

**IN THE HIGH COURT AT CALCUTTA  
CRIMINAL REVISIONAL JURISDICTION  
APPELLATE SIDE**

**Present:**

**The Hon'ble Justice Ananya Bandyopadhyay**

**C.R.R. 1548 of 2011**

**Narendra Kumar Bajoria @ N.K. Bajoria  
-Vs-  
The State of West Bengal & Anr.**

|                    |                                                     |
|--------------------|-----------------------------------------------------|
| For the Petitioner | : Mr. Biswajit Manna<br>Mr. S.P. Tiwary             |
| For the State      | : Mr. Suman De                                      |
| For the O.P. No. 2 | : Mr. Yogesh Kr. Sharma<br>Mr. Anil Kumar Gupta     |
| Heard on           | : 02.04.2024, 24.04.2024, 07.05.2024,<br>06.09.2024 |
| Judgment on        | : 12.12.2024                                        |

**Ananya Bandyopadhyay, J.:-**

1. The instant revisional application has been filed by the petitioner praying for quashing of the proceeding being G.R. No. 368/07 in connection with Kalchini P.S. Case No. 28/07 dated 26.04.2007 under Sections 406/409 of the Indian Penal Code, pending before the Learned Additional Chief Judicial Magistrate, Alipurduar.
2. The prosecution case originated on the basis of a complaint being F.I.R. No. 28/07 dated 26.04.2007 lodged by the opposite party no. 2, the Provident Fund Enforcement Officer, Jalpaiguri at the Kalchini Police Station, Kalchini,

Jalpaiguri alleging the fault of the petitioner for not paying the employees' share of provident fund contribution amounting to Rs.2,21,952/- for the month of March, 2007 in respect of the said tea estate and as such the said tea estate and the petitioner committed an offence under Section 405 of the Indian Penal Code punishable under Section 406/409 of the Indian Penal Code.

3. On the basis of the aforesaid Kalchini Police Station Case No. 28/07 dated 26.04.2007, G.R. Case No. 368/07 has been initiated against the petitioner.
4. The Learned Advocate representing the petitioner submitted as follows:-
  - i. Since the word 'employer' does not include any director and chairman and launching of prosecution against the petitioner as director was illegal and not maintainable in law.
  - ii. In both Explanations No. 1 and 2 to Section 405 of Indian Penal Code it is the person who is the employer and who deducts employees contribution is responsible for commission of the offence. Directors cannot be termed as employers. The petitioner being the director at the time of filing of the said complaint and FIR and now ex-director of the company cannot be said to have committed an offence under Section 405 (Explanation 1) punishable under Section 406/409 of Indian Penal Code.
5. The Learned Advocate representing the petitioner relied upon the following decisions:-
  - i. 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.

- ii. This Hon'ble Court in the case of *Satish Kumar Jhunhunwala v. State of West Bengal* reported in (2008) 3 CAL LT 484(HC) held that launching of the prosecution against the director of the establishment under 406 and 409 of the Indian Penal Code for nonpayment of Employees' Provident Fund Contribution is completely illegal and bad in law and the criminal proceeding was quashed.
- iii. This Hon'ble Court in the case of *Jasoda Glass Silicate Vs. Regional Provident Fund Commissioner*, reported in 2002(2) CHN 407 has in explicit terms laid down that where the provident fund dues has already been deposited with the authority and the same has been accepted by the authority, no purpose would be served by continuing the proceeding and as such the same should be dropped by the concerned Magistrate. This principle has been subsequently followed by this Hon'ble Court on a number of occasions.
- iv. The Hon'ble Apex Court has also in the case of a *Adony Cotton Mills* categorically laid down that when dues have been deposited with the authorities, no useful purpose would be served by continuation of the proceeding and the Hon'ble Apex. Court was pleased to quash the proceeding.

- v. The aforesaid Criminal proceeding was initiated against the petitioner for nonpayment of Provident fund dues which was subsequently paid by the company which made default. In the premises the cause of action for initiating the said Criminal Proceedings and/or continuation of the same is *non est*. It would be abuse of process of Court if the proceedings are allowed to proceed further against your petitioner.
  - vi. The institution of the criminal case and its continuance is an abuse of the process of Court and for the ends of justice the same is liable to be quashed.
6. Considered the rival contentions of the Learned Advocates representing the opposite party no.2 as well as the State.
  7. Pertinently the company had deposited the dues amounting to Rs.2,21,952/- duly accepted by the Provident Fund Authority.
  8. The relevant portion of the complaint dated 26.04.2007, lodged by the Enforcement Officer, Provident Fund, Jalpaiguri to the Officer-in-Charge, Kalchini P.S., is reproduced herein below:-

