Before S. S. Sodhi, J.

LAKSHMIRATAN ENGINEERING WORKS LTD.,—*Petitioner.*

versus

THE UNION OF INDIA AND OTHERS,—*Respondents.*

Civil Writ Petition No. 4809 *of* 1975.

May 20, 1983.

Employees Provident Fund and Family Pension Act (XIX of 1952)—Section 14—Indian Penal Code (Act XLV of 1860) as amended by Employees Provident Fund and Family Pension Fund (Amendment) Act (XL of 1973)—Sections 405 Explanation, 406 and 409—Constitution of India 1950—Article 20—Employer defaulting in the payment of provident fund contributions—Defaults in respect of periods prior to the coming into force of the Explanation—Employer—Whether could be rendered liable for such defaults—Explanation added to section 405 by the Amending Act—Whether violative of Article 20—Defaulting employer prosecuted under section 14—Prosecution launched under section 406 as well—Prosecution under the Penal Code—Whether violates Article 20 on the principle of double jeopardy.

Held, that no violation of Article 20 of the Constitution of India 1950 can be said to arise merely upon the shifting of the onus on to the accused in terms of the explanation added to section 405 of the Indian Penal Code by the Amending Act. Further, no new offence can be said to have been created by this explanation and there is thus no legal bar to the prosecution of the defaulting employer under sections 406 and 409 of the Indian Penal Code in respect of the defaults in making contributions under the Employees Provident Fund and Family Pension Fund Act, 1952 pertaining to the periods prior to the coming into force of the explanation.

(Para 10)

Held, that the ingredients of the offences under section 14(1) of the Act are not the same as those of an offence under section 406 of the Code in that section 14(1A) of the Act, the offence consists in the default in making the payment of the contribution; while under section 406 of the Code in misappropriating the money entrusted to the employer in violation of a direction of law, that is, the money deducted from the wages of the employees as contribution to the Provident Fund alongwith the contribution of the employer made under the Act. Since the ingredients of the offence under section 14(1) of the Act and section 406 of the Code are not the same, there can be no violation of Article 20 of the Constitution and the principle of double jeopardy is thus not applicable.

(Para 11)

Petition Under Articles 226 and 227 of the Constitution of India praying that the following reliefs be granted :—

(a) *a writ in the nature of certiorari be issued calling for the records of the respondents relating to the impugned F.I.R. (Annexure P-3) and after perusal of the same, the impugned F.I.R. (Annexure P-3) be quashed.*

(b) *the provisions of the explanation added to section 405 I.P.C.,*—vide *Section 9 of the Employees Provident Fund and Family Pension Fund (Amendment) Act, 1973, be declared as* ultra vires *of the Constitution, and further the said provisions of the explanation are prospective in operation and in applicable to the facts and circumstances of the case of the petitioner.*

(c) *the provisions of para 32(3) of the Scheme be also declared as deeming provision, illegal fiction not an actuality or reality. Therefore, inoperative in law.*

(d) *The Respondent No. 5 be restrained from investigating and arresting the petitioner and its Directors on the basis of the FIR Annexure P-3 and he should further be restrained not to cause harassment to the petitioner and its Directors.*

(e) *any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case, may be issued.*

(f) *the petitioner be exempted from taking out notices of motion under rule 29 of the Punjab and Haryana Writ Jurisdiction Rules, 1972.*

(g) *ad-interim order be issued restraining respondents from arresting the petitioner and its Directors pending the decision of this writ petition, and staying further proceedings.*

(h) *the petitioner be exempted from filing certified copies of Annexures P-1, P-2 and P-4 as these are not readily available.*

(i) *costs of this petition be allowed to the petitioner.*

S. P. Jain, Advocate, *for the petitioner....*

C. D. Dewan, Advocate with Shyam Kumar Sharma, Advocate, *for the respondent.*

JUDGMENT

S. S. Sodhi, J.

(1) This order will dispose of the Civil Writ Petition referred to above as also Civil Writ Petition No. 1574 to 1976 (M/s. Metal Products of India *v.* The Regional Provident Fund Commissioner and Others). The matter arising for consideration being the same, both these petitions were heard together. For the purpose of the controversy raised, it would suffice to set out the relevant facts of the case pertaining to Messrs Laxmirattan Engineering Works, Faridabad.

(2) Messrs Laxmirattan Engineering Works Limited is a Public Limited Company engaged in the business of manufacture of diesal engines in Faridabad. This company is covered by the provisions of the Employees Provident Fund and Family Pension Fund Act, 1952 (hereinafter referred to as 'the Act'). It defaulted in making payments of provident fund contributions for the periods, November and December 1971, March to August, 1972 and September to November, 1972. The employees' share of contribution deducted from their wages during these periods besides the employer's share were not paid within the stipulated period. Prosecutions were accordingly launched against the officers of the petitioner—company under section 14 of the Act read with paragraph 76 of the Employees Provident Fund Scheme, 1952.

(3) Further, a report was made to the Station House Officer, Faridabad, by the Provident Fund Inspector on December 27, 1972 and another on May 18, 1973, where it was alleged that the petitioner-company had dishonestly misappropriated the money collected out of the wages of the employees under the Act. A request was made to the police to investigate the matter and to take necessary action for the prosecution of the petitioner and their officers. No action appears to have been taken on these reports and the Regional Provident Fund Commissioner then addressed a communication to the Inspector General of Police, Haryana, on April 18, 1975, requesting him to issue instructions to the police authorities concerned for registration of a case against the petitioners. It was thereafter that a case came to be registered against the petitioners. On July 4, 1975 the First Information Report (Annexure P.3) was recorded. The relief sought in this Writ Petition is the quashing of this report.

