

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.09.2018

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Crl.O.P Nos.29306 and 29307 of 2010
and
M.P.No.1 of 2010

Syed Nasir Ahmed
(shown as S.Nazar Ahamed in the Complaint)
S/o Syed Abdul Gaffoor,
Proprietor, A.G.Sons situated at
B-29, First Main Road,
Ambattur Industrial Estate,
Chennai-58 ... Petitioner in both the Crl.O.Ps.

vs.

Employees' State Insurance Corporation,
having its Regional Office at
143, Sterling Road, Nungambakkam,
Chennai - 34,
represented by its Insurance Inspector (Legal)
Regional Office, ESI Corporation,
Chennai - 34. ... Respondent in both the
Crl.O.Ps

Prayer in Crl.O.P.No.29306 of 2010: Criminal Original Petition
filed under Section 482 of Criminal Procedure Code, to call
for the records relating to C.C.No.114 of 2010, pending on the
file of the learned Judicial Magistrate, Ambattur, and prays
to quash the same.

Prayer in Crl.O.P.No.29307 of 2010: Criminal Original Petition
filed under Section 482 of Criminal Procedure Code, to call
for the records relating to C.C.No.626 of 2010, pending on the
file of the learned II Metropolitan Magistrate, Egmore, and
prays to quash the same.

(In both the Crl.O.P.s)
For Petitioner : Mr.M.Guruprasad

For Respondent : M/s.Jaya kumari.S

COMMON JUDGMENT

The issue involved in both the Criminal Original Petitions though arising out of two calendar cases, but they are one and the same. Both the cases filed by the complaint under the provisions of ESI Act, 1948 and in both cases the Respondent/Accused is one and the same. Hence both the cases are clubbed together and common order is passed.

2.As far as the CrI.O.P.No.29306 of 2010 is concerned, it is arising out of a Calendar Case No.114 of 2010 on the file of the learned Judicial Magistrate, Ambathur. The complaint was filed by the Respondent/Complainant under section 87(e) Punishable Under section 85(ii) of the ESI Act, 1948.

3.As far as CrI.O.P.No.29307 of 2010 is concerned, it is arising out of Calendar Case in C.C.No.626 of 2010 on the file of the learned II Metropolitan Magistrate, Egmore, Chennai. The said complaint was filed by the Respondent/Complainant under section 85(a) Punishable under section 85(i)(b) of the ESI Act, 1948.

4.The case of the petitioner in both the cases is that a cottage industry dealt with consumer items run by the Petitioner/Accused. Since, in the cottage industry less than 10 employees are working only for wages in the industry, the said cottage industry will not come under the coverage of the ESI Act. Hence, it was not required for the petitioner to comply with any of the provision of the said Act. However, without ascertaining the fact as to whether, the industry of the petitioner would come under the purview of the ESI Act, summons was issued to appear before the respective learned Magistrates.

5.According to the learned counsel for the petitioner that the allegation in the complaint of the Respondent/Complainant in the Calendar case in C.C.No.626 of 2010 is that the Petitioner/Accused failed to remit the contribution to the Corporation for the period from 22.11.2004 to September 2008. So, it is the violation of section 39 and 40 of the said Act with regulation 31 of the General Regulations of the said Act. At the same time, it is not stated in the complaint that how the cottage industry of the petitioner would be coverable under the ESI Act. Hence, the proceedings of the case in C.C.No.626/2010 is liable to be quashed.

6.On the other hand as far as CrI.O.P.No.29306 of 2010 is concerned, it is arising out of a Calendar Case No.114 of 2010 on the file of the learned Judicial Magistrate, Ambathur. The complaint was filed by the Respondent/Complainant under section 87(e) Punishable Under section 85(ii) of the ESI Act, 1948.

Punishable under section 85(ii) of the ESI Act. The case of the petitioner is that the Petitioner/Accused failed to submit the returns of contribution in Form-6 with regard to the employee's contribution for the period ended on 31.03.2005, 30.09.2005, 30.03.2006, 30.09.2006, 31.03.2007, 30.09.2007, 31.03.2008, and 30.09.2008. All these returns ought to have been submitted on or before 12.05.2005, 11.11.2005, 12.05.2006, 11.11.2006, 12.05.2007, 11.11.2007, 12.05.2008 and 11.11.2008 respectively.

7. According to the learned counsel for the Petitioners/Accused that the complaint itself is not maintainable as against the cottage industry of the Petitioner/Accused as the said industry would not come under definition of Factory as defined under section 2 (12) of ESI Act, and the said provision would read thus "factory means any premises including the precincts thereof whereon ten or more persons are employed or were employed or any day of the preceding 12 months and on any parts". However, without ascertaining the application of the act to the cottage industry of the petitioner, the respondent/complainant initiated proceedings which, according to the petitioner, is unsustainable.

