(2024) 05 GAU CK 0008

In the Gauhati High Court

Case No : Criminal Petition No. 539 Of 2011

Shiv Kumar Kanoi — APPELLANT

Vs

State Of Assam — RESPONDENT

Date of Decision : 15-05-2024

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 468, 482
Indian Penal Code, 1860 — Section 34, 403, 405, 406, 408, 409
Assam Tea Plantations Provident Fund and Pension Fund Scheme and Direct Linked Insurance Fund Scheme Act, 1955 — Section 7, 7(1), 7(3)

Citation : (2024) 05 GAU CK 0008

Hon'ble Judges : Mridul Kumar Kalita, J

Bench : Single Bench

Advocate : A.K. Choudhury, N.C. Das, J. Baishya

Final Decision : Allowed

Judgement

1. Heard Mr. A.K. Choudhury, learned counsel for the petitioners. Also heard Mr. N.C. Das, learned Senior Counsel, assisted by Ms. J. Baishya, learned counsel for the respondents.

2. This criminal petition has been registered on filing of an application under Section 482 of the Code of Criminal Procedure, 1973, by the petitioners, namely, 1. Shiv Kumar Kanoi and 2. Ranjit Kumar Nath praying for quashing of the First Information Report dated 27.09.2011 filed by one Nirmal Roy Choudhury, Fund Control Officer, Assam Tea Plantations Provident Fund & Pension Fund Scheme, Karimganj before the Officer-In-Charge of Katigorah Police Station on the basis of which Katigorah Police Station Case No. 437/2011 was registered under Section 406/34 of the Indian Penal Code. The petitioners have also prayed for quashing of the entire proceeding which arose out of the aforesaid FIR.

3. It is pertinent to mention herein that by order dated 18.11.2011 passed by this court, the investigation of Katigorah Police Station Case No. 437/2011 was stayed by this court during the pendency of the instant criminal petition.

4. The facts relevant for consideration of the instant criminal petition, in brief, are as follows:-

i. that the petitioner No. 1 is the Director of Sree Kamakhya Tea Company Pvt. Ltd. incorporated under the Companies Act, 1956. The said tea company is the owner of two Tea Estates situated in Assam, namely Manohari Tea Estate, Dibrugarh and Craigpark Tea Estate, Kalain, under Katigorah Police Station.

ii. the petitioner No. 2 is the Manager of Craigpark Tea Estate, Cachar.

iii. the respondent No. 2, Nirmal Roy Choudhury, who is the Fund Control Officer, Office of the Board of Trustees of Assam Tea Plantations Provident Fund and Pension Fund Scheme, Karimganj, Cachar had lodged an FIR on 27.09.2011 before the Officer-in-Charge of Katigorah Police Station, inter-alia, alleging that the employer of Craigpark Tea Estate (C/27) in the District of Cachar, Assam have failed to deposit the Provident Fund contribution amounting to Rs. 26,63,682.12 (Rupees Twenty six lakhs sixty three thousand six hundred and eighty two and twelve paise only) for the period with effect from 05.11.2006 to 05.02.2011 .

iv. It is alleged in the FIR that the employer of Craigpark Tea Estate have failed to deposit the collected Provident Fund contribution though it has been deducted from the wages of the workers.

v. It is also alleged that by not depositing the collected Provident Fund contribution and their matching contribution the employers of Craigpark Tea Estate have committed offence of criminal breach of trust and misappropriation and therefore a prayer has been made in the FIR to prosecute the present petitioners under Section 403/405/406/408/409 of the Indian Penal Code.

5. Mr. A.K. Choudhury, learned counsel for the petitioners, has submitted that on 07.09.2010, the petitioner No. 2, who is the Manager of Craigpark Tea Estate, wrote a letter to the Chairman of the Office of the Board of Trustees, the Assam Tea Plantations Provident Fund and Pension Fund Scheme and Direct Linked Insurance Fund Scheme, Guwahati that due to unprecedented crisis faced by the Tea Estate for various reasons like falling price of the tea, rising cost of essential commodities like fuel, electricity, petroleum products etc. and due to the fact that garden has suffered from drought, uneven distribution of rainfall, the petitioners company could not deposit the contribution to Provident Fund in time and prayed for allowing the delayed deposit by the petitioners.

