Office of the E.S.I. Corporation, Madras got examined as P.W. 3 who would also emphasise that the accused did not submit returns in time and that since it came to be known by Exhibit P-1 through P.W. 1, he had to register the case against the accused.

7. The main contentions based on which the Court below had arrived at the conclusion to acquit the respondents/accused were not based on the facts of the case as revealed from the above evidence of the Prosecution, but on three main legal grounds namely :

(1) that the first respondent, even though was the Managing Director of the establishment, under the E.S.I. Act, 1948, he cannot be construed as the Principal employer as decided in :

(i) 1983 LLJ (Cal) 830 and

(ii) 64 FJR 399.

(2) The second objection on the part of the respondent/accused before the lower Court was that, according to the complaint, for non-submission of returns, the penal provision is only Section 85(e), but the complainant had, without any locus standi, registered the above case for an offence punishable u/s 85(g) also and hence this attitude is not only contrary to law, but had been adopted with intent to harass the respondent/accused.

(3) The third legal objection had been that the sanction order as warranted u/s 86(1) of the E.S.I. Act, 1948 had not been marked as a document and it is a condition precedent even for prosecuting any-one under the provisions of the

E.S.I. Act. In the above case, even though the sanction order had been obtained and formed part of the records, for reasons unknown, it had not been marked as a document, as a result of which, the lower Court was not in a position to consider the same prior to delivering its Judgment.

8. All the above contentions have been carefully considered, besides going into the evidence adduced before the lower Court, and on perusal of the Judgment delivered by the Court below and further upon hearing both the counsel for the appellant as well as the respondents, this Court passes the following :

9. As far as the first objection that the first accused could not be considered as either the principal employer or the occupier as far as the establishment in which he was the Managing Director is concerned, two judgments of the Calcutta High Court and the Bombay High Court cited supra holding that neither the Managing Director nor the Manager could be either termed as a "Principal employer" or an "occupier" of the establishment has been overlooked by the Supreme Court in its Judgment in J.K. Industries Ltd. and Others Vs. Chief Inspector of Factories and Boilers and Others, the Supreme Court had considered the scope and ambit of the definition of "Occupier" as found in Section 2(n) of the Factories Act as well as Section 100 of the Act, it had been categorically held that the Directors of the company cannot nominate any person other than a Director who is among the Directors themselves to be an occupier. Since there is no specific definition given for the term "Occupier" in the E.S.I. Act of 1948, the definition of the "Principal Employer" in Section 2(17)(i) of the E.S.I. Act, 1948 includes a person who is called an "Occupier" under the Factories Act. Therefore, the two Judgments cited supra from that of the Calcutta and Bombay High Courts have been superseded by this judgment of the Apex Court and the said principles enunciated in the said Judgments no longer hold good, nor could be followed and hence, on the first score, the case could not have been held not maintainable.

10. Secondly, coming to the second legal objection by the respondent, i.e., for the specific act of non-submission of returns alleged to have been committed by the accused under Sec. 85(e), the Corporation had come forward praying for punishment both under Secs. 85(e) and 85(g) of the E.S.I. Act which was illegal. So far as this objection is concerned, in my view, for a single and specific offence committed, i.e., non-submission of returns, the accused could not be made guilty u/s 85(e). The accused could be punished only under that section as specified u/s 85(g) wherein, for all the offences categorised u/s 85(a) to (f), punishments have been prescribed only u/s 85(g), hence, Section 85(g) is only serving as a penal Section and the other Sections 85(a) to (f) would specify the ingredients of the offence, wherein, no punishments have been prescribed. The only minor mistake committed on the part of the respondent/complainant in his complaint was that instead of generally ordering both the sections, it should have been given as Section 85(a) R/W Section 85(g) of the E.S.I. Act. Barring this, there are two specific offences either contemplated under each of the above sections, or two punishments prescribed, since all the punishments for all the offences

committed which have been categorised in certain forms u/s 85 from sub-sections (a) to (f) become punishable only in the manner as prescribed u/s 85(g) and hence the arguments that for one and the same offence, two punishments cannot be contemplated under two different sections becomes meaningless and the Court below, without reading the Sections carefully, hearing only the objections of the respondents, seems to have concurred with the argument of the respondent which is erroneous and false.

11. Regarding the third objection raised by the respondents/accused before the lower Court that the sanctioning order, though made available in the records, was not marked as a document as required by Section 86(1) of the E.S.I. Act is the only legal hurdle accused, preventing the Court below in passing a Judgment on merit in consideration of the facts and circumstances covering the whole case.

12. Section 86(1) reads that "No prosecution under this Act shall be instituted, except by, or with the previous sanction of the Insurance Commissioner or such other officer of the Corporation as may be authorised in this behalf by the Director General of the Corporation."

13. A perusal of the records as pointed out by the Court below would clearly show that even though the Prosecution had been launched on behalf of the appellant in due compliance of the requirements of Section 86(1) of the E.S.I. Act with the sanction order having been passed and accompanied by the complaint, the prosecutor of the case of the E.S.I. Corporation had, either deliberately or for reasons known to himself, failed and neglected to mark the same as a document thus throwing the case of the complainant at the feet of the accused, resulting in the accused escaping from the clutches of law since such a legal blunder cannot be rectified by any other means in view of the warranting nature of the mandatory provision of the Law u/s 86(1). No amount of attempt made on other angles can sanctify the non-marking of the said vital sanction order since as contemplated by the Apex Court in a case remarking that the "sanctioning is not an idle formality, but a sacrosanct act", and if no sanction is accorded, there is no scope for a trial even to be held, thus becoming a pre-condition imposed by Law.

14. In the above circumstances, this Court is left with no option under this score, but to accept the conclusion arrived at by the Court below and not on the other two grounds offered in acquitting the accused. In result, the above appeal shall stand dismissed.