(2004) 09 GAU CK 0012

In the Gauhati High Court

Case No : Criminal Revision No. 156 of 2002

H.K. Kanoi APPELLANT

Vs

Board of Trustees, ATPPF Scheme RESPONDENT

Date of Decision : 27-09-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Employees State Insurance Act, 1948 — Section 2
Negotiable Instruments Act, 1881 (NI) — Section 138, 142
Penal Code, 1860 (IPC) — Section 403, 405

Citation : (2005) 2 GLT 266

Hon'ble Judges : A.H. Saikia, J

Bench : Single Bench

Advocate : D. Das, R.K. Agarwal and M. Talukdar, for the Appellant; N.C. Das, P.C. Deka, B. Begum, A.M. Buzarbaruah and D. Baishya Gogoi, for the Respondent

Judgement

A.H. Saikia, J.—Heard Mr. D. Das, learned Counsel for the Petitioner and also heard Mr. N.C. Das, learned Sr. Counsel assisted by Mr. P.C. Deka, learned Counsel for the Respondent.

2. In this criminal revision, the Petitioner has sought for quashment of the criminal proceedings initiated against him through Case No. 2652?/01 pending before the Court of learned Sub-Divisional Judicial Magistrate (Sadar), Guwahati and related order dated 13.11.2001 passed therein taking cognizance of the offence u/s 138 of the Negotiable Instruments Act, 1881 (for short, ''the Act'') and Sections 403/405 Indian Penal Code against him.

3. The Respondent filed a complaint case before the learned C.J.M. Kamrup which has been registered as Complaint Case No. 2652 /2001 alleging inter-alia that the Petitioner, being a Managing Director, Tonganagaon Tea Company Pvt. Limited and Director, the All India Tea and Trading Co. Ltd. committed an offence u/s 138 of the Act, read with Sections 403/405 Indian Penal Code because the

post dated cheques amounting to Rs. 20,70,000/- issued by the Petitioner had been dishonoured by the Bank and despite the statutory Notice dated 5.9.2001 served upon the Petitioner, no necessary steps has been taken in this regard by the Petitioner and thereby he dishonestly misappropriated the said amount and in this process he had committed criminal breach of trust.

4. Seeking quashment of the impugned criminal proceeding, Mr. D. Das, learned Counsel for the Petitioner has advanced three fold arguments. Those according to him, are as follows:

1. The impugned complaint was filed by the Respondent beyond the statutory time frame prescribed under provisos (b) and (c) of Section 138 of the Act.

2. The ingredients of Sections 403/405 Indian Penal Code were found to be totally absent in the allegations made in the complaint petition and;

3. The allegations made in the complaint petition is governed by the provisions of the Assam Tea Plantations Provident Fund (and Pension Fund) (and Deposit Link Insurance Fund) Scheme Act, 1955 (for short ''the Provident Fund Act'') for which the Respondent has already approached the competent forum for redressal of their grievances made in the impugned criminal proceedings.

5. Supporting the initiation of the criminal proceedings, Mr. N.C. Das, learned Sr. Counsel has submitted that since the cheques issued by the Petitioner were dishonoured by the Bank for insufficient fund in the respective Bank Account and on failure to take necessary steps after receiving the Notice issued upon them by the Respondent on 5.9.01, the impugned criminal proceeding has been initiated against the Petitioner and the learned Magistrate on being satisfied prima-facie took cognizance of the offence above mentioned and accordingly process was issued vide order dated 13.11.2001 and Petitioner has failed to make out a prima-facie case in the instant revision petition calling for interference u/s 482 Code of Criminal Procedure for quashement of the same.

6. Before delving upon the respective arguments put forward on behalf of the rival parties, it would be apt and necessary to notice the relevant facts essential for determination of the issue in hand. The Petitioner issued post dated cheques in favour of the Respondent being the amount payable against the arrears of accumulated Provident Fund contribution as well as current Provident Fund Contribution for the period from April, 1999 to December, 1999 in respect of Tonganagaon Tea Estate appended as Document-3 to the complaint petition. But those cheques issued by the Petitioner were dishonoured by the drawee Bank on account of insufficient fund therein. When those cheques were dishonoured, the Respondent issued Notice to the Petitioner on 5.9.01 requesting to deposit the amount so dishonoured along with 15% statutory interest on account of delayed deposit of Provident Fund Contributions within fifteen days from the issue of the letter failing which legal action would be resorted against the Petitioner. As the Petitioner failed to comply with the request as well as direction made in the Notice dated 5.9.01, the Respondent initiated the impugned complaint

proceeding against the Petitioner under the provisions of law mentioned herein above.

7. For the sake of convenience, unamended Section 138 of the Act, being applicable in the instant case and Sections 403/405 of the Indian Penal Code are quoted herein below:

138. Dishonour of cheque for insufficiency, etc. of funds in the account:

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to Anr. person from put of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that Bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to one year, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless:

a) The cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

b) The payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

c) The drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice. Explanation-For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability.

