# D.N. Ghosh and anr. Vs. Additional Sessions Judge and ors.

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**Court** : Kolkata

**Decided On :** Apr-01-1958

**Reported in** : AIR1959Cal208,63CWN147,(1959)ILLJ587Cal

**Judge** : Sinha, J.

**Acts** : Constitution of India - Article 245; ;Coal Mines Provident Fund and Bonus Schemes Act, 1948 - Sections 3 and 9; ;Coal Mines Act, 1952 - Section 2(1)

**Appeal No.** : Civil Revn. No. 2734 of 1955

**Appellant** : D.N. Ghosh and anr.

**Respondent** : Additional Sessions Judge and ors.

**Advocate for Def.** : P.K. Banerjee and ;J. Majumdar, Advs. for Opposite Parties 1 to 4

**Advocate for Pet/Ap.** : Anil Kumar Sen, Adv.

**Judgement** :
ORDER

**Sinha, J.**

1. The facts in this case are briefly as follows: The petitioners are the owners of certain Coal Field popularly known as Diguli Colliery within the district of Burdwan.

It is said that for some time the coal field was worked by the petitioners but as they were unable to carry on the business profitably they entered into an agreement on or about 12-1-1948 with one Sri A.K. Goswami. That agreement is evidenced by a registered document, a copy of which was handed over to me at the hearing. The nature of this document is relevant for determination of the points raised in this case. The document starts by describing the petitioners as owners of the properties described in the schedule annexed thereto, along with the lease-hold described and delineated in the attached plan. It is then stated that the petitioners were owners of the said properties along with the lease-hold bearing the name 'The Diguli Colliery' and it was worked by the First Party, namely, the petitioners, under the name and style of 'The Oriental Mining and Trading Syndicate'. The document then proceeds to state as follows:

'Whereas it has been considered by the First Party for more efficient harnessing of the said property to take the help of Shri Amulya Kumar Goswami .... the Second Party .... It is hereby agreed by and between the parties ........'.

2. According to the terms of this agreement, Go-swami had to instal pumping & haulage machinery and other machinery necessary for raising coal. He also advanced a loan of Rs. 6000/- to be utilised for the repayment of debts incurred by the colliery and cost of repair of its boiler etc. Goswami was also to work and develop the colliery, raise and sell its coal, employ staff and labour, accept all payments for any coal despatched out of the mines, open and operate accounts with any bank in the name of the Company. It was then laid down that Goswami would be entitled to purchase ....... machinery and structures',but if it was outside the sphere of legal necessity involving a cost exceeding one thousand rupees, or falling outside the normal day to day necessity, then it would be subject to intimation to, and discussion with, the petitioners, if they so desire. Clause 7 is the most important clause which lays down that accounts of the colliery shall be made up every six months, and 66-2/3 per cent of the share of the net profits would be paid by Goswami to the petitioners. In case the profits per month for any half year exceeds one thousand rupees, Goswami will be entitled to a further 10 per cent of the profit. Clause 12 lays down how consultation was to be made and how the accounts were to be checked. Clause 16 lays down that in the matter of

disbursement of costs for works of a permanent nature, the parties would be charged in the ratio of ten per cent to the Second and ninety per cent to the First Party, in respect of the total cost. I have already mentioned that this Agreement was executed on 12-1-1948.

3. On 3-9-1948 an Act being Act No. XLVI of 1948 called the 'Coal Mines Provident Fund & Bonus Schemes Act, 1948' came into operation. The provisions thereof which are relevant for our present purposes are as follows: Section 2(e) defines the word 'employer' and means the owner of a coal mine as defined in Clause (g) of Section 3 of the Indian Mines Act 1923 (IV of 1923). Section 3 of the Act is very important and is set out below:

'3. Coal Mines Provident Fund Scheme: (1) The Central Government may, by notification in the official Gazette, frame a scheme to be called the Coal Mines Provident Fund Scheme for the establishment of a provident fund for employees and specify the coal mines to which the said scheme shall apply.

