

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD**

**CRIMINAL REVISION APPLICATION NO. 25 OF 2015**

The Employees Provident Fund  
Organization, Sub-Regional  
Provident Fund Office, Nasik,  
Through its Enforcement Officer  
Mukteshwar s/o Gaurishankar Vyas  
age 46 years, occu : service,  
R/o : At present, Sub-Regional  
Provident Fund Office,  
Town Centre, CIDCO,  
Aurangabad-431 003

.. APPLICANT  
[Ori.Complainant]

Versus

- 1] The State of Maharashtra.
- 2] Kashinath s/o Dattatraya Mahajan  
age : Major, occu : Business,
- 3] Rajaram s/o Ganu Mahajan  
age : Major, Occu : Business
- 4] Sopan s/o Tukaram Chaudhari  
age : Major, Occu : Business
- 5] Bajirao s/o Shamu Patil  
age : Major, Occu : Business
- 6] Pundalik s/o Tukaram Patil  
age : Major, Occu : Business

- 7] Mohan s/o Kashinath Patil  
age : Major, Occu : Business
- 8] Rajaram s/o Shamu Chaudhari  
age : Major, Occu : Business
- 9] Dr.Anant s/o Narayanrao Akote  
age : Major, Occu : Business
- 10] Yeshwant s/o Shankar Patil  
age : Major, Occu : Business
- 11] Vinayak s/o Sitaram Patil  
age : Major, Occu : Business
- 12] Bhagwan s/o Fakira Mahajan  
age : Major, Occu : Business
- 13] Dinkar s/o Ananda Mahajan  
age : Major, Occu : Business
- 14] Balkrushna s/o Sitaram Patil  
age : Major, Occu : Business
- 15] Akhardu s/o Kasam Tadv  
age : Major, Occu : Business

All R/o : C/o : Raver Taluka  
Sahakari Sakhar Karkhana Ltd.,  
Onkareshwar Karjod,  
At Post : Rajaram Nagar,  
Tq. Raver, Dist.Jalgaon.

.. RESPONDENTS

[Res.Nos.2 to 15 orig.accused]

(Respondents no.5 and 14  
abated as per Court's  
order dated 6/1/2015)

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Mr.K.B.Chaudhari, Advocate for applicant.

Mr.A.R.Kale, APP for Respondent no.1 State  
Mr.R.S.Shinde,Adv for respondents no.2 to 4, 6 to 13,15.

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**CORAM : MANGESH S. PATIL, J.**

**RESERVED ON : 06/08/2018.**

**PRONOUNCED ON :12/09/2018.**

**JUDGMENT :**

Heard.

2] Rule. The rule is made returnable forthwith. With the consent of both the sides, the matter is heard finally at the stage of admission.

3] The petitioner is a Fund established under a Scheme provided for in the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (herein after the EPF Act) being represented by its Enforcement Officer having his office at Aurangabad. The respondent no.1 is a sugar factory established under the Maharashtra Cooperative Societies Act, 1960. The respondents 2 to 4 are its Executive Directors, Chairman and Vice Chairman respectively, whereas, the respondents no.5 to 15 are its Directors. The petitioner noticed that the respondents had deducted contribution of the members/employees from their salaries for the period between January 2004 and March 2004 amounting to Rs.3,68,992/-. However, they failed to deposit the deductions in the Fund and misappropriated it. The petitioner therefore, lodged an FIR with Raver Police Station and the Crime

No.13/2009 was registered for the offences punishable under Sections 406, 409 read with Section 34 of the IPC against them. The investigation proceeded and in due course of time, the charge sheet was filed. Accordingly Regular Criminal Case No.129/2009 was registered.

4] The respondents filed application (Exh.81) in the trial Court and claimed discharge under Section 239 of the Code of Criminal Procedure on the ground that after registration of the crime, they had deposited the entire contribution in the Fund on 26/12/2009 with a Demand Draft. They also alleged that they were the Directors and Office bearers of the respondent no.1 factory. It had recently started functioning. For want of necessary permission from the Government they could not sell the sugar manufactured by the factory and for want of such liquidity they could not deposit the contribution. There was no *mens rea* or any intention to misappropriate the money.

5] The Public Prosecutor opposed the application and contended that it was the responsibility of the respondents to deposit the money which was deducted from the salary of the employees and the act of depositing the amount subsequently will not obliterate the offence.

