(1988) 07 CAL CK 0060

In the Calcutta High Court

Case No : Criminal Revision No. 2004 of 1982

Sambhu Nath Agarwal and Another APPELLANT

Vs

Employees'' State Insurance Corporation and Another RESPONDENT

Date of Decision : 01-07-1988

Acts Referred:

Employees State Insurance Act, 1948 — Section 86(1), 86(3)
Penal Code, 1860 (IPC) — Section 11, 405, 406

Citation : (1989) 66 CompCas 111 : 93 CWN 69 : (1990) 2 LLJ 100

Hon'ble Judges : A.C. Sengupta, J

Bench : Single Bench

Advocate : None, for the Appellant; B.K. Bhose and J. Sengupta, for the Respondent

Judgement

A.C. Sengupta, J.—This is an application by Sambhu Nath Agarwal and Bijoy Kumar Agarwal for issuance of a rule for showing cause as to why the impugned Criminal Case No. 8C-1048 of 1988 pending before the Additional Chief Judicial Magistrate, Sealdah, should not be quashed. The rule was issued in the year 1982 by Mr. Justice Amitava Dutt. An ad interim stay of further proceedings was also granted. Thereafter, the matter was heard by Mr. Justice J.N. Chowdhury. Judgment was reserved on 16th November, 1984. Thereafter, it was referred to the Division Bench.

2. Sankar Bhattacharyya, an Insurance Inspector in the Employees'' State Insurence Corporation, filed a complaint u/s 406 of the Indian Penal Code before the Chief Judicial Magistrate, Sealdah, against the petitioners on the allegation that the petitioners being the partners of National Engineering Works were the principal employers of the factory. Upon inspection of salary registers and other records of the factory, it transpired that Rs. 22.80 was deducted for the month of February and March, 1988, respectively as the employees'' share of contribution from the monthly wages of the employees but the same was not deposited in the Employees State Insurance Fund within the specified time as required under the

Act. It was further contended that the petitioners have committed criminal breach of trust in respect of the said money within the meaning of Explanation 2 to Section 405 of the Indian Penal Code.

3. The petitioners contended that in the complaint it was not stated that the petitioners were the persons responsible for the day to day affairs in the running of the factory and looking after its affairs. The said sums of money had already been deposited with the necessary account subsequently. The complaint was barred by limitation under the Employees'' State Insurance Act itself and was not maintainable. Moreover, the said Sankar Bhattacharyya was not authorised and/ or competent to file the complaint and, hence, the cognizance taken by the learned Magistrate on the basis of such complaint was not maintainable.

4. Factually the factory was closed and was under lock-out when such deposit was not made. Hence, this present petition challenging the impugned proceeding first of all on the ground that the complaint , was barred u/s 86, Sub-section (3) of the Employees'' State Insurance Act, inasmuch as it was alleged that there had been contravention of the provisions of the Employees'' State Insurance Act, 1948, and sanction u/s 86, Sub-section (1), of the said Act was necessary for the filing of such complaint. It has not been alleged that it was the partnership firm which has violated the provisions of law, nor have other partners been impleaded in the said complaint. No specific period has been mentioned in respect of which such default has been made in the complaint itself.

5. The learned lawyer appearing on behalf of the petitioner relied upon an order passed by Mr. Justice Manoj Kumar Mukherjee in Criminal Revision No. 1271 of 1982 reported in 89 CWN page 646 where Mr. Justice Manoj Kumar Mukherjee was of the view that although the director of a company was the principal employer as defined in the Employees'' State Insurance (Amendment) Act of 1975, he could not be equated with the expression "employer" in the absence of any specific provision in the Indian Penal Code to warrant such equation. Under the circumstances, the learned judge held that the petitioners were not employers within the meaning of Explanation 2 to Section 405 of the Indian Penal Code though they were principal employers under the Act who could have been prosecuted u/s 85 of the Act. Under those circumstances, Justice Mukherjee held that the prosecution u/s 406 of the Indian Penal Code was not maintainable and, as a result, he quashed the impugned proceedings.

