Eskay Electronics (I) Pvt. Ltd. and Others Vs P.K. Khera, Superintendent, Central Excise, Preventive
 Central Excise Vs Eskay Electronics (I) Pvt. Ltd. and Others

Court: Delhi High Court

Date of Decision: Sept. 11, 2009

Acts Referred: Central Excises and Salt Act, 1944 â€" Section 32K(1), 9, 9A
Constitution of India, 1950 â€" Article 21
Criminal Procedure Code, 1973 (CrPC) â€" Section 244, 482
Foreign Exchange Regulation Act, 1973 â€" Section 56
Penal Code, 1860 (IPC) â€" Section 109, 120, 120B, 161, 192
Prevention of Corruption Act, 1947 â€" Section 5(2)

Citation: (2009) 244 ELT 519

Hon'ble Judges: Rajiv Shakdher, J

Bench: Single Bench

Advocate: Dinesh Mathur, D.K. Mathur, in Criminal M.C. 1832/2008 and Satish Aggarwal, in Criminal M.C. 364/200, for the Appellant; Satish Aggarwal in Crl. M.C. 1832/2008, Dinesh Mathur and D.K. Mathur in Crl. M.C. 364/2007, for the Respondent

Final Decision: Allowed

Judgement

Rajiv Shakdher, J.
The captioned petitions, which are filed u/s 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to in

short the Cr.P.C.), can be disposed of by a common judgment in view of the fact that they arise out of the same set of circumstances.

2. Crl. M.C. No. 364/2007, which is preferred by the Central Excise Collectorate, New Delhi (hereinafter referred to as the Department), is

directed against the order dated 09.10.2006 passed by the learned Addl. Chief Metropolitan Magistrate, New Delhi (in short the ""ACMM""),

whereby he has closed the pre-charge evidence being led by the department. On the other hand, the Crl. M.C. No. 1832/2008, which has been

preferred by the Eskay Electronics (I) Pvt. Ltd., its Managing Director, Mr. M.S. Kathuria and its Production Manager, Mr.. N.P. Kathuria

(hereinafter individually referred to as accused No. 1., accused No. 2. and accused No. 3. respectively and collectively referred as accused.),

have preferred the petition primarily on the ground of violation of their fundamental right under Article 21 of the Constitution of India, which

mandates a speedy trial. It is the contention of the accused that they were summoned by the trial court on 04.09.1989 for violation of the

provisions of Section 9 and 9A of the Central Excise & Salt Act, 1944 (hereinafter referred to as the ""CE Act""), and till date, the prosecution has

not even completed the pre- charge evidence.

3. In the aforesaid circumstances, I have decided to deal with the petition filed by the accused, in the first instance, as the decision in it shall impact

the petition of the department.

3.1 In respect of these petitions, the following facts may be noticed:

3.2 The accused No. 1 is a private limited company, while accused No. 2 is its Managing Director. Accused No. 3 is the Production Manager of

accused No. 1 and the son of accused No. 2.

3.3 It transpires that on 23.01.1987, the officers of the A.B. Branch of the department visited the factory premises of the accused No. 1. Raids

were conducted by the department, both at the business premises as well as at the residential premises of the accused No. 2. In addition, raids

were also made at the residential premises of the nominee directors. The result of the raids was that, the department, having resumed several

documents, books and statutory record; it formed an opinion that the accused were involved in clandestine removal of TV sets on a large scale;

without paying the requisite excise duty. Resultantly, a complaint was filed in the court of ACMM, Delhi. In the complaint, the department made

allegations against the accused under the following broad heads:

(i) Failure to account for picture tubes shown in the raw material account register, i.e., Form-IV register;

(ii) Clearances made on the strength of forged invoices in connivance with one of its dealers Espe Industries;

(iii) Clearance on the basis of forged gate pass;

(iv) A comparison of original gate pass, which accompanied the transportation of goods with the second copy of the gate pass, kept for

assessment by the department, and the copy kept in the office of accused No. 1 revealed that the goods were being cleared far in excess of the

quantity shown in the original gate pass, when compared with the second and third copy of the gate pass.

