IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 790 of 2019

Raj Kumar Jain & Anr.

Vs

State of West Bengal & Anr.

For the Petitioners	: Mr. Biswajit Manna, Mr. S.P. Tiwary, Ms. Suparna Mallick.
For the State	: None.
For the EPF/Respondent No. 2	: Mr. Ramjee Singh.
Hearing Concluded on	: 30.08.2023
Judgment on	: 19.09.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of proceeding being Special Case No. 3/13 arising out of G.R. No. 2080/12 in connection with Nagrakata Police Station Case No. 69/12 dated 08.05.2012 under Sections 406/409 of the Indian Penal Code pending in the Court of the Learned 2nd Additional District & Sessions Judge, Special Court, Jalpaiguri.
2. The petitioners case is that the petitioners are the Directors of M/s. Nya Sylee Tea Estate Private Limited/owner of M/s. Nya Sylee Tea Estate having its registered office at 15B, Hemanta Basu Sarani, Kolkata – 700001 and its tea estate namely M/s. Nya Sylee Tea Estate at P.O. Nagrakata, District – Jalpaiguri, Pin – 735225.
3. The petitioners resigned from the post of directorship of the said company w.e.f. 03.07.2013, but the period of default is from December, 2011 to March, 2012 which is the period prior to their resignation.
4. The said company is the owner of the said tea estate and the 'employer' within the meaning of Sec- 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. The said company has to pay provident fund dues under the provisions of the said Act in respect of the said tea estate.

5. 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 imputes as also low price realisation of its product. However, payment of wages has been made fast as a priority, rations and other statutory duties. The provident fund payment is always made thereafter.

6. It is stated that 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. 14,74,435/- for the period from December, 2011 to March, 2012. The said company has been prevented by circumstances beyond its control from making payment of the said provident fund dues. However, the said company subsequently paid the said dues.

7. Pursuant to a complaint dated 08.05.2012 lodged by one Herman Topno. Provident Fund Enforcement Office, Jalpaiguri before the Officer-in-Charge, Nagrakata Police Station, the petitioners were arrayed as accuseds in Nagrakata Police Station Case No. 69/12 dated 08.05.2012 for offence punishable under Sections 406/409 of the Indian Penal Code, 1860 (G.R. Case No. 2080/12).

8. **Mr. Biswajit Manna, learned counsel for the petitioners** has submitted that the said payment has been received and accepted by the provident fund authority. The Assistant Provident Fund Commissioner

(Comp.), Employees' Provident Fund Organisation, Regional Office, Jalpaiguri issued a letter being no. ENF/RO/JPG/WB/1009/18/3030 dated 13.02.2018 to the said establishment confirming the said payment in full in connection with the Special Case no. 03/2013.

9. The petitioners being Directors of a company are not '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.

10. Thus, the petitioners being the Directors cannot be prosecuted under Sections 406 & Sec 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 same should be set aside/quashed.

11. **Mr. Ramjee Singh, learned counsel for the respondent no. 2** has submitted that **admittedly the dues in the present case has been paid subsequently,** but the ingredients required to constitute the offences with which the petitioners have been charged are on record and sufficient for the case to proceed toward trial.

12. 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.*
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> ***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."*

13. The period of default in the present case is prior to the petitioners resignation.

14. 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.

15. 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."*

16. In the present case the 'employer' is the company 'M/s. Nya Sylee Tea Estate Pvt. Ltd.', but has not been made an 'accused' nor charge sheeted.

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

18. 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."*

19. 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.

20. 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.]"*

21. 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".***

22. 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."*

23. 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.]"

24. 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."*

25. 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.

26. Thus it is the company 'M/s. Nya Sylee Tea Estate Pvt. Ltd.' herein who is 'employer' in respect of its employees and not the petitioner who is a director.

27. 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 Sections 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.

28. The revisional application being CRR 790 of 2019 is allowed.

29. The proceeding being Special Case No. 3/13 arising out of G.R. No. 2080/12 in connection with Nagrakata Police Station Case No. 69/12 dated 08.05.2012 under Sections 406/409 of the Indian Penal Code pending in the Court of the Learned 2nd Additional District & Sessions Judge, Special Court, Jalpaiguri, is hereby quashed in respect of the petitioners Raj Kumar Jain and Dilip Kumar Jain.

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

31. Interim order, if any, stands vacated.

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

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

(Shampa Dutt (Paul), J.)