
(1985) 08 BOM CK 0004

In the Bombay High Court

Case No : Criminal Revision Application No. 54 of 1985

Hargovind Gangabisan Bajaj

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 05-08-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 473
Penal Code, 1860 (IPC) — Section 406, 409

Citation : (1985) 2 BomCR 759 : (1986) MhLj 395

Hon'ble Judges : S.W. Puranik, J

Bench : Single Bench

Advocate : V.R. Manohar, for the Appellant; H. Ahmad, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

S.W. Puranik, J.—This revision application is directed against the order passed by the Chief Judicial Magistrate, Wardha, in Criminal Case No. 213 of 1981, rejecting the application of the present applicant Accused No. 1 for dropping the proceedings initiated against him as barred by limitation u/s 468 of the Criminal Procedure Code.

2. The Regional Provident Fund Commissioner, Bombay, lodged a First Information Report on 22nd December, 1976 against the present applicant and other co-accused. It was alleged that the applicant accused and other co-accused, in their capacity as Directors of Pulgaon Cotton Mills Ltd., have deducted the amounts from the salaries/wages of the employees towards the contribution to the provident fund, but have defaulted to deposit the same to the Board of Trustees as required under the notification issued by the Central Government from time to time.

3. After the investigation was completed, the charge-sheet was filed before the trial Court on 27-7-1981 u/s 406 of the Indian Penal Code. The applicant accused and other co accused appeared before the trial Court on receipt of the summons.

Even before framing of charges, the applicant and either co-accused persons filed application before the trial Court on 29-11-1983 raising objection on the ground of limitation u/s 468 of the Criminal Procedure Code. It was contended, inter alia, that the charge sheet has been filed for an offence u/s 406 of the Indian Penal Code after almost five years after the first information report was lodged, that the offence u/s 406 of the Indian Penal Code is punishable with a maximum imprisonment of three years, and that the limitation prescribed for taking cognizance is only three years. Under the circumstances, it was contended, that the trial Court could not take cognizance beyond the period of limitation and that the prosecution was liable to be dropped.

4. Even though the application for dropping of the proceedings was filed in November 1983, the prosecution did not take any steps for seeking condonation of delay u/s 473 of the Criminal Procedure Code. It was ultimately on 27th February, 1984 that the prosecution filed an application u/s 473 of the Criminal Procedure Code asking for condonation of delay in presentation of the charge-sheet. The grounds stated for condonation of delay were-(i) that the accused persons reside at various places in India and could not be contacted in time, and (ii) that initially the investigation was with the local police authorities for a period of about four years and from 19th February, 1980, the investigation was taken by the Crime Branch.

5. The learned trial Judge heard Counsel for both the parties and, by his consolidated order passed on 6th March, 1985, rejected the application of the accused in respect of dropping of the proceedings. He also rejected the application filed by the prosecution for condonation of delay as redundant. The reasons given by the trial Judge recorded in paragraph 7 of the said order are that even though the charge-sheet is apparently filed u/s 406 of the Indian Penal Code and is barred by limitation, yet the perusal of the record shows that the accused persons, in their capacity as Directors of the said company, were not only agents of the said company but were also in the position of Trustees and had consequential control and dominion over the alleged amount in respect of provident fund. He, therefore, reasoned that the accused persons, in their capacity as agents and trustees, having failed to perform the obligation of depositing the amount with the Provident Fund Commissioner, have committed offence of criminal breach of trust and are punishable u/s 409 of the Indian Penal Code. There is no bar of limitation for taking cognizance u/s 409 of the Indian Penal Code and, as such, the learned Judge rejected the applications of the accused persons as well as of the prosecution as stated above. The Provident Fund Commissioner or the State have not preferred any revision against the said order of rejection of their application for condonation of delay. The accused No. 1 Hargovind Bajaj has preferred this revision application against the order of refusal to drop the proceedings.