(v) Clearance made using two sets of invoices bearing the same serial number;

(vi) Clearances being made on the strength of forged challan as well as kuchha slips, in respect of which, allegedly no excise duty was paid;

(vii) Anomaly between the figures with regard to production of TV sets and those received for the purposes of repair; and

(viii) Lastly, under-valuation of goods on which duty was payable at the relevant time on ad volerum basis.

4. Alongwith the complaint, the department had appended a list of witnesses. The said list of witnesses detailed out names of twenty four (24)

persons. The learned ACMM by an order dated 03.02.1989 took cognizance of the complaint, filed by the department, u/s 9 and 9A of the CE

Act read with Section 193, 192 and 120 of the Indian Penal Code, 1860 (hereinafter referred to as the ""IPC""). After taking cognizance, the

learned ACMM registered the complaint, and summoned the accused.

5. Mr. Dinesh Mathur, learned Senior Counsel, appearing for the accused, instructed by Mr. D.K. Mathur, Advocate submitted that pursuant to

orders of the learned ACMM, passed way back on 03.02.1989, the accused have appeared before the learned ACMM, even so, the prosecution

by the department has not proceeded beyond the pre-charge stage. In order to buttress his submission, he has placed reliance on the orders

passed by the ACMM from time to time. It is contended by the learned senior counsel that the accused cannot be held responsible for the tardy

conduct of prosecution by the department. The learned senior counsel has submitted that accused No. 2 is today, approximately 86 years of age,

while the accused No. 3 is nearly 48 years of age. He submits that it is unlikely that the present case will reach culmination in their life time. He has

submitted that the callous manner in which the department has prosecuted the present case has resulted in the infringement of the right of the

accused to a speedy trial as encapsulated under Article 21 of the Constitution of India. In support of his submission, the learned senior counsel

placed reliance on the following judgments:

Vakil Prasad Singh Vs. State of Bihar, ; Pardeep Goyal v. The Enforcement Directorate 2007 (4) JCC 3033

6. As against this, Mr. Satish Aggarwal, Advocate who appeared for the department has opposed the relief sought for by the accused in the

present petition. He has contended before me that while there has been some delay, on the part of the department in conducting its case before the

learned ACMM, the blame for at least a part of the delay, is attributable to the accused. The learned counsel further submitted before me, that this

Court while examining the merits of the petition filed by the accused for quashing criminal proceedings on the ground of delay would bear in mind,

the other factors, such as the seriousness of the offence and the revenue involved. He submitted that the accused had by their illegal actions

deprived the State of excise duty amounting to nearly Rs. 65 lacs. The learned Counsel contended that they would be willing to abide by any order

of the court with regard to setting down a time frame within which the trial be completed, in compliance of which, they would diligently prosecute

their case before the learned ACMM. In support of his submission, learned counsel for the department relied upon two judgments of the Supreme

Court, that is State of Maharashtra Vs. Champalal Punjaji Shah, and State of Bihar Vs. Baidnath Prasad @ Baidyanath Shah and Another,

7. I have heard Mr. Dinesh Mathur, learned senior counsel, instructed by Mr. D.K. Mathur, Advocate for the accused as well as Mr. Satish

Aggarwal, learned Counsel for the department. I am of the view that the petition filed by the accused deserves to be allowed and the proceedings

be quashed. The reasons for coming to this conclusion are as follows:

8. The accused were summoned by virtue of the learned ACMM.s order dated 03.02.1989. The summons were made returnable on 04.05.1989.

After 04.05.1989, it appears on a perusal of the order sheet, that for the first time, the first prosecution witness was partially examined, was on

30.10.1991. His examination got completed on 19.05.2001. In the interregnum on 30.04.1999, second prosecution witness was partly examined.

