# IN THE HIGH COURT AT CALCUTTA
## (Criminal Revisional Jurisdiction)
## Appellate Side

Present:

**Justice Bibhas Ranjan De**

**C.R.R. 3660 of 2016**

**with**

**IA No.: CRAN 6 of 2018 (CRAN1807 of 2018)**

**with**

**CRAN 14 of 2020 (CRAN 702 of 2020)**

**With**

**CRAN 16 of 2024**

**(Application not in the file)**

**Joydeb Basak & Anr.**

**Vs.**

**The State of West Bengal & Anr.**

| | |
|---|---|
| For the Petitioners | :Mr. Moyukh Mukherjee, Adv. |
| | Ms. Aishwarya Bazaz, Adv. |
| For the opposite party no. 2 | :Mr. Anil Kumar Gupta,Adv. |
| For the State | :Mr. Rana Mukherjee, Ld. APP. |
| | Mr. Bitasok Banerjee, Adv. |
| Heard on | :26.02.2024, 12.03.2024, |

21.03.2024, 22.04.2024,
06.05.2024,

**Judgment on : 21.05.2024**

**Bibhas Ranjan De, J.**

**1.** In the present application the challenge is the proceedings in connection with G.R. Case no. 7492 of 2015 arising out of Khardah Police Station case no. 1060/15 dated 18.12.2015 under Sections 406/409/420/120B of the Indian Penal Code (for short IPC) presently pending before the Court of Ld. Additional Chief Judicial Magistrate (for short ACJM), Barackpore.

**Background:-**

**2.** On 18.12.2015 the Inspector of Enforcement, Employees' Provident Fund and Miscellaneous Organization, SRO, Barackpore lodged a written complaint with the officer in-charge of Khardah Police Station *inter alia* alleging the commission of offence under Section 406 of the IPC. The allegation leveled in the said complaint is to the effect that the petitioner no.1/company is covered under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short EPF and MP Act) under code no. 338. It has been alleged that as per provisions of Section 6 of the said act read with paragraph 38 of the Employee's Provident Fund Scheme, 1952, the petitioner no.1 is required to pay the employees' share of provident fund contribution deducted from the salaries/wages/amount on or before 15th of the following month to the Statutory Provident of the Central Board of Trustees. It was alleged that when the complainant went on inspection of the said mill of the petitioner no.1/ company, it was noted by him that the petitioner no. 2 had deducted a sum of Rs. 15,91,619/- from the wages/salaries of the employees for the period months of October and November of 2015 and the same amount was not remitted with the statutory fund.

**3.** On the basis of the aforesaid complaint, a case being no. Khardah Police Station case no. 1060/15 was registered against the petitioners herein under Section 406 of the IPC. During investigation, the Investigating Officer made a prayer for adding further Sections 409/420/120B of the IPC as it was revealed that there was a non-remittance of the said amount being Rs. 15,91,615/- by the petitioners. The prayer was allowed by the Ld. ACJM, Barackpore vide an order dated 20.08.2016 and the charges under Sections 409/420/120B of the IPC were added subsequently.

**Argument advanced:-**

**4.** Ld. Counsel, Mr. Moyukh Mukherjee, appearing on behalf of the Petitioners has advanced a two folds argument. To begin with, it is submitted that petitioner no. 2 herein, being a Director of a company cannot be termed as employer within the meaning of Section 2(e) (i) (ii) of the EPF and MP Act, 1952.

**5.** In addition to, Mr. Mukherjee has submitted that the proceedings was initiated for non-deposit of the share of provident fund of the employees within the stipulated period. But, all the outstanding dues for the months of October and November, 2015 has already been paid by the petitioners although after statutory period. Mr. Mukherjee has further submitted that outstanding amount was paid on 18.12.2015 and 06.01.2016.

**6.** Mr. Mukherjee, thereby, has made an effort to impress this court that the liability of the petitioners/company has been absolved after payment of the outstanding dues even beyond statutory period.