6. It is also submitted that in response to the aforesaid letter, the Secretary-cum-Provident Fund Commissioner, Board of Trustees allowed the petitioners company to deposit the arrear (uncovered) Provident Fund dues amounting to Rs. 22,17,890.02 (Rupees Twenty two lakhs seventeen thousand eight hundred ninety and two paise only) payable for the period from 05.11.2006 to 31.07.2010 in 24 monthly installments with effect from November, 2010 regularly without fail.

7. It is submitted by the learned counsel for the petitioners that accordingly the

petitioners company had made the payment of Provident Fund contribution of Rs. 26,63,682.12 (Rupees Twenty six lakhs sixty three thousand six hundred and eighty two and twelve paise only) for the period from 05.11.2006 to 05.02.2011.

8. Learned counsel for the petitioners has also submitted that Section 7 of the Assam Tea Plantations Provident Fund and Pension Fund Scheme and Direct Linked Insurance Fund Scheme Act, 1955 provides for penalties for default of making any payment under the Act or any scheme under the aforesaid act. The penalty prescribed under Section 7(1) is imprisonment for a term which may extend to 6 months or with a fine which may extend to Rs. 1000 or with both.

9. Learned counsel for the petitioners has also submitted that under Section 7(3) of the aforesaid Act, there is a bar for taking cognizance by any court of any offence punishable under the scheme except on a report in writing of the facts constituting the offence made by an Inspector with the previous sanction of such authority as may be specified by the State Government.

10. It is submitted by the learned counsel for the petitioners that in the instant case, no such report in writing has been submitted by an Inspector to the court and the complainant in this case, i.e. the Fund Control Officer deliberately by-passed the provisions of Section 7(3) of the Assam Tea Plantations Provident Fund and Pension Fund Scheme and Direct Linked Insurance Fund Scheme Act, 1955 by resorting to filing the FIR under Section 406/34 of the Indian Penal Code.

11. It is submitted by the learned counsel for the petitioners that even if the allegations made in the FIR is taken on its face value the petitioners are liable to be prosecuted only under the provisions of the Assam Tea Plantations Provident Fund and Pension Fund Scheme and Direct Linked Insurance Fund Scheme Act, 1955 and by deliberately not filing the complaint under Section 7(3) of the said act, the respondent No. 2, who is the complainant, has taken resort to circumvent the provisions of special law. The learned counsel for the petitioners has submitted that the Doctrine of Circumvention comes into play under the facts and circumstances of this case.

12. Learned counsel for the petitioners has also submitted that for an offence under Section 7 of the Assam Tea Plantations Provident Fund and Pension Fund Scheme and Direct Linked Insurance Fund Scheme Act, 1955 the maximum punishment prescribed is for imprisonment for 6 months or fine which may extend to Rs. 1000 or both and therefore, under the provisions of Section 468 of the Code of Criminal Procedure, 1973, the period of limitation for the said offence is only 1 year and the FIR filed by the respondent No. 2 is ex-facie barred by limitation.

13. Learned counsel for the petitioners has also submitted that there was no Mens rea on the part of the present petitioners, which is required for committing an offence under Section 406 of the Indian Penal Code as by the letter dated 07.09.2010, the petitioners had informed the Chairman, Board of Trustees regarding the difficulties faced by the petitioners' company in payment of

contribution against Provident Funds and also sought time for delayed payment of the same which was allowed by the Provident Fund Commissioner by his letter dated 05.10.2010.

14. Learned counsel for the petitioners has also submitted that as the petitioners have now paid the entire outstanding Provident Fund contribution in respect of the period from 05.01.2006 to 05.02.2011 regarding which the FIR has been lodged, the continuation of the criminal proceedings against the present petitioners would be only an abuse of the process of law and would be only a futile exercise and therefore, he has prayed for quashing the said FIR as well as the consequential criminal proceedings.