From the order sheet, it is not clear as to whether the examination of second prosecution witness was at all completed. What is, however, brought

out, upon perusal of the order sheet, that on 17.07.2003, examination-in-chief of PW3 was carried out. The examination-in-chief was finally

completed on 09.10.2006, when the impugned order was passed. This apart, there have been adjournments, on at least 13 occasions, on the

ground that the prosecution witnesses are not available. These dates are 16.12.1996, 14.01.1998, 28.08.1998, 29.04.1999, 11.10.1999,

12.01.2000, 05.04.2000, 13.07.2000, 13.11.2000, 20.05.2002, 03.09.2002, 04.03.2004 and 13.12.2004. In addition to this reason, the matter

has also been adjourned on the ground of change of counsel by the department, the records being bulky and also that the original documents were

put in a box, whose lock could not be opened as the keys were lost. A reading of the order sheet from 1989 to 2006, leaves no doubt in my mind

that the department has displayed no seriousness in prosecuting the case.

9. The learned Sr. Counsel for the accused has rightly referred to the provisions of Section 244 of the Cr.P.C. The trial court was required to issue

summons to the accused based on an application moved by the department in that regard. The learned Counsel for the petitioner drew my

attention to ground D. of the petition filed by the accused, wherein this has been specifically taken as a ground in the petition. On perusal of the

reply to the petition, I find that the department has not contraverted this position. However, Mr. Satish Aggarwal, learned Counsel, appearing for

the department had drawn my attention to the list of witnesses supplied along with the complaint. He submitted that it was for the court to issue

summons; if the witnesses do not appear, the department could not be held responsible. In my view, the submission of the learned senior counsel

for the petitioners/accused on this aspect has to be accepted. The list of witnesses, filed with the complaint, will not supplant the obligation placed

on the complainant to move an application in accordance with Section 244 of the Cr.P.C. before the trial court for summoning the witnesses. It

often happens that while filing a complaint several witnesses are cited. During the course of trial it is not considered necessary to summon all the

witnesses. Therefore, it is obligatory on the part of the complainant to move a proper application, in respect of witnesses, it is desirous of

summoning. The department cannot shirk its responsibility by placing burden on the trial court.

10. I may also point out at this stage that, on ascertaining from the learned senior counsel for the petitioners/accused, as to whether there was any

adjudication order passed by the department in respect of its allegation with regard to evasion of excise duty, I was informed that upon a show-

cause notice being issued on 29.06.1988, the Principal Collector vide its order dated 28.04.1989 confirmed the entire demand of duty raised in

the show- cause notice, and also imposed a penalty of Rs. 20 lacs. Furthermore, in appeal, the Central Excise and Gold Appellate Tribunal (in

short the ""Tribunal"") vide order dated 24.09.1991 remanded the matter to the adjudicating authority for a re-adjudication. While the matter was

pending before the adjudicating authority, an application was moved by the petitioners/accused before the Settlement Commission, Customs and

Excise, Principal Bench. Before the Settlement Commission, the petitioners/accused had admitted a duty liability of Rs. 8,55,650/- against total

duty demand of Rs. 65,83,506/- apart from a demand of Rs. 11,000/- on seized TV sets. The learned senior counsel placed the final order of the

Settlement Commission dated 28.12.2007 before me, whereby the following directions were issued:

Central Excise Duty: The Duty liability of the applicant in this case is settled at Rs. 45,43,550/-. Amount of Rs. 9,47,090/- already stands

deposited. Applicant is directed to deposit balance amount of Rs. 35,96,460/- within 15 days of receipt of this order and send intimation to

Revenue and the Bench after which the same shall also stand appropriated towards the additional duty liability.

Interest: The SCN does not seek to levy and interest and the applicant has also not made any prayer for immunity from the same. Hence no order

need to be passed on this issue.

