(2006) 09 AP CK 0012

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 5083 of 2005

Sri Krishna Pulverising Mills and Another — APPELLANT

Vs

Employees State Insurance Corporation and Another — RESPONDENT

Date of Decision : 14-09-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 211, 212, 216, 482
Employees State Insurance Act, 1948 — Section 38, 39, 72, 73, 84

Citation : (2007) 1 ALD(Cri) 56 : (2006) 3 ALT(Cri) 506 : (2007) 2 LLJ 409

Hon'ble Judges : N.V. Ramana, J

Bench : Single Bench

Advocate : O. Manohar Reddy, for the Appellant; B.G. Ravindra Reddy and Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

N.V. Ramana, J.—This Criminal Petition, u/s 482 Cr.P.C., is filed praying to quash the additional charge framed by the Judicial Magistrate of First Class, to try the offences under the ESI Act and Chairman, Industrial Tribunal, Hyderabad, in P.C. No. 60 of 2003 against the petitioners u/s 85(1)(a) of the Employees'' State Insurance Act, 1948 (for short ''the ESI Act''), vide order dated 21.09.2005.

2. The learned Counsel for the petitioners submits that since the petitioner No. 2 representing petitioner No. 1-Mill has not paid the employer''s contribution amounting to Rs. 13,354/- for the period from 01.04.2001 to 30.09.2001, which he was liable to pay under the Act, the offence u/s 85(a) of the ESI Act alone is attracted, and the Judicial Magistrate of First Class has rightly framed charge u/s 85(a) of the ESI Act, he however, committed a gross error in framing additional charge u/s 85(1)(a) of the ESI Act, and more so when there was no such prayer made by the complainant in the complaint filed against the petitioners, and no sanction, as required u/s 86(1) of the ESI Act, for prosecuting the petitioners u/s 85(1)(a) of the ESI Act was obtained by the complainant from the competent authority. He thus prayed that the additional charge framed by the Judicial

Magistrate of First Class against the petitioners u/s 85(i)(a) of the ESI Act, be quashed.

3. On the other hand, the learned Standing Counsel appearing on behalf of respondent No. 1-ESI submitted that as petitioner No. 2, representing petitioner No. 1-Mills, has failed to pay the employer''s contribution, amounting to Rs. 13,254/- for the period from 01.04.2001 to 30.09.2001, which he was liable to pay under the ESI Act, the petitioners are liable for prosecution u/s 85(a) of the ESI Act, and as such, after obtaining prior sanction from the competent authority, the complainant lodged the complaint against the petitioners, and the learned Judicial Magistrate of First Class, has rightly framed charge against the petitioners for the offence u/s 85(a) of the ESI Act. He submitted that a person who commits offence u/s 85(a) of the ESI Act, is punishable u/s 85(i)(a) of the ESI Act, and inasmuch as there is an allegation that the petitioner has committed an offence u/s 85(a) of the ESI Act, the learned Judicial Magistrate of First Class, having framed charge u/s 85(a) of the ESI Act, committed no error in framing additional issue against the petitioners u/s 85(i)(a) of the ESI Act, which is a penal provision. He submits that as the complainant has obtained prior sanction from the competent authority for prosecuting the petitioners u/s 85(a) of the ESI Act, no separate sanction is required to be obtained u/s 86(1) of the ESI Act, for prosecuting the petitioner u/s 85(i)(a) of the ESI Act, which is a penal provision. The learned Public Prosecutor appearing on behalf of respondent No. 2-State adopted the submissions of respondent No. 1.

