

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION No. 4679 OF 2018

- | | | | |
|----|--|---|----------------|
| 1. | M/s. Edunetwork Private Limited |) | |
| | Having its registered address at |) | |
| | 2 nd Floor, No.1, KDP Building, |) | |
| | Kira Layout, Dharmaram College Post, |) | |
| | Hosur Main Road, |) | |
| | Bangalore, Karnataka- 560029 |) | |
| 2. | Geetansh Bamania |) | |
| | Founder and Director |) | |
| | M/s. Edunetwork Private Limited |) | |
| | Having its address at 2 nd Floor, |) | |
| | No.1 KDP Building, Kira Layout, |) | |
| | Dharmaram College Post, |) | |
| | Hosur Main Road, |) | |
| | Bangalore, Karnataka- 560029 |) | |
| 3) | Ajay Nain |) | |
| | Co-Founder and Director |) | |
| | M/s. Edunetwork Private Limited |) | |
| | Having its address at |) | |
| | 2 nd Floor, No.1, KDP Building |) | |
| | Kira Layout, Dharmaram College Post, |) | |
| | Hosur Main Road, |) | |
| | Bangalore, Karnataka- 560029 |) | .. Petitioners |

Versus

- | | | | |
|----|------------------------------------|---|--|
| 1. | The Regional Provident Fund |) | |
| | Through Ms. Seema P. Das |) | |
| | The Enforcement Officer |) | |
| | Commissioner, Circle V |) | |
| | Bhavishya Nidhi Bhavan, Sector -3, |) | |
| | Plot No.222, Charkop Poisor Road, |) | |
| | Charkop Market, Kandivali (West), |) | |
| | Mumbai – 400 067 |) | |

2. The State of Maharashtra)
Through its office at)
Advocates for the State of Maharashtra,)
High Court, Bombay)
3. Venkatesh Ratnam Peddi,)
Director,)
M/s. Edunetwork Private Limited)
Having its address at)
2nd Floor, No.1 KDP Building)
Kira Layout, Dharamram College Post,)
Hosur Main Road,)
Banglore, Karnataka- 560029) .. Respondents

Ms. Deepa Chavan a/w. M.S. Reshmarani Nathani i/b. Mr. Shubro Roy for
Petitioners

Ms. Mahalakshmi Ganpathy APP for the Respondent-State

**CORAM : A. S. GADKARI AND
SHYAM C. CHANDAK, JJ.**

**RESERVED ON : 5th DECEMBER, 2023.
PRONOUNCED ON : 17th JANUARY, 2024.**

JUDGMENT [PER: SHYAM C. CHANDAK, J.]

1) Present Petition is preferred under Articles 226 and 227 of the Constitution of India read with Section 482 of the Criminal Procedure Code, seeking to quash F.I.R. dated 28th June, 2018 bearing C.R. No.333 of 2018, registered with Powai Police Station, Mumbai for the offences punishable under Sections 406, 409 read with 34 of the Indian Penal Code, 1860 and Section 14 of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 (*'the Act', for short*).

2) Heard Ms. Deepa Chavan, learned Counsel for the Petitioners and Ms. Mahalakshmi Ganpathy, learned APP for the Respondent-State. Perused the record.

3) Record reveals that, by an Order dated 2nd November, 2018, this Court directed that, till next date the Petitioners as well as the Respondent No.3 should not be arrested in the crime. By an Order dated 16th January 2019, the respondent police was directed not to file the charge sheet. Then the Respondent No.1 filed his Affidavit in Reply. The Rule was issued on 19th October, 2022 and the interim relief was continued till the Petition is finally disposed of.

4) The facts giving rise to this Petition are as under:

4.1) Petitioner No.1 is a Private Limited Company. The Petitioner Nos.2 and 3 are respectively the Founder & Director and Co-Founder & Director of the Petitioner No.1. The Respondent No.3 is a Nominee Director of the Petitioner No.1.

