

1. This is an appeal preferred against the order dated 15/6/1999 passed by Additional Chief Metropolitan Magistrate, 40th Court, Girgaum, Mumbai, thereby allowing the application

filed by respondents No. 2 and 3 in Criminal Case No. 491/P/94 seeking closure of the prosecution case and discharge/release from the case in view of the law laid down in Raj Deo Sharma Vs. State of Bihar – 1998 CRI. L.J. 4596 (hereinafter called 'Raj Deo Sharma-I', for short)

2. The facts which are relevant for the purpose of deciding this appeal may be stated in brief as under.:

There was some dispute in respect of forcible eviction of the appellant from a flat by the respondents No. 2 and 3 going on between the appellant and respondents No. 2 and 3 in the year 1986. It appears that a civil suit was also pending between these parties in respect of the same issue. The appellant, however, filed a complaint with police station, Gamdevi alleging that during the period between 15/8/1986 and 15/9/1986 respondents No. 2 and 3 used force against the appellant, wrongfully restrained him and dispossessed him of the property, a flat, which he claimed to be occupying in a lawful manner. On the basis of this complaint, various offences were registered against respondents No. 2 and 3 at police station Gamdevi. After completion of the investigation, a charge-sheet came to be filed and charge for offences punishable under Sections 341, 451, 454, 457, 380 and 120-B of the Indian Penal Code was framed against respondents No. 2 and 3. As they pleaded not guilty to the same, the trial Court proceeded to try

respondents No. 2 and 3 for the said offences in accordance with law. Charge was framed on 13/11/1999 and thereafter, the case was fixed for recording of evidence of the prosecution. The case remained at the same stage and recording of prosecution evidence did not commence till filing of the application for closure of the prosecution case by respondents No. 2 and 3. This application for closure of the prosecution case by giving them benefit of law laid down by the Hon'ble Apex Court in the case of *Raj Deo Sharma-I* came to be filed on 13/01/1999.

The application was vehemently opposed by the appellant, who was the complainant through the learned A.P.P., who was representing the complainant before the Court, it being a warrant case instituted upon a police report. It was submitted that there were justifiable reasons for not commencing recording of the prosecution evidence as it was agreed between the complainant and respondents No. 2 and 3 that another criminal case initiated under Section 145 Cr. P. C., bearing C. C. No. 125/N/94, which was pending before the same magisterial Court, would be proceeded first as the parties were same, witnesses were same and subject matters of both the cases were substantially the same. It was also agreed between them that after completion of proceedings under Section 145 Cri.P.C., the present case would be tried by the learned Magistrate.

It was also submitted by the prosecution that *Raj Deo Sharma-I* case did not give unlimited power to the Court to close the prosecution case and the facts of the present case being such that they did not permit the learned Magistrate to exercise his discretion in favour of respondents No. 2 and 3 by allowing their application. It was also submitted that there was no delay attributable to the prosecution and that at the most, case could have been directed to be expedited. It was also submitted that in any case, the ratio of the Constitution Bench judgment of the Hon'ble Apex Court rendered in the case of Abdul Rehman Antulay & others Vs. R. S. Nayak & another – (1992) 1 SCC 225 would prevail over the three Judge Bench judgment of the Hon'ble Apex Court in the case of *Raj Deo Sharma-I* (supra) with the Constitution Bench having held that although there was a fundamental right in every accused to expedite trial of the criminal case pending against him, ultimately it was for the concerned Court to decide in the facts and circumstances of each case as to how this right should be made available in an effective way to the concerned accused. One of the ways of making this right available effectively to the accused, as held in *Abdul Rehman Antulay*, would be to pass an order for expedition of the trial and, therefore, it was urged by the prosecution that the application filed by respondents No. 2 and 3 be rejected.

