

(1987) 03 MAD CK 0016

In the Madras High Court

Case No : Criminal R.C. No. 528 and Criminal R.P. No. 527 of 1984

Ashok Kumar Goyal

APPELLANT

Vs

Manager, E.S.I. Corporation, Madras

RESPONDENT

Date of Decision : 13-03-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 401(3)

Citation : (1988) CriLJ 1084

Hon'ble Judges : David Annoussamy, J

Bench : Single Bench

Advocate : N.T. Vanamamlai, for V. Gopinath, K.N. Basha and S. Ananthanarayanan, for the Appellant; Radha Srinivasan and P. Rajamanickam, for the Respondent

Judgement

1. This is a revision petition against an order of retrial by the accused who is the Managing Partner of an industrial concern. The charge against him,

as per the complaint filed by the respondent herein is that he has failed to submit the return of contribution cards in Form 6 together with the

Contribution cards for the set C ending on 29-5-1982, which return and cards should have been submitted by him on or before 10-7-1982. Thus,

he would have become guilty of the offences under S. 85(g) and (e) of the Employees State Insurance Act 1948, hereinafter referred to as the Act,

read with S. 26 of the Employees State Insurance (General) Regulations 1950. The date of the offence, as per the complaint, is 11-7-1982. The

trial court, viz., Sub Divisional Judicial Magistrate, Ponneri, by judgment dt. 5-7-1983 did not give any finding that the accused had failed to submit

the returns and cards referred to in the complaint but gave a finding that the accused has failed to pay his contribution in respect of the period

ending 20-5-1982 and on the basis of that finding convicted the accused under S. 85(g) and (e) of the Act and sentenced him to three months

rigorous imprisonment for each count and to pay a fine of Rs. 1000 on each count. On appeal, the Sessions Judge at Chingleput, by judgment dt.

18-7-1984 found that, since the evidence is only in respect of non-payment of contribution and since there was no evidence whatsoever in respect

of the non-submission of the contribution cards and return, the conviction was not sustainable. Accordingly he acquitted the accused of the offence

for which he stood charge but, however, directed retrial of the accused allowing the respondent to adduce evidence in respect of that offence

complained of. As against that decision, the present revision is preferred.

2. Learned counsel for the revision petitioner mainly contends that if the prosecution has not availed of the opportunity offered to it at the time of

the trial to adduce evidence in respect of the charge, there cannot be retrial for the purpose of affording the prosecution a new opportunity to

adduce such an evidence. In fact, "trial" as the word itself suggests puts an individual to a great strain and he should not be put to such a strain

without proper justification. The criminal prosecution is a serious thing and all the persons involved therein should act with utmost care and caution.

It is not an ordinary transaction in which any one can ask to make good an omission at any time. The Supreme Court in Major Gopinathan Vs. The

State of Madhya Pradesh and Another, has categorically held as follows :

The only reason given by the High Court that the case was between a lawyer and his client, for ordering retrial was against all well established

rules of criminal jurisprudence which requires that the accused should not be placed on trial for the same offence more than once except in very

exceptional circumstance.

No such circumstance exists in the present case and therefore the order of the appellate court directing retrial is bad.

3. Learned counsel for the respondent contended that in this case, as per the scheme of the Act, submission of contribution cards and returns is an

operation which takes place after the payment. That therefore, the fact of non-payment is by itself indicative of the non-submission of records and

that therefore the appellate court was wrong in holding that the petitioner has not become guilty on the evidence on record. He therefore prays this

court to take up this matter on revision for that reason and send it back to the appellate Court for rectifying the mistake done and giving a finding

that the accused is guilty of the offence for which he stood charged.

4. In this case, it is to be first noted that the respondent herein had a right of appeal against the acquittal order. Having not exercised that right, he

cannot ask this court to take up the matter in revision, when the matter comes for hearing upon the revision petition filed by the accused. Secondly,

this Court taking the matter on revision against an order of acquittal cannot substitute an order of conviction to an order of acquittal even if it was

satisfied that such an order is warranted, in view of the embargo found in S. 401(3), Cr.P.C. It can only send the matter back to the lower court.

Therefore, asking this court to do what the learned counsel for the respondent himself agreed that it could not be done in the revision petition filed

by the accused is something extraordinary and unacceptable. Further, such a course is to be resorted to only in cases in which there is a gross

miscarriage of justice, as repeatedly held by the Supreme Court Thirdly, the offence of non-payment and the offence of non-submission of records

are two distinct offences, as could be seen from S. 85 of the Act. The non-payment of contribution is punishable under S. 85(e) of the Act,

whereas the failure of submission of return is punishable under S. 85(e) of the Act. Further, the punishment for the offence under clause (a) is

different from the punishment in respect of other clauses. Since the accused was only charged for an offence punishable under S. 85(e) of the Act

he might not have taken all steps to rebut the evidence adduced to prove an offence under S. 85(a). Convicting the accused on the basis of such an

evidence would be a negation of the most essential principle of criminal jurisprudence. Fourthly, the Legislature by providing two different offences

has by itself indicated its intention that a person who has failed to pay should not be punished for not submitting the contribution cards and return.

As per the scheme of the Act, even after paying the contribution properly the employer can still not send the contribution card in time which course

would deprive the workman from the benefits to which he is entitled to under the Act. It is in order to make sure that the employers not only pay

their contribution but also send the contribution cards to the Corporation, in due time, that the law maker has thought it fit to create a separate

offence for non-submission of the cards. Therefore, the very scheme of the Act, on which the learned counsel for the respondent relies shows that

the appellate Court could not have held the accused guilty of an offence under S. 85(e) of the Act, for the simple reason that he had failed to pay

the contribution. The law maker wants those who do not pay the contribution to be punished more severely than those who simply delay the

sending or the submission of cards and therefore the complainant having found that the contribution itself was not paid should have come forward

with a fresh complaint for the punishment of the accused for the major offence he has committed under S. 85(a) of the Act. Therefore, from

whatever angle we look at the matter, the submission put forth by the learned counsel for the respondent is not acceptable.

5. In the result, the revision petition is allowed and the order of the appellate Court in so far as it ordered retrial is set aside.

6. Petition allowed.