

(2013) 09 DEL CK 0375

In the Delhi High Court

Case No : Criminal M.C. No. 3038 of 1999

C. Vijaya Kumar and Another

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision : 30-09-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 197, 482
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14
Penal Code, 1860 (IPC) — Section 34, 405, 406, 409

Citation : (2013) 09 DEL CK 0375

Hon'ble Judges : Sunil Gaur, J

Bench : Single Bench

Advocate : Vishwa Bhushan Arya in Criminal M.C. No. 3038/1999 and Party in Person in Criminal M.C. No. 102/2000, for the Appellant; Ravi Nayak, Additional Public Prosecutor for Respondent No. 1-State, Respondent No. 2 in Person in CrI. M.C. No. 3038/1999 And Mr. Vishwa Bhushan, Advocate for Respondent No. 2 in CrI. M.C. No. 102/2000, for the Respondent

Final Decision : Disposed Off

Judgement

Sunil Gaur, J.—In the above captioned first petition, petitioners are the Deputy General Manager (P&A) and the Manager of Badarpur Thermal Power Station, who are accused of misappropriating the contribution of canteen employees of Badarpur Thermal Power Station (hereinafter referred to as B.T.P.S.) towards Provident Fund. Aforesaid petitioners in CrI.M.C. 3038/1999 are seeking quashing of complaint No. 642/1/96 (Annexure-A) and the summoning order of 12th May, 1998 (Annexure-B) vide which they have been summoned as accused for committing the offence u/s 409 of IPC. Petitioners' application in CrI.M.C. 3038/1999 to recall abovesaid summoning order stands dismissed by trial court vide order of 27th September, 1999 whereby petitioners' co-accused-R.D. Gupta was discharged.

2. In the above captioned second petition, preferred by Om Prakash, who is the complainant of aforesaid complaint under Sections 405 /406 /409 /34 of IPC

(Annexure-A), trial court's order of 27th September, 1999 discharging R.D. Gupta is assailed.

3. At the final hearing, with the consent of both the sides, above-captioned two petitions were heard together as the challenge in these two petitions is to the order of 27th September, 1999 (Annexure-B) and so, by this common judgment, both these petitions are being disposed of.

4. The facts as disclosed in the impugned order are as under:-

The complainant Om Prakash has filed the present complaint against the accused persons R.D. Gupta, C. Vijay Kumar and R. Hari Kumar and M/s. Badarpur Thermal Power Station for offences U/s. 405/406/409/34 of IPC alleging that they all being the persons responsible to the company for the conduct of its business, having deducted Provident Fund from the salaries of the canteen employees, which is being run through a Contractor and have never deposited the same with the Provident Fund Commissioner and dishonestly misappropriated the same.

5. At the hearing, it was strenuously contended by learned counsel for petitioners-C. Vijaya Kumar & Others that B.T.P.S. is a Public Utility Service of NTPC owned by Government of India and that before the year 1995, the contract to run the canteen of B.T.P.S. plant used to be given to private contractors by inviting tenders and the canteen contractor-Ram Kumar was called upon to deposit the contribution of Provident Fund of afore-referred canteen employees in the office of Regional Provident Fund Commissioner vide letter of 9th March 1990 but there was no response from the canteen contractor.

6. As per petitioners' counsel, in the afore-noted background, B.T.P.S. retained the amount equivalent to the provident fund contribution of canteen employees from the bills of canteen contractor with a clear understanding that the aforesaid amount would be returned to the canteen contractor on production of "No Dues Certificate" from Provident Fund Commissioner. Learned counsel for petitioners further asserts that despite repeated requests, Provident Fund Commissioner had not allotted a separate Provident Fund Code to canteen contractor to deposit canteen employees' contribution of Provident Fund and so, in order to safeguard the interest of the employees of canteen contractor, the management of B.T.P.S. retained an amount equivalent to the canteen employees' contribution to Provident Fund from the bills of canteen contractor. After the canteen contract of B.T.P.S. was terminated, canteen employees had filed Writ Petition No. 610/1995 seeking their absorption in B.T.P.S. It stands noted in order sheet of 4th July, 2013 that aforesaid Writ Petition stands dismissed and erstwhile canteen employees have not succeeded in appeal against it.

7. It was pointed out by petitioners' counsel that in the aforesaid Writ Petition, direction was sought to Regional Provident Fund Commissioner to initiate action against concerned authorities for violation of Employees Provident Fund Act but no such direction was issued. According to learned counsel for petitioners,

respondent-complainant Om Prakash, a Union Leader, in Crl.M.C. 3038/1999, had failed to get the relief in the abovesaid Writ Petition and aforesaid Om Prakash has filed the instant complaint (Annexure-A) with ulterior motive and with malice as, on account of misconduct, aforesaid Om Prakash is facing enquiry proceedings in which his dismissal from service is contemplated.

