

Serial No. 04
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl. Petn. No. 48 of 2022

Date of Decision: 10.02.2023

Shri. T. Pathaw

Vs.

Inspector of Police, CBI & Anr.

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. S. Jindal, Adv.

For the Respondent(s) : Dr. N. Mozika, DSGI with
Ms. K. Gurung, Adv.

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| i) | Whether approved for reporting in
Law journals etc.: | Yes/No |
| ii) | Whether approved for publication
in press: | Yes/No |

JUDGMENT (ORAL)

1. This is an application under Section 482 preferred by the petitioner herein with a prayer to set aside and quash the FIR dated 10.12.2015 filed by the Head of Branch, CBI, ACB, Shillong and upon investigation, a consequent chargesheet dated 31.12.2016 being filed leading to the formal proceeding being CR Case No. 38(S) 2017 now pending before the learned Chief Judicial Magistrate, Shillong with the petitioner herein as the sole accused.

2. Heard Mr. S. Jindal, learned counsel for the petitioner, who has submitted that the background facts and circumstances of the case of the petitioner is required to be placed before this Court to better understand the issues involved.

3. The learned counsel has then submitted that the petitioner herein is the Chairman of M/s Ranger Security and Service Organisation dealing mostly in the area of outsourcing of manpower to various organisation requiring such manpower.

4. North Eastern Indira Gandhi Regional Institute of Health and Medical Sciences (NEIGRIHMS) has floated tender for availing the services of outsource personnel at NEIGRIHMS, Shillong and the petitioner's Organisation being the successful bidder has thereafter entered into an Agreement for Outsourcing Manpower dated 01.01.2012.

5. Pointing out some relevant clauses from the said agreement, particularly clauses 6, 7 and 15 of the same, the learned counsel has submitted that it was agreed that the petitioner/Second Party shall deploy the required manpower of NEIGRIHMS and such manpower shall be the employees of the petitioner/Second Party. It was also incumbent upon the petitioner/Second Party to ensure that due compliance with all statutory obligations under all related legislations including compliance under the provisions of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as EPF Act) and ESI Act,

etc., as far as the said personnel deployed are concerned. At this juncture, the learned counsel has candidly admittedly that the petitioner at the relevant point of time had failed to comply with the conditions and provisions of the EPF Act as far as contribution toward the fund on the part of the employer is concerned.

6. Again, it is submitted that perhaps on some source information or complaint, the respondent/CBI through its official had lodged an FIR No. RC SHG 2015A0005 dated 10.12.2015 under Section 120(B)/420 IPC read with Section 13(2) and 13(1)(d) of the Prevention of Corruption Act, 1988. In the said FIR it was alleged that one Shri. A.R. Myrthong (A-1), Data Processing Assistant, NEIGRIHMS and Shri. T.S. Syngkon, (A-2) Assistant Account Officer, NEIGRIHMS have entered into a criminal conspiracy with each other and also with Shri. T. Pathaw (A-3), the petitioner herein by abusing their official power/position to fraudulently and dishonestly clear the monthly bills claimed by the accused (A-3), towards deployment of manpower of various categories knowing fully well that many of the employees deployed by A-3 have not registered with EPF and ESI in clear violation of the terms and conditions of the tender agreement and the amount paid by NEIGRIHMS towards wages, causing wrongful loss to the Government of India to the tune of ₹ 46,79,025/- and corresponding wrongful gain to themselves.

7. On the matter being investigated, the Investigating Officer(I/O) then filed a final report under Section 173 Cr.P.C before the Court of the learned Chief Judicial Magistrate, Shillong, exonerating the role of A-1 and A-2 respectively, on the ground of insufficient evidence, but has however implicated A-3, the petitioner herein as having committed an offence under Section 420, 406 IPC for allegedly fraudulently and dishonestly misappropriating an amount of ₹ 20,93,305/- meant for EPF. The respondent/CBI has also submitted a list of 164 prosecution witnesses and 640 voluminous documents to be proved. Accordingly, a regular case being CR Case No. 38(S) 2017 was registered and is now pending before the court of the learned Chief Judicial Magistrate, Shillong. The matter is at the stage of consideration of charges.

8. The learned counsel has submitted that looking into the totality of the matter, if there is an allegation of breach of the provisions of the said Agreement for Outsourcing Manpower, then the remedy would be a civil remedy for breach of contract, but certainly, no element of criminality can be inferred upon such breach of contract.

9. The learned counsel has further submitted that the role of the CBI in filing the charge sheet is questionable as the public servants involved had been let off for lack of evidence whereas the petitioner who is not a public servant has been implicated in the charge sheet. No offences under the Prevention of Corruption Act have been made out, but instead

only offences under the Indian Penal Code are said to have been committed by the petitioner and as such, the locus of the CBI as complainant is questionable and the said charge sheet against the petitioner ought not to have been filed in court.

