(2017) 08 CAL CK 0017

In the Calcutta High Court

Case No : 885 of 2015

Tapan Biswas APPELLANT

Vs

The State of West Bengal & Anr. RESPONDENT

Date of Decision : 16-08-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 482 - Saving of inherent powers of High Court
Indian Penal Code, 1860, Section 406 - Punishment for Criminal breach of trust

Citation : (2017) 08 CAL CK 0017

Hon'ble Judges : Siddhartha Chattopadhyay

Bench : SINGLE BENCH

Advocate : S. S. Roy,?Atanu Chakraborty, ? Mihir Kundu

Judgement

1. Challenging the legal pregnability of continuance of proceeding of G.R. Case No. 5316 of 2010 under Section 406 of I.P.C. pending before the learned C.J.M., the petitioner filed this application and prayed for quashing of aforesaid proceedings.

2. Prosecution case is such that the petitioner deducted Rs.8.277 from his employees share of provident fund contribution but did not deposit the same within the stipulated time and so there is violation of Section 6 of the Act of 1952. According to them an offence under Section 406 of I.P.C. is established and the F.I.R. was lodged on 19.11.2010.

3. Thereafter on 25.11.2010 the petitioner deposited the entire dues and so, according to him, the proceedings should be quashed. Factual aspect is not disputed but the legal aspect has been seriously disputed.

4. The core question to be decided here if after initiation of a proceeding for non-deposit of provident fund amount before the appropriate authority, if the employer deposits the same whether it would absolve the accused persons of the liability of the criminal offence or not. Let me discuss the decisions on which the petitioner relied.

5. The petitioner herein has relied on the decision of Adoni Cotton Mills Ltd. -vs.- Regional Provident Fund Commissioner & Ors ., reported in (1995) Supp. 4 S.C.C. 580, Jasoda Glass & Silicate & Ors. -vs.- Regional Provident Fund Commissioner & Ors . reported in 2002 (2) C.H.N. 407, and also a decision of M/s. AIR Transport Corporation and Ors. -vs.- State of West Bengal & Anr . reported in (2006) 1 C. Cr. L. R. (Cal) 616, Howrah Motor Company Ltd. -vs.- Samir Kumar Das reported in (2004) 4 C.H.N. 291.

6. On the other hand, the opposite party i.e. P.F.Authority relied on the decision of Mr. Debidas Dutta -vs.- State of West Bengal reported in 2006 (1) CLJ (Cal) 593, Anjuman Tea Company Ltd. & Ors. -vs.- State of West Bengal & Ors . reported in 2008 (1) CHN 1061, M/s. Hotel Dock Palace Private Ltd and another -vs.- State of West Bengal & Anr . reported in (2007) 2 CLT LT 259 (HC) and an unreported decision passed in connection with Madan Gopal Kundu -vs.- State of West Bengal in C.R.R. 1607 of 2015 and Susil Kumar Bagla -vs.- State reported in (2003) 3 CLT 470 (HC) and also an unreported decision of this Court passed in C.R.R. 2303 of 2014, in which this court had relied upon the decision reported in (2003) 3 C.L.T. 470 and also the unreported decision passed in connection with C.R.R. 1607 of 2015.

7. At the very outset, I would like to refer the decisions reported in 2006 (1) C.R.R. (Cal) 616 wherein the Co-ordinate Bench relied on two decisions reported in 1995 Supp. (4) S.C.C. 580, and (2004) 4 C.H.N. 291. Relying on the said decisions, the said learned Co-ordinate Bench held that since the payment is made and the purpose has been fulfilled the question

of continuance of the proceeding, in his opinion, would be an abuse of the process of the court and accordingly the Co-ordinate Bench has quashed the proceeding. But in the said judgment the Co-ordinate Bench held "no doubt the allegation made in the complaint cannot be white-washed by any subsequent payment." Now, this court is to consider the relevant decision on which the Co-ordinate Bench has relied.

