

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 652 of 2019

Sri Sukumar Das

Vs.

State of West Bengal & Anr.

For the petitioner : Mr. Milon Mukherjee,
Mr. Biswajit Manna,
Mr. S. P. Tiwari.

For the Opposite Party no.2 : Mr. Shiv Chandra Prosad.

Heard on : 17.07.2023

Judgment on : 21.08.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of proceeding being G.R. No.13/16 in connection with Gorubathan Police Station Case No.02/16 dated 07.01.2016 under Section 406/409 of the Indian Penal Code pending in the Court of the learned Additional Chief Judicial Magistrate, Kalimpong.

2. The petitioner's case is that the petitioner is the Director of Subarnapur Tea Estate Pvt. Ltd. owner of Fagu Tea Estate having its registered office at South Colony, P.O. Mal, District-Jalpaiguri and its tea estate namely Fagu Tea Estate at P.O. Gorubathan, District-Darjeeling.

3. The said Company is the owner of the said tea estate and the employer within the meaning of Section 2(i) of the Employees' Provident Fund & Miscellaneous Provisions Act, 1952. The said company is covered by the Employees' Provident Fund & Miscellaneous Provisions Act, 1952, and has to pay provident fund dues under the provisions of the said Act in respect of the said tea estate.

4. The financial condition of the said company depends largely on the market conditions. If the market conditions are adverse the said company is unable to make payment of wages and other statutory dues. The company suffered primarily from high cost of labour and other inputs as also low price realisation of its product. However, payment of wages has been made first as a priority to make payment of wages, rations and other statutory dues. The provident fund payment is always made thereafter.

5. The said company has not defaulted in payment of wages. The said company has however, been unable to make timely payment of provident fund contribution towards the employees' share amounting to Rs.10,70,195/- for the period from April, 2015 to November, 2015 as it has been prevented by circumstances beyond its control from making payment of the said provident fund dues in time. However, the said company subsequently paid the total dues.

6. That pursuant to a complaint dated 07.01.2016 lodged by one Pradip Majumdar, Provident Fund Enforcement Officer, Siliguri before the Officer-in-Charge, Gorubathan Police Station, the petitioner was arrayed as an accused in Gorubathan Police Station case no.02 of 2016 dated 07.01.2016 for offences punishable under Sections 406/409 of I.P.C., for alleged non-

payment of employees' share of provident fund contribution for the period from April, 2015 to November, 2015. On the basis of the said complaint Gorubathan Police Station Case No.02/16 dated 07.01.2016 a criminal case being G.R. Case No.13/16 has been initiated and is pending against the petitioner in the court of the learned Additional Chief Judicial Magistrate, Kalimpong. The Sub-Inspector, Gorubathan Police Station submitted the final report/charge sheet on the basis of which the said learned Magistrate took cognizance of the said offences.

7. On 20.06.2016, the said company has paid Rs.12,38,588/- towards the employees' share for the said period and thereby cleared the dues in respect of the said employees' share amounting to Rs.10,70,195/- for the said period for which the said F.I.R. has been lodged and the said G.R. proceeding has been filed. The said payment has been received and accepted by the provident fund authority. Statement of accounts has been filed.

8. Mr. Milon Mukherjee, learned senior counsel, appearing for the petitioner has submitted that due to prolonged agitation and strike called by the Gorkha Janamukti Morcha headed by Sri Bimal Gurung from 15th June, 2017 to 4th October, 2017 the petitioner could not take any steps for modification of the order dated 21.03.2017.

9. Mr. Mukherjee further submits that it has been held by the Supreme Court in **Employees' State Insurance Corporation vs. S. K. Agarwal & Ors.** that in neither of the explanation under Section 405 of the Indian Penal Code there is found anything to the effect that the Directors of

the Company or an establishment may be prosecuted under Section 405 of Indian Penal code for the alleged commission of Criminal Breach of Trust.

10. In both explanations no.1 & 2 to Section 405 of Indian Penal Code, it is the person who is an employer and who deducts employees' contribution is responsible for commission of the offence.

