

(1989) 10 PAT CK 0003

In the Patna High Court

Case No : Criminal Miscellaneous No. 2246 of 1985 (R)

Sudhendra Nath Mukherjee and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 26-10-1989

Acts Referred:

Companies Act, 1956 — Section 34
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14,
14(2), 14A, 14A(1), 17
Factories Act, 1948 — Section 7(1)
Family Pension Act — Section 12(3)
Penal Code, 1860 (IPC) — Section 405, 406, 409
Revenue Recovery Act, 1890 — Section 7

Citation : (1989) 10 PAT CK 0003

Hon'ble Judges : S.B. Sinha, J

Bench : Single Bench

Advocate : P.S. Dayal and A.K. Kashyap, for the Appellant; K.K. Jhunjhunwala, Assistant Public Prosecutor for State, for the Respondent

Judgement

S.B. Sinha, J.—This application directed against an order dated 2.1.1985 passed by Sri A.A. Gouri, Judicial Magistrate, Dhanbad in G.k. Case No, 926/83, whereby and Where-Under the said learned court has taken cognizance of an offence as against the Petitioners under Sections 406 and 409 of the Indian Penal Code.

2. The facts of the, case lie in a very narrow compass.

3. One B.N. Tiwari, a Provident Fund inspector purporting to act on behalf of the Regional Provident Funds Commissioner, lodged a complaint petition on 7.4.1983 alleging inter alia therein that the employees share of contribution by the firm was not deposited for the period from April, 1981 to February, 1983.

4. Allegedly the Department took steps for launching prosecution u/s 14(2) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1932 (hereinafter referred to as "the Act") and also resorted to proceeding for

recovery of the said dues in terms of Section 7 of the Revenue Recovery Act but the said proceedings have been (sic) a writ application filed before the Calcutta High Court, which is still pending.

3. According to the complainant, no deposit in terms of Section 17 of the said Act and Section 12(3) of the Family Pension Scheme have been made and thus an offence u/s 405 of the Indian Penal Code has been made out.

A charge sheet was submitted as against, the management of Bihar Fire Bricks and Pottery Limited, alleging therein that no deposit, had been made of the Provident Fund after deducting the amount from the employees from April, 1982 to February, 1983 and the said Company used the fund for its own benefit.

7. Mr. P.S. Dayal learned Counsel appearing on behalf of the Petitioners, firstly submitted that the question as to whether the prosecution under the provisions of the said Act as also the proceeding under the provisions of Revenue Recovery Act, are maintainable or not, is pending disposal before the Calcutta High Court in Civil Order No. 5065 (W)/83, wherein stay of further proceeding had been passed, and as such the prosecution against the Petitioners is bad in law.

8. Mr. Dayal, further argued that in any event, the alleged offence having been committed by the company, the Petitioners, who are said to be Directors or other employees of the said company cannot have any liability whatsoever under the provisions of the Indian Penal Code.

9. So far as the first contention raised by Sri Dayal is concerned, the same has no merit and must be rejected, it is not the case of the Petitioners that the Calcutta High Court stayed the lodging of or instigation of the instant case.

10. From a perusal of the report, submitted by Sri B.N. Tiwari before the officer in charge of Nirsa Police Station/superintendent of Police, Dhanbad, on the basis whereof the alleged first information report has been drawn up, discloses no specific overt act against any of the Petitioners except making a raid statement therein that it was found that even amounts realised from the wages of the employees have been used otherwise than has been prescribed under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and the schemes framed thereunder or have not been properly accounted for.

In the said report however, it was further alleged as follows:

Besides, the employers may, perhaps be liable for charging the employees for continuously deducting the employees contributions from their wages without making his matching contribution and/or depositing the contributions with the statutory fund and the Board of Trustees.

11. However, from a perusal of the charge-sheet, it appears that the accused nos. 1 to 8 have been described as Directors of Bihar Fire Bricks and Pottery Works Limited, Mugma, P.S. Nirsa, Dist. Dhanbad accused No. 9 has been described as works Manager and accused No. 10 has been described as

Personnel and labour Welfare Officer, in the body of the charges be it was alleged that the deduction made out of the wages of the employees has been utilised for the benefit of the Company, which evidently means the aforementioned Bihar Fire Bricks and Pottery Limited.

12. There cannot be any doubt whatsoever that the offences adedged, are covered by Section 14 of the Employees, Provident Funds and Miscellaneous Provisions Act. it is further clear that a vicarious liability has been created, so far as the directors and other officers are concerned in terms of Section 14A of the said Act, which reads as follows:

Offences by companies--

(1) If the person committing an offence under this Act, the Scheme or (the Family Pension Scheme or the insurance Scheme) is a company, every person, who at the time the offence was committed was in charge of and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this Sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in Sub-section (1), where an offence under this Act, the scheme (the Family Pension Scheme or the Insurance Scheme) has been committed by a company and it is proved that the offense has been committed with the consent or connivance of or is attributable to, any neglect on the part of, any director or manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed, to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

13. Thus, from the aforementioned provisions, it would be clear that the petitioners could have been prosecuted in terms of the provisions of Section 14 of the said Act in view of the vicarious liability created under the said Act in terms of Section 14A thereof.

