
(1976) 04 KAR CK 0002
In the Karnataka High Court

Ahmed Ramlan

APPELLANT

Vs

Gertie Mathias and Others

RESPONDENT

Date of Decision : 08-04-1976

Acts Referred:

Penal Code, 1860 (IPC) — Section 405, 406

Citation : (1977) CriLJ 309

Hon'ble Judges : M.S. Nesargi, J;C. Honniah, J

Bench : Division Bench

Judgement

M.S. Nesargi, J.—These appeals are directed against the judgments dated 25-1-1975 passed by the Chief Judicial Magistrate, South Kanara, Mangalore, in C.C. Nos. 480/70, 479/70, 481/70, 477/70 and 478/70 respectively acquitting the respective respondents who were the accused therein of the offence u/s 406 of the Indian Penal Code.

2. The undisputed facts may be narrated briefly as follows:

There is one tile factory known as Highland tile factory (hereinafter referred to as "the Factory") in Mangalore. The provisions of the Employees' Provident Funds and Family Pension Fund Act, 1952 (hereinafter referred to as "the Act") and the Employees' Provident Funds Scheme 1952 (hereinafter referred to as "the Scheme") apply to the Factory. The respondents deducted Rs. 3,653.50 for the period 1-10-1968 to 31-12-1968, Rs. 3,673.75 for the period 1-1-1969 to 31-3-1969, Rs. 2,925.50 for the period 1-4-1959 to 30-6-1969, Rs. 2,289.75 for the period 1-7-1968 to 30-9-1968 and Rs. 2,985.75 for the period 1-4-1968 to 30-6-1968 out of the wages of the employees of the Factory towards the concerned employees contribution to the Provident Fund as provided under the Act and the Scheme. The aforementioned amounts pertaining to the said periods are the subject-matter of the charges in C.C. Nos. 480/70, 479/70, 481/70, 477/70 and 478/70 respectively. The respondents failed to credit the said sums with the concerned authority as per the provisions of the Act and the Scheme.

3. The prosecution alleged that the respondents having so failed to credit the said sums had committed the offence u/s 406, Indian Penal Code (during the aforestated periods).

4. The respondents contended that though they had deducted the said sums as put forth by the prosecution and failed to credit the sums, the ingredients of Section 406, Indian Penal Code were not satisfied inasmuch as it could not be in law said that they were entrusted with the said sums as contemplated by Section 405, Indian Penal Code.

5. The learned Chief Judicial Magistrate has agreed with the contention of the respondents.

6. We have considered it appropriate to dispose of these appeals by a common judgment as the only question involved is of law and that is common to all these appeals.

7. Sri U.L. Narayana Rao, the learned senior standing counsel for the Central Government pointed out that by Section 9 of the Employees' Provident Funds and Family Pension Fund (Amendment) Act, 1973 an explanation has been incorporated in Section 405, Indian Penal Code and urged that in view of this explanation the point involved is beyond controversy. He also urged that this explanation removed whatever uncertainty there was in the law as it stood before amendment. For this proposition, he relied on the decision in *Khatizabal Mohamed Ibrahim Vs. Controller of Estate Duty, Bombay*, The explanation stated above reads as follows:

A person being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being the force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Section 405, Indian Penal Code runs as follows:

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust.

8. By virtue of the explanation, an employer who commits the acts mentioned in the explanation is deemed to have committed the offence defined in Section 405, Indian Penal Code. This is evidently a penal provision incorporated for the first time from the date of coming into force of the amending Act, evidently in 1973,

The explanation does not at all state that the provision has retrospective effect. What is enunciated in *Khatizabal Mohomed Ibrahim Vs. Controller of Estate Duty, Bombay*, is as follows:

Expression "deemed" is used a great deal in many modern statutes and for many purposes. It is, at times used to give a special glossary or paraphrase to an expression or an artificial construction to a word or phrase. It is at times used to introduce artificial conceptions which are intended to go beyond settled legal principles. It is at times used to remove uncertainty or leave no scope for doubts and debates which may involve refined and ingenious points. At times it is used to give extended or restricted operation to a rule which cannot be given to it if it be read as enacted. This last is of considerable importance when the Legislature lays down a rule the extent and operation of which according to ordinary canons of construction would be confined to property or interest in property of a particular nature or type or class and the intention is that the rule should have wider extent and embrace more than what it states. In such a case the Legislature may well lay down and add that more than what is stated in the rule shall be deemed to be included in the meaning and concept of the words or phrase used in the rule. In such a case the language of the rule notwithstanding the operation and extent of it is widened by the "deeming" provisions.

But in our opinion the argument of Sri Narayana Rao has to fail in view of the above stated reasons.

