(1984) 01 CAL CK 0001

In the Calcutta High Court

Case No : Criminal Rev. No. 1271 of 1982

S.K. Agarwala and Others APPELLANT

Vs

E.S.I. Corporation and Others RESPONDENT

Date of Decision : 20-01-1984

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 401, 482
Employees State Insurance Act, 1948 — Section 2(17), 46, 83, 85(a), 85B
Penal Code, 1860 (IPC) — Section 11, 405, 406

Citation : 89 CWN 646

Hon'ble Judges : M.K. Mukherjee, J

Bench : Single Bench

Advocate : S.G. Poddar and Bijoli Bhusan Ghosh, for the Appellant; Subal Moitra, for the Respondent

Final Decision : Allowed

Judgement

Monoj Kumar Mukherjee, J.—Sri Sankar Bhattacharjee, an Insurance Inspector of the Employees'' State Insurance Corpn. Calcutta, filed a complaint against the four petitioners of this revisional application in the court of the Chief Metropolitan Magistrate, Calcutta alleging commission of an offence u/s 406 of the Indian Penal Code. The material allegations in the complaint are as under. The petitioners are all directors of M/s. Indo Japan Steel Ltd. and as such they are the principal employers'' as defined u/s 2(17) of the Employees'' State Insurance Act, 1948 (hereinafter referred to as the Act). As the provisions of the said Act are applicable to the factory and the Head Office of the Company, the petitioners as principal employers, are required to deduct from the wages of the every employees an amount of money in accordance with the first schedule of the said Act and are obligated to deposit the said contributions in the manner and within the period provided under the said Act. The complainant inspected the Head office of the Company and found that the petitioners, as the principal employers, deducted a sum of Rs. 2,223.50P, as employees'' share of contribution from their wages during the period from February 1981 to September 1981 but failed to deposit the said amount to the Employees'' State Insurance Fund within the specified time. Thereby, according to the complainant, the petitioner''s committed criminal breach of trust in respect of the aforesaid sum within the meaning of Explanation 2 to section 405 of the Indian Penal Code for which they were liable for prosecution u/s 406 of the Indian Penal Code.

2. On that complaint the learned Magistrate took cognisance and issued summons against the petitioners, to stand trial. The learned Magistrate also issued a search warrant for seizure of certain records of the Company as prayed for by the complainant. Aggrieved thereby the petitioners filed this instant application under sections 401|482 of the Criminal Procedure Code, which was heard as a contested one, for quashing the proceeding of the said case.

3. The only point that was urged on behalf of the petitioners in support of this application was that the petitioners as directors of a limited Company, could not be made liable for prosecution u/s 406 of the Indian Penal Code as they were not employers'' within the meaning of Explanation 2 to section 405 of the Indian Penal Code. On behalf of the complainant it was contended on the other hand that the petitioners being the directors of the Company were the principal employers under the Employees'' State Insurance Act and as such they were liable for prosecution u/s 406 of the Indian Penal Code.

4. To appreciate the contentions of the respective parties it will be necessary at this stage to refer to Explanation 2 to section 405 of the Indian Penal Code which was brought into the statute book by the Employees'' State Insurance (Amendment) Act 1975. The Explanation 2 reads as under :-

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 contribution so deducted by him 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.

5. From the above explanation it would be abundantly clear that the employer, who deducts the employees'' contribution shall be deemed to have been entrusted with the amount of contribution so deducted and he shall be deemed to have dishonestly misappropriated the said amount. In other words, the deeming provision applies to an ''employer''. ''Employer'' has not been defined in the Indian Penal Code, and under the Act only ''immediate employer'' and ''principal employer'' have been defined, though there are some provisions like sections 85B and 85C of the Act which speak of ''employer''.

6. u/s 85(a) of the Act any Person who fails to pay any contribution which under the Act, he is liable to pay, may be prosecuted and if may be argued that since

the liability to pay the contribution u/s 46 of the Act is upon the ''Principal employer'' anybody who comes within the definition of the ''principal employer'' under the Act including a director who may answer to the description of ''occupier'' may be prosecuted. u/s 406 of the Indian Penal Code however the deeming provision of explanation 2 to section 405 would apply only to an employer'' and not to a ''Principal employer.'' In absence of any definition of ''employer'' under the Indian Penal Code the ordinary meaning to the term ''employer'' has to be given and that necessarily means the person who employs. u/s 11 of the Indian Penal Code the word ''person'' includes any Company or association or body of persons Whether incorporated or not and it necessarily follows that the Indo Japan Steel Ltd. which is an incorporated company will be the employer in respect of its employees.

7. On behalf of the complainant a Division Bench judgment of the Punjab and Haryana High Court in the case of ESI Corporation Vs. Dhanda Engineering, reported in 1981 (42) FLR 282 was relied upon to contend that the principal employer was also liable for prosecution u/s 406 of the Indian Penal Code. I have carefully gone through the judgment and I do not find any observation made therein to support the above contention. While refering to the explanation 2 to section 405 it was observed in the said judgment that by the said amendment a delinquent employer was brought within the ambit of the Indian Penal Code. There cannot be any dispute about the observation so made, but the question that arises for consideration in this case was whether ''principal employer'' can be quoted with ''employer in absence of any specific provision in the Indian Penal Code to warrant such equation. In that view of the matter the petitioners cannot be said to be ''employers'' within the meaning: of Explanation 2 to section 405 of the Indian Penal Code though they may be principal employers under the Act for which they might have been prosecuted u/s 83 of the Act. For the foregoing discussions it must be held that the impugned prosecution of the petitioners u/s 406 of the Indian Penal Code is not maintainable. The application is, therefore, allowed and the impugned proceeding is hereby quashed.