IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH : NAGPUR.

CRIMINAL APPLICATION (APL) NO.433/2020

Shri Ajaykumar s/o Chiranjilal Choudhary and others.
Vs.
The State of Maharashtra through the Police Station In charge, MIDC P.S.Butibori, Nagpur and another.

Office Notes, Office Memoranda of Coram, appearances, Court's Orders or directions and Registrar's order	Court's or Judge's Order

Shri A.S.Agrawal Advocate for applicants.
Shri M.J.Khan, Additional Public Prosecutor for non applicant-State

CORAM :- DIPANKAR DATTA, C.J. and A.S.CHANDURKAR, J.

DATED :- AUGUST 27, 2020

Hearing was conducted through video conferencing and the learned counsel agreed that the audio and video quality was proper.

The applicants have approached this Court under Section 482 of the Code of Criminal Procedure, 1973 (for short, 'the Code') seeking quashment of First Information Report No. 0336 registered with MIDC Police Station, Butibori, Nagpur, for the offence punishable under Sections 406, 409 read with Section 34 of the Indian Penal Code as well as Sections 13 and 14 A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (for short, 'the said Act').

In the first information report as filed at the instance of the Enforcement Officer, Regional Provident Fund Office, Nagpur, it has been stated that the applicants were in management of M/s. Spentex Industries Limited for the period from 2016 to 12.01.2019. An amount of Rs.3,28,27,857/- being amount due towards provident fund contribution had not been deposited by them but had been misappropriated. Based on the enquiry as made by the Enforcement Officer and a written report submitted by him, the aforesaid first information report came to be registered.

Shri A.S.Agrawal, learned counsel for the applicants submitted that the ingredients of Sections 406 and 409 of the Indian Penal Code as well as Sections 13 and 14 A of the said Act are not made out and hence the first information report is liable to be quashed. According to him, though the applicant no.1 was the Chairman of the Company in question, his name was not registered in a declaration given under the Factories Act, 1948 or in Form 5 A of the said Act. The applicant nos. 2 and 3 held the post of the General Manager and Deputy General Manager respectively in the company. Applicant no.4 was the Vice President but he had retired from the said post on 15.06.2015. Referring to the provisions of Section 14 A (1) of the said Act and especially proviso thereto, it is submitted that despite exercise of all due diligence, there were dues of provident fund amounts. Placing reliance on the decision in ***Sharad Mittersain Jain and others Vs. State of Maharashtra, 2004 (1) Mh. L .J.776*** it is submitted that in somewhat similar circumstances, this Court was pleased to quash the prosecution as initiated. It is then submitted that with a view to comply with the interim directions that were issued by this Court in Writ Petition No.1830/2019 that was preferred by the petitioners(applicants herein) challenging the recovery proceedings an amount of Rs.8,99,606/- came to be deposited. On 03.01.2020, the National Company Law Tribunal, New Delhi, was pleased to issue various directions in proceedings under the Insolvency and Bankruptcy Code, 2016. As a result of said proceedings, an interim resolution professional came to be appointed. It is thus submitted that taking into consideration these aspects, the first information report as lodged is liable to be quashed. Continuation of the proceedings would amount to an abuse of the process of law. He therefore submits that the prayers made in the application are liable to be granted.

Shri M.J.Khan, learned Additional Public Prosecutor, for the non-applicant no.1-State opposed the aforesaid submissions. According to him, the statements made in the first information report are to be taken at their face value at this stage and the defence as sought to be raised by the applicants is not liable to be taken into consideration. Since the offence was registered pursuant to a written report as well as enquiry conducted by the Enforcement Officer, there is sufficient material to proceed with the prosecution. He further submitted that in Writ Petition No. 1830/2019 this Court had protected the applicants from arrest subject to deposit of various amounts vide order dated 04.03.2019. That order has not been complied with and the applicants are in breach thereof. He therefore submits that no indulgence is liable to be shown to the applicants at this stage. It would be open for the applicants to raise appropriate defences in the trial which would be then considered on their own merit. He thus sought dismissal of the application.

We have heard the learned counsel for the parties and we have given due consideration to their respective contentions. It is well settled that under Section 482 of the Code while considering prayer for quashment of the first information report, the statements made therein have to be taken at their face value. At this stage, it is not necessary to take into consideration the defence that would be available to the accused. It is only when the allegations made in the first information report when taken at their face value and accepted in their entirety do not prima facie constitute any offence that the first information report can be quashed.

The first information report is based on an enquiry made by the Enforcement Officer on the basis of which he submitted his written report. In that report it has been stated that from 2016 to 12.01.2019, the applicants who were in management of the Company in question had defaulted in making payment of provident fund dues to the tune of Rs. 3,28,27,857/-. The first information report is dated 04.10.2019. The offences registered are under Sections 406 and 409 of the Indian Penal Code and Sections 13 and 14 A of the said Act.

The proviso to Section 14 A (1) of the said Act stipulates that a person would not be liable to any punishment if he has exercised all due diligence to prevent the commission of the offences in question. According to the applicants despite all due diligence the dues could not be paid. This is a matter to be considered on the basis of evidence at the trial and at this preliminary stage, it would not be permissible to examine that aspect merely on the basis of oral statements that the applicants despite exercise of all due diligence could not prevent commission of the offences.

As regards officence lodged under Sections 406 and 409 of the Indian Penal Code, we find that explanation to Section 405 of the Penal Code would at this stage be relevant. As stated above, the nature of liability, if any, and role played by the applicants inter se in the Company would be a matter of evidence to be considered in the trial. The decision in ***Sharad Mittersain Jain and others*** (supra) does not assist the case of the applicants in these facts. Moreover, the decision of the Hon'ble Supreme Court in E***employees State Insurance Corporation Vs. .K.Aggarwal (1996) 6 SCC 288*** that was referred to by learned Single Judge has been subsequently considered by a Division Bench of this Court in ***Dr.Ramprasad Ganeshlal Bajaj Vs. State of Maharashtra 2019(1) Mh L J (Cri) 295*** which has held that the ratio thereof was not applicable in such cases.

Another aspect to be noted is that even before the first information report could be lodged, the applicants had filed Writ Petition No.1830/2019 in this Court seeking to challenge show cause notice dated 08.02.2019 issued under Section 8 B of the said Act pursuant to a recovery certificate. On 04.03.2019 this Court directed the applicants to deposit various amounts as condition precedent so as to prevent their arrest. It is undisputed that these directions have not been complied with which fact has been noted by this Court in its subsequent order dated 17.01.2020 passed in the said writ petition. The proceedings before National Company Law Tribunal and the order passed therein on 03.01.2020 is much after registration of the first information report. We therefore do not find this aspect very relevant at this stage.

In view of aforesaid, we do not find that this is a fit case to quash the first information report under Section 482 of the Code. By clarifying that the aforesaid observations are only for the purposes of considering the prayer for quashing the first information report and by keeping open all defences available to the applicants for being raised at an appropriate stage, the criminal application stands dismissed leaving the parties to bear their own costs.

The order be communicated to the counsel appearing for the parties, either on the email address or on WhatsApp or by such other mode, as is permissible in law.

JUDGE **CHIEF JUSTICE**

Andurkar.