MADHYA PRADESH HIGH COURT

Akharbhai Nazarali,

Vs.

Md. Hussain Bhai

Criminal Revn. Nos. 177 and 257 of 1959, D/d. 8.3.1960. from order of Addl. S.J., Ujjain
(H.R. Krishnan, J.)

30.6.1959. 8.3.1960

ORDER

H. R. Krishnan, J.

1. Criminal Revision No. 177 of 1959 is a reference by the Addl. Sessions Judge, Ujjain, on an application in revision by the Provident Fund Inspector; Criminal Revision No. 257 of 1959 is an application in revision filed in this Court by the said Inspector himself. Both arise from the orders of the Magistrate, Ujjain, dismissing three complaints by the said Inspector, on the ground that the allegations mentioned in them did not constitute the offences under the respective counts, because, the law creating them had been brought into force after the omissions had been committed.

2. The accused (non-applicants), who are the proprietors of a textile mill at Ujjain, were, in those complaints, charged under three counts :

> (i) Under Section 406, Indian Penal Code, for criminal breach of trust in respect of amounts deducted during the months, January, February and March 1953, from, the wages of their employees as contribution, to the Empolyees' Provident Fund, which the accused-employers retained themselves and failed to deposit into the fund. (Actually, it is alleged that this is the position during the whole year 1953, but the complaints as such are in regard to the three months already stated).
> (ii) Under Paragraph 76(a) of the Employees' Provident Fund Scheme, 1952, failing to pay to the fund the contribution they (the employers) are liable to pay under the scheme.

(iii) Under Paragraph 76(c) for failing to submit to the Commissioner, the monthly consolidated statements, showing recoveries made from the wages of each employee and the employers' contribution made in the course of each of the months.

3. The learned City Magistrate, Ujjain City, has dismissed the complaints on the preliminary ground that the acts alleged did not amount to any offence, as the scheme itself, though deemed to have come into force from September, 1952, was brought into force retrospectively, by a notification made on 28-10-1953. He seems also to have felt that this notification by the Central Government was itself ultra vires of Article 20 of the Constitution. He, however, did not think it necessary to make a reference under section 432, Criminal Procedure Code, to the High Court, because the Scheme is not "an Act, Ordinance or Regulation".

4. The application in revision filed before the learned Addl. Sessions Judge, Ujjain, from this order, could have been treated as one for further inquiry; but he held that the City Magistrate, Ujjain should have made a reference to the High Court under section 432, Criminal Procedure Code; as he failed to do so, the learned Addl. Sessions Judge has himself done so.

5. The questions before us are, firstly, whether the prima facie case under section 406, can be considered independently of the operation of the Scheme; secondly, whether the allegations in regard to non-payment of the contributions, and the non-submission of returns are continuing offences under Paragraph 76(a) and (c) of the Scheme, read with section 14 of the Employees' Provident Fund Act of 1952; thirdly, whether the notification SRO/2035 of 20-10-1953, bringing the Scheme into operation in September 1952, is itself invalid and inoperative as being repugnant to Article 20 of the Constitution.

6. The facts of the case are practically common ground. The Employees' Provident Fund Act (19 of 1952) came into force on the 4th of March, 1952. Section 5 of the Act empowers the Government to make schemes for the establishment of provident funds for employees or any class of employees and specify the establishment or class of establishments to which the scheme shall apply. Schedule I of the Act enumerates the industries for the establishments in which the schemes would apply at the first instance, which includes establishments employing more than 50 persons and

manufacturing textiles. A scheme was prepared and published in 1952 and was brought into force on the 2nd September of that year. However, the commencement clause was not happily worded and accordingly by a subsequent notification made in October 1953, the relevant provisions of the scheme were "deemed to have come into force on the 2nd September, 1952". The present establishment in charge of the non-applicants started making deductions from the employees and adding its contributions and administrative charges paid it for November and December, 1952. During the further period, the allegation is that the non-applicants deducted the employees' contribution from the wages but retained it and failed to transmit to the fund either these sums or their own contribution or the administrative charges. In addition, they also failed to send the returns to the Commissioner.

7. Thus, they failed to comply with Paragraph 38 of the Scheme, sub-paragraph (1) of which directs that the employer shall deduct the employees' contribution from their wages and then add his own contribution, and such administration charges as might be fixed by the Central Government and shall pay to the fund by cheque or bank draft within 15 days from the close of each month; sub-paragraph (2) directs that he should also forward to the Commissioner within 15 days from the close of each month, a monthly consolidated statement showing the recoveries from the employees' and the employer's own contribution. Failure to do so is punishable under Paragraph 76(a) and (c) of the Scheme, with imprisonment up to six months and a fine up to Rs. 1000/-, or both. The Scheme itself is secondary legislation; but Section 14(2) of the Act enables the framers of the Scheme to make penal rules.