Penalty: In view of the facts and circumstances as mentioned in para 12 above, the Bench is not inclined to give to applicant full immunity from

penalty. Bench imposes a penalty of Rs. 1 lakh on the applicant under the provisions quoted in the SCN and grants immunity to the applicant from

penalty in excess of the amount of Rs. 1,00,000/-.

Fine: Subject to deposit of duty and penalty as recorded above, Bench grants immunity from fine in lieu of confiscation and the seized goods shall

be released to the applicant.

Prosecution: Since the proceedings for prosecution have already been initiated before the date of the receipt of settlement application of the

applicant, immunity from prosecution is not granted in terms of Proviso to Sub-section (1) 32 K of the Act.

10.1 The learned senior counsel for the petitioners/accused further submitted that the order of the Settlement Commission is subject matter of a

challenge in Writ Petition No. 1257/2008, preferred by the petitioners/accused, which is pending adjudication before a Division Bench of this

Court. He, therefore, submitted that in terms of the order of the Settlement Commission, the duty liability has been reduced from Rs. 65,83,506/-

to Rs. 45,43,550 out of which the petitioners/accused having already deposited Rs. 9,47,090/-; they are, as per the order of the Settlement

Commission, required to pay Rs. 35,96,460/- along with Rs. 1,00,000/- towards penalty. He further submitted that, therefore, the contention of

the learned counsel for the department that dues outstanding are, in excess of Rs. 65 lacs, is not correct.

11. In this background, let me examine the judgments cited before me both by, the learned senior counsel for the petitioners as well as the learned

Counsel for the department.

11.1 But first the judgments cited by the petitioners:

11.2 In Pardeep Goyal (supra), the complaint was filed on 21.02.1986. The cognizance of the complaint was taken on the same day. Accused

were summoned to appear in court on 23.04.1986. For one reason or the other the matter was adjourned. In the year 2007 when the mater came

up before this Court, it was still languishing at the pre-charge stage. Twenty one (21) years had passed. This Court analyzed various judgments

passed by the Apex Court in which criminal proceedings had been quashed in the given facts and circumstances of the case where delays were

ranging from 6 years to 26 years.

11.3 In J. Joseph (supra), once again, a single Judge of this Court quashed the proceedings where a matter had languished in trial court at the stage

of pre-charge offence for a period of nearly 12 years. The proceedings were initiated against the accused in the said case u/s 56 of the Foreign

Exchange Regulation Act, 1973. These proceedings were initiated on 26.06.1986, and after nearly a decade, the first witness produced by the

prosecution was still under cross-examination. This Court, based on the principle, enunciated in Raj Deo Sharma Vs. The State of Bihar, quashed

the criminal proceedings. The observations made in Raj Deo Sharma (supra) in para 8 & 9 of the judgment being relevant are extracted

hereinbelow:

8. The entitlement of the accused to speedy trial has been repeatedly emphasised by this Court. Through it is not enumerated as a fundamental right

in the Constitution, this Court has recognized the same to be implicit in the spectrum of Article 21. In Hussainara Khatoon and Others Vs. Home

Secretary, State of Bihar, Patna, the Court while dealing with the cases of undertrials who had suffered long incarceration held that a procedure

which keeps such large number of people behind bars without trial so long cannot possibly be regarded as reasonable, just or fair so as to be in

conformity with the requirement of Article 21, The Court laid stress upon the need for enactment of a law to ensure reasonable, just and fair

procedure which has creative connotation after Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, in the matter of criminal trials.

9. In Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna, this Court held that financial constraints and priorities in

expenditure would not enable the Government to avoid its duty to ensure speedy trial to the accused.

