
(1982) 02 CAL CK 0019
In the Calcutta High Court

Balgopal Goenka

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 02-02-1982

Acts Referred:

Constitution of India, 1950 — Article 20, 226
Criminal Procedure Code, 1973 (CrPC) — Section 482
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 17
Penal Code, 1860 (IPC) — Section 405, 406, 409

Citation : (1983) CriLJ 570 : 86 CWN 540

Hon'ble Judges : N.G. Chaudhuri, J;N.C. Mukherji, J

Bench : Division Bench

Judgement

N.C. Mukherji, J.—This Rule arises on an application u/s 482 of the Code and is for quashing the proceeding being Case No. C/817 dated 30-12-1975 of Hare Street Police Station, Calcutta at the instance of the Regional Provident Fund Commissioner, West Bengal, The facts Of the case may briefly be stated as follows:

2. The petitioner is a Director of M/s. Bharat Overseas Private Limited, The principal business of the said Company was the sole Selling Agency for sale of cement manufactured by Jaipur Udyog Limited. At all material times the petitioner was not in charge of the affairs of the Company, nor responsible for the conduct of the business of the Company, nor was responsible for day to day administration of the business of the Company relating to the Provident Fund. The said Company had a plywood factory known as "Albion plywood" situated at Budge Budge, The said Undertaking was exempted Industry within the meaning of Section 17 of the Employees' Provident Funds and Family Pension Fund Scheme, 1952. The Company agreed to transfer the ownership and possession of the Plywood Manufacturing Undertaking to M/s. Aloke Udyog Vanaspati and Plywood Limited. The said transaction was finalised on 9-2-73. In terms of the agreement it was agreed that during the period from the date of agreement to completion of sale. entire personnel working in the said Albion Plywood shall be

working as employees of the Vendee Company and the Vendee Company would be liable to pay the salaries and other dues. After completion of sale on 9-12-73 the Vendor Company ceased to be employer within the meaning of Section 2(8) (i) of the Employees' Provident Funds Act, 1952 in respect of the employees of Albion Plywood undertaking. Thereafter, the Regional Provident Fund Commissioner by its letters dated 29-10-1973 and 19-2-1974 directed the Vendor Company to show cause why the exemption should not be withdrawn for non-filing of the returns and other reasons. Ultimately, the opposite party by its letter dated 17-9-1974 purported to withdraw with effect from 1-7-1974 the exemption granted under the Provident Funds Act. The Vendor Company by its letter dated 15-11-1973 informed the opposite party No. 3 particulars of the payment made by the Vendor Company. By a notice dated 13-8-1975 opposite party No. 3 directed the Vendor Company to submit returns of Provident Fund for the period ending 30-6-1974. Thereafter, by a letter dated 10-10-1975 the opposite party informed the Vendor Company that the Company had not deposited the provident fund dues in respect of the employees of the said Albion Plywood for the period from July, 1972 to 14-10-1973. By a letter dated 4th September, 1975 the Vendor Company informed opposite party No. 3 that in respect of the past accumulations up to 30th June, 1975 the Trustees of the Bharat Overseas Employees' Provident Fund have already transferred the investment securities aggregating to the value of Rs. 13.72 lakhs" and the balance in their Bank Account of Rs. 22,665.15 deposited in A/c. No. 1 of opposite party No. 3. It was also stated that since the date of transfer there was no trading or industrial activity with the Vendor Company. By a letter dated 6-11-1975 the Vendor Company again reiterated the fact. In spite of the aforesaid communications on 30-12-1975 the opposite party No. 1 filed a letter of complaint dated 23-10-1975 along with a report of Sri J. C. Mazumdar, Provident Fund Inspector, Grade-1, dated 15-10-1975 at the Hare Street Police Station, Calcutta. The said letter and the report was treated as FIR whereupon the Officer-in-Charge of the said Police Station started proceedings being G Case No. 817 dated 30-12-1975. In the said F.I.R four persons including the petitioner were named as accused. The Vendor Company moved an application under Article 226 of the Constitution of India challenging the validity and legality of the notices and the said investigation whereupon a Rule being C.R. No. 410 (W) of 1976 was issued on 19-1-1976. Stay of operation of the impugned notices and of the Criminal case was ordered on condition that the Petitioner-Company would deposit 1.60 lakhs and further amounts by instalments. The company complied with the said direction and paid monthly instalments till March, 1978. In the said Writ proceeding, on behalf of the Regional Provident Fund Commissioner an application dated 3-6-1976 was filed for Vacating the interim order. It is stated that the petitioner has been advised that the F.I.R. discloses no offence and is a gross abuse of process of law and the investigation pursuant thereto is wholly illegal and void ab initio. The petitioner states that Explanation 1 was added to Section 405 of the Penal Code by the Amending Act 40 of 1973 (The Employees' p. F. and Family Pension Fund (Amendment) Act 1973) which received assent of

