

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

(116)

**CRM-M-7892-2021
Date of decision : 14.03.2022**

Provident Fund Inspector

.....Petitioner

VERSUS

M/s Baptist Senior Secondary School and Ors.Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

Present:- Mr. Sumeet Goel, Senior Advocate, with
Mr. Manoj Bajaj, Advocate, for the petitioner.

VINOD S. BHARDWAJ, J. (Oral)

The case has been taken up through Video Conferencing via Webex facility in the light of Pandemic Covid-19 situation and as per instructions.

1. The instant petition raises a challenge to the order dated 06.02.2018 (Annexure P-1) passed by the Judicial Magistrate 1st Class, Bhiwani in Criminal Complaint No.29/14 dated 08.08.2014 under Section 6, 14 (1-A) and 14-A of Employees' Provident Funds & Misc. Provisions Act, 1952 titled as "Provident Fund Inspector Vs. M/s Baptist Senior Secondary School and Others, whereby the accused have been discharged.

2. A brief reference to the facts leading to filing of the instant petition shows that the complaint had been filed by the Provident Fund Inspector against the respondents under the Employees' Pension Scheme, 1995 read with Sections 6, 14(1-A) and 14A of Employees's Provident Funds & Misc. Provisions Act, 1952. The relevant averments made in the said complaint are extracted as under:

*"2. M/s Baptist Senior Secondary School, Circular Road,
Bhiwani (hereinafter referred to as the said establishment)*

is an establishment covered under the Employees' Provident Funds & Misc. Provisions Act, 1952 (herein after referred to as the Act). It has been allotted Code No.HR/2554.

- 3.. *That the accused No.1 M/s Baptist Senior School represented by Rev Solomon David, 2 Rev Solomon David, Manger, BUNI Manager, 3. Dayal Masih, President, BUNI, 4. Daniel Budh Masih, Secy-Treasurer, 5. Joy S. Singh, BCTA, 6. S. K. Raj, Member BUNI, are in charge of an responsible for the conduct of the business of the said establishment. They are required to comply with all the provisions of the said Act, the Scheme (the Pension Scheme or the Insurance Scheme) in respect of the said establishment.*
4. *That under paragraph 4 of the Employees' Pension Scheme, 1995, the accused are required to pay the Employer's contribution to the Pension Fund in respect of employees of the said establishment for every month within 15 days of the close of that month.*
5. *That in spite of several requests, the accused failed to pay in the manner mentioned in paragraph 4 of the complaint, the Pension fund Contribution for the following period:-*

MONTH	AMOUNT OF PENSION CONTRIBUTIN
2/2011	16702
3/2011	16702
4/2011	16713
TOTAL	50117

6. *That I submit that under the above circumstances that said establishment/above mentioned Director/Owner have committed offences under paragraphs 4 of the Employees' Pension Scheme, 1995 read with section(s) 14 (1-A) and 14A of the employees' Provident Funds &*

Misc. Provisions Act, 1952 on or about the dates mentioned in paragraph 4 of the complaint.

7. *That I further submit that accused No.1 M/s. Baptist Senior Secondary School, 2. Rev Solomon David, Manager, BUNI, 3. Dayal Masih, President , BUNI, 4. Deniel Budh Masih, Secy-Treasurer, 5. Joy S. Singh, BCTA, 6. S. K. Raj, Member BUNI, were during relevant period In charge of the said establishment responsible for the conduct of the business of the said establishment. As the said establishment/Director/Owner due to their neglect have failed to comply with the provisions of Section 6 of the Act read with para 4 of the Employees' Pension Scheme 1995 hence have committed offence punishable under section 14(1-A) and 14-A of the Act."*

3. After filing of the aforesaid complaint, the parties were summoned and the matter was fixed for framing of charge. The counsel representing the respondents-accused submitted that Baptist Union of Northern India is registered under the Societies Registration Act, 1860 and that the accused persons-respondents were not legally bound to make contribution in the pension fund of the employees of M/s Baptist Senior Secondary School, Circular Road, Bhiwani, as contribution in the provident fund is to be made by Principal of this school. It was further pointed out that there was no evidence to show that the accused persons were office bearers of M/s Baptist Senior Secondary School, Circular Road, Bhiwani, at the relevant time and a specific argument was raised that the accused/respondents had no control over the affairs of the school and that the same were managed by the Principal who had not been arrayed as an accused. The Baptist Church Trust Association is owner of the property

and does not run the school. After noticing the rival contentions, the Judicial Magistrate 1st Class held as under:

