

(1995) 09 CAL CK 0037
In the Calcutta High Court
Case No : Criminal Revn. No. 2219 of 1993

Niranjan Dey

APPELLANT

Vs

The Regional Provident Fund Commissioner and Others

RESPONDENT

Date of Decision : 22-09-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 468, 472, 482
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14(1A),
14(2), 14A(1), 14AA, 14AAC

Citation : (1996) CriLJ 1424

Hon'ble Judges : R.P. Gupta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

R.P. Gupta, J.—This petition u/s 482 Cr.P.C. has been filed by the petitioner Niranjan De for quashing of the prosecution filed against him by the Regional Provident Fund Commissioner for violation of various provisions of Employees Provident Fund and miscellaneous Provisions Act, 1952, (hereinafter called, the Act) and Scheme framed thereunder, known as Employees Provident Fund Scheme, 1952, (hereinafter called the Scheme, and thus having committed offences punishable u/s 14(1A), 14(2), 14A(1), and 14AA of the Act. The petitioner is Managing Director of a company, called Messrs. Favourite Small Investment Ltd., to which the provisions of the Act and the Scheme were applicable. The prosecution was started by a complaint filed by Provident Fund Inspector, West Bengal with the previous sanction of the Regional Provident Commissioner as required u/s 14AAC of the Act for failure of the company to pay the employees' share as well as employers' contribution to the provident fund for the month of September, 1988 as per requirement of the Act and the Scheme and also for failure to pay the administrative charges for the same month and, thus, contravening the various provisions of the Act and the Scheme and having also failed to submit return for the same month and, thus, contravened the provisions of Para 38 (2) of the Act read with Section 14(2) of the Act. The

amount of the alleged default was as under for this month:-

- i) Employees" share of PF contribution -Rs. 242119/-
- ii) Employees" share of PF contribution - Rs. 242119/-
- iii) Employees" share of PF contribution -Rs. 39499/-
- iv) Employees" share of PF contribution - Rs. 39499/-
- v) Administrative charges - Rs. 23032/-.

2. It had been urged in the complaint that Niranjan De was during the relevant period, in-charge of the Establishment and was responsible to it for the conduct of its business and so was liable to be punished as an accused. The accused were summoned on this complaint to stand trial for the alleged offences by Order, dt. 14-1-94 of the Metropolitan Magistrate, 6th Court, Calcutta.

3. In the present petition u/s 482 Cr.P.C. Niranjan De urges that during the relevant period, that is September, 1988 or thereafter, during the period when the contributions of any type or administrative charges for the month of September, 1988 were to be deposited with the Provident Fund Commissioner in the relevant account by the Company, the Board of Directors did not have any control over the affairs of the company or its finances. The management of the company had been taken over by special officers under the orders of the High Court. It is asserted that by order, dt. 8th June, 1987 passed by this High Court in company petition No. 275 of 1987, the management of the company was taken over by special officer appointed by this Court. Then by Order, dt. 19th July, 1988, in appeal, the Board of Directors of the company were superseded and the special officer appointed by this Court was invested with the powers of the Board in the same company petition. The High Court observed on 27th July, 1990;

"It is on record that provident fund dues of the company could not be deposited since 1988. Such a default in deposit cannot be attributed to Board of Directors of the company in view of the fact that the company was in the control and management of joint special officers appointed by this court since June 1987." It was only by Order, dt. 5th July, 1990 in appeal No. 4988 that the special officers were discharged by the Court. Another point taken is that there was no sanction recorded by the concerned authority u/s 14AAC of the Act and no proper mind was applied for filing of the complaint or for giving sanction. It is urged that in this circumstances, the prosecution of Niranjan De is without basis and discloses no offence against him and is also without proper sanction.