11.4 The third case Vakil Prasad Singh (supra) cited by the petitioner relates to a complaint filed alleging commission of offences u/s 161 (before

its omission by Act 30/2001), 109 and 120B of the IPC and Section 5(2) of the Prevention of Corruption Act, 1947. The Supreme Court was

hearing an appeal against the judgment of the High Court whereby, the application of the accused u/s 482 of the Cr.P.C. was dismissed by the

High Court, while acknowledging the fact that there had been a delay in conclusion of proceedings against accused, and that some prejudice would

have been caused to the accused in his professional career on account of continuation of criminal case against him. Even so the High Court had

dismissed the petition. The Supreme Court reversed the judgment of the High Court, while doing so noticed the following brief facts: In a complaint

against the accused that he had demanded illegal gratification, a trap was laid. After investigation, a chargesheet was filed against the accused on

28.02.1982. Cognizance in the case was taken on 09.12.1982; thereafter the prosecution took no substantial steps in the matter. On 07.12.1990,

a petition was filed by the accused u/s 482 of the Cr.P.C. before the Patna High Court challenging the order of the Special Judge taking

cognizance of the offences against the accused, on the ground that the inspector of police, who had conducted the investigation on the basis of

which chargesheet had been filed, had no jurisdiction to do so. The High Court quashed the order of the Magistrate taking cognizance, with a

direction to the prosecution to complete investigation within a period of three months from receipt of the order, by an officer of the rank of Dy.

Superintendent of Police, or any other officer duly authorized in that behalf. No progress in the case was made till 1998. The accused was forced

to file another petition u/s 482 of the Cr.P.C. seeking to quash the entire criminal proceedings on account of delay. This petition was admitted by

the High Court on 20.11.1998. The petition came up for hearing before Court on 11.05.2007, when in an affidavit, filed on behalf of the

prosecution, it was disclosed that the Superintendent of Police, Muzaffarpur vide letter dated 27.02.2007 had directed the Dy. Superintendent of

Police to complete investigation. Investigation was started on 28.02.2007 and a fresh chargesheet was filed on 01.05.2007.

11.5 The point, to be noted here is that, what is often trotted as contributory delay on the part of the accused, which is really in one sense taking

recourse to a remedy available in law, did not find favour with the Supreme Court. Taking recourse to a legal remedy by the accused was not

countenanced as delay attributable to the accused. As a matter of fact, a specific submission with respect to the delay being attributable to the

accused was raised by the prosecution in the said case, which is noticed by the Court in paragraph 8 at page 263. The Supreme Court after

noticing the principles laid down by it in the various judgments passed by it including its judgment in the case of Abdul Rehman Antulay Vs. R.S.

Nayak and another etc. etc., , at pages 363 and 364 in paragraphs 24 to 30 observed as follows:

24. It is, therefore, well settled that the right to speedy trial in all criminal persecutions (sic prosecutions) is an inalienable right under Article 21 of

the Constitution. This right is applicable not only to the actual proceedings in court but also includes within its sweep the preceding police

investigations as well. The right to speedy trial extends equally to all criminal prosecutions and is not confined to any particular category of cases. In

every case, where the right to speedy trial is alleged to have been infringed, the court has to perform the balancing act upon taking into

consideration all the attendant circumstances, enumerated above, and determine in each case whether the right to speedy trial has been denied in a

given case.

25. Where the court comes to the conclusion that the right to speedy trial of an accused has been infringed, the charges or the conviction, as the

case may be, may be quashed unless the court feels that having regard to the nature of offence and other relevant circumstances, quashing of

proceedings may not be in the interest of justice. In such a situation, it is open to the court to make an appropriate order as it may deem just and

equitable including fixation of time frame for conclusion of trial.

26. Tested on the touchstone of the broad principles enumerated above, we are convinced that in the present case the appellant''s constitutional

right recognised under Article 21 of the Constitution stands violated.

27. It is manifest from the facts narrated above that in the first instance investigations were conducted by an officer, who had no jurisdiction to do

so and the appellant cannot be accused of delaying the trial merely because he successfully exercised his right to challenge an illegal investigation.