2. Any scheme framed under the provisions of Sub-section (1) may provide for all or any of the matters specified in the First Schedule.'

Section 9 of the Act runs as follows:

'Penalty: (1) Any scheme framed under this Act may provide that any person who contravenes any of the provisions thereof shall be punishable with imprisonment for a term which may extend to one thousand rupees, or with both.

(2) No Court shall take cognizance of any offence punishable under any such scheme except on a report in writing of the facts constituting such offence made by an Inspector with the previous sanction of such authority as may be specified in this behalf by the Central Government.'

The First Schedule to the Act lays down the particulars of the matters to be provided for in the Coal Mines Provident Fund Scheme. Clause 2 thereof provides for payment of contributions to the Fund by employers and by, or on behalf of, employees, the rate, time and manner of such payment and the manner in which such contributions may be recovered.

4. Pursuant to the powers granted under the Act, a scheme has been framed by the Government of India on or about the 11th December 1948. The preamble of this scheme states that it has been framed 'in exercise of the powers conferred by Section 3 of the Coal Mines Provident Fund and Bonus Schemes Act 1948 (XLVI of 1948)'. In the definition portion, the word 'employer' is not to be found. Clause 33 of the Scheme deals with the mode of payment of contribution by the employer. Clause 38 deals with the submission of returns of qualified employees. It lays down that every employer shall send by registered post or through a messenger to the Commissioner within six weeks of the commencement of each quarter a return in duplicate, in the prescribed form, of the employees qualifying to become members of the Fund during the preceding quarter and shall send with the return the declarations in the prescribed form furnished by the persons so qualified. Clause 42 deals with the submission of contribution cards to the Commissioner. This is also to be done by the employer within the period prescribed. I now come to Clause 70 which is headed 'Punishment for failure to pay contributions etc.' It prescribes under six headings the circumstances under which a person may become punishable with imprisonment which may extend to six months or with fine which may extend to one thousand rupees, or with both. A punishment is prescribed for failure to pay contribution which a person liable to pay under the Scheme and also for failing or refusing to submit any return, statement or other document required by the Scheme-The penultimate Sub-clause (f) prescribes a punishment for a person who is 'guilty of any contravention of Or non-compliance with any of the requirements of the Act or of the Scheme, in respect of which no special penalty is provided.'

5. On or about the 23rd August, 1954 a complaint was lodged against the petitioners before the Sub-Divisional Officer, Asansol, for violation of the provisions of the Act and the Scheme. The case was registered as Case No. C/1933 of 1954 and was transferred to the Magistrate., First Class, Asansol, for trial. On 26-5-1955 the learned Magistrate passed his order convicting the petitioners under Section 245 of the Code of Criminal Procedure for an offence under paragraph 70 of the Scheme and sentenced them to pay a fine of Rs. 200/- and in default, to undergo simple imprisonment for two months. The petitioners preferred an appeal against the said order being Criminal Appeal No. 242 of 1955.

This appeal was dismissed by the learned Additional Sessions Judge of Burdwan by his judgment and order dated 16-7-1955. The petitioners have then come up to this Court and a Rule was issued on 31-8-1955 calling upon the opposite parties to show cause why a Writ in the nature of Certiorari should not be issued quashing and/or setting aside the order of conviction and sentence complained of in the petition and for other reliefs.

6. Mr. Sen appearing on behalf of the petitioners has taken the following points before me: (1) That the power to impose penalty for violation of the provisions of a Scheme as given in Section 9 of the Act, and the provisions as to penalty as made by Government in Clause 70 of the Scheme, constitute improper delegation, and the exercise of powers improperly delegated, and are therefore void under the Constitution. (2) The Scheme having been framed under Section 3 of the Act, it was not competent for the makers of the Scheme to include in Clause 70 provisions for panalties for transgressions I against the provisions of the Act and or the Scheme. (3) That the petitioners who have been convicted are not employers as defined by the Act and therefore the conviction and the sentence are bad.

