

(1972) 09 CAL CK 0002
In the Calcutta High Court

Sreenarayan Shroff and Another

APPELLANT

Vs

Sambhu Prosad Agarwal and Another

RESPONDENT

Date of Decision : 29-09-1972

Acts Referred:

Employees State Insurance Act, 1948 — Section 40(4), 85, 86
Penal Code, 1860 (IPC) — Section 403, 405, 406, 408, 409

Citation : 79 CWN 538

Hon'ble Judges : N.C. Talukdar, J;A.K. De, J

Bench : Division Bench

Advocate : Balai Chandra Roy, Mr. Tapandeb Nandy and Mr. Durgapada Dutt, for the Appellant; Sarjoesh Mukherjee and Mr. Kishore Mukherjee, for the Respondent

Judgement

N.C. Talukdar, J.—This Rule was issued at the instance of the two accused-petitioners for setting aside an order dated the 18th May, 1971 passed by Sri S. C. Dutta, Presidency Magistrate, 15th Court, Calcutta, in Case No. C--164 of 1970, rejecting their prayer to discharge them; and for quashing the said proceedings pending against them before the learned Trying Magistrate u/s 406 Indian Penal Code. The background of facts is a short one. A petition of complaint was filed in the Court of the learned Additional Chief Presidency Magistrate, Calcutta, on the 13th March, 1970 by the complainant-opposite party No. 1 Sambhu Prasad Agarwal, stated to be the Chief Accountant of M/s. Inter State Transport Agency, a partnership firm having its registered office at 134/1, Mahatma Gandhi Road, Calcutta, alleging inter alia that the staff attached to the Registered Office at Calcutta and branch offices, numbering about 70 heads are entitled to the benefit of Employees Provident Funds Scheme and have been regularly contributing to the said fund according to the Rules; that according to the Provident Funds Scheme, the amount collected every month for the said fund are to be deposited with the State Bank of India, with intimation to the Regional Provident Fund Commissioner, West Bengal, 24, Park Street, Calcutta; that the management of the firm, viz., the accused persons, collected the contribution to the fund by the members of the staff, during the months of November, 1969 to

January, 1970 by making deductions from their wage bills indicated in the records maintained in the office, amounting to Rs. 7,000/- more or less, from staff contributions and a similar sum of Rs. 7,000/- being the management's share of contributions, but did not deposit the sum in the Bank and no intimation was sent to the office of the Regional Provident Fund Commissioner, West Bengal at Park Street, Calcutta; that the entire amount of Rs. 14,000/- which should have been so deposited in the State Bank of India according to the Rules has been misappropriated by the accused persons and was not properly accounted for; that the accused persons were entrusted with the provident fund money referred to above and had dominion over the same but have dishonestly misappropriated the same or have converted the same to their own use in violation of the directions of law, prescribing the mode in which such trusted should have been discharged, thereby causing illegal gain for themselves and illegal loss to the members of the staff, and thus committed an offence punishable u/s 406 of the Indian Penal Code. The learned Additional Chief Presidency Magistrate, Calcutta examined the complainant and sent the matter for judicial enquiry. On the 3rd April, 1970, after perusing the report of the judicial enquiry, he agreed and accepted the same and summoned the accused persons u/s 406 of the Indian Penal Code. The matter proceeded thereafter for some time in the court below and ultimately on the 5th May, 1971 an application was filed on behalf of the accused persons praying for discharging them u/s 253(2) of the Code of Criminal Procedure on the ground that the charge is groundless. The learned Additional Chief Presidency Magistrate, Calcutta, however, by his order dated the 18th May, 1971 rejected the application on grounds as mentioned in the said order. This has been impugned and forms the subject-matter of the present Rule.

