

**(1986) 07 CAL CK 0028**

**Calcutta High Court**

**Case No:** None

Employees" State Insurance  
Corporation

APPELLANT

Vs

Ashutosh Adhikary and Others

RESPONDENT

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**Date of Decision:** July 17, 1986

**Acts Referred:**

- Employees State Insurance Act, 1948 - Section 2, 39, 40
- Factories Act, 1948 - Section 2
- Penal Code, 1860 (IPC) - Section 405, 406

**Citation:** (1987) CriLJ 1812

**Hon'ble Judges:** Shamsuddin Ahmed, J

**Bench:** Single Bench

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**Judgement**

@JUDGMENTTAG-ORDER

Shamsuddin Ahmed, J.

The petitioner herein is a statutory body established under the State Insurance Act, 1948. Opposite Party No. 1 is Managing Director and Ors. are Directors of M/s. Metro Engineering Pvt. Ltd. They are principal employers of the said factory to which ES.I. Code No. 413548 was allotted. Under the provisions of Sections 39 & 40 of the said Act opposite parties are required to deduct from the wages of each employee for each contributor period an amount of money in terms of the said Act and are required to purchase the contribution stamps from the State Bank of India with the said money and make the payment in the manner laid down by the Regulations under the said Act. On inspection of records of the said factory the Insurance Inspector found that during the period from August 1980 to Jan. 1981 the accused/opposite parties deducted from the wages of the monthly paid employees a sum of Rs. 316.20 as the employees" share of the said contribution "Yom July 1980 to Dec. 1980, but did not deposit the said amount to the ESI fund as required by the

said Act and Regulations and thereby committed criminal breach of trust in respect of the said money within the meaning Explanation 2 of Section 405 of the Indian Penal Code. The learned Chief Metropolitan Magistrate, Calcutta took cognizance of the offence and the case was registered as C/2942 of 1981. The case was transferred to the learned Metropolitan Magistrate, 11th Court, Calcutta for trial. The opposite parties filed an application for dropping the proceedings. On the said petition the learned Magistrate relying on a single Bench decision by my learned Brother Mr. Justice Monoj Kumar Mukherjee in Criminal Revision No. 1271 of 1982 S. K. Agarwal v. E.S.I. Corporation subsequently reported in. (1985) 1 Cal HN 113 dropped the said proceedings and discharged them from their bail bonds. Being aggrieved, this revision application has been filed by the ESI Corporation. By the decision relied on by the learned Magistrate the court held that from Explanation 2 to Section 405 of the IPC which was brought into the statute book by the Employees' State Insurance (Amendment) Act, 1975 it is abundantly clear that the employer who deducts the employees' contribution shall be deemed to have been entrusted with the amount of contribution so deducted and he shall be deemed to have dishonestly misappropriated the said amount, if not deposited in the fund. According to the court in other words the deeming provision applies to an employer as the term employer has not been defined by the Penal Code the ordinary meaning to the term employer has to be given and that necessarily means the person who employs. Accordingly, the company will be the employer and the provision of Explanation 2 will apply only against the company and not against its directors

2. Mr. Moitra appearing for the Corporation has urged, relying on a decision reported in 1978 Cal HN 444 : (1978 Lab IC 1332) Bidyut Kumar Sett v. Satyesh Chandra Bagchi. The court held the director of a company can be brought within the meaning of the word occupier as mentioned in Section 2(17) of the Act as according to Section 2(n) of the Factories Act occupier is a person who like a director has ultimate control over the affairs of the factory, It further held that occupier is wide enough to bring any director within the definition of S, 2 (17) of the Act. Mr. Moitra, therefore, contended that the directors of the company are principal employers as defined u/s. 2(17) of the ESI Act. The expression "employer" used in Explanation 2 to Section 405 of the IPC is wide enough to include principal employers as defined in the ESI Act. For convenience I quote below Explanation 2 to Section 405, IPC. "A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid." In S. K. Agarwal's case (1985 1 Cal HN 113) referred to above the entire stress has been given on the expression

"employer" used in Explanation 2 as the court did not find any material to refer to the definition of principal employer of the ESI Act. The court has held that this Explanation can only be used against an employer which generally means the person who employs and in the case of a company it is the company who is the employer. On a close perusal of this Explanation it appears that a person who is liable under Explanation 2 has been amply described by 2 following clauses namely "being an employer" and "who deducts the employees' contribution from the wages payable to the employees for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act". The second clause takes us to the provision of ESI Act. Section 40 of the Act in Sub-section (2) provides "notwithstanding anything contained in any other enactment but subject to the provisions of this Act and the Regulations if any made thereunder the principal employer shall in the case of an employee directly employed by him (not being an exempted employee), be entitled to recover from the employee the employee's contribution by deduction from his wages and not otherwise." It is, therefore clear that only the principal employer as defined in Sub-section 2(17) of the "Act can recover the amount of employees' contribution to the fund from its employees. Therefore, the person referred to in Explanation 2 is an employer who under the authority of Section 40(2) can deduct the employees' share of contribution from their wages. As a result expression "person" appearing in Explanation 2 clearly refers to the principal employer defined in the ESI Act. In the decision of Agarwal's case the second clause which clearly qualifies the expression person in the said Explanation was not considered by my learned Brother in its entirety. With great respect I am unable to share the views of my learned Brother in the aforesaid decision.

3. Under these circumstances, judicial propriety demands that the matter be referred to a larger Bench. But since in a subsequent decision reported in [Sankar Bhattacharjee Vs. Manabendra Nath Dey and Others](#), a Division Bench of this Court consisting of Hon'ble Mr. Justice N. G. Chowdhuri and Mr. Justice G. C. Chatterjee held on 28-5-1985 that where there are sufficient allegations against the principal employer of the factory, they can be prosecuted u/s. 406 on the strength of Explanation 2 to Section 405, IPC. In this decision the question now under consideration was not directly raised. The question which was raised before the Division Bench was that there were no sufficient allegations made in the petition of complaint against the petitioners who were directors of the offending company. In that context the Division Bench considered Explanation 2 to Section 405 and in fact has also quoted the same in the decision. Thereafter it noted that the petitioners were principal employers of the offending factory and sufficient allegations have been made against them. Therefore, a prosecution u/s. 406 lies. The necessary implication of this decision is that the expression employer appearing in Explanation 2 to Section 405, IPC refers to the principal employer as defined in ESI Act.

4. Accordingly, this application succeeds. The impugned order is set aside. The case will now go back to the learned trying Magistrate who is directed to proceed in the case in accordance with law from the stage which has reached. This application is accordingly disposed of.