

(2005) 02 GAU CK 0085

In the Gauhati High Court

Case No : Criminal Revision No. 277 of 2004

Som Prakash Singhanian

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 18-02-2005

Acts Referred:

Assam Tea Plantation Provident Fund and Pension Fund Scheme Act, 1955 — Section 11, 2, 2(17), 3, 7
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 155(2), 156(1), 482
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 17
Employees State Insurance Act, 1948 — Section 85C, 95B
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 403, 405, 406, 407

Citation : (2005) 1 GLT 592

Hon'ble Judges : H.N. Sharma, J

Bench : Single Bench

Advocate : D. Das, A. Das, M. Bordoloi and A.A. Mir, for the Appellant; K. Munir, for the Respondent

Final Decision : Dismissed

Judgement

H.N. Sarma, J.—By this petition, the Petitioner invoking jurisdiction of this Court u/s 482 CPC has prayed for quashing of the G.R. Case No. 75/04, arising out of Golaghat P.S. Case No. 32/04 u/s 406 IPC instituted on the basis of an FIR dated 21.04.04 lodged by one Shri A.P. Sahu, Assistant Provident Fund Commissioner, Golaghat.

2. Facts necessary for disposal of this petition, may be stated as under -- the Petitioner is the Managing Director of Rungajan Tea and Plantation Industries Pvt. Ltd., a Company registered under the Companies Act, 1956 having its registered office at Chatterjee International Centre, 33A Chowrighee Road, Kolkata 700071 (hereinafter referred to as "the Company"). The Assistant Commissioner of Provident Fund, Golaghat lodged an FIR with the Officer-in-Charge of Golaghat

Police Station on 21.01.04 stating, inter alia, that the employer of the Rungajan Tea Estate in the district of Golaghat have failed to deposit the Provident Fund Contribution deducted from the wages of the workers along with their matching contribution with effect from 18.09.95 to date. The amount of such default stood at Rs. 1,80,55,352.13 for the period from 18.09.95 to 22.03.03. It has further been stated that as per Section 11 of the Assam Tea Plantation Provident Fund and Pension Fund Scheme Act, 1955 as amended upto date, every employer shall be responsible for collection of provident fund from their employees, their remittance as per provision laid down in para 24 of the Assam Tea Plantation Provident Fund and Pension Fund Scheme, but the employer of Rungajan Tea Estate have failed to deposit the collected Provident Fund contribution though it had been deducted from the wages of the workers. It is further stated that the employer of the Rungajan Tea Estate have committed a serious offence like criminal breach of trust and misappropriation by not depositing the collected provident fund contributions and, therefore, the Managing Director and the Manager of the Tea Estate are liable to be prosecuted under the relevant provisions of law.

3. On receipt of the aforesaid FIR the police registered the Golaghat P.S. Case No. 32/04 u/s 407 IPC on 21.04.04. It is noteworthy to mention here that the investigation of the case has not yet been completed and the case has not been forwarded for trial to the Court having jurisdiction to try the same. Thus, the case is in the investigation stage.

4. I have heard Mr. D. Das, learned Counsel for the Petitioner and Mr. K. Munir, learned Public Prosecutor, Assam for the Respondent State.

5. Mr. Das, learned Counsel for the Petitioner, in support of his case, has raised the following points:

(a) That the Petitioner being the Managing Director, is not an employer and as such the proceeding is not maintainable and liable to be quashed; and

(b) That Section 405 IPC read with Explanation (1) appended thereto does not attach any liability to the Petitioner as the employer of the Tea Estate and accordingly the case against him is liable to be quashed.

6. Mr. K. Munir, learned Public Prosecutor, on the other hand, refuting the aforesaid contentions has submitted that on a bare reading of the provisions of Section 405 IPC with explanation thereof it is amply clear that the Petitioner squarely falls within the definition of accused and is liable to be dealt with in accordance with law. It has further been submitted that the Petitioner being the employer of the Company and having realized the provident fund contributions from his employees/ workman, is liable to pay under the provisions of the Assam Tea Plantation Provident Fund and Pension Fund Act, 1955 (Assam Act X of 1955) (hereinafter referred to as "the Act"), the said amount along with its own contribution and by not depositing the amount of Rs. 1,80,55,352.13 has misappropriated the said amount committing complete breach of trust and

accordingly the case is not liable to be quashed which is in the investigation stage.

7. Mr. D. Das, learned Counsel for the Petitioner, in support of his argument has relied on the decisions reported in (1) Employees State Insurance Corporation Vs. S.K. Aggarwal and Others, (2) Gopta B.P. and Others Vs. State of Bihar, and (3) CrI. Revision No. 156/02 H.K. Kanoi v. Board of Trustees disposed of on 27.09.04.

