

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION Nos.2622 of 1998 to 2624 of  
1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

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ASHWINBHAI M DAVE

Versus

UNION OF INDIA

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Appearance:

MR BP MUNSHI for Petitioner in all petitions  
MR MAYUR S BAROT for Respondent No. 2 in all  
petitions  
MR KP RAVAL & SA PANDYA, APPs for respondent No.3 in  
2622 & 2623/98 and 2624/98 respectively

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CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 31/03/99

COMMON C.A.V. JUDGEMENT

Above three petitions have been filed under  
sec.482 of Cr.P.C. to quash and set aside the criminal  
proceedings initiated by the respondent No.2 ESI  
Corporation by filing Criminal Case Nos.1100/1995,  
1101/95 and 1102/95 respectively against the petitioner

pending in the Court of learned Metropolitan Magistrate, Court No.2, Ahmedabad. As complainant and accused are same in all the three petitions as also the date of filing the complaint, I have heard all these matters together and decide by this common judgment.

2. The facts of the above three petitions are that the respondent No.2-Employees State Insurance Corporation, hereinafter referred to as 'ESI Corporation' has lodged the complaints against the petitioners in respect of failure to deduct and pay provident fund, ESI Corporation contribution and filing of returns against the petitioners.

3. The case of the petitioner of Cri.Misc.Appln.No.2622/98 is that he failed to submit returns alongwith the copies of chalans for the amount deposited in the bank as provided in Regulation 26 of the ESI (General) Regulations, 1995 in respect of the contribution payable by the Company for the period ended March, 1994 which is punishable under sec.85(e) and (1) read with secs.43 and 44 of the ESI Act, 1948 and Regulation 26 of the ESI (General) Regulation, 1950. The case of the petitioner in Cri. Misc.Appln. No.2623 of 1998 is that the Company has failed to pay contributions for the months from January, 1994 to March, 1995 as required under secs.39 and 40 of the ESI Act which is punishable under secs.85(a) and 85(i)(b) of the ESI Act. Whereas the case of the petitioner in Cri.Misc.Appln.No.2624 of 1998 is that the Company has failed to pay the contributions for the months from October, 1993 to December, 1993 as required under secs.39 and 40 of the ESI Act which is punishable under secs.85(a) and 85(i)(b) of the ESI Act. The petitioners are retired persons. It is stated that pursuant to the sanction order dated 3-4-1995 accorded by the Regional Director for prosecution, complaints have been filed by the Inspector on 18-4-1995 against the present petitioners and since then, the above three complaints are pending in the Court of learned Metropolitan Magistrate, Court No.2, Ahmedabad.

4. I have heard learned counsel for the petitioners, Mr.B.P.Munshi, on behalf of the respondent No.2, learned counsel Mr.Mayur S. Bharot and on behalf of State, learned APPs in all the three petitions.

5. Learned counsel for the petitioners has relied upon on the judgments reported in 1991 Supp.(1) SCC 20

and AIR 1998 SC 2676. Supreme Court while delivering the judgment reported in AIR 1998 SC 2676 has considered the judgment that has been reported in 1991 Suppl.(1) SCC 20 wherein it was held by the Supreme Court as under:

"Section 2(17) of the Employees' State Insurance

Act, defines the principal employer as either owner or, occupier taking care of all eventualities. When the owner of the factory is the principal employer, there is no need to examine who is occupier. The owner will be the principal employer under S.40. Therefore, even if the definition of "principal employer" under the Employees' State Insurance Act, 1948 is read in Expln. 2 to S.405 of the Indian Penal Code, the Directors of the company, would not be covered by the definition of "principal employer" when the company itself owns the factory and is also the employer of its employees at the head office. 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 S.405, this definition cannot be held to apply to the term "employer" in Explanation 2. 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. Based on the above observation made by the Supreme Court, it is established from the record and proceedings that the present petitioner was a Director and factory has been closed since 30th November, 1992. The above fact has been established vide Annexures F and I. Annexure F is the letter sent by Shri K.D.Vaghela, the Deputy Regional Director in which he has put specific note that the factory has been closed with effect from 30th November, 1992. Annexure I is the report submitted by Mr.G.H.Bapat, Inspector of the ESI Corporation. It is also established that the Managing Director of the company, accused-Shri Gopaldas Parikh has died on 8-7-1992 and after his demise, factory has been closed on 30th November, 1992 and at the time of inspection, no workers were there at all. Moreover, the concerned officer was present in the Court alongwith the file and after verifying the same, he has admitted before this Court through his learned counsel, Mr.Barot that company had submitted the form regarding declaration of the name of principal employer and as per the above form, the name of the present petitioner is not mentioned as principal

employer and all the above facts were with them when the concerned authority has accorded sanction for filing the complaints against the petitioner and late Shri Gopaldas Parikh. Admittedly, it is nothing but non-application of mind on the part of sanctioning authority because on that day, above facts were there on record that the factory was closed and present petitioner is not a principal employer and Shri Gopaldas Parikh, accused No.2 has died on 8-7-1992. Still, he has sanctioned the proceedings mechanically more particularly against a dead person, who admittedly and as per the record of the ESI Corporation, was not the principal employer. It is true that in the proceedings under sec.482 of Cr.P.C., normally the Court should not look into other evidence which are on record. Here in this case, present petitioner had submitted the application before the Court below after narrating all the aspects of the matter and after considering the same also, learned Metropolitan Magistrate had rejected the same on 31-1-1998. Against that, the present petitioner has filed the present petitions.

7. If the complainant ignored the documents which are available with him from the very beginning, then it is not a legal and justifiable act on the part of the Court to say that the accused should go and face the trial on merits. Therefore, in these type of serious cases, the sanctioning authority should go through each and every aspect of the matter and act judiciously before passing any order so that innocent persons are not dragged into criminal proceedings due to negligence on the part of prosecution agency.

8. In the result, all the three Criminal Misc. Applications are allowed. Proceedings qua the present petitioner in Criminal Case Nos.1100 of 1995 to 1102 of 1995 pending in the Court of learned Metropolitan Magistrate, Court No.2, Ahmedabad is quashed and set aside. As far as proceedings against the accused No.2 are concerned, admittedly, he has died before filing the complaint itself and, therefore, Court below is directed to pass necessary order to that effect after verifying the correctness of the same.

9. Original judgment is ordered to be kept in Cri.Misc.Appln.No.2622 of 1998 and one copy is ordered to be kept in both Cri.Misc.Appln.Nos.2623 of 1998 and 2624 of 1998.

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