

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.09.2019

CORAM :

THE HONOURABLE MR. JUSTICE P.N. PRAKASH

Cr1.R.C. No.1146 of 2012

Employees State Insurance Corporation,
Rep.by its Inspector,
Chennai - 34.

... Revision Petitioner/Complainant

Vs.

M.Janakarajan

... Respondent/Accused

Prayer: Criminal Revision Case filed under Section 397 read with 401 Cr.P.C., to set aside the order dated 15.10.2009 made in C.C.No.15506 of 2005 on the file of the Metropolitan Magistrate Court No.10, Egmore, Chennai - 8.

For Petitioner : Mr. G.Bharadwaj

O R D E R

This Criminal Revision has been filed to set aside the order dated 15.10.2009 made in C.C.No.15506 of 2005 on the file of the Metropolitan Magistrate Court No.10, Egmore, Chennai - 8.

2. For the sake of convenience, the petitioner and the respondent will be referred to as complainant and accused, respectively.

3. The complainant/ESI Corporation initiated a prosecution in C.C.No.15506 of 2005 before the 10th Metropolitan Magistrate, Egmore, Chennai against M.Janagarajan, Proprietor of ESJI Engineering Company at 121, S.N.Chetti Street, Royapuram, Chennai-13 for the offences under Section 85 (a) read with 85(i) (b) of the Employees State Insurance Act, 1948, (for short "The ESI Act").

4. The factory of M.Janagarajan was assigned a distinctive No.51-19345-62, also known as code number by the complainant. Thus, his factory stood governed by the ESI Act and he was required to comply with the provisions of the ESI Act by deducting the employees' contribution and adding the employer's contribution and remitting both to the complainant, which he is said to have failed to do. Since he failed to comply with the statutory obligation of payment of contribution, the complainant, in exercise of the power conferred under Section 45-A of the ESI Act, determined the amount of contribution due to be Rs.40,434/- for the period from 04/2000 to 9/2000 and communicated the orders to M.Janagarajan, despite which, he did not pay the contributions. Therefore, the complainant filed the prosecution as stated above.

5. On receipt of notice, M.Janagarajan, appeared before the 10th Metropolitan Magistrate, Egmore, Chennai and received the copy of the complaint filed by the complainant. Since the prosecution was by way of a private complaint, two witnesses were examined on the side of the prosecution and charges for the offences under Section 85(a) read with 85(i)(b) were framed against M.Janagarajan.

6. On 15.10.2009, when M.Janagarajan was questioned, he pleaded guilty and therefore, the Magistrate convicted him for the said offences and sentenced him to pay a fine of Rs.5,000/-, in default to undergo one month simple imprisonment. The Magistrate further directed that 25% of the fine amount be paid as compensation to the complainant.

7. Aggrieved by the order passed by the Magistrate, the complainant has filed the present criminal revision under Section 397 read with 401 Cr.P.C. on the ground that the trial Court had not passed any order under Section 85-C of the ESI Act, though the complainant had made a specific prayer for that in their complaint.

8. This revision case was filed on 20.04.2010 and since then neither this Court nor the Corporation was able to serve notice on M.Janagarajan. This Court directed issuance of notice by publication, pursuant to which, the complainant issued necessary publication in 'Malai Murasu' issue dated 30.08.2019, despite which there is no appearance for M.Janagarajan.

9. Mr.Suresh, Superintendent in the complainant-Corporation is present. On instructions, learned counsel for the complainant submitted that the whereabouts of M.Janagarajan is not known even to the complainant despite their best efforts.

