

Surinder Arora and Others Vs. Durga Das and Others

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Court : Delhi

Decided On : Apr-10-1987

Reported in : [1987]62CompCas644(Delhi); [1987]168ITR562(Delhi)

Judge : M.K. Chawla, J.

Acts : [Income Tax Act 1961](#) - Sections 40A(7); [Indian Penal Code \(IPC\), 1860](#) - Sections 405

Appeal No. : Criminal Revision No. 10 of 1984

Appellant : Surinder Arora and Others

Respondent : Durga Das and Others

Advocate for Pet/Ap. : Nitya Ramakrishna,; K.K. Jain and; Madan Lokur, Advs

Judgement :

Chawla, J.

1. On December 9, 1981, Shri Surinder Arora, an ex-employee of M/s. Associated Traders and Engineers Ltd., 20/1, Asaf Ali Road, New Delhi, filed a complaint in the court of the concerned Metropolitan Magistrate, for initiation of proceedings under sections 406 and 418 of the Indian Penal Code, against the managing director, three directors, the Deputy General Manager (Finance), an accountant and Shri P. K. Seth, a partner of the firm of chartered accountants of the company.

2. The case of the petitioner as disclosed in the complaint is that accused Nos. 1 to 5 created an approved gratuity fund and named it as 'Associated Traders and Engineers Employees' Gratuity Fund' and in compliance with the provisions of section 40A(7) of the Income-tax Act, opened an account with the Andhra Bank, Asaf Ali Road, New Delhi. Accused Nos. 1 to 6, however, never deposited the amount of the fund in the post office savings bank account or as prescribed under rule 67(1) and (2) of the Income-tax Rules. The accused thus knowingly and intentionally contravened the terms of the irrevocable trust. It is his further case that the gratuity amount deposited in the approved gratuity fund belongs to the employees of the company and is payable under the Payment of Gratuity Act, 1972. This amount cannot be used by the employer in any other manner. The company, however, has misappropriated it and converted it to its own use. It is contrary to law. By not fulfilling their statutory obligations, the officers of the company had made themselves liable to penal consequences. The accused be summoned and punished according to law.

3. In support of the complaint, the petitioner examined himself and produced Sarvashri G. K. Dua, S. K. Sharma and N. K. Khattar, employees of the company. The learned lower court on a consideration of the oral as well as the documentary evidence came to the conclusion that even if the facts of the complaint are taken on their face value, no criminal liability can be fixed on the Deputy General Manager (Finance), the accountant and the partner of the chartered accountant firm of the company, as they did not play any part in the misappropriation, if any, of the gratuity fund amount. As regards the managing director and the directors of the company, the finding is that the complainant has miserably failed to bring his case within the four corners of the offence referred to above, inasmuch as there is no positive evidence to suggest that accused Nos. 1 to 4 have either converted the amount in question to their own use or have not deposited the gratuity amount in a savings bank account of any recognised scheduled bank as required under the Income-tax Act and the rules framed there under. Furthermore, the gratuity fund amount shown in the balance-sheet only indicates the liability of the company towards its employees to that extent. It is not a circumstance to prove that the accused have either violated the provisions of the trust or the obligations arising under the Income-tax Rules. On these findings, the complaint was dismissed. It is

against this order that the complainant has filed the present petition.

4. The first and the foremost contention of learned counsel for the petitioner is that at the stage of consideration whether or not to issue process, the court below was required to see, as to whether the facts disclosed in the complaint as well as the evidence led in support of the same are sufficient to initiate proceedings or not. The court went wrong in making out a plausible defense for the accused persons. Once it is proved on the record that the company has not complied with the provisions of section 40A(7) of the Income-tax Act and the rules framed there under, the learned Metropolitan Magistrate should have summoned the accused persons. The submission of the learned counsel for the respondents on the other hand is that even if the facts disclosed in the complaint and the evidence on record are taken on their face value, no case for the summoning of the accused has been made out. In this case, the petitioners have failed to bring on record any material showing that there was any entrustment of the property or that it was utilised otherwise than required under the relevant provisions.

5. In order to succeed, in a petition like this one, the petitioner was required to fulfill the essential ingredients of the provisions of sections 405 and 406, Indian Penal Code. Secondly, they are also required to indicate that the respondent company failed to comply with the relevant provisions of the Gratuity Act. It appears that on both counts, the petitioners failed badly.

