

(1971) 09 CAL CK 0014
In the Calcutta High Court
Case No : Criminal Rev. No. 516 of 1970

N.K. Jhajharia

APPELLANT

Vs

L. Chandar

RESPONDENT

Date of Decision : 17-09-1971

Acts Referred:

Coal Mines Provident Fund and Bonus Schemes Act, 1948 — Section 40, 40(4), 9, 9(2)
Criminal Procedure Code, 1898 (CrPC) — Section 195
Employees State Insurance Act, 1948 — Section 40, 84, 85, 86
General Clauses Act, 1897 — Section 26
Penal Code, 1860 (IPC) — Section 403, 405, 406

Citation : (1975) 1 ILR (Cal) 507

Hon'ble Judges : N.C. Talukdar, J

Bench : Single Bench

Advocate : A.K. Dutta and Jahar Lal Roy, for the Appellant; Sankardas Banerjee and Rathindra Nath Das and Deba Prosad Chowdhury, for State, for the Respondent

Judgement

N.C. Talukdar, J.—This Rule is at the instance of three accused Petitioners for quashing the criminal proceedings u/s 406, Indian Penal Code, being case No. C/4564 of 1969, pending against them and another co-accused, in the Court of Shri K. Ahmed, Sub-Divisional Magistrate, Asansol, Burdwan.

2. The facts leading on to the Rule are short and simple. The three accused Petitioners as well as the co-accused Hanuman Prosad Khemka are the Directors of the Searsole Coal Co. Ltd., the owner of the Searsole Colliery in P.S. Ranigunge, Asansol, district Burdwan, having its Head Office at 22 Chittaranjan Avenue, Calcutta. A petition of complaint u/s 406, Indian Penal Code, was filed on October 16, 1969, by Shri L. Chandra, Coal Mines Provident Fund Inspector, Kharsuli, Ranigunge, district Burdwan, under the direction of the Coal Mines Provident Fund Commissioner against four accused persons in the Court of the Sub-Divisional Magistrate, Asansol. The prosecution case stated therein, inter alia, is that the Searsole Colliery is owned by the Searsole Coal Co. Ltd. and the

four accused persons are the Directors of the owners of the company; that the accused No. 1 N.K. Jhajharia is the nominated owner for the purpose of the Mines Act; that the accused persons, being the Directors, are deemed to be the owners of the colliery and are employers in relation to the same under the Coal Mines Provident Fund and Bonus Schemes Act; that under the provisions of the scheme framed under the said Act the employers shall deduct from the weekly or monthly wages of the employees in their mine, qualified as members of the Coal Mines Provident Fund, a sum as prescribed under the Coal Mines Provident Fund Scheme and deposit the same together with the prescribed contributions from the employers' side and the administrative charges within a specified period as laid down in the scheme; that any such sum deducted from the wages of the employees under the provisions of the aforesaid scheme is deducted and kept for the specific purpose of depositing the same to the credit of the fund, according to the provisions of the scheme; that amounts so deducted are kept by the employers in trust for the specific purpose of depositing the same in the manner as laid down in the scheme and within such time as specified thereunder; that in course of inspection the complainant found that for the months of January to March, 1969, the accused persons deducted the total sum of Rs. 751-68 P. from the wages and salaries of the employees named in the accompanying list, but they did not deposit the same along with their contributions and administrative charges in accordance with the provisions of the scheme; that the accused thereby dishonestly converted the same to their own use and/or disposed of the amount in violation of the directions of law prescribing the mode in which such trust was to be discharged; that by not depositing the said amount, the accused persons, jointly or separately, in collusion with one another and in conspiracy with some of the staff of the colliery, committed criminal breach of trust punishable u/s 406, Indian Penal Code and that summons may be issued against the accused persons u/s 406, Indian Penal Code. The learned Sub-Divisional Magistrate examined the complainant on solemn affirmation on the same date, viz. on October 16, 1969 and issued summons against the accused persons u/s 406, Indian Penal Code. The accused Petitioners thereafter submitted to the jurisdiction of the Court by filing an application for exemption u/s 205, Code of Criminal Procedure, but the same was rejected. The three accused Petitioners thereafter impugned the maintainability of the proceedings pending against them u/s 406, Indian Penal Code and obtained the present Rule.

