(2014) 08 KL CK 0065

In the High Court Of Kerala

Case No : Crl. M.C. Nos. 1208 of 2012, 2022 and 2039 of 2013 and W.P. (C) No. 5314 of 2012

Mathews Jose APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 18-08-2014

Acts Referred:

Constitution of India, 1950 — Article 20(3), 21
Criminal Procedure Code, 1973 (CrPC) — Section 300
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 13, 14A, 14AC, 17, 6
Penal Code, 1860 (IPC) — Section 193, 196, 228, 406, 420

Citation : (2014) 08 KL CK 0065

Hon'ble Judges : A. Hariprasad, J

Bench : Single Bench

Advocate : V.B. Hari Narayanan, Advocate for the Appellant; S. Gopakumaran Nair, (Senior Advocate) and A. Rajasimhan, Standing Counsel and N. Suresh, Public Prosecutor, Advocate for the Respondent

Judgement

A. Hariprasad, J.—Petitioner in W.P.(C) No. 5314 of 2012 and Crl. M.C. No. 1208 of 2012 is the same. He is the 1st petitioner in Crl. M.C. Nos. 2022 of 2013 and 2039 of 2013. 2nd petitioner in the above said two Crl. M.Cs. is the wife of the 1st petitioner.

2. As common questions arise in all these cases, all of them are heard together and disposed by this common order. Crl. M.C. No. 2039 of 2013 is taken as the leading case. Documents are referred to as in that petition.

3. Heard the learned counsel for the petitioners and the learned counsel for the contesting respondent, viz., the Enforcement Officer, Employees'' Provident Fund Organization.

4. Facts, in brief, relevant for our purpose, are as follows: 1st petitioner is the Managing Director of a private limited company and the 2nd petitioner is the

Director of the said company. The company is covered under the provisions of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 (in short, "the Act") and the Scheme having allotted Code No. KR/24550. The company started operations in Infopark, Kochi and Thrissur by engaging staff members. Due to certain unforeseen reasons, the company suffered substantial loss. On account of the financial difficulties faced by the company, contribution due to the provident fund account remained unpaid for a certain period. Annexure-A1 is the demand notice issued by the Regional Provident Fund Commissioner under the Act demanding an amount of Rs. 12,10,746/- for a period from September, 2009 toto July, 2010. He has invoked his power under Section 7A of the Act, which reads as follows:

"Determination of moneys due from employers.- (1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner, or any Assistant Provident Fund Commissioner may, by order,-

(a) in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and

(b) determine the amount due from any employer under any provision of this Act, the Scheme or the Pension Scheme or the Insurance Scheme, as the case may be, and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary.

(2) The officer conducting the inquiry under subsection (1) shall, for the purposes of such inquiry, have the same powers as are vested in a court under the Code of Civil Procedure, 1908(5 of 1908), for trying a suit in respect of the following matters, namely:-

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses,

and any such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code (45 of 1860).

(3) No order shall be made under sub-section (1), unless the employer concerned is given a reasonable opportunity of representing his case. (3A) Where the employer, employee or any other person required to attend the inquiry under subsection (1) fails to attend such inquiry without assigning any valid reason or fails to produce any document or to file any report or return when called upon to do so, the officer conducting the inquiry may decide the applicability of the Act or determine the amount due from any employer, as the case may be, on the basis of the evidence adduced during such inquiry and other documents available on

record.

(4) Where an order under sub-section (1) is passed against an employer ex parte, he may, within three months from the date of communication of such order, apply to the officer for setting aside such order and if he satisfies the officer that the show-cause notice was not duly served or that he was prevented by any sufficient cause from appearing when the inquiry was held, the officer shall make an order setting aside his earlier order and shall appoint a date for proceeding with the inquiry;

Provided that no such order shall be set aside merely on the ground that there has been an irregularity in the service of the show-cause notice if the officer is satisfied that the employer had notice of the date of hearing and had sufficient time to appear before the officer.

Explanation.- Where an appeal has been preferred under this Act against an order passed ex parte and such appeal has been disposed of otherwise than on the ground that the appellant has withdrawn the appeal, no application shall lie under this sub-section for setting aside the ex parte order.

(5) No order passed under this section shall be set aside on any application under sub-section (4) unless notice thereof has been served on the opposite party."

