

(1992) 01 KL CK 0037
In the High Court Of Kerala
Case No : Criminal M.C. 950 of 1991

Renuka

APPELLANT

Vs

E.S.I. Corporation

RESPONDENT

Date of Decision : 31-01-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 178
Employees State Insurance (General) Regulations, 1950 — Regulation 26, 29
Employees State Insurance Act, 1948 — Section 39, 85

Citation : (1992) 65 FLR 529 : (1992) KLJ 630 : (1994) 3 LLJ 741

Hon'ble Judges : B.M. Thulasidas, J

Bench : Single Bench

Advocate : P.V. Baby, M.V. Ibrahimkutty, C.V. Vasudevan and G. Mohan, for the Appellant; T.P. Ibrahim Khan, for the Respondent

Final Decision : Dismissed

Judgement

Thulasidas, J.—These are petitions filed u/s 482 of the Code of Criminal Procedure, by the accused in S.T. No. 227, C.C.No. 92 and S.T. 271 and C.C.No. 190 of 1991 pending before the Chief Judicial Magistrate, Thnssur. The complaints have been laid for offence punishable u/s 85 of the Employees State Insurance Act. These petitions were heard together.

2. One of the main contentions taken in all these cases is as regards the jurisdiction of the Chief Judicial Magistrate, Trichur, to take cognizance of the complaints. In CrI M.C. 1185/1991 the petitioner has prayed for transfer of C.C.No. 92 of 1991 and ST. 271 of 1991 from the Chief Judicial Magistrate's Court, Trichur to the Judicial First Class Magistrate Court, Karunagappally, on the ground that S.T No. 322 of 1990 is pending there for non-payment of contribution for the period 1.10.1988 to 31.3.1989. The petitioners in CrI. M.C. 1222 of 1991 have put forward certain grounds to show that the prosecution is an abuse of the process of the Court. They have also stated that they are not liable to be prosecuted u/s 86A of the E.S.I. Act. The petitioner in CrI. M.C. 1093

of 1991 has contended that the amount due by way of contribution from him had not been determined and therefore, the question of his failure to pay the same did not arise. He has alleged that the prosecution is also bad for want of sanction from the Insurance Commissioner.

3. Section 85 of the E.S.I. Act deals with punishment for failure to pay contributions, etc. u/s 86(1) of the Act, no prosecution shall be instituted except by or with the previous sanction of the Insurance Commissioner or of such other officer of the Corporation as may be authorised in this behalf. Under Sub-section (2) thereof, no court inferior to that of a Presidency Magistrate or a Magistrate of the First Class shall try any offence under the Act and under Sub-section (3), no court shall take cognizance of any offence under the Act except on a complaint made in writing in respect thereof. The submission that the complaints are prima facie barred under Sub-section (1) of Section 86, is prima facie belied by the averments and the documents and therefore, in my view, it has no merit. They have been legally instituted on written complaints before the competent court.

4. u/s 43 of the Act "the Corporation may make regulations for any matter relating to or incidental to the payment and collection of contributions payable under the Act." Clauses (a) to (d) of that section say that such regulations may provide for the manner and time of payment of contributions and similar other related matters. u/s 44 of the Act, every principal and immediate employer shall submit to the Corporation or to such officer of the Corporation returns in such form and must also maintain registers as required by the regulations.

5. Under Regulation No. 26, "every employer shall send a return of contributions in quadruplicate in Form 6 along with receipted copies of challans for the amounts deposited in the Bank, to the appropriate office by registered post or by messenger, in respect of all employees for whom contributions were payable in a contribution period." Under Regulation 29, contributions payable under the Act, shall, except when otherwise provided, be paid into a Bank duly authorised by the Corporation. u/s 40 "the principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution" and he should remit the same to the Corporation at his expense.

