IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 410 of 2019

With

CRAN 4 of 2023

Raj Kumar Todi & Ors.

Vs

The State of West Bengal & Anr.

For the Petitioners	:	Mr. Y.J. Dastoor, Ms. Samera Grewal.
For the Opposite Party No.1/State	:	Mr. Avik Ghatak.
For the Opposite Party No. 2	:	Mr. Debangan Bhattacharjee.
Heard on	:	28.02.2023
Judgment on	:	20.04.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred against an order dated 15.12.2018 passed by the Learned 2nd Additional Chief Judicial Magistrate, Kalyani, District Nadia, rejecting the application of the petitioners for discharge made under Section 239 of the Code of Criminal Procedure, 1973, in G.R. Case No. 1819 of 2014, arising out of Chakdah Police Station Case No. 782 dated 26.11.2014 under Sections 420/406 of the Indian Penal Code.
2. The petitioners case is that the petitioner no. 1 Raj Kumar Todi is the Chairman cum Managing Director of M/s Supreme Paper Mills Limited. The petitioner no. 2 Dhrub Todi @ Drub is a Director of the said company and the petitioner no. 3 Rajiv Patel was the General Manager (Works) of the said company at the relevant time.
3. On the basis of a written complaint, dated 25th November 2014, lodged by one Sajal Bramha, Enforcement Officer, Employees Provident Fund, EPFO, SRO, Barrackpore, for non-payment of the Employees contribution to the Employees Provident Fund Scheme to the tune of Rs. 9,28,193/-(Rupees Nine Lakh Twenty Eight Thousand One Hundred Ninety Three) for the period of July' 2014 to October' 2014, a case was initiated under Sections 420/406 of Indian Penal Code, being Chakdah Police Station Case No. 782 of 2014, dated 26.11.2014 (G. R. Case No. 1819 of 2014).

4. It is submitted that subsequently the entire alleged dues had been deposited with the Provident Fund Authorities with interests for late payments.

5. After completion of investigation in Chakdah Police Station Case No. 782 dated 26.11.2014, the Investigating Officer submitted Charge Sheet bearing no. 321 dated 23.06.2015 under Sections 420/406/34 of the Indian Penal Code against all the petitioners **but not against Supreme Paper Mills Limited**.

6. The Learned Additional Chief Judicial Magistrate, Kalyani, District-Nadia, upon receipt of such Charge Sheet, in connection with Chakdah Police Station Case No. 782 dated 26.11.2014 was pleased to take cognizance of the offences disclosed therein and after supplying copies of documents intended to be relied upon by the prosecution, to the petitioners in terms of Section 207 of the Code of Criminal Procedure, 1973, transferred the case to the Learned 2nd Additional Chief Judicial Magistrate, Kalyani, District - Nadia, for disposal.

7. The Petitioners filed an application, dated 10.09.2018 for discharge under Section 239 of the Code of Criminal Procedure, 1973, before the Learned 2nd Additional Chief Judicial Magistrate, Kalyani District-Nadia, inter alia on the ground that the concept of vicarious liability was alien to the Indian Penal Code and where the offences under Sections 420/406/34 were alleged to have been committed by a company, its Managing Director, Directors and other officers could not be prosecuted.

8. The Learned 2nd Additional Chief Judicial Magistrate, Kalyani, District – Nadia, by an order dated 15.12.2018, was pleased to reject the application, dated 10.09.2018 under Section 239 of the Code of Criminal Procedure, 1973, for the discharge of the petitioners, inter alia on the ground that there is a prima-facie case of offence against the accused persons under Section 406 of the Indian Penal Code and was pleased to fix 27.03.2019 for consideration of charge.

9. **Mr. Y. J. Dastoor, learned counsel for the petitioners** has submitted that the impugned order is an abuse of the process of court and as such the same is liable to be quashed against all the petitioners for the ends of justice.

10. It is further submitted that the impugned proceeding does not disclose the essential ingredients required to constitute offences under Sections 420/406/34 of the Indian Penal Code as against the petitioners.

11. It is the case of the petitioners that they do not come within the ambit of "Employer" under the Indian Penal Code and as such they are liable to be discharged.

