

(2011) 06 BOM CK 0025

In the Bombay High Court

Case No : Criminal Revision Appli. No"s. 4, 5, 6, 7 and 8 of 2011

Sharp Eye Detective Services and Another

APPELLANT

Vs

Employees" State Insurance Corporation, Margao, Goa and
Another

RESPONDENT

Date of Decision : 24-06-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 357(1)
Employees State Insurance Act, 1948 — Section 2(9), 85, 86

Citation : (2012) BomCR(Cri) 482 : (2012) 132 FLR 520 : (2012) LLR 284

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : M.P. Almeida, for the Appellant; A.A. Agni, Advocate for Respondent 1 and Mrs. C.A. Ferreira, Public Prosecutor for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Lavande, J.—Heard Mr. Almeida, learned Counsel for the petitioners, Mrs. Agni, learned Counsel for respondent 1 and Mr. Ferreira, learned Public Prosecutor for respondent 2. All the above revision applications are being disposed of by common judgment and order since the question of law and the facts involved in all these revision applications are almost identical.

2. The petitioners have challenged the judgments and orders dated 28th January, 2011 passed by the Additional Sessions Judge, South Goa, Margao in Criminal Appeal Nos. 11/2010, 10/2010, 12/2010, 8/2010 and 9/2010 preferred by the petitioners against the judgments and orders dated 22.12.2009 passed by the learned Judicial Magistrate, First Class, Margao in Labour Case Nos. 215/L/1996/1, 119/L/1997/1, 171/L/1998/1, 55/L/1999/1 and 216/L/1997/1.

3. By the impugned judgments, petitioner 2 has been convicted for the offence punishable u/s 85(i)(b) of Employees State Insurance Act, 1948 (The Act" for short) and sentenced to undergo simple imprisonment for six months and to pay fine of Rs. 5,000, in default to undergo simple imprisonment for 3 months. The

fine amount, if any, recovered from the accused has been ordered to be paid to the complainant in terms of section 357(1) of Cr. P.C.

4. Respondent 1 filed Labour Case Nos. 119/L/1997/1, 17.1/L/1998/1, 55/L/1999/1, 216/L/1997/1 against the petitioners herein for failure to pay contribution for certain periods which are the subject-matters of Criminal Revision Application Nos. 5, 6, 7 and 8 of 2011. Criminal Revision Application No. 4/2011 which arises out of Labour Case 215/L/1996/1 was filed for failure to file return for the period ending March, 1995. In Labour Cases Nos. 215/L/1996/1 and 216/L/1997/1, on behalf of respondent No. 1 one witness was examined namely Anil Krishna Naik, PW 1, the manager of respondent No. 1 and in Labour Case Nos. 119/L/1997/1, 171/L/1998/1 and 55/L/1999/1 on behalf of respondent No. 1 one witness was examined namely K.K. Sukwani, the manager of respondent No. 1 who tendered oral and documentary evidence. After the statements of the accused u/s 313 of Cr. P.C. were recorded, no evidence was led on behalf of the accused. There is no dispute that petitioner No. 2 is the proprietor of petitioner No. 1.

5. Learned Magistrate upon appreciation of the evidence led by the complainant held that the contraventions under sections 85(a) and 85(e) punishable u/s 85(i) (b) of the Act were made out and consequently convicted and sentenced the accused as stated above. The Lower Appellate Court in appeals preferred by the petitioners concurred with the findings given by the Magistrate and consequently dismissed the appeals preferred by the petitioners. The petitioners have filed the present revision applications challenging both the orders passed by the learned Judicial Magistrate First Class and learned Additional Sessions Judge, South Goa, Margao.

6. On behalf of the petitioners, Mr. Almeida has urged the very same contentions which were urged before the learned Judicial Magistrate First Class and learned Additional Sessions Judge. Both the judgments are assailed primarily on the following grounds:

(i) There is no proper sanction in each case in terms of section 86 of the Act and the sanctions do not disclose application of mind by the Sanctioning Authority.