6. It is not in dispute that the Bank duly authorised under Regulation No. 29 is the State Bank of India, Trichur. No doubt, it had extended the facility to the principal employers who have their factory/establishment in various other places in Kerala, for making payment of their contributions at the local branches of the State Bank of India. Such banks are only the collecting agent of the Corporation. Indeed, the Corporation does not maintain account in any branch of the Bank outside Trichur. The payments made at the local branches of the Bank are credited to Account No. 1 of the Corporation with the S.B.I. Trichur. The receipt/payment is complete only when it has been made in Form 6. The appropriate office for submission of that Form is the Regional Office at Trichur, as per the order dated 4.2.1965 issued under Regulation 2(c) where the "appropriate

office", "appropriate Regional Office", "appropriate local office" shall mean with reference to any action taken under the Regulations such office of the Corporation as may be specified for that purpose under a general or special order of the Corporation." By Notification No. 12/13/1/83-P.&D., the appropriate office for the purpose of submission of return of contributions under Regulation No. 26, as far as Kerala, Mahe and the Union Territory of Pondicherry, is concerned is the Regional Office of the E.S.I. Corporation at Trichur. It is that office and that office alone that has jurisdiction in regard to matters coming within the purview of the Act.

7. No doubt, the Corporation has its offices at places outside Trichur. But, that is for administrative reasons and to help the local employers. But the Regional Office at Trichur is the only office of the Corporation where the required returns under the Act must reach. The payment of contributions is effective only when the employer makes the payment in the prescribed Form VI and it has been recorded and credited to the account of the Corporation with the S.B.I. Trichur. As stated already, the appropriate office for submission of Form VI is the Regional Office at Trichur. In view of Section 39 read with regulations 26 and 29 which deals with the procedure for paying the contributions, the Chief Judicial Magistrate, Trichur, has jurisdiction to take cognizance of the complaints laid u/s 85 of the Act.

8. u/s 44 of the Act every principal or immediate employer has to submit to the Corporation or to such officer of the Corporation, as it may direct, such returns in such form and containing such particulars as may be specified in the regulation. Sub-section (2) states that when the return has not been so submitted, the Corporation should require any person in charge of the factory or establishment to furnish the same. The contribution cards have to be sent in respect of each employee to the Corporation by registered post or through messenger, in the prescribed form. Regulation 26(2) provides for the due date by which evidence of contribution having been paid, must reach the Corporation. There is no doubt that returns have to be submitted to the Regional Office at Trichur. Failure to do so would entitle the Regional Office to invoke the relevant provisions for penal action.

9. Even assuming that Chief Judicial Magistrate's Court, Trichur, has no exclusive territorial jurisdiction in the sense that the impugned acts were committed in different local areas, the complaints could still be enquired into by it u/s 178 Cr.P.C. The respondent is not required to invoke the penal provisions in accordance with the convenience of the parties proceeded against.

10. A large number of complaints may have to be filed by the Corporation against employers who have violated the provisions of the Act. Such employers are spread throughout the State. All the material records are being kept at the Regional Office at Trichur, The Corporation would certainly find it difficult to prosecute the cases at different places. From the point of view of the effective implementation of the Act, the Court at Trichur is the proper place for trial of the

cases under the Act. That would also obviate conflicting decisions and ensure a fair amount of uniformity in the decision with respect to disputed questions of law.

11. It seems proper to refer to the Full Bench decision of the Madras High Court in *E.S.I. Corporation v. Ismail Sahib* AIR 960 Mad. 64. Complaints were filed by the Corporation before the Chief Presidency Magistrate Court, Madras. Objection was raised that the court had no territorial jurisdiction since the factories involved in the case, were situated within the jurisdiction of the Sub Divisional Magistrate, Poonamelle. But the objection was overruled. The Full Bench noticed that u/s 39 of the Act:

"The contribution payable under this Act in respect of an employee shall....be paid to the Corporation."

and u/s 44 returns have also to be submitted to it. It was observed that even though the Corporation had issued a circular which enabled payments to be made in mofussil centres, that did not relieve the factories and establishments from the obligation under the common law rule that the debtor must seek the creditor.

