IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

CRR 2148 of 2022

Monika Bhattacharya
Versus
The State of West Bengal & anr.

For the Petitioner	:	Mr. Sabyasachi Banerjee Ms. Minal Palana Ms. Pratiti Das
For the State	:	Mr.Madhusudan Sur, Ld. APP Mr. Manoranjan Mahata
For the opposite party no.2	:	Mr. Rajib Ray Ms. Oishane Ghosh
Heard on	:	23.09.2024
Judgment on	:	20.11.2024

<u>Dr. Ajoy Kumar Mukherjee , J.:</u>

1. The petitioner has preferred this Application challenging the impugned proceeding being G.R. Case no. 2485 of 2018, presently pending before the court of learned Additional Chief Judicial Magistrate, Barasat thereby prayed for quashing the charge sheet submitted in the said proceeding. The court below after submission of charge sheet took cognizance of offence punishable under section 406 of the Indian Penal Code.

2. Brief background of the present case is that on 11.12.2018 the opposite party no.2 herein who is an enforcement officer, the Employees Provident Fund Organization (EPFO), being the defacto complainant herein lodged a complaint against M/s Sudhir Memorial Institute and the petitioner and another for not depositing the employees share of provident fund for the period from June, 2018 to October, 2018,inspite of deducting a sum of Rs. 7,65,067/- from the salary/wages of the employees, in violation of section 6 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter called as Act of 1952) read with paragraph 38 of Employees Provident Fund Scheme,1952.

3. On the basis of said complain, aforesaid Mahdyamgram P.S. case no. 694 of 2018 was initiated on 11.12.2018 and after completion of investigation police has also submitted charge sheet in connection with the above-mentioned case against the petitioner herein and Dr. Subrata Bhattacharya under section 406 of IPC on 31.01.2019.

4. It is submitted by Mr. Banerjee, learned counsel appearing on behalf of the petitioner that Dr. Subrata Bhattacharya (since deceased) was the founder of the Panchajannya Trust vide Trust Deed dated 19th May, 1998 for educative and vocational pursuits and the petitioner herein is the trustee of said Panchajannya Trust. He further argued that in consonance of the object of the establishment of the said trust, a separate independent and distinct unit of the Panchajannya Trust, to impart education in the name and style of "Sudhir Memorial Institute" was established under the

Panchajannya Trust in the year 2018 by way of a supplementary deed of trust dated 03.05.2018 and the petitioner is one of the directors of said Sudhir Memorial Institute. Mr. Banerjee further argued that the Panchajannya Trust is covered under the Act of 1952 and is registered with the Employees Provident Fund Organization with the code no. WB/TLO/35172.

5. Mr. Banerjee argued that M/S. Sudhir Memorial Trust had paid the entire dues of employees share for Rs. 7,57,941/- for the period from June, 2018 to October, 2018 on 15.12.2018 and the same has been duly informed to the chairman, Provident Fund Commissioner,but even after making the aforesaid payment, a charge sheet has been submitted by investigating officer against the petitioner under section 406 of the code.

6. While dealing with the infirmities in the charge sheet, Mr. Banerjee argued that the Panchajannya Trust, being registered with the Employees Provident Fund Organization is entitled to deduct employees share of provident fund from the salary of the employees and deposit it with the provident fund and as such the petitioner cannot be held liable for deduction of the employees share of provident fund and deposit of the same with the provident fund office. He further argued that no specific liability is imposed on the officers of the institute in the charge-sheet and the complaint as well as the charge sheet fails to spell out the specific role attributed to the petitioner in the commission of the offence. Even if any offence has been committed,it has been committed by the Panchajannya Trust, being the employer and in absence of any provision of vicarious liability of the officers of the organization, no person other than the Trust can be prosecuted under the Code.

7. Mr. Banerjee further argued that since immediate after inspection and detection, the petitioners have deposited the entire outstanding dues on 15.12.2018, therefore it cannot be said that the petitioner has misappropriated the employees share of the contribution to be deposited to the credit of the provident fund.

