IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 4320 OF 2022

1. Yogiraj Vaijanath Chidre
2. Mangesh Manohar Yernale
3. Basavraj Ramakant Malshete ..APPLICANTS

VERSUS

1. State of Maharashtra
2. Enforcement Officer,
   Employees Provident Fund Organisation,
   Solapur ..RESPONDENTS

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Mr. S.V. Natu, Advocate for applicants
Mr. N.T. Bhagat, A.P.P. for respondent no.1 – State
Mr. N.K. Choudhari, Advocate for respondent no.2

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CORAM : R.G. AVACHAT AND SANJAY A. DESHMUKH, JJ
RESERVED ON : 30th JUNE, 2023
PRONOUNCED ON : 05th JULY, 2023

ORDER (PER : R.G. AVACHAT, J.) :

1. This application, under Section 482 of Code of Criminal Procedure, has been filed for quashment of First Information Report (‘F.I.R.’), being Crime No. 355 of 2017 registered with Udgir Police Station for the offences punishable under Sections 420, 406, 409, 114 and 109 read with Section 34 of the Indian Penal Code (‘I.P.C.’) and consequential charge-sheet filed in R.C.C. No. 96 of 2018 pending on the file of J.M.F.C., Udgir.

2. Case of the prosecution, as is disclosed from the police papers is as under :-

The informant – Respondent No.2 was serving as Inspector, Employees Provident Fund. She paid visit to M/s Rudrani Health Care Services Ltd. and found that employees' contribution deducted from their salary towards provident fund was not deposited in the provident fund account, during the period April 2015 to June 2015 and August 2015 to December 2015. The applicants herein had deducted the said amount worth Rs.3,41,831/-. As such, it is an offence of criminal breach of trust, punishable under Section 406 of the I.PC. On investigation, charge-sheet has been filed against the applicants herein.

3. Learned counsel for the applicants relied on judgments of the Apex Court in case of ***Employees' State Insurance Corporation Vs. S.K. Aggarwal and Ors. (1998) 6 SCC 288*** and ***S.K. Alagh Vs. State of Uttar Pradesh and Ors. (2008) 5 SCC 662*** to ultimately urge for grant of relief as prayed for.

4. Learned counsel for Respondent No.2 – informant, on the other hand, submits that the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ('the Act of 1952') was enacted to provide social security to the industrial workers. The security defers from security provided under

the Employees' Compensation Act or the Employees' State Insurance Act. According to him, the act provides for compulsory deduction from the salary of employees and equal contribution from the employer. The amount has to be deposited with the office of Employees' Provident Funds Organisation by the employer. Even a single day's delay in depositing the amount invites penal consequence. Learned counsel would further submit that M/s Rudrani Health Care Services Ltd. is a hospital. Names of the applicants figure as whole-time Additional Directors in the Form 5-A provided under the Employees' Provident Funds Scheme, 1952 ('the Scheme of 1952'). The said form is in the nature of return of ownership. These applicants were responsible for the day-to-day management of the establishment. It is these applicants, who have deducted the amount and retained with them without depositing the same with the office of Employees' Provident Fund. He would further submit that submission of Form 5-A is a mandatory compliance of Para 36(a) of the Scheme of 1952. He would further submit that the fact that amount was deducted and has ultimately not been deposited for certain period is an admitted fact. It is, therefore, for the trial Court to proceed with the matter and decide whether the offence was made out against the applicants herein. Learned counsel relied on Apex Court judgment in case of ***Srikanta Datta Narasimharaja Wodiyar Vs. Enforcement Officer, Mysore (1993) 3 SCC 217***. He would further submit that facts of the cases relied on by learned counsel for the applicants are quite distinguishable. There was no reference to Para 36(a) and Form No. 5-A. According to him, depositing the amount lateron does not wipe out the offence committed. He, therefore, ultimately urged for dismissal of the application.

5. Considered the submissions advanced. Perused the F.I.R. and related police papers. Also perused the authorities relied on.

6. M/s Rudrani Health Care Services Ltd. is an establishment within the meaning of the Act of 1952. Section 2(e)(ii) thereof defines "employer" as :-

> *"2(e) "employer" means -*
>
> *(i) ...*
>
> *(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;"*

7. Para 29 of the Scheme of 1952 speaks of contribution paid by the employer. Admittedly, employees' contribution towards provident fund had been deducted, but was not deposited with the office of Employees' Provident Funds for little over 4-5 months. Penal consequence therefor gets invoked. True, names of the present applicants were submitted by the establishment in the prescribed format i.e. Form 5-A describing them to be whole time Directors and Additional Directors as well. Their designations itself indicate

them to have been in the management and control of overall affairs of the establishment. The facts and circumstances of the case may prima facie be sufficient to proceed against them for the offence/s under the Act of 1952 and/or the Scheme of 1952.

8. In the present case, the applicants are sought to be prosecuted for the offence punishable under Section 406 of I.P.C. The legal position in this regard is no longer *res integra*. Undisputedly, the establishment – M/s Rudrani Health Care Services Ltd. is a private limited company. It would, therefore, be a "**Person**" within the meaning of definition of term "Person" given in Section 11 of the I.P.C. Section 405 of the I.P.C. reads thus :-

> *"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 willfully suffers any other person so to do, commits "criminal breach of trust".*
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> *Explanation [1].- A person, being an employer of an establishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law*

for the time being in force, shall be deemed to have been entrusted with the amount for 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 law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid."

9. Apex Court in case of S.K. Aggarwal (supra) has observed thus : -

> *"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 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 as the Head Office.*
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> *11. In any event, in the absence of any express provision in the Indian Penal Code 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."*

10. For the purpose of Explanation 1 to Section 405 of I.P.C., M/s Rudrani Health Care Services Ltd. is an employer. The company is not an accused in the case in hand. The facts of the case (Srikanta Datta Narasimharaja) relied on by learned counsel for Respondent No.2 –

informant, were in relation to an offence under the Act of 1952 and not under I.P.C. The case has, therefore, no application to the case in hand.

11. Relying on the judgments of Apex Court [S.K. Aggarwal and S.K. Alagh (supra)], in our view, the applicants herein being not an "employer" within the meaning of Explanation 1 to Section 405 of I.P.C. and company being not an accused in the case, proceeding against the applicants herein for the alleged offence would be a sheer abuse of process of Court. We are, therefore, inclined to allow the application.

12. In the result, criminal application is allowed in terms of prayer clause (B).

(SANJAY A. DESHMUKH, J.) **(R.G. AVACHAT, J.)**

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