
(2016) 02 KL CK 0033
In the High Court Of Kerala
Case No : Crl. Appeal No. 1670 of 2004

Vincent

APPELLANT

Vs

Jose

RESPONDENT

Date of Decision : 05-02-2016

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(15), 2(17), 40
Factories Act, 1948 — Section 2(n)
Penal Code, 1860 (IPC) — Section 34, 405

Citation : (2016) 150 FLR 748 : (2016) 2 KerLJ 798 : (2016) 3 KHC 259 :
(2016) 2 KLT 834 : (2016) LabLR 820

Hon'ble Judges : P.D. Rajan, J.

Bench : Single Bench

Advocate : T.N. Manoj, Advocate, for the Appellant; M. Pathrose Matthai, Sr. Advocate, Rony J. Pallath, Advocate and N. Suresh, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

P.D. Rajan, J.—This appeal is preferred by the complainant against the judgment of acquittal of the accused in C.C. No. 960/2001 of the Judicial First Class Magistrate Court, Chalakkudy under Section 406 r/w.34 I.P.C. The complainant's case is that he had worked as Assistant Personal Officer of Eddy Current Control Limited (hereinafter referred to as the 'Company') which is a company incorporated under the Companies Act. The 1st accused is the Managing Director and the 2nd accused the Executive Director of the Company, who are principal officers functioning under the terms of the Employees' State Insurance Act and liable to pay employees contribution towards the E.S.I. scheme. The principal officers of the company had been making statutory deduction of the employees share contribution every month from the salary of the complainant and other employees of the Company. The respondents deducted money from the salary of the employees for the period from 1998 to 31.3.99 and remitted it on 11.8.99. The money deducted from 1.4.1999 to

30.9.1999 were remitted on 12.4.2003 and the period from 1.10.99 to 31.3.2000 remitted only on 26.12.2000. The respondents being the principal officers of the company deducted E.S.I. subscription and used the amount for the expense of the company, thereby misappropriated the amount and committed criminal breach of trust and thereby committed offence u/S.406 r/w.34 I.P.C. Hence the complaint.

2. During trial, the complainant was examined as PW1 and documents were marked as Exts. P1 to P3. The incriminating circumstances brought out in evidence were denied by the accused while questioning him under Section 313 Cr.P.C. Exts.DI and D2 were marked as defence evidence. The learned Magistrate, after considering the oral and documentary evidence, acquitted the accused. Being aggrieved by that, complainant preferred this appeal.

3. Heard both sides. The offence of criminal breach of trust is defined under Section 405 I.P.C., which reads as follows:

"405. Criminal breach of trust - Whoever being in any manner entrusted with property, or with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits, ?criminal breach of trust.?

Explanation 1 - A person, being an employer of an establishment whether exempted under Section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Explanation 2 - A person, being an employer who deducts the employee's contribution from the wages payable to the employee for credit to the Employee's State Insurance Fund held and administered by the Employee's State Insurance Corporation established under the Employees' State Insurance Act, 1948, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid."

A reading of Explanation 2 to Section 405 of the I.P.C. shows that "a person being an employer" means an employer who deducts the employee's

contribution from the wages payable to the employee liable for criminal breach of trust, if he commits a default in the payment of such contribution to the Employees' State Insurance Fund. But according to Section 11 of the Indian Penal Code, the word "person" includes any company or association or body of persons whether incorporated or not.

4. Now the question is whether the directors of a company could be considered as employers under Explanation 2 to Section 405 of the Indian Penal Code. As per Section 40 of the Employees' State Insurance Act, the obligation to pay contribution in the Employees' State Insurance Fund has been cast on the principal employer. The word "principal employer" has been defined in Section 2(17) of the Employees' State Insurance Act, 1948. Section 2(17) describes the "principal employer" in a factory as the owner or occupier of the factory. "Occupier" of a factory is formulated in Section 2(15) as having the same meaning assigned to it in the Factories Act, 1948. Section 2(n) of the Factories Act, 1948 as it stood at the relevant time, defined an "occupier" to mean the person who has ultimate control over the affairs of the factory under Section 100(2), occupier in certain cases was a company, any directors thereof could be prosecuted and punished for any offence for which the occupier was liable. A perusal of Section 2(17) of the Employees' State Insurance Act shows that principal employer is either owner or occupier. When the owner of the factory is the principal employer, he will be the principal employer under Section 40. It is pertinent to note that the word employer is not defined under "The Employees' State Insurance Act" even though the word employer is used under Section 85B and 85C of the said Act.