12. That the Learned 2nd Additional Chief Judicial Magistrate, Kalyani, District – Nadia failed to appreciate that the Managing Director, Directors and Managerial Personnel, not being liable for prosecution for alleged offence under Sections 420/406/34 of the Indian Penal Code had been settled by a decision of this Hon'ble High Court, Calcutta in ***S.K. Agarwal and others vs E.S.I., reported in 1985(1) CHN 113*** and

affirmed by the Hon'ble Supreme Court in ***E.S.I. –Verses – S. K. Agarwal, reported in 1998 Cal Cr. L.R.(SC) 396***.

13. That the Learned 2nd Additional Chief Judicial Magistrate, Kalyani, District Nadia also failed to appreciate that the two other recent decisions of the Hon'ble Supreme Court in **S.K. Alagh – Versus- State of Uttar Pradesh, reported in 2008(5) SCC 662 and Maksud Saiyed –Versus- State of Gujrat, reported in 2008(5) SCC 668** reinforce this position.

14. Thus the impugned order is unreasonable, illegal and not in accordance with law. As such the same is liable to be set aside and the proceedings against the petitioners is liable to quashed.

15. **Mr. Avik Ghatak has appeared for the State of West Bengal** and has placed the case diary along with a report as to the present status of the case.

16. **Mr. Debangan Bhattacharjee, learned counsel for the Opposite Party No. 2** on filing a written notes of argument has submitted that in the instant case, the petitioner no. 1 was admittedly the Chairman cum Managing Director. The petitioner no. 2 is the director and the petitioner no. 3 was the General Manager of M/S. Supreme Paper Mills Ltd. The complainant has initiated a complaint before the Officer In-Charge of the Chakdah Police Station on 25.11.2014 and categorically mentioned the name of the company in the letter of complaint. Moreover, after filing of the said complaint, the police authorities submitted the charge sheet wherein the petitioners no. 1, 2 and 3 have been arraigned as accused.

That a company is formed by resolution of Board of Directors and other governing body, authorizing such person as it thinks fit for the management and administration of the company. The directors and employers of the company are liable in the management of the company who run the day to day affairs of the company. The word “employer” as described under Section 2 (e) of the Employees Provident Fund Act states (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 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. The theme of the Section clearly states that a person who has ultimate control over the establishment will come under the purview of the employers.

17. It is further submitted that Section 405 of the IPC clearly indicates that an employer who deducts employees contribution from wages payable to them for credit to the provident fund or to the Employees’ State Insurance Fund is liable to face penal consequences if he makes default in the payment of such contribution. However, in a case under the Indian

Penal Code, 1860, the person liable to be prosecuted is one who at the time when the offence was committed was (i) in charge of the company (ii) responsible to the company for the conduct of its business. However, "mens rea" is one of the relevant facts which is an essential ingredient to constitute the offence. The investigating agency in this case has failed to produce Form 32 of the companies act, regarding the status of the directors or DRI 12 of the Companies Act from which it could be evident that who are the persons responsible at that relevant point of time and what was actual status during the period of committing the offence under Section 420/406 of the Indian Penal Code, 1860.

18. It is submitted that it is well settled in the judgment of ***M/S. Subarna Cooperative Bank Ltd. vs. State of Krnataka and Anr., in Criminal Appeal No. 1535 of 2021,*** wherein it was categorically stated non arraignment of a co-accused in the charge sheet cannot be a ground for quashing and the court may arraigned those person under Section 319 of Code of Criminal Procedure, 1973. It is also well settled in the judgment of the Hon'ble Apex Court in ***Union of India vs. Prakash P. Induja and Anr. Reported in 2003 (6) SCC 195,*** wherein it was also categorically mentioned that illegality in the investigation cannot be ground for quashing. A defense for irregularity in the investigation, however serious has no direct bearing on the procedure relating to the cognizance or trial. The situation can be considered from another angle. The basic principle of invoking the prosecution is not only against the company but against

the officers of the company being employer and who are in charge at that relevant time or who is or are conducting the affairs of the company. Since the company is an artificial and not aliving person, the person in charge of the company are held liable for the offence committed with regard to the conduct of the business of the company. In such circumstances, the application filed by the petitioner is liable to be dismissed.

19. On completion of investigation, Charge Sheet has been submitted against the petitioners (3) as directors of the company 'Supreme Paper Mills Ltd.'.

