(2014) 08 GUJ CK 0101

In the Gujarat High Court

Case No : Special Criminal Application (Quashing) No. 2414 of 2008

Pankaj Gupta APPELLANT

Vs

State of Gujarat RESPONDENT

Date of Decision : 14-08-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 60 — Constitution of India, 1950 - Article 226 — Criminal Procedure Code, 1973 (CrPC) - Section 482 — Employees Provident Funds and Miscellaneous Provisions Act, 1952 - Section 8, 8A, 8B, 8C, 8D — Penal Code, 1860 (IPC) - Section 187, 188

Citation : (2015) 1 GLH 497

Hon'ble Judges : Sonia Gokani, J.

Bench : Single Bench

Advocate : C.R. Abichandani, Dharmesh V. Shah and Lalit M. Patel, for the Appellant; C.M. Shah, Addl. Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Sonia Gokani, J.?By way of present petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973, the petitioner Branch Manager of ICICI Bank Ltd. has prayed for quashing and setting aside the first information report being IIC. R. No. 146 of 2008 registered with J.P. Road Police Station, Vadodara and all the subsequent proceedings emanating therefrom against the petitioner. The present petition has arisen in the following factual background:--

"2.1. The petitioner is the authorised Branch Manager of ICICI Bank, Vadodara Branch, having its registered office at Landmark, Race Course Road, Vadodara.

2.2. An order came to be passed by the Regional Provident Fund Commissioner on May 13, 2008, which is alleged not to have been complied with by the present petitioner. The first information report alleges that M/s. ABB Ltd. has defaulted in Employees'' Deposit Linked Insurance contribution and inspection charges for the period between October, 2006 to November, 2007. Resultantly, the Regional

Provident Fund Commissioner II, issued such direction on May 13, 2008 under the provision of Section 8F of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as ''the Act''), whereby the petitioner Bank was directed to transfer the amount mentioned in such order to the Regional Provident Fund Commissioner, Vadodara. On the ground that there is noncompliance of such direction resulting into attraction of ingredients of Section 78(1) of the Act, the present first information report is filed and, therefore, the present petition is filed seeking quashment of the same."

2. At the time of issuance of Rule and the notice as to interim relief, this Court granted ad interim relief in terms of paragraph 6C and thereby, during the pendency of the petition, further proceedings of the first information report being IIC. R. No. 146 of 2008 registered with J.R Road Police Station, Vadodara, have been stayed.

3. The learned Advocate Mr. Chandresh Patel appearing for the learned Advocate Mr. Dharmesh V. Shah has urged that the present petitioner being a Branch Manager in no manner has flouted or disobeyed the order of the Regional Provident Fund Commissioner nor has he flouted in any manner the provision of Section 188 of the Indian Penal Code. It is further submitted that there is no dispute with regard to the powers of the Regional Provident Fund Commissioner. However, when the petitioner had no holding of any amount of M/s. ABB Ltd. with it and the amount in the account was notional, availing limit to the Bank, the petitioner could not have transferred any amount to the Regional Provident Fund Commissioner. He urged, therefore, to intervene and invoke the powers under Section 482 of the Code of Criminal Procedure, 1973. It is further submitted that within a very short period, the Tribunal had granted stay and that also should weigh with the Court and this Court should quash the first information report.

4. Ms. C.M. Shah, learned Additional Public Prosecutor, has fairly submitted that the provision of Section 187 of the Indian Penal Code speaks of mens rea and the ingredients of such provision would be attracted if there is an intentional disobedience. She has urged the Court to pass appropriate orders on the basis of facts and on applying law to such facts. She, however, has urged that the stringent provision made under Section 8F of the Act is in the interest of the employees and, therefore, any Authority if is found disobeying the orders of the Regional Provident Fund Commissioner, shall have to be dealt with stringently.

5. Upon thus hearing both the sides, at the outset, it would be necessary to refer to the provisions of the Act and particularly, Section 8F of the Act which suggests all other modes of recovery. It is to be noticed that Section 8 of the Act provides for recovery of money due from the employers.

5.1 Section 8A of the Act is in relation to the recovery of moneys by employers and contractors.

Section 8B of the Act speaks of issuance of notice to the recovery Officer by the

Authorised Officer specifying the amount of arrears, which would facilitate the recovery of the amount from the establishment.