(ii) Petitioner No. 2 is not the principal employer in terms of the Act and as such the prosecution for the offence punishable u/s 85(i)(b) of the Act is not maintainable; the security personnel employed by petitioner 2 are not "employees" within the meaning of the Act and petitioner 2 can be at the most termed as immediate employer,

(iii) The sentences imposed on petitioner 2 are highly excessive and considering the facts and circumstances of the case the sentences imposed are liable to be reduced even if the conviction of petitioner 2 is upheld.

Mr. Almeida, learned Counsel for the petitioners in support of the above grounds invited my attention to the records and placed reliance upon the following

judgments:

- (i) Mansukhlal Vithaldas Chauhan Vs. State of Gujarat, .
- (ii) Managing Director, Hasan Co-operative Milk. Producers Society Union Limited v. Assistant Regional Director, Employees" State Insurance Corporation, 2010 (125) FLR 742 (SC).
- (iii) Employees State Insurance Corporation and another v. Goa Bottling Co. Pvt. Ltd., 2006 (6) BCR 524.
- (iv) Bajaj Tempo Limited Vs. The Employees State Insurance Corporation, ,
- (v) Unreported judgment of the Division Bench of this Court in Criminal Appeal No. 1/1999.

7. Per contra, Mrs. Agni, learned Counsel appearing for respondent No. 1 supported the impugned judgments and orders and submitted that the findings recorded by both the Courts are borne out from the evidence-on record and there is no perversity in the said findings. Learned Counsel further submitted that the revisional jurisdiction of this Court is extremely limited and this Court is not entitled to reappraise the evidence and upset the concurrent findings recorded by both the Courts below. Learned Counsel further submitted that the sanctions granted by the competent authority discloses application of mind and there is no serious challenge to the same. On merits, Mrs. Agni submitted that having regard to the admitted fact that the security personnel, who were employed by petitioner No. 2 were paid by him and having regard to the tests laid down by the Apex Court, it is clear that petitioner No. 2 is the principal employer under the Act and the security personnel employed by him are the employees under the Act and, therefore, no interference is warranted with the impugned judgments and orders. She further submitted that the petitioners were also granted code numbers under the Act on 7th April, 1995 and as such, it is too late for the petitioners to contend that petitioner No. 2 is not the principal employer, Insofar as the sentence is concerned, Mrs. Agni submitted that in terms of section 85(i)(b) of the Act, minimum sentence prescribed is six months simple imprisonment and fine of Rs. 5,000 which can be reduced by the Court for adequate and special reasons. Learned Counsel, therefore, submitted that no interference is warranted with the impugned judgments and orders. In support of her submissions, Mrs. Agni relied upon the following judgments:

- (i) State of Punjab Vs. Kulwant Singh @ Kanta, .
- (ii) International Airport Authority of India Vs. International Air Cargo Workers" Union and Another, .
- (iii) M/s. Hindu Jea Band v. Regional Director Employees" State Insurance Corporation, 1987 (54) FLR 443 (SC).
- (iv) State of M.P. v. Harishankar Bhagwan Pd. Tripathi, AIR 2010 SCW 5902.

8. Mr. Ferreira, learned Public Prosecutor for respondent No. 2 submitted that minimum sentence prescribed under the Statute can be reduced only on exceptional grounds and in support of this submission, Mr. Ferreira placed reliance upon the judgment in the case of Harendra Nath Chakraborty Vs. State of West Bengal, .

9. I have considered the rival submissions, perused the record and the judgments relied upon.

10. The first point which arises for consideration is whether the sanctions granted by the competent authority can be faulted on the ground that the same disclose non-application of mind by the competent authority. Section 86 of the Act provides that no prosecution under the said Act shall be instituted except with the previous sanction of the Insurance Commissioner or such other officer of the Corporation as may be authorised on his behalf by the Director-General of Corporation. In the present case, the sanctions have been granted by the Regional Director of E.S.I, and there is no serious dispute that he is entitled to grant sanction. The only challenge to the sanctions is that the sanctions produced by the complainant do not disclose an application of mind by the competent authority while giving sanctions.