“(3) After hearing the rival contentions of learned counsel for both sides and going through the case file very carefully and minutely, this Court is of the considered view that the moot question under determination is whether the pre-charge evidence on record is sufficient to frame the charge upon the accused persons or not? As per the complainant's version, the accused persons being employer of M/s Baptist Senior Secondary School, Circular Road, Bhiwani were legally bound to make contribution in provident fund of their employees by virtue of Section 6 of the Act but they miserably failed to do so. It is also his version that the accused persons committed offences punishable under Section 14 and 14A of the Act by not making contribution in the provident fund of their employees. In order to prove his version, it was incumbent upon the complainant to prove that the accused persons are employers in M/s Baptist Senior Secondary School, Circular Road, Bhiwani. He was also legally bound to prove that the accused persons had control over the affairs of M/s Baptist Senior Secondary School, Circular Road, Bhiwani. As per Section 6 of the Act, an employer is legally bound to make contribution in provident fund of his employees. A careful perusal of the case file reveals that the complainant has not led any specific evidence to prove that they are employers of M/s Baptist Senior Secondary School, Circular Road, Bhiwani. He has also not led any evidence to prove that they were legally bound to make contribution in provident fund of the employees of M/s Baptist Senior Secondary School, Circular Road, Bhiwani from February 2011 to April 2011. There is no evidence on record to show that the accused persons had control over the affairs of M/s Baptist Senior Secondary School, Circular Road, Bhiwani. In order to prove above facts, it was incumbent upon

the complainant to get summoned the record of M/s Baptist Senior Secondary School, Circular Road, Bhiwani. However, he miserably failed to do so. In absence of evidence relating to aforesaid facts, there is no justified reason to hold that the accused persons were employers of M/s Baptist Senior Secondary School, Circular Road, Bhiwani and they were legally bound to make contribution in provident fund of the employees of the school from February 2011 to April 2011. There is no justified reason to hold that the accused persons had ultimate control over the affairs of M/s Baptist Senior Secondary School, Circular Road, Bhiwani during aforesaid period. As the complainant has miserably failed to prove that the accused persons were employers of M/s Baptist Senior Secondary School, Circular Road, Bhiwani from February 2011 to April 2011 or they had control over its affairs during this period or they were legally bound to make contribution in the provident fund of the employees so they can not be charged under Section 14 and 14A of the Act. Apart from aforesaid facts, the complainant has not led specific evidence regarding employees of M/s Baptist Senior Secondary School, Circular Road, Bhiwani during February 2011 to April 2011. He has not led specific evidence as to how the accused persons were legally bound to make contribution of Rs.50,117/-. Admittedly, the accused persons were never remained as Principal of the school. As per Haryana School Education Rules, 2003, the Principal is legally bound to pay the salaries and allowances of the teachers and non teaching staff on time in accordance with the instructions of the Government. However, the complainant has not arrayed the Principal as accused in present complaint. In these circumstances, the complainant's version can not be taken as gospel truth. In other words, the pre- charge evidence on record is not sufficient to frame charge upon the accused persons. In present case, if the pre-charge evidence stand un rebutted, it is paramount duty of the

Court to consider the evidence produced by prosecution to see whether the same constitutes a prima facie against the accused or not? If there is no prima facie case or sufficient and strong grounds against the accused are not made out and the allegations are baseless or proceedings are mainly aimed at harassing an accused, then it is just and proper for the Court to discharge the accused. In other words, charge cannot be framed on mere suspicion that the accused has committed the offence rather it has to be framed only after finding is recorded that there is ground for presuming that the accused has committed an offence.”

4. Aggrieved of the same, the instant petition has been filed by the complainant.

5. Learned Senior counsel has contended that Provident Fund Inspector of the EPF organization appeared as CW1 and has exhibited the documents. The said witness was also duly cross-examined and that on the strength thereof, sufficient material was available to hold that the respondents were liable to be prosecuted. He further contends that the PF code is not in the name of the society, but, the same is in the name of M/s Baptist Senior Secondary School, Circular Road, Bhiwani. He submitted that CW-1 in his cross-examination has clearly stated that he has seen signatures of accused No.2 as he conducted communication with their department. Hence, it cannot be perceived that the accused persons had no the concern with the affairs of the school. It has been vehemently argued for the pension and provident fund are social security schemes for the employees and by virtue of the order discharging the respondent-accused, the perpetrators of the offence have been allowed to compound their violation. It is also contended that at the stage of framing of charge, only a

prima facie case is to be seen and that any other material could not have been examined. The trial Court has passed the impugned orders by relying on material that was to be seen at the time of defence.