7. With regard to the first point, it has been pointed out by Mr. Banerjee that the point of ultra vires was never raised in the Courts below. It is a I common fallacy to suppose that the lower Courts can never go into the question of ultra vires. In the case of Releigh Investment Co. Ltd. v. Governor-General in Council, AIR 1947 PC 78, the Judicial Committee pointed out that the Income-tax Act had the machinery which enabled an assessee effectively to raise tne question whether a particular provision of the Act bearing on the assessment made upon him was ultra vires or not, and there was no reason why he should not have agitated that question in the manner laid down in the Act. In this case also, I do not see why the petitioners should not have raised the question of ultra vires in the Courts below. However, since the point has been raised, it would be better to decide it. The way that Mr. Sen has formulated the point is as follows: He argues that the power to declare any action as an offence, and to prescribe penalty for it, are purely legislative acts and therefore can only be done by the Legislature within whose jurisdiction the matter falls. He follows this up by saying that such a Legislature cannot delegate the power to any other body, not to speak of a non-legislative body, to declare

certain actions as offences and to lay down the punishment. That the power to declare certain acts as offences and to prescribe the punishment are legislative powers, cannot be doubted. The precise question that falls to be decided here is as to whether the Legislature, in enacting a statute, can give power to a non-legislative body to frame rules and regulations and also to declare that a violation of such rules and regulations would constitute an offence and be punishable. The position in such a case has been well summarised in certain notes to be found in Panama Refining Co. v. A.D. Ryan, (1935) 79 Law Ed 446 at 489. It may beset out as follows:

'A legislative body may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations to promote the purpose and spirit of the legislation and to carry it into effect; and the action of the legislature in giving such rules and regulations the force and effect of laws does not violate the constitutional inhibition against delegating the legislative function .....

The validity of a penalty provided by the legislature for a violation of a rule or order of an administrative board or officer depends upon the right of the legislature to delegate the power to make or promulgate the rule or order. If the Board or officer may be vested with this power, there can be no objection, on the ground of delegation of legislative functions, to making the violation of the regulations or orders a punishable offence.

There are numerous cases in which the courts have sustained, as against this objection, statutes authorizing administrative boards, commissions and officers to make and promulgate rules, regulations, and orders on a specified subject, and providing that a violation of such rules or orders should constitute a misdemeanour, punishable as provided in the statute.

However, the legislature cannot delegate to an administrative board the authority to fix the penalty for a violation of orders or regulations which the legislature authorized the board to make. The penalty must be fixed by the legislature itself'.

The above principles may be summarized thus: (1) The legislature may confer upon a non-legislative body or person the power to prescribe rules and regulations as ancillary to a statute. (2) Provided that the policy has been declared and a primary standard has been fixed, such delegation of power is valid. (3) The legislature can prescribe that when such rules and regulations have been promulgated, the violation of any such rule or regulation shall constitute an offence and attract a penalty. (4) In such a case, it is the legislature which must prescribe the penalty or prescribe the standard of penalty to be imposed.

8. In this connection it would be interesting to refer to two American cases. The first case is United States v. Pierre Grimaud, (1910) 55 Law Ed 563. In that case, by the Forest Reserve Acts of 1897, power was given to the Secretary of Agriculture to make rules and regulations and establish., such services as will ensure the objects of certain forest reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction. It was further provided in the Act that any violation of the provisions of such rules & regulations shall be punishable as prescribed. Under these Acts, the Secretary of Agriculture in 1906 promulgated certain rules and regulations regulating the use and occupancy of the public forest reservations and for preserving the forest thereon from destruction. The rules and regulations provided for penalties in case of a violation of its provisions. One of the rules provided that all persons must secure permits before grazing any stock in a forest reserve. The defendants were charged with driving and grazing sheep on a reserve without a permit. It was inter alia urged that the Acts in so far as they made it an offence to violate the rules and regulations made and promulgated by the Secretary of Agriculture, were unconstitutional, in that there was an attempt by Congress to delegate its legislative power to an Administrative Officer. Mr. Justice Lamar stated as follows:

'The Secretary of Agriculture could not make rules arid regulations for any and every purpose. Williamson v. United States, (1908) 207 US 425, 462: 52 Law Ed 278, 297. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorised 'to regulate the occupancy and use and to preserve the forests from destruction'. A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty ..... The Secretary did not exercise the legislative power of declaring the penalty or fixing the punishment for grazing sheep without a permit, but the punishment is imposed by the Act itself The offence is not against the Secretary, but, as the indictment properly concludes, 'contrary to the laws of the United States and the peace and dignity thereof .......'

9. It was held that the delegation of power was constitutional. The next case cited is L. P. Stuart v. Chester Bowles, (1944) 88 Law Ed 1350. This case dealt with the Second War Powers Act 1942, whereby power was given to the President of the United States for defence of the country etc., to allocate the supply of any material in which there was a shortage, upon such condition and to such extent as it shall be deemed necessary and appropriate. The President delegated that power to the Office of the Price Administration, which promulgated a Ration Order. By this Order there was a control of fuel oil and other petroleum products in the eastern States due to war activity. There was a provision that for violation of the Order, a suspension order could be passed against a dealer by prohibiting him from receiving any transfers or deliveries of, or selling or using or otherwise disposing of, any fuel oil etc. This part of the order was challenged as unconstitutional. It was argued that power was delegated to an Administrative Officer to declare an offence and also to punish the same. Douglas J., stated as follows:

'We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute ..... ..... Hence we would have no difficulty in agreeing with petitioner's contention if the issue were whether a suspension order could be used as a means of punishment of an offender. But that statement of the question is a distortion of the issue presented on this record.'

It was held that the order of suspension was really within the province of allocation and did not constitute a separate penalty.

10. We thus find that at least under the American Laws it is permissible to give the power to frame a rule and also to enact that a violation of the rules should constitute an offence and to lay down the penalty. Before I proceed to apply this principle to the facts of this case, it would be necessary to refer to a well-known English case, namely, Hodge v. The Queen, (1883) 9 AC 117. This is a decision of the Judicial Committee, being an appeal from a decision of the Court of Appeal of Ontario, Canada. In this case, the law that came to be considered is the Liquor License Act of Canada. Section 3 of that Act provided for the appointment of a Board of License Commissioners for each city, county etc. Section 4 conferred upon the Board of License Commissioners the power to pass a resolution or resolutions for regulating and determining certain matters, that is to say, conditions and qualifications requisite for obtaining tavern licenses for regulating the taverns and shops to be licensed etc. By Section 5, power was given to the Board of License Commissioners, by any resolution of the Board, to impose penalties for the infraction of such rules and regulations. The Board of License Commissioners was duly appointed under the statute, and in 1881 passed resolutions or regulations in relation to licensed taverns or shops etc., in the city of Toronto. It was inter alia laid down that during a certain period no such licensed person shall permit or allow any billiard or other games to be played in any tavern or shop. It further laid down that any person or persons guilty of any infraction of such a provision shall upon conviction, pay a penalty of 20 dollars etc., and in default of payment he was subject to the issue of a distress warrant and may also be committed to the common jail of the city of Toronto, with or without hard labour for the period of 15 days unless the penalty was sooner paid. The appellant was the holder of a retail license and as he had allowed billiard to be played within the prohibited period he was convicted and fined and it was further ordered that if he did not pay the fine, he should be committed to jail with hard labour until he paid the fine. The regulation, together with the offences prescribed therein, as also the penalties, were challenged as contrary to law. The enactments and the regulations made thereunder were all upheld. Sir Barnes Peacock said as follows:

'It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation, entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide.

Their Lordships do not think it necessary to pursue this subject further, save to add that, if bye-laws or resolutions are warranted, power to enforce them seems necessary and equally lawful.'