8. Alleging abuse of process of the court by abovesaid Om Prakash, it was contended by petitioners' counsel that since petitioner-C. Vijaya Kumar had conducted enquiry against afore-referred Om Prakash and petitioner-R. Hari Kumar had been defending the management in various proceedings against respondent/complainant-Om Prakash, therefore, continuance of proceedings arising out of the complaint in question would demoralize petitioners of Crl.M.C. 3038/1999 and continuance of proceedings in the complaint (Annexure-A) would be futile as petitioner-B.T.P.S. has deposited on 19th August, 1997 the canteen employees' contribution of Provident Fund with Regional Provident Fund Commissioner after they were called upon to do so vide order of 2nd July, 1997 (Annexure-D colly.). Thus, according to learned counsel for petitioners in Crl.M.C. 3038/1999, it is a fit case to quash complaint (Annexure-A) and proceedings arising out of it. To contend so, reliance was placed upon decisions in Provident Fund Inspector, Faridabad Vs. Jaipur Textile, Faridabad and Others, and Employees State Insurance Corporation Vs. S.K. Aggarwal and Others, .

9. Afore-referred Union Leader-Om Prakash is the second respondent in Crl.M.C. 3038/1999, who, not only supports the impugned order, but had submitted during the course of hearing, that the Regional Provident Fund Commissioner vide order of 2nd July, 1997 had held that petitioner-B.T.P.S. has violated the provisions of Provident Fund Act by not depositing the Provident Fund deductions of canteen employees' and so petitioners-accused persons are liable to be prosecuted for commission of the offence of criminal misappropriation.

10. Although plea of lack of sanction u/s 197 of Cr.P.C. or of criminal proceedings in question being barred by Section 14 of the Employees Provident Fund Act, or of canteen employees being not the employees of B.T.P.S. or that non deposit of Provident Fund contribution of canteen employees' does not constitute the offence of criminal misappropriation, was not urged on behalf of petitioners-accused persons but respondent-Om Prakash has placed on record his short written submissions on aforesaid aspects in which reliance has been placed upon decisions in Mohd. Hadi Raja v. State of Bihar AIR 1988 SC 1945 ; Om Prakash Gupta Vs. State of U.P., ; State of Kerala Vs. V. Padmnabhan Nair, ; Maidhan Gupta and Another Vs. The State of U.P. and Another, ; Harihar Prasad Dubey Vs. Tulsi Das Mundhra and Others, ; Akharbhai Nazarali Vs. Md. Hussain Bhai, ; Bhagirath Kanoria and Others Vs. State of M. P., ; The Provident Fund Inspector, Anantapur Vs. The Andhra Co-operative Spinning Mills Ltd. and Others, ; Hari Nath Poddar Vs. The State, ; Jagannath Prasad Jhalani and others Vs. Regional Provident Fund Commissioner (Haryana) and others, ; M/s. Hindustan Times Limited Vs. Union of India and Others, ; C.K. Shah Provident Fund Inspector v.

Natson Manufacturing Co. Pvt. Ltd. & Anr. Guj. LR 419 (1976) ; Ajay Mehra and Anr. v. Durgesh Babu and Ors., 2001 (3) Crimes 155 (SC) ; Mahindra Singh & Ors. v. State of Bihar 2001 (3) Crimes 158 (SC) and Parimal Chandra and Others Vs. Life Insurance Corporation of India and Others, .

11. In the last, it was contended by respondent-complainant Om Prakash, who had chosen to argue these matters in person, that since petitioners-accused had defaulted in paying Provident Fund contribution of canteen employees with Provident Fund Authorities, so proceedings arising out of complaint (Annexure-A) ought to be continued against petitioners-accused persons as well as against their co-accused R.D. Gupta, who had been illegally discharged by trial court vide impugned order of 27th September, 1999 by erroneously holding that abovesaid R.D. Gupta was not working as General Manager, B.T.P.S., during the period in question.

12. Thus, in the above-captioned second petition, prosecution of aforesaid R.D. Gupta as co-accused is sought in the complaint proceedings in question.

13. After having extensively heard both the sides and on perusal of the complaint (Annexure-A), impugned order, written submissions, the material on record and the decisions cited, I find that it would be appropriate to deal with above-captioned second petition first.

14. The operative part of the impugned order of 27th September, 1999 is as under:-

It is not disputed that accused person R.D. Gupta joined the establishment in 1996 whereas the misappropriation relates to earlier period prior to the joining of accused R.D. Gupta as General Manager, BTPS.

It has been argued by the complainant that nonpayment of contribution to provident fund by the employer is a continuing offence as held in Bhagirath Kanoria and Others Vs. State of M. P., , and that being so, the time of posting is of no consequence.

