

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 746 of 2019

Mr. Buddhadev Acharya

Vs.

State of West Bengal & Anr.

For the petitioner : Mr. Biswajit Manna,
Mr. S. P. Tiwary.

For the Opposite Party no.2/EPFO : Mr. Ramjee Singh.

Hearing concluded on : 17.08.2023

Judgment on : 14.09.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of proceeding being G.R. No.1079/18 in connection with Kotwali Police Station Case No.231/18 dated 22.03.2018 under Sections 406/409 of the Indian Penal Code pending in the Court of the learned Chief Judicial Magistrate, Jalpaiguri.
2. The petitioner's case is that the petitioner is the Ex-Director of the Amritapur Tea Company Limited owner of Raipur Tea Estate having its registered office at Raipur Tea Estate, Rangdhamali, P.O.

Jalpaiguri, PIN-735121 and its tea estate namely, Raipur Tea Estate at P.O. Rangdhamali, District-Jalpaiguri, Pin-735121.

3. The petitioner is a tea manufacturing expert. He was appointed as a Director to help the said sick garden to revive the said garden by dint of his vast experience as a tea plantation expert and he took no remuneration for the said service to the said tea garden.
4. The petitioner was appointed as a non-executive Director of the said company on 9th July, 2014. He resigned from the post of directorship of the said company on and from 25.07.2016. On 25.07.2016, the petitioner duly submitted his resignation letter dated 25.07.2016 to the Company and requested to intimate the concerned authorities in this regard. The said company duly received and accepted the said resignation letter dated 25.07.2016 and the said resignation was confirmed by the said company's acknowledgement by two emails dated 12.06.2018 and 22.07.2018.
5. The company has subsequently filed the Requisite Form DIR-12 belatedly committing delay in intimating the Ministry of Corporate Affairs about the petitioner's resignation and intentionally mentioned the resignation date effective from 27.06.**2018** instead of 25.07.**2016** which was the actual date of resignation. The company attached the petitioner's original resignation letter as the mandatory attachment to Form DIR-12 while stating a wrong date in the concerned clause xviii of the said form and attached a doctored resolution dated 27.06.2018 as evidence of cessation.

6. It is submitted that if the company had filed the said requisite form DIR-12 within the stipulated time i.e. within 30 days of the submission of the petitioner's resignation as per provisions of the Companies Act, 2013, then the MCA records would have been updated accordingly, effecting the actual date of the resignation i.e. 25.07.2016.
7. That the late filing of the said Form DIR-12 was a deliberate criminal act of breach of trust against the petitioner and a cruel and blatant abuse of the trust reposed by the petitioner on the company and its directors to ensure filing of Form DIR-12 related to the petitioner's resignation.
8. The petitioner lodged a complaint dated 20/21.11.2018 with the Registrar of Companies, West Bengal, Nizam Palace, 2nd MSO Building, 2nd Floor, 234/4, AJC Bose Road, Kolkata-700 020 as regards the aforesaid unlawful and fraudulent activities of the company. And also lodged an Online complaint with the said Registrar of Companies in this regard. The said complaints were duly received and accepted by the Registrar of Companies on November 23, 2018.
9. That one Mr. Subrata Gun stated to be Provident Fund Enforcement Officer, Employees' Provident Fund Organisation, Regional Office, Jalpaiguri lodged a complaint being FIR No.231/18 dated 22.03.2018 before the Officer-in-Charge, Kotwali Police Station stating that the said establishment, Raipur Tea Estate has not paid the employees' share of the provident fund contribution for the period from August,

2017 to November, 2017 and from January, 2018 to February, 2018 amounting to Rs.11,92,070/- in respect of the said tea estate and as such the petitioner is alleged to have committed offence under Section 405 of IPC punishable under Sections 406/409 of IPC. On the basis of the said Kotwali Police Station Case No.231/18 dated 22.03.2018 a criminal case being G.R. case No.1079/18 has been initiated against the petitioner in the Court of the learned Chief Judicial Magistrate, Jalpaiguri.

