

(1985) 06 CAL CK 0019

Calcutta High Court**Case No:** Criminal Rev. No"s. 882 to 885 of 1981

Kalika Press (P) Ltd. and Others

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision: June 26, 1985**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 251, 300, 31, 313, 397

Citation: 90 CWN 26**Hon'ble Judges:** N.G. Chaudhuri, J; G.C. Chatterjee, J**Bench:** Division Bench**Advocate:** Pradip Kumar Ghosh and Jugal Ch. Porel, for the Appellant; Sardar Amiad Ali for Opposite Party No. 2 and Samir Chatterjee for State, for the Respondent**Final Decision:** Allowed

Judgement

N.G. Chaudhuri, J.

These four cases namely Criminal Revision Cases No. 882, 883, 884 and 885 of 1981 have arisen out of: similar petitions u/s 397, 401 and 482 of the Criminal Procedure Code, 1973 (hereinafter to be referred to as the Code) filed by the same set of petitioners; and they are directed against orders dated 20.4.81 passed in Criminal Appeals No. 34, 33, 32 and 31 of 1980, respectively by the learned Chief Judge, City Sessions Court, Calcutta, affirming the judgement of conviction and sentence rendered against the petitioners in Cases Nos. 2362, 2363, 2364 and 2365 of 1977, respectively by the learned Metropolitan Magistrate 3rd.Court, Calcutta. The aforesaid cases arose out of four petitions of complaint filed on 26.3.1977 by an Inspector under the Employees Provident Funds and Family Pension Funds Act, 1952, (hereinafter to be referred to as the Act). In the complaints allegations of commission of offences by the petitioners u/s 14(2), Section 14A(1) and 14AA of the Act read with paragraph 76(b) of the Scheme framed under the Act by non-performance of their statutory and obligatory duties for the months of September, October, November and December, 1976, were made. The complainant

alleged previous conviction of the petitioners for the "same offence" in cases Nos. 527 and 528 of 1975 and prayed for enhanced punishment u/s 14AA of the petitioners conviction. The courts below have found concurrently that the petitioners committed offences as alleged and they were previously convicted of the "same offence". Each of the petitioners including petitioner No. 1, Kalika Press (P) Ltd., an artificial person, has been sentenced to three months S.I. and fine of Rs.250, in default to S.I. for one month in each case. In view of a single trial for the same offence in four cases and of sections 31 and 427 of the Code, the courts below should have clarified if the sentences were to run concurrently or consecutively. But that has not been done. For reasons of convenience we have heard the four cases together. Mr. Pradip Ghosh the learned advocate for the petitioners contended that the conviction was illegal and was based on insufficient evidence. His further contention was that previous conviction for the same offence for which the present prosecutions were instituted was not proved. Mr. Amjad Ali, the learned advocate for the respondent, however, supported the concurrent findings of the two courts valiently. For proper understanding of the allegations made against the petitioners and the capacity in which they committed the offence we looked into the petitions of complaint, major portions of which is printed. We note With regret that portions of the complaint which had no relevance or applicability to the facts and circumstances under consideration were not scored out. According to Section 1 Sub-section (3), the Act applies to establishments which are factories clause (a) and to other establishments (clause 4). The Classification of establishments in two categories is important, because u/s 2(e) of the Act the term " "employer" in relation to two different kinds establishments will mean two different sets of persons. For correct determination as to who were the employers a statement in the petition of complaint is necessary as to which kind of establishment petitioner No.1 belonged to. Such a statement has not been made. The point has neither been clarified in course of the deposition by prosecution witnesses. In the revision petitions it has been admitted that petitioner No. 1 is a factory. Even then the employers relation to the said factory were required to be mentioned in the complaints. The "employers are required to submit under paragraph 36A of the E. P. F. Scheme, 1952 particulars of ownership in Form 5A. We do not know if such form was obtained in respect of petitioner No. 1 or anybody interested in the prosecution, cared to go through the above form. Our point is that in spite of materials available the complainant did not state in the complaint who were employers in relation to petitioner No. 1.

2. "Employer" has a very important role to play under the Act and connected scheme. In para 4 of the complaint reference to Section 6 of the Act has been made which requires "employer" to pay contributions. Similarly reference to paragraphs 36 and 38 of the Scheme of 1952 has been made which impose duties exclusively on "employers". In para 5 of the complaint reference has been made to paragraphs 9, 20, and 39 of the Scheme of 1971 and those paragraphs indicate that they relate exclusively to "employer". Default on the part of employer has been pleaded in

paragraph 6 of the complaint and this relates to non-discharge of duties cast on "employer" under the Act and the Scheme. In paragraph 7 of the complaint reference has been made to para 76(b) of the Scheme of 1952 which is attracted in cases of non-discharge of duties cast upon the employer under paragraph 36.

