

Form No. J(1)

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Suvra Ghosh

C.R.R. 425 of 2018
CRAN 1009 of 2018
Anil Kumar Nahata
-Vs-
State of West Bengal & Anr.

For the petitioner : Mr. Milon Mukherjee, Sr. Adv.,
Mr. S P Tewary

For the PF Authority : Mr. S C Prasad

Hearing concluded on : 10.02.2021

Judgment on : 10.02.2021

Suvra Ghosh, J. :-

In the present revisional application, the petitioner prays for quashing the proceeding of Special Case No. 14/16 arising out of G.R Case No. 193 of 2009 in connection with Kotowali P.S case no 33 of 2009 under 406/409 IPC.

Contention of the petitioner is that the petitioner is the director of M/s. Nahata Tea Industries (P) ltd., owner of Arihant Tea Estate. A

complaint was lodged against the petitioner under section 406/409 IPC by the opposite party no. 2 which was registered as GR case no. 193 of 2009 wherein the opposite party alleged that an amount of Rs. 34,898/- deducted from the employees' share of provident fund contribution by the opposite party was not remitted to the EPF account maintained by the State Bank of India, the opposite party thereby committing an offence under section 406/409 IPC.

It is submitted by the learned senior counsel for the petitioner that the company being the owner of the tea estate and the employer within the meaning of section 2(e) of the Employees' Provident Funds and Miscellaneous Provisions Act 1952 is responsible for payment of provident fund under the said Act and the petitioner who is only a director of the company cannot be termed as an 'employer' and consequentially cannot be prosecuted under section 406/409 IPC for withholding the provident fund amount of the employees, without fixing criminal liability on the company as an accused.

It is further contended that the company was unable to contribute an amount of Rs. 34,898/- towards the employees' share for the month of June 2008 due to financial stringency and subsequently, has cleared the said dues which was accepted by the provident fund authority. The entire dues with regard to which the criminal case was initiated has been cleared and the complaint is

illegal, bad, mala fide and arbitrary as the company/employer has not been arrayed as an accused therein. The petitioner being a director of the company is not the employer and cannot be held liable for any act of the company.

Learned senior counsel has referred to judicial authorities in **(1998) 6 SCC 288 (Employees' State Insurance Corporation vs. S. K. Aggarwal & Ors., 2015 (3) CHN (Cal) 755 (Ashoke Sadhya vs. State of West Bengal** and decision in **CRR 806 of 2014 (Rajiv Jajodia & Anr. Vs. The State of West Bengal & Anr.** in support of his contention.

Learned counsel for the opposite party has vehemently opposed the submissions made on behalf of the petitioner and has referred to the definition of "employer" as envisaged in section 2(e) of the Employees' Provident Funds and Miscellaneous Provisions Act 1952. According to him, the petitioner admittedly being the director of the company, can be termed as 'employer' of the company and is liable for all acts of the company in his official capacity. Failure of the company to deposit the employees' share of provident fund before the appropriate authority entails legal consequences to be faced by the petitioner as representative of the company and the matter ought to be sent back to the trial court to arrive at a logical conclusion after full-fledged trial. In support of his contention, learned counsel has referred

to the authority in **(2007) 2 CAL LT 259 (HC) (M/s. Hotel Dock Palace Pvt. Ltd. & Anr. Vs. State of West Bengal & Anr.)**.

I have considered the submissions made by both the parties and materials placed before me.

It transpires from the copy of complaint lodged by opposite party no. 2 before Kotowali P.S, Jalpaiguri the opposite party is a Provident Fund Enforcement Officer, Employees' Provident Fund Organisation, Regional Office, Jalpaiguri, Dinbazar and lodged complaint on the allegation that the petitioner who was the director of M/s. Nahata Tea Industries (P) Ltd failed to pay the employees' share of contribution of provident fund made from their salaries before the appropriate authority for which the complaint was lodged under section 405/406/409 IPC. After completion of investigation charge sheet was submitted in the case against the petitioner and another under section 406/409 IPC.

For the purpose of proper appreciation of the case, the definition of employer as stated in the Employees' Provident Funds and Miscellaneous Provisions Act 1952 is set out

"employer" means:

- (i) *In relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and, where a person has been named as a manager of the factory under clause (f) of sub-section (1)*

of section 7 of the Factories Act, 1948, the person so named; and

- (ii) In relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent.*

According to the said definition, employer of a factory/establishment includes an owner or occupier of the factory/establishment as well as agent or manager of such owner/occupier. The provision also lays down that where affairs of the establishment are entrusted to a manager, managing director or managing agent, such persons are deemed to be employers of the establishment.

