THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No. 9485 OF 2018

ORDER:

This petition is filed under Section 482 of Cr.P.C. by the petitioner-accused to quash the proceedings against him in C.C.No. 471 of 2014 on the file of the Court of XV Metropolitan Magistrate at Medchal, Cyberabad (for short, 'the Court below'), registered for the offences punishable under Sections 409 and 420 of IPC.

2. Respondent No. 3 lodged a repot with police alleging that M/s. Neeharika Industries Private Limited, represented by its Managing Director A.Ramakrishna-the petitioner, is an establishment/factory covered under the Employees' Provident Fund & Miscellaneous Provisions Act, 1952 (for short, 'the Act'), and the schemes framed thereunder with effect from 20-12-2009. The employer is required every month to deduct employees' share of provident fund contributions from wages of the employees eligible for membership of the provident fund and the employer shall submit monthly consolidated statement in Form No. 12 A with the office of appropriate authority within 25 days of such collection. On verification of salary/wage register and other relevant records being maintained by the employer for the period from 11/2010 to 09/2013, it is evident that the employer has deducted employees' share of provident fund contributions for the period from 03/2012 to 09/2013 amounting to Rs.5,07,937/- but did not credit the same to the provident fund account in contravention of the EPF scheme and thereby committed criminal breach of trust. Basing on the report, the police registered a case in crime No. 155 of 2014 for the offences referred *supra*, issued FIR and took up investigation. During the course of investigation, the S.I. of Police examined three witnesses and recorded their statements under Section

161 (3) of Cr.P.C. On the basis of evidence collected during investigation, charge sheet is filed.

3. At the hearing, learned counsel for the petitioner has contended that Section 420 of IPC has no application to the present facts of the case even if the allegations made in the charge sheet are accepted as true on its face value and coming to the other offence punishable under Section 409 of IPC, the petitioner would not fall under public servant, banker, merchant, factor, broker, attorney or agent and apart from that, Section 14 of the Act permits prosecution against employer after obtaining necessary leave from competent authority but instead of proceeding under the provisions of the Act, respondent No. 3 with a *mala fide* intention lodged the present report with the police and therefore the petitioner cannot be proceeded for the offences referred *supra*.

4. Learned Public Prosecutor (T.S.) has opposed the petition on the ground that the allegations would fall under Section 409 of IPC though not under Section 420 of IPC and also would attract Section 405 of IPC punishable under Section 406 of IPC and requested to dismiss the petition.

5. As seen from the allegations made in the report and charge sheet, M/s. Neeharika Industries Private Limited, represented by the petitioner, deducted Rs.5,07,937/- for the period from 03/2012 to 09/2013 towards employees' share of provident fund contributions but it did not remit the same to the credit of the employees and thereby committed the offences punishable under Sections 409 and 420 of IPC. However, learned Public Prosecutor has fairly conceded that the allegations would not attract the offence punishable under Section 420 of IPC since there was no cheating or dishonest inducement of a person to part with any movable or immovable property and therefore it would not attract the offence punishable under Section 420 of IPC. Even on analyzing the entire allegations

made in the charge sheet, the compliant and the statements recorded by the police, I find that the petitioner did not cheat and make any dishonest inducement to part with any property. In the absence of any allegation that the petitioner induced the employees of the unit to part with any amount, it would not constitute the offence punishable under Section 420 of IPC. Hence, I find that it is a fit case to quash the proceedings against the petitioner for the offence punishable under Section 420 of IPC.

6. Turning to the other offence punishable under Section 409 of IPC, the person entrusted with property must be public servant or banker, merchant, factor broker, attorney or agent and if he commits criminal breach of trust in respect of that property, he shall be liable for punishment. Criminal breach of trust is defined under Section 405 of IPC as follows:

> *"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express, or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits criminal breach of trust."*

Explanation 1 to Section 405 of IPC makes it clear that a person, being an employer of an establishment whether exempted under Section 17 of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (19 of 1952) or not, who deducts the employee's contribution form the wages payable to the employee for credit to 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 and if he makes default in the payment of such contribution to the said Fund in the said contribution in violation of a direction of law as aforesaid. Therefore, the allegations made in the report would squarely fall within explanation 1 to Section 405 of IPC. While Section 406 of IPC deals with punishment for criminal breach of trust and according to it, whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both, Section 409 of IPC deals with punishment for criminal breach of trust by public servant, or by banker, merchant or agent. Even if the contention of learned counsel for the petitioner that the petitioner is not treated as factor, broker, attorney or agent, still he is liable for prosecution as merchant for the offence punishable under Section 406 of IPC since the allegations made in the report would squarely fall under explanation 1 to Section 405 of IPC. The Court below may frame appropriate charges basing on the material available on record upon hearing on both sides and also competent to alter charges by exercising power under Section 216 of Cr.P.C. If, for any reason, appropriate charge is not framed or not altered, at the end of trial if Court concludes that accused committed a lesser offence though charge is framed for higher offence, it can impose appropriate sentence against him. On verification of entire material on record, respondent No. 3 made out a case against the petitioner for the offence punishable under Section 406 of IPC *prima facie*. However, at this stage, this Court cannot express its opinion as to the penal provisions of law applicable to the present facts of the case examining the material minutely in view of the law declared by the Apex Court in ***Mrs. Dhanalakshmi Vs. R.Prasanna Kumar and others***[1].

7. One of the contentions raised by learned counsel for the petitioner is that respondent No. 3, instead of proceeding against the petitioner under the provisions of the Act, lodged the present report with a *mala fide* intention. When the act committed by the petitioner constitutes an offence under the provisions of either IPC or under the Act or both, it is for respondent No. 3 to proceed either

[1] AIR 1990 SC 494

under IPC or under the Act or under both. Merely because special statute is prescribed to proceed against the petitioner for any offence under it, it would not debar respondent No. 3 from invoking the provisions of IPC in view of explanation 1 to Section 405 of IPC. Therefore, on this ground, this Court cannot quash the proceedings.

8. Coming to the status of the petitioner, he is the Managing Director of Niharika Industries Private Limited and the actual entrustment is with the petitioner and not to the company. In view of para No. 38 (2) of the Act, the petitioner is deemed to have been entrusted with money and in view of the said presumption, it is for the petitioner to rebut the same during trial. In view of the principle of *alter ego i.e.* attribution, the petitioner is liable to be proceeded for the offence punishable under Section 409 of IPC.

9. In view of my foregoing discussion, the proceedings against the petitioner-accused in C.C.No. 471 of 2014 on the file of the Court of XV Metropolitan Magistrate at Medchal, Cyberabad, for the offence punishable under Section 420 IPC are liable to be quashed and are accordingly quashed while permitting the Court below to proceed against him for the offence punishable under Section 409 of IPC and the Court below is directed to dispose of the above C.C. uninfluenced by the observations made hereinabove.

10. The criminal petition is accordingly partly allowed. Pending miscellaneous petitions, if any, in this criminal petition shall stand closed in consequence.

Date: 14-09-2018.

M.SATYANARAYANA MURTHY, J.

JSK