

**(1990) 03 CAL CK 0047**  
**In the Calcutta High Court**  
**Case No : Criminal R. No. 386 of 1984**

Vidyasagar Kejriwal and Others

APPELLANT

Vs

Employees' State Insurance Corporation and Another

RESPONDENT

**Date of Decision :** 28-03-1990

**Acts Referred:**

Employees State Insurance Act, 1948 — Section 2(17), 85

**Citation :** (1990) 2 CALLT 169 : (1991) 62 FLR 17 : (1999) 3 LLJ 159

**Hon'ble Judges :** S.K. Guin, J

**Bench :** Single Bench

**Advocate :** Sumit Maitra, for the Appellant; Subol Maitra, for the Respondent

**Final Decision :** Allowed

## Judgement

S.K. Guin, J.—This revisional petition is directed against the order passed by the learned Additional Sessions Judge, 3rd Court, Alipore on November 30, 1983 in Criminal Appeal No. 109 of 1983 whereby he dismissed the appeal, confirmed the findings and order of conviction passed by learned Judicial Magistrate, 4th Court, Sealdah in Case No. C-211 of 1980 but modified the sentence by reducing the amount of fine from Rs. 500 to Rs. 200 to be paid by each of the appellants before him.

2. One Sankar Bhattacharyya, Insurance Inspector of the Employees' State Insurance Corporation filed a petition of complaint before the learned Judicial Magistrate, Sealdah alleging that the accused persons being the partners of M/s. Bharat Udyog at 105/1, Ultadanga Main Road, Calcutta which were an establishment as defined in E.S.I. Act, 1948, were the principal employers as defined in Clause 17 of Section 2 of the said Act in respect of the said establishment. It was further alleged that the accused persons having failed to submit contribution cards together with return in Form No. 6 in Set --B for the contribution period that expired on September 29, 1979 within the due date i.e. on or before November 10, 1979 committed an offence punishable u/s 85(g) of the said Act. After having obtained the requisite sanction to prosecute the

accused persons for such offence, Sri Sankar Bhattacharyya, Insurance Inspector, filed the said petition of complaint. The learned Judicial Magistrate by his order dated March 7, 1980 took cognizance on such petition of complaint and issued summons against the accused persons u/s 85(g) of the said Act. In obedience thereof four accused persons, one of whom died subsequently appeared before the learned Judicial Magistrate and they were examined u/s 251 of the Code of Criminal Procedure. They pleaded not guilty to the accusation made against them and claimed to be tried.

3. The prosecution examined two witnesses including the complainant and produced some documents. The accused persons did not adduce any evidence. On consideration of the evidence as laid before him, the learned Judicial Magistrate found the accused persons guilty of the offence punishable u/s 85(g) of the E.S.I. Act, 1948 and convicted them accordingly. As, in the opinion of the learned Judicial Magistrate, the offence committed by the accused persons was technical in nature, he took a lenient view of the matter and sentenced each of them to pay a fine of Rs. 500/- I. D. to R.I. for one month. He also directed that 10% of the total fine amount, if realised, would be paid to the E.S.I. Corporation as cost.

4. Being aggrieved by the said order of conviction and sentence, the accused persons preferred an appeal being Criminal Appeal No. 109 of 1983 challenging the propriety and correctness of said order of conviction and sentence. The learned Addl. Sessions Judge, who heard the appeal, by his order dated November 30, 1983, which is being impugned in this revision, held that the Trial Court was very right in finding the accused persons guilty of the offence alleged to have been committed by them. He maintained the order of conviction but having regard to the very technical nature of the offence he modified the sentence by reducing the amount of fine from Rs. 500 to Rs. 200 to be paid by each of the accused persons.

5. The accused persons, who were the appellants in the said appeal, being aggrieved by the said order of dismissal of appeal as passed by the learned Addl. Sessions Judge filed the instant revisional petition challenging the legality and propriety of the impugned orders and also challenging the legality of the entire proceeding in which such orders were made. Mr. Sumit Maitra, learned advocate for the petitioners has argued that as Sri Sankar Bhattacharyya, the Insurance Inspector was not authorised in anyway to file a petition of complaint against the accused persons, the learned Judicial Magistrate should not have entertained the said petition of complaint and taken cognizance upon it and that as Sri Bhattacharyya did not file the said petition of complaint in discharge of his official duty, the learned Judicial Magistrate committed an error in taking cognizance on it without examining Sri Bhattacharyya. In support of his argument he has referred to a decision reported in 1980(1) CHN 388 and also referred to decisions reported in *Norode Baran Mukherjee Vs. The State of West Bengal*, : *Manindra Nath Das Vs. Public Prosecutor*, He has also argued that the sanction

