MANU/MH/0576/2002

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IN THE HIGH COURT OF BOMBAY

Criminal Appeal Nos. 285 and 288 of 1999 and 146 to 151 of 2000

Decided On: 05.09.2002

Appellants: **N.T. Kate, Insurance Inspector, E.S.I. Corpn.**
Vs.
Respondent: **Yogendra Swarup Agarwal and Anr.**

Hon'ble Judges/Coram:
A.B. Palkar, J.

Counsels:
For Appellant/Petitioner/Plaintiff: H.V. Mehta, Adv.

For Respondents/Defendant: C.R. Naidu, Advj/b., C.R. Naidu and Co. for Respondent No. 1

For State: K.V. Saste, A.P.P. (in C.A. Nos. 285/99 and 298/99), K.K. Kapoor, A.P.P. (in C.A. Nos. 146/2000, 147/2000 and 148/2000) and A.S. Shitole, A.P.P. (in C.A. Nos. 149/2000, 150/2000 and 151/2000)

Case Note:

The case dealt with the acquittal of the accused in respect of offences under Section 85(a) of the Employees State Insurance (ESI) Act, 1948- The insurance inspector filed an appeal, against the order of acquittal, stating that the acquittal was not justified on the ground of non-mentioning of the amounts in the notice or complaint or the sanction order of the sanctioning authority - The appeal was allowed and the acquittal was set aside - Taking into account the facts and circumstances of the case, it was found that, there was no strict compliance within the time, but thereafter, on demand of the department, entire amount claimed had been paid with interest and damages by the respondents - The accused was convicted under Sections 85(d) and 85(e), with 85(2) of the E.S.I. Act and sentenced to pay fine of Rs. 500/-, in default R.I. for 7 days - The Court dismissed rest of the appeals as the respondents had complied with the amnesty scheme and the prosecution should not have proceeded against the accused, after compliance with the amnesty scheme and after payment of the entire dues in strict compliance, with the scheme declared by the Government.

JUDGMENT

A.B. Palkar, J.

1. All these appeals are filed against the order of acquittal by the Insurance Inspector on behalf of the Employees State Insurance Corporation (for short "ESIC").

2. Respondent No. 1 i.e. Yogendra Swarup Agarwal was prosecuted under Section

85(a) of the E.S.I. Act and different complaints were filed for different periods and therefore, in order to challenge various orders of acquittal passed against them all these appeals have been preferred. The case of the prosecution as is obvious from the complaints is that contributions were not paid as prescribed. It is not disputed that later on payments were made and therefore, prosecution are for late deposit of contribution by the employer.

3. According to the complainant, respondents have been allotted employer code under which the employer is required to pay contribution and file returns in respect thereof as provided under Regulation 16 of the E.S.I. (General) Regulation 1950 which provides that every employer shall send their return in form No. 6 along with receipted copies of the challans for the amounts deposited in Bank in respect of all the employees for whom contribution is payable for the concerned period so as to reach the office of the Corporation within 42 days from the termination of the contribution period to which it relates. Respondents failed to comply with the aforesaid provisions and since it amounts to offence under Section 85(a) punishable under Section 85(2) of the Act, different complaints were filed.

4. The facts are not disputed. During the trial the Insurance Inspector, the present appellant, was examined. He has produced the sanction order. He stated that he has filed the complaint as per the direction given by the Regional Director. He also proved the sanction order.

5. However, the learned Magistrate observed that the person who visited the premises and the factory was not be examined by the prosecution and he was an important witness. Moreover the person who submitted proposal for sanction is not examined. However, it is an admitted fact that there was delay for filing return and in making payment of contribution and on mere technicalities that the person who visited the factory was not examined, the learned Magistrate could not have passed an order of acquittal and therefore, in this Court the facts not being in dispute, arguments were advanced only on the legal aspect of the matter. In some of the cases, the learned Magistrate has relied on the ratio in the judgment of the Supreme Court in the case of Rajdeo Sharma v. State of Bihar, in Cri. Appeal No. 1045 of 1998, decided on 8-10-1998. However, in this Court the learned Counsel for respondents stated that Rajdeo Sharma's case is no more a good law and therefore, he did not press that point.

