

(1991) 04 CAL CK 0038
In the Calcutta High Court
Case No : Criminal Rev. No. 883 of 1984

Anup Kumar and Another	Vs	APPELLANT
State of West Bengal		RESPONDENT

Date of Decision : 29-04-1991

Acts Referred:

Constitution of India, 1950 — Article 21
Penal Code, 1860 (IPC) — Section 405, 406

Citation : 96 CWN 129

Hon'ble Judges : A.M. Bhattacharjee, J;A.K. Nandi, J

Bench : Division Bench

Advocate : Dillip Kumar Dutta and Prasanta Kumar Mukherjee, for the Appellant;P.K. Roy, for the Respondent

Final Decision : Allowed

Judgement

A.M. Bhattacharjee, J.—We have by now travelled a long distance from the strict concept of "Adversarial Process" of administration of Justice, whereunder a Judge could not see a thing unless shown, or hear a sound unless made, by the parties, or their Counsel and was to act as a neutral observer in the forensic combat and only to declare at the end as to who has won or lost, not that who ought to have won or lost. We do not any longer hesitate to decide a case on a point, even though not articulated by the parties or their Counsel, if, on the materials on record, the same shows its head and stares at the face and appears to be of such material importance as to determine the lis. We do not either hang the accused or bang the prosecution, if a decisive factor irresistibly manifests itself from or on the record, no matter whether the parties or their Counsel did or could urge the same. We have adverted to this as in the case at hand, we have decided to allow the revision, not on the points urged, but on a point not precisely urged by the petitioners. The accused persons at the relevant time were the Directors of Ramjhore Tea Co. which owned the Ramjhore Tea Estate or Tea Garden. We may note that before us and also in the petition before us, some distinction was sought to be made between a Tea Garden and a Tea Estate. We have found none,

and even assuming there can be one it would be a distinction without any difference for our present purpose.

2. A First Information report was lodged and then a charge-sheet was filed against the accused Directors u/s 406, Penal Code on the allegation that the amounts deducted from the wages of the employees of the Tea Garden as their contribution to the Statutory Fund under the Employees Provident & Miscellaneous Provisions Act, were not deposited in the said Fund. On that charge-sheet, the Magistrate took cognizance and issued process against the Directors and two of them have moved this Court in revision against such taking of cognizance and issuance of process.

3. The offence of Criminal Breach of Trust punishable u/s 406 and the succeeding Sections of the Penal Code has been defined in Section 405 of the Code and Explanation I added thereto by an Amendment In 1973 reads as hereunder:-

A person, being an employer, who deducts the employee's 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 in 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.

4. It has been urged that the Company being admittedly the owner of the Tea Garden, it alone can be the employer of the employees of the Garden. The contention must be rejected as unsound. A body corporate, which is the owner of a concern, can legally vest another person or body under it with all the authority to appoint officers and employees and to terminate their employment. A company under its Articles of Association can, and very often does, employ, the Directors, Managing Agent, Secretary or others to make appointments and employ workers. An employer is one who has the right to employ or appoint and dismiss an employee, even though he may not have any right of ownership in the concern or undertaking in which the employee is employed. We are inclined to think that the decisions of this Court in *B.M. Chatterjee Vs. The State of West Bengal and Another*, and in *Bidyut Kumar Seth vs. Satyesh Chandra Bagchi* (1978 Labour & Industrial Cases 1332) go a long way to support the view we take. We would accordingly hold that it cannot be ruled, at any rate at this stage, that the accused-directors could not be the "employer" within the meaning of Explanation I to Section 405 of the Penal Code. We, therefore, decline to intervene on this ground.

5. In this case, however, it has not been disputed that the amounts payable have been deposited, though beyond the period prescribed, but before the complaint and the FIR were lodged. The petitioners have produced before us a series of official Challans supported by affidavit to show that contributions for the months of September, October, November and December, 1979 were deposited on

13-2-80 and that for the month of January, 1980 was deposited on 21-3-80. This, as already indicated, has not been and could not be disputed by the Respondent and therefore, when the complaint was lodged on 8-6-80 there was no longer any amount payable. There was as the petitioners fairly admit in the petition before us failure to deposit in time, but it is urged that there was no longer any failure to deposit when the prosecution was initiated.

6. In Hooghly Docking & Engineering Co. (1980-1 Calcutta High Court Notes 280) a learned Judge of this Court, sitting singly, held that when the entire amount payable was paid up, though beyond the period prescribed, but before the prosecution was launched, such post-payment prosecution was to be quashed. My learned brother Nandi, J., and myself, sitting in Division, have, with respect, dissented from this view in Pranati Textiles vs. State (1989) Criminal Law Journal 1804) and have held that once there was a failure to pay in time, a belated even though pre-prosecution payment, would be no bar to a criminal prosecution and conviction, but the same may be a mitigating circumstance and a factor to be taken into consideration in determining the sentence.

7. We have found no reason to deviate from our view in Pranati Textiles (Supra). But we cannot but take note of the fact that the view in Hooghly Docking & Engineering Co., held the field till 1989 until we took a different view in Pranati Textiles (supra) and the view was that a belated but pre-prosecution payment could not sustain a prosecution for failure to pay. Every person in this State has the obvious right to govern himself and to regulate his acts according to the law as enunciated by this Court, until the same is altered in due course, judicial or legislative. At the relevant period, therefore, the accused could have repelled a criminal prosecution on the strength of the later but pre-prosecution payment on the strength of Hooghly Docking & Engineering Co. (supra). Not only a sentence of imprisonment, but even of fine, if unpaid, would result in deprivation of personal liberty and such deprivation can, under the mandate of Article 21 of the Constitution be effected only according to a procedure which is reasonable, right, fair and just. We have no doubt that it cannot be in any way reasonable, right, just or fair, for us to lay down a law in a particular manner and then to change our view and convict a person for some act which, at the material time and until we have ruled differently, could not according to our view then prevailing warrant a criminal prosecution. We accordingly allow the revision and quash the criminal prosecution and direct all the accused to stand discharged from their bail bonds. Records, with copy of our Judgment, to go down at once.

Amulya Kumar Nandi, J.

I agree.