

(1989) 11 KL CK 0045

In the High Court Of Kerala

Case No : Criminal R.P. No's. 741 and 742/89

Velayudhan

APPELLANT

Vs

E.S.I. Corporation

RESPONDENT

Date of Decision : 28-11-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 472
Employees State Insurance Act, 1948 — Section 39, 40, 85, 86(1), 86(2)
Trade Union Act, 1871 — Section 12

Citation : (1989) 11 KL CK 0045

Hon'ble Judges : K.T. Thomas, J

Bench : Single Bench

Advocate : K.P. Dandapani, for the Appellant; C.S. Rajan, for the Respondent

Judgement

K.T. Thomas, J.—Petitioner, who faces two prosecution proceedings for offences u/s 85 of the Employees' State Insurance Act 1948 (for short "the Act" or "E.S.I. Act" as the context requires) raised a preliminary objection that prosecutions are barred by limitation u/s 86(3) of the Act. The trial Magistrate overruled the preliminary objection by the impugned order against which the present revisions are filed by the Petitioner.

2. For failure to pay employer's contribution towards Employees' State Insurance Scheme in respect of the period between 1st April 1986 and 30th June 1986 a complaint was filed in the trial Court on 8th January 1988 for prosecuting the Petitioner. Another complaint was filed against him on 24th May 1988 for failure to pay his contribution in respect of the next period ending with 31st May 1987. The Chief Judicial Magistrate, before whom the prosecutions are pending, took the view that the offence u/s 85 of the Act is a continuing one and hence the bar envisaged in Section 86(3) cannot operate merely for the reason of the expiry of six months from the last date of the period during which it was payable. The correctness of the view is assailed in these revisions.

3. Section 85(a) of the E.S.I. Act makes failure to pay any contribution due

under the Act as an offence. Section 86(1) of the Act says that no prosecution under the Act shall be instituted except by or with the previous sanction of the Insurance Commissioner or of such other officer of the Corporation as may be authorised in this behalf by the Director General of the Corporation. Sub-section (2) only deals with the forum in which the trial is to be held. The crucial provision is Sub-section (3) which reads thus:

No court shall take cognizance of any offence under this Act except on a complaint made in writing in respect thereof, within six months of the date on which the offence is alleged to have been committed.

4. The employer who evades payment of his statutory contribution towards the welfare of the workmen seeks shelter under law of limitation. The apex court has disapproved the attempt to seek shelter under limitation provision to escape from penal consequence arising from failure to pay contribution which is intended to ensure welfare of the workers. The Supreme Court suggested that the interpretation of the provisions of such welfare legislations must be such as to attain the object and purpose of the legislation. Chandrachud, C.J., has further observed in *Bhagirath Kanoria and Others Vs. State of M. P.*, thus: "It is putting an incredible premium on lack of concern for the welfare of workers to hold that the employer who has not paid his contribution or the contribution of the employees to the Provident Fund can successfully evade the penal consequences of his act by pleading the law of limitation". The Supreme Court held in that decision that non-payment of contribution to the Provident Fund is a continuing offence and hence the period of limitation has no application. Learned Chief Judicial Magistrate has relied on the said decision and concluded that non-payment of contribution under the Act is also a continuing offence and hence the bar u/s 86(3) does not apply.

5. Learned Counsel for the Petitioner made an endeavour to show that the principle in *Bhagirath Kanoria and Others Vs. State of M. P.*, cannot be applied in a prosecution under the E.S.I. Act mainly on the ground that there is no provision in the Employees Provident Funds Act and Miscellaneous Provisions Act, 1952 (for short "the Provident Funds Act") similar to Section 86(3) of the E.S.I. Act. According to the learned Counsel, the Supreme Court in *Bhagirath Kanoria and Others Vs. State of M. P.*, has only considered the implications of limitation provisions in the Code of Criminal Procedure in which there is a rider provision (Section 472) to the effect that period of limitation shall begin to run at every moment of time during which the offence continues in case of a continuing offence. It is true that Section 86(3) of the Act is a special provision of limitation de hors the limitation provisions in the Code of Criminal Procedure. But absence of any such rider clause in Section 86(3) is no reason to hold that the offence envisaged in Section 85(a) would never be a continuing offence. Section 86(3) of the Act operates in the case of a continuing offence only when the offence does not recur after performance of the offender's obligation. The bar in Section 86(3) cannot operate in any other case of continuing offence. There is nothing in the

language of that Sub-section to support the view that even if the offence is a continuing one the prosecution must be launched within six months from the first day of failure to pay contribution.