2. Mr. Balai Chandra Roy, Advocate, (with Messrs. Tapandeb Nandy and Durgapada Dutt, Advocates) appearing on behalf of the accused petitioners in support of the Rule made two short submissions. Firstly, that paragraph 32(3) of the Employees' Provident Fund Scheme, 1952 merely creates a fiction of an entrustment, punishable u/s 14 of the Employees' Provident Funds Act, 1952 (Act XIX of 1952) but there cannot be any prosecution for an offence of criminal breach of trust based on such a fiction of entrustment; and secondly that the facts and circumstances of the present case did not, in any way, make out any entrustment within the meaning of section 405 of the Indian Penal Code constituting thereby the offence of criminal breach of trust u/s 406 of the Indian Penal Code and as such a continuance of the present proceeding thereunder would be an abuse of the process of the court. Mr. Sarojesh Mukherjee, Advocate, appearing on behalf of the complaint-opposite party No. 1 and Kishore Mukherjee, Advocate, appearing on behalf of the State joined issue. They contended that sub-paragraph 3 of paragraph 32 of the Employees' Provident Fund Scheme, 1952 creates a statutory offence and the contravention of even a fictional trust as created by the statute, would constitute an offence u/s 406 of the Indian Penal Code. Their reply to the second branch of Mr. Balai Chandra

Roy's submissions is that a continuance of the present proceeding u/s 406 of the Indian Penal Code would not be, in any way bad in law or improper inasmuch as sub-paragraph 3 of paragraph 32 of the Employees' Provident Fund Scheme, 1952 provides "any sum deducted by an employer from the wage of an employee under this scheme shall be deemed to have been entrusted to him for the purpose of paying the contribution in respect of which it was deducted" and is accordingly good enough to constitute a statutory offence based on such entrustment. It was further contended in this respect that the aforesaid provisions of the special Act, rule out the circumscribed definition of entrustment laid down in the line of cases u/s 405 of the Indian Penal Code, inasmuch as the statute provides for such a contravention and creates an offence and nobody is above the same. Several cases were cited and would be considered in their proper context.

3. The first branch of the contentions raised by Mr. Balai Chandra Roy relates to the effect of a fiction of an entrustment created under paragraph 32(3) of the Employees' Provident Funds Scheme, 1952. It is pertinent in this context to refer to the provision in paragraph 32(3) of the Employees' Provident Funds Scheme, 1952. It runs as follows : --

Any sum deducted by an employer from the wage of an employee under this Scheme shall be deemed to have been entrusted to him for the purpose of paying the contribution in respect of which it was deducted.

4. If there is a contravention of the aforesaid provisions, the penalty enjoined u/s 14 of the Employees' Provident Funds Act, 1952 is attracted. The aforesaid provisions do not differ from the provisions laid down in paragraph 29(2) of the Coal Mines Provident Funds Scheme, 1948 or section 40 (4) of the Employees' State Insurance Act, 1948. The relevant provisions lay down that such deductions "shall be deemed to have been entrusted" to the employer. The words "shall be deemed to have been entrusted to him" constitute the starting point of controversy as to whether it can create in law a- new category of entrustment enjoined by a special statute or is a mere legal fiction for the purposes necessary to such employment. On a consideration of the provisions of paragraph 32(3) of the Employees' Provident Funds Scheme, 1952 we hold that the same creates only a fiction of an entrustment, falling short of the essential ingredients of the offence of criminal breach of trust within the bounds of section 406, Indian Penal Code. The imprimatur of judicial decisions lends assurance to the said finding and a reference may be made to the case of National Pod-dar vs. Salil Kumar Chakraborty reported in 74 C.W.N, pp. 792 decided in the context of section 40(4) of the Employees' State Insurance Act, 1948 (Act XXXIV of 1948). It was held therein that "there is no actual entrustment of the amount in question with the accused persons but they are merely deemed to be entrusted therewith u/s 40(4) or Act XXXIV of 1948". This runs off at a tangent from the concept of entrustment as defined from time to time "by the different High Courts as also the Supreme Court and forming the basis of a proceeding u/s 406 or section 403,

