(2001) 06 BOM CK 0060

In the Bombay High Court

Case No : Criminal R.A. No. 265 of 2000

Regional Director, Employees'' State Insurance Corporation — APPELLANT

Vs

Madhukar S. Jadhav and Others — RESPONDENT

Date of Decision : 19-06-2001

Acts Referred:

Employees State Insurance Act, 1948 — Section 85
Penal Code, 1860 (IPC) — Section 405

Citation : (2002) 93 FLR 596 : (2002) 2 LLJ 640

Hon'ble Judges : T.K. Chandrashekhara Das, J

Bench : Single Bench

Advocate : H.V. Mehta, for the Appellant; D.S. Mhaispurkar, for the Respondent

Final Decision : Allowed

Judgement

T.K. Chandrashekhara Das, J.—This Revision Application has been filed by the Regional Director of the Employees'' State Insurance Corporation, Panchdeep Bhavan, Lower Parel, Mumbai-400 013, seeking to revise the order passed by the Metropolitan Magistrate, 25th Court, Mazagaon, Mumbai dated June 5, 2000. The petitioner-complainant filed a complaint before this learned Magistrate u/s 85(a) of the ESI Act, alleging that certain contribution due under the Act of the ESI Corporation has not been remitted by the respondent in accordance with the provisions of the ESI Act. Therefore the respondent has committed offences under the said Section.

2. The respondent has filed an application before the learned Magistrate contending that more than a period of two years has been lapsed after taking cognizance of the complaint, the trial has not been commenced and that therefore the respondents are entitled to be discharged in view of the judgment of the Supreme Court rendered in common cause judgment dated May 1, 1996 in Common Cause, A Registered Society Vs. Union of India (UOI) and Others, . The said application was allowed and the respondent was discharged.

3. The learned counsel for the Petitioner Mr. H.V. Mehta has contended that the learned Magistrate has committed an error in discharging the respondent without taking into consideration the directions contained in the judgments of both Common Cause Cases. Not only that, according to him, the subsequent clarification issued by the Supreme Court in second common cause judgment dated November 28, 1996 in Common Cause, a Registered Society v. Union of India and Ors., (supra), has been altogether ignored by the lower Court.

4. I find considerable force in the argument of Mr. Mehta. It is clear that the failure to remit the amount to the ESI Corporation is statutorily incorporated in Section 405 of IPC to be included in the offence of criminal breach of trust. Therefore it can be safely held that prima facie the failure to remit the periodical contribution to the ESI Corporation will come under the offence of criminal breach of trust, apart from that such failure amounts to an economic offence.

5. Mr. Mehta has contended that even the first common cause judgment which is rendered on May 1, 1996 the economic offences are excluded, as seen from paragraph 4 of the common cause judgment (first). According to him the failure to make payment to ESI Corporation, as required by statutory mandate, will amount to economic offence and therefore the common cause judgment cannot be made use of for discharging the respondent as written in this case. I find substance in this argument. The economic offence as indicated in para 4 of the first Common Cause Case should embrace even failure to remit the dues to the State as imposed by the statute because it affects the economic life or financial condition on a large segment of the society. It is worthwhile to refer here to an illuminating remark in paragraph 28 of the judgment of Mr. V.R. KRISHNA IYER J. in Organo Chemical Industries and Another Vs. Union of India (UOI) and Others, , which is read thus at p. 418 of LLJ:

" The pragmatics of the situation is that if the stream of contributions were frozen by employers'' defaults after due deduction from the wages and diversion for their own purposes, the scheme would be damnified by traumatic starvation of the Fund, public frustration from the failure of the project and psychic demoralization of the miserable beneficiaries when they find their wages deducted and the employer gets away with it even after default in his own contribution and malversation of the workers'' share. ''Damages'' have a wider socially semantic connotation than pecuniary loss of interest on non-payment when a social welfare scheme suffers mayhem on account of the injury. Law expands concepts to embrace social needs so as to become functionally effectual".

Therefore even as per the first common cause judgment, the petitioner ought not to have been discharged by the Court below. The Supreme Court has made it further clear that criminal breach of trust for the purpose of exclusion from the sweep in the earlier judgment.

