$~22

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: September 02, 2022
Decided on: September19, 2022

+ CRL.M.C. 2235/2019, CRL.M.A. 8937/2019 & CRL.M.A. 1204/2020

ABHISHEK GUPTA ..... Petitioner

Through: Mr. Rajesh Yadav, Sr. Advocate with Mr. Naresh Gupta and Ms.Amita Singh Kalkal and Ms.Aditi Gupta, Advocates.

versus

EMPLOYEES STATE INSURANCE CORPORATION .... Respondent

Through: Mr. V.K Singh, Advocate (through V.C), Ms. Prachi Singh, Ms.Yahshi Rawal and Mr. Saurav Kumar, Advocates with Mr. Arvind Kuamr Bansal, SSO, ESIC.

%

CORAM:
HON'BLE MR. JUSTICE SUDHIR KUMAR JAIN

JUDGMENT

1. The present petition is filed under section 482 Cr.P.C. for quashing of complaint dated 05.06.2018 filed by the respondent for the offence punishable under section 85(g) read with sections 45(2) and 86 of the Employee State Insurance Act, 1948 and all proceedings arising there from including order of summoning of the petitioner dated 08.06.2018 passed by the Court of Shri Pranjal Aneja,

Metropolitan Magistrate, Shahdara District, Karkardooma Courts, Delhi.

2. The respondent filed a complaint under section 85(g) of The Employees' State Insurance Act, 1948 (hereinafter referred to as "the Act"), 1948 against M/s H.M.R. Institute of Technology and Management and others, in which the petitioners were implicated as one of the accused being the trustee of the accused no. 1/M/s H.M.R. Institute of Technology and Management.

3. The Court of Shri Pranjal Aneja, MM-01/Shahdara, Karkardooma Court, Delhi vide order dated 08.06.2018 after perusal of the complaint and the documents annexed with the complaint took the cognizance and ordered for summoning of the accused as named in the complaint including the petitioner.

4. It is stated in the petition that on 09.05.2017, Social Security Officer ("SSO") of the respondent visited the premises of the institute i.e. HMR Institute of Technology and Management and issued intimation of inspection of record under the Act on 17.05.2017.

4.1 The inspection could not be carried out as the relevant documents were not available and the next date of inspection was fixed on 29.05.2017 and the said time was further extended. SSO visited the institute on 08.06.2017 and at that time the examination of the University was going on but SSO declined to give further time to the Institute vide letter dated 08.06.2017 and made recommendation to the Deputy Director (I/C) Divisional Office, ESI Corporation, Shahdara to initiate action under 85(g) against the Institute for non-production of the records despite giving three opportunities.

4.2 A show cause notice addressed to the Institute was issued on 21.07.2017 to the effect that why the prosecution should not be launched for the offence under section 85(g) read with section 45(2) of the Act. The Show cause notice was replied vide reply dated 11.08.2017 wherein the cause of delay in production of records for inspection was explained. The show cause notice was addressed to the Institute but it was not issued in the name of the petitioner. The Deputy Director, ESIC was requested to depute SSO to visit the institute and inspect the record. The Deputy Director, ESIC acceded to the request and fixed 25.08.2017 for inspection. However, SSO did not visit the premises on 25.08.2017 and asked for production of the entire records at his office.

4.3 The Deputy Director (I/C) on 05.10.2017 accorded the sanction against Institute and Anil Kumar Gupta for alleged commission of offence under section 85(g) read with section 45(2) of the Act in a mechanical manner, without due application of mind on incorrect premise that the Institute had failed to produce the records without appreciating that the Institute had the records and offered the same for inspection on 25.08.2017.

4.4 The legal branch of respondent vide letter dated 09.10.2017 was communicated about the grant of sanction for prosecution wherein it was incorrectly mentioned that the sanction for prosecution has also been granted in the case of the petitioner being trustee although no such sanction was granted as per sanction Letter dated 05.10.2017.

4.5 The respondent filed the complaint bearing Comp. ID No. 2829/18 dated 05.06.2018 in the court of Shri Pranjal Aneja, MM-01, Karkardooma Courts, Delhi in which the petitioner was arrayed as Accused No. 4.