10. It is further stated that the petitioner **resigned** from the Directorship of the said company on and from **25th July, 2016** and the said **complaint** was filed on **22.03.2018** for alleged non-payment of employees' share of provident fund dues for the **period from August, 2017 to November, 2017 and from January, 2018 to February, 2018** which is the subsequent period, after the petitioner's resignation and as such the petitioner is not liable to pay the said provident fund dues for the said period and the said complaint, FIR as well as the said proceeding are illegal, bad in law and the same are liable to be quashed.
11. **That on or about 16.01.2019 the said company issued a letter to the Regional Provident Fund Commissioner, Jalpaiguri with a copy to the petitioner that the petitioner was in no way connected with the alleged non-payment of provident fund dues as mentioned in the FIR.**
12. That the said company is the owner of the said tea estate and the employer within the meaning of Section 2(e) of the Employees'

Provident Fund & Miscellaneous Provisions Act, 1952. The said company is covered by the Employees' Provident Fund & Miscellaneous Provisions Act, 1952. The said company has to pay provident fund dues under the provisions of the said Act in respect of the said tea estate.

13. **Mr. Biswajit Manna, learned counsel for the petitioner** has submitted that it has been held by **the Supreme Court in *Employees' State Insurance Corporation vs. S. K. Agarwal & Ors. reported in 1998 Cal Cr.LR (SC) 396***, that in neither of the explanation under Section 405 of the Indian Penal Code there is anything found to the effect that the Directors of the Company or an establishment may be prosecuted under Section 405 of the Indian Penal Code for the alleged commission of Criminal Breach of trust.
14. Mr. Manna submits that in both explanation No.1 and 2 to Section 405 of Indian Penal Code, it is the employer who deducts the employees' contribution, who is responsible for commission of the offence.
15. 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 Ex-Director of the Company cannot be said to have committed offence under Section 405 (Explanation 1) punishable under Sections 406/409 of the Indian Penal Code and as such the petitioner cannot be prosecuted for alleged commission of default in the criminal prosecution under Section 405 of the Indian Penal Code.

16. It is also submitted that this Hon'ble Court in the case of **Satish Kumar Jhunjunwala v. State of West Bengal reported in (2008) 3 CALLT 484 (HC)** held that launching of the prosecution against the Directors of the establishment under Sections 406/409 of the IPC 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 cases of **B.P. Gupta & Ors. vs. State of Bihar reported in 2000 Cr.LJ 781 (Patna)**, **R. L. Kanoria & Ors. vs. State & Anr. reported in 2003 C. Cr. LR (Cal) 341** and **Prabhas Kumar Basu vs. State of West Bengal reported in (2012) 2 C Cr.LR (Cal) 615**.
17. The petitioner being Ex-Director is not an 'employer' under the Act. In Indian Penal Code there is no provision for prosecution of the Director by invoking the principle of vicarious liability. Thus, the petitioner being the Director cannot be prosecuted under Sections 406 & 409 of the IPC for alleged non-deposit of Provident Fund Contribution of the employees' share and as such the said complaint and FIR as well as the said proceeding are illegal and bad in law and as such the same should be quashed.
18. It is submitted that the aforesaid criminal proceeding was initiated against the petitioner for alleged non-payment of Provident Fund Dues for the period from August, 2017 to November, 2017 and from January, 2018 to February, 2018 when the petitioner was not the Director of the said company, in view of the petitioner's resignation from the Directorship of the company with effect from 25.07.2016 and

It would be an abuse of process if the proceeding is allowed to proceed against the petitioner.

19. It is further submitted that the prosecution of the Directors by invoking the principle of vicarious liability is wholly unwarranted in the facts and circumstances of the case. The petitioner never possessed any 'mens rea' to commit offence as alleged in view of the petitioner's resignation as aforesaid.
20. **Supplementary affidavit** has been filed by the petitioner with documents to show that all outstanding dues for the period in this case has been cleared/paid.
21. **Mr. Ramjee Singh, learned counsel for the opposite party no. 2/provident fund authorities** has submitted that the petitioner in this case has made delayed deposit of the dues in the present case. Mr. Singh has further submitted that though payment has been made subsequently, the offences have been committed.
22. **From the materials on record**, it appears that the petitioner submitted his resignation on 25.07.2016 (with immediate effect).
23. By a reply e-mail dated 12.06.2018, one Mr. Gurushankar Raman, acknowledged the petitioner's resignation but has stated that it has been accepted (the resignation dated 25.07.2016) but effective from 27.06.2018, instead of immediate effect and by another mail dated 22.07.2018, stated that the petitioner was an independent Director.
24. **Section 168 of the Companies Act, lays down:-**

"168. Resignation of director.-

(1) A director may resign from his office by giving a notice in writing to the company and the Board shall

on receipt of such notice take note of the same and the company shall intimate the Registrar in such manner, within such time and in such form as may be prescribed and shall also place the fact of such resignation in the report of directors laid in the immediately following general meeting by the company:

Provided that a [director may also forward] a copy of his resignation along with detailed reasons for the resignation to the Registrar within thirty days of resignation in such manner as may be prescribed.