8. The facts alleged have not been disputed before the Magistrate, so that, we have to proceed on the assumption that they are prima facie true, and see if that constitutes the offences respectively under section 406, Indian Penal Code, and Paragraph 76(a) and 76(c) of the Scheme. In regard to the charge under section 406, Indian Penal Code, there is no difficulty whatever. If the employer deducts 6 p.c., 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. The sums deducted for this purpose are held in trust by the employer who has to discharge the duties imposed by the trust. Sri Chafekar, learned counsel appearing for the employer-non-applicants argues that though this may be the general position, here the allegation is that the trust was created not by virtue of the mere fact of the deductions or the recoveries, but on the strength of the provision in

the Scheme to the effect that the amounts so deducted shall be deemed to be held in trust on behalf of the employees. I fail to see what difference it makes.
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. Then even without invoking the scheme there is a prima facie case against the non-applicants for criminal breach of trust in respect of the contributions deducted from the wages of the employees.

9. The next question is, whether the failure to pay to the fund the employees' contribution, the employer's own contribution, and the administration charge fixed by the Central Government on a percentage basis, is an offence under Paragraph 77(a) of the Scheme, which is a statutory regulation made under the powers given to the Central Government by section 5 of the Employees' Provident Fund Act. The learned Magistrate seems to have had some difficulty in making up his mind as to whether the scheme is an "ordinance" or "regulation" for the purpose of Section 432, Criminal Procedure Code. The word "regulation" in that section is used in a very general sense as equivalent to any secondary legislation in other words, any rule or what amounts to a rule, made by the Government in exercise of powers given by an enactment and itself having the force of law; law itself is separately mentioned

10. The establishments in the textile industry came under the operation of the Act from its very inception. The Scheme itself came into force on 02-09-1952, the date on which it was notified. It was felt that there were certain omissions in the Scheme as was originally made and accordingly, by notification SRO/2035 of 20-10-1953, it was expressly provided that as respects factories relating to industries other than certain ones, and including the textile industry, the Scheme should be deemed to have come into force with effect from the 2nd September, 1952. There is nothing wrong in the Scheme itself being made retrospective in its operation, and if there was any doubt, Section 5(2) removes it. But it is one thing to say that any non-penal law or rule or regulation, can operate retrospectively, and another thing to urge that by virtue of a parliamentary enactment, even a penal provision can have retrospective effect. In my view, it was not the intention of Section 5(2) that even, a penal provision contained in a scheme can act retrospectively. Even if it was intended, it cannot have any effect

because of the overriding provisions of Article 20 of the Constitution.

11. Incidentally, I note that the learned Magistrate seems to have felt that the notification already mentioned, directing that the Scheme would be deemed to have come into force on the 2nd September is ultra vires. That certainly is not.
Our Constitution, unlike the American Constitution, does not ban each and every piece of ex post facto legislation. All that Article 20(1) provides is that a penal law, whether providing punishment or increasing the penalty for an act which is already punishable, cannot operate retrospectively. Thus, the most, that can be urged in regard to the Scheme is that the penal provisions such as those contained in Paragraph 76, may not act retrospectively, assuming, of course, that the offence alleged does not continue to be an offence after the coming into force of the penal provision. Here, for example, if the act of non-payment into the fund of the contribution and the administrative charge was a non-recurring or non-continuing offence, then, unless committed after the 28th October 1953, it would not be punishable under Paragraph 76.

12. There is no doubt about this as a proposition; but this takes us to another question regarding the nature of the omission; whether the non-payment of contribution and non-submission, of the return, in the manner provided in Paragraph 38, are offences that recur and continue every moment, till the payment is made and the returns are submitted, or whether they are complete on the 15th of the next month and do not continue after that. If these offences are continuing offences that are, as it were, being committed every moment till the payments are made and the returns submitted, they would be punishable after October, 1953.

