
(2001) 10 CAL CK 0022
In the Calcutta High Court
Case No : Writ Petition No. 2029 of 2001

Smt. Ginia Devi Agarwalla

APPELLANT

Vs

The Provident Fund Inspector and Others

RESPONDENT

Date of Decision : 11-10-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 142, 21, 226

Criminal Procedure Code, 1973 (CrPC) — Section 462, 468

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14(1B), 17(3), 17(3A), 5, 6

Citation : (2002) 1 CALLT 404 : (2002) 2 CHN 550 : 106 CWN 1014 : (2002) 93 FLR 1214 : (2002) 3 LLJ 136

Hon'ble Judges : Dilip Kumar Seth, J

Bench : Single Bench

Advocate : Biswanath Samaddar, for the Appellant; Vinay Mishra, for the Respondent

Judgement

Dilip Kumar Seth, J.—A complaint has been lodged u/s 14(1B) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 against the petitioner. Mr. Biswanath Samaddar, learned counsel for the petitioner, contends that the petitioner is an 80 years old lady and that before the launching of the prosecution the entire dues on the basis whereof the prosecution was initiated had been paid. He contends that there might be some delay in the deposit but the entire deposit having been made, no prosecution can continue in view of the decision in the case of Provident Fund Inspector, Faridabad Vs. Jaipur Textile, Faridabad and Others, . He also contends that there has been a non-application of mind in lodging the Criminal Case, inasmuch as alongwith the prosecution a prayer was also made for recovery of the dues which had already been paid and it clearly shows a blatant non-application of mind. He also relies on a decision of the Division Bench of this Court in the case of The Regional Provident Fund Commissioner, West Bengal v. Raj Kumar Nemani and Ors. reported in 1995 (1) CLJ 89 in which the decision of the apex Court in Jaipur Textile (supra) was

considered. He also relies on an unreported decision in the case of Nayek Paper and Board Mills and Anr. v. The Union of India and Ors. In C.R. Case No. 6445 (W) of 1982 disposed of on November 30, 2000, in support of his contention.

2. Mr. Mishra, learned advocate for the respondents, on the other hand, contends that this Court in Writ Jurisdiction cannot interfere with the criminal prosecution. If the petitioner has any defence, it is to be pleaded before the Criminal Court. He relies on an unreported decision of a Division Bench of this Court in the case of Universal Heavy Mechanical Lifting Enterprise and Anr. v. Union of India and Ors. In matter No. 97 of 1993 disposed of on December 16, 1995, to support his contention that in exercise of the Writ Jurisdiction the prosecution cannot be interfered with. He also relies on a decision in the case of N.K. Jain and others Vs. C.K. Shah and others, which supports this view. He further relies on a decision in the case of Bhagirath Kanoria and Others Vs. State of M. P., as well as a decision in the case of Sanyal Lahiri and Co. Ltd. and Others Vs. C.B. Paul and Others, .

3. After having heard the learned counsel for the parties, it appears that Section 14 (1A) and (1B) of the Act, makes an employer liable for prosecution whenever there is a contravention or default in complying with the provisions mentioned therein. It is not in dispute that the provisions were contravened or there was a default in complying with the provisions. Thus default was sought to be explained that it means a total default or a default till the prosecution is launched. According to Mr. Samaddar, it cannot be treated as a default before launching of the prosecution, in case the entire amount is paid before the prosecution is launched, in that event, it would neither be a contravention nor a default.

4. I cannot accede to such a proposition. Section 6 of the Employees' Provident Fund & Miscellaneous Provisions Act, 1952 (hereinafter referred to as the Act) casts a liability on the employer to contribute to the Fund as provided therein. For carrying out the object and purpose of the Act Section 5 provides for Employees' Provident Fund Scheme (hereinafter referred to as the Scheme). In chapter V, paragraph 30 of the scheme makes the employer liable for payment of both the contribution at the first instance. Paragraphs 35 and 36 of the Scheme cast an obligation on the employer to prepare cards and submit returns respectively. By reason of Clause 2 of paragraph 36 of the Scheme return is to be submitted within 15 days of the close of each month. Under paragraph 38 the employer is obliged to pay the contributions and administrative charges to the Fund within 15 days of the close of each month. Section 14(1A) of the Act makes contravention or default in compliance of Section 6(a) or 17(3) of the Act or Paragraph 38 of the Scheme punishable. Similarly Section 14(1B) makes contravention or default in compliance of Section 6C, Section 17(3A)(a) of the Act punishable.

