CALCUTTA HIGH COURT CIRCUIT BENCH
AT JALPAIGURI
(Criminal Revisional Jurisdiction)
Appellate Side

Present:

The Hon'ble Justice Bibhas Ranjan De

C.R.R. 87 of 2021

Mehboob Habib Chinoy

Vs.

State of West Bengal & Anr.

With

CRR 86 of 2021

Mehboob Habib Chinoy

Vs.

State of West Bengal & Anr.

For the Petitioner :Mr. Krishnendu Gooptu, Adv.
Mr. Kanakendu Chatterjee, Adv.

For the State :Mr. Aditi Shankar Chakraborty, Adv.
Mr. Abhijit Sarkar, Adv. (CRR 86 of 2021)
Mr. Kallol Acharjee,Adv.(CRR 87 of 2021)

For the E.P.F. Organization :Mr. Bhaskar Roy Mahashaya

Heard on : July 12, 2023

Judgment on : July 14, 2023

Bibhas Ranjan De, J.

1. Both the revision application are taken up together by this common judgement for the identical issue involved in both the cases.

2. Aforesaid two revision applications under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as CrPC) were filed with a prayer for quashing the proceeding in connection with Matelli Police Station Case no. 95 of 2018 dated 27.06.2018 and 70 of 2016 dated 04.05.2016 corresponding to GR Case No. 2478 of 2018 & GR Case No. 1650 2016 respectively, under Section 406/409/34 of the Indian penal Code (herein after referred to as IPC).

3. Complaints were lodged before the officer-in-charge Matelli Police Station by the Enforcement Officer, Regional Office, Jalpaiguri against the M/s Kilcott TG, Duncans Industries Limited, and other Directors of the Company including the petitioner for non-remitting of the employees contribution after deducting the same from their salary/wages. The said company lodged FIR before the Metalli Police Station as PS Case no. 95 of 2018 dated 27.06.2018 & 70 of 2016 dated 04.05.2016 respectively and after investigation charge sheet

was submitted separately against M/s Kilcott TG (owners Duncans Industries Limited, Post Matialli, District Jalpaiguri), the petitioner of this case as well as one Gouri Prasad Goenka and Directors of the Company including petitioner of both the revisional application.

4. Ld. Advocate, Mr. Krishnendu Gooptu, appearing on behalf of the petitioner raised a question that whether Directors of a Company can be made answerable to the charge under Section 406/409 of the IPC. It is also submitted by Mr. Gooptu that Directors of the Company cannot be prosecuted for non-payment of employee's contributions under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (herein after referred to as Act). It is, next, submitted that the Director of the Company cannot be prosecuted in terms of settled principle reiterated by the Hon'ble Apex Court.

5. Mr. Gooptu, in support of his contention relied on the following cases:-

- ***Employees State Insurance Corporation Vs. S.K. Aggarwal and others*** reported in ***(1998) 6 Supreme Court Cases 288***,

- ***Rajiv Jajodia & Anr. Vs The State of West Bengal & Anr.*** reported in ***2017 SCC OnLine Cal 15563,***
- ***Prabhas Kumar Basu Vs. State of West Bengal*** reported in ***2012 SCC OnLine Cal 4306,***
- ***Satish Kumar Jhunjhunwala Vs. The State of West Bengal*** reported in ***2008 OnLine Cal 189.***

6. In opposition to that, Ld. Advocate, Mr. Aditi Shankar Chakraborty, Ld. APP along with Mr. Kallol Acharjee, appearing on behalf of the State has contended that petitioner, Director of the Company, being in charge of the administration deducted the employee's contribution but did not deposit the same to the Provident Fund Organization in violation of the Rules of the Act. Therefore, entrustment of money with the petitioner and misappropriation of the fund thereof cannot be disputed. According to Mr. Chakraborty, petitioner cannot be discharged from the proceeding which was ended in charge sheet.