3. After giving hearing to the learned Counsel for respondents No. 2 and 3 and also learned A.P.P. at length, learned Magistrate found that since the trial got delayed beyond period of 3 years without any reasons attributable to the accused persons i.e. respondents No. 2 and 3 and the offences that were charged against them were punishable with maximum imprisonment of either 7 years or more than 7 years, the conditions prescribed in *Raj Deo Sharma-I* case were fulfilled and accordingly, learned Magistrate by her order dated 15/6/1999 allowed the application and directed that prosecution case be closed and respondents No. 2 and 3 be released. Being not satisfied with the same, the appellant-complainant is before this Court in the present appeal.

4. I have heard learned Counsel Mrs. Lata Desai for the appellant and learned A.P.P. Ms Mulekar for the State. Nobody has appeared on behalf of respondents No. 2 and 3. I have also gone through the record of the case and the impugned order.

5. It is submitted on behalf of the appellant that in view of the law laid down by the Constitution Bench of the Hon'ble Apex Court in the case of *Abdul Rehman Antulay* (supra), which was a judgment rendered by a Larger Bench than a Bench which delivered the judgment in the case of *Raj Deo Sharma-I*, it was not open to the Magistrate to close the prosecution case and order for release of respondents No. 2 and 3. She further submits that very

specific directions have been issued in the case of *Abdul Rehman Antulay* and these directions indicate that although every accused has a fundamental right of speedy trial, consequence of it's infringement is not always of closure of prosecution case and ultimately it is for the Court to perform a balancing act by considering several relevant factors and determine in each case as to how to make effective the right to speedy trial of the accused.

6. Learned Counsel for appellants further submits that in fact when the impugned order was passed, the judgment in the case of *Raj Deo Sharma-I* was suspended by the Hon'ble Apex Court as a second case reported in **1999(4) Crimes 52 (SC)** [hereinafter called as, "*Raj Deo Sharma-II*", for the sake of brevity], which was initiated to seek further clarification over the directions issued in *Raj Deo Sharma-I* case was pending and direction of suspending it's operation had been passed. This judgment, learned Counsel for the appellant further submits, remained suspended during the period from 14/5/1999 to 22/9/1999. Therefore, according to her, the learned Magistrate ought not to have followed the ratio of *Raj Deo Sharma-I* case and allowed the application for closure of prosecution case. Learned Counsel for the appellant further submits that even on the facts of the present case, the guidelines or directions given in *Raj Deo Sharma-I* as well as *Raj Deo Sharma-II* were not applicable and on

this count also the impugned order cannot be sustained in law.

7. Learned A.P.P. for respondent No.1-the State has supported the arguments of learned Counsel for the appellant by adopting them in their entirety.

8. So far as the argument relating to suspension of operation of judgment in *Raj Deo Sharma-I* is concerned, I must say, there is no dispute about the same. In paragraph 15 of the judgment reported in 1999(4) Crimes 52 (SC), Hon'ble Apex Court has clearly referred to the suspension of operation of the judgment w.e.f. 14/5/1999 till the delivery of the judgment in the second case which was pronounced on 22/9/1999. The impugned order in the instant case has been passed on 15/6/1999 which date is covered under the period during which the operation of the judgment in *Raj Deo Sharma-I* case was suspended. Therefore, the learned Magistrate ought not to have applied the ratio of *Raj Deo Sharma-I* case to the facts of the present case.

9. However, it appears that the fact that operation of the judgment in *Raj Deo Sharma-I* case had been suspended was not brought to the notice of the learned Magistrate as there is no reference about it in the impugned order. If this fact had been pointed out to the learned Magistrate, I do not think that the learned Magistrate would have proceeded to consider the ratio of *Raj Deo Sharma-I* case and made his conclusion in the matter.

Therefore, I am of the view that no fault could be found with the learned Magistrate on this count. In such a case we would be required to examine legality and correctness of the impugned order in the context of other objections raised on behalf of the complainant/appellant.