*“2. Under paragraph 38(1) of the employees, Provident Funds Scheme, 1952 and paragraph 12 of the Employees Pension Scheme, 1995 framed under the Act, the employer in relation to an establishment covered under the act are required to deduct the members share of provident fund/provident fund contributions from the wages of member employees and remit the amount into the State Bank of India to the credit of E.P.F. Accounts within fifteen days from the close of the month for which the contributions were deducted.*

*3. Paragraph 32(3) of the Employees Provident Funds Scheme, 1952 and Paragraph 12(3) of the Employees Pension Scheme, 1995 stipulate that any sum deducted under the schemes by an employer from the*

wages of an employee shall be deemed to have been entrusted to him for the purpose of paying the contributions in to the Fund in respect of which it was deducted.

4. By Central Act 40 of 1973 which received the assent of the President of India on 6<sup>th</sup> September, 1973 (Act came into force with effect from 01.11.1973, the following explanations have been added to Section 405 of the Indian Penal Code.

*Explanation:* A person being an employer who deducted to Employees, contributions from the wages payable to the employees for credit to Employees Provident Funds/Employees Pension Funds established by law for the time being in force, shall be deemed to have been entrusted with the amount of the contributions. So deducted by him and if he makes default in the payment of such contributions to the said fund in violation of the said law shall be deemed to have dishonestly, used to amount of the said contribution in violation of law as aforesaid.

5. The employer has deducted the members share of Provident Fund Contributions from the wage of employees for the months of 03/07. The month wise total of each deduction are furnished below-

| Month | Employees share of contributions towards Provident Fund Account No.1 |
|-------|----------------------------------------------------------------------|
| 03/07 | Rs.221952.00/-                                                       |
| Total | Rs.221952.00/-                                                       |

6. As the amount deducted from the employees have not been remitted to the E.P.F. Accounts maintained by the State Bank of India, they have committed the offence of Criminal Breach of Trust. Hence, action may please be taken to file complaints under Section 406/409 of the Indian Penal Code against the employer.

7. The establishment is situated within the jurisdiction of Kalchini P.S.

8. It is suggested that the relevant wages registers in possession of the establishment be searched and seized forthwith as they will be material evidence in support of the prosecution.

*9. It may also be mentioned that conviction under the Employees Provident Funds and Miscellaneous Provisions Act, 1952 will not stand as an impediment to the Police proceedings against the establishment under the provisions of the Indian Penal Code.”*

9. Section 406 of the Indian Penal Code states as follows:-

**“406. Punishment for criminal breach of trust.**—Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”

10. Section 409 of the Indian Penal Code states as follows:-

**“409. Criminal breach of trust by public servant, or by banker, merchant or agent.**—Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

11. Section 2(e) of the Employees’ Provident Funds and Miscellaneous Provisions Act, 1952 stated as follows:-

**“2. Definitions. - In this Act, unless the context otherwise requires, (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 (63 of 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;”*

12. In **S.K. Alagh v. State of U.P.**<sup>1</sup>, the Hon’ble Supreme Court held the following:-

**16.** *The Penal Code, save and except some provisions specifically providing therefor, does not contemplate any vicarious liability on the part of a party who is not charged directly for commission of an offence.*

**17.** *A criminal breach of trust is an offence committed by a person to whom the property is entrusted.*

**18.** *Ingredients of the offence under Section 406 are:*

*“(1) a person should have been entrusted with property, or entrusted with dominion over property;*

*(2) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or wilfully suffer any other person to do so;*

*(3) that such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.”*

13. In **HDFC Securities Ltd. v. State of Maharashtra**<sup>2</sup>, the following was held by the Hon’ble Supreme Court:-

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<sup>1</sup> (2008) 5 SCC 662

<sup>2</sup> (2017) 1 SCC 640

**“19.** *The learned counsel for the respondents have not rebutted this issue in any of his arguments. With the meticulous understanding of the orders of the courts below in the instant case, we can see that general and bald allegations are made in the context of Appellant 1 who is a juristic person and not a natural person. The Penal Code, 1860, does not provide for vicarious liability for any offence alleged to be committed by a company. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor e.g. the Negotiable Instruments Act, 1881. Further, reliance was made on S.K. Alagh v. State of U.P. [S.K. Alagh v. State of U.P., (2008) 5 SCC 662 : (2008) 2 SCC (Cri) 686] , wherein at para 16, this Court observed that : (SCC p. 666)*