6. I have considered the submissions advanced by learned senior counsel appearing on behalf of petitioner. Before proceedings further into the matter, it is essential to refer to the relevant statutory provisions, the violation whereof is alleged in the complaint:-

2. (viii) " Pension " means 'the pension payable under the Employees' Pension Scheme and also includes the family pension admissible and payable under the Employees' Family Pension Scheme, 1971 immediately preceding the commencement of the Employees' Pension Scheme, 1995 with effect from the 16th November, 1995 .

4. Payment of contribution. -

(1) The employer shall pay the contribution payable to the Employees' Pension Fund in respect of each member of the Employees' Pension Fund employed by him directly or by or through a contractor.

(2) It shall be the responsibility of the principal employer to pay the contributions payable to the Employees' Pension Fund by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor.

[Provided that the Central Government shall pay the contribution payable to the Employees' Pension Fund in respect of an employee who is a person with disability under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996) and under the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (44 of 1999) respectively, upto a

maximum of three years from the date of commencement of membership of the Fund.]

7. The perusal of the same would show that the application to make the contribution has been fastened against the employer. The Pension Scheme 1995, however, does not define an employer. As the said scheme has been framed in exercise of power conferred by Section 6(A) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, the relevant provisions of the same are extracted as under:-

2.e) “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 (63 of 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.

6. Contributions and matters which may be provided for in Schemes.—

The contribution which shall be paid by the employer to the Fund shall be 6 [ten per cent.] of the basic wages, 7 [dearness allowance and retaining allowance (if any)] for the time being payable to each of the employees 8 [(whether employed by him directly or by or through a contractor)], and the employees' contribution shall be equal to the contribution payable by the employer in respect of him and may, 9 [if any employee so desires, be an amount exceeding 6 [ten per cent.] of his basic wages, dearness allowance and retaining allowance (if any),

subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section]:

[Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this section shall be subject to the modification that for the words 6 [ten per cent.], at both the places where they occur, the words 10[twelve per cent.]shall be substituted:]
Provided further that where the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for the rounding off of such fraction to the nearest rupee, half of a rupee or quarter of a rupee.

[Explanation 1].—For the purposes of this 12[section], dearness allowance shall be deemed to include also the cash value of any food concession allowed to the employee. 13

[Explanation 2.—For the purposes of this 12[section], “retaining allowance” means an allowance payable for the time being to an employee of any factory or other establishment during any period in which the establishment is not working, for retaining his services.]

14.(1-A) *An employer who contravenes, or makes default in complying with, the provisions of section 6 or clause (a) of sub-section (3) of section 17 in so far as it relates to the payment of inspection charges, or paragraph 38 of the Scheme in so far as it relates to the payment of administrative charges, shall be punishable with imprisonment for a term which may extend to 6 [three years] but—*

(a)which shall not be less than 7 [one year and a fine of ten thousand rupees] in case of default in payment of the employees’ contribution which has been deducted by the employer from the employees’ wages;

(b) which shall not be less than six months and a fine of five thousand rupees, in any other case;]

Provided that the court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term.

14-A. Offences by companies.—(1) *If the person committing an offence under this Act 4 [, the Scheme or 5 [the 6 [Pension] Scheme or the Insurance Scheme]] is a company, every person, who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:*

Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) *Notwithstanding anything contained in sub-section (1), where an offence under this Act 4 [, the Scheme or 5 [the 6 [Pension] Scheme or the Insurance Scheme]] has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director or manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.*

Explanation.—*For the purposes of this section,—*

“company” means any body corporate and includes a firm and other association of individuals; and)

(ii) “director” in relation to a firm, means a partner in the firm.”

8. A conjoint reading of the said provision shows that the

obligation to pay the contribution is that of an employer and that the

prosecution being on account of breach of mandate of the Act, it must necessarily be established by the complainant that the person sought to be prosecuted is the employer within the meaning of the said provisions.