8. The further contention of the learned counsel for the petitioner is that though the show-cause notice for the proposed criminal prosecution was issued on 07.04.2007, the same was not served upon the petitioner. So, on that score also the complaint of the respondent/complainant is unsustainable and the same is liable to be quashed. The learned counsel for the petitioner would further submit that though the alleged offences are similar in nature, the cognizance taken by the learned Trial Court is totally against the procedure as contemplated under section 219 of Cr.P.C., wherein the said provision authorized the joinder of charges for the offences of same kind. The said provision would read thus:

"Three offences of same kind within year may be charged together:

- 1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, any number of them not exceeding three.
- 2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code (45 of 1860) or of any special or local law

Provided that, for the purposes of this section, an offence punishable under section 379 of the Indian Penal Code (45 of 1860) shall be deemed to be an offence of the same kind as an offence punishable under section 380 of the said code, and that an offence punishable under any section of the said code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence."

9. Therefore, the learned counsel for the petitioner prays this court that is the fit case and deserved to get the benefit of the inherent power of this Court under section 482 of the Code of Criminal Procedure and both the complaints are liable to be quashed.

10. Per contra, the learned counsel for the respondent/complainant would submit that the initiation of the proceedings which are under challenge is in accordance with law and no violation could be shown in the complaint either on law or on facts. Moreover, the failure on the part of the petitioner/accused, in no manner would absolve his liability under the ESI Act. Apart from that the learned counsel for the respondent/complainant added further that though the offences are for different period, the initiation of the proceedings by joining all the charges together could no way be termed as unsustainable. Hence, both the original Petitions are liable to be dismissed.

11. I heard Mr.M.Guruprasad, learned counsel for the petitioner and Mr.S.Jayakumar, learned counsel for the respondent in both the criminal original petitions and the materials available on record are perused.

12. It is the case of the petitioner that his cottage industry will not come under the definition of factory as contemplated under section 3(12) of the ESI Act. The perusal of the complaint in this regard would show that the respondent/Complainant has not stated in the complaint in respect of the application of the ESI Act into the cottage industry of the petitioner. So, the genesis of the complaint itself does not fulfill the requirement of the initiation of criminal prosecution as against the petitioner/Accused. Moreover, absolutely, there is no explanation as to how the charges can be clubbed together as admittedly the offences are allegedly committed for more than the period prescribed under section 219 of the Cr.P.C.

13. Apart from that it is the case of the complainant that the non-payment of the employee's contribution is an offence under section 85 of the ESI Act, 1948. However, the provision for filing of the complaint and punishment would come into force only after the complainant proved that the Act is applicable to the cottage industry of the petitioner, where according to the petitioner, less than 10 employees are working. When no such averment is made in the complaint as to the application of the Act then the court is unable to accept that the complaint is legally sustainable.

14. However, in the considered opinion of this court, and it is the concern of this court also that the authorities under the ESI Act shall not be sluggish on their part to initiate legal action. It is for their duty to bring all the necessary information to the court as to the application of the Act first. It is brought to the notice of this court that in the instant case, the learned Magistrates concerned have not recorded any reason as to how the charges can be clubbed together which are alleged to have committed for more than a period of one year.

15. These two aspects as raised in the quash petition are having legal force for consideration positively in favour of the petitioner. Therefore for the foregoing discussion both the criminal original petitions succeed and this court is constrained to allow both the criminal original petitions accordingly, the proceedings initiated by the respondent/complainant under the ESI Act against the petitioner is unsustainable and therefore the complaint in C.C.No.114 of 2010 on the file of the learned Judicial Magistrate, Ambattur, and C.C.No.626 of 2010 on the file of the learned II Metropolitan Magistrate, Egmore, Chennai are hereby quashed. Consequently, connected miscellaneous petition is closed.

Sd/-
Deputy Registrar (CS)

//True Copy//

Sub Assistant Registrar

vs

To

1. The Judicial Magistrate, Ambattur.

2. The II Metropolitan Magistrate, Egmore, Chennai

+ 2 ccs to Mr. Guruprasad, Advocate Sr.63928, 63927

+ 1 cc to Mr. S. Jayakumari, Advocate Sr.64058

CrI.O.P Nos.29306 and 29307 of 2010

and

M.P.No.1 of 2010

(Cs-dr)

EU (24/09/2018)