the President on 6-9-1973 but the said amendment clause came into force on 1-11-1973 as per Notification dated 17-10-1973. As such the period of offence mentioned in the F.I.R., namely, July 72 to 14-10-1973 is entirely outside the applicability of the said amendment. It has been further stated that there was no amendment up to H-10-1-1973 under which non-payment of provident fund contributions could be treated as an offence of criminal breach of trust under Sections 405, 406 and 409 and the said criminal case is clearly violative of the prohibition under Article 20(1) of the Constitution. It is further stated that during the period of the alleged offence as mentioned in the F.I.R., the facts and circumstances mentioned in the F.I.R. did not make out any case of entrustment and the alleged non-fulfilment of obligations under the Provident Funds Act, 1952 did not constitute any offence under Sections 405, 406 or 409 of the Penal Code. It is also stated that prior to 1-11-73 the failure to deposit Provident Fund Contribution and other allied or incidental contributions was only an offence, if any, within the provisions of Provident Funds Act, 1952 subject to the law of Limitation provided for such offence, such failure to deposit as aforesaid could never constitute any offence under the provisions of the Penal Code. The petitioner states that contribution deducted, if any, from wages of employees under Provident Funds Act, 1952 does not amount to an entrustment within the meaning of Section 405 (before amendment) and failure to credit such sum did not make the employer liable u/s 405 of the Penal Code or Section 406 or 409 thereof. It is further stated that the Explanation 1 to Section 405 of the Penal Code does not apply to the period of offence disclosed in the F.I.R. It is also stated that no cognizable offence of any kind is disclosed in the F.I.R. In the facts and circumstances, stated above, it is prayed that the proceeding is liable to be quashed.

3. Mr. S.N. Dey, learned Advocate appearing on behalf of the petitioner, contends that there cannot be any offence u/s 405 of the Indian Penal Code as the Explanation to Section 405 has been added only by amendment Act 40 of 1973. That amendment has come into effect from 1-11-1973. F.I.R. discloses liability of the petitioner up to 14-10-1973. The amendment Act has no retrospective effect and as such the acts alleged to have been committed on 14-10-1973, that is prior to the date of amendment Act, cannot amount to an offence u/s 405 of the Indian Penal Code. In this connection, Mr. Dey first refers to a Bench decision of our Court reported in (1975) CWN 538 Sreenarayan Shroff V. Sambhu prasad Agarwal. In this case, it was held that "in order to constitute legal entrustment within the meaning of Section 405 of the Penal Code, five Ingredients are necessary, the complainant must be the owner of the property alleged to have been entrusted; there must be a transfer of possession; such transfer must be made by somebody who has no right excepting that of a custodian; and such entrustment must be made to a person, not to a Company or a firm," It was further held, "Any sum deducted by an employer from the wages of an employee as contribution to a Provident Fund under the Employees' Provident Funds Scheme, 1952, although deemed to be entrusted to the employer under

paragraph 32 (3) of the Scheme falls short of the essential ingredients of the offence u/s 405/406 of the Penal Code." This judgment was delivered on September 29, 1972. The amendment came on 1-11-1973, Mr. Dey also refers to Article 20(1) of the Constitution and submits that that which was not an offence at a time when the amendment was not in force cannot be an offence after the amendment has come in force. In short, Mr. Dey wants to submit that this amendment has no retrospective operation. Mr. Sanyal, learned Advocate appearing on behalf of the opposite party, contends that explanation of Section 405 has only clarified and the explanation has not added anything new. If the elements of Section 405 I.P.C. are fulfilled, it will be always an offence. It was an offence before the amendment and it will also be an offence after the amendment. The explanation is only by way of clarification. Mr. Sanyal refers to a decision reported in AIR 1961 Madh 37 : 1961 (1) Cri LJ 266 Akharbhai Nazarali v. Hussain Bhai. It was held in this case that "deduction from employees" wages on account of their contribution to Provident Fund and the employer's failure to credit the amount in the fund amounts to Criminal breach of trust and is an offence u/s 406 of the Penal Code." This is a decision of a single Judge and we are not inclined to rely on this decision in preference to a Division Bench Judgment reported in (1975) CWN 538. Mr. Sanyal also refers to a decision reported in Bihta Co-operative Development Cane Marketing Union Ltd., and Another Vs. The Bank of Bihar and Others, , and contends that explanation to a section must be read so as to harmonise that and clear up any ambiguity in the main section and cannot be BO construed as to widen ambit of section. This is generally so, but in the present case this explanation to section 405 is really not an explanation but some addition to the section and that addition has been added by that amendment Act 40 of 1973 which has no retrospective operation. We also do not agree with Mr. Sanyal that before the explanation was added, the allegations made in the P.I.R. amounted to an offence u/s 405 of the Penal Code. We agree with Mr. Dey that it is only after the introduction of the explanation to Section 405 the allegations may amount to an offence u/s 405 and from 1-11-1973. that is. the date of enforcement of the amendment Act.