Section 8C provides for the Authorised Officer to forward the certificate referred to in Section 8B of the Recovery Officer within whose jurisdiction the applicant resides or his movable or immovable properties are situated.

Section 8D of the Act provides for validity of the certificate and amendment thereof. Once the certificate is issued by the Authorised Officer to the Recovery Officer under Section 8B of the Act, it is not open for the employer to dispute such correctness of amount and no objection would be entertained by the Recovery Officer.

Section 8E provides for stay of proceedings under certificate and amendment or withdrawal thereof, where it is the power of the Authorised Officer to grant time for payment of amount and thereupon the Recovery Officer needs to stay the proceedings until the expiry of the time so granted.

Section 8F of the Act speaks of other modes of recovery, which authorises the Central Provident Fund Commissioner or any other Officer authorised by the Central Board to recover the amount by any one or more of the modes provided in the said provision. It would be profitable to reproduce Section 8F of the Act as under:--

"8F : Other modes of recovery:--

(1) Notwithstanding the issue of a certificate to the Recovery Officer under Section 8B, the Central Provident Fund Commissioner or any other Officer authorised by the Central Board may recover the amount by any one or more of the modes provided in this Section to "1[8F. Other modes of recovery.--(1) Notwithstanding the issue of a certificate to the Recovery Officer under Section 8B, the Central Provident Fund Commissioner or any other Officer authorised by the Central Board may recover the amount by any one or more of the modes provided in this Section."

(2) If any amount is due from any person to any employer who is in arrears, the Central Provident Fund Commissioner or any other Officer authorised by the Central Board in this behalf may require such person to deduct from the said amount the arrears due from such employer under this Act and such person shall comply with any such requisition and shall pay the sum so deducted to the credit of the Central Provident Fund Commissioner or the Officer so authorised, as the case may be: to "(2) If any amount is due from any person to any employer who is in arrears, the Central Provident Fund Commissioner or any other Officer authorised by the Central Board in this behalf may require such person to deduct from the said amount the arrears due from such employer under this Act and such person shall comply with any such requisition and shall pay the sum so deducted to the credit of the Central Provident Fund Commissioner or the Officer so authorised, as the case may be: "Provided that nothing in this Sub-section

shall apply to any part of the amount exempt from attachment in execution of a decree of a civil Court under Section 60 of the Code of Civil Procedure, 1908 (5 of 1908). to "Provided that nothing in this Sub-section shall apply to any part of the amount exempt from attachment in execution of a decree of a civil Court under Section 60 of the Code of Civil Procedure, 1908 (5 of 1908)."

(3) (i) The Central Provident Fund Commissioner or any other Officer authorised by the Central Board in this behalf may, at any time or from time to time, by notice in writing, require any person from whom money is due or may become due to the employer or, as the case may be, the establishment or any person who holds or may subsequently hold money for or on account of the employer or as the case may be, the establishment, to pay to the Central Provident Fund Commissioner either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due from the employer in respect of arrears or the whole of the money when it is equal to or less than that amount to "(3)(i) The Central Provident Fund Commissioner or any other Officer authorised by the Central Board in this behalf may, at any time or from time to time, by notice in writing, require any person from whom money is due or may become due to the employer or, as the case may be, the establishment or any person who holds or may subsequently hold money for or on account of the employer or as the case may be, the establishment, to pay to the Central Provident Fund Commissioner either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due from the employer in respect of arrears or the whole of the money when it is equal to or less than that amount."

(ii) A notice under this Sub-section may be issued to any person who holds or may subsequently hold any money for or on account of the employer jointly with any other person and for the purposes of this Sub-section, the shares of the joint holders in such account shall be presumed until the contrary is proved, to be equal to "(ii) A notice under this Sub-section may be issued to any person who holds or may subsequently hold any money for or on account of the employer jointly with any other person and for the purposes of this Sub-section, the shares of the joint holders in such account shall be presumed until the contrary is proved, to be equal."