6. Section 405 is the relevant provision which defines criminal breach of trust. Section 406 prescribes the punishment for criminal breach of trust. The essential ingredients of the section are :

'1. The accused must have been entrusted with property or with any dominion over property;

2. (a) The accused must have misappropriated that property or converted it to its own use; or

(b) used or disposed of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged; or

(c) used or disposed of the property in violation of any legal contract (express or implied) which he has made touching on the discharge of such trust; or

(d) willfully suffered any other person so to do.

3. Such misappropriation or user or disposal must be dishonest or such sufferance must be willful.'

7. In the absence of proof of entrustment of property or dominion over the property of another, this section will not apply. Similarly, in the absence of proof of dishonest intention, the rigour of this section will not be attracted.

8. In this view of the matter, one has first to find out if the petitioner has entrusted any amount to the company which they in turn have put to their own use. There cannot be any entrustment in the case of payment of gratuity amount. It is not disputed that at no point of time any amount is contributed by the employee or deducted from the salary towards the gratuity fund. Section 4 of the Payment of Gratuity Act, 1972, lays down an obligation on the employer to pay gratuity to the employee on the termination of his employment after he has rendered service for not less than 5 years, on his superannuation or on his retirement or on his death or his disablement due to accident or disease. For every completed year of service or part thereof in excess of six months, an employer has to pay gratuity at the rate of 15 days' wages based on the rate of wages last drawn by the employee concerned. However, this amount of gratuity payable to an employee is not to exceed 20 months' wages.

9. The gratuity payable can also be wholly or partially forfeited if his services are terminated for his riotous or disorderly conduct or any other act of violence on his part, or if his services have been terminated for any act which constitutes an offence involving moral turpitude. Section 7 of the Payment of Gratuity Act deals with determination of the amount of gratuity and enjoins upon the employer to pay the amount of gratuity within such time as may be prescribed. If there is a dispute in this regard, the controlling authority has to decide it. The Gratuity Act is a complete code by itself. The liability to pay the gratuity arises only after retirement or death and it is the responsibility of the employer to find the money and pay the

same.

10. The employer is within its right to create a fund or take out an insurance policy with a view to lessen its burden for arranging funds at the time the gratuity is to be paid to its employees. In this fund, if created, the money is contributed by the company only and no person has any right or interest in it : there is no entrustment at all.

11. For claiming deductions of gratuity amount out of the income, the provisions of section 40A(7) of the Income-tax Act and rule 106 of the Income-tax Rules come into play. If an employer does not keep the fund as required by the income-tax authorities, it disentitles itself from the deduction. There is no other disablement.

12. In this case, admittedly, the company has taken out a policy of insurance. As and when a particular employee of the company retires or is otherwise made to leave the service, the insurance company calculates the exact amount of premium and releases the said payment on the due date. If there is any shortfall in the money received from the insurance, the same has to be made up by the company and the employees get the full amount of gratuity.

13. The contention of the learned counsel for the petitioner is that the company having created a trust in accordance with the provisions of section 40A(7) of the Income-tax Act, the amount has necessarily to be invested in the manner specified in sub-rule (2) of rule 67. It was not open to the company to convert the said amount for its own use. The petitioners have led evidence on record to show that the company intentionally failed to pay the premium of Rs. 75,000 to the insurance company to keep the policy alive. The learned lower court has altogether ignored this material evidence which has resulted in the miscarriage of justice.

14. This argument has no basis. As observed earlier, the present is not a case of the payment of an amount from the provident fund. Rules 67(1) and 67(2) of the Income-tax Rules is applicable to recognised provident funds and do not apply to gratuity. In the case of provident fund, the employees have also to contribute a certain amount every year in addition to what the employer contributes. In the case of gratuity, no amount is contributed by an employee, and it becomes payable only

on retirement or death, etc. Gratuity can be forfeited in certain eventualities. No employee, however, has any right or interest in any account or fund whatsoever even if created. The question of protection of interest of any one under these circumstances does not arise and the provisions of section 418 are not attracted. There being no entrustment nor any evidence of the conversion of the fund by the company for its own use, or towards other purposes, the provisions of section 406 are also not attracted. Both these essential ingredients are missing and as such the learned lower court in my opinion was justified in dismissing the complaint. The impugned order is factually and legally correct. The judgment cannot be said to be perverse calling for any interference.

15. In the result, I see no force in the revision petition and the same is dismissed.

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