4.2) The Petitioner No.1 company has been registered under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (*'the Act'* for short). Therefore, the Petitioners are responsible to deposit the EPF dues of its employees and the EPF dues of the Petitioner No.1 in the relevant EPF account. On 6th March, 2018, the Respondent No.1 visited the office of

Petitioner No.1 and inspected its relevant record. It revealed that, from September, 2017 to February, 2018, the Petitioner No.1 deducted total Rs.37,23,451/- as the EPF subscription from the salaries of its employees. The said subscription amount, however, was not deposited in the relevant EPF account maintained with the State Bank of India. Therefore, the Respondent No.1 gave a letter to deposit the said amount at the earliest. Thereafter, on 28th June, 2018, the Respondent No.1 lodged a report with Powai police station alleging that, the Petitioners converted for their own use the said amount and thus, misappropriation the same. In turn, Powai police station registered the impugned F.I.R.

5) Learned counsel for the Petitioners submitted that, during the period of September, 2017 to April, 2018, the executive role of finance team of Petitioner No.1 was shifted from its base in Mumbai to Bangalore. Therefore, all executive and operational decisions regarding the finances of the Petitioner No.1 were to be taken from the Bangalore Office of Petitioner No.1. From the period of March, 2017 to April, 2018, key finance team members of the designations of “Head–Accounts and Payments”, “Manager–Accounts and Payments” and “Senior Executive–Accounts” exited the services of Petitioner No.1, leaving no responsible or competent finance team member(s) to oversee the dues payable by the Petitioner No.1 and also due

to the change in management structure, the aforesaid dues were inadvertently left unpaid due to oversight. However, immediately after the inspection by Respondent No.1, the Petitioners realized that said amount has not been deposited in the concerned EPF account. Therefore, on 12th March, 2018 and 20th March, 2018, the Petitioners deposited the said EPF dues totalling to Rs.73,50,586/- in the concerned EPF account (*vide* bank *Challans* at Exhibit B-1 to B-6). On 11th September, 2018, the Petitioner No.1 paid an amount of Rs. 3,37,998/- towards the interest and penalty for the unpaid dues. There is no much delay in payment of said dues.

5.1) Learned counsel for the Petitioners submitted that, the Petitioner No.1 company was registered in the year 2012. *Vide* D.O. Letter No.Z-13025/39/2015-LR Cell, issued on 6th April, 2017, by the Department of Ministry of Labour & Employment, Government of India, the Central Government intends to promote 'Starts-Up'. The learned counsel submitted that, the Petitioner No.1's annual turnover is not exceeding Rs.25 crores. Hence, the Petitioner No.1 is a 'Start-Up' company. Therefore, as provided in the above letter, Petitioner No.1 may be taken up for the inspection only when very credible and verifiable complaint of violation is filed in writing and the approval has been obtained from at least one level senior to the inspecting officer or from the Central Analysis and Intelligence Unit (CAIU),

as the case may be. Such was not the situation when the Respondent No.1 held the inspection at Petitioner No.1's office.

5.2) Learned counsel for the Petitioners submitted that, unless the mandatory inquiry is held under Section 7A of the Act to determine the moneys due from the employer, direct lodging of the impugned F.I.R. is not permissible in law. To buttress the submission, the learned Counsel has relied upon the decision in the case of *Niranjan Lakhumal Hiranandani vs. Central Bureau of Investigation and Ors.: MANU/MH/1341/2018*.

6) Per contra, learned APP for the Respondents-State submitted that, the Petitioners have admitted that, even though they deducted the EPF subscription from the salaries of the employees for the period of September, 2017 to February, 2018, they have not deposited it in time in the concerned bank account. Instead, the Petitioners converted that huge amount for their use and thus, misappropriated the same. As such, *prima facie* the offences under Sections 406, 409 r/w. 34 of the I.P.C and Section 14 of the EPF Act are made out against the Petitioners. As a result, the Petition be dismissed.

7) In view of the rival submissions and considering the observations in the case of *Niranjan Hiranandani (supra)*, before adverting to the question of quashing the F.I.R impugned in this petition, first; it would be appropriate to consider the relevant provisions of the Act.

