



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

CRIMINAL APPEAL NO. 167/2010

EMPLOYEES STATE INSURANCE CORPORATION REGIONAL
OFFICE,
REGIONAL OFFICE, BAMUNIMIDAN, GUWAHATI-21.

.....APPELLANT

VERSUS

1. NIRMAL GANGULY,
PARTNER, M/S STAR SECURITY SERVICE, C.K.B. ROAD,
KADAMTOLA, P.O. SRIPURIA, TINSUKIA.
2. M/S STAR SECURITY SERVICE
C.K.B. ROAD
KADAMTOLA
P.O. SRIPURIA
TINSUKIA.
3. THE STATE OF ASSAM.

.....RESPONDENTS

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN

For the Appellant : Mr. M. Smith,
.....Advocate.

For the Respondents : Ms. Debashri Saikia,
Amicus Curiae,

Mr. K. Baishya, Addl. P.P.
.....Advocates.

Date of Hearing : 18.11.2023

Date of Judgment : ***4th December, 2023***

JUDGMENT AND ORDER

Heard Mr. M. Smith, learned counsel for the appellant; Mr. K. Baishya learned Additional Public Prosecutor for the State of Assam-respondent No.3; and Ms. D. Saikia, learned Amicus Curie.

2. This appeal, under Section 378 of the Cr.P.C., the Employees State Insurance Corporation Regional Office, Bamunimaidan has put to challenge the correctness or otherwise of the judgment and order, dated 17.08.2010, passed by the learned Sub-Divisional Judicial Magistrate [Sadar] No. II, Kamrup [M] at Guwahati, in C.R. Case No. 7642[C]/2007.

3. It is to be noted here that vide judgment and order dated 17.08.2010, the learned court below has acquitted the accused persons from the offence under Section 39/40/41/42 and Regulation 26 of the ESI Act.

4. The background facts leading to filing of this Appeal is briefly stated as under :-

“The respondent No. 1 namely, Sri Nirmal Ganguly is the proprietor of the respondent No. 2 namely, M/S Star

Security Service situated at C.K.B. Road, Kadamtola, Sripuria, Tinsukia and which is covered under Section 2[12] of the ESI Act, 1948 and it was allotted Code No. 43-4330 and being the principal employer, he is responsible for conduct of its business of the said establishment within the meaning of Clause 17, Section 2 of the ESI Act, 1948. As such, as per Section 40 of the ESI Act, every employer shall pay both the contribution i.e. employer's share of contribution and employees share of contribution in respect of every employees in the first instance and the principal employer is entitled to recover the employees share of contribution from their wages relating to the period in respect of which the contribution is payable and as per Regulation 26 of the ESI [General] 1950, every principal employer is required to submit the Return of Contribution in Form-6 in quadruplicate, along with the receipted copies of challan within 42 days from the date of expiry of such contribution. But, being the principal employer, the respondent No.2, had failed to contribute amounting to Rs. 26,813/- within the stipulated time for the period from 5/2006 to 9/2006, and also failed to submit the return of contribution in quadruplicate in Form No. 6, along with the receipted copies of the challan for the amount deposited in the Bank in respect of the employees working under him. Thereafter, notice was issued to the respondents vide Show Cause Notice, Dated 28.03.2007, about commission of the offence punishable under Section 85[a][e] of the ESI Act,

1948. But, the principal employer has failed to comply with the aforesaid notice for which sanction was obtained to prosecute the respondents, i.e. the firm and the principal employer. And thereafter, a complaint was filed before the learned court below and after hearing both the parties and taking evidence of the witnesses, the learned court below has acquitted the respondents from the offence.”

5. Being highly aggrieved, the appellant has preferred the present appeal for setting aside the impugned judgment and order dated 17.08.2010, passed by the learned Sub-Divisional Judicial Magistrate [Sadar] No. II, Kamrup [M] at Guwahati, in C.R. Case No. 7642[C]/2007, on the following grounds:-

- [i] That, the respondent No. 2 was allotted Code No. 43-4330 and the same was duly intimated to the respondent No. 2, but the learned court below has arrived at the finding that there is no evidence of receiving information regarding allotment of the Code Number;
- [ii] That, as per Regulation 10B of the ESI [General] Regulation 1950, having received the allotted Code Number, the respondents have submitted Form No. 1, but, the learned court below has arrived at the finding that there is no evidence of receiving information about allotment of Code;
- [iii] That, one Abdul Haque deposed on behalf of the ESI Corporation and being the public servant he is

competent to depose the same, but, the learned court below has held that as there is no authorization to adduced evidence, his evidence is not acceptable;

[iv] That, the respondents having submitted Form No. 1 specified that 20 employees have been working under him and now it is their duty to submit return of contribution in accordance with Regulation 26 of the ESI [General] Regulation 1950, but, they have failed to submit the same and also failed to make payment of the contribution and as such, they are liable to be punished under Section 85[a][e] of the ESI Act 1948 and therefore, the finding of the learned court below is without any basis; and

[v] That, all the findings of the learned court below are completely based upon the presumption, surmises and conjectures and without application of judicial mind."