9. The aforesaid discussion takes us to the consideration of the legal position bereft of the explanation introduced by the amending Act.

9-A. Paragraph 30(1) of the Scheme makes it incumbent on the employer to, in the first instance, pay both the contribution payable by himself and also on behalf of the member employed by him. Paragraph 32(1) of the Scheme provides for recovery of a member's share of contribution by deduction from the wages of the member. The provision particularly relied upon by Sri Narayana Rao is paragraph 32(3) of the Scheme. It reads as follows:

Any sum deducted by an employer or a contractor from the wage of an employee under this Scheme shall be deemed to have been entrusted to him for the purpose of paying the contribution in respect of which it was deducted.

10. The argument of Sri Narayana Rao is that the amount deducted from the wages of an employee belongs to such employee and is held by the employer on behalf of the employee, therefore the employer is entrusted with this amount for being credited on behalf of the employee and hence when an employer fails to credit he commits the offence punishable u/s 406, Indian Penal Code. He further urged that in view of the specific provision in paragraph 32(3) of the Scheme there can be no doubt about the legal position.. He relied on the decision in *Akharbhai Nazarali Vs. Md. Hussain Bhai*, . It is held therein as follows:

The sums deducted for this purpose are held in trust by the employer who has to

discharge the duties imposed by the trust. Shri Chafekar, learned Counsel appearing for the employer-non-applicants argues that though this may be the general position, here the allegation is that the trust was created not by virtue of the mere fact of the deductions or the recoveries, but on the strength of the provision in the Scheme to the effect that the amounts so deducted shall be deemed to be held in trust on behalf of the employees. I fail to see what difference it makes.

It may be that the deduction and retention of the employees' contribution is a trust created by virtue of that very fact, or by virtue of a provision in statute or statutory rule. But even apart from the latter, the mere fact of telling the employees that it is their contribution to the provident fund scheme and then making a deduction or recovery and retaining it, constitutes the offence of criminal breach of trust. This is so obvious that nothing more need be said about it. Then even without invoking the scheme there is a prima facie case against the non-applicants for criminal breach of trust in respect of the contributions deducted from the wages of the employees.

11. It is evident that paragraph 32(3) of the Scheme has not been taken into consideration. We respectfully disagree with the above view.

12. What amounts to entrustment within the meaning of Section 405, Indian Penal Code is laid down by the Supreme Court in the decision in *The State of Gujarat Vs. Jaswantlal Nathalal*, as follows:

The term "entrusted" in Section 405 Indian Penal Code, governs not only the words "with the property" immediately following it but also the words "or with any dominion over the property" occurring thereafter. The expression "entrustment" carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. Further, the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them, A mere transaction of sale cannot amount to entrustment.

13. Under the Act and the Scheme an employee is statutorily made liable to pay his contribution to the Fund. Statutory liability is also cast on the employer to deduct the contribution of an employee from the wages of the employee. Hence once the deduction is made, the employee will have no control over the sum so deducted. He cannot exercise any act or acts of ownership over the sum so deducted. Hence after a particular sum is deducted out of the wages of an employee, the employee no longer remains the owner of the said sum. Therefore, applying the principle of law laid down by the Supreme Court in *The State of Gujarat Vs. Jaswantlal Nathalal*, it follows that an employer in whose possession such sum is cannot be, for the purpose of Section 405, Indian Penal Code, regarded as having been entrusted with the sum. This aspect has been overlooked in *In Re: Rayala Rama Rao*, .

14. The above view is supported by the decision in State of Kerala Vs. Haridas (V.) and Others, wherein the very provisions of the Act and the Scheme have been considered.

15. In Nathmull Poddar Vs. Salil Kumar Chakraborty, it has been held while dealing with the provisions of the Employees' State Insurance Act, 1948, that deduction by principal employer from wages under the said Act does not amount to entrustment within Section 405, Indian Penal Code, though under the said Act it does so amount. We may observe here that the relevant provisions of the said Act are similar to the ones on hand.

16. We do not agree with the contention of Sri Narayana Rao that "entrustment" in paragraph 32(3) of the Scheme is also "entrustment" as contemplated in Section 405 I.P.C. We are of the view that paragraph 32(3) of the Scheme creates a fiction of entrustment for purpose of Section 14 of the Act. The same is the view taken in Ranjit Kumar Chaudhury v. The State 1974 Lab IC 691 (Cal), Therein it is held that paragraph 32(3) of the Scheme merely creates a fiction of entrustment punishable u/s 14 of the Act and it falls short of essential ingredients of offence of criminal breach of trust u/s 406, Indian Penal Code.

17. In view of the foregoing reasons, we dismiss the appeals.