20. As noted in this Courts order dated 15.03.2019, the payments of the said dues were made on 27.11.2014, 29.11.2014, 02.12.2014 and 12.12.2014.

21. Written notes of argument has been submitted on behalf of the petitioners, relying upon the following judgments:-

I) **1985 (1) CHN, 113, S.K. Agarwalla & Ors, Vs ESI Corporation & Anr.**

> *"**6.** From the above explanation it would be abundantly clear that the employer, who deducts the employees' contribution shall be deemed to have been entrusted with the amount of contribution so deducted and he shall be deemed to have dishonestly misappropriated the said amount. In other words, the deeming provision applies to an 'employer'. 'Employer' has not been defined in the Indian Penal Code, and under the Act only 'immediate employer' and 'principal employer' have been defined, though there are some provisions like S 85 E and 85 C of the Act which speak of 'employer'.*
> ***7.** Under S. 85 (a) of the Act any person who fails to pay any contribution which under the Act, he is liable*

to pay, may be prosecuted and it may be prosecuted and it may be argued that since the liability to pay the contribution under S 40 of the Act is upon the 'Principal employer' anybody who comes within the definition of the 'principal employer' under the Act including a director who may answer to the description of 'occupier' may be prosecuted. Under S 406 of the Indian Penal Code however the deeming provision of explanation 2 to S 405 would apply only to an 'employer' and not to a 'Principal employer'. In absence of any definition of 'employer' under the Indian Penal Code the ordinary meaning to the term 'employer' has to be given and that necessarily means the person who employs. Under S. 11 of the Indian Penal Code the word 'person' includes any Company or association or body of persons whether incorporated or not and it necessarily follows that the Indo Japan Steel Ltd. which is an incorporated company will be the employer in respect of its employees.

8. *On behalf of the complainant a Division Bench judgment of the Punjab and Haryana High Court in the case of ESI Corporation vs Dhanda Engineering, reported in 1981 (42) FLR page 282 was relied upon to contend that the principal employer was also liable for prosecution under S. 406 of the Indian Penal Code. I have carefully gone through the judgment and I do not find any observation made therein to support the above contention. While referring to the explanation 2 to S 405 it was observed in the said judgment that by the said amendment a delinquent employer was brought within the ambit of the Indian Penal code. There cannot be any dispute about the observation so made, but the question that arises for consideration in this case was whether 'principal employer' can be equated with 'employer' in absence of any specific provision in the Indian Penal Code to warrant such equation. In that view of the matter the petitioners cannot be said to be 'employers' within the meaning of Explanation 2 to S 405 of the Indian Penal Code though they may be principal employers under the Act for which they might have been prosecuted under S. 85 of the Act."*

In appeal by the ESI Corporation, the Supreme Court upheld the decision of the Calcutta High Court in (1998 C Cr LR (SC) 396).

> *"9. 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.*
> *10. In any event, in the absence of any express provision in Indian Penal code incorporating the definition of "principal employer" in Explanation 2 to Section 405, this definition cannot be held to any 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 nct its directors either singly or collectively.*
> *11. In the premises we do not see any reason to interfere with the impugned judgment of the Calcutta High Court. The appeal is therefore dismissed."*

II) **Judgment in CRR 1678/2016 of Calcutta High Court.**

22. **On hearing the parties and considering the materials on record the following relevant facts are before this Court.**

a) FIR has been filed only against the petitioners, who are the directors of the company. Charge Sheet has also been filed only against them.

b) The company was not impleaded as an accused.

c) The provision under Section 14-B of the Employees provident fund act was not applied.

23. **Section 2(e) of the Employees' Provident Funds & Misc. Provisions Act (herein after referred to as 'EPF Act'), is reproduced here :-**

> *"**2. Definitions.** - In this Act, unless the context otherwise requires, -*

(a)……………….
(b)……………….
(c)……………….
(d)………………
(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, 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."