8. Mr. Banerjee strenuously argued that it is settled principle of law that in absence of the company being made a party the proceeding cannot continue against the directors of the company, when the statute does not provide for vicarious liability. In the present context Panchajannya Trust which is the employer has not been made an accused and for which also the impugned proceeding against the petitioner is bad in law and is liable to be set aside.

9. He further contended that the word “employer” as has been defined in the Act of 1952 means owner or occupier of the factory which may include Directors. However, in the absence of any express provision in the Code incorporating the definition of principal employer in explanation 1 of section 405 of IPC, the said definition cannot be held to apply to the term “employer” in Explanation 1 to section 405 of the Code. He stressed that the term “employer” in Explanation 1 must be understood as in ordinary parlance and in ordinary parlance it is the company which is the employer and not its directors either singly or collectively.

10. In the present case opposite party no. 2 has roped the petitioner herein in the impugned proceeding but in committing the offence alleged,in the instant case, no specific liability has been attributed against the officers of the organization. He contended that no persons other than the company can be prosecuted under the impugned FIR and in this context he relied upon the judgment of ***Ravindranath Bajpe Vs. Mangalore Special Economy Zone Ltd. and others*** reported in ***2021 SCC OnLine SC 806***. The petitioner being the director of Sudhir Memorial Institute is the employee of the institute and therefore cannot be called as employer who deducts the employees' share of contribution from the salary of its employees as stated in the FIR.

11. Mr. Banerjee also argued that inspite of all these, after registration of FIR and upon notice, the payment towards employees' contribution of provident fund has been made by Sudhir Memorial Institute and in such a situation the Apex court was pleased to quash the prosecution initiated against the company for default in payment of provident fund on payment made by the company.

12. In this context he relied upon the case of ***Adony Cotton Mills Ltd. and others Vs. Regional Provident Fund Commissioners and others*** reported in **1995 Supp (4) SCC 580** and also judgment of this court passed in ***Jasoda Glass and Silicate and others Vs. Regional Provident Fund Commissioner& Others***reported in **(2002) 2 CHN 407**, ***Howrah Motor Company Ltd and others Vs. Samir Kr. Das*** **(2004) 4 CHN 291,** ***Atelier Fashion Flash Pvt. Ltd. Vs. Provident Fund Commissioner***, **(2014) SCC OnLine Del 2853** and the judgment passed in CRR 41 of 2019 by this High Court. Accordingly Mr. Banerjee submitted that further continuation of present proceeding will be an abuse of the process of the court and prayed for quashing the said proceeding.

13. Mr. Ray, learned counsel appearing on behalf of the opposite party/Employees Provident Funds Organization submits that a bare perusal of the letter of complaint and the charge sheet submitted against the petitioner, makes it clear that the charge has been *prima facie* made out against the petitioner for violation of provision under the Act of 1952, including its allied scheme framed thereunder, which are punishable under section 406 of the Code. Such non-compliance by the Sudhir Memorial Institute attract the violations under section 405, Explanation-I of the Code and all the trustees of M/s Sudhir Memorial Institute during the relevant period are liable to be punished under section 406 of the Code.

14. He further argued that the petitioner has not even disputed the fact that the contributions and the administrative charges for the relevant period were not remitted by the petitioner. The only defence taken by the petitioner is that the concept of vicarious liability is unknown to IPC and that M/s Sudhir Memorial trust has paid the entire dues on 15.12.2018 and that on the part of the petitioner there was no wilful neglect or criminal intention to disobey the provision of the scheme.

15. Referring paragraph 38(2) of Employers Provident Fund Scheme and section 14A of the Act, Mr. Ray submits that since the petitioner is in charge of the management of the Trust, is thus directly responsible for the remittance of the contributions to the fund. This is the mandate of the statute that the offence in such cases is complete when there has been default on the part of the employer in remitting the contribution and whenever a company committed an offence under the Act or the scheme, the person in charge of and responsible to the company for the conduct of the business of the company will also be deemed to be guilty of the offence.