10. The judgment in the case of *Abdul Rehman Antulay* (supra) was delivered by a Constitution Bench of the Hon'ble Apex Court. In this judgment, Hon'ble Apex Court has exhaustively dealt with the various aspects relating to fundamental right to speedy trial, which came to be crystallized in real terms in the judgment of the Hon'ble Apex Court in the case of *Hussainara Khatoon (I) vs. Home Secretary, State of Bihar – (1979) 3 SCR 169*. The Hon'ble Apex Court, after following various judgments, held that fair, just and reasonable procedure implicit in Article 21 of the Constitution accrued a right in the accused to be tried rapidly. It observed that right to speedy trial was the right of the accused and speedy trial was also in public interest. It further held that right to speedy trial flowing from Article 21 encompassed all the stages of a criminal case, namely the stage of investigation, enquiry, trial, appeal, revision and retrial. Hon'ble Apex Court also considered the consequence of denial or deprivation of the right to speedy trial of the accused. Hon'ble Apex Court held that ultimately the Court has to perform a balancing act or apply

'balancing test' so as to determine as to whether in a given case the right to speedy trial has been denied or not. It particularly held that depending upon the facts and circumstances of a case, charge against the accused or conviction of the accused could be quashed if the Court comes to a conclusion that right to speedy trial of the accused has been infringed.

11. Hon'ble Apex Court thus indicated that it was neither advisable nor practicable to fix any time limit for trial of offences and it all depended on the facts and circumstances of a case as to when the charge or conviction should be quashed and when trial should be directed to be concluded within a fixed time limit. Thus, Hon'ble Apex Court ultimately left it to the discretion of the Court to decide as to what course it should adopt so as to effectuate right to speedy trial of an accused. A useful reference in this regard may be made to the observations of Hon'ble Apex Court as appearing in sub-paragraphs 8, 9, and 10 of paragraph 86, which read thus:

“(8) Ultimately, the court has to balance and weigh the several relevant factors – 'balancing test' or 'balancing process' – and determine in each case whether the right to speedy trial has been denied in a given case.

(9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the

case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order – including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded – as may be deemed just and equitable in the circumstances of the case.

(10) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit ineffectuates the guarantee of right to speedy trial...”

These directions or guidelines having been issued by the larger Bench of the Hon'ble Apex Court would have to be followed in case the guidelines or the directions issued by a smaller Bench are found to be making a departure or standing in conflict with

the larger Bench directions.

12. In the case of P. Ramachandra Rao Vs. State of Karnataka – (2002) 4 SCC 578 referred to me by learned Counsel for the appellant which ultimately overruled the cases of *Raj Deo Sharma-I* and *Raj Deo Sharma-II* to some extent, it was held by seven Judge Bench of Hon'ble Apex Court that the bars of limitation enacted in Common Cause cases (I) and (II), *Raj Deo Sharma-I* & *Raj Deo Sharma-II*, cannot be sustained as these decisions, though two or three Judge Bench decisions, run counter to some extent to the dictum of the case in *Abdul Rehman Antulay* and thus the Hon'ble Apex Court declared them as 'not good law' to the extent they were in breach of the doctrine of the precedent.

13. The observations of the Hon'ble Apex Court made in this regard in the case of *P. Ramachandra Rao* (supra) in paragraph 28 are reproduced thus :

“The other reason why the bars of limitation enacted in Common Cause (I), Common Cause (II) and Raj Deo Sharma-I and Raj Deo Sharma-II cannot be sustained is that these decisions, though two or three Judge Bench decisions, run counter to that extent to the dictum of the Constitution Bench in A. R. Antulay case and therefore cannot be said to be good law to the extent they are in breach of the doctrine of precedents. The well settled principle of precedents which has crystallised into a rule of law is that a Bench of lesser strength is bound by the view expressed

by a Bench of larger strength and cannot take a view in departure or in conflict therefrom....”