15. On the other hand, learned Senior Counsel for the respondents have admitted that the petitioners have made the outstanding Provident Fund contribution of Rs. 26,63,682.12 (Rupees Twenty six lakhs sixty three thousand six hundred and eighty two and twelve paise only) for the period from 05.11.2006 to 05.02.2011. However, he has submitted that the statutory interest at the rate of 15% against the delayed deposit which comes to Rs. 12, 27, 028.96/- (Rupees Twelve lakhs twenty seven thousand twenty eight and ninety six paise only) is yet to be paid by the petitioners. He has fairly submitted that in view of the payment of the outstanding Provident Fund contribution which is mentioned in the impugned FIR, he has no objection if the FIR against the petitioners is quashed subject to a direction to the petitioners to pay the outstanding statutory interest or delayed deposit against the period from 05.11.2006 to 05.02.2011 which comes to Rs. 12, 27, 028.96/-(Rupees Twelve lakhs twenty seven thousand twenty eight and ninety six paise only).

16. I have considered the submissions made by learned counsel for both the sides and have perused the materials available on records.

17. There is no dispute at the bar that the amount of Rs. 26, 63,682.12 (Rupees Twenty six lakhs sixty three thousand six hundred and eighty two and twelve paise only) which is mentioned as an outstanding contribution against Provident Fund in the impugned FIR has already been paid by the petitioners' company.

18. As non-payment of contribution against the Provident Fund under the provisions of the Assam Tea Plantations Provident Fund and Pension Fund Scheme and Direct Linked Insurance Fund Scheme Act, 1955, as well as under the schemes made in the said Act has specifically been made an offence under Section 7 of the said Act, which is a special law, it overrides and outweighs the provisions of general law operating in the same sphere. By not filing a complaint under Section 7 (3) of the aforesaid Act, by the authorities mentioned in the said provisions and by taking resort to lodging of an FIR under Section 406 of the Indian Penal Code appears to be an attempt on the part of the respondent No. 2 to circumvent the provisions of the special law in this regard only to pressurize the petitioners to pay the outstanding Provident Fund contributions.

19. Moreover, mere failing to deposit the Provident Fund contribution in due

time, in itself, would not attract the provisions of Section 406 of the Indian Penal Code as the Mens rea (of dishonestly misappropriating) appears to be absent in this case, as much before filing of the FIR by the respondent No. 2, the petitioner No. 2 by his letter dated 07.09.2010 addressed to the Chairman, Office of the Board of Trustees of Assam Tea Plantations Provident Fund and Pension Fund Scheme and Direct Linked Insurance Fund Scheme, Guwahati had informed him about the difficulties in payment of Provident Fund contribution and also requested not to impose any damages for delayed payment. Moreover, the fact that the petitioners have made, delayed deposits of entire amount of Rs. Rs. 26,63,682.12 (Rupees Twenty six lakhs sixty three thousand six hundred and eighty two and twelve paise only) itself shows that there was no Mens rea on the part of the petitioners as required for constituting an offence punishable under Section 406 of the Indian Penal Code.

20. In view of above circumstances, this court is of considered opinion that the FIR was filed only because of the fact that the petitioners failed to deposit the Provident Fund contribution for the period 05.11.2006 to 05.02.2011 in due time. However, as now the aforesaid amount has already been deposited, as well as for the reasons mentioned in the foregoing paragraphs, continuance of criminal proceedings in the instant case be a futile exercise and would be only an abuse of the process of law.

21. For the discussions made and reasons stated in foregoing paragraphs the FIR dated 27.09.2011 as well as the criminal proceedings of Katigorah Police Station Case No. 437/2011 are hereby quashed and this criminal petition is accordingly allowed.

22. Send back the case record of Katigorah Police Station Case No. 437/2011 corresponding to G.R. Case No. 3260/2011 to the court of learned Chief Judicial Magistrate, Cachar, Silchar along with a copy of this judgment.