HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No. 6048 OF 2018

ORDER:

This criminal petition is filed under Section 482 of the Code of Criminal Procedure (for short, "Cr.P.C.") by accused Nos.1 and 2 in Cr.No.59 of 2018 on the file of Mahankali P.S., Hyderabad City, registered for the offences punishable under Sections 406 and 409 IPC, to quash the proceedings in the said crime.

2. The petitioners are Managing Director and Executive Director respectively of M/s. Surya Jyothi Spinning Mills Limited. The 2nd respondent-Enforcement Officer of Employees' Provident Fund Organisation lodged report with the Police on 26.03.2018 making serious allegations against the petitioners, more particularly, violation of paragraph 38 (1) of the Employees' Provident Scheme, 1952 (for short "the Scheme") and failure to credit the amount to the account of the fund, thereby committed an offence. On the strength of the complaint, the Station House Officer, Mahankali P.S. registered the above crime and issued FIR for the offence punishable under Sections 406 and 409 IPC.

3. The petitioners now challenged the very registration of crime against them on the ground that, in the absence of any determination of money due under Section 7-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short "the Act"), the Commissioner is not competent to initiate criminal proceedings against them for contravention of paragraph 38 (1) of the Scheme and

thereby the petitioners are not liable to be proceeded against for the offences under Sections 406 and 409 IPC.

4. Sri M. Chandrashekhara Rao, learned counsel for the petitioners, contended that in the absence of any determination as required under Section 7-B of the Act, the very initiation of proceedings against the petitioners is illegal and prayed to quash the proceedings.

5. Learned Public Prosecutor for the State of Telangana opposed the petition on the ground that the petitioners contravened paragraph 38(1) of the Scheme and thereby the petitioners are liable to be prosecuted for the above offences.

6. A bare look at the complaint lodged with the Police would make it clear that the petitioners contravened paragraph 38(1) of the Scheme. Paragraph 38(1) deals with mode of payment of contribution, as per which, the employer shall, before paying the member his wages in respect of any period or part of period for which contributions are payable, deduct the employee's contribution from his wages which together with his own contribution as well as an administrative charge of such percentage of the pay (basic wages, dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than excluded employee and in respect of which provident fund contribution payable, as the Central Government may fix. He shall within fifteen days of the close of every month pay the

same to the fund by separate bank drafts or cheques on account of contributions and administrative charge.

7. According to Paragraph 38(2), the employer shall forward to the Commissioner, within twenty-five days of the close of the month, a monthly abstract in such form as the Commissioner may specify showing the aggregate amount of recoveries made from the wages of all the members and the aggregate amount contributed by the employer in respect of all such members for the month. At the same time, as per Paragraph 32 (3) of the Scheme, any sum deducted by an employer [or the contractor] from the wages of an employee under this Scheme shall be deemed to have been entrusted to him for the purpose of paying the contribution in respect of which it was deducted.

8. In the present case, the basic allegation is that the petitioners contravened Paragraph 38 (1) of the Scheme and there is presumption under Paragraph 32 (3) that deduction made by an employer is deemed to have been entrusted to the employer. Therefore, when there is a deemed entrustment under Paragraph 32 (3), non-payment of the amount to the credit of the fund by the petitioners would constitute an offence punishable under Section 406 IPC prima facie. Further, the explanation (1) thereto makes it clear that a person, being an employer of an establishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not, who deducts the employee's 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 for 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 law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

9. On a conjoint reading of Paragraph 32(3) of the Scheme and explanation (1) to Section 406 IPC, I find prima facie material against the petitioners to proceed against them for the offences under Sections 406 and 409 IPC.

10. It is the contention of the learned counsel for the petitioners that petitioners would not fall within the meaning of "employer" as defined under Section 2 (e) of the Act; thereby the question of commission of offences punishable under Sections 406 and 409 IPC does not arise. No doubt, the 1st petitioner is the Managing Director and the 2nd petitioner is the Executive Director of M/s.Surya Jyothi Spinning Mills Ltd. Counsel for the petitioners placed on record the proceedings issued by the Enforcement Officer, EPF Organisation dated 23.08.2017, which were addressed to the General Manager, M/s. Surya Jyothi Spinning Mills Ltd., calling for production of certain documents. Reply dated 23.08.2017 was given to the authorities by the said company, duly signed by General Manager (HR) admitting that they are having four factories located at Makthal, Burgul, Rajapur and Kucherkal; out of these four units, Makthal and Kucherkal units are not running and agreed to provide the information

as required. By proceedings dated 05.01.2016 issued by the Regional P.F. Commissioner, Hyderabad, the employer, i.e., M/s.Surya Jyothi Spinning Mills Ltd., was asked to produce certain documents like Attendance Registers, Cash Book and Vouchers, General Ledger and other relevant documents. Thereafter, an order was passed determining the amount payable by the employer. The petitioners being the employers paid PF dues for the previous years. However, now they contend that they do not fall within the definition of "employer" under Section 2(e) of the Act. In view of order passed by the Commissioner for the earlier year, such contention cannot be permitted. Therefore, this contention has nothing to do with the present issue.

11. The other contention raised before this Court is that unless Section 7-B of the Act is complied with, determining the amount payable, the proceedings against the petitioners cannot be continued. Section 7-B deals with review of orders passed under Section 7-A of the Act. This contention has no relevance, since, the basis for complaint is violation of Paragraph 32 (3) of the Scheme.

12. Learned counsel for the petitioners finally submitted that in case this Court is not inclined to accept his contentions, petitioners be permitted to raise all these contentions before the trial Court during trial, limiting the observations, if any, for disposal of the present petition.

13. For the foregoing reasons, I find that there is prima facie material to proceed against the petitioners for the offences under Sections 406 and 409 IPC by the investigating agency.

14. Admittedly, investigation is pending and in such case, this Court cannot exercise jurisdiction under Section 482 Cr.P.C. to quash the proceedings. In **State of Orissa v. Saroj Kumar Sahoo**[1], it is held that the inherent powers under Section 482 Cr.P.C. should not be exercised by the High Court to stifle a legitimate prosecution. The High Court, being the highest Court of State, should normally refrain from giving a *prima facie* decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. The same principle was laid down in **Kurukshetra University v. State of Haryana**[2].

15. Criminal petition is liable to be dismissed and is accordingly dismissed, giving liberty to the petitioners to raise their contentions before the trial Court, if so advised.

As a sequel, miscellaneous petitions, if any pending, stand closed.

M.SATYANARAYANA MURTHY, J

July 24, 2018
MRR

[1] (2005)13 SCC 540 : 2006(2) ALT (Crl.) 16
[2] (1977)4 SCC 451 : AIR 1977 SC 2229