7. In S.K. Aggarwal (supra) Hon'ble Apex Court ruled as under :-

> *"The respondents were, at the material time, Directors of a company M/s Indo-Japan Steel Ltd. The Company has a factory and Head Office at Calcutta. Under the provisions of Section 40 of the Employees' State Insurance Act, 1948, the "principal employer" is required to pay, in respect of every*

employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution. Under sub-section (2) of Section 40, the principal employer, in the case of an employee directly employed by him, is entitled to recover from the employee the employee's contribution by deduction from his wages. Under sub-section (4), any sum deducted by the principal employer from wages under this Act shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted. The complainant who is the appellant before us inspected the Head Office of the Company and found that the Company had deducted a sum of Rs 2,223.50 as the employees' share of contribution from their wages during the period February 1981 to September 1981. The employer, however, had failed to deposit the said amount in the Employees' State Insurance Fund within the specified time.

2. *Thereupon the appellant lodged a complaint against the respondents of criminal breach of trust under Section 405 Explanation 2 of the Penal Code, 1860 read with Section 406 of the Penal Code, 1860. On the basis of this complaint, the learned Magistrate took cognizance and issued summons against the respondents to stand trial. The learned Magistrate also issued a search warrant for seizure of certain records of the Company as prayed for by the complainant. Aggrieved thereby, the respondents filed an application under Sections 401/482 of the Criminal Procedure Code for quashing the proceedings in the said case. The High Court by its impugned judgment has quashed the proceedings on the ground that the respondents cannot be considered as “employers” within the meaning of Explanation 2 to Section 405 read with Section 406 of the Penal Code, 1860. Hence they were not liable for prosecution under Section 406. From this judgment, the present appeal has been filed by the original complainant.*

3. *Section 405 Explanation 2 is as follows:*

“405. Criminal breach of trust.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the

mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'.

*Explanation 1.—****

Explanation 2.—A person, being an employer, who deducts the employee's contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid."

Explanation 2 was inserted by the Employees' State Insurance Amendment Act 38 of 1975. Explanation 2 makes "a person being an employer" who deducts the employee's contribution from the wages payable to the employee liable for criminal breach of trust if he commits a default in the payment of such contribution to the Employees' State Insurance Fund. Under Section 11 of the Penal Code, 1860, the word "person" includes any company or association or body of persons whether incorporated or not. The High Court has held that the term "a person being an employer" in Explanation 2 to Section 405 of the Penal Code, 1860 can refer only to the company who had employed the employees in question. The directors of that company could not be considered as employers under Explanation 2 to Section 405 of the Penal Code, 1860. The complainant, however, contends that Explanation 2 to Section 405 of the Penal Code, 1860 should be read in the light of the Employees' State Insurance Act, 1948. Under Section 40 of the Employees' State Insurance Act, the obligation to pay contribution in the Employees' State Insurance Fund has been cast on the principal employer. The relevant provisions of Section 40 are as follows:

"40. Principal employer to pay contributions in the first instance.—(1) The principal employer shall pay in respect of

every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution.

(2) Notwithstanding anything contained in any other enactment but subject to the provisions of this Act and the regulations, if any, made thereunder, the principal employer shall, in the case of an employee directly employed by him (not being an exempted employee), be entitled to recover from the employee the employee's contribution by deduction from his wages and not otherwise:

Provided that no such deduction shall be made from any wages other than such as relate to the period or part of the period in respect of which the contribution is payable, or in excess of the sum representing the employee's contribution for the period.

*(3)****

(4) Any sum deducted by the principal employer from wages under this Act shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted.

*(5)***"*

The term "principal employer" has been defined in Section 2(17) of the Employees' State Insurance Act, 1948 as follows:

"2. (17) 'principal employer' means—

(i) in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under [the Factories Act, 1948 (63 of 1948)], the person so named;

*(ii)****

(iii) in any other establishment, any person responsible for the supervision and control of the establishment;"

Section 2(17) defines the "principal employer" in a factory as the owner or occupier of the factory. "Occupier" of a factory is *defined in Section 2(15) as having the same meaning assigned to it in the Factories Act, 1948. Section 2(n) of the Factories Act, 1948 as it stood at the relevant time, defined an "occupier" to mean the person who has ultimate control over the affairs of the factory. Section 100 of the Factories Act dealt with the determination of occupier in certain cases. Under sub-section (2), where the occupier was a company, any directors thereof could be prosecuted and punished for any offence for which the occupier was liable.*

4. *Section 2(17) of the Employees' State Insurance Act, however, defines the principal employer as either owner or occupier — taking care of all eventualities. When the owner of the factory is the principal employer, there is no need to examine who is the occupier. The owner will be the principal employer under Section 40.*