3. Reference has also been made to the penal section of the Act, namely. Section 14(1A) and 14(2); Section 14(1A) defines offences for "employer" and section 14(2) read with paragraph 76(b) and 38 aforesaid relate to "employer" only. Further reference has been made to section 14A(1) of the Act which applies to offending company and every person in charge of and responsible to the Company for the conduct of its business at the time the offence under consideration was committed. For attracting Section 14A(1) of the Act it was necessary to allege in the complaint that a company as defined in Explanation 1 to Section 14A(2) of the Act had committed an offence and also the manner of such commission, but in the complaints no such statement has been made although in para 3 of the complaint with reference to petitioner No. 2 and 3 the words used in Section 14A(1) have applied.

4. The substance of the prosecution case, as far we understand. was that duties cast on employers by an under the Act and the Scheme framed thereunder were not strictly discharged and as such the petitioners were prosecuted. We note, however, that the nexus between the non-performance of duties by the employer and prosecution ion of the petitioners has not been clearly spelt out. Neither in the complaints nor in evidence it has been explained how the petitioners come within the category of "employer" to deserve punishment under the Act. The learned Magistrate has observed that there was no dispute that petitioner No. 2 was the Managing Director and petitioner No. 3 was the Director of petitioner No. 1 and this was admitted in course of their examination u/s 313 of the Code. From the above he concluded that they were "employers" as provided in Section 2(e) (ii) of the Act. To our mind the conclusion is untenable. Section 2(e)(ii) applies to establishments other than factories whereas in the present case we have materials to permit an inference that the offending establishment was a factory attracting section 2(e)(i). Further in the complaints and in course of the deposition of the prosecution witnesses the words "has the ultimate control over the affairs of the establishment" have not been applied to the petitioner No. 2 and 3. The expressions used, with reference to petitioner No. 2 and 3 in the complaint have been quoted from Section 14A(1) of the Act, which are somewhat different from those used in Section 2(e)(ii).

5. For the reasons discussed above we conclude that for bringing the offences home to the petitioners it was incumbent on the party of the complainant to allege and prove that petitioner No. 1 as a company was employer u/s 2(e) (i) of the Act" and having failed to discharge its statutory duties the company committed offences as alleged and in consequence thereof petitioner No. 2 and 3 became culpable under the provisions of section 14A(1) of the Act. The complainant did not do that. So we

arrive at the conclusion that the conviction of the petitioner is untenable.

6. The view of ours as noted above may appear technical leading to frustration of the aims and objects of a labour welfare legislation. So we note that the complainant himself was very technical. Admittedly defaults were made in the months of September, October, November and December, 1976. From the evidence of P.W. 2 in Case No. 2 365/77 it transpires that the payments were made by petitioner No. 1 on 11.3.77. Even then the complaints were filed on 26.3.77.

7. In view of our finding that the conviction in the present cases is untenable and incorrect we are not called upon to the onside the question of previous conviction of the petitioner and its bearing on the prosecution under consideration. Still entering into the question we notice that section 14AA of the Act provides for imposition of enhanced punishments if the person prosecuted was convicted previously of the "same offence". We have discussed the nature of offences alleged against the Peters. We will only highlight that there was no allegation that the petitioners committed any offence u/s 14(2A) of the Act. To satisfy himself as to the petitioners previous conviction the learned Magistrate referred to the order passed in case No C527-30 of 1975; 6th court of Metropolitan Magistrate, Calcutta as shown by Ext. 4, in his judgement. Reference to the above cases has been made in paragraph 10 of the petition of complaint. Looking into Ext. 4, however, we find that the cases as explained to the accused petitioner prior to their examination u/s 251 of the Code was one u/s 14 (2A) of the Act. The said section is repeated again in the order portion where the learned Magistrate noted "each of the accused persons is found guilty u/s 14(2A) of the Act and they are convicted thereunder". The previous conviction was, therefore, u/s 14(2A) of the Act for which there was no prosecution in cases under our consideration. We add that we have interpreted the word "same offence" used in Section 14(AA) of the Act to mean the same kind of offence, although the said expression means generally the identical offence in point of time and place in which sense it has been used in Section 300 of the Code. The conclusion, therefore, is inescapable that the present prosecution of the petitioners was not for the "same offence" for which they were convicted previously and in the result Section 14(AA) of the Act was not attracted. We conclude accordingly that the courts below acted illegally in interpreting the petitions of complaint and in considering the evidence in support thereof and in consequence the courts arrived at illegal and untenable conclusion and passed wrong orders of conviction and sentence. We, therefore allow the revision applications, make the Rules issued absolute, set aside the orders of conviction and sentences passed against the petitioners and quash the proceedings altogether. This order will govern all the four Criminal Revision cases namely 882 to 885 of 1981.
Gobinda Chandra Chatterjee, J.

I agree