11. Perusal of the sanctions discloses that the sanctioning authority has mentioned therein that he had read the papers concerning the prosecution u/s 85 of the Act and offences under sections 85(a) and 85(e) of the Act were made out and, therefore,, sanctions were being granted to prosecute the petitioners. In the cross-examination of the complainant except as to the question as to whether he was aware as to what document was produced before the sanctioning authority, no other challenge is thrown to the sanctions. Both, the Magistrate and the Lower Appellate Court have held that no fault could be found with the sanctions in view of the limited challenge thrown in the cross-examination on behalf of the accused. I do not find any ground to uphold the contention of Mr. Almeida that the sanctions granted to prosecute the petitioners discloses non-application of mind and, therefore, the prosecution of the accused was not maintainable. No doubt in the case of Mansukhlal Chauhan (supra), the Apex Court has held that the sanctions must disclose application of mind by the sanctioning authority and the grant of sanction is not an empty formality. There cannot be dispute with this proposition which has been reiterated by the Apex Court in a catena of decisions. However, in the present case as stated above, the sanction orders which have been produced on behalf of respondent No. 1 clearly disclose that the sanctioning authority had applied his mind while ordering prosecution and having regard to the limited challenge thrown in the cross-examination of the witness examined on behalf of respondent No. 1, I find it difficult to uphold the contention of Mr. Almeida that the sanctions are invalid on the ground of non-application of mind. It is also pertinent to note that the prosecution is under the Act which is beneficial legislation. The purpose of making provision for prior sanction for prosecution is to ensure that a person

should not be made to face frivolous prosecution. I am of the opinion that the prosecution of the petitioners cannot be scuttled on the ground that the sanction orders disclose non-application of mind by the sanctioning authority. Therefore, I am not inclined to accept the first submission of the petitioners.

12. In order to appreciate the second contention made on behalf of the petitioners that petitioner No. 2 is riot the principal employer and that the security personnel employed by him are not employees under the Act, it would be appropriate to quote the definitions of principal employer, employee and also immediate employer. They read thus:

2(17) "Principal Employer" means--(i) In a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the Factories Act, 1948 the person so named;

(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the head of the Department;

(iii) in any other establishment, any person responsible for the supervision and control of the establishment; 2(9) "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies, and--

(i) who is directly employed by the principal employer, on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or

(ii) who is employed by or through an immediate employer, on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment or any person engaged as apprentice, not being an apprentice engaged under the Apprentices Act, 1961, and includes such person engaged as apprentice whose training period is extended to any length of time but does not include--

(a) any member of the Indian naval, military or air forces; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government a month:

Provided that an employee whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period;

2(13) "immediate employer", in relation to employees employed by or through him, means a person who has undertaken the execution, on the premises of a factory or an establishment to which this Act applies or under the supervision of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment, and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer and includes a contractor;

13. A bare perusal of the definition of employee, more particularly Clause (i) discloses that the employee means a person who is employed for wages in connection with the work of factory or establishment and who is directly employed by the principal employer on any work of or incidental or preliminary to or connected with the work of factory or establishment whether such work is done by the employee in the factory or establishment or elsewhere. The contention of the petitioners that since the security personnel, who are employed by the petitioners are made to work at the establishments of different persons over which the petitioners have no control and, therefore, they cannot be termed as employees, cannot be accepted in view of the clear language of section 2(9) (i). In terms of section 2(9)(i), it is not necessary that to be an employee he must work in the factory or establishment of the employer himself. In the present case, admittedly, the security personnel were not only appointed by the petitioners but their salaries were also paid by the petitioners/employer. Merely because the security personnel were made to work at different establishments by itself would not be sufficient not to term them as employees in terms of the Act

