(2019) 04 DEL CK 0226

In the Delhi High Court

Case No : Criminal Leave Petition No. 292 Of 2019

Regional Director Esic APPELLANT

Vs

M/S AK Motor Workshop & Anr RESPONDENT

Date of Decision : 30-04-2019

Acts Referred:

Employee State Insurance Act, 1948 — Section 39, 40(1), 43, 45A, 45A(1), 85(a), 85(e), 86(1)
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2019) 04 DEL CK 0226

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : A.K. Verma

Final Decision : Dismissed

Judgement

Mukta Gupta, J

Crl. M.A. No. 9130/2019 (Exemption)

Exemption allowed subject to just exceptions.

Crl.M.A. No. 9131/2019 (Delay)

For the reasons stated in the application delay of 131 days in re-filing the leave to appeal petition is condoned.

Application is disposed of.

CRL.L.P. 292/2019 & Crl.M.A. 9129/2019 (for additional documents)

1. Aggrieved by the judgment dated 29th November 2017, whereby the learned Metropolitan Magistrate acquitted the respondent for the offences punishable under Sections 85 (a) and (e) of the Employee State Insurance Act (in short 'ESIC Act'), the petitioner/complainant has preferred the present leave petition.

2. Briefly stated, the case of the complainant as per the complaint is that the

complainant company is a statutory body constituted under the Employees State Insurance Act and its Insurance Inspector has been authorized by the said corporation to institute in the name of the Corporation, suits and other legal proceedings necessary in the interest of the Corporation, and to defend any such proceedings instituted against the Corporation in all Courts or Tribunals including those established under the Employees State Insurance Act and to represent the Corporation in all Courts or Tribunals in cases in which Corporation is a party and to act appear, make applications, plead and withdraw money on behalf of the Corporation.

3. Respondent No.2 is the proprietor and principal employer of the M/s A.K. Motor Workshop and is responsible for the conduct, supervision and control of the business of firm. Respondent firm is covered by the ESIC Act and has been allotted Code No.11-24466. Therefore Respondent no.2 is under a statutory obligation to pay the contribution and submit returns of contribution under the ESIC Act in respect of the employees of the company M/s A.K. Motor Workshop. Respondent no.2 has failed to pay the contribution from October 2003 to March 2004 and also failed to submit return of contribution in respect of employees of his firm for the period ending March 2004 thereby violating Sections 39/40(1)/43 ESIC Act read with regulation 31/26 ESI (General) Regulation, 1950.

4. A show cause notice dated 7th January 2004 was sent to respondent No.2. Despite the service of the show cause notice he failed to discharge his statutory obligation in time. Therefore, the prosecution of the respondent No.2 was sanctioned by the Regional Director in exercise of his powers under Section 86 (1) of the ESIC Act.

5. After the pre-charge evidence, charge was framed against respondent no.2 for the offences punishable under Sections 85 (a) and (e) of the ESIC Act.

6. Petitioner examined Vijay Kumar, Retd. SSO (Insurance Inspector) as CW-1, Sunil Prasad, SSO, Regional Office Mumbai as CW-2 and Santosh Chauhan, Retd. SSO as CW-3.

7. Statement of respondent no.2 was recorded under Section 313 Cr.P.C. wherein he stated that he had no place of business in the aforesaid period at the given address as he had surrendered the said shop to the landlord in the year 2001. He further stated that he had no liability to pay any contribution or to file any return as no ESI number had ever been allotted to him.

8. Perusal of the record reveals that Santosh Chauhan (CW-2) proved the show cause notice. In her testimony she stated that she was an assistant posted at the divisional office in the year 2004 at the time of issuance of show cause notice. In her examination in chief she stated that she prepared the show cause notice on the direction of Ashok Chandra, Deputy Director ESI but in her cross-examination she could not recall the date when such direction was given. There is also no document on record containing such direction from the Deputy Director ESIC to the assistant to prepare the show cause notice. She stated that the direction was

given in June 2004 whereas the show cause notice bears the date of October 2004. She further stated that the notice was sent at both addresses and the AD card contains the full address but the AD card tendered in evidence does not mention the full address. In the above circumstance it cannot be assumed that the show cause notice was served upon the respondent. Mere dispatch register bearing a postal stamp cannot by itself be a proof to the fact that the service of the show cause notice has been duly effected upon the recipient.

9. The petitioner did not examine the sanctioning authority that is the Joint Director or any one on his behalf as a witness to prove the sanction letter dated 7th December 2004. Thus sanction of prosecution was not proved by the petitioner.

10. In the decision reported as 2006 (Suppl.) GLT 412 Sawarmal Agarwalla v. State of Assam the Guahati High Court held that while invoking Sections 85 (a) and (e), a reasonable opportunity of hearing under proviso to Section 45A(1) must be accorded to the person against whom proceedings are sought to be initiated. It is the duty of the authority concerned to determine the exact amount of contribution legally realizable from the person concerned and the mere fact that a factory or an establishment continues to be governed by the ESIC Act will not in itself be sufficient to prosecute the employer unless and until the quantum of contribution payable by the employer has been determined after inquiry. If such inquiry reveals that the factory or establishment has ceased to be operative or the employees have ceased to work, then the employer cannot be prosecuted for not depositing the contribution and in such case violation of the regulation 26 of the ESI (General) Regulations does not arise.

11. The petitioner has not determined the quantum of contribution payable by the respondent for the given period and has thus not carried out any proceedings as prescribed under Section 45A (1). After the survey in the year 1995, ESIC has not carried out any determination under Section 45A or issued any show cause notice and has neither filed any document or record to show that the respondent had been paying the contribution and/or filing the returns. It is only after a long gap of about nine years that ESIC issued show cause notice and decided to prosecute the respondent without following the procedure prescribed under Section 45A ESIC Act.

12. Considering the evidence as noted above findings of the learned Metropolitan Magistrate in the impugned judgment acquitting the respondent cannot be said to be perverse warranting interference of this Court.

13. Leave to appeal petition is dismissed.