4.6 The Trial Court took cognizance vide order dated 08.06.2018. The Complaint, dated 05.06.2018 is bad against the petitioner as no sanction as per section 86 was accorded in respect of the petitioner. The petitioner prayed as under:-

> **(i) Quashing/setting aside of the Complaint dated 05.06.2018 filed by the Respondent for the offence under Section 85(g) read with section 45(2) and 86 of the Act against the Petitioner herein; and/or**
> **(ii) Quashing/setting aside of all proceedings arising from the said complaint; and/or**
> **(iii) Quashing/setting aside order of issuance of summons dated 08.06.2018 passed by the court of Sh. PranjalAneja, MM Shahdara District, Karkardooma Courts, Delhi; and/or**
> **(iv) Any other/ further order(s), direction(s) which this Hon'ble Court may deem fit, just and proper may also kindly be passed in favour of the Petitioner.**

5 The perusal of the complaint under section 85(g) of the Employees' State Insurance Act, 1948 reflects that the petitioner was made one of the accused and the sanction was only accorded against the Anil Kumar Gupta and M/s HMR Institute of Technology and

Management vide letter dated 05.10.2017 but no sanction was granted against the petitioner.

6 The section 86 of Employees' State Insurance Act, 1948 reads as under:-

> **"Section 86 - Prosecutions**
> **(1) No prosecution under this 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].**
> **[(2) No court inferior to that of a Metropolitan Magistrate or Judicial Magistrate of the First Class shall try any offence under this Act.]**
> **(3) No Court shall take cognizance of any offence under this Act except on a complaint made in writing in respect thereof."**

7 The counsel for the petitioner argued that the prosecution against the petitioner and the summoning order dated 08.06.2018 passed by the Court of Shri Pranjal Aneja, MM Shahdara District, Karkardooma Courts, Delhi are bad in law for the want of sanction as per the section 86 of the Act and during the course of the argument also referred the judgment of passed by the co- ordinate bench of this Court in **Vipul Aggarwal V. Income Tax Office** in CRL.M.C. 3894/2018 decided on 19.07.2022 wherein it was held as under:-

> **"25 .Thus, the sanction is specifically to institute a criminal complaint against the Company M/s ASM Traxim Pvt Ltd. It is crystal clear that the sanction has been accorded for the prosecution only of the "person" named as the "assessee ", namely the Company M/s ASM Traxim Pvt. Ltd**

> **There is no sanction qua the petitioner, even as a "person" being a director/being responsible to the conduct of the business of the company. It cannot be held that the observation in para no. I O of this sanction, that the petitioner had verified the returns filed by appending his digital signatures, would tantamount to sanction qua him. That would be stretching language too far.**
> **26. Since the law provides that without sanction u/s 278B of the IT Act, the Department cannot proceed against a person found liable to prosecute him for the offence under Section 276 CC of the IT Act, the present prosecution must fail qua the petitioner. In the absence of a specific sanction for prosecuting the petitioner, the learned ACMM could not have taken cognizance of the complaint against him and then framed charge against him. The edifice built without foundation must crumble. "**

8 The Allahabad High Court in **Vishwanidhi Dalmia (Raja) V. Director, Employees' State Insurance Corporation and Ors.** vide judgment and order dated 16.08.1995 passed in Cr. Misc. Application No. 3173 of 1982, while dealing with similar proceedings under the Employees State Insurance Act, 1948, quashed the complaint as no sanction was obtained for prosecution of the petitioner/Director under section 86 of the Act. It was held that sanction being mandatory no prosecution can be instituted against the petitioner/director. Consequently complaint against the Director was quashed.

9 The Patna High Court in **Raj Kumar Sodera V. Chief Commissioner of Income Tax & Ors** vide judgment and order dated

15.11.1996 passed in Crl. Misc. No. 7513 of 1991 also quashed the prosecution of the petitioner in absence of Sanction in similar matter dealing with prosecution under the Income Tax Act.

10 The counsel for the respondent in the written arguments submitted that the petitioner is one of the trustees of the trusts i.e. Hiralal Mohan Devi Rita Gupta Memorial Trust, who is running the Institute. The petitioner is the principal employer of the as per the section 2(17) of the Act and also referred the judgment of **Sankar Bhattacharjee V. Bholonath Ghosh** 91CWN 282, (1995) IIILLJ 495Cal decided on 08.08.1986.

11 It is true that no sanction was granted against the petitioner as per section 86 of the Act, as such the prosecution cannot be launched against the petitioner. Accordingly, the summoning order dated 08.06.2018 against the petitioner is bad in the eyes of law and hence set aside. The present petition is allowed, however the respondent shall be at liberty to initiate appropriate prosecution after according the sanction in accordance with law.

12 The present petition along with pending applications, if any, stands disposed of.

SUDHIR KUMAR JAIN
(JUDGE)

SEPTEMBER 19, 2022
J/kg