6. The offence envisaged in Section 85(c) of the E.S.I. Act is the failure to pay contribution. As per the section, if any person fails to pay any contribution which he is liable to pay such person shall be punishable u/s 85(a). Section 39 of the Act says that the contribution payable under the Act in respect of an employee shall comprise contribution payable by the employer as well as the contribution payable by the employee. Such contribution would be paid to the Employees' State Insurance Corporation. Section 40 of the Act casts obligation on the employer to pay contribution to the Corporation. As per that provision the employer shall pay both employer's and employees' contributions in respect of every employee whether directly employed by him or by or through an immediate employer. In the Regulations made by the Corporation in exercise of powers u/s 97 of the Act the time for payment of contribution is specified. Such contribution should be paid (as per Regulation No. 31) within 21 days of the last day of the wage period in which the contributions fall due. Regulation No. 31A says that an employer who fails to pay contribution within the period specified in Regulation No. 31 shall be liable to pay interest at the rate of six percent per annum "in respect of each day of default or delay in payment of contribution". Thus, the relevant provisions of the Act and the Regulations would show that failure to pay the contribution does not end with the expiry of the last day of the period specified in Regulation No. 31. The failure has a recurring character. The failure does not stop with the expiry of one single day, unless the contribution is paid in the meanwhile. If there was failure on the first day after the expiry of the period, there would be again failure on the next day and also on the succeeding days until the payment is made. The employer who fails to make contribution on the last day of the period cannot say that "since the last day is over, I have no statutory liability to pay the contribution any more". If he continues to fail to pay the contribution, the offence also continues. If the first day's failure to pay contribution would amount to an offence, he continues to commit that offence on subsequent days also as long as he continues to fail to pay contribution. In this view, the offence contemplated in Section 85(a) is a continuing offence.

7. Learned Counsel for the Petitioner cited two decisions, one rendered by a Single Judge of the Madras High Court and the other by a Single Judge of the Andhra Pradesh High Court. [Vide V. Seetha Vs. Employees' State Insurance Corporation, and E.S.I. Corporation v. M/s Ajantha Transport 1983 Lab. I.C. 1066. It was held in those decisions that the offence u/s 85(a) of the Act is not a continuing offence.

8. In State of Bihar Vs. Deokaran Nenshi and Another, the Supreme Court has indicated on the characteristic of a continuing offence. A continuing offence is one which is susceptible of continuance and is distinguishable from one which is committed once and for all. It is one of those offences which arises out of a

failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. "On every occasion that such disobedience or non-compliance occurs and recurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient or continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all". In *Best v. Butler* 1932 K.B. 108 the King's Bench division considered the implications of the offence specified in Section 12 of the Trade Union Act, 1871 (English Act) as per which the officer of a trade union withholding money of the trade union is liable to the punishment prescribed in the section. Lord Howert, C.J. held that as the withholding continues the offence is a continuing offence. The aforesaid decision was quoted with approval by the Supreme Court in *Bhagirath Kanoria and Others Vs. State of M. P.*, (cited supra). Chandrachud, C.J. in the said decision, has further observed that "the question whether a particular offence is a continuing offence must necessarily depend upon the language of the statute which creates that offence, the nature of the offence and, above all, the purpose which is intended to be achieved by constituting the particular act as an offence". The statute which was the subject of consideration in *Bhagirath Kanoria and Others Vs. State of M. P.*, is the Provident Funds Act which casts an obligation on the employer to make contribution to the Provident Fund and failure to pay such contribution is made an offence under that Act. The E.S.I. Act is almost a parallel legislation for social welfare of the workmen. Common features between the two legislations outnumber the differing features. Hence the ratio evolved in *Bhagirath Kanoria and Others Vs. State of M. P.*, must apply in this case despite the difference between the two statutes. In view of the said Supreme Court decision, I am unable to rely on, with great respect, the decisions of the learned Single Judges of the Madras and Andhra Pradesh High Courts. It follows, that the prosecutions cannot be dismissed as barred by limitation.

The revision are, accordingly, dismissed.