**7.** In support of his contention, Mr. Mukherjee, has relied on the following cases:-

- ***Adoni Cotton Mills Limited v. Regional Provident Fund Commissioner*** reported in ***1992 0 Supreme (SC) 391***
- ***Air Transport Corporation & Ors. v. State of West Bengal & Anr.*** reported in ***2006 SCC OnLine Cal 164***
- ***Jasoda Glass and Silicate and others v. Regional Provident Fund Commissioner and others*** reported in ***2001 SCC OnLine Cal 542.***
- ***Employees' State Insurance Corporation v. S.K. Aggarwal and others*** reported in ***(1998) 6 Supreme Court Cases 288***
- ***Howrah Motor Company Limited & Ors. v. Samir Kumar Das*** reported in ***2004 SCC OnLine Cal 430***

**8.** Before parting with Mr. Mukherjee, submitted that the judgements relied on behalf of the opposite parties did not refer the observation of the Hon'ble Apex Court in ***Adoni Cotton Mills*** (supra). As a sequel, the judgments relied on behalf of the opposite parties are all in *per curiam.*

**9.** Per contra, Ld. Counsel, Mr. Anil Kumar Gupta, appearing on behalf of the opposite party no. 2 has contended that the term ‘employer’ as per Section 2(e) of the EPF and MP Act includes 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.

**10.** Mr. Gupta has further added that a director who is neither an occupier nor a manager can be prosecuted under Section 14A of the EPF and MP Act for violation of the provident funds scheme when in form 5A, columns 8 & 11, the director has declared himself as one of the persons in charge of and responsible for conduct of the business of the establishment of the factory. In support of his contention, Mr. Gupta adduced the form 5A wherein he tried to show that the petitioner no. 2 gave a self declaration regarding the ownership of the said company.

**11.** Before parting with Mr. Gupta has tried to substantiate his argument by submitting that the employers, even if they pay their dues after expiry of the statutory period that would not absolve them of their original guilt but that would snap the recurrence of the offence.

**12.** In support of his contention, Mr. Gupta has relied on the following cases:-

- ***Srikanta Datta Narasimharaja Wodiyar vs. Enforcement Officer, Mysore*** reported in ***(1993) 3 Supreme Court Cases 217***
- ***Anjuman Tea Company Ltd. & Ors. vs. State of West Bengal & ors.*** reported in ***2007 SCC OnLine Cal 463.***
- ***Mr. Debidas Dutta vs. The State of West Bengal*** reported in ***2005 SCC OnLine Cal 237***
- ***Kamala Tea Company Limited & Ors. vs. The State of West Bengal & Anr.*** reported in ***2007 SCC OnLine Cal 122***
- ***Ajay Jalan & Ors. vs. The State of West Bengal & Anr.*** reported in ***2018 SCC OnLine Cal 1367***
- ***Rajiv Jajodia & anr vs. The State of West Bengal & Anr. in CRR No. 806 of 2014***

**13.** Ld. APP, Mr. Rana Mukherjee, appearing on behalf of the State has relied on the evidence collected during investigation and contended that there is sufficient material to hold the petitioner liable for the offences alleged and added that the prayer of the petitioners to take into consideration the subsequent payment of dues cannot be considered for quashment of proceedings but only for deciding the question of sentence.

**14.** Mr. Mukherjee in support of his argument also relied on the same case i.e. ***Anjuman Tea company*** (supra) which was advanced by the opposite party no. 2.

**<u>Analysis:-</u>**

**15.** Employer is liable to pay contribution in compliance with Section 6 of the EPF & MP Act, 1952 read with paragraph 38 of the EPF Scheme on or before 15th of the following months to the statutory fund.

**16.** It is not disputed by the petitioner that the contribution was not paid within the statutory period.

**17.** Mr. Mukherjee appearing on behalf of the petitioner has relied on the observation of the Hon'ble Apex Court in ***Adoni Cotton Mills*** (supra) and tried to make this court understand that if the contribution is paid even after the statutory period no proceeding can be continued under any penal law.