12. A similar view was taken by the Bombay High Court in *Sohanlal Awashthi v. E.S.I Corporation* 1987 I CLR 332. That was a case where the Regional Office of the Corporation was situated at Nagpur and Account No. 1 of the Corporation was maintained with the State Bank of India, Nagpur. The employers in question had their establishments at Nanded. The S.B.I. Nagpur had extended the facility to them for making payments of their contributions under the Act to its branch at Nanded. The question that arose for consideration was whether the offences under Sections 85A and 85(g) of the Act for non-payment of contribution and non-submission of Contribution cards by the employers situated at Nanded, were triable by the Court at Nagpur where Regional Office of the E.S.I. Corporation was situated and where Account No. 1 was maintained, or the Court at Nanded would have jurisdiction over the matter, inasmuch as, contributions were paid at the Nanded Branch of the State Bank of India. It was held:-

"...The offence of non-payment of contributions and non-submission of contribution cards by the employers situate at Nanded, was triable by the Court at Nagpur where the Regional Office of the E.S.I. Corporation was situate and its Account No. 1 was maintained, and the Court at Nanded had no jurisdiction to try the offence. It was no doubt true that the State Bank of India, Nagpur, had extended the facility to its branch at Nanded for accepting the payment from the employers at Nanded and for remitting the same to the Account No. 1 of the Corporation maintained at the State Bank of India at Nagpur. It deserved, however, to be noted that no contract between the employers in question on one hand and the branch of the State Bank of India at Nanded and the Corporation on the other hand had been arrived at in this respect. It was an arrangement between the Head Office of the State Bank of India at Nagpur with its branch at

Nanded whereby the facility had been extended to the employers to remit the amount at Nagpur at their own expense and at their own risk. This extension of the facility by the State Bank of India, Nagpur, hardly meant that the payment had to be made at Nanded alone. The overall impact of the Act, the Rules made thereunder and the regulation framed by the Corporation, under the Act was undoubtedly to the effect that the payment of contributions had to be made at Nagpur only. Under Regulation 26, the contribution cards had to be sent to the appropriate office, which in the instance case was situate at Nagpur. They had to be sent by registered post or by a messenger together with a return in duplicate in Form 6 to the appropriate Office i.e. at Nagpur. The proviso to Regn. 31-A clinched the matter under consideration. It showed that the payment of contribution was inextricably interlinked with submission of cards, and therefore, the payment of contribution got completed only on the submission of the contribution cards to the office at Nagpur in view of the proviso to Regulation 31-A and that too within the time prescribed. The position, therefore, was that the contribution had to be paid and the cards, had to be submitted so as to reach the office at Nagpur within the prescribed period and unless both these things took place there would be no payment under the law. It, therefore followed that the offence of non-payment of contribution as well as of non-submission of cards, took place at Nagpur and not at Nanded in any case. Therefore, as per Section 177, Crl. P.C. the Nagpur Court had Jurisdiction to try the offence and not the Court at Nanded.

13. The above decisions had been followed by the Punjab and Haryana High Court in Crl. Misc. No. 3703-M/1980 dated 7.1.1982 *Shri Subhas Sahni of S.J. Knitting & Finishing Mills, Faridabad v. The Employees" State Insurance Corporation Chandigarh* quoted in "Compendium of Case Law issued by the Director General of Employees" State Insurance Corporation, New Delhi. I am in respectful agreement with the above decisions which in my view, lay down the correct law. This court also held in the decision in Crl. M.C. 79 of 1991 etc. that the Chief Judicial Magistrate, Thrissur, has jurisdiction to entertain the complaints filed by the Corporation. The petitioners" case that the C.J.M. Court, Thrissur, has no territorial jurisdiction is without merit.