5. *The Employees' State Insurance Act does not define the term "employer" although under Sections 85-B and 85-C of that Act, the term "employer" is used.*

6. *The provisions of Section 40 in the light of these definitions have been considered by various High Courts in order to decide whether a director of a limited company can be considered as the principal employer liable to pay contribution under Section 40. A Division Bench of the Bombay High Court in the case Suresh Tulsidas Kilachand v. Collector of Bombay [1984 Lab IC 1614 : 1984 LLN 312 (Bom)] held that a director of a company by virtue of being a director is not the principal employer contemplated by Section 2(17) of the Employees' State Insurance Act. He is not personally liable to pay employer's contribution under the Act. In the context of Section 2(17) read with Section 2(15), the Court held that whether a person is occupier or not has to be ascertained with reference to whether he is in ultimate control over the factory. When the definition of principal employer in Section 2(17) refers to the "owner" or "occupier" of a factory, the principal employer can be either the owner or the occupier depending upon the facts of each case. When there is an owner of the factory, that owner must be considered as the principal employer liable for contribution.*

7. *Under Section 40 [sic 2(17)] the words "owner" and "occupier" have been used disjunctively. The Court also* *referred to Section 100 of the Factories Act and said that even under the Factories Act, 1948, the legislature has clearly contemplated that in the case of a factory, a company can be the "occupier". Therefore, when the owner of a factory is a company, it is the company which is the principal employer and not its director. The Bombay High Court overruled the judgment of the Single Judge of the Bombay High Court in so deciding.*

8. *The same view has been taken by the Madhya Pradesh High Court in the case of ESI Corpn. v. Kailashchandra [1989 Lab IC 760 (MP)] . The Madhya Pradesh High Court also said that when there is a default in the payment of contribution by the company, the managing director, or other directors cannot be made personally liable. The contribution can be recovered from the company as the principal employer.*

9. *In the case of ESI Corpn. v. Gurdial Singh [1991 Supp (1) SCC 204 : 1991 SCC (L&S) 833 : 1991 Lab IC 52] this Court held that the directors of a private limited company were not personally liable to pay contributions under the Employees' State Insurance Act, 1948. The Court was considering a case where a private limited company was the owner of the factory and the occupier of the factory had been duly named under the Factories Act, 1948. The Court said that the directors did not come within the definition of clause 1 of Section 2(17) of the Employees' State Insurance Act. This Court also disapproved of the decision of a Single Judge of the Bombay High Court which has been subsequently overruled by the Division Bench of the Bombay High Court in the case of Suresh Tulsidas Kilachand v. Collector of Bombay [1984 Lab IC 1614 : 1984 LLN 312 (Bom)] .*

10. *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 Penal Code, 1860, 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.*

11. *In any event, in the absence of any express provision in the Penal Code, 1860 incorporating the definition of "principal employer" in Explanation 2 to Section 405, this definition*

> *cannot be held to apply 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 not its directors, either singly or collectively.*
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> ***12.*** *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."*

8. The matter of liability of the Director of the company has been expounded with clarity in the above ratio and requires no further clarification. I am in respectful agreement with the above ratio while issue raised in the case in hand is almost identical to that of the case dealt with by the Hon'ble Apex Court.

9. Aforesaid observation of the Hon'ble Apex Court was repeatedly relied on by this court in ***Satish Kumar Jhunjhunwala*** (supra) ***Pravas Kumar Basu*** (supra) & **Rajiv Jajodia** (supra).

10. Therefore, by any stretch of imagination, I am unable to come to any conclusion that petitioner being director of the company is liable to be prosecuted under Section 406/409/34 of the IPC for non-payment of employees contribution under the Act.

11. Accordingly, both the revisional applications are allowed and quashed the criminal proceeding pending against the petitioner **only** in connection with GR Case No. 2478 of 2018 corresponding to SPL 02/2019 & GR Case No. 1650 2016 corresponding to SPL 36/2016 pending before the Additional Session Judge, 2nd Court, Jalpaiguri.

12. For the reasons, the revisional applications being CRR 87 of 2021 & CRR 86 of 2021 stand disposed of.

13. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

[BIBHAS RANJAN DE, J.]