6. Mr. Smith, learned counsel for the appellant, submits that the impugned judgment and order dated 17.08.2010, passed by the learned Sub-Divisional Judicial Magistrate [Sadar] No. II, Kamrup [M] at Guwahati, in C.R. Case No. 7642[C]/2007, suffers from manifest illegality, as the respondents were allotted Code Number and they have acknowledged the same. It is the further submission of Mr. Smith that the respondents have filed the Form No. 1, and despite filing of the Form No. 1, their contention of not receiving the Code Number is not acceptable and they have failed to make contribution of their portion and also the employees portion under the ESI Act,

they are liable to be punished, under Section 85[a][e] of the ESI Act, 1948. Mr. Smith further submits that the way, the learned court below had disregard the evidence of PW-1, is also not tenable in the eye of law and as such, the impugned judgment and order passed by the learned court below failed to withstand the legal scrutiny and therefore, it is contended to allow the petition, by setting aside the aforesaid impugned judgment and order. Mr. Smith, learned counsel for the appellant, had referred one case law of **Associated Cement Company Limited vs. Keshvanand**, reported in **[1998] 1 SCC 687**, to bolster his submission.

7. On the other hand, Ms. Saikia, learned Amicus Curie submits that though the learned counsel for the appellant has submitted that the allotment of the Code Number was duly communicated with the respondents, yet, in fact the same was not communicated to the respondents. Ms. Saikia referring to the evidence of PW-1, submits that the PW-1 in his evidence admitted that notice was not served upon the respondents and though the learned counsel for the appellant submits that the presumption, under the General Clauses of Act is available, yet, the said presumption is a rebuttable presumption. Ms. Saikia further submits that allotment of Code Number was not communicated to the respondents, and that Regulation 10[B] of the ESI [General] Regulation 1950 is not applicable, and on such count, the appellant has failed to establish its case and therefore, the learned court below had correctly decided the case in favor of the respondent. Ms. Saikia also submits that since the respondents were acquitted by the learned court below, the

presumption of innocence is further strengthened and this court would disturb the same, unless gross illegality is shown to have been committed by the learned court below, and which the appellant side had failed to demonstrate. And therefore, it is contended to uphold the impugned judgment and order dated 17.08.2010, passed by the learned Sub-Divisional Judicial Magistrate [Sadar] No. II, Kamrup [M] at Guwahati, in C.R. Case No. 7642[C]/2007.

8. Having heard the submissions of learned counsel for both the parties, I have carefully gone through memo of appeal as well as the grounds mentioned therein and also gone through the provision of law and also perused the impugned judgment and order dated 17.08.2010, and also the case law referred by Mr. Smith, learned counsel for the appellant.

9. It appears from the Section 10B of the ESI [General] Regulation 1950 provides that employer of the factory or an establishment shall have furnished to the appropriate regional office a declaration form or registration in writing in Form No. 1 to which employer's Code Number is not yet allotted and in that event as per Section 10[B][cc] of the ESI Act, the employer in respect of the factory or establishment has to be allotted a Code.

10. Further, it appears that though it is being contended by the learned counsel for the appellant that the respondents have been allotted any Code Number, and the same was communicated by registered post, yet, P.W. 1, in his evidence admitted having not lead any evidence to that effect. Therefore, it cannot be said that the learned court below had rightly arrived at the finding that there is no

proof of receiving the Code Number by the respondents. The evidence of PW-1 also reveals that a demand notice was also sent to the respondents for depositing contribution for the period of May, 2006 to September, 2006 by registered post and despite the respondent have failed to make payment would have no consequence in as much as the allotment of Code Number and receipt of the same by the respondents could not be proved.

11. It also appears that the learned court below has also arrived at a finding that the ESI Corporation has authorized one Mr. C.K. Borua, to depose evidence before the learned court below and instead of Mr. Borua, one Mr. Abdul Haque adduced evidence before the learned court below as P.W.1, who was not authorized to adduce evidence before the learned court. Thereafter, the learned court below had held that he is not authorized person to depose evidence before the learned court below, relying on a decision of Hon'ble Supreme Court in the case of **Associated Cement Company Limited [Supra]**,

12. It is to be noted here that in the aforementioned case Hon'ble Supreme Court has held that :-

"25. Be that so, we suggest as a pragmatic proposition that no magistrate shall insist that the particular person, whose statement was taken on oath at the first instance, alone can continue to represent the company till the end of the proceedings. There may be occasions when a different person can represent the company e.g. the particular person who represents the company at the first instance may either retire from the company's service or may otherwise cease to associate therewith or he would be transferred to a distant place. In such cases it would be practically difficult for the company to continue to make

the same person represent the company in the court. In any such eventuality it is open to the de jure complainant company to seek permission of the court for sending any other person to represent the company in the court."