3. Mr. Ajit Kumar Dutta, Advocate (with Mr. Jaharlal Roy, Advocate) appearing on behalf of the accused Petitioners, raised three points of law. He firstly contended that for a contravention of any provisions of the Coal Mines Provident Fund Scheme, a specific penalty is provided for u/s 9 of the Coal Mines Provident Fund and Bonus Schemes Act, 1948 (XLVI of 1948), which is a special Act and that such contravention would not attract the penalty u/s 406, Indian Penal Code, which is a general Act, more so, as it would result ultimately in circumventing the sanction enjoined u/s 9(2) of the special Act (XLVI of 1948). Mr. Dutt next contended that there cannot be any offence of criminal breach of trust, based on

the fiction of an entrustment, as created under the Coal Mines Provident Fund Scheme framed u/s 3 of the Coal Mines Provident Fund and Bonus Schemes Act, 1948. The third and last submission of 2 Mr. Dutta is that, even if the general Act be deemed to apply, the facts and circumstances of the present case do not make out an entrustment within the meaning of Section 405, Indian Penal Code, constituting the offence of criminal breach of trust u/s 406, Indian Penal Code and as such, a continuance of the present proceedings thereunder would be an abuse of the process of the Court. Mr. Dutta cited also several cases in support of his contention and the same would be considered in their proper context. Mr. Deba Prosad Chowdhury, Advocate appearing on behalf of the State, joined issue. The first contention of Mr. Chowdhury is that there is no bar to a prosecution under the general Act for a contravention, which may also come within the bounds of the special Act, if and when the offence provided for under the general Act is a graver offence, attracting higher punishment. He next contended that the offence created under para. 29(2) of the Coal Mines Provident Fund Scheme is, a statutory offence and the statute having created a fictional trust, any contravention thereof, by a dishonest misappropriation or conversion to the accused's own use or any dishonest user or disposal thereof in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, expressed or implied, made touching the discharge of such trust, would attract the penalty. He contended in this context that para. 29, sub-para. (2) of the Coal Mines Provident Fund Scheme raises "a fiction, viz. that any sum deducted under sub-para. (1) by an employer or a contractor from the wages of a member "shall be deemed to have been entrusted to him for the purpose" and is good enough to constitute a statutory offence based on such entrustment, ruling out any reference to the line of cases decided u/s 406, Indian Penal Code, to ascertain what really makes out "entrustment". The statute provides for such a contravention and creates the offence and nobody is above the same. Mr. Chowdhury also referred to several decisions which would be considered in their proper context. Mr. Sankardas Banerjee, Advocate (with Mr. Rathindra Nath Das, Advocate) appearing on behalf of the opposite party, L. Chandar, Coal Mines Provident Fund Inspector, Kharsuli, Ranigunge, submitted that there is a statutory entrustment provided for under Clause 29 of the Provident Fund Scheme and any dishonest conversion of any properties so entrusted would amount to an offence u/s 406, Indian Penal Code and that there is no bar in law to such a prosecution. Mr. Banerjee next contended that the entrustment created under the Coal Mines Provident Fund Scheme in fact adds to the classes of entrustment as provided for u/s 405, Indian Penal Code and punishable u/s 406, Indian Penal Code. Mr. Banerjee finally contended that there is no bar in law to a prosecution under the general Act for a contravention of any paragraph of the scheme framed under the special Act in view of the specific provisions made in the body of the special Act that any such amount deducted under para. 29(2) shall be deemed to be an entrustment. He referred also in this connection to some cases which would be considered in their proper context.

4. Having heard the learned Advocate appearing on behalf of the respective parties and on going through the materials on the record, I will now proceed to determine the points at issue. For a consideration of the first point raised by Mr. Dutta relating to the maintainability of the present proceedings u/s 406, India Penal Code, avoiding thereby the sanction required u/s 9(2) of the Coal Mines Provident Fund and Bonus Schemes Act, 1948, I will refer in the first instance to the provisions of the General Clauses Act, 1897. Section 26 thereof provides that where an Act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence.