4. Heard the learned Counsel for the petitioners, the learned Standing Counsel for respondent No. 1-ESI and the learned Public Prosecutor for respondent No. 2-State. Having regard to the rival contentions it is expedient to notice the relevant provisions of the Employees'' State Insurance Act, 1948 (for short, ''the Act'') and the very scheme under the Act. The Act is a beneficial legislation meant to sub-serve the interests of the employees. It seeks to provide inter alia certain benefits to employees in case of sickness, maternity and employment injury and for certain other matters in relation thereto. It obligates every factory or establishment to which the Act applies to get registered in the manner prescribed under the Act. For the purpose of administration of the insurance scheme to employees, the Central Government is obligated to establish a Corporation to be known as the Employees'' State Insurance Corporation. The Corporation thus established shall in addition to the scheme of benefits, specified inter alia in the Act, promote measures in the improvement of the health and welfare of insured persons and rehabilitation and re-employment of insured person who have been disabled or injured and may incur in respect of such measures, the necessary expenditure from the funds of the corporation. Chapter IV of the Act, envisages contributions from the employees and the employers to create a fund called the Employees'' State Insurance Fund. The Act obligates u/s 38 all the employees in the factories or establishment to which it applies shall get insured. u/s 39 the contributions shall be paid by the employer and the employee which are known as the "employers'' contribution" and the "employees'' contribution". The

principal employer shall pay in respect of every employee, both the employers'' contribution and the employees'' contribution. Thereafter in cases where the employees are directly employed, the principal employer is entitled to recover from the employee the employee''s contribution by deduction from his wages. The Act in Chapter VI contemplates the adjudication of disputes and claims that might arise in the administration by establishing Courts. The Court is competent to adjudicate the dispute as to whether any person is an employee, the rate of wages or average daily wages of an employee, the rate of contribution payable by the principal employer, whether any person is the principal employer, the right of any person to any benefit and such other matters. Chapter VII provides for the penalties for violation of the provisions of the Act. Section 84 prescribes punishment for furnishing a false statement. Section 85 prescribes punishment for failure to pay contribution. Section 85A prescribes enhancement in the event of repeating the crime.

5. Section 85 is germane in the context and it reads thus:

85. Punishment for failure to pay contributions, etc.:-- If any person-

(a) fails to pay any contribution which under this Act he is liable to pay, or

(b) deducts or attempts to deduct from the wages of an employee the whole or any part of the employer''s contribution, or

(c) in contravention of Section 72 reduces the wages or any privileges or benefits admissible to an employee, or

(d) in contravention of Section 73 or any regulation dismisses, discharges, reduces or otherwise punishes an employee, or

(e) fails or refuses to submit any return required by the regulations, or makes a false return, or

(f) obstructs any Inspector or other official of the Corporation in the discharge of his duties, or

(g) is guilty of any contravention of or non-compliance with any of the requirements of this Act or the rules or the regulations in respect of which no special penalty is provided,

he shall be punishable-

(i) where he commits an offence under Clause (a), with imprisonment for a term which may extend to three years but--

(a) which shall not be less than one year, in case of failure to pay the employee''s contribution which has been deducted by him from the employee''s wages and shall also be liable to fine of ten thousand rupees;

(b) which shall not be less than six months, in any other case and shall also be liable to fine of five thousand rupees;

Provided that the Court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term;

(ii) where he commits an offence under any of ;the Clauses (b) to (g) (both inclusive), with imprisonment for a term which may extend to one year or with fine which may ;extend to four thousand rupees, or with both.