4. Mr. Dey next contends that it is now necessary to see whether any offence has been committed under the Employees' Provident Funds Act, Even if the allegations made in the F.I.R. amount to an offence then the period of limitation for filing complaints is one year. The liability of the petitioner as stated in the F.I.R. is up to 14-10-1973. The F.I.R. has been filed on 30-12-75, that is much beyond the period of limitation. On the point of limitation, Mr. Dey refers to our unreported decision in C.R. Nos. 2268 to 2282 of 1979 Bal Gopal Goenka v. State of West Bengal and also to our decision reported in (1981) 2 Cal HN 301 Krishna Kumar Dalmia v. State. In the present case also we find that the F.I.R. was filed at a time much beyond the period of limitation. We are, however, conscious of the fact that delay in filing complaints can be condoned by Court on sufficient grounds being shown.

5. The most important aspect of Mr. Dey's argument is that though generally a

Court does not stop an investigation, but in this particular case considering the facts and circumstances, the Court will be within its rights to stop investigation. Mr. Dev in support of his contention first refers to a decision reported in (1945)CWN 191 : 1945 Cri LJ 413 (PC) (The King-Emperor v. Khwaia Nazir Ahmed). This is a pronouncement of the Judicial Committee and it has been held, "The Court may have a right to interfere when no cognizable offence or offence of any kind is disclosed, which would give authority to the police to undertake an investigation." The next case relied on by Mr. Dey has been reported in R.P. Kapur Vs. The State of Punjab, . In this case, it has been laid down that "the inherent power of High Court u/s 561A, Criminal Procedure Code cannot be exercised in regard to matters specifically covered by the other provisions Of the Code. The inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice". Some of the categories of cases where the inherent jurisdiction to quash proceedings can and should be exercised are;- (i) Where it manifestly appears that there is a legal bar against the institution or continuance of the Criminal proceeding in respect of the offence alleged, (ii) where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; (iii) where the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge....

Mr. Dey next relied on a decision reported in M. Sejappa Madimallappa Vs. State of Mysore and Another, . It is a Bench decision of Mysore High Court and it has been held that. "High Court has power u/s 561A in a proper case to stop investigation by police which could never have been made under Criminal Procedure Code. This power is always exercisable where there is a misuse of power by the police or there is the commencement of an investigation without the requisite authority and the High Court considers it necessary to exercise its inherent power to secure the ends of justice." In the case before their Lordships there were allegations against the petitioner an employee of a Co-operative Society, that he had committed an offence of misappropriation. There were also counter allegations by the petitioner that a large sum of money was due to him towards salary and other amounts. The Arbitrator to whom the dispute was referred u/s 71 of the Mysore Cooperative Societies Act found all the questions in favour of petitioner. The appeal preferred by the Society to the Revenue Appellate Tribunal was also dismissed. Thereafter an investigation was started by the police authorities into a complaint made by the Society against the petitioner that he had committed an offence of misappropriation. During the progress of investigation the petition was filed u/s 561A for an order stopping the investigations and forbidding its continuance. Mr. Sanyal contends that the investigation is completely within the jurisdiction of the police authorities and till a chargesheet is submitted and a case is started in criminal court, that court, or

for the matter of that, the higher courts have no jurisdiction to interfere with the investigation. As has been indicated earlier, this is, the accepted position of law. But, as has been pointed out by their Lordships in the decision referred to above, in some cases the High Court has inherent jurisdiction to stop investigation. In the present case, we find that the allegations do not constitute an offence u/s 405 of the penal Code. The allegations may constitute an offence under the Employees' Provident Funds Act. But F.I.R. having been lodged long after the period of limitation, no useful purpose will be served by the police in continuing investigation and ultimately submitting a chargesheet, if any. This being the position, considering the facts and circumstances of this particular case, we are of the opinion that the investigation should be stopped.

6. In the result, the application succeeds. The Rule is made absolute. AH further proceedings in pursuance of the F.I.R. be quashed.

N.G. Chaudhuri, J.

7. I agree.