An unreported decision by a Division Bench of this Court in Nagendra Chandra Ghosh alias N.C. Ghosh v. State Unreported. Criminal Rev. No. 1569 of 1960 decided on September 11, 1961, by S.K. Sen and N.K. Sen JJ. lays down that the prosecution u/s 420 of the I.P.C. would not be bad even if the offence with which the Petitioner was charged had come within the scope of Section 84 of the Employees' State Insurance Act.

There is, therefore, no bar in limine to such a prosecution, subject of course to the overriding consideration of double jeopardy. The other part of the objection that the prosecution under the general Act, viz. the Indian Penal Code, would result in circumventing the provisions of sanction under the special Act, viz. the Coal Mines Provident Fund and Bonus Schemes Act, 1948 (XLVI of 1948), is not also maintainable. The principle receiving the imprimatur of judicial decisions is that a prosecution under the general Act can be launched in spite of the bar of a sanction under the special Act, if the offence under the general Act be a graver one. It is pertinent in this context to refer to some cases on the point. In the case of Basir-ul-huq and Others Vs. The State of West Bengal, . M.C. Mahajan J. (as his Lordship then was) observed that the provisions of that Section, viz. Section 195, Code of Criminal Procedure, "cannot be evaded by resorting to device or camouflages." The same

cannot be evaded by the device of charging a person with an offence to which that Section does not apply and then convict him of an offence to which it does, upon the ground that such latter Offence is a minor offence of the same character, or by describing the offence as being one punishable under some other Section of the Indian Penal Code, though in truth and substance the offence falls in the category of Sections mentioned in Section 195, Code of Criminal Procedure.

In a later decision, however, viz. in the case of (i) Chandrika Sao in Cr. A. No. 35 of 1961 and (ii) Hazari Lal in Cr. A. No. 36 of 1961 v. State of Bihar AIR 1967 S.C. 170 (173) Mudholkar J. delivering the judgment of the Court observed that--

In choosing to prosecute the Appellant for a graver offence under the general law the prosecution cannot be regarded as having acted colourably...for, if the prosecution were to be so restricted, grave offences will go unpunished.

A reference may be made to a recent decision of the Calcutta High Court, viz. the case of Nathmull Poddar Vs. Salil Kumar Chakraborty, where it has been held that in view of Section 26 of the General Clauses Act and in view of the principles laid down by their Lordships of the Supreme Court in Chandrika Sao's case and by this Court in the unreported decision in Nagendra Chandra Ghosh's case, there is no bar illumine on the prosecution to proceed under the general Act on an offence which otherwise lies, merely because the same facts also constitute an offence under the special Act, subject only to the overriding consideration of double jeopardy.

I agree with the principles laid down in the aforesaid cases and I ultimately hold that there is no bar to the maintainability of the present proceedings merely on the ground that it is under the Indian Penal Code which is a general Act and not u/s 9 of the Coal Mines Provident Fund and Bonus Schemes Act, 1948, which is a special Act, requiring a sanction u/s 9(2) thereof, inasmuch as the offence proceeded with under the general Act is a graver offence. The first contention raised by Mr. Dutta accordingly fails.

5. The second contention of Mr. Dutta is, however, a material one. For a proper appreciation thereof, it is necessary to refer to the provisions of the Coal Mines Provident Fund Scheme, 1948. Paragraph 28 thereof lays down that

the employer shall in the first instance pay both the contributions payable by himself and also on behalf of the members employed by him.

and para. 29 provides for the recovery of the members' contributions from the wages payable to the member. Under Sub-clause (2) thereof it is provided that

any sum deducted under sub-paragraph 1 by an employer or by a contractor from the wages of a member shall be deemed to have been entrusted to him for the purpose of paying contribution in respect of which it was deducted.

The words shall be deemed to have been entrusted to him constitute the starting point of the controversy as to whether it creates a new category of entrustment enjoined by a special Statute or is a mere legal fiction for the purposes necessary to the employment. It is pertinent to note in this connection that the aforesaid provisions of the Coal Mines Provident Fund Scheme, 1948, are similar to those of Section 40 of the Employees' State Insurance Act, 1948 (XXXIV of 1948). Clause 4 of Section 40 of the latter Act provides that

any sum deducted by the principal employer from the wages under this Act shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted.