6] After hearing both the sides learned Magistrate by the impugned order dated 28/2/2014 allowed the application (Exh.81) and discharged the respondents. Hence this Revision.

7] The learned advocate for the petitioner vehemently submitted that the very fact that after the prosecution was launched the respondents deposited the money in the Fund is sufficient to *prima facie* establish the crime. There was strong reason to infer that they had deducted the contribution from the salaries of the employees but had failed to deposit it with the Fund. May be for a temporary duration it was nothing but a misappropriation and thus this was sufficient to refuse them to be discharged.

8] The learned advocate would submit that reliance placed by the learned Magistrate in the decision of the Supreme Court in S.K.Alagh V/s State of Uttar Pradesh; (2008) 5 SCC 662 and in the decision of the Patna High Court in the case of B.P.Gopta and others V/s State of Bihar; 2000 Cr.L.J. 781 (Patna) is misplaced. An opportunity ought to have been extended by the Magistrate to the petitioner to establish that the respondents were the 'occupiers' of the factory within the meaning of Clause (k) of Section 2 of the EPF Act. He would point out that in their application (Exh.81), the respondents had not denied that they were having ultimate control over the affairs of the factory and therefore, in the absence of such a stand by them, the Magistrate ought not to have assumed such a stand and ought not to have relied upon the decisions (*supra*).

9] The learned advocate for the petitioner then referred to

and relied upon the judgment of this Court in Criminal Writ Petition No.421/2001 (Aurangabad Bench) in the case of Ashok s/o Gulab Vaswani V/s The State of Maharashtra and others dated 11/7/2017 wherein the Division Bench refused to quash the F.I.R. in similar fact situation. The learned advocate also referred to and relied upon the decision of the Single Judge of the Calcutta High Court in Sushil Kumar Bagla V/s State of West Bengal; 2004 Cr.L.J. 171 taking a similar view as that of the Division Bench of this Court in the case of Ashok G. Waswani (supra) and had refused to quash and set aside the F.I.R. against the Directors of a factory.

10] *Per contra*, the learned advocate for the respondents supported the impugned order and submitted that the respondent no.1 being a legal entity, no *mens rea* can be attributed to it whereas the rest of the respondents were merely the office bearers and Directors of the factory and would not constitute its 'occupier' so as to fasten them with a liability by resorting to Sub Section 1 of Section 405 of the I.P.C.

11] I have carefully gone through the impugned order and the judgments cited by the two sides and the ones referred to by the learned Magistrate in the impugned order. In my considered view, the foremost fact that needs to be borne in mind is that admittedly, the respondents are not being sought to be implicated for any offence provided for under the EPF Act and are merely sought to be prosecuted under the general law for

allegedly committing offences punishable under Sections 406 and 409 of the IPC. The purpose for emphasising this aspect is that the offence provided for under Section 14A of the Employees Provident Fund Act being a special statute is a technical offence. It seeks to punish for violation of various provisions of the Act and would therefore, need not have any *mens rea* on the part of the persons responsible for committing such breach. Whereas the offences punishable under Sections 409 and 406 of the IPC essentially require existence of *mens rea*. Suffice for the purpose to respectfully refer to and rely upon the observations of the Supreme Court in the case of S.K.Alagh (supra) in paragraph no.20, which read as under :

“20] We may, in this regard, notice that the provisions of the Essential Commodities Act, the Negotiable Instruments Act, the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, etc. have created such vicarious liability. It is interesting to note that Section 14-A of the 1952 Act specifically creates an offence of criminal breach of trust in respect of the amount deducted from the employees by the company. In terms of the Explanations appended to Section 405 of the Penal Code, a legal fiction has been created to the effect that the employer shall be deemed to have committed an offence of criminal breach of trust. Whereas a person in charge of the affairs of the company and in control thereof has been made vicariously liable for the offence committed by the company along with the company but even in a case falling under

Section 406 of the Penal Code vicarious liability has been held to be not extendable to the Directors or officers of the company.”