16. He further contended that under the trust deed the petitioner herein and Dr. Subrata Bhattacharya having sole control over the fund and the affairs of the accounts of the trust, they would be guilty of offence of criminal breach of trust. He further contended that the judgment cited by the petitioners to raise the contention that director cannot be prosecuted while company has not been made an accused, has got no application in the present context as the complaint was lodged against M/S. Sudhir Memorial Institute i.e. the employer and the petitioner and another being the person responsible for the conduct of the business of the said Institute. Mr. Das further argued that it is trite law that in a case where the name of the accused, is mentioned in the complaint and after investigation in the report submitted by investigating officer, the said person is not added as an accused, by invoking power under section 319 of the Code of criminal procedure read with section 358 of Bharatiya Nagarik Surakha Sanghita 2023, court can suo moto or on an application by someone, including accused already before it, add such party if it is satisfied that any person other than an accused has committed an offence and he is to be tried together with the accused. It is also submitted by Mr. Ray that unless the inspection was done and FIR was lodged, the petitioner would not have paid the dues. Accordingly opposite party no.2 prays for rejection of the Application.

17. I have considered submissions made by both the parties.

18. At the outset it must be remembered that criminal proceeding can be quashed and that too after submission of charge sheet, only when it fails to disclose prima facie cognizable offence against the accused and still he must undergo the agony of criminal trial. In the land mark judgment of **Bhajanlal's Case (1992) Supp(1) SCC 335,** regarding exercise of inherentpower under section 482 of the Code of Criminal Procedure, the Apex Court had laid down following categories of instances wherein inherent power can be exercised in order to secure the ends of justice, these are :-

> *1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*
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> *(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*
>
> *(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.*
>
> *(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.*
>
> *(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*
>
> *(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.*
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> *(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.*

19. In the present context there is no dispute that the contributions for the relevant period were not remitted to the opposite party no.2. It is also not in dispute that the payment of the contribution is mandatory under the scheme and no exception has been provided for avoidance of this payment by a company to which the Act has been made applicable. This is the mandate of the statute which has to be complied with. There is also no dispute about the proposition of law that where there is an unqualified mandatory direction for doing of an act calculated to cater for the welfare of the people, the offence in such cases is complete when there has been default on the part of the employer in remitting the contribution. There is also no dispute that whenever a company has committed an offence under the Act or the scheme, the person in charge of and responsible to the company for the conduct of the business of the company will also be deemed to be guilty of the offence.

20. However, in the present context the petitioner has prayed for quashing the impugned proceeding *interalia* on the following grounds:-

- **(i)** That the Panchajannya Trust being registered with the EPFO is entitled to deduct employees share of provident fund from the salary of the employees and deposit it with the provident fund and as such the petitioner cannot be roped under section 406 of the Code
- **(ii)** The complaint as well as the charge sheet fails to spell out the specific role attributed to the petitioner in the commission of the offence and accordingly if any offence is committed by the Panchajannya Trust being the employer, the petitioner cannot be prosecuted under the Penal Code in absence of a provision of vicarious liability of the officers of the organization.

(iii) In the absence of the Panchajannya Trust being made a party which has been registered with the EPFO and is entitled to deduct employees share of provident fund from the salary of the employees, the present proceeding cannot continue against the directors of the company when the statute does not provide for vicarious liability and also in absence of specific allegation against the director.

(iv) The allegations of misappropriation of contribution by the petitioner is completely false and fabricated as the payment towards such outstanding dues was made on 15.12.2018 immediately after the inspection. Relying upon the case of ***Adony Cotton Mills Ltd. (supra)*** passed by the Supreme Court and which was followed by this High Court in subsequent judgments, the present proceeding is also liable to be quashed, in view of the payment towards outstanding dues, which was made immediately after the detection.