(4) Before proceeding further, it may be mentioned that an explanation was added to Section 405 of the Indian Penal Code by the employees Provident Fund and Family Pension Fund (Amendment) Act, 1973. This explanation came into effect from November 1, 1973 and read as under:—

> "A person being an employer who deducts the employees contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund Established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him if he makes default in the payment of such contribution to the said fund, in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid."

(5) It was the contention of Mr. Satya Parkash Jain counsel for the petitioner that the amendment, referred to above, was violative of the provisions of Article 20 of the Constitution, in as much as it placed the onus of proving his innocence upon the accused. It was also argued that this amendment could not, at any rate, render the petitioner liable for any defaults in the payment of contributions under the Act in respect of the periods prior to the coming into force of this explanation, namely, November 1, 1973. The contention being that as the First Information Report (Annexure P.3) was in respect of contribution due from the petitioner prior of this date, the petitioner could not be charged under section 406 or Section 409 of the Indian Penal Code with regard thereto. Finally, it was sought to be contended that the prosecution of the petitioner under sections 406 and 409 of the Indian Penal Code was again violative of Article 20 of the Constitution of India under the priciple of double jeopardy as in respect of the same cause of action the petitioner was also being prosecuted under the provisions of the Act.

(6) The stand taken up by Mr. C. D. Dewan counsel for the Regional Provident Fund Commissioner, on the other hand, was that the explanation added to Section 405 of the Indian Penal Code merely incorporated a new Rule of evidence. No new offence, he contended, was brought into being or created thereby and there was thus no violation of the provisions of Article 20 of the Constitution in the present case. In order to substantiate his argument, he adverted to the provisions of Section 5(3) of the Prevention of

Corruption Act, 1947 by way of anology. Section 5(3) of this Act is reproduced hereunder:—

> S. 5(3) "In any trial of an offence punishable under sub section (2) of fact that the accused person or any other person on his behalf is in possesion, for which the accused person cannot satisfactorily account of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the Court shall presume, unless the contrary is proved, that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefor shall not be invalid by reason only that it is based solely on such presumption."

(7) This provision of law came up for consideration before the Supreme Court in *Sajjan Singh* v. *State of Punjab,* (1). What was questioned here was the presumption prescribed by Section 5(3) of the Prevention of Corruption Act, 1947, under which the burden upon the prosecution to prove the guilt of the accused stood discharged if certain facts as mentioned therein, were proved, in which event the burden shifted upon the accused that in spite of his assets being disproportionate to his known sources of income he was not guilty of the offence. A contention was raised that these provisions could apply only to property acquired by the accused after the date of the Act but not prior thereto. This was repelled with the observation that a statute cannot be said to be retrospective "because a part of the requisites for its actions is drawn from a time antecedent to its passing" (Maxwell on Interpretation of Statutes, 11th Edition, P.211) and it was accordingly held that taking into consideration the property in the possession of the accused acquired before the date of the Act did not in any manner give it retrospective effect.

(8) Further, in repelling the argument that section 5(3) had the effect of creating a new offence and that the taking into consideration of property acquired before the date of the Act was a breach of the provisions of Article 20 of the Constitution, it was observed that section 5(3) merely prescribed a rule of evidence for the purpose of proving the offence of criminal misconduct as defined in section 5(1) for which an accused person was already under trial.

(1) AIR 1964 S.C. 464.

(9) A similar view had been expressed in the earlier case of *C. S. D. Swami* v. *The State,* (2).

(10) On a parity of reasoning observations of the Supreme *Court in Sajjan Singh's case* (supra) thus provide a complete answer to the contentions raised by the counsel for the petitioner based upon the provisions of Article 20 of the Constitution. No violation thereof can be said to arise merely upon the shifting of the onus on to the accused in trems of the explanation added to section 405 of the Indian Penal Code by the Amendment Act, referred to above. Further no new offence can be said to have been created by this explanation and there is thus no legal bar to the prosecution of the petitioner under sections 406 and 409 of the Indian Penal Code in respect of the defaults in making contributions under the Act pertaining to the periods prior to the coming into force thereof, that is, November 1, 1973.

(11) Finally, turning to the plea of double jeopardy, the answer to this is provided by the judgment of Calcutta High Court in *Hari Nath Poddar* v. *The State,* (3). This was a case, where a similar plea of double jeopardy had been raised in respect of the conviction of the petitioner under the Employees Provident Fund Act and his prosecution under section 406 of the Indian Penal Code. It was observed that the ingredients of the offences under section 14(1) of the Act were not the same as those of an offence under section 406, of the Indian Penal Code, in that under section 14(1A) of the Act, the offence consists in the default in making the payment of the contribution; while under Section 406 of the Indian Penal Code in misappropriating the money entrusted to the employer in violation of a direction of law, that is, the money deducted from the wages of the employees as contribution to the provident fund along with the contribution of the employer made under the Act. It was accordingly held that as the ingredients of the offence under section 14(1) of the Act and Section 406 of the Indian Penal Cade were not the same, there was no violation of Article 20 of the Constitution of India. The principle of double jeopardy is thus not applicable here.

(12) For the reasons set out above, there is clearly no warrant for granting to the petitioner the relief claimed. The Writ Petition is accordingly hereby dismissed with costs. Cousel's fee Rs. 300.

N. K. S.

(2) AIR 1960 S. C. 7.
(3) 1978 Cr. L.J. 1918.