8. Factual aspects of Adoni Cotton Mills Ltd. -vs.- Regional Provident Fund Commissioner & Ors . reported in (1995) Supp. 4 S.C.C. 580 is such that the said prosecution was initiated in respect of certain offences alleged to have been committed in 1976 i.e. about 15 years back from the date of passing of the judgment by the Hon''ble Apex Court. Hon''ble Court granted stay of further proceeding on condition that the appellants would deposit an amount of Rs.43,000/- and also furnished a bank guarantee for sum of Rs.60,000/- and that was complied with by the said appellant by depositing the same. It would be apt to mention that in the said case the company made a default to make relevant deposits for the months of April 1976 to July 1976. But before that a writ petition was filed in the same High Court and the first appellant was appointed as a Receiver to manage the affairs of the Mills. The said writ petition was filed challenging "The Textile Undertaking Nationalisation ordinance" and the said writ petition was dismissed on 27.7.1976. Therefore, it can be safely presumed that due to pendency of writ petition before the said High Court up to August 1976, the defaults occurred. So the default was up to July 1976. Considering all the above-stated circumstances, Hon''ble Apex Court came to the finding and quashed the proceedings on certain terms.

9. The petitioner also relied on another decision reported in (2004) 4 C.H.N. 291 in Howrah Motor Company Ltd. -vs.- Samir Kumar Das wherein a Co-ordinate Bench quashed the proceeding. Factual aspects of that case is such that due to an order passed in C.S. 384 of 1998 the respondents of that case were restrained from withdrawing the amount

from the banks. The respondent also sought for an order to pay the entire amount and expressed its intention to liquidate the remaining dues as early as possible and permission was accorded to liquidate the remaining dues by six monthly instalments. As there was an order from a competent court, by which the said respondents were restrained from withdrawing the money from the bank, so the learned Co-ordinate Bench held "things, however, were not within the effective control of the petitioners either." That problem was eventually sorted out with the appointment of a special officer overseeing the disbursement of salary and other dues of the employees. Considering all these aspects learned Co-ordinate Bench has relied on the decision in connection with Adoni Cotton Mills Ltd. -vs.- Regional Provident Fund Commissioner & Ors. In that case also there were certain contingencies and exceptional facts for which the Hon''ble Apex Court quashed the proceeding. Another decision was cited which is reported in 2002 (2) C.H.N. 408 (Jasoda Glass & Silicate & Ors. -vs.- Regional Provident Fund Commissioner & Ors .). While disposing of the said case, Hon''ble Division Bench of this court has considered the decisions reported in connection with Adoni Cotton Mills Ltd. -vs.- Regional Provident Fund Commissioner & Ors . and the decision reported in AIR 1987 SC 1738 in Provident Fund Inspector, Faridabad -vs.- Jaipur Textile Faridabad . In the said case, Hon''ble Apex Court held that since the arrear had been deposited prior to the lodging of criminal case, the prosecution could not be proceeded with. Not only that in the said judgment, Hon''ble Apex Court specifically indicated that the same was not to be treated as a precedent. Therefore, factual aspects of Adoni Cotton Mills Ltd., and Jaipur Textile Faridabad are different in nature.

10. Learned Counsel appearing on behalf of the Provident Fund Authority relied on the decision of Mr. Debidas Dutta -vs.- State of West Bengal reported in 2006 (1) CLJ (Cal) 593. In the said judgment learned Co-ordinate Bench held that it would not be proper to quash the proceeding

pending before the Court below and after considering the judgment reported in Jasoda Glass & Silicate & Ors. -vs.- Regional Provident Fund Commissioner & Ors . directed the trial court for taking into consideration the claim that the entire payment has since been made while disposing of the case finally. If after scrutiny, it appears to the court below that entire payment has been made, then he can dispose of the case in the light of the observation as made by the Division Bench in connection with Jasoda Glass & Silicate & Ors. -vs.- Regional Provident Fund Commissioner & Ors.

11. Learned Counsel for the opposite party relied on a decision reported in Anjuman Tea Company Ltd. & Ors. -vs.- State of West Bengal & Ors . reported in 2008 (1) CHN 1061. The factual aspect of that case is almost similar to this case under adjudication. The learned Judge opined that "subsequent deposit, that welcome, as it is better late than never, cannot and does not absolve the accused persons of the liability of the criminal offence" and ultimately the learned Co-ordinate Judge was not inclined to quash the criminal proceedings.