9. A perusal of the complaint shows that the same had been filed against M/s Baptist Senior Secondary School and the respondents who are claimed to be office bearers and manager of Baptist Union of Northern India, are being sought to be prosecuted. Since the complainant has averred that the person sought to be prosecuted are in-charge of and responsible for the conduct of M/s Baptist Senior Secondary School, Circular Road, Bhiwani, hence, the burden lay upon the complainant to establish that the respondents are the employers in M/s Baptists Senior Secondary School, Circular Road, Bhiwani. No material had however been brought on the record of the trial Court to *prima facie* establish that the respondents are the employers and were thus, legally bound to make contribution in the provident fund of the employees of M/s Baptist Senior Secondary School. There can be no presumption of a criminal liability on the basis of preponderance of probabilities. The burden lies upon the complainant to *prima facie* establish that the respondents were the employers in M/s Baptist Senior Secondary School.

10. The definition of 'employer' clearly establishes that in an establishment, the authority which has ultimate control over affairs and where such affairs are entrusted to a manager etc, then such person is deemed to be the employer. Hence, it is for the complainant to establish and prove that the person sought to be prosecuted is actually the one who has ultimate control over the affairs of the establishment. Such an obligation

complaint. The requirement of *prima facie* case would require something more than a bald assertion when a complaint is instituted for entrustment of statutory compliance.

11. It is also evident that no reasons have been given as to why the relevant record, either from the school or from the Baptist Union of Northern India has not been adduced by the complainant. It is also noticed that the trial Court had specifically recorded a finding that none of the accused persons ever remained as Principal of the school and also observed that as per Haryana School Education Board, 2003, the Principal of the school is legally bound to pay the salary and allowances of the teachers and non-teaching staff on time and in accordance with instructions of the government. He is thus deemed to be an employer under the provisions as having been nominated or authorized under the statute to perform certain functions. However, for reasons best known, the school has not been arrayed through the Principal. No other material has been adduced on record on the basis whereof it could be held that the respondents are the employers in M/s Baptist Senior Secondary School.

Legal position as to framing of charge holding in a case instituted otherwise than on a police complaint.

12. In the case of **Balbir Singh Vs. State of Punjab and others decided on 28.02.2022 passed by this Court in CRM-M-11092 of 2011**, It is held as under:

6. Charge is prescribed under Chapter XVII of the Criminal Procedure Code. Since the controversy in the case pertains to discharge in a case instituted otherwise than on police report, we would restrict the discussion to the element of discharge.

7. Further, Section 227 of Chapter XVIII of the Criminal Procedure Code deals with discharge in case of trial before a Court of Sessions and Section 239 CrPC under Chapter XIX of the Criminal Procedure Code deals with discharge in a warrant case by Magistrate. The same are extracted as under:-

'227. Discharge. If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.'

'239. When accused shall be discharged. If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.'

8. Section 245 of Chapter XIX of the Criminal Procedure Code also deals with the issue of discharge in cases instituted otherwise than on police report i.e., the facts of the present case. Section 245 CrPC reads thus:-

245. When accused shall be discharged.

(1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded

by such Magistrate, he considers the charge to be groundless.

9. Further, Volume 3, Chapter I Part D of the Punjab and Haryana High Court Rules and Orders under Rule 18 deals with discharge of an accused in the trial of other warrant cases. The same reads thus:-

18. Discharge of accused:- After taking the evidence and making such examination of the accused as he may think necessary, **if no case is made out which, if unrebutted would warrant a conviction**, the magistrate should discharge the accused, and record his reasons for doing so. If, however, at any previous stage of the case the magistrate considers the charge to be groundless, he may record his reasons for that opinion, and discharge the accused.

10. A perusal of the same would show that the language used in the said Section is distinct while Section 227 CrPC comes into force if there is no sufficient ground to proceed; Section 239 CrPC prescribes discharge when the 'Magistrate considers it to be groundless'. On the other hand, Section 245 CrPC and Rule 18 of the Punjab and Haryana High Court Rules and Orders are application in respect of cases other than on police report. The legislature has preferred the use of phrase "no case is made out which, if unrebutted would warrant a conviction". It would be pertinent to point out that for the purposes of issuance of process as per Chapter XVI under Section 204 CrPC, the requirement prescribed is "existence of sufficient grounds to proceed". Hence, while a person may be summoned in a complaint case on sufficient grounds to proceed, the requirement prescribed under Section 245 CrPC is distinct and separate. The mere sufficiency of further proceedings is substituted by the element of sufficiency to take the case to a logical end without considering a possible defence and/or the probative value of the evidence. A bald and

unsubstantiated statement and relying upon conjecture, probability, hypothesis and suspicion cannot be perceived as evidence sufficient for the purposes of framing a charge.

