

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Judgment: 3rd November, 2017**

+ CRL.M.C. 3010/2015 & CRL.M.A. 10727/2015

1. K.K. SHARMA Petitioner

Through: Mr. Manoj Ohri, Senior Advocate
with Mr. Rakesh Malhotra,
Mr. Abhimanyu Singh, Mr. Rajiv
Ranjan, and Mr. Siddharth Handa and
Mr. Bharat Malhotra, Advocates.

versus

1. THE STATE

2. THE ADDL. COMMISSION EMPLOYEES PROVIDENT FUND
ORGANIZAION, MINISTRY OF LABOUR, GOVT OF INDIA

..... Respondents

Through: Mr. K. K. Ghei, APP for State with SI
Harish Kumar, P. S. Naraina
Mr. Keshav Mohan and Mr. Piyush
Choudhary, Advocate for R-2.

CORAM:

HON'BLE MR. JUSTICE I.S.MEHTA

JUDGMENT

I.S. MEHTA, J.

1. Instant petition under Section 482 Cr.P.C. has been filed by the petitioner-K.K. Sharma for quashing the proceedings in FIR NO. 75/2010 dated 10.06.2010 registered at Police Station

Naraina under Sections 406/409 IPC, and all the proceedings emanating thereof.

2. Brief facts as per the complaint are that the petitioner is the Managing Director of M/s Aimil Pharmaceutical (I) Ltd. (*herein after termed as the company*) doing the business of manufacturing and trading of pharmaceutical items and the strength of the staff of the company at the relevant time was 793 employees. It is further alleged that the Regional Provident Fund Commissioner on 08.06.2010 made a complaint against the said company to the Additional Commissioner of Police (South West) to register a case under Sections 406/409 IPC stating therein that the employer/company of the petitioner had deducted the employee's share of Provident Fund contribution from the salaries of the employees for the period of May, 2009 to January, 2010 amounting to Rs. 35,58,377/- but did not deposit the same in the Employees Provident Funds (EPF) account as per para 30 and 32 of the Employees Provident Fund Scheme and an offence under Section 406 IPC is made out against the petitioner. It is further alleged that the employer/petitioner deposited the deducted PF amount of the employees share after filing of the said complaint with the police vide separate deposit challans dated 26.06.2009, 25.07.2009, 15.11.2009, 12.02.2010, 15.03.2010, 17.03.2010 and 18.03.2010.

3. Thereafter, vide order dated 21.11.2012 the learned Metropolitan Magistrate-11, Dwarka Courts, New Delhi framed charge under Sections 406/409 IPC against the petitioner.
4. Aggrieved from the aforesaid orders on charge the petitioner on 25.02.2013 moved a revision petition before the Court of District & Sessions Judge, Dwarka Courts, New Delhi and the learned Additional Sessions Judge vide judgment dated 01.08.2013 in CR No. 41/13 dismissed the said petition being devoid of merit.

Hence the present petition.

5. The learned senior counsel appearing for the petitioner has submitted that the present dispute pertains to non deposit of Provident Fund dues with respect to its employees for the period from May, 2009 to January, 2010. In the present case the F.I.R is dated 10th June, 2010 and the employer has deposited the due amount on 26th June, 2009; 25th July, 2009; 12th January, 2010; 15th March, 2010; 17th March, 2010; 18th March, 2010 after receiving the notice by the respondent No.2/complainant, i.e. Department of EPF (Employees Provident Fund Organization).
6. The learned senior counsel for the petitioner further submitted that the F.I.R itself shows that before registration of the F.I.R the employer has deposited the said due amount. He further submits that once on the notice employer has submitted the amount due, F.I.R should not have been registered and further proceedings under criminal law should not have been

initiated. Reliance is placed on the judgments of the Apex Court in *Provident Fund Inspector, Faridabad vs. Jaipur Textiles, Faridabad and Ors*; AIR 1987 SC 1738 and *Adoni Cotton Mills Ltd. and Others vs. Regional Provident Fund Commissioner and Others*; 1996 (2) LLJ 739.