This argument of the complainant suffers from a fallacy and is devoid of any merit.

It is the settled principle of criminal jurisprudence that the offence is committed once i.e. to say offence once committed is committed and the continuity of the offence has been in respect of the period of limitation and not in respect of the persons.

It is not disputed that at the time when the default in payment of PF was made accused R.D. Gupta was not posted at any position in the establishment and that being so, it cannot be said that he is liable to be prosecuted simply because he was served with a notice dated 17.10.96 regarding payment of PF contributions to the Fund and further that he had preferred an appeal against the order dated 2.7.97 of the RPFC as he being the at helm of affairs of the establishment is

under an obligation to protect the interest and defend the establishment.

As far as accused persons-C. Vijaya Kumar and R. Hari Kumar are concerned they being the Managers (IR & W) were responsible for the affairs of the canteen. Accused C. Vijaya Kumar had even issued circular from time to time regarding the canteen and as DGM (P&A) had been responsible for the observance and implementation of all statutory obligations. Accused R. Hari Kumar himself has stated before RPFC on oath that he is connected with the affairs of the canteen and that the canteen is functioning directly under him.

In view of the aforesaid observations, I allow the application of review of the summoning order as regards accused R.D. Gupta and summoning order against him is withdrawn. Accused R.D. Gupta is discharged. And as regards accused persons C. Vijaya Kumar and R. Hari Kumar, the application is dismissed, and they are directed to appear in person.

15. In the above-captioned second petition, it is neither averred nor it was contended by Om Prakash that the finding returned in the impugned order of 27th September, 1999 of R.D. Gupta joining the establishment of B.T.P.S. prior to the year 1996 i.e. during the period in question being not disputed, is factually incorrect. Otherwise also, Om Prakash has not placed on record any material/document to show that R.D. Gupta was in the establishment of B.T.P.S. during the period in question. Since the finding returned in the impugned order of R.D. Gupta of being not in any position in the establishment of B.T.P.S. remains unassailable, therefore, the above-captioned second petition being without substance, is dismissed.

16. However, so far as the above-captioned first petition is concerned, it transpires that the central issue raised is of deposit or non deposit of entire contribution of canteen employees Provident Fund with Provident Fund Authorities. The stand taken on behalf of petitioners-accused is that when they were called upon to deposit the Provident Fund contribution, it was promptly done. In this regard, reliance was placed upon order of 2nd July, 1997 of Regional Provident Fund Commissioner, Delhi to assert that the retained Provident Fund contribution amount was deposited with the Provident Fund Authorities without delay. In this regard, attention of this Court was drawn to letter of 19th August, 1997 by petitioner-R. Hari Kumar to Regional Provident Fund Commissioner disclosing that in pursuance to aforesaid order of 2nd July, 1997, a sum of Rs. 4,67,252/- & Rs. 53,596/- was promptly deposited towards canteen employees' Provident Fund.

17. It is no doubt true that in the order of 2nd July, 1997 of Regional Provident Fund Commissioner (Annexure-D colly.), the retained amount due has not be quantified but in the subsequent order of 6th August, 2004, Assistant Provident Fund Commissioner (placed on record by Employees' Provident Fund Organization), M/s. NTPC Limited, a parent organization of petitioner-B.T.P.S., has been directed to deposit the canteen employees' provident fund contribution

in question after giving a set off of Rs. 5,20,878/- deposited by petitioners-accused and thereafter, the amount due was found to be Rs. 7,54,360/-.

18. Neither during the course of final hearing nor in the written synopsis, it was disclosed by learned counsel for petitioners-accused that the outstanding amount of Rs. 7,54,360/-, as reflected in the order of 6th August, 2004, has been deposited by petitioner-B.T.P.S. or its parent organization-National Thermal Power Corporation. Relevantly, vide interim order of 17th August, 2004 in the above-captioned first petition, petitioners-accused had sought time to file additional documents to show that the entire Provident Fund dues in question stand deposited. However, at the final hearing, learned counsel for petitioners-accused had not drawn attention of this Court to any document to show that the entire Provident Fund due stood deposited.

19. In aforesaid view of this matter, central issue as to whether entire B.T.P.S. canteen employees' provident fund dues have been deposited or not, remains a disputed question of fact, which ought not to be determined by this Court while exercising its inherent powers u/s 482 of Cr.P.C. In the peculiarity of these matters, it is deemed fit to leave the aforesaid issue open to be considered at the appropriate stage of trial. Thus, while not commenting upon merits, above-captioned first petition is disposed of in the aforesaid terms. Above-captioned second petition is dismissed in light of the observations made in the preceding paragraphs of this judgment. However, nothing is observed in the judgment which can be construed as an expression on merits, to avoid prejudice to either side. Both these petitions are accordingly disposed of.