8) Section 7 (1) (2) of the Act provides that, the Central Provident Fund Commissioner (C.P.F.C.), Addl. C.P.F.C., Deputy P.F.C., Regional P.F.C. or any Assistant P.F.C., as the case may be, who is conducting the inquiry under Section 7A of the Act, for the purpose of conducting such inquiry, has been vested with the same powers as are vested in a Court under the Civil Procedure Code, 1908, for trying a Suit in respect of following matters namely:- (a) enforcing the attendance of any person or examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavit; and (d) issuing commissions for the examination of witnesses. The said enquiry is also deemed to be a judicial proceeding within the meaning of Sections 193 and 228 and for the purpose of Section 196 of the I.P.C. Section 7 (3) provides that, no Order shall be made under sub-Section (1), unless the employer concerned is given a reasonable opportunity of representing his case. The Order passed under Section 7A is appealable before the Tribunal and the Order passed by the Tribunal attains finality under Section 7N. The Order passed under Section 7A can also be reviewed under Section 7B or re-determined under Section 7C. For non payment of the said amount, the employer can be prosecuted and penalty can be imposed under Section 14 and recovery can be made as per procedure laid down under Section 8.

8.1) Sub-Section (1) of Section 14 of the Act provides that, “Whoever, for the purpose of avoiding any payment to be made by himself under this Act, the Scheme, the Pension Scheme or the Insurance Scheme or of enabling any other person to avoid such payment, knowingly makes or causes to be made any false statement or false representation shall be punishable with imprisonment for a term which may extend to one year, or with fine of five thousand rupees, or with both”.

8.2) Section 14A of the Act provides for offences by companies and sub-Section (1) and (2) thereof provides as under :-

“(1) If the person committing an offence under this Act, the Scheme or the Pension Scheme or the Insurance Scheme is a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-Section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-Section (1), where an offence under this Act, the Scheme or the Pension Scheme or the Insurance Scheme has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any Director or Manager, Secretary or other officer of the company, such Director, Manager, Secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly”.

8.3) Section 14AB of the Act provides that an offence relating to default in payment of contribution by the employer punishable under this Act shall be cognizable. Section 14AC provided for cognizance and trial of offences and upon sanction of the Central Provident Fund Commissioner or such other officer as may be authorized by the Central Government. Section 14B provides for power to recover damages in case where an employer makes default in the payment of any contribution to the Fund or charges payable under any other provision of this Act or any scheme.

9) In view of the above provisions, in the case of *Niranjan Hiranandani (supra)*, in para 16, it is observed that, an inquiry under Section 7A of the Act is mandatory to ascertain the EPF dues without which the dues could not be ascertained. Therefore, in para 23, it is observed that,

“When the Act itself has provided for a mechanism and elaborate procedure for determining the amount due from any employer by the Authorities under the said Act, it would run counter to the provisions of the Act if any other authority not empowered under the Act determines the amount due from any employer or arrives at a finding where there is any default in the compliance of the provisions of the said Act. It is only after the dispute regarding the applicability of the Act to an establishment is decided and upon determination of the amount due from any employer if upon the finding recorded that there has been any omission or failure on the part of the employer to make any document or report available or to disclose fully and truly all material facts necessary for determining the correct amount due from employer that the question of invoking the penal provisions will arise. The matters for determination of dues from the employer or his liability to pay the contribution under the Act of the scheme is to be determined in the course of the enquiry to be conducted under the said Act”.

10) The case of *Niranjan Hiranandani (supra)* was basically related to evasion of payment of Employees Provident Fund dues of persons who were employed by the contractor of the Petitioner therein. Said evasion revealed from the report of the surprise inspection conducted on 4th March, 2006. As noted in para 26 of the said decision, said Petitioner was not being

held liable to pay the PF dues of his employees but the PF dues of employees of his contractors. As such, the Petitioner was liable to pay the dues only if his contractors failed to pay the dues of the workers. No inquiry was held under Section 7A of the Act to determine the dues. However, pursuant to the inspection report, the F.I.R. was filed which ultimately resulted in filing of charge-sheet by the CBI, for the offences punishable under Sections 420, r/w. 511, 467, 468, 471 of the I.P.C. and the conspiracy to do the said acts.

