

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 154 OF 2000

APPELLANT :- C.K. Thapliyal,
(Ori. Complainant) Insurance Inspector,
Employees' State Insurance Corporation,
Panchdeep Bhavan, Lower Parel,
Mumbai-400 013.

...VERSUS...

RESPONDENTS :- (1) Sakharam R. Dalvi,
Proprietor of
M/s Prakash Buffing Works,
36, B.M.C. Industrial Estate,
370, Bapty Road,
Mumbai-08.

(2) State of Maharashtra,

Mr. H.V. Mehta Advocate for the Appellant.
Mrs. G.P. Mulekar, APP, for the Respondent/State.

CORAM : S.B. Shukre, J.

DATED : 26th June, 2015.

ORAL JUDGMENT :

This is an appeal preferred against the judgment and order dated 22.2.1999 delivered in Case No. 411/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 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 April 1989, May 1989 and June 1989, which were payable on or before 21.5.1989, 21.6.1989 and 21.7.1989 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. State of Bihar** reported in **1998 Cri.L.J. 4596 (SC)**, (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 v. State of Karnataka** reported in **(2002) 4 SCC 578**. 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 **A.R. Antulay & ors. vs. R.S. Nayak & anr.** reported in **(1992) 1 SCC 225** 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. On perusal of the Roznama, it is seen that respondent no. 1 was absent on several occasions from the date of 23.12.1991 and onwards. It is also seen that the Court was even required to issue bailable warrant of Rs.500/- against him. It is further seen that the plea of respondent no. 1 was recorded on 5.1.1996 and thereafter on 24.6.1996 respondent no. 1 filed an application seeking his discharge from the case. This was an application which was *per se* untenable and yet it was filed by respondent no. 1 after a period of almost five years from the date of filing of the complaint. Such belated filing of the application can be seen as an attempt on the part of respondent no. 1 to protract the trial. As if this was not enough, respondent no. 1 after rejection of his application for discharge on 30.8.1996 started remaining absent on several occasions before the trial Court. All these facts led to delay in completion of recording of prosecution evidence. Obviously, the delay in completion of the prosecution evidence lay heavily on the shoulders of the accused, of which no advantage could be given to him. Therefore, the learned Magistrate has committed a serious

illegality when he found that the ratio of Raj Deo Sharma's case was applicable to the facts of the present case and accordingly directed closure of prosecution evidence. Owing to closure of prosecution evidence, the prosecution felt handicapped in proving the offence alleged against respondent no. 1 and, therefore, a great prejudice has been caused to the appellant in the present case.

12. Even otherwise, having regard to the peculiar facts and circumstances of the case and also the fact that the offence alleged against respondent no. 1 is an economic offence involving larger interest of the workers community, interest of justice demanded that the trial Court opted for other option of ordering expedition of the trial in stead of closure of prosecution evidence as laid down in the case of A.R. Antulay, *supra*. This was not done by the learned Magistrate and, as such, I find that it is yet another illegality committed by the trial Court.

13. In the result, I am of the view that the appellant has made out a case for interference with the impugned judgment and order by allowing this appeal and remanding the matter to the trial Court for proceeding further in accordance with law. The appeal, therefore, deserves to be allowed.

14. The appeal is 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.

JUDGE

/TA/