5. The phrase "contravention" and "default" is to be read in the context in which it is used according to the legislative intent having regard to the Scheme of the Act and frame of the Scheme. The Act prescribes in Section 6 read with Section 5

the liability to pay the contribution according to the Scheme. The scheme in paragraph 30 read with 38 provides for made manner, method and time for payment of contribution. Therefore, the phrase "contravention" or "default" etc. is to be read having regard to the above provision. The phrase contravention is to be read as : "contravention of Section 6 Clause (a) or sub Section (3) of Section 17or paragraph 38 of the Scheme.....". Similarly the phrase default is to be read thus : "makes default in complying with the provision of Section 6 Clause (a) or Subsection (3) of Section 17". Thus it is the contravention of or making default in compliance with the relevant provision, that constitutes the offence. If the provision itself postulate a particular mode manner and prescribes time for observation or compliance, then non-compliance of any mode manner or time limit would definitely constitute a contravention. Non-payment within time is a failure to pay within time. Default means failure to pay. Failure to pay within time is therefore a default. Whether the default continues after payment is a question which need not be gone into here so as to keep it open to be agitated in the criminal proceedings.

6. Paragraph 38 of the Scheme requires payment within 15 days from the closing of the month. If it was not paid within the said time it was a contravention. If it is delayed it is still a default in compliance with the provisions, since Section 6 read with paragraphs 30 and 36 of the scheme makes it incumbent that the entire contribution is to be paid in terms of paragraph 38. Thus prima facie there was contravention and default in compliance. As such, the application of Section 14 (1A) and (1B) of the Act is attracted. Therefore, 3 prosecution may be launched.

7. The decision in M/s. Jaipur Textile (supra) was undertaken in peculiar, facts and circumstances of the case as was recorded in the said order, though the peculiar facts and circumstances of the case were not mentioned or referred to therein." However, at the end it was pointed out that will not serve as a precedent Therefore, the reliance on this decision does not help us to follow the same as a precedent. However, drawing analogy there from Mr. Samaddar wants this Court to take a similar view since the lady is 80 years old which is also a fact peculiar as is contemplated in the said decision. Drawing, of analogy relying on or taking cue from a decision is an indirect way of treating it as precedent. When the Court, being alive to the situation, forbids, in express terms, that the decision shall not be treated as precedent, then the Court can not rely upon it even for analogy. But however it is always open to the Court to take its own decision according to its ownjudicial conscience and discretion having regard to the facts and circumstances of the case, independently.

8. The decision in Jaipur Textiles was expressly passed by the apex Court in exercise of jurisdiction under Article 142 of the Constitution of India. Their expressly provided an order passed in exercise of jurisdiction under Article 142 can never be a precedent, in as much as the Jurisdiction under Article 142 is an exclusive jurisdiction conferred specially on the Supreme Court.

9. It can not be exercised by any other Court. No such Jurisdiction is available to

the High Court, Article 142 empowers the apex Court to make such order as is necessary for doing complete Justice in any cause or matter pending before it, and an order so made is enforceable through out the territory of India. The phrase "such order as is necessary" gives the Supreme Court wide power to make ancillary to its power to make decisions under Articles 131 to 136. It contains no word of limitation. It was so held in *K.M. Nanavati Vs. The State of Bombay*, .

10. When an order is made in exercise of Jurisdiction under Article 142 of the Constitution by the apex Court to do complete justice in a case, it exercises an exclusively special Jurisdiction conferred upon it. Such order stands out on an independent distinct and different footing. It is an order that assumes altogether a separate character. It becomes enforceable by itself under Article 142, even in case there be no prescribed mode of execution or enforcement. Such orders are special kind of order passed in exercise of special and exclusive Jurisdiction. Such order, therefore, can not form a precedent for other Courts, unless it is so directed or intended by the apex Court. Be that as it may, in the decision the apex Court had itself provided that the same shall not be a precedent.

11. The principles of precedent was enacted in Section 212 of the Government of India Act, 1935. It was engrafted in Article 141 of the Constitution of India. Long before Section 212 of the Government of India Act was enacted the doctrine of precedents substantially prevailed in England and was recognised and applied in British India. The judgments of the highest Court of appeal the Privy Counsel were binding on all Courts in British India. The difficulties with regard to the legal authority of the precedents and the Rules governing the precedents, in the words of Salmond. are described thus--"since precedent can not logically leave itself by its boot straps. The limiting rules are not strictly rules at all but are mere statement of practice" (Samand, Jurisprudence 12th edition, at page-159). But this might be true in England. But in India by reason of Section 212 of the Government of India Act and Article 141, it is a settled practice having the force of rule of law.

12. Under Article 141 law declared by the Supreme Court is binding on all Courts in India. In *Tribhuvandas Purshottamdas Thakur Vs. Ratilal Motilal Patel*, , the apex Court had held that the precedents which enunciate rules of law form the foundation of the administration of Justice under our system. However, it is a well settled principle that the decision of even the Highest Court on question of fact can not be cited as precedents *Prakash Chandra Pathak Vs. State of Uttar Pradesh*, followed in *Municipal Committee, Amritsar Vs. Hazara Singh*, . In *B. Shama Rao Vs. The Union Territory of Pondicherry*, , it was held that its trite to say that a decision is binding not because of up conclusion but in regard to its ratio and the principles laid down therein. In *State of Maharashtra etc. Vs. Madhavrao Damodar Patilchand and Others etc.*, , it had taken a view that it is not only the ratio but also the conclusion that is binding.