21. In the present context the opposite party no.2 has lodged the FIR against the Sudhir Memorial Institute and charge sheet has also been submitted against the institute and it's admitted directors namely Dr. Subrata Bhattacharya and also against the present petitioner Monica Bhattacharya. It also appears from the record that after lodging the FIR the payment of Rs. 7,57,941/- for the period from June, 2018 to October 2018 was made by Sudhir Memorial Institute and not by Panchajannya Trust. It is also not in dispute that the petitioners are the director of the said Sudhir Memorial Institute and Dr. Bhattacharya/accused had made the said payment as chairman of the said Sudhir Memorial Institute. The concerned Trust Deed, dated 19th May 1998 has been made as annexture P2 and the subsequent supplementary Deed of Trust made on 3rd May, 2018 has been made as annexture P3. Under the trust deed dated 19th May, 1998, the petitioner and Dr. Subrta Bhattacharya have been described as trustees who shall hold office for life and under clause (d) of the Deed Dr. Subrata Bhattacharya shall be the managing trustee for life and he would act as a chairman and the managing trustee and the trustees have been given full power to do all acts, matters and things deemed necessary, proper or expedient for carrying on the business and the concerned bank account or accounts of the trust fund and to exercise the powers, authorities and discretion of the company's fund.

22. Accordingly the Trust Deed makes it clear that the managing trustee and trustee have sole control over the funds and affairs of the Trust. Furthermore the supplementary Deed of Trust dated 03.05.2018 also mentioned that all other clauses of the original Trust Deed dated 19.09.1998 shall remain effective and unaltered.In this context explanation I of section 405 of IPC stipulates that a person being an employer of an establishment whether exempted under section 17 of the Act of 1952 or not, who deduct the employees contribution from the wages payable to the employee for credit to a provident fund for the time being in force, shall be deemed to have been entrusted with the amount of contribution so deducted by him and if he makes default in the payment of such contribution to the said fund in violation of the law, shall be deemed to have dishonestly used the amount of the said contribution, in violation of direction of law.

23. In the present case though it has been argued that Panchajannya Trust is the employer for the purpose of said explanation under section 405 but as I have stated above that Dr. Bhattacharya /accused being admitted chairman of Sudhir memorial institute have met the payment of entire dues of employees share for Rs. 7,57,941/- which pre supposes that the deduction from the employee salary was well within the knowledge of the said chairman/accused of Sudhir Memorial Trust.

24. Needless to reiterate that the Act of 1952 is a social legislation designated to promote the welfare of the employees and under the said scheme the employer shall make contribution at the prescribed rate to the provident fund and the employee also will contribute equal amount. Such payment of the contribution is mandatory under the scheme and due to such unqualified direction mandated in the Act to cater for the welfare of the people, the offence is completed when there has been default on the part of the employer in remitting the contribution. Now, whether such default has been made with any criminal intention or not is not an answer to the charge although it may in appropriate cases be a mitigating factor while imposing penalty upon the accused.