10. The main allegation against the petitioner is that he has committed criminal breach of trust as well as cheating. However, under Section 405 IPC, Explanation 2 of the same being relevant to the case of the petitioner, the provision states that an employer who after having deducted the employees' contribution from their wages for the purpose of contribution towards the Employees State Insurance Fund and if he makes a default in the payment of such contribution, he is deemed to have committed criminal breach of trust. In this case, there is no question of the petitioner committing breach of trust as regard the employees' share of the Provident Fund as no such deduction has been made from the employees' wages and admittedly, at the relevant point of time, the petitioner (employer) has also not contributed his share of the same and as such, this provision would not be attracted to the case of the petitioner.

11. Similarly, there is no element of cheating as far as the conduct of the petitioner is concerned, since in the light of the provision of Section 415 IPC, cheating involves a fraudulent or dishonest inducement of a person to deliver any property to any person, thus, attracting the punishment prescribed under Section 420 IPC, which is also not the case

herein as the petitioner has never induced any of his employees to part with their property.

12. Another limb of argument advanced by the learned counsel for the petitioner is that prior to the filing of the aforesaid charge sheet on 31.12.2016, the EPF Authorities had already instituted proceedings against the petitioner under the provisions of the EPF Act initiated vide notice No. NE/SHG/AS/4234/7A/ENF/741 dated 24.02.2016 and such proceedings has culminated in the passing of a formal assessment order dated 20.11.2018 passed under Section 7A of the EPF Act by which, the petitioner was assessed to be liable to pay an amount of ₹ 68,25,645/- in addition to the amount of ₹ 2,64,96,754/- already deposited by him towards the Employees' Provident Fund. The said amount of ₹ 68,25,645/- was also paid by Demand Draft dated 29.03.2019. Therefore, for the same charges when the petitioner was made liable in one set of proceedings under the EPF Act, the continuance of the present criminal proceedings against him would be without basis and amounts to attracting the principle of double jeopardy, it is further submitted.

13. In support of his contention the learned counsel has cited the case of *Bajrang Mica Company (private) Ltd., & Ors. v. State of Bihar & Anr.: 1990 SCC Online Pat 69 para 21* and also the case of *E. Hill & Company Ltd. v Regional Provident Funds: (1998) ILLJ 76 ALL para 3.*

14. It is therefore prayed that this Court may be pleased to allow this petition and to set aside and quash the said FIR and consequential criminal proceedings against the petitioner.

15. Per contra, Dr. N. Mozika, learned DSGI along with Ms. K. Gurung, learned counsel, appearing for the respondents has submitted that the Central Bureau of Investigation (CBI) empowered under the Delhi Special Police Establishment (DSPE) Act, 1946, *inter alia*, is also empowered to investigate into offences under the Indian Penal Code, including offences under Sections 420 and 406 IPC respectively on the strength of a notification issued by the Central Government pursuant to the provision under Section 3 of the said DSPE Act.

16. Alluding to the facts and circumstances of the case between the parties, the learned DSGI has submitted that facts and circumstances would reveal that the petitioner herein in terms of the said agreement (supra) is responsible for the payment of wages to his employees and also to comply with all existing statutory obligations including the required registration under the EPF and ESI Act respectively. In the process, the NEIGRIHMS was induced to release the wages meant for the said employees out of which an amount of ₹ 20,93,305/- meant for contribution towards the Employees Provident Fund was not deposited by the petitioner, thereby constituting the offences of cheating and criminal breach of trust and as such, the charge sheet wherein a prima facie case

under Section 420 and 406 IPC being found well established against the petitioner, the prayer of the petitioner to quash the consequential criminal proceedings cannot be allowed.

17. On the submission of the petitioner that a proceeding was initiated against the petitioner under the Employees' Provident Fund Act, particularly under Section 7A of the same in which an enquiry was initiated against him and his Organisation and in the final analysis it was found that the petitioner's Organisation was required to clear the outstanding dues amounting to ₹ 68,25,645/- which was also said to have been cleared by the petitioner on 29.03.2019, the learned DSGI has submitted that the petitioner's complicity in the matter has not been finally laid to rest and clearance of the outstanding dues would not absolve the petitioner of the liability of the criminal offence as provided under Section 14 and other related provisions of the EPF Act.

18. In support of this contention, the learned DSGI has referred to the decision of the Hon'ble Calcutta High Court in the case of *Anjuman Tea Company Ltd. & Ors. v. State of West Bengal & Ors.: 2007 SCC Online Cal 463* para 24 wherein the High Court in a case in which the facts and circumstances are similar to the present case, has observed that “...This Court is, however, of the firm opinion that subsequent deposit, though welcome, as it is better late than never, cannot and does not absolve the accused persons of the liability of the criminal offence...”