13. The distinction between Articles 141 and Article 142 are apparent While

under Article 141 law is declared, under Article 142 only an order is made for doing complete Justice. It may not be a declaration of law, until and unless the apex Court expressly declares it to be a law. When the apex Court does not declare to be a law and provides that the same shall not be a precedent, then it can not be treated to be a precedent. It is only when the apex Court intend it to be treated as precedent, it can be so treated and not otherwise.

14. In as much as this Article contemplates only passing of decree or making of an order. It does not travel beyond that As such until a ratio is decided or unless a law is laid down it can not be a precedent. At the same time when a ratio is decided or a law is laid down or a judgment is given, the apex Court does not need the aid of Article 142. It does it in exercise of the Jurisdiction conferred upon it independent of Article 142. Aid of Article 142 is needed when it is not possible to do it in the exercise of its ordinary or extra ordinary course of jurisdiction conferred upon it other than Article 142. Then again an order or decree does not operate as precedent. It is the reasons given and the conclusion arrived at in the judgment. It is the ratio decided in the judgment that forms the precedent. An order may be a precedent when it applies a particular law in a particular case which might have general application. As soon it is made under Article 142, such order stands out without being a precedent, unless it is so directed or intended by the apex Court.

15. The above decision was taken note of in the decision of Raj Kumar Nemani and others (supra), but even thereafter the Division Bench in the said decision had held that prosecution cannot be interfered with. A similar view was taken by the Division Bench in M/s. Universal Heavy Mechanical UJltnng Enterprise & Anr. (supra) where the decision in M/s. Jaipur Textile (supra) was taken into consideration and even then it was held that the prosecution cannot be interfered with by the Court.

16. These decisions being Division Bench decisions, I am bound by them. The decision in M/s. Nayek Paper and Board Mills (supra) being that of a learned single Judge and without laying down any ratio does not help us in this case. On the other hand, the decision by the learned single Judge in M/s. Sanyal Lahiri & Co. Ltd. and Others (supra) supports the contention of Mr. Mishra. In W.K. Jain & Others (supra) the apex Court in paragraph 20 held as follows :-

"From the above discussion, it emerges that at least Sections 14(1A) and 14(2A) are attracted to the facts in the present case and, therefore, it cannot be said that there is no *prima facie* case and consequently the accused cannot claim any acquittal, even before the conclusion of the trial under Chapter XX, Cr.PC dealing with trial of Summons cases. Other sections like 14(2), 14A(1) and 14A(2) and paragraph 76 of the Employees Provident Fund Scheme, 1952. will not apply to the facts of the present case. Therefore, the trial Court may proceed with the trial for the offences punishable under Sections 14(1A) and 14(2A) against the appellants and dispose of the matter in accordance with law. Subject to the above directions, these appeals are disposed of."

17. Having regard to the said decision read with the Division Bench Judgment in M/s. Universal Heavy Mechanical Lifting & Anr. (supra), it is very difficult to make a departure therefrom by this Court. The decision in Bhagtrath Kanorta and others (supra) was also taken note of by the Division Bench to hold that it is a continuing offence.

18. Mr. Mishra relied upon Bhagtrath Kanorta (supra). In the said case default was held to be a continuous offence which is governed by Section 472 of the Code of Criminal Procedure (hereinafter referred to as the Code) and limitation provided u/s 468 of the Code is not applicable. Mr. Samaddar contended that this was a case where payment was not at all made. But in the present case though delayed, but the payment was made before the launching of the criminal prosecution. Mr. Samaddar has raised two objections. One that as soon the payment was made the default ceased. The offence ceased to be a continuing offence after the payment, though delayed. Therefore no criminal case could be launched after the expiry of the period of limitation provided u/s 468 of the Code calculated from the date of payment. Where payment is made and default ceases, the offence ceases to be a continuing offence. As such Section 472 of the Code can not be attracted. Secondly he contended that once payment is made the default disappears. It would then be a case of delayed payment and not of default. Therefore no criminal case at all can be initiated. Mr. Samaddar wanted to distinguish the decision cited thus. However Mr. Mishra contended even if it is assumed that it is not a default, still it is a contravention. But I do not propose to enter into this question, since it is not necessary at this stage. The objections as raised by Mr. Samaddar are left open to be agitated in the criminal proceedings.

19. It would be open to the petitioner to approach the Court in view of the peculiar facts to take resort to the provisions of Section 14. particularly, the proviso to Subsection (1B), of the Act and having regard to the age of the petitioner and the fact that the payment was already made and offence did not continue after payment so made and that the prosecution was launched after the payment was made which are really facts peculiar which would weigh with the prosecution.

20. It will also be open to the petitioner to apply for bail before the criminal Court where the Magistrate should allow such bail and try the case in accordance with law, having regard to the decisions as discussed hereinabove and in the light of the said decisions and the observations made in this order.

Since no affidavit-in-opposition has been used in this matter, the allegations as contained in the petitioner are deemed to be not admitted by the respondents.

This writ petition is thus disposed of. There will be no order as to costs.

All parties concerned are to act on a xeroxed signed copy of this dictated order on the usual undertaking.