4. Both sides have made their submissions. The reliance of the Id. Counsel for petitioner accused on copies of the order of this Court passed in company matters to show that in September, 1988, special officers were in control of the management of the company and even thereafter till 27th July, 1990, the relevant order on 19th July, 1988 is by a Division Bench of this Court. It shows

that the earlier appointed special officer having expressed his unwillingness to continue as special officer of the company was discharged from his duties as special officer. It was further directed; "Having regard to the nature of the duties and responsibilities to be shouldered by the special officers, we appoint Mr. Amal Dutta, a retired inspector-general of police as one of the special officers. He will be assisted by Mr. A. Mitra who had already been appointed as one of the special officers.-. Now, the Board has been superseded by the Court of the first instance, the special officers are invested with the powers of the Board. One relevant portion of order of the Division Bench dt. 25th July, 1990, is as under;

"By consent of parties, the appeal is allowed in the following terms" :-

1) "The order under appeal is set aside.

2) The special officers as well as the committee of management appointed by this Court are hereby discharged, the discharge of the special officers is, however, subject to their submitting audited account within three months from the date hereof unless the said time limit is extended by this Court".

"It may be recorded the company had been under management of the special officers who have not been in a position to run its regular business. It is in the best interest of all concerned that it goes back into the business, if possible and permissible. This could be done if the management is entrusted to persons conversant with the business."

5. Another order to which my notice has been drawn and which was passed by company on 27th July, 1990, in company matters No. 275 of 1987. Pertaining to this company was to give certain directions for the management of the company and, further it was recorded as under;

"It is on record that the provident fund of the company could not be deposited since 1988, such a default in deposit cannot be attributed to the Board of Directors of the company in view of the fact that the company was under the control and management of joint special officers appointed by this Court since June, 1987.

Accordingly, after hearing the submissions of the Id. advocates for the company and also the Id. advocate of the Provident Fund Commissioner, order is passed directing that the company will pay the shares of the provident fund dues instalments of 50 per cent of one month's contribution along with each current month's contribution.

6. The Counsel for petitioner has urged that since the orders of the High Court in company matters were such as barred the Board of Directors from participating in the management of the company during the period when liability to pay the various contributions under the Act and the Scheme arose for the month of September, 1988, they could not be saddled with criminal liability for non-compliance. They could not handle the finances of the company. Only the special officers could do so.

7. As against this, the contention of the Id. Counsel for the Provident Fund Commissioner i.e. on behalf of the complainant-opposite party, is that the proceedings should not be quashed merely on production of some of the orders of a Court, as the exact nature of the orders is not clear and the Provident Fund Commissioner was not party to those proceedings. The order of June 1987, has not been produced. It is urged that the matter could be raised before the trial Magistrate by the accused persons so that the prosecution could also get the opportunity to meet the same by adducing proper rebuttal. The prosecution Counsel has relied upon a Supreme Court pronouncement cited at Smt. Chand Dhawan Vs. Jawahar Lal and others, " titled "Smt. Chand Dhawan v. Jawaharlal and others". Their Lordships of the Supreme Court observed that the High Court can exercise its inherent jurisdiction of quashing a Court. Only if allegations made in the complaint do not constitute an offence or that the exercise of the power is necessary either to prevent the abuse of the process of the Court or otherwise to secure ends of justice.

No inflexible guidelines or rigid formula can be set up and it depends upon the facts and circumstances of each case whether such power should be exercised. When the allegations in the complaint prima facie constitute the offence against any or all of the accused, in the absence of material on record to show that the continuance of the proceedings would be abuse of the process of Court or would defeat the ends of justice, the High Court would not be justified in quashing the complaint.

8. It is asserted that the complaint makes out clear allegations against the petitioner for violation of provisions of the Act and the Scheme. It is also asserted that these violations are continuous for years and contributions worth crores have remained outstanding. It is asserted that non-payment of the contributions have continued even upto date, even after the Board was revived (assuming the assertions of the accused are correct regarding supersession of the Board during July 1987 to July 1990). The contributions have not been made even thereafter and so, in any case, the offence is made out. Reliance has been placed on the principle that a continuing offence is one which purports to be continued to be committed at every moment of time. The factum of non-payment of Provident Fund remains an offence at every moment of non-payment. After the due date, according to this submission. Reliance has been placed on a Supreme Court pronouncement cited at Bhagirath Kanoria and Others Vs. State of M. P., titled "Bhagirath Kanaria & others v. the State of Madhya Pradesh etc." In this case, their Lordships observed that non-payment of the employers' contribution to the provident fund before the due date is a continuing offence and, therefore, the period of limitation prescribed by Section 468 cannot have any application. The offence will be governed by Section 472, according to which a fresh period of limitation begins to run at every moment of time during which the offence continues. In this case, the Apex Court observed as under;