13. In the case in hand, it appears that the complainant corporation had never sought permission from the learned court below to authorize Mr. Abdul Haque to adduce evidence before the learned court below and hence, the learned court below has rightly held that he is not authorized person to depose evidence before the learned court below. Thus, instead of advancing the case of the appellant the ratio laid down in the case of **Associated Cement Company Limited [Supra]**, has advanced the case of the respondents.

14. It is to be noted here that in the case in hand the respondents were acquitted by the learned court below. How to deal with, decide and dispose of the criminal appeal against an acquittal under Section 378 Cr.PC, has elaborately been dealt with by Hon'ble Supreme Court, after considering the catena of earlier decisions, in the case of **Guru Dutt Pathak Vs. State of Uttar Pradesh, (2021) 6 SCC 116**. In paragraphs 15 to 20 it has been observed as under: -

"15. In Babu v. State of Kerala [Babu v. State of Kerala, (2010) 9 SCC 189, this Court has reiterated the principles to be followed in an appeal against acquittal under Section 378 CrPC. In paras 12 to 19, it is observed and held as under: (SCC pp. 196-199)5

"12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court.

The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject matter of scrutiny by the appellate court.

13. In Sheo Swarup v. King Emperor [Sheo Swarup v. King Emperor, 1934 SCC OnLine PC42], the Privy Council observed as under: (SCC OnLine PC)'... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.'

14. The aforesaid principle of law has consistently been followed by this Court (See Tulsiram Kanu v. State [Tulsiram Kanu v. State, AIR 1954 SC 1 : 1954 Cri LJ225], Balbir Singh v. State of Punjab [Balbir Singh v. State of Punjab, AIR 1957 SC 216 :1957 Cri LJ 481], M.G. Agarwal v. State of

Maharashtra [M.G. Agarwal v. State of Maharashtra, AIR 1963 SC 200 : (1963) 1 Cri LJ235] , Khedu Mohton v. State of Bihar [Khedu Mohton v. State of Bihar, (1970) 2 SCC 450 :1970 SCC (Cri) 479], Sambasivan v. State of Kerala [Sambasivan v. State of Kerala, (1998) 5SCC 412 : 1998 SCC (Cri) 1320], Bhagwa Singh v. State of M.P. [Bhagwan Singh v. State of M.P., (2002) 4 SCC 85 : 2002 SCC (Cri) 736]and State of Goa v. Sanjay Thakran [State of Goa v. Sanjay Thakran, (2007) 3 SCC 755 :(2007) 2 SCC (Cri) 162].)

15. In Chandrappa v. State of Karnataka [Chandrappa v. State of Karnataka, (2007) 4 SCC 415], this Court reiterated the legal position as under : (SCC p. 432, para 42)'42. ...

(1) *An appellate court has full power to review, re appreciate and reconsider the evidence upon which the order of acquittal is founded.*

(2) *The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.*

(3) *Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.*

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.'

16. In Ghurey Lal v. State of U.P. [Ghurey Lal v. State of U.P., (2008) 10 SCC 450 : (2009) 1SCC (Cri) 60], this Court reiterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In State of Rajasthan v. Naresh [State of, Rajasthan v. Naresh, (2009) 9 SCC 368 : (2009)3 SCC (Cri) 1069], the Court again examined the earlier judgments of this Court and laid down that : (SCC p. 374, para 20). ... An order of acquittal should not be lightly interfered with even if the Court believes that there is some

evidence pointing out the finger towards the accused."

18. In State of U.P. v. Banne [State of U.P. v. Banne, (2009) 4 SCC 271: (2009) 2 SCC(Cri) 260], this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances include: (Banne case [State of U.P. v. Banne, (2009) 4 SCC 271: (2009) 2 SCC (Cri) 260] ,SCC p. 286, para 28)

'28. ... (i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.'

A similar view has been reiterated by this Court in Dhanapal v. State [Dhanapal v. State,(2009) 10 SCC 401 : (2010) 1 SCC (Cri) 336] .

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference

15. And when the findings of fact, recorded by a court, can be held to be perverse, has been dealt with and considered in para 20 in **Babu v. State of Kerala, (2010) 9 SCC 189**, as under:-

"20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality."

It is further observed, after following the decision of this Court in *Kuldeep Singh v. Commr. of Police* [*Kuldeep Singh v. Commr. of Police*, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] , that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with."

16. In the case in hand there is nothing on the record to show that the findings have been arrived at by the learned court below, ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. There is also nothing to show that the finding is “against the weight of evidence”, or it is so outrageously defies logic so as to suffer from the vice of irrationality. There is also nothing on the record to suggest that the decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it. In absence of such materials, the impugned judgment and order of acquittal, so passed by the learned court below, cannot be said to be perverse.

17. Under the aforesaid facts and circumstances, this Court is of the considered opinion that there is no merit in this appeal and accordingly, the same stands dismissed.

18. Before parting with the record, this Court is inclined to acknowledge the service rendered by Ms. D. Saikia, learned Amicus Curie and therefore, it is provided that the Registry shall pay the fee, which she is entitled to and to furnish a certified copy of this Judgment.

JUDGE

Comparing Assistant