(iii) A copy of the notice shall be forwarded to the employer at his last address known to the Central Provident Fund Commissioner or, as the case may be, the Officer so authorised and in the case of a joint account to all the joint holders at their last addresses known to the Central Provident Fund Commissioner or the Officer so authorised to "(iii) A copy of the notice shall be forwarded to the employer at his last address known to the Central Provident Fund Commissioner or, as the case may be, the Officer so authorised and in the case of a joint account to all the joint holders at their last addresses known to the Central

Provident Fund Commissioner or the Officer so authorised."

(iv) Save as otherwise provided in this Sub-section, every person to whom a notice is issued under this Sub-section shall be bound to comply with such notice, and, in particular, where any such notice is issued to a Post Office, Bank or an Insurer, it shall not be necessary for any pass book, deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like being made before payment is made notwithstanding any rule, practice or requirement to the contrary. to "(iv) Save as otherwise provided in this Sub-section, every person to whom a notice is issued under this Sub-section shall be bound to comply with such notice, and, in particular, where any such notice is issued to a post office, Bank or an insurer, it shall not be necessary for any pass book, deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like being made before payment is made notwithstanding any rule, practice or requirement to the contrary."

(v) Any claim respecting any property in relation to which a notice under this Sub-section has been issued arising after the date of the notice shall be void as against any demand contained in the notice. to "(v) Any claim respecting any property in relation to which a notice under this Sub-section has been issued arising after the date of the notice shall be void as against any demand contained in the notice."

(vi) Where a person to whom a notice under this Sub-section is sent objects to it by a statement on oath that the sum demanded or any part thereof is not due to the employer or that he does not hold any money for or on account of the employer, then, nothing contained in this Sub-section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false is any material particular, such person shall be personally liable to the Central Provident Fund Commissioner or the Officer so authorised to the extent of his own liability to the employer on the date of the notice, or to the extent of the employer''s liability for any sum due under this Act, whichever is less. to "(vi) Where a person to whom a notice under this Sub-section is sent objects to it by a statement on oath that the sum demanded or any part thereof is not due to the employer or that he does not hold any money for or on account of the employer, then, nothing contained in this Sub-section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false is any material particular, such person shall be personally liable to the Central Provident Fund Commissioner or the Officer so authorised to the extent of his own liability to the employer on the date of the notice, or to the extent of the employer''s liability for any sum due under this Act, whichever is less."

(vii) The Central Provident Fund Commissioner or the Officer so authorised may, at any time or from time to time, amend or revoke any notice issued under this Sub-section or extend the time for making any payment in pursuance of such notice. to "(vii) The Central Provident Fund Commissioner or the Officer so authorised may, at any time or from time to time, amend or revoke any notice issued under this Sub-section or extend the time for making any payment in pursuance of such notice."

(viii) The Central Provident Fund Commissioner or the Officer so authorised shall grant a receipt for any amount paid in compliance with a notice issued under this Sub-section, and the person so paying shall be fully discharged from his liability to the employer to the extent of the amount so paid. to "(viii) The Central Provident Fund Commissioner or the Officer so authorised shall grant a receipt for any amount paid in compliance with a notice issued under this Sub-section, and the person so paying shall be fully discharged from his liability to the employer to the extent of the amount so paid."

(ix) Any person discharging any liability to the employer after the receipt of a notice under this Sub-section shall be personally liable to the Central Provident Fund Commissioner or the Officer so authorised to the extent of his own liability to the employer so discharged or to the extent of the employer''s liability for any sum due under this Act, whichever is less. to "(ix) Any person discharging any liability to the employer after the receipt of a notice under this Sub-section shall be personally liable to the Central Provident Fund Commissioner or the Officer so authorised to the extent of his own liability to the employer so discharged or to the extent of the employer''s liability for any sum due under this Act, whichever is less."

(x) If the person to whom a notice under this Sub-section is sent fails to make payment in pursuance thereof to the Central Provident Fund Commissioner or the Officer so authorised he shall be deemed to be an employer in default in respect of the amount specified in the notice and further proceedings may be taken against him for the realisation of the amount as if it were an arrear due from him, in the manner provided in Sections 8B to 8E and the notice shall have the same effect as an attachment of a debt by the Recovery Officer in exercise of his powers under Section 8B. to "(x) If the person to whom a notice under this Sub-section is sent fails to make payment in pursuance thereof to the Central Provident Fund Commissioner or the Officer so authorised he shall be deemed to be an employer in default in respect of the amount specified in the notice and further proceedings may be taken against him for the realisation of the amount as if it were an arrear due from him, in the manner provided in Sections 8B to 8E and the notice shall have the same effect as an attachment of a debt by the Recovery Officer in exercise of his powers under Section 8B."