10. Mrs.G.Narmadha, learned counsel representing Mr.G.Bharadwaj, learned counsel for the complainant, submitted that though the complainant had specifically included the prayer in the complaint for passing orders under Section 85-C of the ESI Act, the trial Court did not pass any order, but, had let off M.Janagarajan by merely sentencing him to pay a fine of Rs.5,000/-. In this regard, the learned counsel drew the attention of this Court to Section 85-C of the ESI Act, which reads as under:

" 85-C. Power of Court to make orders:

(1) Where an employer is convicted of an offence for failure to pay any contribution payable under this Act, the Court may, in addition to awarding any punishment, by order, in writing require him within a period specified in the order (which the Court may if it thinks fit and on application in that behalf, from time to time, extend), to pay the amount of contribution in respect of which the offence was committed [and to furnish the return relating to such contributions.]"

11. The learned counsel placed strong reliance on the judgment of the Kerala High Court in ESI Corporation Vs. Chakrapani [(2013) 1 KLJ 38], wherein it is held as under:

"8.Section 85C quoted above would show that when an employer is convicted for an offence under the Act for failure to pay contribution payable under the Act, it is quite mandatory that the court shall order the convicted person to pay the amount of contribution within a time frame. Order to remit compensation is the rule. There also, the trial court failed. It is reported that more than Rs.32,000/- is the due amount. In such a case if an employer can avoid remitting contribution by remitting a fine of Rs.1,000/- employer would prefer prosecution rather than remitting the contribution. Such an attitude would defeat the welfare legislation. While disposing cases of this nature, trial courts shall not overlook the legislative intention. Trial court should have imbibed the legislative intention. In cases like this, if a small fine, that too deviating from the minimum, is imposed and the employer is let off, the deterring effect of punishment itself would be lost. Prosecution under the Act is with a target to enforce the legislation. If such prosecutions are disposed with small fine enforcement of welfare legislation would

become rather difficult. Criminal courts should bear in mind that generally the people respect the law not because of the respect to the law but because of the fear of penal consequences. If the penal consequences are simpler than the consequences in complying the statutory provisions, option would always be in favour of breach. There is such a human tendency. Therefore, criminal courts, while imposing sentence shall bear in mind the deterring effect of sentence. Sentence shall always be in proportion to the offence and should be of deterring nature to the extent possible. When the statute provides for minimum sentence, it should be complied unless there are good reasons to be recorded. So also when the statute provides for issuing direction to a convicted employer to comply with the statutory provisions, it shall be issued. Or else, the result would be defeating the legislation.'

12. Therefore, she contended that the trial Court ought to have passed an order under Section 85-C of the ESI Act, once the accused pleaded guilty. A reading of Section 85-C, *ibid*, shows that when the employer is convicted of an offence for failure to pay any contribution payable under the ESI Act, the Court may, in addition to awarding any punishment, require the accused to make the payment within a specified time. Thus, the expression used in Section 85-C, *ibid*, is 'the Court may' and not 'the Court shall'. Of course, while interpreting a social and labour welfare legislation, a narrow approach should not be adopted. The trial Court should be conscious of these provisions while sentencing the accused. Otherwise, the statute may become a dead letter. The complainant is not powerless and it is clothed with the powers to recover the amount from the accused by attaching his properties and through other means.

13. In the evidence of Boobalan (P.W.1) and Seshan (P.W.2), they have also not prayed for the passing of an order under Section 85-C, *ibid*, of the Act. It would have been an ideal situation, had the complainant adduced evidence for invoking Section 85-C, *ibid*, and despite which, if the trial Court had not passed an order under Section 85-C, *ibid*, there may be justification for this Court to interfere in this revision case. It is not known, whether M.Janagarajan is alive or not and in such circumstances, no useful purpose will be served by setting aside the judgment and order of the trial Court and remitting the matter for de-novo trial.

14. Hence, this Criminal Revision case stands dismissed.

Sd/-
Assistant Registrar(Insp.Cell)

//True Copy//

Sub Assistant Registrar

To

The Metropolitan Magistrate No.10,
Egmore, Chennai - 8.

copy to:

The Section Officer,
Criminal Section,
High Court, Madras

Crl. R.C. No.1146 of 2012

bs(co)
nr 11/11/2019