6. A perusal of the above provision shows that certain acts and omissions on the part of the employer are made punishable. Under Clause (a) if any person fails to pay any contribution, which he is obliged to pay under the Act, he is punishable. Under Clause (b) if that person takes or attempts to take from the wages of an employee the whole or any part of the employer''s contribution, he is punishable. Under Clause (c) if any person reduced the wages or any privileges or benefits of an employee in contravention of Section 72, he is liable for penalty. Under Clause (d) if any person contravenes Section 73 or any regulation by dismissing, discharging, reducing or otherwise punishing any employee, he is liable for penalty. Under Clause (e) if he fails or reduced to submit any return or makes a false return, he is liable. Under Clause (f) if he obstructs any Inspector or other official of the corporation in the discharge of his duties is liable and under Clause (g) if he is guilty of any contravention of order, non-compliance with any of the requirements of the Act or the rules made there under for which no special penalty is provided for, he is liable. For these acts and omissions as enumerated under Clauses (a) to (g) the punishment is prescribed under Clauses (i) and (ii). Clause (i) is again divided into two categories (a) and (b). Clause (i) prescribes punishment for failure to pay any contribution by the employer. The punishment provided for under this clause is imprisonment for three years and fine of Rs. 10,000/-. If the employer fails to pay the contribution after having deducted the same from the salary of the employee it is an aggravated form of offence. Clause (i)(a) prescribes a minimum sentence of one year in such cases, besides the payment of fine. Clause (b) prescribes punishment in all other cases which is again a minimum of not less than six months, besides the payment of fine of Rs. 5,000/-. Under the proviso incorporated thereunder, the Court is given discretion to impose the sentence of imprisonment for a lesser term after recording adequate and special reasons. Clause (ii) prescribes punishment for the violation of Clause (b) to (g). Under this clause the punishment provided for is imprisonment for a term which may extend to one year or with fine which may extend to Rs. 4,000/- or with both.

7. Earlier, Clauses (i) and (ii) were not incorporated in the provision. The provision has been amended twice. Firstly, vide Act 38 of 1975 with effect from 01-09-1975 and secondly vide Act 29 of 1989 with effect from 20-10-1989. Thus, it is obvious that violation of Clauses (a) to (g) of Section 85 are made punishable prescribing punishment separately for violation of each one of them. Of them, Clause (a) seems to be a serious violation because it draws a distinction in between the omission on the part of the employer in contributing towards employees'' insurance fund and omission on his part after having collected fund

from the employee by deduction from his wages. If the employer fails to contribute the same towards the insurance fund he is liable for imprisonment which may extend for a term of three years with a minimum sentence of one year, besides paying the fine of Rs. 10,000/-. For the violation of other Clauses (b) to (g) the employer is liable for punishment with imprisonment for a term which may extend to one year or with fine which may extend to Rs. 4,000/-. No compulsory sentence is prescribed under the Act for violation of Clauses (b) to (g). Therefore, any employer who fails to pay any contribution after having collected the same from the employee by deducting from his wages, he is liable to be punished u/s 85(a)(i)(a). If any person fails to pay the contribution towards the employees'' contribution but has not deducted the same from the wages of the employee, he is liable for punishment u/s 85(a)(i)(b). In fact, Section 85 is a single provision containing various clauses. This is obvious from a glance at the relevant provision as excerpted hereinabove.

8. A charge is expected to be framed by the Court containing concisely the essential ingredients that constitute the offence, the name of the offence, the penal provision under which the offence is punishable, the date and time of place of offence committed, if any, as can be seen from Sections 211 and 212 of the Criminal Procedure Code, so as to give notice of the same to the accused, so that the accused can meet the charge effectively. That is the object behind the framing of a charge.

9. In the instant case, the Court below framed the necessary charge and has incorporated inter alia therein the penal provision under which the offence is punishable as Section 85(a) in the first instance. When the successor Officer of that Court had noticed the defective form of framing the charge he sought to amend the charge by framing an additional charge u/s 85(a)(i). In fact, it is not at all a case of framing an additional charge. The charge can be amended u/s 216 of the Code of Criminal Procedure at any time before the final verdict. The penal provision which ought to have been incorporated in the charge has been initially mentioned as Section 85(a) instead of Section 85(a)(i)(a). It is not, to reiterate, a case of framing an additional charge at all. While Clause (a) of Section 85 makes the act of not paying the contribution of the employee by the employer punishable, Clause (i)(a) and (b) prescribe punishments for such violation. The contention that an additional charge has been framed under Clause 85(a)(i)(a) is fallacious and is obviously a misunderstanding of the provision germane in the context. Without seeking to understand the relevant provision in its proper perspective unnecessarily an objection has been raised and the matter has been carried to a higher Court, which, in my considered view, is nothing but abuse of the process of the Court.

10. For the above reasons, the Criminal Petition fails and is dismissed.