24. **In the present case the 'employer' is the company 'Supreme Paper Mills Ltd., but has not been made an accused nor charge sheeted.**

25. Admittedly Sec14-B of the EPF Act (a social beneficial legislation) has not been applied by the authorities.

26. The Supreme Court in **Horticulture Experiment Station Vs The Regional Provident Fund, Civil Appeal No(s). 2136 of 2012 on 23rd February, 2022 citing several precedents** held:-

> *"**17.** Taking note of three-Judge Bench judgment of this Court in Union of India and Others v. Dharmendra Textile Processors and others (supra), which is indeed binding on us, we are of the considered view that any default or delay in the payment of EPF contribution by the employer under the Act is a sine qua non for imposition of levy of damages under Section 14B of the Act 1952 and mens rea or actus reus is not an essential element for imposing penalty/damages for breach of civil obligations/liabilities."*

27. The complainant without taking recourse to the provision under Section 14-B of EPF Act opted to prosecute under Sections 420/406 of the Indian Penal Code.

28. **Section 14-B of the Employees' Provident Funds & Misc. Provisions Act, lays down:-**

> *"[**14B. Power to recover damages.—**Where an employer makes default in the payment of any contribution to the Fund [the [Pension] Fund or the Insurance Fund] or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 [or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of [any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, [the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf] may recover [from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:]*
> *[Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard:]*
> *[Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme.]"*

29. **The Supreme Court in Horticulture Experiment Station vs. The Regional Provident Fund (Supra)** further held:-

> ***"Any default or delay in payment of EPF contribution by the employer under the act is a sine qua non for imposition of levy of damages under Section 14-B of the Act".***

30. The Supreme Court in ***Dayle De' Souza Vs Government of India Through Deputy Chief Labour Commissioner (C) and Anr., in SLP (Crl.) No. 3913 of 2020, on October 29, 2021,*** held:-

> *"**27.** In terms of the ratio above, a company being a juristic person cannot be imprisoned, but it can be subjected to a fine, which in itself is a punishment. Every punishment has adverse consequences, and therefore, prosecution of the company is mandatory. The exception would possibly be when the company itself has ceased to exist or cannot be prosecuted due to a statutory bar. However, such exceptions are of no relevance in the present case. Thus, the present prosecution must fail for this reason as well."*

31. **Section 14-A of the Employees' Provident Funds & Misc. Provisions Act, lays down:-**

> *"[**14A Offences by companies .—***
>
> *(1) If the person committing an offence under this Act [,the Scheme or [the [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 the Act [, the Scheme or [the [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,—*
>
> *(i) "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.]"*

32. Paragraph 7 of ***S. K. Agarwalla & Ors. Vs ESI Corporation & Anr. (1985 (1) CHN 113)*** is reproduced once again for its relevance.

> *"**7.** Under S. 85 (a) of the Act any person who fails to pay any contribution which under the Act, he is liable to pay, may be prosecuted and it may be prosecuted and it may be argued that since the liability to pay the contribution under S 40 of the Act is upon the 'Principal employer' anybody who comes within the definition of the 'principal employer' under the Act including a director who may answer to the description of 'occupier' may be prosecuted. Under S 406 of the Indian Penal Code however the deeming provision of explanation 2 to S 405 would apply only to an 'employer' and not to a 'Principal employer'. In absence of any definition of 'employer' under the Indian Penal Code the ordinary meaning to the term 'employer' has to be given and that necessarily means the person who employs. Under S. 11 of the Indian Penal Code the word 'person' includes any Company or association or body of persons whether incorporated or not and it necessarily follows that the Indo Japan Steel Ltd. which is an incorporated company will be the employer in respect of its employees."*

33. Accordingly under Section 14A of the Employees' Provident Funds & Misc. Provisions Act, 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.

34. Thus it is the company 'Supreme Paper Mills Ltd.' herein who is 'employer' in respect of its employees and not the petitioners who as directors are not liable under Section 405(1) of the Indian Penal Code.

35. **CRR 410 of 2019 is thus allowed.**

36. The order dated 15.12.2018 passed by the Learned 2nd Additional Chief Judicial Magistrate, Kalyani, District Nadia, thereby rejecting the application of the petitioners for discharge made under Section 239 of the Code of Criminal Procedure, 1973, in G.R. Case No. 1819 of 2014, arising out of Chakdah Police Station Case No. 782 dated 26.11.2014 under Sections 420/406 of the Indian Penal Code, is hereby set aside and quashed.

37. There will be no order as to costs.

38. All connected Applications stand disposed of.

39. Interim order if any stands vacated.

40. Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.

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

(Shampa Dutt (Paul), J.)