

(2009) 05 CAL CK 0062
In the Calcutta High Court
Case No : C.R.R. No. 3375 of 2005

Sunil Kumar Panti and Others

APPELLANT

Vs

Stte of West Bengal and Others

RESPONDENT

Date of Decision : 14-05-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154
Employees State Insurance Act, 1948 — Section 2(17)
Penal Code, 1860 (IPC) — Section 405, 406, 409

Citation : (2010) 6 RCR(Criminal) 2040

Hon'ble Judges : Partha Sakha Datta, J

Bench : Single Bench

Advocate : S. Mitra and S. Bhagat, for the Appellant; S. Mullick, for the Respondent

Final Decision : Allowed

Judgement

Partha Sakha Datta, J.

The Judgment of the Court was as follows:

1. I have heard the learned Advocate for the petitioner. None appears for the opposite party.
2. The Enforcement Officer, P.F., SRO, Jalpaiguri lodged an FIR u/s 154 Cr.PC against the four petitioners who are said to be the Directors of Octavious Tea and Industries Limited alleging offences under Sections 406/409 of the Indian Penal Code. The allegations are that the employer deducted the member's share of provident fund contribution from the wages of the employees for the months from December 2004 to May 2005. The month wise total amount comes to Rs. 11,16,194/-. As the amount deducted from the employees have not been remitted to the E.P.F. accounts maintained by the S.B.I., the accused persons committed the offence of criminal breach of trust.
3. Now this FIR is sought to be challenged in this revisional application on the

ground that the Directors of a company cannot be termed as the owner of a company and they cannot be fastened with criminal liability inasmuch as it is the company who is the owner and is responsible for payment of provident fund dues with the authorities. Prosecution of the Directors by invoking the principle of vicarious liability is wholly unwanted in the facts and circumstances of the case inasmuch as not only the deposit "is being duly made with the P.F. Authorities but the company and/or its office bearers never possessed any mens rea to commit the offence. The other ground was that since money has already been deposited there is no purpose in continuation with the criminal proceeding.

4. Now with respect to the first point, it appears that the FIR was registered against the four petitioners in their capacity as Directors of the said company under Sections 406/409 of the Indian Penal Code. The decision of the Hon'ble Supreme Court in Employees State Insurance Corporation Vs. S.K. Aggarwal and Others, has made it clear once for all that the word "employer" does not include the "Director" for the purpose of prosecution. Their Lordships of the Supreme Court took into consideration the definition of the word "employer" as it occurs in Section 2(17) of the ESI Act, 1948. According to the definition, "principal employer" in a factory means "owner" and or "occupier" of the factory and includes the managing agent of such owner or occupier or legal representative of declared owner or occupier and where the person as been named as manger of the factory persons so named. Their Lordships held that for the purpose of prosecution of employer u/s 405 of I.P.C. the definition of the word "employer" as it occurs in the ESI Act, 1948 cannot be borrowed simply because of the fact that such definition has got no manner of application to either of the explanation to Section 405 of the I.P.O Therefore, it was held that in the absence of any express provision in the Indian Penal Code incorporating the definition of "Principal Employer" in Explanation 2 to Section 405 the definition in ESI Act cannot be held to apply to the term "Employer" and Explanation 2. My attention has been drawn, however, to this Court's decision in R. L. Kanoria & Ors. vs. State & Anr., reported in 2003 C Cr LR (Cal)..... which in fact has followed the decision in S. K. Agarwal & Ors. (supra). The decision of the Patna High Court in Gupta B.P. and Others Vs. State of Bihar, has also been referred to. This decision also followed the decision in S.K.Agarwal (supra) which I have discussed already. Here the learned Single Judge observed that the definition of the term "employer" did not include the directors of the Company and they could not be prosecuted for commission of default in the criminal prosecution u/s 405 I.P.C. Yet, the decision of the Bombay High Court in Sharad Mittersain Jain, Shri P.M. Jan, Shri R.R. Kumar, Shri S. Rajendran and Shri Rashmi Jatalal Zaveri Vs. State of Maharashtra, has also been cited. Here the accused persons who were prosecuted u/s 406 of I.P.C. sought for quashing of the proceeding on the ground that as Directors they cannot be held responsible for alleged commission of the breach of trust because they cannot be termed as "employers" of the establishment.

5. The decision in the State of Haryana and others Vs. Ch. Bhajan Lal and others,

and R.P. Kapur Vs. The State of Punjab, are the guidelines in the matter of quashing of criminal prosecution. The only question that has been argued is as to whether for the purpose of prosecution of the petitioners under Sections 406/409 I.P.C. they can be prosecuted in the capacity of director or not, and no other point has been agitated in the revisional application. Having considered a good number of decisions cited by the learned Advocates for the parties. I am clearly of the opinion that judgment of the Supreme Court in the case of S. K. Agarwal & Ors. has given a complete answer to the question. It has been held by Their Lordships in the said decision that in neither of the explanation u/s 405 I.P.C. there is found anything to the effect that the Directors of the Company or an establishment may be prosecuted u/s 405 I.P.C. for the alleged commission of criminal breach of trust. In both the Explanations 1 and 2 to Section 405 it is the person who is employer, and who deducts employees' contribution that is responsible for the commission of the offence. Necessarily the question is whether the person acting as Director can be termed as "Employer" of the establishment and Their Lordships in the Supreme Court in the case of S.K. Agarwal (supra) has categorically ruled that the word "employer" does not include director. This decision has been followed by other High Courts in the decisions which have been referred to above.

6. Application is allowed. The prosecution is quashed.

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