"The question whether a particular offence is a continuing offence, must necessarily depend upon the language of the statute which creates that offence, the nature of the offence and, above all, the purpose which is intended to be achieved by constituting the particular act as an offence. Turning to the matters before us, the offence, of which the appellants are charged is the failure to pay the employer's contribution before the due date. Considering the object and purpose of this provision, which is to ensure the welfare of workers, we find it impossible to hold that the offence is not of a continuing nature. The appellants were unquestionably liable to pay their contribution to the Provident Fund before the due date and it was within their power to pay it, as soon after the due date had expired as they willed. The late payment could not have absolved them of their original guilt but it would have snapped the recurrence. Each day that they failed to comply with the obligation to pay their contribution to the Fund, they committed a fresh offence."

9. Their Lordships further observed in this case that the concept of Continuing offence does not wipe out the original guilt. It keeps the contravention alive day by day. Their Lordships observed "For this reason, we are of the opinion that the offence of which the appellants are charged namely non-payment of the employers' contribution to the provident fund before the due date is a continuing offence and, therefore, the period of limitation prescribed by Section 468 of the Code cannot have any application. The offence which is alleged against the appellants will be governed by Section 472 of the Code, according to which a fresh period of limitation begins to run at every moment of time during which the offence continues."

10. The contention of the Counsel for the Provident Fund Commissioner is that non-payment of provident fund by the due date is an offence and even thereafter it is an offence committed day by day so long as the non-payment of the required contribution continues. Thus, even if it might be said that during the period when the contribution was to be paid, this accused was not in management or was not responsible to the company for the conduct of its business due to certain supervening orders of the company Court, he reverted to its management after those orders were discharged in July 1990 and then as Managing Director, he was responsible to the Company for the conduct of its affairs and the liability of the company to pay the contribution of the sums deducted from employees in previous period as well as employers' contributions and the administrative charges, continued. So, the duty of this petitioner - Managing Director came into existence at least when the management of the company reverted to Board of Directors by order of the company Court on July 19. The company did not pay even thereafter, although he was responsible for payment of these contributions. So, even for the previous defaults of the company, he will be responsible and liable to suffer criminal consequences even for previous defaults. It is not a case where management of an establishment has been overtaken by a new management, say by transfer or some other event, totally new management has taken over. In this case, if at all, the powers of the

Board of Directors was for certain purposes, put under suspension by order of the company Court and special officers took charge for those matters as were directed by the criminal Court. The contention of the Counsel for Provident Fund Commissioner is that merely because the petitioner-accused has produced copy of order before this Court along with the revision petition, does not mean that those orders show the final picture or that they were the only orders passed and, in fact, the initial order of June 1987 has not been produced. this revision Court should not act on the basis of certain documents i.e. orders of a company Court, which could be produced in defence at the trial, as in such a case the Provident Fund Commissioner will be deprived of producing other relevant orders or material which might show criminal responsibility of the accused in his capacity as Managing Director of the company. It is urged that the company in any case has liability to pay contributions and by not doing so, the company's criminal liability arose and continued to exist whosoever was in Management. The Id. Counsel for the Provident Fund Commissioner has relied upon certain Supreme Court pronouncements that quashing of complaint on additional material filed by accused was not justified when the Magistrate was satisfied on the evidence of complainant and his witnesses and other material on record and had taken cognizance of the case and issued notices to the accused to appear for trial of such offences. One such judgment is cited at Smt. Chand Dhawan Vs. Jawahar Lal and others, " titled "Smt. Chand Dhawan v. Jawaharlal and others" (supra). Their Lordships of the Supreme Court observed as under;

"The High Court can exercise its inherent jurisdiction of quashing a criminal proceeding only when the allegations made in the complaint do not constitute an offence or that the exercise of the power is necessary either to prevent the abuse of the process of the Court or otherwise to secure the ends of justice. No inflexible guidelines or rigid formula can be set out and it depends upon the facts and circumstances of each case wherein such power should be exercised. When the allegations in the complaint, prima facie constitute the offence against any or all of the accused in the absence of materials on record to show that the continuance of the proceedings would be an abuse of the process of the Court or would defeat the ends of justice, the High Court would not be justified in quashing the complaint.