8. I have heard the rival submissions of the parties and also perused the connected materials annexed with the petition. As alluded above, G.R. Case No. 75/04 (arising out of Golaghat P.S. Case No. 32/04) was registered on the basis of the FIR lodged by Shri A.P. Sahu, Assistant Provident Fund Commissioner, Golaghat. Further, while the case is at the initial stage of investigation, the Petitioner has approached this Court for quashing of the said case in exercise of the inherent jurisdiction of this Court u/s 482 Code of Criminal Procedure

9. In order to appreciate the contention of Mr. Das to the effect that the Petitioner not being an employer, the case is not maintainable against him and is liable to be quashed, we look into the relevant provisions of the Act as well as Section 405 of the Indian Penal Code to find out whether the Petitioner can be treated as an employer within the meaning of the Act or not. Section 2(b) of the Act defines "employer" as follows:

2(b). "Employer" means the any person who is the proprietor of a plantation and includes a Managing Agent, Manager, Superintendent, Managing Director, Director or any other person who is in charge of any plantation.

Section 3 of the Act makes provisions for compulsory provident fund scheme and payment thereof by the employer, which is quoted below:

3. Compulsory Provident Fund Scheme: (1) The State Government may, by notification in the official Gazette, frame a Scheme to be called the Assam Tea Plantations Provident Fund and Pension Fund Scheme for the establishment of Provident Fund and Pension Fund for the employees in plantations and specify the plantations to which the same shall apply.

(2) A Scheme under the provisions of sub-s(1) may provide for all or any of the matters specified in the Schedule.

(3) The contribution which shall be paid the employer to the Provident Fund shall be eight per cent of the total wages including all such allowances as are included within wages as defined in Clause (i) of Section 2 for the time being payable to each of the employee and the employee's contribution shall be equal to the contribution payable by the employer in respect of him. Provided that where there exists any Provident Fund in any plantation at the commencement of this Act and the rate of contribution payable by either the employee or the employer is higher than what has been prescribed above, the employee shall have the option within such period as may be fixed by the Board in its meeting to elect

either to continue to subscribe to the existing fund or join the Provident Fund established by this Act, but the election once made shall not be changed except with the permission of the Board.

Provided further that in respect of the employee opting to subscribe to the existing fund as above the obligation of the employer to continue to the existing fund shall continue and shall not be affected by the provisions of this Act.

Section 7 of the provides for provision of penalty as follows:

7. Penalties (1): Whoever, for the purpose of avoiding any payment to be made by himself under this Act or under any scheme or of enabling any other person to avoid such payment, knowingly makes or causes to be made any false statement or false representation, shall be punishable within imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees or with both.

(1-A): An employer who contravenes, or makes default in complying with the provisions of Section 3 of the Scheme in so far as it relates to the payment of administrative charges, shall be punishable with imprisonment for a term which may extend to six months; but --

a) Which shall not be less than three months in case of default in payment of the employees' contribution which has been deducted by the employer from the employee's wages;

b) Which shall not be less than one month, in any other case; and shall also be liable to fine which may extend to two thousand rupees; Provided that the Court may, for the adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term or of fine only in lieu of imprisonment.

10. Section 403 IPC defines dishonest misappropriation of property and Section 405 defines, criminal breach of trust as follows:

403. Dishonest misappropriation of property: Whoever, dishonestly misappropriates or converts to his own use any moveable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

405. Criminal breach of trust: 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 dispose 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 been made touching the discharge of such trust, or wilfully 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 employees' contribution from the wages payable to the employee for credit to a Provident Fund and Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount for 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 law, shall be deemed to have dishonestly used the amount of the said contribution in violation of the 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 the contribution so deducted by him and if 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 deduction of law as aforesaid.

11. On careful perusal of the definition of the term "employer" within the meaning of the Act, it leaves no iota of doubt that an employer includes the Managing Director, Director or any other person in charge of plantation. Section 3 of the Act makes it incumbent upon the employer to pay contribution of Provident Fund which shall be eight per cent of the total wages including all such allowances as are included within wages. Explanation (1) to Section 405 of the Indian Penal Code specifically provides that a person, being an employer, of an establishment, who deducts the employees' contribution from the wages payable to the employee for credit to a Provident Fund and Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount for 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 law, shall be deemed to have dishonestly used the amount of the said contribution in violation of the law as provided in Section 405.

12. Thus, on a conjoint reading of aforesaid definition of employer under the Act and Section 403 and 405 IPC with its explanation, it leaves no doubt that a Managing Director or Director will fall within the category of the employer within the meaning of the Act. The case reported in AIR 1998 SC 2676 (supra) as cited by Mr. Das, is of no application in the instant case. The said case is a case relating to default committed under the provisions of the Employees State Insurance Corporation Act and not under the Tea Plantation Provident Fund and Pension Fund Act, 1955. In the Employees State Insurance Act, the term "employer" is not defined and this has been held in para 4 of the aforesaid case as follows:

4. The Employees State Insurance Act does not define the term "employer" although u/s 95-B and 85-C of that Act the term "employer" is used.