6. The learned Magistrate found that sanction order is defective. According to the learned Magistrate the complainant did not specify the amount due and therefore, no fixed or ascertained amount is mentioned in the complaint and in the sanction order and therefore, the complaint and the sanction order are defective. In this connection the learned Counsel for the appellants submitted that number of cases are being thrown overboard by the Magistrate on some legal technicalities, namely finding defect in the sanction order, not mentioning of amount or not mentioning of number of employees or on the ground of delay and also in cases on the ground of payment after the due date and the learned Counsel urged that this Court should reiterate the law that has already laid down in various judgments.

7. The learned Counsel, relied on the judgment of the Supreme Court in the case of State of Bombay v. Parshottam Kanaiyalal, reported in MANU/SC/0062/1960. It was a case under the provisions of Food Adulteration Act which provides institution of prosecution with written consent not merely of the State Government or of the local authority by a person authorised in this behalf by the State Government or a local

authority. The learned Judges of the High Court found the prosecution to be incompetent on reasoning that "the written consent" did not in terms name the person "in whose favour" the sanction or written consent was given, holding that a written consent of the nature which was in the case before them or a written consent without mentioning the person to whom such consent or sanction is given, would not be sufficient compliance with the term of sanction. The High Court found that consent did not mention the name of the Food Inspector as the person competent to institute prosecution and held that the prosecution was without jurisdiction. While reversing the judgment of the High Court, the Supreme Court observed in para 13 as under :

> "The learned Counsel for appellant-State challenged the correctness of this construction. He referred us to the analogy of the decisions rendered on Section 197 of the Criminal Procedure Code where it has been held that "the sanction" referred to need not name the person who could institute the prosecution. We consider it unnecessary to canvass the relative scope of the language of Section 197 of the Criminal Procedure Code and of Section 20(1) of the Prevention of Food Adulteration Act. We prefer to rest our decision on the terms of Section 20(1) itself. To start with, the Statute does not in terms prescribe that the complainant shall be named in the "written consent". The only question, therefore, is whether such a limitation or condition could be gathered as a necessary intendment of the provision. In the first place, the reason of the rule could not suggest or imply such a condition. The rule has undoubtedly been designed to prevent the launching of frivolous or harassing prosecutions against traders. It therefore provides that the complaint should be filed, either by a named or specified authority or with the written consent of such authority. To read by implication that before granting a written consent, the authority competent to initiate a prosecution should apply its mind to . the facts of the case and satisfy itself that a prima facie case exists for the alleged offender being put up before a Court appears reasonable but the further implication that the complainant must be named in the written consent does not, in our opinion, follow. In the present case, the Analyst's Report was before the Chief Officer of the Municipality and it was after considering that report and the connected documents that the written consent or sanction was given. In the second place, the subsection itself contains an indication that the written consent is for the launching of a specified prosecution, and not one "in favour" of a complainant authorising him to file the complaint."

It should be borne in mind that the Court is dealing with economic offence having serious repercussions on the society. The Supreme Court has given a word of caution in the case of State of Madhya Pradesh v. Shri Ram Singh, reported in 2000 Cri.LJ. page 1401, by observing in para 10 as under :

> "Procedural delays and technicalities of law should not be permitted to defeat the object sought to be achieved by the Act. The overall public interest and the social object is required to be kept in mind while interpreting various provisions of the Act and decided cases under it."

8. Non payment of contribution or delay in payment of contribution by the employer is not a matter to be taken lightly. It would be worthwhile to refer to the observations of the Supreme Court in Organo Chemical Industries and Anr. v. Union of India and Ors., reported in MANU/SC/0582/1979. The Supreme Court observed after reference to the objects and reasons of the Employees Provident Funds and Miscellaneous

Provisions Act, 1952, and Employees Provident Fund Scheme :

> "Briefly and broadly and lopping off aspects unnecessary for this case the scheme of the Act is that each employer and employee in every "establishment" falling within the Act do contribute into a statutory fund a little, viz. 6-1/4 per cent of the wages to swell into a large Fund wherewith the workers who toil to produce the nation's wealth during their physically fit span of life may be provided some retiral benefit which will keep the pot boiling and some source wherefrom loans to face unforeseen needs may be obtained. This social security measure is a humane homage the State pays to Articles 39 and 41 of the Constitution. The viability of the project depends on the employer duly deducting the workers' contribution from their wages, adding his own little and promptly depositing the mickle into the chest constituted by the Act. The mechanics of the system will suffer paralysis if the employer fails to perform his function. The dynamics of this beneficial statute derives its locomotive power from the funds regularly flowing into the statutory till"