14. So, from the view point of law of precedents, the learned Magistrate, who ought to have given his thoughtful consideration to the application of law laid down by Bench of larger strength in preference to the law laid down by a Bench of a smaller strength, in case it was noticed by him that the directions of the latter Bench having lesser strength were departing from the decision of the larger Bench, and it was indeed the case. This was not done by the learned Magistrate and the result was of erroneous conclusion in the matter. If he had done that, I am of the view, his findings could have perhaps been different. Even otherwise, if the impugned order is to be tested on the anvil of the directions given by the Hon'ble Apex Court in the case of *Raj Deo Sharma-I*, still, I do not think that the order could be found to be sustainable. These are my conclusions reached after careful perusal of the record of the case, and reasons therefor are given in the foregoing paragraphs.

15. In *Raj Deo Sharma-I* case, Hon'ble Apex Court has directed that in cases where the trial was for an offence punishable with imprisonment for a period not exceeding 7 years, whether the accused was in jail or not, the Court should close the prosecution evidence on completion of period of two years from

the date of recording of plea of the accused on the charges framed against him. The Hon'ble Apex Court further directed that in cases where the offence charged against the accused prescribed punishment of more than 7 years imprisonment, the period within which the prosecution evidence could be closed would be of three years from the date of recording of plea of the accused. But, there was a rider to these directions. They were subject to the condition that the accused should not be found responsible for delaying trial of the case. Hon'ble Apex Court observed that if the inability for completing the prosecution evidence within the said periods was attributable to the conduct of the accused and it was found that he was responsible for protracting the trial, the Court would not be obliged to close the prosecution evidence within the said periods of time.

16. Now, if we examine the *roznama* of the case, we would find that there were several dates on which the adjournments were granted either on the joint request of the prosecution and accused persons, i.e. respondents No. 2 and 3 or at the request of accused persons only. The *roznama* available on record clearly shows that since the beginning of the trial in the year 1991 till closure of the prosecution case in the year 1999, barring an intervening period of about four years during which time the Court was vacant with no Presiding Officer having been

appointed, there was always one or the other date when a request for grant of adjournment had been made by the accused or even when no request was made, the Court was compelled to adjourn the case due to absence of both the respondents or at least one of them. When a joint request for postponement of the trial is made, it cannot be said that postponement is only due to reasons attributable to the prosecution and not to the accused. The accused would have to be equally held accountable for the postponement and delay of the case against him. Therefore, I find that the learned Magistrate has committed a serious error of fact in recording a finding that there was no such delay as could be attributable to the conduct of the accused, i.e. respondents No. 2 and 3. If this was so, ratio of *Raj Deo Sharma-I* case could not have been applied to the facts of the present case.

17. Then, having regard to nature of dispute between the parties, at the centre of which lay simmers and sentiments over an immovable property brewing over a long period of time between the parties which can be sensed also from the fact that complainant is still pursuing this case in spite of it's antiquity, it is better to adopt some other options as revealed to us in *Abdul Rehman Antulay* case than that of terminating the trial half-way through, so that a decision on merits can be given. In such a case, a decision on technicalities is likely to show that remedy is worse

than the disease. These facts, therefore, would justify passing of a direction for expedition of trial, following the law of *Abdul Rehman Antulay* case.

In the circumstances, I find that the impugned order is not sustainable in law and deserves to be quashed and set aside. Now, the trial would have to be directed to be concluded within a specific time limit. Hence, the order.

- 1) Appeal is allowed.
- 2) Impugned order dated 15/6/1999 is hereby quashed and set aside.
- 3) The trial is directed to be concluded within six months from the date of receipt of record by the trial Court. The trial of case shall start from the stage at which it was closed and it shall be concluded in accordance with law. Needless to say, full opportunity to defend themselves shall be given to respondents No. 2 and 3.
- 4) The complainant and respondents No. 2 and 3 shall appear before the trial Court on 10/8/2015.

S. B. SHUKRE, J.