

A.P. JaIn and ors. Vs. C.N. Jotwani, Inspector and ors.

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Court : Gujarat

Decided On : Mar-23-1976

Reported in : (1977)18GLR299

Judge : M.P. Thakkar, J.

Appellant : A.P. JaIn and ors.

Respondent : C.N. Jotwani, Inspector and ors.

Judgement :

M.P. Thakkar, J.

1. At the threshold of a prosecution powers of the High Court have been invoked by Directors of a Public Limited Company which has admittedly failed to pay (and retained with itself) contributions deducted from the wages of the employees under the Employees' State Insurance Act, 1948 (E.S.I. Act). When financially powerful economic offenders successfully stall proceedings in Courts for years at the very doorsteps of Courts by disingenuous technical weapons, the image of the judicial system suffers an eclipse in the eye of the common man. Even so, if the process of law is being misused or ends of justice pressing so demand inherent powers may have to be exercised if inevitable. This perspective must loom large on the horizon in this petition by the petitioners who contend that prosecution should not have been instituted against them for failure to submit the contribution cards and returns under the Employees' State Insurance Act, 1948 (E.S.I. Act) even in respect of amounts deducted from the salaries of the employees of Public Limited Companies of which they are Directors. The question will have to be examined from the angle as to whether it would be right for the High Court to decide questions of facts and law which can appropriately and more conveniently be decided upon material placed before the trial Court by the learned trial Magistrate. In other words, the question is whether the inherent powers of this High Court which can be exercised inter alia to prevent abuse of the process of law or to secure the ends of justice should be invoked by converting the High Court into an original forum for decision of preliminary questions of law or questions of fact at the instance of the petitioners.

2. This question arises in the context of the Directors of two Public Limited Companies, namely, M/s. Priyalaxmi Mills, Baroda, and M/s. Shree Shubhalaxmi Mills, Company. In both the matters the facts are similar and the inherent powers of this High Court under Section 482 of the Criminal Procedure Code of 1973 have been invoked on similar grounds. One of the Directors in both the matters is common. It will be, therefore, convenient to dispose of both these petitions by this common judgment.

3. Before dealing with the submissions urged on behalf of the petitioners, a few facts may be recounted. Miscellaneous Criminal Application No. 3/76 arises from Criminal Case No. 2608/75 pending in the Court of the Metropolitan Magistrate, 5th Court. The prosecution is in relation to the affairs of M/s. Shree Shubhalaxmi Mills Ltd., Cambay. It is the prosecution case that though the employees' contribution was deducted from the wages of the employees of the said Company, contribution cards and returns required to be submitted under

the relevant provisions of E.S.I. Act were not submitted within the prescribed time by the principal employers who were responsible for submission of such returns and cards. Default, it is said, has taken place in relation to periods ended September 28, 1974, November 30, 1974, January 25, 1975 and March 29, 1975. As defaults in relation to the first two periods have become immune from prosecution on account of delay, the prosecution giving rise to the present petition relates to periods ended January 25, 1975 and March 29, 1975. The prosecution was instituted after obtaining the requisite sanction from the Regional Director of the Employees' State Insurance Corporation of Ahmedabad. In the said order the names of the petitioners are specified. The complaint was lodged by Shri C.N. Jotwani, Inspector, Employees' State Insurance Corporation, on September 1, 1975 and the learned Magistrate issued process on the same day. The complaint was not accompanied by any list showing the names of witnesses other than the complainant intended to be examined by the prosecution.

4. So far as Misc. Criminal Application No. 4/76 is concerned, it stems from Criminal Case No. 2058/75 in respect of M/s Priyalaxmi Mills, Baroda. In this case also it is alleged that though deductions were made from the wages of the employees, contribution cards and returns required to be filed under the relevant provisions of the E.S.I. Act were not filed within the prescribed time in respect of seven periods. However, in view of the aspect relating to limitation complaint was lodged in respect of three periods, namely, periods ending on November 30, 1974, January 25, 1975 and March 29, 1975. In this case also the requisite sanction was granted by the Regional Director in which the names of all the petitioners were specified. In this case also the complaint was not accompanied by a list of witnesses other than the complainant intended to be examined in support of the prosecution case. The complaint was lodged by Shri C.N. Jotwani, Inspector, Employees' State Insurance Corporation, on July 10, 1975 and process was issued on the same day.

