

## Hari Nath Poddar Vs The State

**Court:** Calcutta High Court

**Date of Decision:** March 3, 1978

**Acts Referred:** Constitution of India, 1950 " Article 20

Criminal Procedure Code, 1973 (CrPC) " Section 300

Employees Provident Funds and Miscellaneous Provisions Act, 1952 " Section 14

Penal Code, 1860 (IPC) " Section 405, 406, 409

**Citation:** (1978) CriLJ 1018

**Hon'ble Judges:** Jyotirmoyee Nag, J

**Bench:** Single Bench

### Judgement

@JUDGMENTTAG-ORDER

Jyotirmoyee Nag, J.

The petitioner who is the Proprietor of the factory under the name and style of M/s. Poddar Iron Industries was

prosecuted by the respondent No. 2 u/s 14(1) of the Employees' Provident Fund Act for not making payment of employees' contribution for the

period between September, 1974 and September, 1975 before the S. D. J. M. Howrah. The petitioner was convicted and sentenced to pay fine

in default imprisonment in all the cases. Thereafter, the petitioner was prosecuted under Sections 406 and 409, I.P.C. on the complaint of

respondent No. 2, being G. R. Case No. 104/76, It is against this prosecution that the petitioner has come up before this Court.

2. The petitioner's Advocate submits that the prosecution u/s 406 I.P.C. cannot go on as it is violative of Article 20(2) of the Constitution and also

the mandatory provision of Section 300, Cr. P.C. The petitioner filed an application before the Judicial Magistrate, Howrah, challenging the

maintainability of the prosecution in view of provisions of Article 20(2) and Section 300, Cr. P.C.

3. The learned Advocate for the petitioner has submitted before me that the facts on the basis of which, the petitioner was prosecuted and

convicted u/s 14(1) of the Employees' Provident Fund Act, are the same on the basis of which, the petitioner is being prosecuted for the offence

u/s 406, I.P.C. Hence this liberty is being jeopardised twice and as such the proceedings cannot go on in view of the provision of Article 20(2) of

the Constitution which provides that no person shall be prosecuted and punished for the same offence more than once. Apart from the point taken

as indicated above, the petitioner has submitted before me that the present prosecution cannot go on as the amount that the employer deducts from

the employees by way of provident fund deduction and the contribution of the Employer do not constitute entrustment as defined in Section 405 of

the Indian Penal Code. In this connection the petitioner has drawn my attention to a decision by N. C. Talukdar and A. K. De, JJ. reported in

(1975) 79 CWN 538. Their Lordships were considering the question whether a person who had been convicted for an offence u/s 14 of the

Employees' Provident Fund Act and the Employees' Provident Fund Scheme, 1952, commits criminal breach of trust, if he does not send the

employees' contribution to the proper authority as required under the Act and also under the scheme. It has been held by Their Lordships there

that

In order to constitute legal entrustment within the meaning of Section 405 of the Penal Code, five ingredients are necessary, the complainant must

be the owner of the property alleged to have been entrusted; there must be a transfer of possession; such transfer must be made by somebody

who has no right excepting that of a custodian; and such entrustment must be made to a person not to a company or a firm.

Any sum deducted by an employer from the wages of an employee as contribution to Provident Fund under the Employees' Provident Fund

Scheme, 1952, although deemed to be entrusted to the employer under para. 32 (3) of the Scheme falls short of the essential ingredients of the

offence u/s 406 of the Penal Code.

Relying on this decision the learned Advocate for the petitioner prays that the proceedings against his client u/s 406, I.P.C. pending before the

learned Judicial Magistrate be quashed. Since that decision of the Division Bench the I.P.C. has been amended by Section 9 of Act 38 of 1975 by

the Parliament. To the amended Penal Code u/s 405 of the Indian Penal Code an explanation has been inserted, viz., Explanation 2 which reads as

follows : --

A person being an employer who "deducts the employees' contribution from the wages payable to the employee for credit to the Employees'

State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance

Act, 1948 shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment

of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in

violation of a direction of law as aforesaid.

In view of this explanation added to Section 405 of Act XLV of 1860, the arguments advanced on behalf of the petitioner fall through, As the Act

itself makes provision for prosecution u/s 406, I.P.C. if the employer dishonestly, in violation of the provision of law, in the instant case the

Employees" Provident Funds Act and Scheme fails to credit that amount to the account of the employee he shall be liable for offence u/s 406, I P.

C. The decision reported in (1975) 79 CWN 538 can have no application to such prosecution after the said amendment, Accordingly, I hold that

the prosecution u/s 406, I.P.C. is maintainable.

4. Further, I repel the argument of the petitioner's Advocate that his client is being prosecuted on the same facts for the same offence and thus he

is put to double jeopardy. The ingredients of the offences u/s 14(1) of the Employees" Provident Funds Act and the Scheme are not the same as

ingredients of the offence u/s 406 I.P.C., in the former there is violation of Section 14(1A) of the Act, if default is made in payment of the

contribution after the due date. In the latter, the offence consists in misappropriating the money "entrusted" to the Employer in violation of a

direction of law i. e. the money deducted from the wages of the employees as contribution to the Provident Fund along with the contribution of the

employer made by the direction of law i. e. the Employees" Provident Funds Act, should be sent to the appropriate authority under the Act and

Scheme within a particular date. There is no violation of Section 300 of the Cr.P.C, as under that section the second prosecution must be for the

same offence i, e. identical offence. If the two offences are different as in the present case though the facts are same in both the cases, the

provisions of Section 300 Cr. P.C. are not attracted.

5. Accordingly, I hold that ingredients of the offences u/s 14(1) of the Employees" Provident Funds Act and the Scheme are not the same as those

u/s 406 of the Indian Penal Code and thus there is no violation either of Article 20(2) of the Constitution and of Section 300 of the Code of

Criminal Procedure. The present prosecution may go on.

6. The Rule is accordingly discharge ed.