
(2012) 05 CAL CK 0019
In the Calcutta High Court
Case No : C.R.R No. 3931 of 2008

Prabhash Kumar Basu

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 02-05-2012

Acts Referred:

Constitution of India, 1950 — Article 14
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14A, 2(e)
Penal Code, 1860 (IPC) — Section 21, 405, 406, 409

Citation : (2012) 3 CHN 233

Hon'ble Judges : Kanchan Chakraborty, J

Bench : Single Bench

Advocate : Sekhar Basu, Kaushik Gupta and Ratnesh Rai, for the Appellant;
Partha Pratim Das and Binoy Kumar Panda for the State, for the Respondent

Final Decision : Allowed

Judgement

Kanchan Chakraborty, J.—Prabhash Kumar Basu who has been made an accused in Nagarkata police station case No. 58 of 2006 dated 28.10.2006 u/s 406/ 409 of Indian Penal code, has taken out this application praying for quashing of the proceeding on the grounds that:

- i) that he is not an "Employer" coming within the mischief of Explanation i) and ii) of section 405 of IPC;
- ii) that protection given to the persons by explanation ii) is also to be extended to the person coming under explanation i) in view of equal protection as envisaged under Article 14 of the Constitution;
- iii) that the company being the "Employer" has not been made an accused; and
- iv) two persons held responsible for the offence alleged which can not be possible in view of explanation ii) of section 405 of IPC.

Petitioner Prabhash Kumar Basu was arraigned as an accused person on the basis of one FIR lodged by Bijoy Kumar Sarkar, the Enforcement Officer, Employees Provident Fund Organization, Jalpaiguri. It was alleged that he being the Owner-cum-Managing Director of Carron Tea Estate failed to deposit employees contribution towards employees provident fund although he deducted a sum of Rs. 321,117 from the monthly salary of the employees of the Tea Estate for the period June 2006 to August 2006. On the basis of said FIR Nagarkata police station No. 58 of 2006 was started against him and another one under sections 406 and 409 of Indian Penal Code. Investigation was ended in a chargesheet dated 29.11.2006 under the above mentioned sections. The petitioner has come up with this application praying for quashing of the proceeding against him on the ground already stated.

2. Mr. Sekhar Basu, learned Counsel appearing on behalf of the petitioner submitted that in view of the decision of the Hon'ble Apex Court in Employees State Insurance Corporation Vs. S.K. Aggarwal and Others, and the decision of this Court in Satish Kumar Jhunjhunwala vs. the State of West Bengal reported in 2008 (3) Cal LT 484, the petitioner can not be prosecuted under sections 406 and 409 of the IPC because the word "Employer" does not include against any Director. He submitted further that in ordinary parlance the company is the employer and not its director, either singly or collectively in order to attract the provisions of section 405 of Indian Penal Code. He contended further that when the benefit of this principle is given to the persons coming under Explanation ii), it should be extended to the person coming under Explanation i) of section 405 of IPC because Article 14 of the Constitution speak about equal protection of less law.

3. Mr. Das, learned Counsel appearing on behalf of the Regional P.F. Authority contended that the petitioner has been mentioned in the FIR as Managing Director of Carron Tea Estate owned by Basu P. Private Limited. So, in view of definition of the word "Employer" given in section 2(e) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952, he can well be prosecuted for committing u/s 405 of IPC. He also refers to the decision of the Hon'ble Apex Court in Srikanta Datta Narasimharaja Wodiyar Vs. Enforcement Officer, Mysore, in support of his contention.

4. Mr. Das, learned Counsel appearing on behalf of the opposite party contended that in the instant case the petitioner can not be prosecuted u/s 409 of IPC as he is not a public servant as defined in section 21 of the IPC.

5. Section 405 of the IPC reads as follows:

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

discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust."

Explanation 1- A person, being an employer, of an establishment whether exempted u/s 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952) or not, who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution to the said fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Explanation 2.- A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

6. A careful reading of the Explanation I and Explanation II of the Section 405 of the IPC would make it clear that virtually there is no difference between them. While explanation I relates to Employees Provident Fund and Miscellaneous Provisions Act, 1952, the Explanation II relates Employees State Insurance Act, 1948.

7. In both the cases, a person liable should be an employer who deducts employees contribution. The instant case was not filed for committing an offence under 14A of the Employees Provident Fund and Miscellaneous provision Act, 1952 but u/s 405 of Indian Penal Code. There can not be any dispute as to the legal proposition propounded by Hon'ble Apex Court in Srikanta Dutta Narasingha Raja Wodiyer (Supra). That principle is applicable when a person coming within the mischief of definition of employer as it occurring in section 2(e) of the Act, is prosecuted u/s 14A of the Act. The proposition of law cannot be applied to a prosecution initiated u/s 405 of IPC.

8. The Hon'ble Court in Employees State Insurance Corporation vs. S.K. Agarwal (Supra) viewed, "In any event, in the absence of any express provision in the Indian Penal Code incorporating the definition of "principal employer" in Explanation II to section 405, this definition can not be held to apply to the term "Employer" in Explanation II. As the High Court has observed, the term "employer" in Explanation II must be understood as in ordinary parlance. In ordinary parlance, it is the company which the employer not its directors, either singly or collectively."

9. In Satish Kumar Jhunjhunwala (Supra), this Court considered the view of the

Hon"ble Court in the S.K. Agarwal Case (Supra) and applied the said principle in a case under Employees Provident Fund and Miscellaneous Provision Act, 1952.

10. It has already found that the petitioner has been prosecuted as Managing Director of the Tea Company owned by Basu Tea Pvt. The company has not been prosecuted. Being the Managing Director, the petitioner may come within the mischief of section 2(e) of the Act, 1952 but can not be said to be an employer within the meaning of Explanation (I) to section 405 of the IPC.

11. The word "employer" as has been defined in E.P.F. Act, 1952 is para materia with the E.S.I. Act, 1948 which does not include Managing Director within any explanation of section 405 of IPC. One person cannot at the same time be an employer as well as employee. It would be very anomalous if either the Directors or the Managing Director of a company to be deemed employer of the company. It would be a peculiar position if the same person is treated as both employer and an employee.

12. The legal proposition propounded in S.K. Agarwal and Ors (Supra) is squarely applicable in cases under E.P.F Act. It has already been stated that there is no difference in the language in Explanation I and II of the section 405 of IPC. Therefore, when protection is given to a person by the Hon"ble Apex Court who comes within Explanation (II), the same should be extended to a person similarly placed under Explanation (I) of the section 405.

13. This Court thinks that the question raised is no longer res integra in view of the decision of the Hon"ble Apex Court S.K. Agarwal and Ors. (Supra). Had this prosecution been u/s 14A of the E.P.F. Act, the matter would have been different. But the prosecution is initiated u/s 405 of IPC against the Managing Director, the petitioner and another without prosecuting the company to which they belonged. Therefore.. I find substance in the contention of Mr. Basu and constrained to hold that launching of the prosecution against the petitioner as employer of the establishment is not legal and, as such, bad in law.

14. Accordingly, I allow the application and quash the prosecution against the petitioner.

15. No order as to costs. Urgent photostat certified copy of the judgment, if applied for, be handed over to the parties on compliance of necessary formalities.