7. The learned senior counsel for the petitioner further submits that in the instant petition the company has not been made party to it because even if at all or any offence stated to be there is under the company and present petitioner is Managing Director of the company. Reliance is placed upon judgment of *Aneeta Hada vs. Godfather Travels & Tours Private Limited*; (2012) 5 SCC 661.
8. On the contrary the learned counsel for the respondent No.2 has submitted that the petitioner was negligent in not depositing the Provident Fund dues even after deducting the same from the wages of employees itself. Once the employer takes away the money from wage of employees he is duty bound to deposit the same on the due date. Violation of the Employees Provident Funds Act deems to be a criminal breach of trust under Section 405 IPC explanation 1. It is further submitted that subsequent to the filing of complaint with the police the petitioner paid the Provident Fund amount due.
9. The learned counsel for the respondent No.2 has further submitted that the judgment relied by the petitioner are passed in peculiar facts and circumstances and those judgment would not apply in the present case. If applied there would be similar

type of breach in every corner of business activity. The learned counsel for the respondent No.2 has relied upon the judgment in case ***M/s Jenson Nicholson (India) Limited and Another; 2013 LLR 934*** wherein the Court made the observation that subsequent payment cannot condone the offence.

10. In the instant case it is an admitted fact emerging on the record that an amount of Rs. 35,58,377/- was deducted from the share of Provident Fund contribution from the salaries of the employees for the period of May, 2009 to January, 2010 by the petitioner/employer.

11. Further, the complaint made to the Additional Commissioner of Police on 08.06.2010 by the Regional Provident Fund Commissioner indicates that the Provident Funds of the employees so collected was not deposited in the Employees Provident Funds account as per para 30 and 32 of the Employees Provident Fund Scheme by the petitioner/employer.

The plea of the petitioner that subsequently before registration of the FIR after making the complaint by the complainant/respondent No.2 qua against the petitioner he had deposited the said amount with the Provident Fund Department *ipso facto* does not absolve his liability to deposit the same in a stipulated period. The said factum of the stipulated period is to be determined during the trial before the Trial Court after adducing the material witnesses by both the parties which is emerging as a mixed question of fact and law which will be

determined during the trial by the concerned Trial Court. Reliance is placed on the judgment in the case *Jenson Nicholson* (supra) and the relevant para is reproduced as under:-

"...The dispute here regarding non-payment of Provident Fund contribution and subsequent payment of the same has to be gone into through evidence inasmuch as it is a mixed question of fact and law. While treating a case under section 482 of the Code of Criminal Procedure initially the Court is not supposed to go into any merit..."

12. At this stage there is sufficient material to proceed with the trial. Therefore, in view of the complaint no ground is made to discharge the present petitioner and quash the criminal proceeding qua against the petitioner in view of the judgments ***Amit Kapoor vs. Ramesh Chander and Anr.; (2012) 9 SCC 460***, relevant para is reproduced as under:-

"27. Having discussed the scope of jurisdiction under these two provisions, i.e., Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be:

27.1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the

Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

27.2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

27.5. Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

27.6. The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

27.7. The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

27.8. Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly

give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.10. It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

27.11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

27.12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.

27.13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records

with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

27.14. Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

27.15. Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised *ex debito justitiae*, i.e. to do real and substantial justice for administration of which alone, the courts exist."

(underlining supplied)

13. Therefore, in view of the above, this Court find no merit in the contentions of the learned counsel for the petitioner and the judgments relied by him are not helpful in view of the facts and circumstances of the present case.
14. Consequently, the present petition is dismissed having no merit. One copy of this judgment be sent to the concerned Court. No order as to costs.
15. All the pending applications (if any) are also disposed of.

I.S.MEHTA, J

NOVEMBER 03, 2017/sr