6. Shri V.R. Manohar, Advocate, appeared for the applicant. The non applicant State of Maharashtra is represented by Shri H. Ahmad, A.G.P. On hearing the

contentions of both the Counsel, the question that arises for consideration is as to whether the trial Judge erred in holding that the offence alleged against the applicant-accused falls in the category covered by section 409 of the Indian Penal Code and not u/s 406 of the Indian Penal Code.

7. The learned trial Judge, in paragraph 7 of his order, has based his reasoning on the ruling of the Supreme Court in *Laxmi Bank's* case reported in *Shivnarayan Laxminarayan Joshi and Others Vs. State of Maharashtra*, . The said case arose out of a prosecution against the Directors of the Laxmi Bank, which was a company under the Companies Act. It was contended that the offence of mis-appropriation in respect of the "company amounts" would at best be covered u/s 406 of the Indian Penal Code and not u/s 409 of the Indian Penal Code. Relying upon the decision in the case of *R.K. Dalmia Vs. Delhi Administration*, it was observed that a director of a company is not only an agent but in the position of a trustee also. It was in this view that the Supreme Court held that the criminal breach of trust committed by "an agent" of the company is punishable u/s 409 of the Indian Penal Code.

8. The learned trial Judge only picked up the stray sentence that in the present case the accused persons, being the directors of the Pulgaon Cotton Mills Limited, are not only the agents but also in the position of trustees and, hence, the offence alleged against them relates to an aggravated form of criminal breach of trust punishable u/s 409 of the Indian Penal Code.

9. This reasoning has been assailed by Shri V.R. Manohar, Advocate, for the applicant, on the ground that even though in view of the rulings in *Dalmia's* case, AIR 1968 S.C. 1821 and *Laxmi Bank's* case, AIR 1960 S.C. 439, the directors of a company are trustees and agents of the said company, yet the said proposition would not be applicable to the present case where the alleged default is committed by the directors of the company in violation of the statute regarding the provident fund, inasmuch as in this case, they are not acting as agents either for the workers or for the Provident Fund Commissioner. It was only a failure on their part of a statutory obligation imposed under the Employees' Provident Fund Act.

10. The explanation No. 1, as added by amendment of 1973 to section 405 of the Indian Penal Code, states that :

"A person, being an employer, who deducts the employee's contributes 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 directions of law as aforesaid".

It is, therefore, clear that a default committed by a director of a company in the matter of transferring the deducted wages to the Provident Fund Commissioner

amounts to a criminal breach of trust. Only question is whether the directors of the company are acting in any one of the capacity as stipulated in section 409 of the Indian Penal Code. The offence of criminal breach of trust when committed by any person in his capacity as a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, then the said offence is punishable u/s 409 of the Indian Penal Code, and can be sentenced to imprisonment upto a maximum term of ten years and fine.

11. The applicant director of Pulgaon Cotton Mills Limited is neither a public servant nor is a banker, merchant, factor, broker or attorney. He was also not acting as an agent for the workers. The capacity of an agent cannot be unilateral. It arises out of a bilateral relationship of a principal and an agent. The directors who are the principal officers of the company are not the employers of the workers. It is the company which is the employers. The directors of the company are also not the agents of the workers in the matter of deposition the amounts of provident fund. There is only a statutory duty imposed upon the directors to credit the said amounts deducted by the employer with the provident fund authorities.

12. Under Explanation No. 1 of section 405 of the Indian Penal Code, therefore, it is deemed to have been dishonestly used because of violation of a direction of law. The directors of the company may be acting as trustees or agents quay the company, but they cannot be termed as trustees or agents quay the workers. Since they do not fall in the category of such agents in the present case, the offence of criminal breach of trust would not be covered u/s 409 of the Indian Penal Code, but would be covered u/s 405 read with section 406 of the Indian Penal Code alone.