Indian Penal Code." It was further held that the failure on the part of the employers to pay such contributions may be the basis of a prosecution u/s 85 read with section 86 of the Employees' State Insurance Act, 1948 on the fiction of an entrustment created under the special statute but the concept of such entrustment cannot transgress the bounds of the special Act to constitute the necessary ingredients of entrustment within the periphery of section 405, Indian Penal, Code, which alone can form the basis of a valid prosecution u/s 406/403 of the Indian Penal Code. A reference may also be made to the unreported decision in the case of N. K. Jhajharia and two others vs. L. Chandra (Criminal Revision Case No. 516 of 1970 decided on 17.9. 1971 since reported 78 C.W.N. 657); and also to another unreported decision in Criminal Revision Cases Nos. 398 and 636 of 1970 (Ranjit Kumar Choudhury and another-petitioner vs. The State and another, opposit-parties; and Prahlad Chandra Bose, petitioners vs. The State, opposite-party) decided on 17.9.1971 by a single Bench of this Court. We respectfully agree with the said observations and we held that the provisions of paragraph 32 (3) of the Employees' Provident Funds Scheme 1952 being similar to the provisions which were the subject-matter of the decisions in the aforesaid cases, the same clearly applies to the facts of the present case. The first dimension of the contention raised on behalf of the accused-petitioners accordingly succeeds.

5. The second and last dimension of the submissions made on behalf of the accused-petitioners is that even if the fiction of an entrustment be deemed to apply to the facts of the present case, the same will not constitute "entrustment" within the purview of section 406 I.P.C., inasmuch as the essential ingredients of such an entrustment, within the bounds of the said provisions, are ruled out by the facts. There is a considerable force behind this submissions raised on behalf of the petitioners in the two Rules. In order to constitute a legal entrustment, the complainant must be the owner of the property, to wit, the deducted wages; there must be a transfer of possession; that such transfer must be an actual transfer and not a fictional or notional one; such transfer must be made to somebody who has no right excepting that of a custodian; and such entrustment may be made to a person and not to a company or a firm. These are the Panch Sheel of a legal entrustment within the purview of section 405 I.P.C. which, if contravened, can only form the basis of a valid prosecution u/s 408|409 I.P.C. The imprimatur of judicial decisions also lends assurance to the same and without multiplying the number of cases, a reference may be made to the case of Velji Raghalji Patel, Appellant vs. The State of Maharastra, Respondent reported in AIR 1965 S.C. 1438; Bhuban Mohan Das vs. Surendra Mohan Das reported in AIR 1951 Cal. (F.B.) 69; Nathmull Poddar Vs. Salil Kumar Chakraborty, ; N. K. Jhajharia and, two others vs. L. Chandra (Criminal Revision Case No. 516 of 1970 decided on 17.9.1971) supra; and to the unreported decision in Criminal Revision Cases Nos. 398 and 636 of 1970 (Ranjit Kumar Chaudhury and another, petitioners vs. The State and another, opposite parties; and Prahlad Chandra Bose, petitioners vs. The State, opposite-party) decided on 17. 9.1971 by a

single Bench of this Court. The imprimatur of judicial decisions supports the submissions made in this behalf by the learned Advocate on behalf on the accused-petitioners and we agree with the same. The learned Trying Magistrate appears to have interpreted and misunderstood the principles laid down in the case reported in 1971 CLJ 361 which he had referred to. The point involved is one of law and not of facts and if ex facie there appears to be a fictional transfer, there is no point in continuing with the resultant proceedings. We are certainly reluctant to quash criminal proceedings ordinarily at the interlocutory stage but when such proceedings are prima facie bad amounting to an abuse of the process of the Court, it is expedient in the interests of justice that such proceedings should be quashed at the earliest opportunity. In the result, we make the Rule absolute; set aside the order dated the 18th May, 1971 passed by Sri S. C. Dutta, Additional Chief Presidency Magistrate, 15th Court, Calcutta, in Case No. C--164 of 1970, rejecting the accused petitioners' prayer to discharge them; and we quash the relative proceedings pending against the accused-petitioners before the learned Trying Magistrate u/s 408 of the Indian Penal Code.

A.K. De, J.

I agree.