

**Criminal Revisional Jurisdiction**

Present: **The Hon'ble Justice Ashim Kumar Roy**

*C.R.R. No. 139 of 2010*

**Judgment On: 31-03-2010.**

*Sri Bidyut Kumar Gope*

*versus*

*The State of West Bengal & Anr.*

**POINTS:**

E.S.I COVERAGE - Establishment of the petitioner has been brought under the coverage of the E.S.I. Act since April 1991- Even if it decided that the establishment has been brought under coverage by mistake, such decision shall become operative prospectively - The Employees State Insurance Act, 1948, S. 85 (a)

**FACTS:**

The Petitioner is the owner of a sweetmeat shop. The aforesaid complaint case was instituted against him for non-payment of E.S.I. contributions.

In the year 1991 the establishment of the petitioner was brought under the coverage of E.S.I. Act and the petitioner never raised any objection against such coverage and in terms of such coverage he was regularly paying its contributions until June 2006, but all of a sudden stopped payment of its contributions from 2006 on a plea that the establishment was wrongly and illegally brought under the coverage of the E.S.I. Act since it came in the exempted category.

In the year 2008 a show cause notice was issued calling upon the petitioner to make payment under the threat of taking penal actions and the said show cause notice was challenged before this High Court and High Court directed the concerned authority to

resolve the dispute in accordance with law. The concerned authority however decided against the petitioner and such decision is now challenged before the E.S.I. Court.

**HELD:**

It is an admitted position that the establishment of the petitioner has been brought under the coverage of the E.S.I. Act since April 1991. The petitioner never raised any dispute as against such coverage and has been regularly paying the E.S.I. contributions for years together. Therefore, his plea that by mistake of fact the establishment has been brought under coverage even if is decided in his favour by the E.S.I. Court then in that case the effect of such decision shall become operative prospectively i.e. from the date of such decision. In this case, the period of default admittedly relates to the month of October and November, 2004, therefore, the petitioner could not be exonerated from its liability. Hence, no question arises for interfering with the impugned criminal proceeding.

Para-6

**CASES CITED:**

- 1) Iqbal Singh Marwah & Anr. Vs. Meenakshi Marwah & Anr., 2005 SCC (Cri) 1101
- 2) M.S. Sheriff V. State of Madras (AIR p. 399, paras 15-16)

For Petitioner: Mr. Uddipan Banerjee  
Mr. Swapan Kumar Dutta

For E.S.I.: Mr. Subal Moitra

For State: Mrs. Krishna Ghos

**THE COURT:**

- 1) The subject matter of challenge in this criminal revision is an order passed on September 7, 2009 by the Learned Metropolitan Magistrate, 5th Court, Calcutta in connection with a complaint case, relating to an offence punishable under Section 85 (a) of the Employees State Insurance Act, 1948.

2) The aforesaid complaint case was instituted against the present petitioner, who happened to be the owner of the establishment, a sweetmeat shop for non-payment of E.S.I. contributions.

3) Heard the Learned Counsel appearing on behalf of the petitioner as well as the Learned Counsel appearing on behalf of the E.S.I. Authorities and the Learned Counsel appearing on behalf of the State.

4) The Learned Counsel appearing on behalf of the petitioner vehemently contended that in the year 1991 the establishment of the petitioner, a sweetmeat shop was wrongly and illegally brought under the coverage of E.S.I. Act. According to him such establishment of the petitioner was only engaged in selling of various kinds of sweets, prepared manually and without the aid of electricity and the business was run by employing 7 workers and number of workers was always below 10. According to him although the establishment of the petitioner was coming under the purview of the exempted category, still the aforesaid complaint was illegally lodged alleging non-payment of E.S.I. contributions. He further contended after the petitioner discovered that his establishment has been wrongly and illegally covered under the E.S.I. Act, he immediately prayed for exemption but the concerned authority without paying any heed to the same, in the year 2008 issued a show cause notice calling upon the petitioner to make payment under the threat of taking penal actions and the said show cause notice was challenged before this High Court and High Court directed the concerned authority to resolve the dispute in accordance with law. He further submitted the concerned authority however decided against the petitioner and such decision is now under challenged before the E.S.I. Court. It is lastly submitted since the question whether the petitioner's establishment shall remain covered under the E.S.I. Act or not is pending for decision before the E.S.I. Court, the impugned criminal proceeding is to be quashed or alternatively be stayed till the final decision of the E.S.I. Court.

5) On the other hand, the learned lawyer appearing on behalf of the opposite party no. 2, the complainant submitted that the petitioner's establishment was brought under the coverage of E.S.I. Act in April 1991 and the petitioner never raised any objection against such coverage and in terms of such coverage he was regularly paying its contributions until June 2006, but all of a sudden stopped payment of its contributions from 2006 on a plea that the establishment was wrongly covered. According to him, once an establishment is covered under E.S.I. Act, there is no scope available to it for claiming exemption. He submitted this criminal revision is absolutely frivolous and liable to be dismissed.

6) I have given my anxious and thoughtful consideration to the rival submissions of the parties. It is an admitted position that the establishment of the petitioner has been brought under the coverage of the E.S.I. Act since April 1991. The petitioner never raised any dispute as against such coverage and has been regularly paying the E.S.I. contributions for years together. Therefore, his plea that by mistake of fact the establishment has been brought under coverage even if is decided in his favour by the E.S.I. Court then in that case the effect of

such decision shall become operative prospectively i.e. from the date of such decision. In this case, the period of default admittedly relates to the month of October and November, 2004, therefore, the decision of the E.S.I. Court, even if goes in favour of the petitioner then in that case the petitioner could not be exonerated from its liability. Hence, no question arises for interfering with the impugned criminal proceeding. The next question arises for consideration whether the pending decision of the E.S.I. Court, a Civil Court, the impugned criminal proceeding be stayed on the ground that any decision of the E.S.I. Court would be binding on the Criminal Court. In this case reliance may be placed in the decision of the Hon'ble Supreme Court in the case of Iqbal Singh Marwah & Anr. Vs. Meenakshi Marwah & Anr., reported in 2005 SCC (Cri) 1101, where a Constitution Bench of the Supreme Court held as follows;

“Coming to the last contention that an effort should be made to avoid conflict of findings between the civil and criminal courts, it is necessary to point out that the standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor any legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein. While examining a similar contention in an appeal against an order directing filing of a complaint under Section 476 of the old Code, the following observations made by a Constitution Bench in M.S. Sheriff V. State of Madras give a complete answer to the problem posed: (AIR p. 399, paras 15-16)

“15. As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard-and-fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.

16. Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust. This, however, is not a hard-and-fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under Section 476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished.” (Para 32).

7) Lastly, having gone through the impugned order, I find that the Learned Court below dismissed the petitioner's application for exemption under Section 205 of the Code as the same was lacking of material particulars. At the same time, the Learned Court below rejected the petitioner's prayer for discharge on the ground there was no default, due to the fact the E.S.I. Authority has disputed such claim of the petitioner.

8) This criminal revision has no merit and accordingly stands dismissed. Interim order, if any, stands vacated.

9) Criminal Section is directed to deliver urgent Photostat certified copy of this Judgment to the parties, if applied for, as early as possible.

( *Ashim Kumar Roy, J.* )