accompanying the petition of complaint is invalid inasmuch as all the relevant materials were not placed before the competent authority who thus could not apply his mind to the facts of the case and that as the learned Judicial - Magistrate examined the accused persons u/s 313 of the Code of Criminal Procedure in a perfunctory manner, the accused persons have been seriously prejudiced thereby. It has also been argued by Mr. Maitra, learned advocate for the petitioners that as only the petitioners have been prosecuted as partners of M/s. Bharat Udyog without impleading; the partnership firm as an accused, the petitioners cannot be held liable without further allegations that they were responsible for the supervision and control of the establishment i.e. M/s. Bharat Udyog, that as no such further allegations were made in the petition of complaint the learned Judicial Magistrate should not have taken cognizance against the petitioners on such petition of complaint and that as the prosecution could not prove that the petitioners were responsible for the supervision and control of the establishment, the learned Judicial Magistrate was not justified in finding the petitioners guilty of the offence alleged against them and that the learned Addl. Sessions Judge was not justified in affirming that finding of the learned Judicial Magistrate. In support of his view he has referred to a decision reported in 1978 CHN 336. Mr. Subol Maitra, learned advocate for the opposite party complaint has argued that Sri Sankar Bhattacharyya, Insurance Inspector was duly authorised by the E.S.I. Corporation to file a petition of complaint before the learned Judicial Magistrate and that as Sri Bhattacharyya a public servant filed the instant petition of complaint in discharge of his official duty, it was not necessary for the Magistrate to examine him at the time of taking cognizance on such petition of complaint and that decisions as referred to by the learned advocate for the petitioners are not applicable to the facts of the present case. He has argued that sanction for the prosecution of the accused persons was quite legal and valid inasmuch as the authority concerned accorded it on perusal of all relevant papers and by applying his mind to the facts of the case. He also contended that the examination of the accused persons was not at all perfunctory. He has further argued that though the petition of complaint mentions M/s. Bharat Udyog as an establishment as defined in the E.S.I. Act the said concern in fact is a factory within the meaning of Section 2(17)(i) of the said Act as admitted by the petitioners in the instant revisional petition and not as establishment within the meaning of Section 2(17)(iii), that the partners of the said concern being the owner of the factory are the principal employers within the meaning of Section 2(17)(i) and that no further allegation was to be made to implicate them in the instant case. In support of his view he has referred to a decision reported in 1978 CHN 444.

6. The learned advocate appearing for the State has adopted the argument as advanced by learned advocate for the opposite party No. 1 and supported the impugned orders.

Though the E.S.I. Corporation appears to have made the instant petition of complaint through its Insurance Inspector, Sri Sankar Bhattacharyya, but in fact,

it is Sri Sankar Bhattacharyya who signed this petition of complaint and presented it before the Court. In my opinion he is the actual complainant in the instant case and in this regard accept the view as expressed by AHMED, J. in his judgment passed in Criminal Revision Case No. 1649 of 1935 and Criminal Revision Case No. 562-A of 1986, a copy of which was given by Mr. Subol Maitra at the time of hearing of this revisional case. Thus it is clear that Sri Sankar Bhattacharyya was the complainant in the petition of complaint filed against the accused persons who are petitioners here. Now the question that arises for determination is whether Sri Bhattacharyya was in any way authorised or empowered to file such petition of complaint. There are no provisions in the E.S.I. Act, 1948 or in the Regulations framed thereunder authorising or empowering the Insurance Inspector to file such petition of complaint. But at the time of hearing of appeal before the learned Additional Sessions Judge a copy of Gazette Notification in Part IV dated January 3, 1959, was produced and on perusal of such copy of Gazette Notification, he found that the Insurance Inspector was duly authorised to lodge complaint against the defaulting party on behalf of the Corporation. It is true that the copy of such Notification is not on record. But I am not inclined to believe that any copy of spurious Gazette Notification was produced before the learned Additional Sessions Judge in course of hearing of the appeal. Since the learned Additional Sessions Judge was satisfied from that copy of Gazette Notification that Insurance Inspector like Sri Bhattacharyya was duly authorised to file a petition of complaint like the instant one against the defaulting party, I see no reason to differ from him. As such it appears that the learned Additional Sessions Judge quite rightly held that Sri: Bhattacharyya was duly authorised to file the instant petition of complaint. Facts of the case in the decision as reported in 1980 (1) CHN 388 are somehow different. As the appeal in that case was not filed by the complainant and as the complainant who filed the complaint was not authorised by Union of India to file the complaint, it was held that the appeal at the instance of Sri Jiban Krishna, the Customs Officer, was not competent. But in the instant case, as it has been found just now, the Insurance Inspector, Sri Bhattacharyya was duly authorised as per Gazette Notification to file the petition or complaint. As such the decision as referred to above has no manner of application to this case. Next let me consider whether the learned Judicial Magistrate committed an error in taking cognizance on the petition of complaint without examining Sri Bhattacharyya. Just now, it has been seen that Sri Bhattacharyya, Insurance Inspector, was authorised to file the instant petition of complaint. Under the provisions of Section 93 of the E.S.I. Act, the Insurance Inspector is a public servant. The functions and the duties of the Insurance Inspector have been enumerated u/s 45 of the said Act. It is clear from the provision of Section 45 that the Inspector is appointed by the Corporation for purposes of the said Act. One of the purposes is to see whether the provisions of the Act have been complied with by the principal employers or immediate employers. For that purpose he is required to see whether, the said employers contravene any provision of the Act and to take appropriate steps against them for such contravention. The scope of Section 45