(2) The resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later:

Provided that the director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure.

(3) Where all the directors of a company resign from their offices, or vacate their offices under Section 167, the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in general meeting.

25. The Supreme Court in **Shiv Kumar Jatia vs. State of NCT of Delhi**,

Criminal Appeal nos. 1263, 1264 and 1265-1267 of 2019, held:-

“27. The liability of the Directors /the controlling authorities of company, in a corporate criminal liability is elaborately considered by this Court in the case of **Sunil Bharti Mittal**. In the aforesaid case, while considering the circumstances when Director/person in charge of the affairs of the company can also be prosecuted, when the company is an accused person, this Court has held, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. At the same time it is observed that it is the cardinal principle of criminal jurisprudence that there is no vicarious liability

unless **the Statute specifically provides for**. It is further held by this Court, an individual who has perpetrated the commission of an offence on behalf of the company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Further it is also held that an individual can be implicated in those cases where statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

29. By applying the ratio laid down by this Court in the case of **Sunil Bharti Mittal** it is clear that an individual either as a Director or a Managing Director or Chairman of the company can be made an accused, along with the company, only if there is sufficient material to prove his active role coupled with the criminal intent. Further the criminal intent alleged must have direct nexus with the accused. Further in the case of **Maksud Saiyed vs. State of Gujarat & Ors.** this Court has examined the vicarious liability of Directors for the charges levelled against the Company. In the aforesaid judgment this Court has held that, the Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company, when the accused is a Company. **It is held that vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the Statute.** It is further held that Statutes indisputably must provide fixing such vicarious liability. It is also held that, even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.

30. In the judgment of this Court in the case of **Sharad Kumar Sanghi vs. Sangita Rane** while examining the allegations made against the Managing Director of a Company, in which, company was not made a party, this Court has held that when the allegations made against the Managing Director are vague in nature, same can be the ground for quashing the proceedings under Section 482 of Cr.P.C. In the case on hand principally the allegations are made against the first accused-

*company which runs Hotel Hyatt Regency. At the same time, the Managing Director of such company who is accused no.2 is a party by making vague allegations that he was attending all the meetings of the company and various decisions were being taken under his signatures. **Applying the ratio laid down in the aforesaid cases, it is clear that principally the allegations are made only against the company and other staff members who are incharge of day to day affairs of the company.** In absence of specific allegations against the Managing Director of the company and having regard to nature of allegations made which are vague in nature, we are of the view that it is a fit case for quashing the proceedings, so far as the Managing Director is concerned.”*

26. **The period of default in the present case is clearly after the petitioner’s resignation.**

27. **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.

28. **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.”

29. **In the present case the ‘employer’ is the company ‘Amritapur Tea Company Ltd.’, but has not been made an ‘accused’ nor charge sheeted.**

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

31. 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.”

32. **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.**

33. **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.]”

34. **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”.

35. 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.”

36. 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.]”

37. 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.”

38. 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.

39. Thus it is the company 'Amritapur Tea Company Ltd.' herein who is 'employer' in respect of its employees and not the petitioner who is a director.
40. 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.
41. **The revisional application being CRR 746 of 2019 is allowed.**
42. The proceeding being G.R. No.1079/18 in connection with Kotwali Police Station Case No.231/18 dated 22.03.2018 under Sections 406/409 of the Indian Penal Code pending in the Court of the learned Chief Judicial Magistrate, Jalpaiguri, is hereby quashed.
43. All connected applications, if any, stands disposed of.
44. Interim order, if any, stands vacated.
45. Copy of this judgment be sent to the learned Trial Court for necessary compliance.

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

(Shampa Dutt (Paul), J.)