11. We find therefore that so far as this English case goes, it proceeds farther than the American cases or the principles adumbrated therein. So far as the law in India is concerned, dealing with the delegation of powers, the matter has been the subject or numerous decisions. In recent times the leading case has been the decision of the Supreme Court, Art. 143, Constitution of India and Delhi Laws Act (1912) etc., In re, 1951 SCR 747: (AIR 1951 SC 332). I have analysed the decision in Gopal Chandra Mukherjee v. B.C. Das Gupta, 93 Cal LJ 304. I have pointed out that broadly speaking the question of delegated legislation has come up for consideration before Courts of Law in two distinct classes of cases. One of these classes comprises of what is known as cases of 'conditional legislation.' The other class is what is known as 'subordinate legislation'. In subordinate legislation we have delegation proper, where admittedly some portion of the legislative power has been conferred by the legislative body, upon what is described as a subordinate agent or authority. The limits of subordinate legislation are roughly that it must operate under the control of the legislature from which it derives its authority, it must not have an independent authority. There must be no delegation of the essential legislative powers, and there must be a declaration of the legislative policy, and the formula enacting that policy into a binding rule of conduct. It was open to the legislature to formulate the policy as broadly and with as little or as much detail as it thought proper and it may delegate the rest of the

legislative work to, a subordinate authority who will work out the detail within the framework of that policy. So long as a policy is laid down and a standard established by statute, no constitutional delegation of legislative power is involved in leaving to selected instrumentalities the making of subordinate rules within the prescribed limits and the determination of facts to which the legislation is to apply. It was enough if the legislature laid down an intelligent principle which can be implemented by the subordinate authorities for specific cases or classes of cases.

12. I must admit that so far as the decided cases are concerned, the present case is distinguishable only in one respect. In the cases quoted above, it has been laid down that if the statute authorises rules and regulations to be framed and lays down that a violation thereof would constitute an offence and then further lays down penalties for the offence, then all such actions would be constitutional. In this particular case, the matter goes a little further. The legislature has enabled rules and regulations to be made, it has laid down that violation thereof may constitute an offence, and also has prescribed the limit of the penalties that may be imposed. It has however given power to Government to determine as to whether the rules and regulations shall at all contain a penalty clause. Mr. Sen has argued that this takes the matter out of the permissible limits. In my opinion, it does not. The underlying principle is as follows: Prescribing an offence and its punishment is essentially a legislative act. But provided that this can be attributed to the legislative body, the actual working out of it can be delegated to a non-legislative body. The most simple example will be where the legislature itself prescribes the rules, makes its violation an offence, and lays down the penalty. Next, it may delegate the power to make rules to a non-legislative body but declare that violation of such rules when prescribed would be an offence and prescribe the penalty. But it may equally lay down that in such a case, the non-legislative body may itself have an option as to whether it will avail of this power or not. In other words, the non-legislative body may not think it necessary to go to the extent of having a violation of the rules treated as an offence, in which case, it need not avail itself of this provision. The legislative body, instead of prescribing the precise penalty may also lay down the limit or standard, leaving it to the non-legislative body to prescribe the penalty within such limits or in accordance with the standard laid down. In such a case where the non-legislative body avails itself of the power,

it cannot be said that it has created the offence or prescribed the penalty. It is the legislative body which has created the offence and prescribed the penalty, but has delegated the power to the non-legislative body to apply or not to apply such provisions, or apply them in a suitable manner within the limits imposed, as is required under the prevailing circumstances. To this extent the delegation of power is a permissible delegation. Although the power to frame the rules and regulations and to introduce penalty is left to Government, it is hedged with safeguards. To start with, a scheme cannot be made with regard to any and every subject. The Act lays down the heading under which the scheme can be formulated. Consequently it is only an infraction of any such scheme that can be penalised. Then again the limits of the penalty nave been fixed by the legislature and the standard to be followed has also been laid down. The extent of the term of imprisonment has been laid down and the ceiling of the fine that can be imposed has also been laid down. In my opinion, therefore, the legislature has laid down the policy and is also in control of it Consequently the tests for declaring the validity of a subordinate legislation like this is easily passed. In my opinion, Section 9 is not ultra vires and Section 70 of the scheme is not an unconstitutional exercise of a delegated power. This point therefore fails.