is wide enough to indicate that it is the duty of the Inspector to prevent contravention of the provisions of the Act by the principal employers and to take appropriate steps against them in case of such contravention. So when he files a petition of complaint against the principal employers for contravention of the provisions of the Act, he does so in discharge of his official duty. The Insurance Inspector is a public servant u/s 93 of the said Act as mentioned earlier. So when the Insurance Inspector, a public servant, files a petition of complaint in discharge of his official duty, the Magistrate taking the cognizance on such petition of complaint need not examine him. As such the learned Judicial Magistrate while taking cognizance on the petition of complaint did not commit any illegality by not examining the complainant. Decisions as reported in *Norode Baran Mukherjee Vs. The State of West Bengal*, and *Manindra Nath Das Vs. Public Prosecutor*, cannot be made applicable to the present case. In these reported cases the Public Prosecutor while filing the petition of complaint did not do so as a public servant in discharge of his official duty. So non-examinations of the Public Prosecutor by the Magistrate at the time of taking cognizance has been held to be fatal. But in the instant case the petition of complaint was filed by a public servant in discharge of his official duty. So I hold that learned Magistrate committed no error in taking cognizance without examining Insurance Inspector Sri Bhattacharyya. So these two contentions of the petitioners fail.

7. Validity of the sanction accorded for the instant prosecution has been challenged on the ground that all the materials were not placed before the concerned authority who therefore, could not apply his mind to the facts of this case. Whether all materials have been placed before the concerned authority or whether he applied his mind to those facts is essentially a question of fact and cannot be entered into and decided in revision. However, the impugned sanction Ext. 2 is on record. From it, it is very much clear that all the relevant papers were placed before the concerned authority for prosecution of the principal employers of the establishment M/s. Bharat Udyog, 105/1, Ultadanga Main Road, Calcutta. The Regional Director who was competent to accord sanction appears to have gone through those papers and satisfied that the principal employers failed to submit contribution cards in Set-B together with the return in triplicate in Form 6 for the contribution period that expired on September 29, 1977, within the specified time and thus failed to comply with the requirements of the E.S.I. Regulations. On being so satisfied, he appears to have accorded the sanction. So the contention as raised on behalf of the petitioners in this regard has no substance and is rejected. Three (3) accused persons after the evidence had been closed were examined by the learned Judicial Magistrate under the provisions of Section 313 of the Code of Criminal Procedure. I have gone through the record and it does not appear to me such examination of the accused persons was perfunctory or that the accused persons were prejudiced by such manner of examination. So this contention has got no; substance and is also rejected.