11. *The Hon'ble Supreme Court, in the matter of **Ajoy Kumar Ghose Vs. State of Jharkhand & Anr**, bearing Criminal Appeal No.485 of 2009 decided on 18.03.2009, observed as under:-*

*'14. However, in a warrant trial instituted otherwise than on a police report, when the accused appears or is brought before the Magistrate under Section 244(1) Cr.P.C., the Magistrate has to hear the prosecution and take all such evidence, as may be produced in support of the prosecution. In this, the Magistrate may issue summons to the witnesses also under Section 244(2) Cr.P.C. on the application by prosecution. All this evidence is evidence before charge. **It is after all this, evidence is taken, then the Magistrate has to consider under Section 245(1) Cr.P.C., whether any case against the accused is made out, which, if unrebutted, would warrant his conviction, and if the Magistrate comes to the conclusion that there is no such case made out against the accused, the Magistrate proceeds to discharge him.** On the other hand, if he is satisfied about the prima facie case against the accused, the Magistrate would frame a charge under Section 246(1) Cr.P.C. The complainant then gets the second opportunity to lead evidence in support of the charge unlike a warrant trial on police report, where there is only one opportunity. In the warrant trial instituted otherwise than the police report, the complainant gets two opportunities to lead evidence, firstly, before the charge is framed and secondly, after the charge. Of course, under Section 245(2) Cr.P.C., a Magistrate can discharge the accused at any previous stage of the case, if he finds the charge*

to be groundless.

16. Now, there is a clear difference in Sections 245(1) and 245(2) of the Cr.P.C. Under Section 245(1), the Magistrate has the advantage of the evidence led by the prosecution before him under Section 244 and he has to consider whether if the evidence remains unrebutted, the conviction of the accused would be warranted. If there is no discernible incriminating material in the evidence, then the Magistrate proceeds to discharge the accused under Section 245(1) Cr.P.C. 17. The situation under Section 245(2) Cr.P.C. is, however, different. There, under sub-Section (2), the Magistrate has the power of discharging the accused at any previous stage of the case, i.e., even before such evidence is led. However, for discharging an accused under Section 245 (2) Cr.P.C., the Magistrate has to come to a finding that the charge is groundless. There is no question of any consideration of evidence at that stage, because there is none. The Magistrate can take this decision before the accused appears or is brought before the Court or the evidence is led under Section 244 Cr.P.C. The words appearing in Section 245(2) Cr.P.C. "at any previous stage of the case", clearly bring out this position. It will be better to see what is that "previous stage". 18. The previous stage would obviously be before the evidence of the prosecution under Section 244(1) Cr.P.C. is completed or any stage prior to that. Such stages would be under Section 200 Cr.P.C. to Section 204 Cr.P.C. Under Section 200, after taking cognizance, the Magistrate examines the complainant or such other witnesses, who are present. Such examination of the complainant and his witnesses is not necessary, where the complaint has been made by a public servant in discharge of his official duties or where a Court has made the complaint or

further, if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192 Cr.P.C. Under Section 201 Cr.P.C., if the Magistrate is not competent to take the cognizance of the case, he would return the complaint for presentation to the proper Court or direct the complainant to a proper Court. Section 202 Cr.P.C. deals with the postponement of issue of process. Under sub-Section (1), he may direct the investigation to be made by the Police officer or by such other person, as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. Under Section 202(1)(a) Cr.P.C., the Magistrate cannot give such a direction for such an investigation, where he finds that offence complained of is triable exclusively by the Court of sessions. Under Section 202(1)(b) Cr.P.C., no such direction can be given, where the complaint has been made by the Court. Under Section 203 Cr.P.C., the Magistrate, after recording the statements on oath of the complainant and of the witnesses or the result of the inquiry or investigation ordered under Section 202 Cr.P.C., can dismiss the complaint if he finds that there is no sufficient ground for proceeding. On the other hand, if he comes to the conclusion that there is sufficient ground for proceeding, he can issue the process under Section 204 Cr.P.C. He can issue summons for the attendance of the accused and in a warrant-case, he may issue a warrant, or if he thinks fit, a summons, for securing the attendance of the accused. Sub Sections (2), (3), (4) and (5) of Section 204 Cr.P.C. are not relevant for our purpose. It is in fact here, that the previous stage referred to under Section 245 Cr.P.C. normally comes to an end, because the next stage is only the appearance of the accused before the Magistrate in a warrant- case under Section 244 Cr.P.C. Under Section

