
(2015) 06 BOM CK 0142
In the Bombay High Court
Case No : Criminal Appeal No. 153 of 2000

C.K. Thapliyal

APPELLANT

Vs

Sakharam R. Dalvi and Others

RESPONDENT

Date of Decision : 26-06-2015

Acts Referred:

Employees State Insurance Act, 1948 — Section 39, 40, 85(1), 85(A)

Citation : (2015) 4 BomCR(Cri) 520

Hon'ble Judges : S.B. Shukre, J

Bench : Single Bench

Advocate : H.V. Mehta Advocate, for the Appellant; G.P. Mulekar, APP, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

S.B. Shukre, J.—This is an appeal preferred against the judgment and order dated 22.9.1999 delivered in Case No. 412/ESIC/90 by Metropolitan Magistrate, 46th I/c 25th Court, Mazgaon, Mumbai, thereby acquitting respondent No. 1 of the offence punishable under Section 85(A) of Employees State Insurance Corporation Act (for short ESI Act).

2. Respondent No. 1 was covered under the provisions of of ESI Act having been assigned Employer's Code No. BL/31-9550. Under the provisions of ESI Act, respondent No. 1 was obliged to pay contributions for the wages paid to its employees. In the present case, such contributions were due from respondent No. 1 to the appellant for wage periods of July 1989, August 1989 and September 1989, which were payable on or before 21.8.1989, 21.9.1989 and 21.10.1989 respectively as required under Sections 39 and 40 of the ESI Act read with Regulation 31 of the ESI (General) Regulations, 1950. Respondent No. 1 committed defaults in paying the contributions due for the aforesaid periods to the appellant. Respondent No. 1 had earlier also committed serious defaults and he was penalized for the same by imposing penalty of Rs. 50/-each in previous criminal case Nos. 593/1989 and 594/1989. Since the respondent No. 1 had

committed defaults in paying contributions for providing insurance coverage, according to the appellant, respondent No. 1 committed an offence under Section 85(1) of ESI Act. Therefore, a complaint for prosecuting respondent No. 1 for the said offence was filed by the Inspector of the appellant before the Court of Metropolitan Magistrate, Mazgaon, Mumbai.

3. Particulars of the offence as disclosed by the complainant and documents filed on record along with it, were read over and explained on 5.1.1996 to respondent No. 1. He pleaded not guilty to the same and, therefore, respondent No. 1 was tried in accordance with law. Thereafter, the case was fixed for recording of evidence of the complainant. However, the evidence could not be completed within a period of two years, from 5.1.1996, and, therefore, the trial Court, as per the directions issued by the Hon"ble Apex Court in the case of Raj Deo Sharma Vs. The State of Bihar, (1998) 7 AD 401 : AIR 1998 SC 3281 : (1998) CriLJ 4596 : (1998) 4 Crimes 53 : (1998) 7 JT 1 : (1998) 5 SCALE 477 : (1998) 7 SCC 507 : (1998) 2 SCR 130 Supp : (1999) 1 UJ 136 : (1998) AIRSCW 3208 : (1999) AIRSCW 2310 : (1998) 7 Supreme 556 , (hereinafter referred to as Raj Deo Sharma I, for short) closed the prosecution evidence and proceeded further with the trial of the case. The learned Magistrate found that the evidence available on record was insufficient to prove the charge of commission of defaults in making payment of contribution of wages of employees for providing of insurance coverage by the appellant and also the fact that sanction order was defective. Therefore, the learned Magistrate acquitted respondent No. 1 of the offence punishable under Section 85(A) of ESI Act by his judgment and order dated 22.2.1999. Not being satisfied with the same, the appellant, ESIC, is before this Court in the present appeal.

4. I have heard Shri Mehta, learned counsel for the appellant. Nobody is present on behalf of respondent No. 1, although this case is on the board for quite some time. I have also heard learned APP. I have carefully perused the record of the case and the impugned judgment and order.

5. It is submitted by learned counsel for the appellant that the impugned judgment and order are against the well settled principles of law and also reflect non-application of mind to the facts of the case, which clearly show that the trial had been delayed mainly on account of the conduct of respondent No. 1. He, therefore, submits that the impugned judgment and order be quashed and set aside and this case be remanded to the trial Court for proceeding further in the matter in accordance with law.

6. Learned APP has adopted the arguments of learned counsel for the appellant.

7. It is seen that the acquittal of respondent No. 1 has been recorded mainly on account of insufficiency of the evidence. Insufficiency of evidence, as can be seen from the impugned judgment and order, was due to the fact that the evidence of prosecution was closed by the trial Court in view of the law laid down by the Hon"ble Apex Court in the case of Raj Deo Sharma, supra, although, the ratio of