13. The perusal of the complaint itself shows that according to the Provident Fund Commissioner, the offence was one covered u/s 406 of the Indian Penal Code. Even the application filed on behalf of the prosecution u/s 473 of the Criminal Procedure Code for condonation of delay also states in categorical terms that the charge sheet is filed in respect of offence committed u/s 406 of the Indian Penal Code, and it is only for certain reasons that the investigation could not be completed and the prosecution sought condonation of delay. For all these reasons, I find that the learned trial Judge has erroneously come to the conclusion that the offence is one u/s 409 of the Indian Penal Code and that he could, therefore, take cognizance without any bar of limitation. The offence cannot be any other than the one u/s 406 of the Indian Penal Code. In view of this, the order passed by the learned trial Judge refusing to drop the proceedings and proceeding to take cognizance u/s 409 of the Indian Penal Code is liable to be quashed.

14. It was next contended that, if the offence is one u/s 406 of the Indian Penal Code, then surely the charge-sheet has been filed almost five years after the knowledge of the investigating authority. Even if the date of lodging of the First Information Report, i.e. 22nd December, 1976, is taken as the starting point,

then for an offence u/s 406 of the Indian Penal Code, the investigation ought to have been completed within three years and the charge sheet should have been tendered on 21 December, 1979. In the present case, the charge-sheet has been filed on 7th July, 1981. It must be noted that over three months after the objection on the ground of limitation was filed by the accused, the prosecution had filed their application u/s 473 of the Criminal Procedure Code for condonation of delay on 27-2-1984. Only two grounds were mentioned in the said application, namely, (i) that the accused could not be contacted as they stay at various places and were not easily available, and (ii) that the investigation initially was with the local police authorities at Pulgaon and thereafter on 19-2-1980 it was transferred to the State C.I.D. (Crime Branch).

15. As regards the first ground for condonation of delay, I am afraid that it is not a valid ground for seeking condonation of delay, inasmuch as the registered addresses of the directors of the company are always available with the Provident Fund Commissioner as well as with the Investigating Officer. A period of three years was more than enough for contacting all the parties concerned, to complete the investigation. As regards the second ground for condonation of delay, even this ground has no substance, inasmuch as whether the local police authorities or the crime branch authorities conducts the investigation, they must bear in mind the offence that they were investigating was one u/s 406 of the Indian Penal Code, for which there is a bar to take cognizance after a period of three years. Whichever investigating authority it was, it was their duty to complete the investigation and file the charge-sheet before the expiry of three years. On both these grounds, therefore, the delay was not liable to be condoned. In this connection, it would be useful to reproduce the observation of S.M. Fazal Ali, J., of the Supreme Court in the matter of State of Punjab Vs. Sarwan Singh,

"x x x x x x The object of Criminal Procedure Code in putting a bar of limitation on prosecution was clearly to prevent the parties from filing cases after a long time, as a result of which material evidence may disappear and also to prevent abuse of the process of the Court by filing vexatious and belated prosecutions long after the date of the offence. The object which the statute seeks to subserve is clearly in consonance with the concept of fairness of trial as enshrined in Article 21 of the Constitution. It is, therefore, of the utmost importance that any prosecution whether by the State or a private complainant must abide by the letter of law or take the risk of the prosecution falling on the ground of limitation.

x x x x x x"

16. I am enforced by the Counsel for the applicant that the Pulgaon Cotton Mills Limited was subsequently declared as a sick mill and has been take over the Textile Corporation of India and that the amounts defaulted have been collected from the assets and credited with the Provident Fund Commissioner.

17. In view of the above reasons, the impugned order of the trial Judge is liable

to be quashed and set aside. For the reasons stated above, the offence alleged against the applicant-accused was one u/s 405 read with section 406 of the Indian Penal Code and the charge-sheet has been filed beyond the period of limitation and the delay thereon is not liable to be condoned. As such, the prosecution against the applicant as well as other co accused is liable to be dropped.

18. In the result, therefore, the Criminal Revision Application No. 54 of 1985 is allowed. The impugned order is set aside. It is hereby directed that the prosecution against the applicant as well as the other co-accused is dropped as barred by limitation.