19. In a similar case, also cited by the learned DSGI, the Hon'ble Calcutta High Court in the case of *Ajay Jalan & Ors. v. State of West Bengal & Anr.*, 2018 SCC Online Cal 1367 at para 22 has held as follows:

“22. In the instant case, admittedly, there was a default in deposit of employees share of Provident Fund contribution for the period in question which was deposited subsequently after initiation of the instant proceeding. But mere payment of the contributions after filing of the case will not absolve the employer from his liability. Moreover, there is also neither any law nor any decision that in case of subsequent payment of employees share of Provident Fund contribution would result in quashing of the proceeding though it can be a mitigating circumstances to be taken into consideration in the event of the employer/accused found guilty by the trial court. In the matter of *Sajjan Kumar Jhunjhunwala and Ors. (Supra)* and *Anjuman Tea Company Ltd. and Ors. (Supra)* also this court held that subsequent deposit will not absolve the defaulter nor lead to quashing of the proceeding.”

20. Again, yet another judgment of the Hon'ble Calcutta High Court in a case of *Hotel Dock Palace (Private), Ltd. & Anr. v State of West Bengal & Anr.*: 2007 (3) L.L.N. 766 was cited by the learned DSGI wherein in a case of similar nature involving Section 7A of the said EPF Act, the High Court at para 10 has held that the fact that subsequent payment was made is a necessary circumstance which 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.

21. The learned DSGI has fairly submitted that in the event this Court finds that there are no ingredients or evidence to proceed against the

petitioner under Section 420 and 406 IPC, however on the basis of the authorities cited above, the competent authority may be allowed to proceed against the petitioner under the other penal provisions of the EPF Act including Section 14 of the same.

22. This Court, on the submission and contention of the learned counsels for the rival parties have given its anxious consideration to the same. It appears that the issues involved here are two-fold, one which concern the jurisdiction of the CBI and the other, the proceedings under the EPF and ESI Act.

23. Factually established, the CBI on some source information or otherwise have found it fit to lodge an FIR implicating two persons who are admittedly public servants being employees of NEIGRIHMS and the petitioner herein who is a private individual, in a case under Section 120B, 420 IPC and Section 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988. At this stage, nobody has questioned the jurisdiction of the CBI to launch prosecution. However, once investigation is completed, the Investigating Officer has filed the final report under Section 173 Cr.P.C and has come to the conclusion that no case is made out against the two public servants, but instead a case under Section 420 and 406 IPC has been made out against the petitioner herein and the matter was forwarded to the court of the learned Chief Judicial Magistrate, Shillong for trial.

24. The CBI is the premiere investigating agency of India known to investigate several cases of corruption particularly under the PC Act, 1988 as well as other economic crimes or special crimes. The legal powers of investigation of the CBI are derived from the DSPE Act, 1946. As pointed out by the learned DSGI, Section 3 of the DSPE Act provides for offences to be investigated by the CBI on being notified by the Central Government in this regard. An extract from the CBI manual was produced in court by the learned DSGI wherein under the heading Section 3, at column A, a list of offences punishable under various sections of the Indian Penal Code has been listed, Section 420 and 406 being included therein which can be investigated upon by the CBI.

25. However, under Section 6 of the said DSPE Act, if the CBI is to operate in any of the States, consent of such State Government for exercise of its powers and jurisdiction is required. By now, it is well settled that CBI can investigate into cases involving offences under the PC Act, however, when it comes to offences under the IPC which are generally taken up and investigated into by the State or local police, if a particular case involves provisions of offences under the PC Act as well as IPC then the CBI would be well within its right to investigate into such cases, but if, as in the present case, though initially the offences involves provisions under the PC Act along with those under the IPC, which was rightfully investigated into by the CBI, after the filing of the charge sheet wherein

only the provisions under the IPC remains, while the offences under the provisions of the PC Act were dropped, including release of liabilities of the public servants implicated therein, it stands to reason that the jurisdiction of the CBI would cease as on the date of filing of the charge sheet. At this juncture, if the CBI is to continue prosecution, the specific consent of the State is required. Admittedly, nothing is on record as to whether such consent was given or not or whether the same was requested or not. In view thereof, as submitted by the learned counsel for the petitioner, that the charge sheet was forwarded by the CBI in the court of the Chief Judicial Magistrate, the same was without jurisdiction. On this ground alone, the entire proceedings against the petitioner are vitiated.