403. Dishonest misappropriation of property-Whoever dishonestly misappropriates or converts to his own use any moveable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

405. Criminal breach of truest: Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly, misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other

person so to do, commits "criminal breach of truest."

Explanation (1)-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 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.

Explanation (2): A person being an employer, who deducts the employees'' contribution from the wages payable to the employee for credit to the Employees'' State Insurance Fund held and administered by the Employees'' State Insurance Corporation established under the Employees'' State Insurance Act, 1948 (34 of 1948) 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 Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

8. I have carefully perused the above-mentioned complaint petition with all the annexures appended thereto which has been placed on record by way of annexure accompanying this criminal revision petition. On meticulous scanning of the same, and on perusal of the abovementioned provisions of law, it appears that Documents-3 annexed to the complaint petition, being notice dated 5.9.01, contained only the list of dishonoured cheques with the respective dates of issue last date being shown as 25.6.01, but the contentions of the said notice do not reflect any date as to when the Respondent received the dishonoured cheques and on receipt of such information what steps were being taken in compliance of the above provision of Section 138 of the Act. Since no such date is available on the record, this Court has no hesitation to hold that the Notice dated 5.9.01, being the basis of initiation of a criminal case u/s 138 of the Act, had been issued much after the expiry of the fifteen days period as fixed by the statute in Section 138 of the Act.

9. Now, coming to the allegations of dishonest and criminal breach of trust levelled against the Petitioner under Sections 403/405 Indian Penal Code respectively, made in the complaint petition, this Court, after going carefully through the averments made in the complaint petition, finds no such specific allegations to attract the ingredients of those sections into the present case against the Petitioner. In paragraph 16 of the complaint petition the Respondent has stated as under:

That the complainant states that the Accused person not only committed an offence punishable u/s 138 of the Negotiable Instruments Act, 1881, but also they have committed an offence u/s 403 of the Indian Penal Code for misappropriation of the Provident Fund contributions collected from the employees and workers working in their different Tea Estates and also at the same time, committed an offence u/s 405 of the India Penal Code for Criminal breach of trust. The accused persons are chronic defaulters in respect of payment of Provident Fund contributions and they are utilising the Provident Fund contributions, which they have deducted from the salary paid to the employees and workers working in their different Tea Estates.

10. From the conjoint reading of the contentions made in paragraph 16 as well as the provisions of Sections 403/405 Indian Penal Code, I am of the view that the basic ingredients to rope in the Petitioner under those sections are not available.

11. At this stage, Mr. D. Das, learned Counsel for the Petitioner, has contended that since the complaint has been filed against the Director, the impugned criminal proceedings cannot be permitted to proceed against the Director as he is not being the employer responsible for non deposit of the contribution of the Provident Fund as alleged. To substantiate his submission, he has relied upon a decision of the Apex Court in a case of Employees State Insurance Corporation Vs. S.K. Aggarwal and Others, which has been exclusively relied upon by the Patna High Court in a case of Gopta B.P. and Others Vs. State of Bihar, wherein the Apex Court categorically held that in view of the definition of ''employer'' u/s 2 of the Employees'' State Insurance Act, 1948 and Explanation 2 to Section 405 Indian Penal Code, the expression employer did not include the Director. Mr. Das has further submitted that since the Respondent has taken legal recourse against the Petitioner projecting him as the Director in the instant proceeding and applying the ratio of S.K. Agarwal''s case (supra), the impugned criminal proceeding cannot continue and as such initiation of the same against the Petitioner has resulted in the abuse of the process of the Court. This Court finds enough force in the submissions of the learned Counsel representing the Petitioner.

12. Having carefully gone through the above cited cases, and also upon extensive hearing the learned Counsel for the rival parties, this Court is of the view that the Respondent has failed to take appropriate action in terms of provision of section (b) and (c) of Section 138 of the Act for which no cognizance can be taken by any Court u/s 142 of the Act which provides as under:

Cognizance of offences: Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974):

a) No court shall take cognizance of any offence punishable u/s 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

b) Such complaint is made within one month of the date on which the cause-of-action arises under Clause (c) of the proviso to Section 138.

It appears from the records that on the basis of the complaint filed on 22.10.01, summons were issued on 13.11.01 by the learned Magistrate to the Petitioner finding a prima facie case under the relevant provisions of law abovereferred. But amazingly, the complaint did not disclose the date of cause of action to take cognizance u/s 142(b) of the Act.

13. Since the impugned criminal proceedings has been precisely instituted for violation of Section 138 of the Act, criminal proceedings u/s 403 as well as 405 Indian Penal Code cannot be sustained. The criminal action against the Petitioner, being the Director of the concerned Company, is also an abuse of the process of the Court. That apart, from a bare perusal of records, it appears that no specific case has been made out against the Petitioner under Sections 403/405 Indian Penal Code.

14. For the foregoing reasons, discussions and observations, this Court is of the view that the Petitioner has made out a prima-facie case for quashment of the criminal proceeding. Accordingly, this criminal proceeding is hereby quashed.

15. In the result, this criminal revision succeeds and stands allowed.

