

(2005) 01 KAR CK 0047
In the Karnataka High Court
Case No : Criminal A. No. 315 of 1999

State

APPELLANT

Vs

Kranthi Kumar and Another

RESPONDENT

Date of Decision : 24-01-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Employees State Insurance Act, 1948 — Section 44, 85 (f), 85 (g)

Citation : (2005) 105 FLR 20 : (2005) ILR (Kar) 875 : (2005) 2 KarLJ 63 :
(2005) 1 KCCR 52 SN : (2005) 2 LLJ 675

Hon'ble Judges : N.S. Veerabhadraiah, J

Bench : Single Bench

Advocate : V. Narasimha Holla, for the Appellant; Kiran S. Javali and S.S. Hiremath, for the Respondent

Judgement

N.S. Veerabhadraiah, J.—This appeal is by the Employees State Insurance Corporation assailing the judgment of acquittal of the accused for the offence punishable u/s 85(f)&(g) of the ESI Act in CC.No.2843/ 89 on the file of the I Addl. JMFC, Gulbarga, dated 29.9.1998.

2. The brief facts of the case are as follows:

The respondent M/S Kranthi Kannada Daily is carrying on with the business of printing and publishing of Kannada Daily News Papers represented by the first respondent Sri Kranthi Kumar and another his mother Mrs. M.S. Annapurna, the second respondent, at Gulbarga. The establishment is covered under the ESI Act with Code No. 53.3395.105. The ESI inspector issued notice to the respondent about his inspection of the establishment on 26.9.1988 and to produce the relevant records maintained before him. The ESI Inspector inspected the establishment on 26.9.1988 on which day the records were not produced wherein, a letter was submitted by one of the partners of the Kranthi Kannada Daily which is dated 26.9.1988. As the records were not produced, the ESI Inspector made a note as per Ext.PI and submitted a report as per Ext.P 2 to the

Regional Director, ESI Corporation for taking necessary action in the matter. On the basis of the report, the Regional Director, ESI Corporation, issued a sanction order to prosecute the principal employer of M/s Kranthi Kannada Daily, Gulbarga for the offence u/s 85(f)&(g) of the ESI Act. After obtaining sanction, a complaint was filed before the I Addl. JMFC Gulbarga, which came to be registered as C.C.No.2843/89 after taking cognizance. The presence of the accused was secured and plea was recorded for the offence u/s 85(f)&(g) of the ESI Act.

3. The accused Sri Kranthi Kumar, one of the partners who is arrayed as one of the accused pleaded not guilty and claimed to be tried. The Complainant examined P.Ws 1 and 2 and produced Exts.PI to P8. The statement of the accused was recorded u/s 313 Cr.P.C. The defence of the accused is one of total denial and he filed a written statement in support of his defence.

4. The learned Magistrate analysing the testimony of the prosecution witnesses and the documents, recorded a finding of acquittal for the offence u/s 85(f)&(g) of the ESI Act. It is this judgment of acquittal which is questioned in the present appeal.

5. Learned Counsel for the appellant Sri V. Narasimha Holla contended that the approach of the learned Magistrate disbelieving the case of the prosecution and the interpretation of Section 85(f)&(g) of the ESI Act is erroneous and not sustainable. The material on record and the evidence clearly establishes the fact that the establishment is covered under the ESI Act and a Code number is also given. Therefore, it is mandatory on the part of the establishment to maintain the records as required u/s 44 of the ESI Act. He has further submitted that the very non- maintenance of the records itself is an offence when once the establishment is covered under the ESI Act. Therefore, the acquittal of the accused is not proper. Accordingly, prayed to allow the appeal by setting aside the judgment of acquittal and to convict the accused.

6. Learned Counsel for the respondents Sri Kiran S.Javali vehemently submitted that the judgment of acquittal is well founded with sound reasonings and does not call for interference. He has further submitted that the learned Magistrate has considered that the number of employees that were found at the time of the inspection by the Inspector is less than 5 and when the question of payment of contribution does not arise, the question of maintenance of the records also does not arise. He has further submitted that the ESI Corporation has not placed any documents to show that the establishment is covered. Therefore, prayed to dismiss the appeal.

7. In the light of the submissions, the points for consideration that arise are:

1. Whether the learned Magistrate is justified in acquitting the accused for the offence u/s 85(f)&(g) of the ESI Act?

2. What order?

8. It is an admitted fact that the respondents' establishment M/s. Kranthi

Kannada Daily is carrying on with the business of printing and publishing of Kannada Daily News Papers at Gulbarga. It is also an admitted fact that initially the establishment came to be covered under the provisions of the ESI Act and it was assigned with Code No. 53.3395.105.

9. It is in the evidence of P.W.I, C.R.Nageshwaran that the ESI Inspector when inspected the establishment, the respondent- accused did not produce the records like the Registers maintained in the course of their business. Therefore, a complaint was filed for obtaining the sanction of the Regional Director of the ESI Corporation and a complaint came to be filed.

10. It is no doubt true from the evidence of P.W.I the details are not forthcoming but, in the cross-examination it is elicited that he does not know whether the accused used to work in the press along with the family members and that he did not personally verify or inspect the press at any time. However admitted the complaint filed is in a cyclostyled form.