6. The second common cause judgment evidently has been rendered to limit the

scope and sweep of the first common cause judgment. It is relevant to note the observations of the Supreme Court in that judgment. It started by saying:

"We have heard learned counsel appearing for the parties concerned in the present proceedings. Having given our anxious consideration to their contentions, we deem it fit to clarify/modify our judgment in """Common Cause"- A Registered Society v. Union of India, as under ....":

7. The learned counsel for the petitioner Mr. Mehta has further emphasized that certain criminal offences have been excluded from the operation of the common cause judgment by the subsequent order of the Supreme Court. He drew my attention to para III of the judgment where the Supreme Court stated as follows:

"In para 4 of our judgment in the list of offences to which directions contained in paras 1 and 2 shall not apply, the following additions shall be made:

(n) matrimonial offences under Indian Penal Code including Section 498-A or under any other law for the time being in force; (o) offences under the Negotiable Instruments Act including offences u/s 138 thereof; (p) offences relating to criminal mis-appropriation of property of the complainant as well as offences relating to criminal breach of trust under the Indian Penal Code or under any other law for the time being in force; (q) offences u/s 304-A of the Indian Penal Code or any offence pertaining to rash and negligent acts which are made punishable under any other law for the time being in force; (r) offences affecting the public health, safety, convenience, decency and morals as listed in Chapter XIV of the Indian Penal Code or such offences under any other law for the time being in force".

8. The learned counsel for the petitioner submitted that one of the offences that has been sought to be excluded from the sweep of the first common cause judgment is offences relating to breach of trust under the Indian Penal Code or under any other law for the time being in force. According to him the respondent has committed a criminal breach of trust by defaulting making contribution to ESI. The learned counsel for the petitioner brought to my notice the act or the omission alleged in the complaint, those amount to criminal breach of trust, which has been specifically defined u/s 405 of IPC reads as follows:

405. Criminal breach of trust: -Explanation - 2,

"A person, being an employer, who deducts the employee''s contribution from the wages payable to the employee for credit to the Employees'' State Insurance Fund held and administered by the Employees'' State Insurance Corporation established under the Employees'' State Insurance Act, 1948, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid."

9. The learned counsel for the respondent however contended that in the

complaint filed before the Magistrate, there is no allegation that the contribution to the fund collected by the employer from the employee has not been remitted to the Corporation.

10. Mr. Mehta has also brought to my notice Sub-section (4) of Section 40 of the ESI Act 1948 which reads as follows:

"Any sum deducted by the principal employer from wages under this Act shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted."

11. According to the learned counsel for the respondent such allegation is not there in the complaint so as to attract the definition of criminal breach of trust. I am afraid whether that contention could be entertained at this stage. My endeavour in this case is only to examine the legality or otherwise of the order of the Magistrate by applying the common cause judgment that the accused could be discharged. Of course, the above contention of the counsel for the respondent is a matter to be agitated before the Magistrate at the time of trial, certainly not at this stage.

12. It is further contended on behalf of the respondent that the Magistrate''s order discharging the respondent is also justified in Raj Deo Sharma Vs. The State of Bihar, and also Raj Deo Sharma Vs. The State of Bihar, . At any stretch of imagination Raj Deo Sharma''s case both 1 and 2, will not apply to the present case. It has been observed therein thus:

"Whether the accused is in jail or not, the Court shall close the prosecution evidence on completion of a period of two years from the date of recording the plea of the accused on the charges framed whether the prosecution has examined all the witnesses or not within the said period and the Court can proceed to the next step provided by law for the trial of the case"

13. In Raj Deo Sharma''s case No. 2 (supra) the Supreme Court has clarified in para 23 as under:

"The judgment has also taken care to mention that the directions given therein are only to supplement the propositions laid down by the Constitution Bench in case and also in addition to and without prejudice to the directions issued by this Court in "Common cause" cases."

It is clear that by Raj Deo Sharma''s judgment, the direction contained in Common Cause Judgment cannot be deemed to have been withdrawn by the Supreme Court. Therefore the attempt on the part of the Magistrate to rely upon Raj Deo Sharma''s case No. (1) to discharge the accused, is held to be illegal.

14. For the foregoing reasons there is, no justification for the learned Magistrate at this stage to discharge the accused as done in the impugned order.

15. In the result the Revision Application is allowed. Rule is made absolute in terms of prayer Clause (a). No order as to costs.

16. Parties to act on the copy authenticated by the Associate of this Court.