Be that as it may, admittedly the High Court vide its order dated 7-9-1990 had directed the prosecution to complete the investigation within a

period of three months from the date of the said order but nothing happened till 27-2-2007 when, after receipt of notice in the second petition

preferred by the appellant complaining about delay in investigation, the Superintendent of Police, Muzaffarpur directed the Deputy Superintendent

of Police to complete the investigation. It was only thereafter that a fresh chargesheet is stated to have been filed on 1-5-2007.

28. It is also pertinent to note that even till date, learned Counsel for the State is not sure whether a sanction for prosecuting the appellant is

required and if so, whether it has been granted or not.

29. We have no hesitation in holding that at least for the period from 7-12-990 till 28-2-2007 there is no explanation whatsoever for the delay in

investigation. Even the direction issued by the High Court seems to have had no effect on the prosecution and they slept over the matter for almost

seventeen years. Nothing could be pointed out by the State, far from being established to show that the delay in investigation or trial was in any

way attributable to the appellant. The prosecution has failed to show any exceptional circumstance which could possibly be taken into

consideration for condoning a callous and inordinate delay of more than two decades in investigations and the trial. The said delay cannot, in any

way, be said to be arising from any default on the part of the appellant.

30. Thus, on facts in hand, in our opinion, the stated delay clearly violates the constitutional guarantee of a speedy investigation and trial under

Article 21 of the Constitution. We feel that under these circumstances, further continuance of criminal proceedings, pending against the appellant in

the court of the Special Judge, Muzaffarpur, is unwarranted and despite the fact that allegations against him are quite serious, they deserve to be

quashed.

11.6 The two judgments of the Supreme Court cited by the department, i.e., Champalal Punjaji (supra) and Baidnath Prasad (supra) expound no

different principles from the ones referred to hereinabove. As a matter of fact in both judgments, there is reference to decisions of the Supreme

Court which are also referred to in its judgment in Vakil Prasad Singh (supra). What is required to be noted is, in the Champalal Punjaji (supra) the

Supreme Court was hearing an appeal against an order of acquittal passed by the High Court. The Supreme Court in the last paragraph of its

judgment at page 616 in paragraph 6 rejected the plea of the learned Counsel for the accused to dismiss the appeal of the State, on the ground of

delay, broadly; for the following reasons: First, the accused himself was responsible for a fair part of delay. Second, the accused was not able to

show how delay had prejudiced him in the conduct of defence. This case, according to me, is distinguishable on facts.

11.7 The second case, i.e., Baidnath Prasad (supra) is also distinguishable on facts as the Supreme Court categorically noted that the trial in the

case could not commence for a substantial period on account of absence of one or other accused. (See page 468 paragraph 6 of Baidnath Prasad

(supra)). The Court was also cognizant of the fact that the offence with which the accused had been charged was of a serious nature.

12. In the present case, the accused have been appearing in the case since the date when summons were first made returnable on 04.05.1989. The

delay in the instant case is purely on account of callous attitude on the part of the prosecution. It may also be noted that in so far as the aspect of

revenue loss is concerned, the same is subject matter of the proceedings before a Division Bench of this Court. The delay in the instant case has

clearly deprived the accused of their fundamental right to speedy trial under Article 21 of the Constitution of India. The accused No. 2, as noted

hereinabove, is 86 years of age. Accused No. 3 is 48 years of age. The matter is at the pre-charge stage. In view of the long delay, it is quite

obvious that the prosecution will find it quite hard, if not impossible, to secure conviction, given the long gap of time since the prosecution first

commenced.

13. In these circumstances, I am of the opinion that the proceedings pending in the court of learned ACMM, Delhi entitled Sh. P.K. Khera,

Superintendent, Central Excise, Prevention, Delhi v. Eskay Electronics (I) Pvt. Ltd. be quashed. It is ordered accordingly. The writ petition is

allowed. The bail bond furnished by the accused stand cancelled and the security is discharged.

14. In view of my order quashing the proceedings in Crl. M.C. 1832/2008, the department.s petition being Crl. M.C. No. 364/2007 has been

rendered infructuous. It is accordingly disposed of.