5. The learned Counsel for the petitioners has urged the following submissions in support of these petitions:

(1) The sanction accorded by the competent authority is defective inasmuch as it shows that the competent authority has not applied his mind to the facts of the case.

(2) If regard be had to the definition of expression 'principal employer', it cannot be said that the petitioners who are the Directors of the aforesaid two Public Limited Companies fall within the description of 'principal employer'.

(3) The learned Magistrate had no jurisdiction to issue a process against the petitioners inasmuch as the complaint was not accompanied by a list of prosecution witnesses as enjoined by Sub-section (2) of Section 204 of the Code of Criminal Procedure, 1973.

6. So far as the first point is concerned, I do not think it would be proper for this High Court to examine the validity or otherwise of the order of sanction in exercise of its inherent powers and to convert it into a forum for an original trial on a preliminary issue. This point, assuming that there is any force in it, may be urged at the trial at the relevant time. It would not be right on principle to exercise inherent powers in order to foreclose an argument in the trial Court. I am not prima facie impressed by the argument that the sanction is defective. But I do not wish to express any final opinion on the question lest it might prejudice one or the other party.

7. So far as the second point is concerned, it is a matter of evidence. I am not prepared to say that the Directors of a Public Limited Company can never be said to fall within the definition of 'principal employer' embodied in Sub-section (17) of Section 2 of the E.S.I. Act. The expression 'principal employer' has been defined as under:

2(17) '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;

And the expression 'occupier' has been assigned the same meaning by Sub-section (15) as is assigned to it in the Factories Act, 1948 wherein it has been defined in Section 2(n) as under:

2.(n) 'occupier' of a factory means the person who has ultimate control over the affairs of the factory, and where the said affairs are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory;

The expression 'principal employer' takes within its sweep the expression 'managing agent'. A managing agent in this expression does not refer to a managing agent as defined in the Companies Act but the expression 'managing agent' carries its own meaning which is contained in Sub-section 14A of Section 2 of the E.S.I. Act which is in the following terms:

2(14A) 'managing agent' means any person appointed or acting as the representative of another person for the purpose of carrying on such other person's trade or business, but does not include an individual manager subordinate to an employer;

On a plain reading of these provisions it is clear that even Directors can in a given case fall within the description of 'principal employer'. Whether or not the petitioner would fulfil that description having regard to the facts and circumstances of the present case is a matter which depends on evidence which might be adduced at the trial. In any view of the matter, I do not consider it right on principle to examine this question at the threshold of the matter (when only process has been issued and no evidence has been recorded) in exercise of the inherent powers of the High Court which must by the very nature of the powers be sparingly exercised. To accede to the argument urged on behalf of the petitioners would be to convert this Court into a Court of first instance and to decide questions of preliminary nature at the threshold by staying the proceedings in the trial Court and stalling prosecution in such matters, it would be extremely undesirable to invoke the inherent powers for such a purpose. I am, therefore, not prepared to accede to the argument urged on behalf of the petitioners that this Court should examine this question at this juncture in exercise of its inherent powers. It is obvious that there is no question of the abuse of the process of law involved. Nor does it raise any question relating to the securing of the ends of justice for the petitioners can raise these contentions in the trial Court and if the trial Court on the basis of material placed before it by both the sides upholds the plea raised on behalf of the petitioners, they would be doubtless acquitted.

8. The third and the last point urged on behalf of the petitioners is that the learned Magistrate ought not to have issued a process against the petitioners inasmuch as the complaint was not accompanied by a list of witnesses. Reliance is placed in this connection on Sub-section (2) of Section 204 of the Code of Criminal Procedure of 1973 which enjoins that no summons or warrant shall be issued against an accused under Sub-section (1) until a list of the prosecution witnesses has been filed. Ordinarily it means a list of witnesses, if any, apart from the complainant himself. The complainant would be examined in his capacity as the complainant and when Sub-section 21 of Section 204 refers to witnesses, it obviously means witnesses other than the complainant, if any. No doubt if it is intended to examine witnesses other than the complainant at the stage of the institution of the complaint, a list of witnesses must be annexed and till such a list is annexed, the Court would not be justified in issuing a process. In *Dhanji Mavji and Ors. v. Gadhvi Govind Jiva and Anr.* 15 G.L.R. 136, J.M. Sheth J. has taken view that the provision contained in Section 204(2) is mandatory. There is no doubt that it is mandatory. If, however, the complainant relies on his own evidence and the documentary evidence, it would not be obligatory on him to annex a list in which it is stated that he does not propose to examine any