11. It is further stated that a director cannot be termed as an 'employer'. It has been categorically stated by the Supreme Court that the word 'employer' does not include 'director'. In view of the above, the petitioner being the Director of the company cannot be said to have committed offence under Section 405 (explanation 1) punishable under Sections 406/409 of Indian Penal code and as such the petitioner cannot be prosecuted for commission of default if any by the company, **who is not an accused in this case in the criminal prosecution under Section 405 of the Indian Penal Code.**

12. It is also submitted that a Co-ordinate Bench of this Hon'ble Court in the case of **Satish Kumar Jhunjunwala vs. State of West Bengal reported in (2008) 3 CAL LT 484 (HC)** held that launching of prosecution against the directors of the establishment under Sections 406 and 409 of the Indian Penal Code for non-payment of employees' provident fund contribution is completely illegal and bad in law and the criminal proceeding was quashed. The aforesaid view was taken in the case of B.P. Gupta & Ors. vs. State of Bihar reported in 2000 Cr.L.J 781(Patna), R. L. Kanoria & Ors. vs. State of Another reported in 2003 C Cr. LR(Cal) 341 and Probhas Kumar Basu vs. State of West Bengal reported in (2012) 2 C Cr. LR(Cal) 615. Similar view was taken by this Hon'ble Court in an order

dated 18.12.2017 in CRR no.2885 of 2009 (Babulal Nahata & Ors. vs. State & Anr.) and in the order dated 17.11.2017 passed in CRR No.806 of 2014 (Rajib Jajodia & Anr. Vs. State of West Bengal & Ors.)

13. The petitioner being a 'Director' of the company is not an 'employer' under the Act, as it is the 'company' owning the tea estate which is the employer for the purpose of the said Act. In Indian Penal Code there is no provision for prosecution of the Directors by invoking the principle of vicarious liability.

14. The petitioner being a Director cannot be prosecuted under Sections 406 & 409 of the Indian Penal Code for non-deposit of Provident Fund Contribution of the employees' share and as such the said complaint, FIR and the charge sheet as well as the said proceeding are illegal and bad in law and as such the proceedings should be set aside/quashed.

15. It is further submitted that since the entire dues for which the said criminal case has been initiated has been paid and the same having been realized and/or accepted by the provident fund authority the said complaint and the said proceedings are illegal, bad, malafide, arbitrary, without jurisdiction and the same are issued in colourable exercise of power and the same should be withdrawn, set aside and/or cancelled/quashed.

16. The following judgments of coordinate benches of this Court has been relied upon on behalf of the petitioner:-

- i) *Raj Kumar Todi & Ors. vs The State of West Bengal & Anr., CRR 410 o 2019.***

- ii) Rajiv Jajodia & Anr. Vs The State of West Bengal & Anr., CRR 806 of 2014.*
- iii) Sri Anil Kumar Nahata vs State of West Bengal & Anr., CRR 425 of 2018.*
- iv) Malhati Tea & Industries Ltd. & Ors. vs State of West Bengal & Anr., CRR 755 of 2014.*

17. The period of default in this case is from April, 2015 to November, 2015. FIR was filed on 07.01.2016. Charge sheet has been filed on 30.06.2016 for offence punishable under Sections 406/409 of the IPC.

18. Receipts showing deposit for the total period of default and also for December, 2015 have been filed showing deposit of Rs.123858/- (dues with interest). Due shown in the FIR is Rs.10,70,195/- statement of accounts has been filed.

19. 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.

20. 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.”

21. In the present case the ‘employer’ is the company ‘Subarnapur Tea Estate Pvt. Ltd., but has not been made an ‘accused’ nor charge sheeted.

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

23. 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.”

24. The complainant without taking recourse to the provision under Section 14-B of EPF Act opted to prosecute under Sections 406/409 of the Indian Penal Code.

25. 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.]”

26. 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”.

27. 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.”

28. 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.]”

29. 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.”

30. 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.

31. Thus it is the company 'Subarnapur Tea Estate Pvt. Ltd.' herein who is 'employer' in respect of its employees and not the petitioner who is a director.

32. Thus the 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 made an accused 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 making the company also an accused in the case.

33. The revisional application being CRR 652 of 2019 is allowed.

34. The proceeding being G.R. No.13/16 in connection with Gorubathan Police Station Case No.02/16 dated 07.01.2016 under Section 406/409 of the Indian Penal Code pending in the Court of the learned Additional Chief Judicial Magistrate, Kalimpong, is hereby quashed.

35. All connected applications, if any, stands disposed of.

36. Interim order, if any, stands vacated.

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

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

(Shampa Dutt (Paul), J.)