(2015) 02 JH CK 0054

In the Jharkhand High Court

Case No : Cr.M.P. No. 892 of 2002

V. Nagrajan and Others APPELLANT

Vs

State of Jharkhand RESPONDENT

Date of Decision : 13-02-2015

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2(e), 2(e)(i)
Factories Act, 1948 — Section 7
Penal Code, 1860 (IPC) — Section 11, 34, 405, 406, 409

Citation : (2015) 3 JLJR 500

Hon'ble Judges : Rongon Mukhopadhyay, J.

Bench : Single Bench

Advocate : Anurag Kashyap, for the Appellant

Final Decision : Allowed

Judgement

Rongon Mukhopadhyay, J.—Heard learned counsel for the petitioners and the learned counsel for the State.

2. In this application, the petitioners have prayed for quashing the entire criminal proceeding in connection with Khelari P.S. Case No. 72 of 1997, G.R. No. 1880 of 1997 including the order dated 4.3.2002, passed by learned Chief Judicial Magistrate, Ranchi, whereby and whereunder, cognizance has been taken for the offence punishable under sections 406, 409/34 of the Indian Penal Code.

3. It appears that an FIR was instituted by the Enforcement Officer, Employees'' Provident Fund, Bihar, Ranchi, alleging therein that the employer M/s Lemos Cement Ltd. Khelari has failed to deposit the provident fund amount of the employees/workmen amounting to Rs. 12,63,690/- in respect of the period from August, 1996 to April, 1997 in spite of deductions made from their salary/wages. It has been further alleged that the employer M/s Lemos Cement Ltd. Khelari committed a breach of trust in respect of the employees'' share of provident fund contribution.

4. On the basis of the aforesaid allegations, Khelari P.S. Case No. 72 of 1997 was instituted. After investigation, the case having been found to be true, chargesheet was submitted and thereafter vide order dated 4.3.2002, the learned Chief Judicial Magistrate, Ranchi has been pleased to take cognizance against the petitioners for the offences punishable under sections 406, 409/34 of the Indian Penal Code.

5. It has been submitted by the learned counsel for the petitioners that the petitioners are the Rotational Directors of M/s Lemos Cement Ltd. Khelari and they are not concerned with day to day affairs of the company. He has further submitted that infact the Company having become sick was referred to Board for Industrial and Financial Reconstruction for its rehabilitation under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 and in view of the financial position of the company, the Recovery Officer, Regional Provident Fund Commissioner, had allowed the Company to pay the monthly installment with respect to the provident fund dues of its employees from June, 1994 to December, 1996 in 32 monthly installments. He has further submitted that pursuant to the direction of the Recovery Officer, the entire dues arising out of provident fund contribution of its employees for the aforesaid period was cleared and as such the present proceeding is liable to be quashed. He has referred to explanation to section 405 of Indian Penal Code and has submitted that since the petitioners do not come within the definition of employer as defined in section 2(e) of the Employees'' Provident Fund Miscellaneous Provisions Act, 1952, they cannot be held responsible for non deposit of employees'' contribution of provident fund. In this context, he has referred to a judgement in the case of Employees State Insurance Corporation Vs. S.K. Aggarwal and Others, .

6. Learned counsel for the State, on the other hand, has submitted that the petitioners being the Directors in terms of the provision of the Factories Act are directly responsible for non deposit of the employees'' provident fund contribution. In this context, he has referred to Explanation to Section 2(e) of the Employees'' Provident Fund and Miscellaneous Provisions Act, 1952 and submitted that the petitioners come within the definition of an employer and it was their duty and responsibility to deposit provident fund contribution of the employees before the concerned authority.