13. The next point taken is that the scheme in its preamble states that it is being promulgated under Section 3 of the Act. It is argued that Section 3 has got nothing to do with the imposition of penalty. It is Section 9 which imposes the penalty and therefore in a scheme professedly framed under powers conferred by Section 3, there is no scope for the imposition of a penalty. In my opinion, there is no substance in this argument. The preamble merely recites the power under which a scheme could be made, and there can be no doubt that Section 3 is the appropriate section. Section 9 of the Act says that any scheme framed under the Act may provide for the imposition of a penalty. There is no doubt that so far as Section 70 of the Scheme is concerned, it does provide for penalty, but it was unnecessary to state that this was being promulgated under Section 9 or any other section. The preamble correctly recites the power under which the scheme was framed. It was not necessary to repeat in every clause of the scheme the source of power under which it was enacted. Provided that the power is there, the exercise of it cannot be declared unconstitutional or illegal and the provisions of the law

made under an existing power cannot be declared void because it is not mentioned in the preamble or somewhere else in the statute, or the scheme. This point consequently fails.

14. The third and the last point relates to the word 'employer' as used in Section 2(e) of the Act. The Indian Mines Act 1923 has now been repealed and we have now 'the Coal Mines Act 1952' being Act XXXV of 1952. 'Owner' therein has been defined in Section 2, Clause (1) as follows:

'Owner, when used in relation to a mine, means any person who is the immediate proprietor or lessee or occupier of the mine or of any part thereof and in the case of a mine the business whereof is being carried on by a Liquidator or Receiver, such Liquidator or Receiver; but does not include a person who merely receives a royalty, rent or fine from the mine or is merely the proprietor of the mine, subject to any lease, grant or license for the working thereof, or is merely the owner of the soil and not interested in the minerals of the Mine; but any contractor for the working of a Mine or any part thereof shall be subject to this Act in like manner as if he were an owner, but not so as to exempt the owner from any liability.'

15. As to whether the petitioner comes within this definition is primarily a question of fact, which depends on a construction of the document embodying the agreement between the parties. Both the Courts have held that upon the construction of this document the petitioner cannot be said to be exempted from liability. It will be found from a reference to the clauses of the said document that the petitioner has not renounced his ownership. In fact, he is to share the profits, has power to check the accounts, and is liable to contribute for the construction of structures. Under the definition in the Coal Mines Act, he could only escape liability if he had leased out or gave a license and merely received royalty, rent or fine. But this is not what he is doing under the agreement. He is to share the profits. Consequently he must be called an owner, because he continues to be the proprietor and enjoys the advantages of ownership and exercises the powers of a proprietor, although such powers and liabilities are now shared. Whether Goswami is to be convicted or not is not within the scope of this application. The question is whether the petitioners have been rightly convicted or not, I do not see why they

cannot be called owners as defined in the Act and consequently why they should not be dubbed as 'employer' within the mischief of Section 2(e) of the Act. Mr. Sen has argued that this would put his client in a very difficult position as Goswami is really conducting the mine and it would be impossible for the petitioners to deal with the provident fund of the employees. In my opinion, that is not a relevant consideration for this Court. Either the petitioners come within the definition of an 'employor' as given in the Act, or they do not. If by do, then it is up to them to safeguard their own interests in the best way possible, but they cannot escape liability under the Act or the Scheme framed thereunder. This point therefore fails.

16. These are the three points taken in this application all of which have, failed. The application must therefore fail and must be dismissed. The Rule is discharged. Interim order, if any, is vacated. There will be no order as to costs.

17. I direct that the copy of the agreement dated 12-1-1948 which has been handed over to me and made use of at the hearing be kept as of record.