In a concurring judgment Justice Krishna Iyer in para 28 observed :

> "The pragmatics of the situation is that if the stream of contributions were frozen by employees defaults after due deduction from the wages and diversion for their own purposes, the scheme would be damnified by traumatic starvation of the Fund, public frustration from the failure of the project and psychic demoralisation of the miserable beneficiaries why they find then wages deducted and the employer get away with it even after default in his own contribution and malversation of the workers' share. "Damages" have a wider socially semantic connotation than pecuniary loss of interest on non-payment when a social welfare scheme suffers mayhem on account of the injury. Law expands concepts to embrace social needs so as to become functionally effectual."

In para 42 observations are more relevant :

> "What are the strands which make the fabric of damages under the Article? I have stated earlier that the composite idea of damages includes more than pecuniary compensation. Moreover, the injured party is the Board of Trustees who administer the Fund. That Fund not merely loses the interest consequent on the non-payment but receives a shock in that its scarce resources are further famished by employers" default. There is great social injury to the scheme when employers default in numbers. So the lash of the law is delivered when its object is frustrated. What is more denunciatory is the fact that the employer makes deductions from the poor wages of the workers and (makes them suffer to that extent) and diverts even those sums for this private purposes by failing to make prompt remittances. Thus, default in contributions is compounded by embezzlement, as it were. Naturally, damages will take an exemplary character and inflict a heavy blow on the shady defaulter."

Supreme Court also referred to a judgment of the Patna High Court in R.B.H.N. Jute Mills v. Provident Fund Commissioner, reported in (1958) I LLJ 598 (equivalent to ILR 37 Pat 47.

> "In other words, the infliction of the damages under Section 14-B is not

meant to provide compensation or redress to the employees whose interest may be injured. It is not meant to provide reparation to such employees and the quantum of damages imposed has no relation to the amount of loss suffered by the employees. I consider that the infliction of the damages under Section 14-B is penal in its nature. It is a warning to employers in general not to commit a breach of the statutory rule."

9. After taking into consideration the legal position, the learned Single Judge of the Karnataka High Court has observed in the case of Employees State Insurance Corporation, Bangalore v. Bangalore Engineers Industry, reported in 2001 (1) CLR 372. In an exhaustive judgment, the learned Single Judge (Justice Saldanha) has pointed in para 4 as below :

"4. The second aspect of the case which again requires to be clarified emanates from the fact that the scheme of the Act casts the legal obligation on the employer and this presupposes the fact that the employer is required to pay the contribution both on behalf of the employer and the employee, after having done the right computation within the prescribed period of time. Any failure as far as these obligations are concerned is actionable and if a notice has been issued to the defaulter, it will be obligatory on the part of the defaulter to either make amends or at that point of time to point out in writing within the prescribed period, that the amount has either been paid or if there is any inaccuracy or error to bring this to the notice of the Department. I need to clarify here that the facts and figures in relation to employees, such as the exact total emoluments for purposes of computing the percentage of contribution is something within the special knowledge of the employer and is a variable figure. Under these circumstances, the mathematical calculations are required to be done by the employer and it is only when the return is filed, that it is for the Department to do a verification or possibly cross-check as to whether the contents of the return are correct and if not, to take appropriate action. Suffice it to say therefore, that if the Department points out that there has been a default for a prescribed period, then the obligation of setting out in actual terms i.e., in terms of rupees and paise as to what precisely is, the quantum of default, will not be necessary insofar as for the reasons indicated by me earlier, these are figures within the special knowledge of the employer. Again, the Trial Court will take note of the fact that once a default has been committed, or a notice has been issued to the defaulting party to rectify or remedy the default and if the party has not disputed the contents of the notice, the Court will take note of the fact that a presumption would arise against the employer and that the Court will be justified in drawing the requisite adverse inference. This would to a very large, extent obviate the host of frivolous objections that are sought to be canvassed at a later stage when the trial commences. In this regard, it was also pointed out to me that it is often pleaded before the Trial Court that sanction to prosecute if it is issued without due application of mind insofar as if for instance the requisite or exact quantum has not been determined, that this should be treated as bad in law. This would be a hyper-technical approach. These are cases where sanction to prosecute is really a formal sanction and all that the sanctioning authority has got to ascertain as to (a) whether the accused was covered, (b) whether the contribution has been made, and (c) whether the returns have been filed and lastly as to whether there is compliance if notice has been served, if on the basis of the aforesaid determination it is found that the default subsists, the sanction to prosecute

would certainly be a valid one even if detailed computations having not been done."