11. Now coming to the evidence of P.W.2, Nizamuddin, the ESI Inspector, it reveals that he visited the establishment on 26.9.1988 and found the respondents-accused carrying on with the business of printing and publishing of Kannada Daily News Papers. His evidence reveals that Sri Kranthi Kumar and Mrs. M.S. Annapurna are the partners of the establishment. During the inspection, he found 2 persons viz., R.N.Kulkarni and another person by name Abdul Azeez, who are also said to be working in the establishment.

12. In the cross-examination, he has admitted that he did not record the statements of any of the employees. Further his evidence reveals that the records were not produced by the respondents for his inspection. Therefore, he submitted the inspection report as per Ext.P 2 in respect of non-production of the documents.

13. It is pertinent to note that the respondents by a letter dated 26.9.1988 marked at Ext.P 5 has clearly admitted that they have engaged only 5 persons as they are using all sophisticated machineries for printing and publishing. Even in the written statement filed by the accused they have categorically stated regarding printing and publishing of Kannada Daily News Papers in the name and style of M/s. Kranthi Kannada Daily and also the fact of the establishment being covered under the ESI Act. Thus it is clear that the establishment is covered under the ESI Act. But the question that is required to be considered is, whether it is mandatory on the part of the establishment to maintain the relevant records like attendance register, wage register and cash register as required u/s 44 of the ESI Act and further the non- maintenance of the records does amount to contravention of Section 85(g) of the ESI Act.

14. Section 85(f)&(g) of the ESI Act reads as follows:

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

(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 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."

15. Where there is obstruction by the establishment regarding the discharge of duties to the persons authorised by the ESI authorities such a person is liable for punishment as contemplated under the Act. In the present case, there is no allegation by P.W.s 1 and 2 or in the complaint stating that there was any obstruction by the management to the ESI Inspector when inspecting the establishment. Therefore, Section 85(f) of the ESI Act is not attracted.

16. Now coming to Section 85(g) of the ESI Act is concerned, if any of the requirements of the Act or the rules or regulations are contravened, the persons responsible are liable to be punished under the said provision. In that perspective, the matter has to be looked into to find out whether there is any contravention of the provisions of the Act.

17. It is settled position of law that when once the establishment is covered under the ESI Act, whether the establishment is liable to pay any contribution or not, it requires that the mandatory provisions have to be complied with.

18. Section 44 of the ESI Act reads thus:

" 44. Employers to furnish returns and maintain registers in certain cases.-

(1) Every principal and immediate employer shall submit to the Corporation or to such officer of the Corporation as it may direct such returns in such form and containing such particulars relating to persons employed by him or to any factory or establishment in respect of which he is the principal or immediate employer as may be specified in regulations made in this behalf.

(2) Where in respect of any factory or establishment the Corporation has reason

to believe that a return should have been submitted under sub-section (1) but has not been so submitted, the Corporation may require any person in charge of the factory or establishment to furnish such particulars as it may consider necessary for the purpose of enabling the Corporation to decide whether the factory or establishment is a factory or establishment to which this Act applies.

(3) Every principal and immediate employer shall maintain such registers or records in respect of his factory or establishment as may be required by regulations made in this behalf."

19. On a reading of the section, it makes clear that it is mandatory on the part of the establishment to maintain the records required and to produce the same before the authorities as and when demanded.

20. In the present case, it is seen that the establishment has not maintained any records and the same is also stated in the statement filed while questioned u/s 313 Cr.P.C. In that view of the matter, the respondents-accused of the establishment violated the provisions of Section 44 of the ESI Act in not maintaining the, records. Therefore, it is a clear contravention of the provisions of the ESI Act which resulted in the non-production of the documents when demanded by the ESI Inspector. Therefore, the provisions of Section 85(g) of the ESI Act are attracted and thereby, the accused are liable to be punished for violation of the above provision.

21. The learned Magistrate has not examined the provisions of Section 44 of the ESI Act while dealing with the matter. Whether an establishment pays contribution or not, when once the establishment is covered under the ESI Act, it is mandatory on the part of the establishment to maintain the records as required u/s 44 of the ESI Act which fact has been lost sight of by the learned Magistrate. In that view of the matter, the judgment of the trial Court in acquitting the accused is not sustainable. Accordingly, the judgment of acquittal recorded by the learned JMFC, Gulbarga, dated 29.9.1998 is set aside by allowing the appeal.

22. Heard Sri Kiran S.Javali, learned Counsel for the respondents regarding the sentence. He has submitted that the proceedings were initiated somewhere in the year 1989 and till now the matter is pending. Therefore, prayed to take a lenient view and to dispose of the appeal.

23. On the other hand, Sri V.Narasimha Holla, learned Counsel for the appellant prayed to impose the maximum punishment.

24. Having regard to the facts and circumstances of the case, the management of the establishment might have been under the impression that they are not required to maintain the records as they have employed less than 5 persons. It is also not in the evidence of the ESI Corporation that the establishment had engaged more than 10 persons so as to pay contribution. In that view of the matter, the non-maintenance of the records in this case appears to be bona fide.

25. Considering the facts of the case, the Court having found the respondents-accused guilty for the offence u/s 85(g) of the ESI Act is liable to be convicted.

26. Accordingly, the respondents-accused are convicted for the offence u/s 85(g) of the ESI Act and both the respondents-accused are sentenced to pay a fine of Rs,500/- each within 6 weeks and in default of payment of fine within 6 weeks, the respondents-accused are sentenced to undergo SI for a period of 10 days each.