13. There is no direct authority available on, whether this non-payment of contributions and the non-submission of returns is, or is not, a continuing offence; but, it is clear that the pith and substance of paragraph 38 is that the contributions should be paid into the fund, and the return should be made to the Commissioner. While the fixing of a date does mean that the employer should pay into the fund and send to the Commissioner the returns by that date, it cannot mean that once the date is passed, the employer is relieved of his duty and there is nothing more to be done. On the contrary, the duty of the employer is in any event, to pay and to send the returns; otherwise, one will be ignoring the very purpose of the. scheme.

14. A similar question arose before the High Courts of Patna and Calcutta in connection with the construction of creches and bathrooms as provided in the Mines Creche Rules and the Coal Mines Pithead Bath Rules of 1946. The Management having omitted to construct these amenities within the time specified, it was prosecuted in those cases, after the lapse of the term before which prosecution should have been launched. In both, the defense contended that the prosecution would not lie after the expiry of the term; the prosecution urged, however, that the offence of omission to construct these amenities was a continuing one. In the *Patna High Court, State v. Kunj Behari,* [1] there was a difference of opinion, the majority view being that it was a continuing offence and the prosecution was not barred by section 42 of the Mines Act, which provided a limitation for such prosecutions. The matter is elaborately discussed in the Calcutta judgment, in *G.D. Bhattar v. State,* [2]

> "The question whether an illegal omission is a continuing offence or not, can hardly be answered in summary manner without considering the nature of the duty imposed, and the object which the Legislature had in view in imposing the duty ..... The pithead baths and the mines creches are amenities required by the Legislature, the first for the sanitation and health of the miners and the second for the proper care of the children of female miners.....without these, the miners could not be expected to preserve their health, and children of the female miners could not be properly looked after. The mere fact, therefore, that the specified date within which the baths and the creches were required under the rules to be constructed, expired, cannot possibly mean that the duty of the owner ended with the expiry of the date. That duty still remains. It continues till the pithead baths and the creches are constructed as required by the rules. A continuing wrong or a continuing offence is after all, a continuing breach of a duty which itself is continuing. If a duty continues from day to day, the non-performance of that duty from day to day is a continuing wrong."

15. The creation of the Employees' provident Fund and the fixing of the contributions of the employees and of the employer was for the purpose of the welfare of the employees. One has only to read this passage from the Calcutta judgment with the appropriate substitution of the payment of the contribution, and the submission of the returns. The mere fact that the 15th of the month next after the one for which the contributions were due, expired, has not, in any manner, terminated the duty of the employer to pay in the contributions to the fund and send the return to the

Commissioner. It is a duty created by the statute and continues day after day till, of course, the payment is made and the returns are submitted. It is, therefore, obvious that the failure to pay up contributions and to submit the returns was a continuing wrong which even on the view propounded by the learned Magistrate, became a penal offence under Paragraph 76(a) and (c) on the day in October 1953, when the notification was made amending Paragraph 3(b)(v) of the Scheme.

16. It is almost a trite proposition that Article 20(1) of the Constitution against ex post facto penal legislation does not hit a law punishing continuing offences. Till the date of the penal legislation, the act alleged may not be an offence calling for punishment under the penal law. But as soon as the law comes into force, then it becomes an offence and can be punished as such. A stereotype example given in text-books on the American Constitution is the prohibition law. The possession of liquor till the coming into force of prohibitory legislation may not be an offence. But as soon as the prohibitory legislation comes into force, the possession of liquor even though it may have commenced before that day, may become a punishable offence. Thus, the prima facie case under Paragraph 76(a) and (c) would not be hit by Article 20(1). Certainly, this argument has no application whatsoever to the prima facie case under section 406, Indian Penal Code, which, to any view of the matter, should have been inquired into and investigated.

17. On behalf of the non-applicant-employer, it is pointed out that section 8 of the Act enables the appropriate Government to realize as arrears, of land revenue, any monies that are due from the employers. But I do not see how it follows that penal action under Paragraph 76 of the Scheme should not be invoked. One can find dozens of enactments which provide both for punishment after prosecution and for the realization by a certificate or similar process, all the monies outstanding. In fact, such prosecution deals with the contumacious conduct of the wrong-doer while the realization is by way of collecting the dues.

18. In the result, the reference by the learned Addl. Sessions Judge is disposed of with a direction that the learned Magistrate should hold further enquiry into the subject-matter of the complaints in view of the prima facie case made out under section 406, Indian Penal Code, and Paragraph 76(a) and (c) of the Employees Provident Fund Scheme, 1952, read with Section 14(2) of the Employees Provident Funds Act, 1952.

Order accordingly.

Cases Referred.

1. AIR 1954 Pat 371
2. AIR 1957 Cal 483