11. One more judgment relied upon the Counsel for Provident Fund Commissioner in Inderjit C. Parekh and Others Vs. Shri V.K. Bhatt and Another, " titled "Indrajit C. Parekh & others v. B.K. Bhat and another". In this case, the concerned establishment was being proceeded under Bombay Relief Undertakings (Special Provisions) Act, 1958 and stay of other proceedings against this undertaking had been ordered u/s 4(1)(a)(iv) of the Act. The Directors were sought to be prosecuted under Para 76(a) of the Employees' Provident Scheme, 1952 for non-compliance with provisions of Para 38 of that Scheme. This was challenged before the Supreme Court. The High Court observed that the responsibility to pay the contributions to the provident fund is under Para 38(1) of the Employees' Provident Scheme, 1952, on the Directors

and officers of the undertaking and if they have defaulted in paying the amount, they are liable to be prosecuted under Para 76 (a) of the Scheme. Such a person's liability does not fall within the scope of Section 41 (a) (iv) of Bombay Relief Undertakings (Special Provisions) Act and the prosecution pending against the Directors cannot be stayed.

12. The contention of the Counsel for petitioners is that during the period of June, 1987 to July 1990, " the Board of Directors had no say in the management of the company due to the order of the company Judge, so, during that period they could not be said legally responsible to the company for conducting its affairs. The order was operative against them and it was not a case of merely giving relief to the company. So, the personal liability of the petitioner. was not attracted for the month of September, 1988 and even up to July, 1990. The contribution had to be paid for that month by 15th day of the next following month and if during that period, there was no personal responsibility of this petitioner due to the supervening order of the company Court, there could be no question of continuation of criminal liability when it did not come into existence at the beginning. It is urged that criminality cannot arise after lapse of 15th day, if at the lime of lapse of the 15th day, there was no criminality attached.

13. The questions which have been raised in the present petition before this Court are not simply questions of law. They are mixed questions of fact and law. The nature of various orders passed, as there were a number of them, during the period of three years, is an important factor to be considered in this prosecution. This Court cannot go into questions of fact even if raised by defence, merely on the basis of copies of some of the orders of the company judge. If this Court asks prosecution to produce any other orders which may be having sufficient effect on the orders produced by the petitioner before this Court, this Court would be entering into trial of that issue. This exercise should not be undertaken in petitions u/s 482 Cr.P.C. for quashing of prosecution. In fact, the mandate of the Supreme Court in the case cited by the Id. Counsel for prosecution namely "Chand Dhawan" referred above is against this course of action by this Court in the present proceedings. Again the opportunities available to this petitioner on the company to make payments after the management of the Board of Directors was reinstated (if at all it was completely superseded earlier), would be a material factor to be proved by parties at the trial. The observations of the Supreme Court in the case of Bhagirath Kanoria and Others Vs. State of M. P., that an offence is continuous offence because it is committed every moment of time of its continuance cannot be ignored at this stage and are worth consideration by the trial Court. Of course, they have to be considered in the light of facts and circumstances about what the accused could or could not do due to certain supervening orders, if there were any, and what was the availability of funds with them pertaining to the relevant period so that the management was revived. Both these questions are likely to become relevant at the trial. However, I am making this observation without prejudice to the merits of the case and assuming some possibilities and those observations will have [no

effect on the finding of the trial Court based on evidence which may come on record from both sides.

14. In view of my above discussion, I am of considered view that it will be improper to quash the proceedings of trial and the continuance of trial will not be called an abuse of process of Court. The petition is rejected. It is directed that the trial Court shall proceed with the trial with expedition. Both parties shall appear before the trial Court on 17th November as one month's puja holidays will be intervening soon now. Petition dismissed.