As can be seen, these observations refer to the provisions of the special enactments including the Employees' Provident Funds Act 1952 and even by referring to the Explanation appended to Section 405 of the IPC, it has been observed that a person incharge of the affairs of the company has been made vicariously liable for the offence committed by the company but in a case falling under Section 406 of the IPC, the vicarious liability is not extendable to the Director or Officer of the company. The observations of the Supreme Court in the earlier decision in the case of Maksud Saiyed V/s State of Gujrat; (2008) 5 SCC 668 are referred to while arriving at such a conclusion. It is to be noted that though these observations in the case of S.K.Alagh pertain to the Director of a Company registered under the Companies Act, the facts in the matter in hand do not make material difference merely because the respondent no.1 is a factory registered under the Maharashtra Cooperative Societies Act 1960. By virtue of Section 36 of that Act, such a factory/society is also a body having perpetual succession and a common seal and is a legal entity like a company registered under the Companies Act. Therefore, at first blush the fact situation in the matter in hand can be said to be governed by the decision of the Supreme court.

12] For that matter, even the observations of the Supreme

Court in the case of Employees State Insurance Corporation V/s S.K.Aggarwal and others; AIR 1998 S.C. 2676 are broadly on the same lines. Though in that matter the case was pertaining to the Employees' State Insurance Act, 1948 where the directors of a public limited company were prosecuted for the offence punishable under Section 406 of the IPC on their failure to deposit the contribution deducted from the employees' pay. It was held that the Directors of the Company were not covered by the definition of 'principal employer' as defined under Sub Section 17 of Section 2 of that Act and the proceeding was quashed by the High Court and was sustained by the Supreme Court. It was also held that when the owner of a factory is a company, it is the company which is the principal employer and not its Director. It was further observed that Section 40 of the Employees' State Insurance Act used the words 'owner' and 'employer' disjunctively. The Supreme Court also relied upon the Division Bench decision of this Court in the case of Suresh Tulsidas Kilachand and others V/s Collector of Bombay and others; (1980) II Labour Law Journal 81 Bom holding that the Director of a company by virtue of being a Director is not principal employer contemplated by Sub Section 17 of Section 2 of the Employees' State Insurance Act and would not be personally liable to pay employer's contribution under that Act.

13] In view of such consistent decisions of the Supreme Court, apparently no fault can be found with the impugned order passed by the learned Magistrate by referring to and relying

upon the decision of the Supreme Court in the case of S.K.Alagh (supra).

14] True it is that in the case of Sushilkumar Bagla (supra) the learned Judge of the Calcutta High Court has refused to rely upon the decision in the case of S.K.Aggarwal (supra) by holding it to be *per incuriam* and in doing so he has observed that the decision was rendered without considering the statutory provisions and the decisions of the Supreme Court. According to the learned Judge the decision in the case of S.K.Aggarwal referred to the definition of 'principal employer' contained under Sub Section 17 of Section 2 and Section 40 of the Employees' State Insurance Act but the EPF Act does not contain similar provisions. It is observed that unlike the offence under the I.P.C. *mens rea* is not necessary ingredient for the offence under the provisions of the EPF Act.

15] In the matter in hand, as is pointed out at the inception the respondents are not being sought to be prosecuted for any offence punishable under the provisions of EPF Act and are being simply prosecuted for the offences punishable under Sections 406 and 409 of the IPC. The former may not require but the latter would essentially require existence of such *mens rea*. Precisely for these reasons, one cannot look into the definitions of 'employee' and 'employer' of a factory laid down under Clause 2(e) and 2(k) of the E.P.F.Act respectively. Had the respondents been prosecuted for violation of some provisions of that Act,

certainly those definitions could have been gone into and the role attributable to the respondents Directors and office bearers could have been assessed. Since they are being implicated merely for the offence under the Sections of the IPC, in the absence of any *mens rea* on their part, they cannot be allowed to face the trial. The learned Magistrate has correctly appreciated the matter in controversy and has rightly allowed the application discharging the respondents. I find no infirmity in the impugned order.

16] The Division Bench of this Court in the case of Ashok G. Waswani (*supra*) has apparently refused to quash a similar crime against the Managing Director of a company. However, with respect, apparently the decisions of the Supreme Court in the case of S.K. Alagh and S.K. Aggarwal (*supra*) were not brought to the notice of the Division Bench and in my considered view, the petitioner is not entitled to derive any benefit from the judgment of the Division Bench.

17] The Revision Application therefore does not hold any merit and is accordingly dismissed.

18] The Rule is discharged.

(MANGESH S. PATIL,J.)

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