*“16. The Penal Code, save and except some provisions specifically providing therefor, does not contemplate any vicarious liability on the part of a party who is not charged directly for commission of an offence.”*

**20.** *Further in Maksud Saiyed v. State of Gujarat [Maksud Saiyed v. State of Gujarat, (2008) 5 SCC 668 : (2008) 2 SCC (Cri) 692] , at para 13, this Court observed that : (SCC p. 674)*

*“13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. 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 the company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes*

*indisputably must contain provision fixing such vicarious liability. 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.”*

**21.** *In Thermax Ltd. v. K.M. Johnny* [Thermax Ltd. v. K.M. Johnny, (2011) 13 SCC 412 : (2012) 2 SCC (Cri) 650] and in *Sunil Bharti Mittal v. CBI* [Sunil Bharti Mittal v. CBI, (2015) 4 SCC 609 : (2015) 2 SCC (Cri) 687] , at para 39, this Court held : (Thermax Ltd. case [Thermax Ltd. v. K.M. Johnny, (2011) 13 SCC 412 : (2012) 2 SCC (Cri) 650] , SCC p. 429)

*“39. Apart from the fact that the complaint lacks necessary ingredients of Sections 405, 406, 420 read with Section 34 IPC, it is to be noted that the concept of “vicarious liability” is unknown to criminal law. As observed earlier, there is no specific allegation made against any person but the members of the Board and senior executives are joined as the persons looking after the management and business of the appellant Company.”*

14. In **Thermax Ltd. v. K.M. Johnny**<sup>3</sup>, the Hon’ble Supreme Court held the following:-

**“32.** *In S.K. Alagh v. State of U.P.* [(2008) 5 SCC 662 : (2008) 2 SCC (Cri) 686] , this Court considered the ingredients of Sections 405 and 406 IPC—criminal breach of trust and vicarious liability. In the said decision, after finding that the complaint petition did not disclose necessary ingredients of criminal breach of trust as mentioned in Section 405 IPC and also pointing out the ingredients of offence under Section 406 IPC, interfered with the order passed by the High Court.

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<sup>3</sup> (2011) 13 SCC 412

**33.** *In Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd.* [(2010) 10 SCC 479 : (2011) 1 SCC (Cri) 68] , after perusal of the complaint, allegations therein, role of the Directors mentioned therein and applicability of Section 34 IPC, this Court in para 35 concluded as under : (SCC p. 491)

“35. It is manifest that common intention refers to a prior concert or meeting of minds, and though it is not necessary that the existence of a distinct previous plan must be proved, as such common intention may develop on the spur of the moment, yet the meeting of minds must be prior to the commission of offence suggesting the existence of a prearranged plan. Therefore, in order to attract Section 34 IPC, the complaint must, prima facie, reflect a common prior concert or planning amongst all the accused.”

15. The following was held by the Hon<sup>ble</sup> Supreme Court in ***Sham Sunder v. State of Haryana***<sup>4</sup>:-

“9. But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold.”

16. The petitioner functioning as a director presently being an ex-director does not fall within the ambit of employer as defined under the provisions of the aforesaid Act to attract liability to be criminally prosecuted since the Tea company as aforesaid had not been made a party.
17. The petitioner in his individual capacity shall not be liable to be indicted in absence of the company as aforesaid being impleaded.

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<sup>4</sup> (1989) 4 SCC 630

18. In view of the observation of the Hon'ble Supreme Court in the aforesaid decisions, the theory of vicarious liability is not applicable in criminal cases therefore without the company being impleaded as a party the petitioner cannot be proceeded against any criminal liability which he is under the statute inculpable of.
19. To allow to continue with the instant criminal proceedings would result in abuse of the process of law.
20. In view of the above discussions, the proceeding being G.R. No. 368/07 in connection with Kalchini P.S. Case No. 28/07 dated 26.04.2007 under Sections 406/409 of the Indian Penal Code, pending before the Learned Additional Chief Judicial Magistrate, Alipurduar is quashed.
21. Under such facts and circumstances, the instant criminal revisional application being CRR 1548 of 2011 is allowed.
22. Accordingly, CRR 1548 of 2011 is disposed of. Connected application, if any, also stands disposed of.
23. There is no order as to costs.
24. Case Diary, if any, to be returned forthwith.
25. Let the copy of this judgment be sent to the Learned Trial Court as well as the police station concerned for necessary information and compliance.
26. All parties shall act on the server copy of this judgment duly downloaded from the official website of this court.

**(Ananya Bandyopadhyay, J.)**