14. Mrs. Agni is justified in placing reliance upon the judgment of the Apex Court in the case of *M/s. Hindu Jea Band* (supra) in which the Apex Court has held that it is not the place where the goods are sold is only a shop. The place where the services are sold on retail basis is also a shop and place of business of firm carrying on business of playing music on occasion, such as, marriages and other social functions which make available payment of stipulated price the services of the members of the group of musicians employed by it on wages is a shop to which the Act is applicable by virtue of the notification. In view of the said judgment, it is clear that the place where the employees personally work is not

decisive for finding out as to whether a person is employee under the Act.

15. Considering the factual position, it cannot be said that the security personnel employed by the petitioners were not the employees nor petitioner No. 2 was not the principal employer in terms of the Act. Moreover, the fact remains that the petitioners were given code number under the Act in the year 1995 itself and at no point of time the petitioners challenged that they were not covered under the Act. No doubt mere fact that code number was given by itself would be conclusive to hold that the Act is applicable but this factor to be considered along with the other factors to find out as to whether the petitioners are covered under the Act or not.

16. I shall now deal with the judgments relied upon by Mr. Almeida in support of his contention that petitioner No. 2 cannot be termed as the principal employer nor the security personnel employed by the petitioners can be termed as the employees for the purpose of the Act. In the case of Managing Director, Hassan Co-operative Milk Producers Society Union Limited (*supra*), the Apex Court was dealing with the situation wherein the appellants had engaged a contractor and entered into agreement with the union and the contractor for transportation of the milk from the places on rates specified. After considering the terms of the agreement and the evidence led in the matter, the Apex Court held that the appellant therein had no say over the terms and conditions of the employment of the employees and that the appellant had any thing to do with the logistic operations of the contractor. The Apex Court further observed that as a matter of fact there was nothing on record to show that the principal employer had any knowledge about the number of persons engaged by the contractors or the names or other details of the persons nor any evidence to show that the appellant was aware of the amount payable to each of these workers. In this factual background, the Apex Court held that the appellant was not covered under the Act and consequently, allowed the appeal. Facts in this case are clearly distinguishable and, therefore, do not advance the case of the petitioners.

In the case of Goa Bottling Co. Pvt. Ltd. (*supra*), considering the factual background in the case, the learned Single Judge of this Court held that the persons employed by the contractor for the purpose of loading and unloading of crates of bottles of aerated drinks and other soft drinks were not the employees and as such, were not covered under the Act. It is well settled that in order to a judgment is treated as precedent, the facts in the case have to be considered and small difference in facts may lead to different conclusion.

Having regard to the facts in the said case which are not at all identical with the facts in the present case, the ratio of the said judgment also would not help the petitioners.

In the case of Bajaj Tempo Ltd. (*supra*), the learned Single Judge of this Court held that the persons engaged by the contractors are the employees of the appellants before the High Court. Again, the said judgment would not advance

the case of the petitioners.

17. In the case of International Airport Authority of India (supra) relied upon by Mrs. Agni, the Apex Court observed thus:

19.... The tests that are applied to find out whether a person is an employee or an independent contractor may not automatically apply in finding out whether the contract labour agreement is a sham, nominal and is a mere camouflage. For example if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by a contractor, if the right to regulate the employment is with the contractor, and the ultimate supervision and control lies with the contractor. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/ allotted/ sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short, worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor,

18. Thus, having regard to the admitted factual position, there can be no dispute that the petitioners are the principal employers for the purpose of the Act. Therefore, the finding recorded by the learned Magistrate which has been confirmed by the Lower Appellate Court that the petitioners are covered under the Act in as much as the petitioners are the employers and the security personnel employed by them were the employees cannot be said to be perverse or contrary to the record warranting interference in exercise of revisional jurisdiction. It is also well-settled that the revisional jurisdiction of this Court is limited and the findings recorded by the Lower Courts which are based on the appreciation of the evidence, cannot be interfered with unless the same are perverse. In the present case, the findings recorded by both the Courts below cannot be termed as perverse and, therefore, the exercise of revisional jurisdiction against the said findings would be impermissible in law.