12. The learned Counsel appearing on behalf of the opposite party cited the decisions reported in (2003) 3 CLT 470 (HC) in connection with Susil Kumar Bagla -vs.- State and a decision reported in (2007) 2 CLT LT 259 (HC) in connection with M/s. Hotel Dock Palace Private Ltd & Anr. -vs.- State of West Bengal & Anr. In the aforesaid cases both the learned Judges dismissed the revisional application of the respective parties after recording sound reasons. In the judgment reported in connection with M/s. Hotel Dock Palace Private Ltd & Anr. -vs.- State of West Bengal & Anr. the Co-ordinate Bench held "I am of the considered judgment that the applications seeking for quashing of the proceedings under Section 482 of Cr.P.C. cannot be allowed. It can also be said that subsequent payments are necessarily a circumstance that should not miss the attention of the learned trial court, if and when the learned trial

court proceed to award punishment to the petitioners only when guilt is established according to law and this circumstance is indeed, a good circumstance and a mitigating circumstance to be taken cognizance of only at the conclusion of the trial and only when the offender is proved guilty."

13. Therefore, this Court had the opportunity to have considered two judgments of this Court, which favours the offender of such type of cases. One of those judgments was passed by a Division Bench in connection with Jasoda Glass & Silicate & Ors. -vs.- Regional Provident Fund Commissioner & Ors . reported in 2002 (2) C.H.N. 407. Practically in that case Hon''ble Division Bench exercised its criminal appellate writ jurisdiction and had no scope to deal with quashing of proceeding in the light of Section 482 of Cr.P.C. The Hon''ble Division Bench did not quash the proceeding for obvious reasons and so they directed the learned trial court to dispose of the said case on certain terms. Practically no ratio is laid down in that judgment. So, in my considered view, that judgment is not at all applicable in this case.

14. I have already discussed why the decision reported in M/s. AIR Transport Corporation and Ors. -vs.- State of West Bengal & Anr . reported in (2006) 1 C. Cr. L. R. (Cal) 616 cannot be applied in this case. With utmost respect to the Hon''ble Judge, I may be permitted to say that in the said judgment, the learned Co-ordinate Bench without discussing as to how the factual situation fits in with the facts situation of the said decision, on which reliance is sought to be placed came to a finding. It is perhaps needless to say that it is to be remembered that the judicial utterances are made in the fitting of the facts of a particular case. Therefore, none of the authorities cited by the petitioners, makes it a law that subsequent payment would liquidate the offence. While dealing with this case this Court is not oblivious to the decision reported in AIR 1981 Supreme Court 81 in connection with Harihar Prasad Dubey -vs.- Tulsi Das Mundhra & Ors .,

wherein relying on a decision of Madhya Pradesh High Court (in Akharbhai Nazarali -vs.- Md. Hussain Bhoi) Hon''ble Apex Court quoted "... the mere fact of telling the employees that it is their contribution to the provident fund scheme and then making deduction or recovery and retaining it, constitutes the offence of criminal breach of trust."

Echoing the ratio of the said judgment of that Madhya Pradesh High Court, I may be permitted to reproduce the finding "this is so obvious that nothing more need be said about it." In my view, the judgment of the Hon''ble Apex Court squarely fits in this case. With due respect to the learned Co-ordinate Bench, who passed the judgment in M/s. AIR Transport Corporation and Ors. -vs.- State of West Bengal & Anr. I am of the view that it is not at all a good law. Although he held "no doubt the allegation made in the complaint cannot be white-washed by any subsequent payment."

Therefore, it seemed to me that the Hon''ble Judge was possibly confused as to what is to be done. I may be permitted to say with great respect to the said Co-ordinate Bench that the said judgment was passed either out of ignorance or forgetfulness of some authority binding on the Court concerned. The logic and reason given by the said Co-ordinate Bench is demonstratably erroneous and has become per incurium. Having so opined. I cannot commatose my judicial conscience. Sophocles said "Laws can never be enforced unless fear supports them." If anyone ventures to defy law, he must face the wrath of law.

15. Having regard to the facts and circumstances of the case, I have no hesitation in my mind that there is no merit in this revisional application and it is accordingly dismissed.

16. However, learned court shall proceed with the case in accordance with law and at the end of trial, if he finds the accused petitioner is guilty, in that case subsequent payment (which has been claimed to have paid already) be treated as a mitigating circumstance.

17. Let a copy of this judgment and the L.C.R. be sent to the learned

Court below for information and taking necessary action in accordance with law.

18. Urgent certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