On receiving the notice, the petitioner filed writ petition seeking the following relief''s:

"i) To issue a writ of certiorari or any other appropriate writ, order or direction to quash Ext. P4 since the same is issued by the 1st respondent without jurisdiction or authority.

ii) To declare that the conduct on the part of the 1st respondent in retaining the passport belonging to the petitioner is illegal and without authority in so far as the same will amount to curtailing his freedom of movement guaranteed under Article 21 of the Constitution of India.

iii) To issue a writ of mandamus or any other appropriate writ, order or direction directing the respondents to grant installment facility to clear the outstanding dues.

iv) To declare that the 1st respondent has no authority to issue a warrant of arrest against the employer for recovery of amounts due under the Act.

v) To issue a writ of mandamus or any other appropriate writ, order or direction directing the respondents not to initiate any coercive proceedings including arrest and detention of the petitioner for non-payment of amount covered by Ext. P1.

vi) To issue a writ of mandamus or any other appropriate writ, order or direction directing the 1st respondent to return the passport bearing No.: J 5794678 and Cheque No. 059957 dated 1-3-2012 to the petitioner And

vii) To pass such other orders as are deemed fit and necessary in the facts and circumstances of the case."

In that matter, a learned Single Judge of this Court passed an order on 02.03.2012, which reads as follows:

"Admit. Sri. A. Rajasimhan, learned standing counsel takes notice for the respondents. Heard the learned counsel appearing on both sides. On going through the pleadings and after hearing the submissions made at the Bar by the learned counsel on either side, I am prima facie satisfied that the first respondent erred in directing the petitioner to surrender his passport, even assuming that the petitioner had voluntarily offered to surrender his passport. That apart, a learned single Judge of the Andhra Pradesh High Court has in D.R. Venkatesh Vs. The Regional Provident Fund Commissioner, Employees provident fund office and The Assistant Provident Fund Commissioner Recovery, Sub-Accounts office, observed that power to arrest the employer may not be available to be exercised until and unless the power to attach and sell the immovable property belonging to the employer is exhausted. In the instant case, Ext. P4 proceedings does not show that the property belonging to the petitioner could not have been attached and sold.

In such circumstances, there will be an interim order staying the operation and implementation of the warrant of arrest dated 15.2.2012 issued by the first respondent acting either as the Assistant Provident Fund Commissioner or as the Recovery Officer and also all further proceedings pursuant to Ext. P4 proceedings dated 1.3.2012. The first respondent shall forthwith return the petitioner''s passport, if he has surrendered the same.

Hand over to both sides on usual terms."

It is the grievance of the petitioners that the Commissioner under the Act without exhausting the remedy of attachment and sale of property belonging to the company, issued a warrant of arrest against the 1st petitioner under Section 8B of the Act. Section 8B of the Act reads as follows:

"Issue of certificate to the Recovery Officer.-(1) Where any amount is in arrear under section 8, the authorised officer may issue, to the Recovery Officer, a certificate under his signature specifying the amount of arrears and the Recovery Officer, on receipt of such certificate, shall proceed to recover the amount specified therein from the establishment or, as the case may be, the employer by one or more of the modes mentioned below:

(a) attachment and sale of the movable or immovable property of the establishment or, as the case may be, the employer;

(b) arrest of the employer and his detention in prison;

(c) appointing a receiver for the management of the movable or immovable properties of the establishment or, as the case may be, the employer:

Provided that the attachment and sale of any property under this section shall first be effected against the properties of the establishment and where such attachment and sale is insufficient for recovering the whole of the amount of arrears specified in the certificate, the Recovery Officer may take such proceedings against the property of the employer for recovery of the whole or any part of such arrears.

(2) The authorised officer may issue a certificate under sub-section (1), notwithstanding that proceedings for recovery of the arrears by any other mode have been taken."

On a careful reading of the provision, it becomes clear that the attachment and sale of the property under the Section shall first be effected against the properties of the establishment before taking recourse to arrest of the employer and his detention in prison. Learned Single Judge while passing the order dated 02.03.2012 referred to the above, took note of a decision in D.R. Venkatesh Vs. The Regional Provident Fund Commissioner, Employees provident fund office and The Assistant Provident Fund Commissioner Recovery, Sub-Accounts office, . It is the contention of the petitioners that the Commissioner under the Act has no authority to issue a warrant of arrest against the 1st petitioner and to detain his passport. It is also seen that the authorities under the Act preferred a complaint before the Police, which resulted in registration of Crime No. 375 of 2012 of Koratty Police Station under Sections 406 and 420 of the Indian Penal Code (in short, "IPC"). Learned Public Prosecutor submitted that after investigation, a final report was filed by the Police stating that the Assistant Provident Fund Commissioner, Kochi is proceeding under the provisions of the Act and, therefore, the prosecution by Police was not required in that case. With that observation, a negative final report was filed by the Police. On a perusal of Section 14AC of the Act, it can be seen that the Police has no authority to register a crime for the offence falling under Section 14A of the Act. Sections 14A and 14AC are extracted hereunder for clarity:

"14A. Offences by companies.-(1) If the person committing an offence under this Act, the Scheme or the Pension Scheme or the Insurance Scheme is a company, every person, who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this subsection shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under the Act, the Scheme or the Pension Scheme or the Insurance Scheme has been committed by a company and it is proved that the offence has been

committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director or manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.- For the purposes of this section,-

(a) "company'' means any body corporate and includes a firm and other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

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14AC. Cognizance and trial of offences.- (1) No court shall take cognizance of any offence punishable under this Act, the Scheme or the Pension Scheme or the Insurance Scheme except on a report in writing of the facts constituting such offence made with the previous sanction of the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf, by an Inspector appointed under section 13.

(2) No court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act or Scheme or the Pension Scheme or the Insurance Scheme."

5. Reckoning the above facts, it is evident that registration of the crime alleging offences under Sections 406 and 420 IPC is a misconceived action and legally unsustainable. However, the Police has closed the case and, therefore, no relief need be granted in Crl. M.C. No. 1208 of 2012.

6. Regarding Crl. M.C. Nos. 2022 and 2039 of 2013, it is submitted by the learned counsel for the petitioners that the prosecution is not legally sustainable since the Police after investigation filed a final report finding that no offence was made out against the 1st petitioner. I am unable to agree with the contention for the following reasons: Firstly, since the case was registered by the Police alleging only offences under Sections 406 and 420 IPC as none of the provisions of the Act can be invoked by the Police. Hence, it cannot be stated that the prosecution launched by the Police is a bar to proceed with a complaint for an offence under the Act. The next reason is that what is prohibited under Section 300 of the Code of Criminal Procedure (in short, "Cr.P.C.") is only a subsequent trial of a person for the same offence, if he had been tried once and the trial ended in conviction or acquittal. Here, the Police case reached only a stage of filing a final report, which is a pre-trial stage. Therefore, neither the benefit of Section 300 Cr.P.C. nor the protection under Article 20(3) of the Constitution of India is available to the petitioners.

7. Learned counsel for the petitioners submitted that in Annexure-A6 notice only the 1st petitioner is shown as the person responsible for the conduct of the

business of the establishment. In fact, the notice was issued only to the 1st petitioner/2nd accused. In the complaint (Annexure-A8), the name of the 2nd petitioner is also added without any legal justification. My attention is drawn to paragraph 3 of the complaint, wherein it is stated that the 2nd accused (1st petitioner) was the person in charge of the said establishment and was responsible to it for the conduct of business. Section 14A of the Act shows that the person, who, at the time the offence was committed, was in charge and was responsible to the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence under the Act. In the absence of any specific averment that the 2nd petitioner (3rd accused) was also a person in charge of the affairs of the company and responsible to the company, I am of the view that the prosecution against the 2nd petitioner in both the cases, are legally unsustainable.

8. Learned counsel for the petitioners submitted that there are altogether eight prosecutions, of which, two only are under challenge herein. It is also submitted that prayer No. (iii) in the writ petition is for granting installment facility to clear off the outstanding dues. According to the learned counsel for the petitioners, the dues originally was about Rs. 10,00,000/-, out of which Rs. 4,00,000/- was paid as per the directions in the order dated 24.04.2012 passed by this Court in Crl. M.C. No. 1208 of 2012. Fact remains that still there is arrears of more than Rs. 6,00,000/-. Learned counsel for the contesting respondent submitted that in spite of giving an opportunity to the petitioners, they did not pay off the entire liability. Considering the fact that the company is closed down due to unforeseen reasons, learned counsel for the petitioners requests for three months time to clear off the entire arrears. Reckoning the entire facts and circumstances, the following directions are issued:

Crl. M.C. No. 1208 of 2012 is disposed of finding that as the prosecution in Crime No. 375 of 2012 of Koratty Police Station has come to an end by filing a negative report. The complaints against the 2nd petitioner in C.C. Nos. 7117 and 7118 of 2012 are quashed for want of essential averments to attract any offence against her. 1st petitioner shall pay the entire contribution payable under Section 6 of the Act, which is to be determined with reference to Section 17 of the Act, in three equal instalments within a period of three months from today. If the 1st petitioner makes default in payment of one installment, the prosecution shall be continued against him. In the said facts and circumstances, the prosecution against the 1st petitioner in C.C. Nos. 7117, 7118, 7119, 7120, 7121, 7122, 7123 and 7124 of 2012 on the file of Judicial First Class Magistrate Court, Chalakkudy shall be kept in abeyance for a period of three months.

All pending interlocutory applications will stand dismissed.