10. It is also pertinent to note that in the same paragraph the learned Judge has observed that the sanction to prosecute required in this case is a formal sanction and all that the sanctioning authority has to ascertain is (a) whether the accused was covered, (b) whether the contribution has been made, (c) whether the returns have been filed and lastly whether there is compliance if notice has been served, and if on the basis of the aforesaid determination, it is found that the default subsists, the sanction to prosecute would certainly be a valid one even if detailed computations having not been done.

11. These observations have been referred to at length even though the learned Counsel appearing for the respondents did not seriously support the observations of the learned Magistrate on the defects in sanction order. It is obvious that the learned Magistrate treated the matter very lightly found out an easy way by resorting to legal technicalities which resulted in acquittal in all the cases. However, the learned Counsel for respondents placed reliance to the amnesty scheme declared by the Department. The amnesty scheme was declared and published by the department is not in dispute and although this point was not raised before the learned Magistrate, the same will have to be considered. The learned Advocate appearing for the accused/respondents stated that the Amnesty Scheme gives assurance to the accused that the prosecution would be withdrawn. In fact the accused had challenged the fact that the factory was covered by the E.S.I. Act. The Amnesty Scheme formulated by the E.S.I. Corporation informed the respondents that the prosecution under Section 85 of the ESI Act would be withdrawn if the contribution along with interest and damages thereon are paid by the accused in full within a period of one month and compliance is made in respect of other provisions of Section 85 of the Act involving prosecution. The suit was not prosecuted and was settled.

12. In respect of the period 10/87 to 3/89 the accused was informed that the period of amnesty scheme had already expired on 15-4-1993 and therefore, he was called upon to pay amount as per fresh calculations. It was stated before me that the said amount was also deposited and receipt regarding payment is also produced. However, the learned Counsel for the respondents fairly conceded that since payment for this period was beyond the date declared by the amnesty scheme he would not be pressing the concerned appeal which is criminal appeal No. 288 of 1999. In all other appeals the learned Counsel for the respondents contended that he is not supporting the reasons for acquittal recorded by the learned Magistrate. However, in view of the payments made strictly as per the amnesty scheme, the prosecution should have been withdrawn. In any case, the Insurance Inspector should not have preferred the appeals. Taking into consideration this aspect of the matter. I am inclined to interfere with the order of acquittal in appeal No. 288/99 and at the same time I am not inclined to interfere with the acquittal order in rest of the matters.

13. In appeal No. 288 of 1999 the acquittal is merely on the ground of non-mentioning of the amounts in the notice or complaint or the sanction order of the sanctioning authority, I am therefore inclined to set aside the acquittal of the respondent in Criminal Case No. 1582 of 1999.

14. Taking into consideration the facts and circumstances of the case, specially the fact that although there is no strict compliance within the time, but thereafter on demand of the department, entire amount claimed has been paid with interest and

damages by respondents, I am inclined to pass sentence of nominal fine and therefore, appeal No. 288 of 1999 is allowed and the acquittal of accused in Criminal Case No. 1582 of 1999 is set aside and respondent No. 1 is convicted under Sections 85(d) and 85(e) read with 85(2) of the E.S.I. Act and sentenced to pay fine of Rs. 500/-, in default R. I. for 7 days. Rest of the appeals are dismissed in view of the fact that respondents have complied with the amnesty scheme and the prosecution should not have been proceeded with against the accused after compliance with the amnesty scheme arid after payment of the entire dues in strict compliance with the scheme declared by the Government. Fine to be deposited within 7 days of receipt of writ of this Court by the trial Magistrate.

15. Parties to act on the ordinary copy of the judgment duly authenticated by the Court Sherestadar.