5. In this backdrop, I extract S.40 of the Employees' State Insurance Act which reads as follows:

"40. Principal employer to pay contribution in the first instance - (1) The principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution.

(2) Notwithstanding anything contained in any other enactment but subject to the provision of this Act and the regulations, if any, made thereunder, the principal employer shall, in the case of an employee directly employed by him (not being an exempted employee), be entitled to recover from the employee the employee's contribution by deduction from his wages and not otherwise:

Provided that no such deduction shall be made from any wages other than such as relate to the period or part of the period in respect of which the contribution is payable, or in excess of the sum representing the employee's contribution for the period.

(3) Notwithstanding any contract to the contrary, neither the principal employer nor the immediate employer shall be entitled to deduct the employer's contribution from any wages payable to an employee or otherwise to recover it

from him.

(4) Any sum deducted by the principal employer from wages under this Act shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted.

(5) The principal employer shall bear the expenses of remitting the contributions to the Corporation."

6. Section 2(17) reads as follows:

"Principal employer" means-

(i) in a factory, the owner or occupier of the factory and includes the managing agent of such owner or 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 (63 of 1948), the person so named;

(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the head of the Department;

(iii) in any other establishment, any person responsible for the supervision and control of the establishment."

7. Apex Court in *Employees? State Insurance Corporation v. S.K. Aggarwal & Ors.*, (1998) 6 SCC 288) held as follows:

"5. In any event, in the absence of any express provision in the Indian Penal Code incorporating the definition of "principal employer" in Explanation 2 to Section 405, this definition cannot be held to apply to the term "employer" in Explanation 2. As the High Court has observed, the term "employer" in Explanation 2 must be understood as in ordinary parlance. In ordinary parlance it is the company which is the employer and not its directors either singly or collectively.

6. In the premises we do not see any reason to interfere with the impugned judgment of the Calcutta High Court. The appeal is, therefore, dismissed. Appeal dismissed."

8. Full Bench of the Apex Court in *Employees? State Insurance Corporation v. Gurdial Singh* (1991 (1) SCC 204) held as follows :-

"Learned counsel for the appellant relied upon two decisions as precedents. In the case of the Bombay High Court in *Suresh Tulsidas Kailachand v. Collector of Bombay*, the court found liability by relying upon clause (i) of the definition without first ascertaining whether the matter was covered by clause (i). Now on our finding in the instant case that clause (i) applied, we do not have to go to clause (iii) where the liability is of the person who is responsible for the supervision and control of the establishment. The other decision on which reliance has been placed is in the case of *B.M. Chatterjee v. State of West*

Bengal. That was a case where a learned Single Judge proceeded on the footing that the Directors were owners of the company. We called upon the learned counsel for the appellant to substantiate the proposition that Directors in the absence of anything more would have to be treated owners of the company and he has candidly accepted the position that in the absence of facts and proof of actual position, Directors cannot be treated ipso facto as owners. Thus no support is available from the precedents. We are of the view that the High Court was right in its conclusion that the liability was of the company and in the event of their being an occupier, he was liable to meet the demand".

9. Therefore, the Directors of a Private Limited Company are not personally liable to the contribution collected under the Employees' State Insurance Act, 1948. In a case where the private limited company was the owner of the factory and the occupier of the factory had been duly named under the Factories Act, 1948, the Directors did not come within the definition of Clause 1 of Section 2(17) of the Employees' State Insurance Act. It is true that the appellant filed a complaint against the respondents for criminal breach of trust, which is an offence under the Indian Penal Code. On the basis of the above complaint, Judicial First Class Magistrate, Chalakkudy took cognizance of the offence and issued summons against the respondents. The learned Magistrate considered the documentary evidence of Exts. P1 to P3. After trial, the respondents were acquitted. Therefore, the Trial Court considered the position of the directors and directed that no materials were produced in the Trial Court for fastening the criminal liability and acquitted them. There is no merit in this appeal and it is dismissed accordingly.