244, on the appearance of the accused, the Magistrate proceeds to hear the prosecution and take all such evidence, as may be produced in support of the prosecution. He may, at that stage, even issue summons to any of the witnesses on the application made by the prosecution. Thereafter comes the stage of Section 245(1) Cr.P.C., where the Magistrate takes up the task of considering on all the evidence taken under Section 244(1) Cr.P.C., and if he comes to the conclusion that no case against the accused has been made out, which, if unrebutted, would warrant the conviction of the accused, the Magistrate proceeds to discharge him. The situation under Section 245(2) Cr.P.C., however, is different, as has already been pointed out earlier. The Magistrate thereunder, has the power to discharge the accused at any previous stage of the case. We have already shown earlier that that previous stage could be from Sections 200 to 204 Cr.P.C. and till the completion of the evidence of prosecution under Section 244 Cr.P.C. Thus, the Magistrate can discharge the accused even when the accused appears, in pursuance of the summons or a warrant and even before the evidence is led under Section 244 Cr.P.C., makes an application for discharge.' (Emphasis supplied) .

12. Having considered the above, it also needs to be seen that the Punjab and Haryana High Court Rules and Orders Volume 3, Chapter D Rule 18 mandates a slightly higher degree of the evidence while considering whether a charge is to be framed or not. The same goes to an extent of requiring that the quality of evidence, if unrebutted, should be sufficient to warrant a conviction. The language used under Rule 18 of the Punjab and Haryana High Court Rules and Orders is at variance with the language used in Section 245 CrPC to an extent that Section 245 CrPC refers to the sufficiency of

evidence recorded during Section 244 CrPC. No such distinction however has been incorporated under Rule 18 (supra).

13. Hence, it becomes imperative for the Court to harmoniously construct the said provisions as they appear in the Criminal Procedure Code and the Punjab and Haryana High Court Rules and Orders.

*14. Further, while interpreting the scope of jurisdiction to be exercised by the Court at the stage of charge/discharge, the Hon'ble Supreme Court in the matter of **Union of India Vs. Prafulla Kumar Samal And Another**, 1979 AIR (SC) 366, held as under:- 'Thus, on a consideration of the authorities mentioned above, the following principles emerge:*

(1) That the Judge while considering the question of framing the charges under section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has

to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.'

15 Still further, in the matter of **Sajjan Kumar Vs. Central Bureau of Investigation, 2010 (9) SCC 368**, the Hon'ble Supreme Court observed as under:-

'17) Exercise of jurisdiction under Sections 227 & 228 of Cr.P.C.

On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:- (i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

iv) If on the basis of the material on record, the Court

could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.'

16. The Hon'ble Supreme Court in the matter of *State of Tamilnadu by Ins. Of Police Vigilance and Anti Corruption Vs. N. Suresh Rajan & Others, 2014 (11) SCC 709* held as under:-

'19. xxxxxxxxxxxxxxxxxxxx. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouthpiece of the prosecution or act as a post office and may sift evidence in order to find out

whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage. Reference in this connection can be made to a recent decision of this Court in the case of Sheoraj Singh Ahlawat & Ors. vs. State of Uttar Pradesh & Anr., AIR 2013 SC 52, in which, after analyzing various decisions on the point, this Court endorsed the following view taken in Onkar Nath Mishra v. State (NCT of Delhi), (2008) 2 SCC 561: “11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging there from, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court

is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence."

17. Further, the Hon'ble Supreme Court in the matter of **Sanjay Kumar Rai Vs. State of Uttar Pradesh & Anr**, Criminal Appeal No.472 of 2021, observed as under:-

16. Further, it is well settled that the trial court while considering the discharge application is not to act as a mere post office. The Court has to sift through the evidence in order to find out whether there are sufficient grounds to try the suspect. The court has to consider the broad probabilities, total effect of evidence and documents produced and the basic infirmities appearing in the case and so on. [Union of India v. Prafulla Kumar Samal, 5 (1979) 3 SCC 4]. Likewise, the Court has sufficient discretion to order further investigation in appropriate cases, if need be.