25. Relying upon the judgment of ***Adnoy Cotton Mills Ltd. (supra)*** Mr. Banerjee on behalf of the petitioner strongly argued that admittedly the payment of outstanding amount has already been made and as such the present lame prosecution is not required to be continued in order to prevent abuse of the process of the Court. It is true that in the subsequent judgments like **Jasoda Glass *(Supra),* Howrah Motor Company ltd**. **(Supra) , Atiliar fashion flash pvt. Ltd**. and also in some other cases, the High Court had quashed the proceeding following ***Adony Cottons Mills Ltd. (supra)*** since the payment of outstanding amount has already been made by the accused. On perusal of the judgment passed by the Apex Court in ***Adony Cotton Mills Ltd.(supra),*** it is very much clear that the facts and circumstances of the said case is clearly distinguishable from the present one. First of all in the said case the company who has made the default was taken over by the Government under the Textile Undertaking Nationalization Ordinance which was replaced by the Sick Textile Undertaking Nationalization Act, 1974 which took effect from 01.04.1974 and the company challenged the proceeding for nationalization by a writ petition and the first appellant was appointed as a Receiver to manage the affairs of the mills. Though the writ petition was dismissed on 27.07.1976 but a Special Leave Petition was preferred challenging the order of dismissal and ultimately said SLP was also dismissed on 17.08.1976, and the default on the part of the company was made from April 1976 to July 1976 for a period of 4 months, when the SLP was pending before the Apex Court. Furthermore in the said proceeding the prosecution was initiated in respect of certain offences which alleged to have committed 15 years back and two of the appellants died in the mean time. During pendency of the appeal the court granted stay of further proceeding on condition that the appellants shall deposit an amount of Rs. 40,000/- and furnished a bank guarantee for a sum Rs. 60,000/- to the satisfaction of the Registrar of the High Court and such deposit was made by the accused inconnection with defaulted amount of around Rs. 90,000/-. Taking into account all the circumstances, the Apex Court held that this was a case in which the proceedings by way of prosecution need not be persuaded, provided the amount deposited in court are paid to the provident fund commissioner and learned Counsel appearing for the appellants also did not raise any objection in withdrawing the amount by the provident fund commissioner.

26. However to my understanding the said judgment does not lay down any ratio that whenever a payment of outstanding amount has been made by the accused concerned after lodging FIR, the proceeding is liable to be quashed. Here as I have already stated that the FIR has been lodged against the Sudhir Memorial Institute and the petitioners are admitted trustees and chairman as per Trust Deed which explained their duties and liabilities.

27. Whether Panchajannya Trust being registered with the EFPO is solely responsible for the offence and whether petitioner being mere employee of Sudhir Memorial Trust has no liability either to deduct or deposit the amount or not are all disputed questions of fact and law and can only be adjudicated during Trial. The exercise of the inherent power to quash the proceeding is called for only in a case where the complaint does not disclose any offence against the accused or is frivolous, vexatious or oppressive.

28. Though the petitioners relying upon various judgments contended that unless the company registered under the EFPO is made a party the proceeding is not maintainable and moreover in the absence of any specific role attributed to the petitioner the proceeding against the present petitioner cannot continue, I do not find any merit in the said contention in the present proceeding, as in the instant criminal proceeding, charge sheet has already been filed and the petitioner can always be at liberty to pray for discharge before the court below on the said ground at the time of hearing of the charge but such arguments does not fulfil the criteria for quashing the proceeding as laid down in the **Bhajanlal's Case (Supra)**.

29. In fact in a catena of decisions, the Apex Court has deprecated the interference by the High Court in exercise of its inherent power under section 482 of the Code in a routine manner. It has been held consistently that the power under section 482 must be exercised sparingly with circumspection and in rarest of rare cases and such exercise is not to be taken as a rule but it is to be taken as an exception and such exception is applied only when it is brought to the notice of the court that grave miscarriage of justice would be caused, if the trial is allowed to proceed and the accused would be unnecessarily harassed, and when prima facie it appears to court that the trial would be ended in acquittal.

30. In view of such discussion I do not find that if the trial in the present case is allowed to proceed, it would cause abuse of process of any court and as such this is not a fit case where the power under section 482 can be invoked to quash the said criminal proceeding as the allegations made in the FIR constitute prima facie case against the petitioners.

31. However considering the facts and circumstances of the case, if the petitioner is represented before the court below within three weeks from the date of the order, the court below will recall the order of warrant of arrest dated 15th January, 2022 and shall make every endeavor for expeditious disposal of the case preferably within a period of eight weeks from the date of this order, without being influenced by any observation made herein. This order will also not prevent the petitioner/accused to agitate all the grounds taken herein at the time of hearing the charge or at any subsequent appropriate stage before the court below.

32. This application being **CRR 2148 of 2022** is accordingly disposed of.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(DR. AJOY KUMAR MUKHERJEE, J.)