It is abundantly clear, therefore, that the provisions of the two enactments are the same and the relevant words used are identical, viz. shall be deemed to have been entrusted to him A reference in this context may again be made to the case of Nathmull Poddar and Anr. v. Salil Kumar Chakraborty (Supra), which was

decided in the context of Clause 4 of Section 40 of Act XXXIV of 1948. It was, inter alia, held therein that

there is no actual entrustment of the amount in question with the accused persons, but they are merely deemed to be entrusted therewith u/s 40(4) of Act XXXIV of 1948. This runs off at a tangent from the concept of entrustment as defined from time to time by the different High Courts as also the Supreme Court and forming the basis of a proceeding u/s 406 or Section 403, I.P.C.

It was ultimately held that

a prosecution of the accused for a failure on their part to pay the contributions enjoined u/s 40 of Act XXXIV of 1948 in their fictional capacity as principal employers, may be good enough for a prosecution u/s 85 read with Section 86 of the Employees' State Insurance Act, 1948, inasmuch as for the purpose of the said Act XXXIV of 1948, any sum deducted by the principal employer from the wages under this Act can be deemed to have been entrusted to the said accused, but the concept of such entrustment cannot transgress the bounds of the said special Act to form the necessary ingredient of entrustment within the ambit of Section 405, I.P.C. which alone can form the basis of a valid prosecution under Sections 406/ 403, I.P.C.

I agree with the same and hold on ultimate analysis that the provisions of sub-para. (2) of para. 29 of the Coal Mines Provident Fund Scheme create only a fictional entrustment falling short of the essential ingredients of the offence of criminal breach of trust within the ambit of Section 406 of the Indian Penal Code. A point may be raised as to why the words "shall be deemed to have been entrusted to him" has been used in sub-para. (2) of para. 29 of the Coal Mines Provident Fund Scheme, 1948 and whether some meaning and effect must be given to the said deeming provision. Maxwell in The Interpretation of Statute has observed that

a Statute is the will of the Legislature and the fundamental rule of interpretation to which all others are subordinate is that the Statute is to be expounded according to the intent of them on merit.

Judges are not called upon ordinarily to apply their opinion of sound policy so as to modify the plain meaning of statutory words. The principles of interpretation of Statute undoubtedly rule out redundancy. As was observed by Lord Sumner in the case of Quebec Railway Light, Heat and Power Co. Ltd. v. Vandry AIR 1920 P.C. 181 (186) that

effect must be given if possible to all the words used, for the Legislature is deemed not to waste its words or to say anything in vain.

I respectfully agree with the said observations and the same only rule out the interpretation given to the provisions of the Coal Mines Provident Fund Scheme by the learned Advocates appearing on behalf of the opposite party and the State. On giving my anxious consideration to the words incorporated in sub-para.

(2) of para. 29 of the Coal Mines Provident Fund Scheme, 1948, I hold that a contravention of sub-para. (2) of para. 29 only attracts the specific penalty provided for u/s 9 of the Coal Mines Provident Fund and Bonus Schemes Act, 1948 and not that u/s 406, Indian Penal Code. This interpretation, as based on the principles laid down and the decisions referred to above, does neither defeat the intention of the Legislature nor render the provisions of the special Act redundant. The other interpretation sought to be given to the words by the learned Advocates, appearing on behalf of the opposite party and the State, are not tenable by the test of "the principles of intent and that of meaning". The consequence of the other interpretation would be to legislate. As was observed by Viscount Simonds in the case of *Magor and St. Mellons Rural District Council v. New Port Corporation* (1952) A.C. 189 (191) that

the power and duty of the Court to travel outside them on a voyage of discovery are strictly limited.

I respectfully agree and I hold that to give effect to the other interpretation would result in an embarkation on a voyage of discovery beyond bounds of the provisions referred to above. The second contention of Mr. Dutta, accordingly, succeeds.

