Dixit

# IN THE HIGH COURT OF JUDICATURE AT BOMBAY

***CRIMINAL APPELLATE JURISDICTION***

**CRIMINAL APPEAL NO.801 OF 2000**

| | | |
|---|---|---|
| C.K. Thapliyal, | ] | |
| Insurance Inspector, | ] | |
| Employees' State Insurance Corporation, | ] | |
| Panchdeep Bhavan, Lower Parel, | ] | …. Appellant / |
| Mumbai – 400 013. | ] | (Org. Complainant) |
| ***Versus*** | | |
| 1. Shri. Victor Kaunds, | ] | |
| Prop. M/s. Victor Press Tools, | ] | |
| 102, Indo Saigon Industrial Estate, | ] | |
| M.V. Road, Marol Naka, | ] | |
| Andheri (East), Mumbai – 400 059. | ] | …. Org. Accused |
| | ] | |
| 2. State of Maharashtra | ] | …. Respondents |

Mr. H.V. Mehta for the Appellant.

Ms. Rajeshree Gadhvi, A.P.P., for the Respondent/State.

**CORAM : <u>DR. SHALINI PHANSALKAR-JOSHI, J.</u>**

**DATE : <u>21ST AUGUST, 2015.</u>**

**<u>P.C.</u> :**

1. This Appeal is preferred by the Original Complainant taking an exception to the Judgment of acquittal dated 26th February, 1999 passed by the Metropolitan Magistrate, 25th Court, Mazgaon, Mumbai in Case No.965/ESIC/89.

2. The facts of the Appeal are to the effect that Appellant is the Insurance Inspector working in the office of Employees' State Insurance Corporation. Respondent No.1 is Proprietor of M/s. Victor Press Tools. Respondent No.1 has been assigned Employer's Code No.31-13243, under which he was required to pay the employees' contribution for every wage period @ 2.25% of the wages in respect of each employee in his factory. However, it was noticed that Respondent No.1 has failed to make such payment, along with his own contribution, within the specified period for the wage period January, 1989, February, 1989 and March, 1989.

3. Hence, as per the Appellant, Respondent No.1 has committed an offence punishable under Sections 85(a) and 85(i)(b) of ESI Act. With these allegations, the complaint was lodged before the Trial Court. On appearance of Respondent No.1, charge was framed against him, to which he pleaded not guilty, raising the two fold defences that he has not received the notice before the launch of prosecution and, secondly, he has made the payment, as required.

4. In support of its case, the Appellant examined only two witnesses. PW-1 is C.K. Thapliyal, the Appellant himself, who has proved the contents of the complaint, and PW-2 is Kamlakar Raikar, who was working as Deputy Regional Director in the ESI Corporation. On appreciation of their evidence, the Trial Court was pleased to hold that, in the instant case, the Sanction Order does not reflect application of mind. Further, it was held that the fixed or ascertained amount of contribution, which was required to be paid by Respondent No.1, is not mentioned either in the complaint or at any other place and hence the Trial Court acquitted Respondent No.1 of the charge levelled against him.

5. This Judgment of the Trial Court is assailed in this Appeal by learned Counsel for the Appellant by submitting that the Sanction Order in such cases is merely of a formal nature. It is absolutely not necessary to mention therein the ascertained or fixed sum of the contribution, which employer is required to make, as the said fact is exclusively within the knowledge of the employer. Therefore, the finding of the Trial Court that Sanction Order does not reflect application of mind is not correct. Secondly, it is submitted that even in the complaint also it is not necessary to mention the exact amount of contribution, which is required to be paid by the employer. The onus is on the employer to show that he has made such payment and unless and until he does so, he cannot be absolved from the liability.

6. To substantiate his submissions, the learned Counsel for the Appellant has relied upon ***Employees' State Insurance Corporation, Bangalore Vs. Bangalore Engineers' Industry, Bangalore & Anr., 2001 I CLR 372***, of Karnataka High Court and ***N.T. Kate, Insurance Inspector, E.S.I.C. & etc. Vs. Yogendra Swarup Agarwal and Anr., 2003 LAB. I. C. 199***, of this High Court..

7. The ratio laid down in both the authorities is to the effect that non mentioning of the amount of contribution due from employer, either in the Sanction Order or in the complaint, is merely a technical defect and the Accused cannot be acquitted on the basis of such technical defect.

8. In my considered opinion, in view of these two authorities relied upon by learned Counsel for the Appellant, even if this Court need not

enter into the aspect whether the non mentioning of amount of contribution due from the employer, either in the Sanction Order or in the complaint, is not having fatal effect on the decision of the case, but there is one more serious lacunae in the prosecution case, which is in the case of Appellant, which appears to go to the root of the matter.

9. In the authority of Karnataka High Court, in para No.5, it has been clearly laid down that, *"under the scheme of the Act or the rules, the service of notice on the employer has not been strictly provided, but the advisability for service of such notice is on two fold grounds, firstly, in order to specifically confront the defaulter with the fact that a default has taken place so that he can make amends instead of inviting a prosecution and, secondly, in order to bring it to the notice of the defaulter that a breach has taken place and if this is not rectified, it is for a Court at a subsequent point of time to draw the appropriate adverse inferences."* Thus, the service of notice on the employer before the launch of the prosecution, though is not mandatorily provided, it is definitely desirable and advisable so as to avoid unnecessary launch of prosecution and also to give an opportunity to the employer to make good the payment.

10. In the instant case, as per the evidence of PW-2 Kamlakar Raikar Deputy Regional Director, the notice was issued and it was sent by R.P.A.D. However, as admitted by him, the acknowledgment receipt of the service of the said notice on Respondent No.1 is not produced in the case. The very defence taken by Respondent No.1 is that he has not received the notice and, therefore, he has not responded to the same. In such situation, it follows that he was not given the opportunity to make the payment good in time, or, in such situation, alternatively, the Court also

cannot draw an adverse inference that as Respondent No.1 has not responded to the said notice, he has committed default in payment of contribution amount. The further defence taken by Respondent No.1 in his statement, under Section 313 of the Cr.P.C., is that he has made the payment of contribution amount. In such situation, the non mentioning of the amount, which was due from him, and the absence of proof as to the service of notice on him, becomes fatal to the case of the Complainant.

11. On these two very grounds, in my considered opinion, the Judgment of acquittal, as delivered by the Trial Court, does not call for any interference. The Appeal, therefore, holds no merit and hence stands dismissed.

**[DR. SHALINI PHANSALKAR-JOSHI, J.]**