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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.A. 332/2000

EMPLOYEES STATE INSURANCE CORPORATION

Appellant

Through: Mr. K.P. Mavi, Mr. B.P. Mishra, &
Mr. Aamir Husain, Advocates

versus

SURESH CHANDER, PROP. M/S SURESH CHANDRA

..... Respondent

Through: Mr. Ishaan Chhaya, Advocate

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

ORDER
21.02.2014

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Upon failure to pay contribution on behalf of employees for the period from 20th December, 1994 upto 19th May, 1995, as mandated under Section 81 of *The Employees State Insurance Act, 1948* (hereinafter referred to as the 'ESI Act'), respondent-accused was prosecuted in a complaint under Section 85 (a) of the *ESI Act*. In complaint case No. 889/3, *E.S.I. Vs. Suresh Chandra* the stand taken by respondent/accused was that he had never employed more than three or four employees.

Vide impugned order of 11th June, 1999, trial court has acquitted respondent-accused on the ground that statutory sanction granted is not duly proved on record.

Sanction for respondent/ accused's prosecution in the complaint case in question was granted by the then Regional Director of ESI. According to appellant/ complainant, the sanction letter was proved at trial by the two Insurance Inspectors (PW-2 & PW-3). Trial court vide impugned judgment of 11th June, 1999 has acquitted respondent /accused by adopting the following reasoning:-

'However as far as question of sanction is concerned, there is a force in the plea of accused. Section 86 of the Employees State Insurance Act 1948 provides that "no prosecution under this Act shall be instituted except by or with the previous sanction of the Insurance Commissioner. It is a settled to be a position of law that sanction is not a mere formality and it is a sine qua non for the institution of the prosecution. Wherever the sanction is required to be obtained, it is a deliberate check be put by the legislation on the authorities concerned, so that no innocent person be made to face the litigation on the authorities concerned, so that no innocent person be made to face the litigation without any basis. The authority, who has been conferred the power to grant the sanction is required to consider the entire facts and circumstances of the case and he is supposed to grant the sanction only after due application of mind and not mechanically. The grant of sanction is not a formality. It can only be granted after due application of mind. The grant of sanction is quasi judicial function. Therefore, the person, who has granted the sanction is required to appear in the Court and make a specific statement on oath that he has granted the sanction only after due application of mind. The other party can get chance for cross-examine so as to make out a case that sanction has been granted without application of mind, only if the sanctioning authority appears in the witness box. Non-

appearance of the sanctioning authority is fatal for the case of the prosecution. The sanction cannot be accorded in a casual or mechanical manner. If any authority is required, reference can be made to 243 (1991) DLT 512 and 1989 Vol. II C.L.R. 119.”

The challenge in this appeal to impugned judgment is on the ground that failure to examine the sanctioning authority is not fatal in such like cases.

At the hearing of this appeal, learned counsel for appellant had relied upon Apex Court’s decision in *State of Madhya Pradesh Vs. Jiya Lal* (2009) 15 SCC 72 to contend that there is a presumption that sanction order was passed in discharge of routine official duties and hence, it is to be taken that it was done in a *bona fide* manner and so, acquittal of respondent/accused vide impugned judgment on the ground of non-examination of the sanctioning authority is patently erroneous and thus, the impugned judgment deserves to be set aside.

Learned counsel for respondent/ accused had supported the impugned judgment and had submitted that respondent /accused was not covered under the *ESI Act* and attention of this Court was drawn during the course of hearing to letters of 26th October, 1995 and of 25th November, 1995 to submit that these two letters were written in response to the show cause notice issued to respondent/accused and in these letters, the basic question of applicability of *ESI Act* was raised, which has not been considered by the sanctioning authority while granting sanction and so, examination and cross-examination of sanctioning authority was essential on this vital aspect and thus, it was submitted that on failure to

get examined the sanctioning authority to prove the sanction, grave prejudice has been caused to respondent/accused. In support of the above stand taken, reliance is placed by learned counsel for respondent upon decisions in *Ashok Kumar Vs. State* 43 (1991) DLT 512 and Apex Court's decision in *Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh* (1979) 4 SCC 172.

After having heard both the sides and on perusal of impugned judgment, evidence on record and the decisions cited, I find that while dealing with the appeals against acquittal, parameters reiterated by the Apex Court in *Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi)*, (2010) 6 SCC 1 have to be kept in mind, which are as under:-

‘ (i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded.

(ii) The appellate court in an appeal against acquittal can review the entire evidence and come to its own conclusions.

(iii) The appellate court can also review the trial court's conclusion with respect to both facts and law.

(iv) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons set aside the judgment of acquittal.

(v) An order of acquittal is to be interfered with only when there are “compelling and substantial reasons” for doing so. If the order is “clearly unreasonable”, it is a compelling reason for interference.

(vi) While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities, it can reappraise the evidence to arrive at its own conclusion.

(vii) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed'

It is no doubt true that the question of applicability of the *ESI Act* cannot be subject matter of adjudication in complaint case in question, as applicability of *ESI Act* is to be strictly considered under Section 25 of the *ESI Act*. But whether the sanctioning authority has applied its mind while granting sanction is an aspect which has to be considered in view of letter of 25th November, 1995 (*EX. DW-1/1*) written by respondent/accused to appellant. On the sanction aspect the strict interpretation given by Apex Court in *Jia Lal (Supra)* was not there when trial court rendered impugned judgment. To find out whether there was due applicability of mind at the time of grant of statutory sanction, examination of sanctioning authority is essential and it can be so said in the instant case. The reasoning adopted by trial court to acquit respondent/accused cannot be termed to be manifestly erroneous or

palpably wrong, as trial court has followed the dictum of the Apex Court in *Mohd. Iqubal (Supra)* and decision of this Court in *Ashok Kumar (Supra)*.

In view of aforesaid, this Court finds that there are no cogent or adequate reasons to upset the impugned judgment of acquittal.

Consequently, finding no substance in this appeal, it is dismissed.

(SUNIL GAUR)
JUDGE

FEBRUARY 21, 2014

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