Section 2(17) of the said Act defines "principal employer" as follows:

2(17) Principal employer" means --

(i) In a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and here a person has been named as the manager of the factory under the Factories Act, 1948; (LXIII of 1948) the person so named;

(ii) In any establishment under the control of any department of any Government in India, the authority appointed as such Government in this behalf or where no authority is so appointed, the head of the Department;

(iii) In any other establishment any person responsible for the supervision and control of the establishment.

13. Thus, in the aforesaid Employees State Insurance Act the Director and Managing Director is not included as employer and on that count the Apex Court, in interpreting the provisions of the Employees State Insurance Act rendered the judgment and the case in hand are on a different footing, inasmuch as, in the instant case the term "employer" has been specifically defined which includes the Managing Director and Director. Accordingly, this case is of no assistance to the Petitioner. The case reported in 2000 CrL.J. 781 (supra) has been decided solely on the basis of S.K. Agarwalla's case (supra). Further, in the said case also it is noticed that Section 2(e) of the Act does not include the Director or Managing Director. The said case was decided ex parte and the facts of that are not applicable to the present case. The ratio of the Criminal Revision No. 156/02 (supra), which is sought to be pressed into service, is also not applicable in the instant case, inasmuch as, both the cases are absolutely on different footings. The said criminal revision was filed for quashing a proceeding initiated u/s 138 of the Negotiable Instrument Act for alleged dishonour of certain cheques issued by the Petitioner of that case. The said case did not take the notice of the definition "employer" as defined in the Assam Tea Plantation Provident Fund and Pension Fund Act and relying on the decision rendered by the Apex Court in S.K. Agarwalla (supra), the observation was made to the effect that the recourse taken against the Petitioner of that case projecting him as a Director in the said proceeding cannot continue has enough force in view of the ratio laid down in S.K. Agarwalla's case, but no definite finding was expressed by the Court (para 11 of the judgment).

14. From a conjoin reading of the aforesaid provisions of law enacted in different Acts, it cannot be said that the Managing Director, Director or Manager of the concerned Tea Estate is not an employer within the meaning of the Assam Tea Plantation Provident Fund and Pension Fund Act, 1955.

15. The power of quashing a criminal proceeding in exercise of powers conferred u/s 482 Code of Criminal Procedure by High Court is by now well settled. The Apex Court in the case of R.S. Raghunath Vs. State of Karnataka and another,

held as follows:

102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers u/s 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficient channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers u/s 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated u/s 155(2) of the Code.

(5) Where the allegations in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

16. Similarly, in the case of State of Bihar and Another Vs. Md. Khalique and Another, the Apex Court held as follows:

4. Law is well settled regarding interference by the High Court with an investigation of a case. In the leading case of this Court in State of Haryana v.

Bhajan Lal this Court by way of illustration stated seven categories of cases where the extraordinary power under Article 226 or inherent power u/s 482 Code of Criminal Procedure can be exercised by the High Court either to prevent abuse of process of any court or otherwise to secure the ends of justice. Out of seven categories two categories are relevant for our present purpose viz.

(i) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers u/s 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

In the said case, it was also held that where specific allegation is made against the accused person including disclosing a cognizable offence, the High Court committed grave error in quashing the entire proceeding.

17. Similarly, in case of State of Bihar Vs. Rajendra Agrawalla, it was held by the Apex Court that inherent power of the Court u/s 482 Code of Criminal Procedure should be very sparingly and cautiously used only when the court comes to the conclusion that there would be manifest injustice or there would be abuse of the process of the court, if such power is not exercised. So far as the order of cognizance by a Magistrate is concerned, the inherent power can be exercised when the allegations in the first information report or the complaint together with the other materials collected during investigation taken at their face value, do not constitute the offence alleged. At that stage, it is not open for the court either to sift the evidence or appreciate the evidence and come to the conclusion that no prima facie case is made out.

18. In another case, Raj Lakshmi Mills v. Shakti Bhakoo reported in (2002) 8 SCC 237, in para 4 held as follows:

4. We are of the opinion that at the stage of summoning when evidence was yet to be led by the parties, the High Court could not on an assumption of facts come to a finding of fact that the Respondent was not responsible for the conduct of the business. On this ground alone, these appeals are allowed and the impugned decision of the High Court is set aside.

19. On over all consideration of the relevant facts of the present case and the materials on record, applying the aforesaid principle laid down by the Apex Court, it cannot be said that manifest injustice would be caused to the Petitioner, if this Court do not quash the proceeding in exercise of power u/s 482 Code of Criminal Procedure nor it can be said that the FIR, accepting the allegations made therein to be true, does not disclose any cognizable offence against the Petitioner. The case is still in the investigation stage. After the investigation, if the charge sheet is submitted that will be forwarded to the court for taking

necessary cognizance in accordance with law and at the stage of investigation this case is not liable to be quashed as prayed for.

20. For the foregoing reasons, this Court is of the view that the Petitioner has not been able to make out a case for quashing of the proceeding. Accordingly, the petition is dismissed. Interim order passed on 21.05.2004 stands vacated.