19. The next question which arises for consideration is whether the sentences imposed on petitioner No. 2 are excessive. No doubt, Mr. Almeida has placed reliance upon the unreported Division Bench judgment of this Court dated 16th November, 1999 in Criminal Appeal No. 1/1999 in which the Division Bench of this Court while setting aside the acquittal of the respondents in the appeal for the offence punishable u/s 85(i)(b) of The Act, while convicting respondent No. 2 has sentenced him to undergo simple imprisonment till rising of the Court and to pay fine of Rs. 5,000 each.

20. Section 85(i)(b) of the Act provides that if a person is convicted for contravention in terms of sections 85(a) and 85(e), the sentence should not be less than six months and fine should not be less than Rs. 5,000. It also provides that the Court may for adequate and special reasons to be recorded in the judgment impose sentence of imprisonment for a lesser term.

21. Mr. Ferreira, is justified in placing reliance upon the judgment of the Apex Court in the case of Harendra Nath Chakraborty (supra) in which the Apex Court while dealing with the conviction under the Essential Commodities Act, 1955 has held that when the statute prescribes minimum punishments ordinarily the Court has to impose the same and imposition of sentence less than minimum is permitted only in exceptional cases. The Apex Court has held that ordinarily, the legislative sentencing policy as laid down in the Act where the parliamentary "intent has been expressed in unequivocal terms should be applied and the sentence of less than minimum period prescribed by parliament may be imposed only in exceptional cases. In the present case, on behalf of the petitioners it has been submitted that petitioner No. 2 has stopped the activity of supplying security personnel and he has also paid the amount due under the Act and, therefore, the sentence less than minimum be imposed. As far as the first Submission is concerned, Mrs. Agni has not seriously disputed, but insofar as the payment of dues under the Act is concerned, the same has been seriously disputed by Mrs. Agni on behalf of respondent No. 1. Be that as it may, the fact that the petitioners have paid the dues under the Act or that the petitioner No. 2 has stopped the activity of supplying security personnel, would not be the relevant factors for the purpose of finding out whether adequate and special reasons exist for imposing the sentence less than the minimum. From the bare reading of the proviso to section 85(i)(b) it is clear that in order to impose the sentence less than minimum, the accused, who is convicted has to make out adequate and special reasons. In the present case, none exists. In so far as the unreported Division Bench judgment in the case of P.V.K. Industries (supra) is concerned, the same cannot be relied upon as the ratio for the proposition is that in all cases of conviction u/s 85 of the Act less than minimum can be imposed. Probably the attention of the Division Bench was not brought to section 85 of the Act which prescribes minimum sentence and the grant of sentence less than the minimum only on adequate and special reasons. Therefore, I am not able to place any reliance on the judgment of the Division Bench in support of the petitioners' plea that in the present case less than minimum sentence deserves to be imposed on petitioner No. 2, in all the cases, learned Magistrate has imposed minimum sentence on petitioner No. 2 which has been confirmed by the Lower Appellate Court and I do not find any ground to take a contrary view.

22. In the result, therefore, I do not find any merit in the revision applications filed by the petitioners. Hence, the revision applications are dismissed.

23. At this stage, Mr. Almeida, learned Counsel for the petitioners seeks time of eight weeks to surrender to undergo the sentences imposed on petitioner No. 2.

Mrs. Agni, learned Counsel for respondent No. 1 and Mr. Ferreira, learned Public Prosecutor for respondent No. 2 have no objection. Hence, petitioner No. 2 is granted time of eight weeks to surrender. Bail bonds executed by petitioner No. 2 shall stand discharged after a period of eight weeks or upon surrender of petitioner No. 2 before eight weeks.