In the present case, it is the admitted position that the petitioner is the director of the company and not the owner or occupier thereof. There is nothing on record to suggest that the petitioner was entrusted by the company with the responsibility of depositing the employees' share of provident fund before the provident fund authority. Therefore, the petitioner can at best be termed as a senior employee of the company and nothing more than that. A director of a company owned by some other individual can under no stretch of imagination be termed as the employer of the company.

At this juncture, it shall be useful to refer to the authority in ***Employees' State Insurance Corporation vs S K Aggarwal & Ors.*** reported in **(1998) 6 SCC 288**. In the said judgment, the Hon'ble Supreme Court has elaborately dealt with the definition of "employer" as stated in the Act of 1952. The relevant paragraphs of the judgment are set out :

10. *Therefore, even if we read the definition of "principal employer" under the Employees' State Insurance Act 1948 in Explanation 2 to section 405 of the Indian Penal Code, the Directors of the Company, in the present case, would not be covered by the definition of "principal employer" when the company itself owns the factory and is also the employer of its employees at the Head Office.*

11. *In any event, in the absence of any express provision in the Indian Penal Code incorporating the definition of "Principal employer" in Explanation 2 to section 405, this definition cannot be held to apply to the term "employer" in Explanation 2. As the High Court has observed, the term "employer" in Explanation 2 must be understood as in ordinary parlance. In ordinary parlance, it is the company which is the employer and not its directors, either singly or collectively.*

Similar principles have been enunciated in **Rajiv Jajodia & Anr.** (supra) and **Inderjit Singh Oberoy** (supra) passed by co-ordinate Benches of this court.

In view of the observation of the Hon'ble Supreme Court in **Employees' State Insurance Corporation (supra)**, there can be no other alternative but to hold that the director of a company cannot be held personally liable for non-deposit of the share of the provident

fund amount of the employees and it is the company which should be made liable for such offence. In other words, the director of a company cannot be prosecuted for any offence committed by the company without impleading the company as an accused in the complaint.

The authority relied upon by the opposite party pertains to a case where a single bench of this court refused to quash a proceeding against the company and its managing director upon subsequent deposit of provident fund amount by the company after the complaint was initiated. In fact, in the said case the company itself was arrayed as an accused besides the managing director of the company. So the said authority cannot come to the aid of the opposite party in the instant case.

Learned Counsel appearing on behalf of the opposite party has also placed reliance upon the authority in **Shiv Kumar Jatia vs. State of NCT of Delhi** reported in **(2020) 3 SCC (Cri) 281**. Referring to paragraphs 19 and 21 of the judgment, learned Counsel has submitted that a Director/person in charge of affairs of the company can also be prosecuted when the company being an artificial person and a corporate entity acting through its Directors and other office-bearers is an accused person. Such Director can be made an accused along with the company if there is sufficient material to prove his active role coupled with criminal intent.

The ratio laid down in the said case can be distinguished from the present case as according to the Hon'ble Supreme Court, the Director of the company can be prosecuted as representative of the company along with the company which indicates that the company should necessarily be made an accused in the case besides the Director. In the instant case, the company has not been arrayed as an accused at all.

Upon consideration of the facts of the case as well as the law on the point, it is crystal clear that a prosecution initiated against the director of the company in his official capacity without arraying the company itself as an accused cannot continue as no offence under section 406/409 IPC can be said to have been committed by the director in his official capacity without the company being saddled with the liability of the offence. It is trite law that vicarious liability is unknown to criminal jurisprudence unless specifically provided in the statute itself. As the Penal Code does not provide for such provision, the director/petitioner cannot be held responsible for any act of the company who is the employer and is liable for depositing the employees' share of provident fund before the provident fund authority, without roping in the company as an accused.

The present case before the learned trial court against the petitioner has no leg to stand upon and allowing the said case to

continue shall amount to miscarriage of justice and abuse of the process of court.

In the result, proceeding being Special Case No. 14/16 arising out of G.R Case No. 193 of 2009 in connection with Kotwali P.S case no 33 of 2009 under Sections 406/409 IPC pending before the Court of the learned 2nd Additional District & Sessions Judge, Special Court, Jalpaiguri, is quashed.

CRR 425 of 2018 is disposed of. Connected application, if any, also stands disposed of.

However, there shall be no order as to costs.

Copy of the judgment be sent down to the trial court at once for necessary compliance.

Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

(Suvra Ghosh, J.)