26. As to the contention of the learned counsel for the petitioner that even otherwise, prima facie, no offence against the petitioner is made out under Section 406 and 420 IPC, as noted at para 10 and 11 above, this Court on careful examination of the same is also persuaded to believe that there are no ingredients under Section 406 and 420 IPC present in the allegation against the petitioner since the issue revolves around the question of contribution of the employer and the employees' share towards the Employees' Provident Fund.

27. The other aspect of the matter involves the provisions of the EPF Act to which the learned counsel for the petitioner has submitted that in course of the investigation carried out by the CBI against the petitioner

and others, the EPF Authorities have initiated proceedings under Section 7A of the said Act and as submitted, though the petitioner has candidly admitted initial default on his part, eventually as borne out by records, he has, in totality paid about ₹ 3,33,22,399/- including pending dues, fines, penalties, interests, etc., which was also reflected in the proceedings before the Assessing Authority, Regional Office, Shillong of the Employee's Provident Fund and the final order dated 20.11.2018 passed by the Regional P.F. Commissioner.

28. In the case of *Bajrang Mica Company (Private) Ltd.* (supra), in a matter under the EPF Act dealing with the provisions of Section 14(1-A) the court at para 21 has observed that before filing of the case the petitioners therein have complied with all the requirements, have paid administrative charges, deposited the Provident Funds and filed returns, the same not being brought to the notice of the sanctioning authority, the sanctioning authority could not have permitted to file such criminal cases.

29. In the case of *E. Hill & Company* (supra), the learned counsel for the petitioner has referred to paragraph 3 of the same to only point out that the Hon'ble Allahabad High Court in that case has held that proceedings under Section 7A of the EPF Act are quasi-judicial proceedings and as such, in the context of the case of the petitioner herein, once the said proceedings under Section 7A has been finally disposed of, another proceeding, be it under Section 406 and 420 IPC cannot be prosecuted on

the same facts and circumstances as the principle of double jeopardy would come into play and continuation of the latter proceedings would prejudice the petitioner's rights. In the context of the case of the petitioner this argument is found relevant, though this Court in a different context has held that the preference of the charge sheet by the CBI is vitiated vis-à-vis the proceedings under the provisions of Section 406 and 420 IPC.

30. In the cases cited by the learned DSGI a common refrain is that proceedings under the relevant provisions of the IPC can be continued or initiated in spite of the dues as required under the EPF Act being satisfied by the petitioner. In this regard, a look at the order dated 20.11.2018 passed by the said Regional PF Commissioner in the case concerning the petitioner and his Organisation as aforementioned, would reveal that a rider was inserted in the said order to the extent that it is indicated that the order is passed without prejudice to any action to be taken by the Department under Section 7C, 7Q, 8, 14 and 14B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 for the inquiry period against the employer and the establishment. This, accordingly would answer the contention of the learned DSGI in this regard.

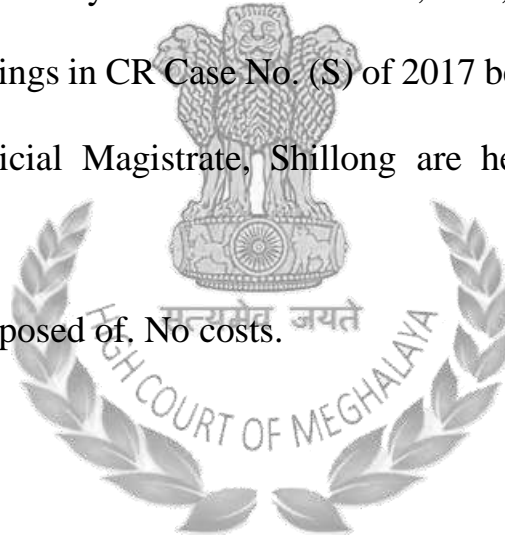
31. On an analysis of the case of the parties herein and the observations made above, this Court would refer to the case of *State of Haryana & Ors. v. Bhajanlal & Ors.: 1992 Suppl (1) SCC 335*, wherein the Hon'ble Supreme Court categorising instances or illustrations within

which the inherent power of the High Court under 482 can be exercised, one such instance being para 102(1), this Court applying the principle therein, is convinced that the petitioner has made out a case for his prayer to be allowed. The said paragraph reads as follows:

“102.(1) Where the allegations made in first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused...”

32. In the light of the above, this petition is hereby allowed, the FIR dated 10.12.2015 filed by the Head of Branch, CBI, ACB, Shillong and the related proceedings in CR Case No. (S) of 2017 before the court of the learned Chief Judicial Magistrate, Shillong are hereby set aside and quashed.

33. Petition disposed of. No costs.



Judge

Meghalaya
10.02.2023
"Tiprilynti-PS"