14. However, an explanation has been appended to Section 405 of the Indian Penal Code, which inter (sic) reads as follows:

A person being an employer, who deducts the employee's contribution from the wages payable to the employee credit to a Provident Fund or 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 a direction of law as aforesaid.

In view of the aforementioned explanation appended to Section 405 of the Indian Penal code, there cannot be any doubt that despite the existence of a penal provision as contained Section 14 of the said Act, an employer, may also be held guilty, by reason of a legal fiction created, Under Sections 406 or Section 409 of the Indian Penal Code, as the case may be.

15. However, the word 'employer' has not been defined in the Indian Penal Code. The word 'employer' has been defined in Section 2(e) of the said Act in the following term:

Employer means--

(i) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier And, where a person has been named as a manager of the factory under clause (f) of Sub-section (1) of Section 7 of the Factories Act, 1948, the person so named, and

(ii) in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent.

16. It is thus clear, that on the said persons who come within the purview of the definition of the employer under the aforementioned Act can be prosecuted under the provisions of the Indian Penal Code in view of the explanation appended to Section 405 of the Indian Penal Code.

17. In the instant case, the owner of the factory is a limited company.

18. In terms of Section 34 of the Companies Act, 1956, the company itself is a juristic person and thus can itself be prosecuted. However, in this case the company has not been prosecuted.

19. Nothing has been stated in the first information report or in the charge sheet as to whether any particular person has the ultimate control over the affairs of the establishment or as to who were the occupiers of the factory.

20. Further in view of the fact that from a perusal of the charge sheet itself, it appears that the fund collected by reason of deductions made from the wages of the employees by way of their contribution to the provident fund, had been utilised only for the advantage of the company it is thus evident that the Petitioners have not converted the said amount for their personal gain.

21. It is thus clear, that a penal offence created by factory a legal action can be extended only to the manager of the factory and no body else.

22. As noticed herein before in the complaint petition, Sri A.K. Kaviraj has been described as a Manager of the factory, although, it is not clear as to whether he had been named as a manager of the factory under clause (f) of Sub-section (1)

of Section 7 of the Factories Act or not.

23. It is now a well settled principle of law that a penal offence created by a legal fiction should be extended only to its logical end and cannot be stretched unnecessarily.

24. In Commissioner of Sales Tax, State of Gujarat v. Union Medical Agency reported in 1981 (sic) S.C.C. 51, the Supreme Court held as follows:

It is thus apparent that the legal fiction in Sub-section (2) of Section 4 is created for a limited purpose namely, to make Section 4 a self contained Code which not only imposes a charge of tax and lays down the rate structure, but also provide the machinery for assessment and recovery of tax and penalty. The legal fiction contained in Sub-section (2) of Section 4 of the Act cannot be stretched any further.

26. Thus, in my opinion, the vicarious liability of the directors or other employees, who do not come within the purview of the definition of 'employer' as contained in Section 2(e) of the said Act, cannot be stretched too far so as to prosecute them under Sections 406 and 409 of the Indian Penal Code inasmuch as the vicarious liability created under the provisions of Section 14A of the said Act, cannot be brought into play in prosecuting a person under Sections 406 and 409 of the Indian Penal Code.

27. It is further well known that a penal statute should be strictly construed. The provision of Indian Penal Code apply only to a person who is guilty of an offence committed in terms of the provision of the said Act.

28. A person, by creation of a legal fiction might be held guilty for an offence which he might not have committed but that does not mean that vicarious liability created under another statute can be held to be incorporated by reference, although the statute does not say so.

29. In law, there cannot be incorporation of a provision of one statute in the other by inference unless the same is provided for in the statute itself.

30. A distinction thus, in my opinion, has to be made between the statute where a vicarious liability has been created and a statute where no such vicarious liability has been created. A person proceeded under the later law, can be punished only if he is an offender within the four corners thereof and not by reason of the fact that he is vicariously liable under a different Act, although both Acts deal with the same subject matter.

31. It is now well known that the punishment under the Indian Penal Code is harsher than the punishment provided for under the said Act.

32. It is for the prosecution to elect the provisions of a statute, under which a person can be prosecuted although an offence can be made out under two Acts, one general and one special.

But, where a prosecution has been launch under the provisions of the Indian penal Code, a person can only be held guilty only when all the ingredients of the offence (sic) satisfied and not other wise.

33. In this view of the matter, this application must succeed in so far as the Petitioner nos. 1 to 8 and 10 are concerned, as they are neither the employers within the meaningful of the provisions of the said Act, nor is there any allegation against them that they have defalcated the amount in question or converted the same for their own use.

However, the Petitioner No. 9 having been alleged to be the manager, it is nor possible to quash the proceedings against has at the stage as he may come within the purview on the term ?employer? in terms of the (sic) of the said Act.

34. In the result, this application is owned, so far as the Petitioners No. 1 to 10 are concerned but dismissed as against the Petitioner No. 9. The proceeding shall thus continue only as against the Petitioner No. 9.

35. In the facts and circumstances of this case, there will be no order as to costs.