witness. The learned Counsel for the petitioners contends that in case no witnesses other than the complainant are sought to be examined, such a statement must be made by the complainant before the Magistrate prior to the issuance of process and if such a statement is not made, the process issued by the Magistrate would be without jurisdiction. Reliance is placed on Dhanji Mavji's Case for this proposition. Now, on an examination of the facts of that case, it is clear that in the complaint giving rise to the aforesaid revisional application which came up before the High Court, it was in terms stated that there were other witnesses and they would be examined whenever the Court called upon the complainant to do so. A statement was made to the effect that the complainant entertained an apprehension that the witnesses would be tampered with and that is why he had not mentioned the names of witnesses. In other words, admittedly the complainant wanted to examine other witnesses but for certain reasons he wanted to keep back the names of these witnesses. That such was the position is patently clear from paragraph 9 of the judgment:

Mr. Patel has (hen urged that there is nothing to indicate that the complainant wanted to examine any other witnesses in support of his complaint. In my opinion, this argument is not well-founded. In the complaint itself, the complainant has stated that the accused of this case would destroy his evidence. That is his apprehension. He will, therefore, produce his witnesses whenever directed by the Court. It cannot, therefore, be said that the complainant was the only witness. Complainant does refer to the fact that there are other witnesses and he has apprehension of those witnesses being tampered with by the accused. So, he will produce them as witnesses whenever called upon by the Court to do so.

9. And it was in the context of the aforesaid background that the High Court took the view that the order for issuance of process deserved to be set aside inasmuch as the mandatory requirement of Sub-section (2) of Section 204 had not been complied with. It was clearly a case where admittedly witnesses were to be examined and the list was not annexed. The ratio of that decision will not, therefore, buttress the proposition canvassed on behalf of the petitioners that if no witnesses are sought to be examined, a negative statement to that effect must be made before the Magistrate and if no such statement is made or no such reply is elicited by the Magistrate before the issuance of the process, the order passed by the Magistrate would become illegal on account of non-compliance with Sub-section (2) of Section 204. It is not possible to read Section 204(2) in the manner suggested by counsel for it would amount to re-writing the said sub section or re-fashioning Sub-section (2) of Section 204 which is not the function of this Court. Read in the manner suggested by the counsel Sub-section (2) would read somewhat as follows:

No summons or warrant shall be issued against an accused under Sub-section (1) until a list of prosecution witnesses has been filed or until the complainant states that he does not want to examine any witnesses.

10. It is not possible in re-write the sub-section under the guise of interpreting the provision as suggested by the learned Counsel for the petitioners. I am, therefore, unable to accede to this argument. It may be mentioned that learned Counsel for the opponent No. 1 stated that he hoped to establish the offence by producing documentary evidence and it was not considered necessary to examine any witness in order to prove the prosecution case and that is why the list of witnesses was not produced. It was stated that a list of witnesses was required to be annexed in case it was intended to examine such witnesses. Learned Counsel for the petitioner, however, called my attention to the observations made in paragraph 10 of the aforesaid judgment in Dhanji Mavji's case wherein has been observed as under:

There is nothing brought on the record by the complainant to indicate that he does not want to examine any other witnesses and the complainant is the only solitary witness. If such a fact is brought on the record prior to the issue of the process, that would have been sufficient. The Court has not made any such inquiry from the complainant and has not recorded any such fact. The order passed by the Court, therefore, regarding the issue of process without filing any such list as required under Section 204(1-A) of the Code, cannot be sustained in law.

11. As observed by me earlier, the ratio of the decision in Dhanji Mavji's case is that if witnesses are intended to be examined and the list of the witnesses is not annexed to the complaint, the order for issuance of process would be without jurisdiction. That is the ratio because the decision has been rendered in the facts and circumstances narrated in paragraph 2 wherein it is in terms clarified that in the complaint itself a statement was made that there were other witnesses and it was intended to examine them. What has been observed in paragraph 10 is, therefore, not the ratio of the decision. Besides, as stated by me earlier, if Section 204 were to be interpreted as suggested by the learned Counsel for the petitioners, it would amount to reading the provision as if it casts a mandatory obligation to make a negative declaration to the effect that no witnesses are sought to be examined. Dhanji Mavji's case is not an authority for such a proposition. 9. In my opinion, therefore, there is no substance in the petitions. The petitions fail and are rejected. Rule is discharged. 10. Interim orders are vacated.

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