this case came to be modified by the Hon''ble Apex Court in second case of Raj Deo Sharma 1999 (4) Crimes 52(SC). (hereinafter referred to as "Raj Deo Sharma II" for short). Later on, the decisions in first case and second case of Rajdeo Sharma, were largely over ruled by the Hon''ble Apex Court by its judgment in P. Ramachandra Rao Vs. State of Karnataka, AIR 2002 SC 1856 : (2002) CriLJ 2547 : (2002) 2 Crimes 200 : (2002) 4 JT 92 : (2001) 4 SCALE 226 : (2002) 4 SCC 578 : (2002) 3 SCR 68 : (2002) AIRSCW 1841 : (2002) 3 Supreme 260 . But, the fact remains that first case of Raj Deo Sharma did govern the field when the impugned judgment and order was passed. At that time, however, the law laid down by the Constitution Bench of the Hon''ble Apex Court in the case of Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc., AIR 1992 SC 1701 : (1992) CriLJ 2717 : (1991) 6 JT 431 : (1991) 2 SCALE 1273 : (1992) 1 SCC 225 : (1991) 3 SCR 325 Supp was also holding the field.

8. In the case of A.R. Antulay, Hon''ble Apex Court has observed that the accused has a fundamental right to speedy trial and there could be several ways in which this fundamental right of the accused can be allowed to be crystalised. Hon''ble Apex Court further observed that while quashing of the charge or the conviction of the accused could be some of the ways of giving effect to the said fundamental right of the accused, and an order for expedition of the trial would be another way of effectuating the same right and it depends upon peculiar facts and circumstances of the case for determining which way should be adopted in the matter. In Raj Deo Sharma I case, the Hon''ble Apex Court made it an imperative rule of law that in cases where the punishment prescribed is not more than seven years and in those cases where the punishment prescribed is more than seven years, if the evidence of the prosecution is not completed within a period of two years and three years respectively, the trial Court shall close the evidence of the prosecution. This was the way mandatorily suggested by Hon''ble Apex Court for expediting the trial of a criminal case pending against an accused so as to make effective his fundamental right to speedy trial. In that very case, the Hon''ble Apex Court also put a rider to its direction regarding closure of prosecution evidence. The rider was that if the delay was attributable to the conduct of the accused, the trial Court would not be bound to close the prosecution evidence. In A.R. Antulay's case, it was observed by the Hon''ble Apex Court that considering various factors that influenced the trial of a criminal case, it was neither proper nor practicable to fix any time within which a criminal trial should be concluded and ultimately it left it to the discretion of the trial Court to decide the issue by applying "Balancing Test". The view taken by the Constitution Bench of the Hon''ble Apex Court in the case of A.R. Antulay was reiterated by a seven Judge Bench judgment rendered in the case of P. Ramachandra Rao, supra.

9. Now, it would have to be considered as to whether or not the approach adopted by the trial Court in the present case was consistent with these legal principles.

10. We have already seen that in Raj Deo Sharma I case also, one of the essential conditions prescribed by the Hon"ble Apex Court for ordering closures of the prosecution evidence was that delay should not be attributable to the conduct of the accused. Now, if the Roznama of the present case before the trial Court is perused carefully, one can very well see that this condition has not been fulfilled.

11. It appears from the Roznama that the complaint was filed on 11.5.1992 and thereafter the accused remained absent on many occasions till his plea was recorded on 5.1.1996. On that date the case was adjourned to 26.9.1996 when respondent No. 1 was present, but witnesses of the complainant, i.e. the appellant was absent and, therefore, the case was adjourned to 25.3.1996. On 25.3.1996 also the witness was absent and, therefore, the case was adjourned to 10.5.1996. On 10.5.1996, however, respondent No. 1 was absent. Thereafter, it is seen that respondent No. 1 filed an application praying for his discharge from the case. This application, which was filed on 24.6.1996, came to be rejected on 25.10.1996. This application which was filed after recording of plea of respondent No. 1 was per se untenable in law and yet it was filed almost after a period of about four years after filing of the complaint, and obviously it appears, it was filed with a view to protract the trial. Even thereafter, there were several dates, as can be seen from the Roznama, on which respondent No. 1 remained absent and because of his absence before the Court, the evidence of the complainant could not be recorded. It is obvious from this discussion that the delay which had occurred in completion of prosecution evidence was also on account of the conduct exhibited by respondent No. 1. Therefore, I find that the learned Magistrate has committed a serious illegality in erroneously applying the ratio of Raj Deo Sharma I case to the present case. Even otherwise, this case involving an economic offence and also an offence against larger interest of workers community required a differential treatment as laid down in the case of A.R. Antulay, in the sense that instead of closure of prosecution evidence the learned Magistrate ought to have directed the complainant, i.e. the appellant to expeditiously complete recording of its evidence.

12. In the circumstances, I find that this is a fit case for making interference with the impugned judgment and order by remanding the matter to the trial Court for proceeding further in accordance with law.

13. The appeal is partly allowed. The impugned judgment and order are hereby quashed and set aside. Case is remanded back to the trial Court for proceeding further from the stage of recording of evidence of prosecution or the complainant in accordance with law. The evidence which has been recorded so far on behalf of the prosecution shall be duly considered by the trial Court and liberty shall be given to respondent No. 1 to defend himself in the case.

Appellant and respondent No. 1 are directed to appear before the trial Court on 03.8.2015.