
(1968) 11 KL CK 0006
In the High Court Of Kerala

State of Kerala

APPELLANT

Vs

Haridas (V.) and Others

RESPONDENT

Date of Decision : 14-11-1968

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 342
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 13
Penal Code, 1860 (IPC) — Section 406, 409

Citation : (1970) 1 LLJ 287

Hon'ble Judges : T.C. Raghavan, J

Bench : Single Bench

Judgement

T.C. Raghavan, J.—The respondents in these four appeals are proprietors of firms coming within the Employees' Provident Funds Act and the Employees' Provident Fund Scheme framed thereunder. The facts in these cases are similar, and the cases were disposed of by the lower Court in a common judgment. The facts are also not in dispute. The prosecution was under Sections 406 and 409 of the Penal Code in that the respondents did not remit the deductions they made from the wages of their employees into the Reserve Bank or the State Bank of Travancore. The lower Court acquitted the respondents and hence the appeals by the State.

2. The admitted facts are that the contributions to be deposited by the employers were not deposited during a few months. During those months they sent returns regularly: and in those returns also it was not stated that they made the deposits. The case of the respondents in their statements u/s 342 of the Code of Criminal Procedure is that they did not know that the deposits were not made, since it was the managers of the firms that were attending to the work; and that when they knew that the deposits were not made, they immediately made the deposits. In other words, they did not have the intentions to retain the deductions with them, nor did they retain the deductions knowingly.

3. The first question to be considered in these cases is whether there was entrustment as contemplated by the Indian Penal Code to attract Sections 406

and 409. The Public Prosecutor draws my attention to Para. 32 (3) of the Provident Fund Scheme, which provides that any sum deducted by an employer from the wages of an employee under the scheme shall be deemed to have been entrusted to him for the purpose of paying the contribution in respect of which it was deducted. Basing on this the Public Prosecutor argues that there was entrustment and there was a breach of the same when the money was not deposited in the bank as contemplated by the scheme.

4. This provision is evidently a deeming provision, a legal fiction. A legal fiction is essentially a fiction, not an actuality or a reality. A legal fiction is occasionally created with a purpose; and the fiction should not be extended beyond the purpose for which it is created. Of course, within the ambit of the fiction it will have full force, in other words, once the legal fiction is accepted, all the consequences that flow from it within the field where it applies must follow. This proposition is fairly self-evident. However, I may refer to the recent decision of the Supreme Court in *Braithwaite and Co. (India) Ltd. Vs. The Employees' State Insurance Corporation*, following the earlier decision of the same Court in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, . The Supreme Court has said that legal fictions are created only for some limited and definite purpose.

5. Now, what is the purpose for which this deeming provision is made in the provident fund scheme ? Sri K.V. Saryanarayana Ayyar, the Counsel of the respondents in some of these cases, draws my attention to Paras. 30 and 32 of the scheme. Paragraph 30 says that the employer shall in the first instance, pay both the contributions payable by himself and also on behalf of the employee. Paragraph 32 (1) provides that the amount of a members (employee's) contribution paid by the employer shall, notwithstanding the provisions in the scheme or any law for the time being in force or any contract to the contrary, be recoverable by means of deduction from the wages of the member and not otherwise. Those two provisions indicate that the payment of the contribution, in the first instance, has to be made by the employer and he has to recover or recoup the amount from the wages of the employee. Thus, the liability to make the contribution is cast on the employer-both his own contribution and the contribution on behalf of the employee; and employer has thereafter to recoup the money he paid on behalf of the employee from the latter's wages. It is then that Sub-rule (3) of Para. 32 follows. It the deposit has to be made by the employer even before he makes the deduction from the wages of the employee and he only recoups his money he already paid from the wages, where is entrustment ? What is being deducted is only in recumbent of the money the employer has already paid from his pocket. Probably, in a case where the deduction has been made already and the deposit follows, sub-Para. (3) might still apply. And I shall examine the question a little further. Under Para. 76 of the scheme punishments, are pro-vided for failure to pay contributions, etc. Sub-paragraph (a) provides that if any person fails to pay any contribution which he is liable to pay under the scheme, he shall be punishable. Since the responsibility

to make the deposit and the liability for the non-payment of the contribution are cast on the employer, a deeming provision might have been thought necessary to the effect that the sum deducted shall be deemed to have been entrusted to the employer so as to bring him under the mischief of Para. 76 (a) of the scheme. That, in my opinion, might be the purpose of Para. 32 (3). At any rate, the purpose cannot be to make the deduction an entrustment so as to attract the provisions of the Indian Penal Code. The contribution has to be deposited in one lump-the employee's contribution and the member's contribution together; the member's contribution is not to be deposited separately. Suppose an employer deducts the member's contribution, but, due to scarcity of funds to add his own contribution, falls to make the deposit, can he be made liable for misappropriation or breach of trust ? The mere fact that he made the deduction but failed to make the deposit is not sufficient, in any view, to hold that he committed a breach of trust.

6. During the arguments I suggested an illustration like the following. In these days when heart transplants are becoming common and there is controversy about; its ethics and even about its success, if the Medical Council or any such authority controlling the medical profession frames a code of conduct for the doctors wherein it is laid down that a member of the profession who is making a heart transplant will be deemed to have the intention to cause the death of the recipient of the heart, can it be said that the ingredients of the offence of murder as defined in the Penal Code will be attracted to a case of heart transplant which results in the death of the recipient ? Can the doctor who is responsible for this be convicted for murder on the basis of this fiction? The answer must obviously be in the negative. Similarly, the entrustment contemplated by Para. 32 (3) of the Provident Fund Scheme will not be an entrustment for the purpose of Sections 406 and 409 of the Penal Code.