14. The petitioner in Crl. M.C. 950 of 1991 has contended that the application filed on behalf of the society for exemption u/s 87 of the Act has not been disposed of and therefore, pending such disposal, prosecution ought not to have been launched. It is admitted that exemption was granted only till 30.7.1983. The pendency of the application for further exemption did not disentitle the Corporation to file the complaint. The petitioner being the Secretary of the society, is responsible for its affairs. This aspect has been noticed by this Court in the decision in Crl. M.C. No. 606 of 1990 dated 26.2.1991, where it was held that the society is not a factory where the owner or the occupier alone could be treated as the principal employer. It comes under any other establishment within the purview of Section 2(17)(iii) of the E.S.I. Act. Being the Secretary, she is the responsible person for the supervision and control of the establishment. In my

view, the prosecution is legitimate.

15. The petitioner in Crl. M.C 1093 of 1991 is principal employer of Bismillah Cashew factory. There was failure to send the contributions in Form 6 for the period ended 30.9.1990 which should have been submitted on or before 11.9.1990. There was also failure to pay the contributions for the months of July, August and September, 1990. A show cause notice had been issued. He had also failed to produce the books of accounts and other connected records. To the show cause notice, no reply was sent. He had also failed to abide by the relevant provisions. It was submitted that the amount of contribution payable was not determined and that he was not guilty of wilful disobedience of the lawful directions of the respondent. This is belied by the records. Prima facie, the complaint is maintainable. The petitioner has to sustain the contentions he has advanced by acceptable evidence at the trial.

16. The petitioner in Crl. M.C. 1185 of 1991 is the Proprietor of A.K. Industries, Sooranadu South. He is the accused in C.C. 92 of 1991 and S.T. 271 of 1991 for offences under Sections 85(a) and (e) of the Act. He has stated that the first case is with respect to his alleged failure to pay the contributions due for the period 1.10.1989 to 31.3.1990 which had already been paid by him in the course of the revenue recovery proceedings taken by the Collector, Kollam. Such payment alone will not absolve him from penal liability. C.C. 271 of 1991 is with respect to his failure to furnish the returns within the prescribed time, where he states that he has a valid defence. According to him, since C.C. 322 of 1990 filed in connection with non-payment of contribution for the period 1.10.1988 to 31.3.1989 is pending against him before the First Class Magistrate's Court, Karunagappally, the two cases against him now before the Chief Judicial Magistrate's Court, Trichur may be transferred to that Court. This request was not opposed. It seems to me it is just and necessary to allow his prayer. Accordingly, I order transfer of C.C. No. 92 of 1991 and S.T. 271 of 1991 pending before the Chief Judicial Magistrate Court, Trichur, to the Magistrate of the First Class, Karunagappally.

17. In Crl. MC. 1222 of 1991, the petitioners are the Executive Director, Managing Director and the Director of Hotel Luciya Continental. It is urged that they are not liable u/s 86A of the Act. It has been stated in the petition that "none of the petitioners is either a Managing Director or whole-time Director. The first two petitioners are permanent residents in Madras. The 3rd petitioner is a full time Law Student at Poona. The 1st petitioner is only a sleeping Director and has no responsibility for the day-to-day conduct of the business. The second petitioner is not the Managing Director from 1988. The petitioners are not principal employers as per Sub-section (2) of Section 17." I do not think these contentions which are belied by the allegations in the complaint, can now be accepted. The submissions rested upon Section 86A and section 17(2) of the Act are prima facie, unsustainable. In my view, the decision reported in Suresh v. Collector of Bombay 1984 LIC 1614 is inapplicable to the facts of this case.

Admittedly, there was failure to pay contribution for the period 1.10.1989 to 31.3.1990 within the prescribed time. An offence had been committed by such failure to pay the contribution. Belated payment with interest and damages would not absolve them of their original guilt but might perhaps, snap the recurrence of the offence (See, Bhagirath Kanoria v. State of U.P 1984 2 SCC 222). The Corporation was justified to file the complaint.

18. In view of what I have stated above, I hold that prosecution is not an abuse of the process of the court. The prayer of the petitioner in M.C. No. 1185 of 1991 for transfer alone is allowed. Subject to that the Crl. M.Cs. are dismissed.