(4) The Central Provident Fund Commissioner or the Officer authorised by the Central Board in this behalf may apply to the Court in whose custody there is money belonging to the employer for payment to him of the entire amount of such money, or if it is more than the amount due, an amount sufficient to discharge the amount due.

(5) The Central Provident Fund Commissioner or any Officer not below the rank of Assistant Provident Fund Commissioner may, if so authorised by the Central Government by general or special order, recover any arrears of amount due from an employer or, as the case may be, from the establishment by distraint and sale of his or its movable property in the manner laid down in the Third Schedule to the Incometax Act, 1961 (43 to 1961).]"

5.2 This mode of recovery under the law provides that the Central Provident Fund Commissioner or any other Officer authorised by the Central Board may require any person if any amount is due from any person to any employer who is in arrears, to deduct from the amount of arrears due from such employer and the payment shall have to be made to the credit of the Central Provident Fund Commissioner or any such authorised Officer. The only exception is that the amount exempted from attachment under Section 60 of the Code of Civil Procedure, 1908, is protected by way of this provision. This also provides that a notice in writing may require any person from whom the money is due or may become due from the employer or if any person holds or subsequently, may hold money for and on account of the employer, the Central Provident Fund Commissioner with such notice can direct payment of money becoming due forthwith or being held or at or within the time specified in the notice. Sub-section (3)(ii) of Section 8F of the Act clearly provides that a notice under this Section may be issued to any person who holds or may subsequently hold any money for or on account of the employer jointly with any other person and for the purposes of this Sub-section and the shares of the joint holders in such account also shall be presumed, until the contrary is proved.

5.3 So far as the present petition is concerned, it is pertinent to note that the notice has been issued to the Branch Manager of ICICI Bank Ltd. on May 13, 2008 under Section 8F of the Act, directing the Bank to forthwith transfer the amount of Rs. 40,18,739/- and Rs. 40,189/- being outstanding amount which M/s. ABB Ltd. had defaulted in payment of Employees'' Deposit Linked Insurance contributions during the period between 2006 and 2007.

5.4 It is also further pointed out to the Bank that every person to whom such communication is issued under Section 8F of the Act, shall be bound to comply with the contents of the same. The letter addressed by the present petitioner to M/s. ABB Ltd. communicates that it has received an attachment order from the Regional Provident Fund Commissioner for the said sum of Provident Fund Linked insurance contribution and inspection charges and they have marked lien in the account for the said amount. A letter dated September 17, 2008, which is annexed with the petition at page 21, is an order of the Assistant Provident Fund Commissioner, which shows that consequent upon remittance of a sum of Rs. 20,29,464/- by M/s. ABB Ltd., the order under Section 8F bearing No. GJ/1854/RPFC/BRD/EXM/ENF II/8F/20 dated May 13, 2008, is lifted with immediate effect. The Tribunal appears to have been moved being the Appellate Authority and on May 19, 2008, the Tribunal passed the following order :"Consequent upon remittance of a sum of Rs. 20,29,464/in respect of M/s. ABB Ltd., Maneja, Vadodara, 8F order bearing No. Gil 1854/RPFC/BRD/EXM/ENF II/8F/20 dated 13.05.2008 is hereby lifted with immediate effect."

5.5. It can, therefore, be noticed that on May 13, 2008, the order was passed and communicated to the Bank. On May 15, 2008 a communication had been addressed to M/s. ABB Ltd. for keeping the lien on the account for the said amount and M/s. ABB Ltd. moved the Tribunal, which has stayed such an order specifying that the Bank account if attached be released immediately.

5.6 This was, of course, subject to payment of predeposit of 50% of the assessed amount within eight weeks from the date of the order. In this background, when the prosecution is lodged under Section 187 and 188 of the Indian Penal Code, the question that needs to be answered is whether the petitioner has intentionally omitted to give any assistance and whether the act of the petitioner is such whereby he has knowingly acted and taken the steps to disobey such directions and the answer shall have to be in negation.