8. It has been categorically stated in the instant petition of complaint that M/S.

Bharat Udyog are an establishment as defined in the Act and that the accused persons being its partners are the principal employers as defined in Clause 17 of Section 2 of the E.S.I. Act in respect of the said establishment. As per provisions of Section 2(17) of the said Act, the Principal employer in a factory means the owner or occupier of the factory and includes the managing agent of such owner and occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the Manager of the factory under the Factories Act, 1948, the person so named. In an establishment under the control of any department of any Government in India, the principal employer means the authority appointed by such Government in this behalf or where no authority is so appointed, the head of the department and in any other establishment it means any person responsible for supervision and control of the establishment. It is the definite case of the complaint that the partnership firm M/s. Bharat Udyog is an establishment as defined in the E.S.I. Act and not a factory. Since the said establishment is not under the control of any department of any Government in India it is an establishment within the meaning of Section 2(17)(iii) of the said Act. In such an establishment only the persons responsible for a supervision and control of the establishment are the principal employers. Or in other words to proceed against the principal employers falling in the category of Section 2(17)(iii), it has got to be alleged that those persons are responsible for the supervision and control of the establishment. Without making such allegations in the petition of complaint, the principal employers of the aforesaid category cannot be proceeded against. In the instant case the accused persons were proceeded against as principal employers simply because they are the partners of the said establishment i.e. Ms. Bharat Udyog. It has not been alleged therein that the accused persons were responsible for the supervision and control of the establishment. In absence of such allegations in the petition of complaint, the learned Judicial Magistrate was not justified in taking cognizance against the accused persons. In support of his argument on this point, learned advocate for the petitioners has referred to a decision reported in 1978 CHN 336. That was a case u/s 14A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 against the Directors of a Private Limited Company for not paying the employers-cum-members contributions together with the administration charges within the statutory period. In such a case the company was primarily liable for an offence committed under the Act. The liability may be extended to other persons vicariously only under the conditions laid down in the section. There was no material from which the learned Magistrate could satisfy himself that the petitioners took some part in the running of the business of the company. In absence of such averments in the petition of complaint, the cognizance as taken by the learned Magistrate was held to be bad in law and was quashed. The reported case relates to the Directors of the Private Ltd. Company but the case at hand relates to the partners of a partnership firm and the reported decision was arrived at in the context of a different Statute. However, the principle as enunciated therein may be taken into consideration in arriving at a decision in the case at hand. It has been made clear in the reported case that in the

absence of any averments in the complaint to the effect that the petitioners took some part in the running of the business of the company, the cognizance as taken by the learned Magistrate was bad in law. In this connection Mr. Subol Maitra learned advocate for the opposite party has referred to a decision reported in 1978 CHN 444. In that case the Directors of a Private Ltd. Company were proceeded against for alleged failure to submit the necessary contribution cards for a particular period within the statutory period. A question was raised in that case as to whether a Director of a Company can be brought within the meaning of word "occupier" as mentioned in Section 2(17) of the Act as according to Section 2(n) of the Factories Act occupier is a person who like a Director has ultimate control over the affairs of the factory. It was held therein that the word "occupier" was wide enough to bring any Director including the petitioner within the definition of Section 2(17) of the Act. So question that was raised in the reported case is quite different from the question to be decided in the case at hand. Mr. Subol Maitra, learned advocate for the opposite party No. 1 has argued that though in the petition of complaint M/s Bharat Udyog had been described as an establishment as defined in the E.S.I. Act but it is, in fact, a factory covered under the E.S.I. Act, 1948 as admitted by the petitioners in paragraph 1 of the revisional petition, that the petitioners being the partners of M/s. Bharat Udyog which are a factory, are the owners and occupiers of the said factory and the principal employers within the meaning of Section 2(17)(i) and that no further allegation to the effect that they were responsible for the supervision and control of the establishment was necessary to proceed against them for offence punishable u/s 85(g). It may be that in the instant revisional petition, it has been stated that M/s. Bharat Udyog own a factory at 105/1, Ultadanga Main Road, Calcutta. But that will not improve the prosecution case or cure the defect in the petition or complaint which is sought to be cured now. At the time of taking cognizance there was no allegation in the petition of complaint that M/s. Bharat Udyog at 105/1, Ultadanga Main Road were a factory. On the other hand there was a specific statement to the effect that it was an establishment of which the accused persons being the partners were the principal employer. On such averment in the petition of complaint and in absence of further averment that the accused persons were responsible for the supervision and control of the establishment, the learned Judicial Magistrate was not at all justified in taking cognizance against the accused persons and such cognizance must be held to be bad in law. The prosecution did not adduce any evidence to prove that the accused persons were responsible for the supervision and control of the establishment as mentioned in the petition of complaint. In absence of such proof, the learned Judicial Magistrate was not at all justified in holding that the accused persons were the principal employers as claimed by the complainant and was not at all justified in finding them guilty of offence punishable u/s 85(g) of the said Act. For the above reasons the learned Additional Sessions Judge was also not justified in passing the impugned order and in affirming the order of conviction and sentence as he did after modification. So as per determination on the last point as raised by learned advocate for the petitioners, the instant

revision succeeds and the impugned orders as well as the order passed by learned, Judicial Magistrate must be set aside.

9. In the result, revisional petition is allowed. Rule is made absolute. The impugned order i.e. the order passed by the learned Additional Sessions Judge in Criminal Appeal No. 109 of 1983 and also the order of conviction and sentence as passed by the learned Judicial Magistrate, 4th Court, Sealdah on April 30, 1983 in Case No. 211 of 1980 are set aside. The cognizance of offence, as taken by the learned Judicial Magistrate in the said case is hereby quashed. The amount of fine if realised be refunded to the accused persons forthwith.

10. Let the case record together with the copy of this order be sent to the Court concerned as expeditiously as possible.