6. In the case reported in Agrawal Trading Corporation and Others Vs. The Collector of Customs and Others, , it was held that (at page 540):

"The second contention that because the firm is not a legal entity, it cannot be a person within the meaning of Section 8 of the Foreign Exchange Regulation Act, or of Section 167(3), (8) and (37) of the Sea Customs Act, is equally untenable. There is, of course, no definition of ''person'' in either of these Acts but a definition in Section 2(42) of the General Clauses Act, 1897, or Section 2(3) of the Act of 1868 would be applicable to the said Acts in both of which "person" has been defined as including any company or association or body of individuals whether incorporated or not. It is of course contended that this definition does not apply to a firm which is not a natural person and has no legal existence ; as such, Clauses (3), (8) and (37) of Section 167 of the Sea Customs Act are inapplicable to the appellant firm. In our view, the Explanation to Section 23C clearly negatives this contention, in that a company for the purpose of that section is defined to mean any body corporate and includes a firm or other association of individuals and a director in relation to a firm means a partner in the firm. The High Court was clearly right in holding that once it is found that there has been a contravention of any of the provisions of the Foreign Exchange Regulation Act read with the Sea Customs Act by a firm, the partners of the firm who are in charge of its business or are responsible for the conduct of the same, cannot escape liability, unless it is proved by them that the contravention took place without their knowledge or that they had exercised all due diligence to prevent such contravention ".

In the instant case, the petitioners contended that the petitioners were not in charge of the partnership business nor were they responsible for the conduct of the same when such contravention had taken place without their knowledge during the period when the factory was under a lock-out. Under those circumstances, the petitioners could not be held liable for such contravention.

7. The petitioners contended that inasmuch as the complaint has been filed for violation of the provisions of the Employees'' State Insurance Act beyond the period of limitation as provided in the Act itself, the complainant could not invoke the provisions of Sections 405 and 406 of the Indian Penal Code solely with the purpose of circumventing the point of limitation.

8. In the instant case, the complaint is filed against the petitioners u/s 406 of the Indian Penal Code for committing an offence within the meaning of Explanation 2 to Section 405 of the Indian Penal Code which provides as follows:

"Explanation 2.--A person, being an employer, who deducts the employees'' 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 contributions 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."

The complaint was not under the Employees'' State Insurance Act. Under the circumstances, the period of limitation as provided under the said Act had no application. On the contrary, the com-plaint has been filed within a period of three years from the date of commission of the offence. The complaint was filed u/s 406 of the Indian Penal Code and not under the Employees'' State Insurance

Act. The complaint had been specific about the period, i.e., January and February, 1980, for which the default was committed by the petitioner who failed to deposit the contributions after duly deducting the same from the wages of the employees. It had further been contended that the petitioners had been habitual defaulters. Apart from the instant case, a number of prosecution cases had been filed against the firm of which the petitioners are the partners and it had been also convicted in some cases.

9. From the grounds taken in the petition, it appears, that ground No. 1, that the prosecution was barred by the law of limitation, is not tenable inasmuch as the prosecution of the petitioners was u/s 405/406 of the Indian Penal Code and not under the Employees'' State Insurance Act. Similarly, on the same ground, the petitioner is not entitled to pray for any relief on ground No. 2.

10. The petitioners are the partners of M/s. National Engineering Works, a partnership firm, and as such they are the employers within the meaning of Explanation 2 to Section 405 of the Indian Penal Code. They being the employers who deducted the employees'' contributions were deemed to be entrusted with the amount of contributions so deducted and by not depositing the same, were deemed to have dishonestly misappropriated the said amount. The deeming provision given under Explanation 2 to Section 405 applies to an employer. The word "employer" has been defined in the Indian Penal Code and includes the immediate employer. u/s 11 of the Indian Penal Code, the word "person" includes any company or association or body of persons whether incorporated or not. Under the circumstances, a firm falls within the category of "person" as defined u/s 11 of the Indian Penal Code. The petitioners admittedly being the partners of the firm are the employers. Under the circumstances, they are liable to be prosecuted for the alleged violation u/s 405/406 of the Indian Penal Code. The distinction drawn by Mr. Justice Mukherjee between an "employer" and a "principal employer" has no application to the facts and circumstances of this case. Under the circumstances, this court is of the view that the rule obtained be discharged and all interim orders vacated.