18. Further, this Court in the matter of **Surinder Kumar alias Palu Singh & Others** decided on 17.05.1983 passed in Criminal Revision No.1574 of 1982, observed as under:-

6. Sections 245 and 246 of the Code of Criminal Procedure are found in Chapter XIX-B of the Code. The apply to cases instituted otherwise than on police report. An analogous set of provisions is sections 239 and 243 found in Chapter XIX-I of the Code pertaining to cases instituted on a police report. So far as the trial before a Court of sessions is concerned, whether it be

instituted on a police report or a complaint, the relevant provisions of law are Sections 227 and 228 of the Code. for the stage of the aforesaid three sets of twin provisions, the legal position uniformly understood is that the Court has to apply the test whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction, and when there is prima facie evidence the matter has to be put to even though the person charged of an offence might have a plausible defence. In State of Bihar v. Ramesh Singh, AIR 1977 Supreme Court 2018, their Lordships of the Supreme Court, taking note of Chandra Deo Singh v. Prokash Chandra Bose alias Chabi Bose and another, AIR 1963 Supreme Court 1430, observed as follows :-

"Reading these two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor purpose to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilty or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction.

Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused."

But in Ramesh Singh's case (supra), it was also noted that in Nirmaljit Singh Hoon v. The State of Bengal and others, AIR 1972 Supreme Court 2639 Shelat, J., had illustratively further added "Unless, therefore, the Magistrate finds that the evidence led before him is self-contradictory of intrinsically untrustworthy, process cannot be refused if that evidence makes out a prima facie case". Neither of these cases is that of section 245 of the Code of Criminal Procedure.

7. But the expression "if unrebutted would warrant his conviction" is perhaps a pointer towards proper interpretation of section 245 of the Code. Such an expression is significantly not employed either in sections 239/240 or sections 227/228 of the Code. Here, by cross-examining the complainants witnesses material can obviously be brought in to innately rebut the prosecution evidence and thereby claim that it has become "self contradictory or intrinsically untrustworthy" as the expression was employed by the Supreme Court in Chandra Deo Singh's case (supra). The Court at that stage, to my mind, is entitled to see whether there are inherent weaknesses, basic infirmities and improbabilities in the prosecution case. But, in coming to that conclusion, the trial Magistrate is of course required to record reasons for the purpose. Even

in sub-section (2) of section 245 of the Code, the Magistrate can, at any previous stage of the case, discharge the accused if he considers the charge to be groundless. Therefore, in my view even, at the stage of section 245 of the Code, the Magistrate can take into account the material introduced during cross-examination of the witnesses and, if a plausible defence has been introduced, weigh the case in its entirety and say that the prosecution case is intrinsically untrustworthy and suffers from infirmities and improbabilities”

9. In Anil Kapoor v. Finance-cum-Health Secretary, Chandigarh Administration, 1973 Chandigarh Law Reporter 601, an Hon'ble Single Judge, while applying Mahant Abbey Dass's (supra), held that only a prima facie case had to be seen at the stage of charge. A prima facie case meant a case established by prima facie evidence which, in turn, meant "evidence sufficient in law to raise a presumption of fact or to establish the fact in question, unless rebutted." Now, here again, "evidence sufficient in law" would mean, as I understand, the state of evidence as the Magistrate had before him, intertwined intermingled and embroiled with de- fence suggestions. At that stage, to say that he should ignore them and keep the prosecution case pristinely pure and un-sullied is to cause violence to the language of section 245 of the Code. Surely, at that stage he has to see not the prosecution case alone, and defer seeing the case of the defence at a later stage, but as it seems to me, to look to the entire material available on the record, as introduced by both the sides, to determine whether the prosecution case is intrinsically trustworthy. If it is so, he must frame a charge and if it is not, there is no point in requiring him to proceed ritualistically to frame

charge and then finally pronounce judgment that the prosecution case is intrinsically such. That would seem to me sheer wastage of precious court-time and an abuse of the process of Court. I hold it so.

19. Further, this Court in the matter of **Subhash Chander Vs. State of Punjab**, passed in Criminal Misc. No.3240-M of 1996, it was observed as under:-

(8) From the bare perusal of Section 245 of the Code, as reproduced above, it is evident that before framing a charge, it is the paramount duty of the Court to consider the evidence produced by the prosecution/complainant and to see whether the same constitute prima facie case against the accused. The scope of Section 245 of the Code does not speak about meticulous consideration of evidence, but it definitely mandates a sincere and honest application of mind to the allegations made and that the Court shall find out that the grounds or ingredients of an offence alleged are made out. This Section does not contemplate a mechanical approach, but it expects a reasonable and judicious approach to know the existence of grounds and establishment of a prima facie case. If there is no prima facie case, or sufficient and strong grounds to proceed against the accused are not made out and the allegations are baseless or the proceedings are mainly aimed at harassing an accused, under such circumstances it is just and proper for the Court to discharge the accused and thus prevent abuse of the process of the Court. In *Century Spinning and Manufacturing Co. Ltd. v. State of Maharashtra* AIR 1972 SC 545 : it was held:

It cannot be said that the Court at the stage of framing the charges has not to apply its judicial mind for considering whether or not there is a ground for presuming the commission of the

offence by the accused. The order framing the charges does substantially affect the person's liberty and it cannot be said that the Court automatically frame the charge merely because the prosecuting authorities by relying on the documents referred to in Section 173 consider it proper to institute the case. The responsibility of framing the charges is that of the Court and has to judicially consider the question of doing so. Without fully advertent to the material on the record it must not blindly adopt the decision of the prosecution.”

20. *A perusal of the same shows that the Court is not expected to act as a post office and the Judge has to sift and weigh the evidence as well as the material placed before it. Hence, even though Court may not get into the probative value of the evidence at the stage of framing of charge/discharge, if there are two views that are possible and only one of them gives rise to a suspicion, the Judge would be empowered to discharge an accused. Law would permit the Court to examine the evidence, without going into the probative value thereof, and to determine whether the same, if un-rebutted, is prima facie sufficient to lead to a conviction.”*

13. It cannot be perceived that the charge must always be framed merely because an allegation has been levelled in the complaint by the complainant. The requirement of *prima facie* evidence cannot be satisfied by a mere oral testimony. The *prima facie* requirement would require existence of such legally admissible evidence as would give rise to a presumption against the accused over and above than being a mere suspect. Such a presumption cannot be expressed from unsubstantiated and uncorroborated bald assertions especially when there is a statutory

authority defined or prescribed and prosecution is based on documentary evidence and for violation of statutory obligation. It cannot be adhered that the agony had no means to determine who is responsible and liable to be prosecuted and that such liability on the part of prosecuting agency must give it liability to prosecute all and sundry. A statement of fact pertaining to a juristic entity and its office bearers is not a fact that can be presumed. The same has to be *prima facie* established by some material. The Court would not, at the stage of framing of charge, go into the probative value of the said evidence, however, absence of any evidence cannot be discarded or be ignored. A complainant cannot be extended a leverage to an extent that all persons named by him should be prosecuted despite absence of any material to connect therewith the juristic entity liable to be prosecuted. Such a proposition, if accepted, would vest unbridled authority in a complainant to array any number of accused and to claim their prosecution irrespective of any material to link and establish their association with the establishment sought to be prosecuted.

14. It is well settled that criminal prosecution has ramification on the liberties of an individuals and that such liberties cannot be subdued at the whims of a complainant. Once a complainant chooses to prosecute a person, a *prima facie* burden lies upon him to establish that the person chosen by the complainant to be prosecuted for the acts of omission of a juristic entity, are the persons who are responsible for and are in ultimate control of the management and of the affairs of the juristic entity sought to be prosecuted. The petitioner-complainant has however, failed to adduce evidence on record to establish as to how the respondents-accused are

Unless the Baptist Union of Northern India is held to be an 'employer' within the meaning of Employees Provident Fund and Miscellaneous Provisions Act, 1952 and the Employees Pension Scheme, 1995, the office bearers of the Baptist Union of Northern India cannot be prosecuted. The 'employer', within the meaning of Haryana School Education Board, 2003, is the Principal of the school who has also not been arrayed as an accused. An owner of the premises would not become employer of the employees working therein. It has to be established by the complainant that the owner of the premises also controls the affairs of the establishment against whom the default has been alleged. The said burden has to be primarily discharged by the complainant who is prosecuting the respondents and only if there is sufficient material that can lead to an inference that the person sought to be prosecuted is in-charge of affairs of the establishment, would the burden shift upon the person so sought to be prosecuted. It is evident that the trial Court noticed the aforesaid deficiencies in the case of the petitioner and hence, exercised its jurisdiction under Section 245 Cr.P.C., to discharge the respondents. I find that there is no illegality or perversity in the impugned order and it also does not suffer from any non-appreciation of the material available on record.

Petition is accordingly, dismissed.

(VINOD S. BHARDWAJ)
JUDGE

14.03.2022
anil

Whether speaking/reasoned :	Yes/No
Whether reportable	Yes/No