**18.** In ***Adoni Cotton Mills*** (supra) Hon'ble Apex Court dealt with a case where the appellants including the company itself allegedly defaulted in making deposits relevant for the months of April to July 1976 i.e. the period of four (4) months and accordingly attracted Provisions of EPF Act, 1952 and Additional Emoluments (Compulsory Deposit) Act, 1974 but in that case the said company was taken over by the Government under the Textile Undertaking Nationalization Ordinance which took effect from 01.04.1974. This nationalization process was challenged by the said company in the High Court. The Hon'ble Apex Court opined that the offence allegedly took place for a short period of four (4) months immediately following the discharge of the appellant company from the receivership unlike the case at hand. In addition to that, in the present case, the petitioner no. 2 herein allegedly deducted a sum of Rs. 15,91,619/- from the wages/salaries of the employees for the alleged period of four (4) months which he did not remit with the statutory fund whereas in the ***Adoni Cotton Mills*** (supra) the company in the relevant time period was taken over by the Government and the question of deduction of the contribution of the employees does not arise.

**19.** Therefore, the Hon'ble Apex Court in ***Adoni Cotton Mills*** (supra) quashed the proceedings in special circumstances which cannot be said to be applicable in the present case.

**20.** Therefore, observation of ***Adoni Cotton Mills*** (supra) cannot be said to be a panacea for the employers making due payment after statutory period of time. From that point of view, I am not agreeable with Mr. Mukherjee that all the judgments disallowing the prayer for quashing on the ground of delay in payment are all in per curiam.

**21.** In the case of ***Jasoda Glass*** (supra) the Division Bench of this Court quashed the proceedings in view of the findings of the Hon'ble Supreme Court in ***Adani Cotton Mills*** (supra).

**22.** In ***Rajiv Jajodia*** (supra) Co-ordinate Bench of this Court quashed the proceedings on the ground that the company was not impleaded as an accused unlike our case.

**23.** In ***Howrah Motor Company*** (supra) the Co-ordinate Bench of this Court dealt with a case where the accused company was restrained from depositing employees' provident fund dues in view of the order of restraint passed by the High Court unlike the case at hand.

**24.** In ***Air Transport Corporation*** (supra) the Co-ordinate Bench of this Court quashed the proceedings in view of the findings of ***Howrah Motor Company*** (supra).

**25.** In ***Employees' State Insurance Corporation (supra)*** the Hon'ble Apex Court quashed the proceedings by observing that the Directors of a company cannot be said to be defined as 'principle employer' under the ESI Act, 1948 and in explanation 2 of Section 405 of the IPC, as the company itself is the owner of the factory and is also the employer of its employees' at the head office unlike the case at hand.

**26.** On the contrary, Ld. Counsel, Mr. Gupta appearing on behalf of the opposite party no. 2 relied mainly on the observation of the Hon'ble Apex Court in the case of ***Srikanta Datta*** (supra) wherein it was held that the expression 'in charge of and responsible to the company for the conduct of business' is very wide and it includes not only the owner or occupier but all those who have control or are responsible for the affairs of the company. The declaration, therefore, in form 5A including the appellant therein as one of the persons in charge and responsible for affairs of the company means that he can be prosecuted for violation of any provision of any scheme.

**27.** In our case, careful perusal of column 8 and 10 of form no. 5A under the EPF Scheme, 1952 shows that the petitioner no. 2 has given a self declaration claiming himself to be the owner as well as the occupier of the establishment/petitioner no. 1.

**28.** Therefore, the petitioner no. 2 being the owner and the occupier of the company/petitioner no. 1 is the employer within the meaning of Section 2 (e) of the EPF Act and also explanation 1 to Section 405 of the IPC clearly speaks that an employer of an establishment who deducts the employee's contribution from the wages payable to the employee for the credit to a Provident Fund 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 aforesaid Act, he shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law.

**29.** In the aforesaid view of the matter, I am unable to quash the proceeding as subsequent payment of the due amount made by the petitioner does not absolve his liability which, at best, could be considered as a mitigating circumstances only at the time of imposition of sentence.

**30.** Accordingly, CRR No. 3660 of 2016 stands dismissed.

**31.** Interim order, if there be any, stands vacated.

**32.** Connected applications, if there be any, stand disposed of accordingly.

**33.** All parties to this revisional application shall act on the server copy of this order downloaded from the official website of this Court.

**34.** 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.]**