5.7 At this stage, it would be profitable to reproduce Sections 187 and 188 of the Indian Penal Code, which read as under:--

"187. Omission to assist public servant when bound by law to give assistance. Whoever, being bound by law to render or furnish assistance to any public servant in the execution of his public duty, intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both; and if such assistance be demanded of him by a public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a Court of Justice, or of preventing the commission of an offence, or suppressing a riot, or affray, or of apprehending a person charged with or guilty of an offence, or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

188. Disobedience to order duly promulgated by public servant. Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both: and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

5.8 Indisputably, the Regional Provident Fund Commissioner, Vadodara, was executing his public duty and any order passed by him as provided under the Act, the petitioner was bound under the law to render and furnish assistance to him. In the event of intentional omission on his part to give such assistance, the provision of Section 187 of the Indian Penal Code gets attracted and if such assistance is demanded by a public servant legally competent to make such demand for the purpose of executing any process lawfully, issued by the Court of justice or for preventing the commission of an offence, any intentional omission would make a person liable for enhanced sentencing. It is to be noted that the order passed by the Regional Provident Fund Commissioner under Section 8F of the Act was against the cash credit account of the defaulter M/s. ABB Ltd. According to the say of the Bank, such amount in the account was notional. In other words, it was a limit given by the Bank and it was a facility given to the customer, but there was no holding as such of any amount of such employer. Such facts are not controverted. It further appears that the Bank on receipt of communication dated May 13, 2008 had kept a lien on May 14, 2008 over the total amount mentioned in the said order on the cash credit account of M/s. ABB Ltd. and a communication was also effected to the Company of having kept a lien. It is also the say of the Bank that the account kept at Vadodara Branch was a working account to the tune of Rs. 15 crore and the same was linked with the main account maintained by the Company at Bangalore.

5.9. Of course, the communication addressed to M/s. ABB Ltd. on May 15, 2008 and allowing them to move the Tribunal, are said to be some of the steps which are being perceived as not only disobedience on the part of the petitioner, but an intentional omission in executing his public statutory duty.

5.10. In the opinion of this Court, in absence of any mens rea, the provisions of Sections 187 and 188 of the Indian Penal Code cannot be attracted at all. Section 8F of the Act suggests the other modes of recovery, where a certificate is issued by the Authorised Officer to the Recovery Officer under Section 8B of the Act and the Central Provident Fund Commissioner or any Officer authorised by the Central Board in this behalf can require any person from whom the money is due or may become due to the employer or if any person holds or may subsequently hold the same money to pay to the Commissioner or to such other person either forthwith upon the money becoming due or being held or at or within the time provided in the notice, so much of money due from the employer or the whole of the money.

5.11. In the wake of an uncontroverted fact that there was no holding of money by the Bank as the amount in the account was the limit given by the Bank to the defaulter M/s. ABB Ltd., in absence of any holding, if an order passed under Section 8F of the Act is communicated, noncompliance of the same may not attract the provisions of Sections 187 and 188 of the Indian Penal Code. Assuming the cash credit account against which such order was passed since had contained the limit issued by the Bank and the Bank could have obeyed such an order, the communication to the defaulter employer of keeping a lien of Regional Provident Fund Commissioner within a day also needs to be seen as a step towards compliance. When the Appellate Authority was moved within a short duration of five days, which directed 50% of the amount by way of predeposit and granted stay in favour of the employer, which was already paid, the order under Section 8F of the Act also came to be revoked on September 17, 2008. Therefore, the alleged noncompliance with the request made by way of an order under Section 8F of the Act cannot be attributed to the Bank. It was by virtue of the order of the Tribunal, which is an Appellate Authority, that no further recovery was possible. 50% of the amount was already deposited within a short time and, therefore, if the overall facts and circumstances of the case are considered, this Court is of the firm opinion that the criminal proceedings initiated against the present petitioner deserve intervention.

For the foregoing reasons, the present petition succeeds and the same is, accordingly, allowed. The first information report being IIC. R. No. 146 of 2008 registered with J.P. Road Police Station, Vadodara along with all the subsequent proceedings against the petitioner emanating therefrom, are quashed and set aside. Rule is made absolute.