6. The third and last contention of Mr. Dute is also a pertinent one, viz. that even if the fiction of an entrustment be deemed to apply to the facts of the present case, the same will not constitute "entrustment" within the purview of Section 405, Indian Penal Code, inasmuch as the essential ingredients of an entrustment within the ambit of the said provision are ruled out by the facts. The steps of his reasoning in this context are that in order to constitute a legal entrustment, the complainant must be the owner of the property, to wit, the deducted wages; that there must be a transfer of possession; that such transfer must be an actual transfer and not a fictional or notional one; that such transfer must be made to somebody who has no right, excepting that of a custodian; and that such entrustment may be made to a person and not to a company or a firm. These are the five ingredients or the Pancha-Sheel of a legal entrustment within the ambit of Section 405, Indian Penal Code, which alone can form the basis of a valid prosecution. The imprimatur of judicial decisions also lends assurance to the submissions made by Mr. Dutta. In the case of *Bhuban Mohan Das Vs. Surendra Mohan Das*, Harries C.J. observed that--

Before criminal breach of trust is established it must be shown that the person charged has been entrusted with property or with dominion over property and that he has been guilty of breach of trust using that latter phrase loosely. There must be entrustment and therefore, the person accused must be shown to have held the property in a fiduciary capacity.

A reference again may be made to the case of *Velji Raghavji Patel Vs. State of Maharashtra*, wherein Mudholkar J. delivering the judgment of the Court observed that--

In order to establish "entrustment or dominion" over property to an accused person the mere existence of that person's dominion over property is not enough. It must be further shown that his dominion was the result of entrustment.

I respectfully agree and I hold ultimately that there cannot be an entrustment in law on the fiction of an entrustment or a notional entrustment which is de hors the Statute and result in a nullity. The third and last submission of Mr. Dutta also succeeds.

7. Mr. Chowdhury lastly made an ancillary submission, viz. that the Coal Mines Provident Fund Scheme and the Coal Mines Provident Fund and Bonus Schemes Act, are pieces of social legislation for the benefit of the employees and any circumscribed interpretation of the provisions thereof would result in defeating the intention of the Legislature. It is difficult again to agree with the contention of Mr. Chowdhury. There is no objection to the prosecution availing of the penal provisions of the Scheme and the Act in a case disclosing such an offence and there is no bar to any such prosecution, if the same is otherwise maintainable on merits. The point at issue in the present cases, is as to whether the prosecution can switch over to a proceeding under the general Act, namely, the Indian Penal Code, leaving aside the penal provisions of the special Act, I have already arrived at findings on the same as referred to above and I hold that such an interpretation would not in any way result in circumscribing the application of the Scheme or the Act. As was observed by Francis Bacon in his Essays or Counsels Civil and Moral: of Judicature that

Judges ought to remember that their office is jus decreed and not jus dare; to interpret the law and not to make law or give law.

I respectfully agree with the said observations and I hold that Judges are to proceed on the law as it is and not on law as it should be. I hold ultimately that the rather expansive interpretation sought to be given to the words deemed to have been entrusted as incorporated in sub-para. 2(b)(i)(ii) to para. 29 of the Coal Mines Provident Fund Scheme is unwarranted and untenable. The socio-economic needs or the ultimate benefit of the employees based on the Sweet Theory is undoubtedly material question, but when the same has been provided for or covered by the relevant penal clauses enjoined in special Statutes, one need not leave the inland waters of the special Statutes and ride on the high seas. The ancillary submission made by Mr. Choudhury also fails.

8. I ultimately hold in the facts and circumstances of the case that a continuance of the present proceedings would be bad and repugnant and as such, the same should be quashed. A reference in this context may be made to the case of R.P. Kapur Vs. The State of Punjab, . Gajendragadkar J. (as his Lordship then was) delivering the judgment of the Court observed that--

It is well established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of

the process of any Court or otherwise to secure the ends of justice.

The Supreme Court further proceeded to observe that--

There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the Court or that the quashing of the impugned proceedings would secure the ends of justice.

I respectfully agree and I hold that in view of the points raised and the facts and circumstances on the record, the impugned proceedings should be quashed for the ends of justice.

9. In the result, the Rule is made absolute and the impugned proceedings are quashed.

10. Let the records go down as early as possible.