

(2015) 12 KL CK 0010
In the High Court Of Kerala
Case No : Criminal R. P. No. 1691 of 2015

Gopalkrishna Pillai

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 17-12-2015

Acts Referred:

Employees Provident Fund Scheme, 1951 — Para 32(3)
Penal Code, 1860 (IPC) — Section 405, Section 406

Citation : (2016) 2 KHC 338

Hon'ble Judges : Mr. B. Sudheendra Kumar, J.

Bench : Single Bench

Advocate : Koshy George; K. M. Jamaludheen, Advocate, for the Petitioner

Final Decision : Allowed

Judgement

Mr. B. Sudheendra Kumar, J. - The revision petitioner is the accused in CC No 122 of 2013 on the files of the Court of the Judicial Magistrate of First Class, Kayamkulam. The revision petitioner was indicted for the offence under Section 406 IPC.

2. The prosecution allegation is that the revision petitioner, who was the proprietor of Divya Cashew Export Enterprises, Eruva, deducted Rs. 1,43,024/- for the period from March, 2012 to May, 2012 out of the salary of the employees of his firm towards the employees contribution to the Provident Fund of the employees concerned as provided under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred as "the Act") and the Employees' Provident Funds Scheme, 1952 (hereinafter referred as "the Scheme"). However, the said amount was not deposited with the authority concerned within the time stipulated as per the Scheme.

3. The revision petitioner appeared before the Court below in response to the process issued from the Court below and filed CMP No. 182 of 2015 under Section 239 of the Code, praying for discharge. The Court below dismissed the

said petition. Aggrieved by the said order, this revision petition has been filed.

4. Heard both sides.

5. It has been argued by the learned counsel for the revision petitioner that even if the entire allegations of the prosecution are admitted in to, there is no entrustment at all so as to attract the offence under Section 406 IPC and consequently, the prosecution against the revision petitioner cannot be legal and correct.

6. The learned Public Prosecutor, on the other hand, has argued that since the revision petitioner collected the amount from the employees, there was entrustment as provided under Para 32(3) of the Scheme and since the said amount was thereafter not deposited as per the Scheme, there was misappropriation also and consequently, the prosecution under Section 406 IPC is perfectly maintainable.

7. Para 32(1) of the Scheme makes it incumbent upon the employer to, in the first instance, pay both the contribution payable by himself and also on behalf of the member employed by him. Para 32(2) of the Scheme provides for the recovery of a member's share of contribution by deduction from the wages of the member. Para 32(3) of the Scheme provides that any sum deducted by an employer or the contractor from the wages of an employee under the Scheme shall be deemed to have been entrusted with him for the purpose of paying contribution in respect of which it was deducted. It appears from Para 32(3) that there is a deemed entrustment of the amount of the wages of the employee with the employer.

8. Now the question to be considered is as to whether the said entrustment would amount to entrustment within the meaning of Section 405 of IPC. The ingredients to constitute entrustment within the meaning of Section 405 IPC were laid down by the Apex Court in *State of Gujarat v. Jaswantat Nathai* 1968 KHC 588 : AIR 1968 SC 700 : 1968 (2) SCR 408 : 1968 CriLJ 803 as follows:

"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."

9. 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. Therefore, once deduction is made, the employee will have no control over the amount deducted. He cannot exercise any act or acts of ownership over the amount so deducted. Therefore, after a particular sum is deducted out of wages of an employee, the employee ceases to remain the owner of the said sum. For the said reason, the money collected by the employer from the employee to be

deposited in the Provident Fund Account of the employee, cannot be treated as entrustment of money within the meaning of Section 405 IPC.

10. The above view gains support from the decision of this Court in *State of Kerala v. Haridas* 1969 KHC 190 : 1969 KLT 906 : 1969 KLJ 85 : ILR 1969 (1) ker. 217. In *Haridas* (supra), it was held by the Court that Para 32(3) of the Scheme only provides a fiction of entrustment and the said entrustment would not fall within the ambit of criminal breach of trust under Section 405 of IPC. It was held in *Nathmull Poddar v. Salil Kumar Chakraborty* 1971 CriLJ 361 that the deduction made under the provisions of Employees' State Insurance Act, 1948 by the principal employer under the said Act from the wages of the employees would not amount to entrustment within the ambit of Section 405 of IPC. A Division Bench of High Court of Karnataka in *Ahmed Ramlan v. Smt. Gertie Mathias and Others* 1977 CriLJ 309 held that the contribution deducted by the employer from the wages of the employees under the Employees' Provident Fund and the Family Pension Fund Act, 1952 would not amount to entrustment within Section 405 of IPC.

11. The above discussion would make it clear that the entrustment in Para 32(3) of the Scheme is not the 'entrustment' as contemplated under Section 405 of the Code. Para 32(3) of the Scheme only creates a fiction of entrustment punishable under Section 14 of the Act and the said entrustment lacks the ingredients of criminal breach of trust under Section 405 of IPC. This being the legal position, even if there is entrustment within the meaning of Para 32(3) of the Scheme, the said fictional entrustment falls short of essential ingredients of the offence of criminal breach of trust under Section 406 IPC and consequently, no prosecution can be initiated, against the employee under Section 406 IPC, even though it may be good enough for a prosecution under Section 14 of the Act.

12. In this case, it is admitted that the amount collected had been subsequently remitted by the employer. Since the amount collected by the employer from the employees would not amount to entrustment within the meaning of Section 405 of IPC, no purpose would be served in continuing the prosecution against the revision petitioner under Section 406 of the Code. In the said circumstances, it is only just and proper to discharge the revision petitioner, dropping the further proceedings against him.

In the result, this revision petition stands allowed, setting aside the order in CMP No. 182 of 2015 in CC No. 122 of 2013 passed by the Court below and the revision petitioner stands discharged, dropping the further proceedings against him under Section 406 IPC.