7. After hearing the learned counsel for the parties and after going through the records, I find that the FIR, which was instituted by the Enforcement Officer, Employees'' Provident Fund, Bihar, Ranchi, related to non payment of the employees share of provident fund for the period from August, 1996 to April, 1997. It appears that M/s Lemos Cement Ltd. Khelari became a sick industry and was referred to Board for Industrial and Financial Reconstruction for its rehabilitation under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985. It further appears that since the total outstanding dues of the company in respect of employees'' provident fund from June 1994 to December, 1996 was a substantial amount taking into consideration the

background of the company having become sick, as such the Recovery Officer, Ranchi had allowed the company to deposit the employees'' contribution of the provident fund in 32 installments. It also appears that the entire dues on account of employees'' contribution of the provident fund was deposited in installments. It further appears that the request of M/s Lemos Cement Ltd. Khelari for liquidating the provident fund dues amounting to Rs. 25,17,100/- for the period January 1997 to May, 1998 in installments had been allowed by the Regional Provident Fund Commissioner, Ranchi and the company was directed to make payment in 50 monthly installments of Rs. 50,000/- each.

8. Section 2(e) of the Employees'' Provident Fund Miscellaneous Provisions Act, 1952 defines an employer, which reads thus;-

2[e) "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(63 of 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;]

9. Section 2(e)(i) therefore includes within the definition of an employer, the son or employee of the factory including the agent or a legal representative of deceased, owner or employee. The petitioners admittedly were the Rotational Directors, who were not concerned with day to day affairs of the Company. In Explanation 2 to section 405 of the Indian Penal Code, the same reads as follows:-

[Explanation-2- A person, being an employer, who deducts the employee''s contribution from the wages payable to the employee for credit to the Employees'' State Insurance Fund held and administered by the Employee''s State Insurance Corporation established under the Employee''s State Insurance Act, 1948 (34 of 1948) shall be deemed to have been entrusted with the amount of 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 Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.] 10. The term employer as envisaged in explanation 2 to Section 405 of the Indian Penal Code has further been considered in the case of Employees'' State Insurance Corporation (Supra), in which it was held as follows:-

Explanation 2 was inserted by the Employees'' State Insurance Amendment Act 38 of 1975. Explanation 2 makes "a person being an employer" who deducts the employee''s contribution from the wages payable to the employee liable for criminal breach of trust if he commits a default in the payment of such contribution to the Employees'' State Insurance Fund. Under section 11 of the Indian Penal Code the word "person" includes any company or association or body of persons whether incorporated or not. The High Court has held that the term "a person being an employer" in Explanation 2 to Section 405 of the Indian Penal Code can refer only to the Company who had employed the employees in question. The directors of that company could not be considered as employers under Explanation 2 to Section 405 of the Indian Penal Code." 11. The aforesaid judgment specifically restrains the Directors of the Company to be considered as employees under Explanation 2 to Section 405 of the IPC.

12. The present case is concerned with Explanation 1 to Section 405 of the Indian Penal Code. Taking into consideration the aforesaid view of the Hon''ble Supreme Court vis a vis Explanation 2 to section 405 of the IPC, it can be deduced that explanation 1 to section 405 of the IPC has also not included the Directors of the Company within the ambit of an employer. It must also be borne in mind that although it was the Enforcement Officer, Employees'' Provident Fund, Bihar, Ranchi, who had instituted the FIR but subsequently taking into consideration the financial health of the Company, it was the office of the Regional Provident Fund Commissioner, who allowed the Company to make payment of the employees'' provident fund contribution in installments and pursuant to which, as has been admitted by learned counsel for the petitioners, that from June, 1994 to December, 1996, the same was deposited. It would also mean that the period specified by the office of the Regional Provident Fund Commissioner to the Company to deposit the dues and pursuant to which, the amount has been deposited, though with respect to the period after December, 1996, the petitioners do not have any instruction and the fact remains that till December, 1996, the amount was deposited and the petitioners, who are admittedly Rotational Directors and being not employers within the definition of Explanation 1 to Section 405 of the Indian Penal Code, continuation of the present criminal proceeding against the petitioners would be an abuse of the process of law.

13. In view of what has been discussed above, I do find merit in this application. This application is, accordingly, allowed and the entire criminal proceeding in connection with Khelari P.S. Case No. 72 of 1997, G.R. No. 1880 of 1997 including the order dated 4.3.2002, passed by learned Chief Judicial Magistrate, Ranchi, whereby and whereunder, cognizance has been taken for the offence punishable under sections 406, 409/34 of the Indian Penal Code, is hereby quashed.