7. The question then arises whether, apart from the entrustment under Para. 32(3) there is an entrustment in a case like this. Entrustment is the result of confidence. In a case like this, when a deduction is made by an employer from the wages of his employee, is there any confidence or trust reposed in the employer by the employee? is there a fiduciary relationship between the employer and the employee as a result of the deduction? Could the employee have refused to allow the deduction and taken his full wages? Even after the deduction could the employee claim that the amounts so as to claim any dominion over that he can withdraw the same as and when he wants ? Could he claim any dominion over the amount so as to control its investment or management? To all these questions the obvious answer appears to be in the negative. In this connexion again. I shall refer to a recent decision of the Supreme Court. In *The State of Gujarat Vs. Jaswantlal Nathalal*, the State of Gujarat entrusted the building of a litho-printing press to the B.S.S. The B.S.S. entrusted the work to a contractor; and the contractor purchased 100 bags of cement from the State Government, of which 60 bags alone were utilized for the construction of the building. The rest, 40 bags, were taken somewhere else. The

contractor was prosecuted under Sections 406 and 409 of the Penal Code regarding the 40 bags of cement; and the Supreme Court has said that the expression "entrustment" carries with it the implication that the person handing over any property or on whose behalf the property is handed over to another continues to be its owner; and that the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them. The Supreme Court has ultimately held that since the contractor purchased the cement, though there was an understanding that the cement purchased from the State Government should be utilized for the building he was not liable under the Indian Penal Code.

8. Now I shall examine the facts of the cases before me in the light of this decision. After the deductions were made, do the employees continue to be the owners of the amounts deducted from their wages in the sense that they could withdraw the amounts as they wish ? Can it be said that the employees reposed confidence in the employers and hence allowed the deductions? As I have already pointed out, the answers to these questions are in the negative: and in such cases. In the light of the decision of the Supremes Court, there cannot; be any entrustment.

9. It is thus clear that there is no entrustment in these cases, with the result that no breach of trust could have also arisen.

10. Two other decisions cited before me require consideration. The first is the decision of Balakrishna Ayyar, J., of the Madras High Court in *State Prosecutor v. K. NarayanaswamiNayudu* AIR 1966 Mad. 6 , Balakrishna Ayyar, J., says that he was not told that there was any rule which required an employer to invest in any particular manner moneys which he deducted from the salary of his employees with a view to the building up of a provident fund: and in that view the learned Judge holds that the employer had a discretion to invest the deductions in any manner he considered businesslike and hence he was not liable for criminal breach of trust. The other decision is *Rameshwar Prasad and Another Vs. Narayandas*, by H.R. Krishnan, J. The learned Judge observes:

If the employer deducts 6 per cent or any other percentage from the wages of the employees, telling them that it is their contribution to the provident fund, but fails to credit it to that fund, and retains it, he is *prima facie* guilty under that section.

Krishnan, J., also says:

The sums deducted for this purpose are held in trust by the employer who has to discharge the duties imposed by the trust.

The learned Judge says further;

It may be that the deduction and retention of the employees' contribution is a trust created by virtue of that very fact, or by virtue of a provision in statute or statutory rule. But even apart from the latter, the mere fact of telling the

employees that it is their contribution to the provident fund scheme and then making a deduction or recovery and retaining it, constitutes the offence of criminal breach of trust. This is so obvious that nothing more need be said about it.

11. It is evident that these two learned Judges have taken two extreme views contradictory one to the other. According to Balakrishna Ayyar, J., there is no rule which compels an employer to invest the amounts deducted by him in a particular manner. According to Krishnan, J., the mere fact of deduction from the wages of the employee creates a trust. As I have already stated, both are extreme views on either side. There is a rule in the scheme which says that the investment should be made in a particular manner: to that extent the observation of Balakrishna Ayyar, J., does not appear to be correct. The mere deduction of a portion of the wages by the employer does not by itself constitute a trust. I have already discussed this question referring to a decision of the supreme Court. Therefore, I am constrained to disagree with the extreme views of both the learned Judges and, in particular, with the view of Krishnan, J., that the mere deduction of a portion of the wages constitutes a trust.

12. In view of this finding, I do not think I need go into the other question, namely, whether there was dishonest misappropriation or conversion of the money to the use of the employers or dishonest use or disposal of the money in violation of any direction of law prescribing the mode in which such trust is to be discharged. At any rate, the statements of the respondents were that they did not know that the deposits were not made and that the responsibility for making the deposits was that of their managers. They also said that the moment they came to know about the failure to deposit the amounts, they deposited the amounts as well. It may be noted at this stage that none of the returns submitted contains a statement that the amounts were deposited. This shows absence of dishonesty, absence of criminal intention, absence of requisite mens rea.

13. The Public Prosecutor then pleads that this Court may convict the respondents under Para. 76 of the scheme. Firstly, I do not think I need convict the respondents under the Provident Funds Act when the prosecutions against them were commenced under the Indian Penal Code. There is yet another difficulty for the prosecution. u/s 14(3) of the Provident Funds Act no Court shall take cognizance of any offence punishable under the Act or under any scheme except on a report in writing of the facts constituting such offence made with the previous sanction of such authority as may be specified in this behalf by the appropriate Government by an inspector appointed u/s 13. Thus, a Court can take cognizance of an offence under the Act or the scheme only on a report in writing of the facts constituting the offence by an inspector u/s 13 of the Act: and this report by the inspector must also have the previous sanction of such authority as may be specified in this behalf by the Government. There is no evidence in these cases that such sanction was obtained and reports were

submitted by the inspector. Therefore, this prayer cannot also be granted.

14. The appeals are dismissed.