10.1) In this background and considering the procedure of the inquiry stated in Section 7A of the Act, this Court in para 25 observed that, the Act covers all possible contingencies for recovery of the Provident Fund dues in cases where the employer makes a willful default in making of the payments under the Act or the Scheme framed thereunder. The employer can raise dispute regarding the applicability of the Act or that he is not liable to pay the contribution under the Act towards the Provident Fund. The liability can be determined only after an inquiry under Section 7A of the Act is conducted. The dues can be recovered only after an Order is passed under Section 7A after following the procedure laid down therein and after giving opportunity to the employer. The Act is a complete Code in itself. It is Special Act to deal with Provident Fund dues and hence, it will prevail over the General Act. The Act contemplates that an opportunity be given to the

employer to answer after notice is issued to him. However, no notice was issued to the petitioner. The procedure under Section 7A of the Act was not followed i.e. the inquiry under Section 7A was not conducted. As a result, the Petitioner was not given an opportunity of representing his case as visualized under Section 7A (3) and in consonance with the principles of natural justice. Therefore, in para 26, it was observed that, the prosecution without holding an enquiry under Section 7A cannot say that the Petitioner has evaded or tried to evade payment of PF dues, therefore, in para 27, this Court held that no F.I.R could have been registered against the Petitioner which F.I.R. essentially related to evasion of payment of PF dues. Hence, the prosecution was quashed holding it as abuse of the process of Court.

11) In the case in hand, the Respondent No.1 has not claimed that, before its officer held the inspection of the EPF dues payable by the Petitioners, there was any complaint against the Petitioners that even though the Petitioners deducted the EPF subscription of its employees, it was not credited to the concerned bank amount and instead they misappropriate it. Secondly, it is not the case of the Respondents that, before filing of the F.I.R., the Respondent No.2 or any other officer authorised in this behalf, by Order, held the inquiry as provided under Section 7A (1) (2) of the EPF Act to determine the moneys due from the Petitioners. Thirdly, which is most

important to note, before filing the impugned F.I.R., the Respondent No.1 has not recorded a finding that the Petitioners in order to avoid the payment of the EPF dues under the said Act, knowingly made or caused to be made a false statement or false representation. Lastly, it is not the case that, the Petitioners failed to make any document or report available or to disclose fully and truly all material facts necessary for determining the correct amount due from The petitioner No.1.

11.1) Undisputedly, the Petitioner No.1 is company. Hence, as stated in the proviso to sub-Section (1) of Section 14A of the Act, the Petitioner Nos.2, 3 and the Respondent No.3 being the directors of Petitioner No.1, they should have been given an opportunity to prove that, the offence was committed without their knowledge or that they exercised all due diligence to prevent the commission of said offence. Giving such an opportunity was possible only if the inquiry provided under Section 7A of the Act was held, which also allows to receive evidence on affidavit under Section 7 (2) (c) of the Act.

12) As against this, only inspection was held on 6th March, 2018, at the office of Petitioner No.1 by Respondent No.1 and on the same day itself she prepared the Inspection Report based on the documents *viz*; (i) Copy of *Challan* for August, 2017, (ii) Salary Statement of the established for the

months of September, 2017 to February, 2018 and (iii) List of Directors of the Establishment alongwith their details *i.e.* address, PAC Card etc. and concluded that the Petitioners have not paid the EPF dues of Rs.37,23,451/-. Thereafter, within two weeks, the Petitioners deposited the dues which are double to the above amount. Nevertheless, there is no clarification in this regard. Thereafter, the Respondent No.1 filed the impugned F.I.R. on 28th June, 2018, alleging that, the Petitioners converted for their own use the said amount and thus, misappropriated the same. Yet, the F.I.R. and the affidavit-in-reply does not show as to how the Petitioners converted for their own use the moneys due and thus, misappropriated the same.

12.1) In the backdrop, and considering the aforesaid observations in the case of *Niranjan Hiranandani (supra)*, according to us, the penal provisions of Section 14 (1) and Section 14A (1), (2) of the EPF Act and Sections 406 and 409 of the I.P.C. cannot be applied or invoked against the Petitioners.

12.2) The Petitioners have clearly averred that, the Petitioner No.1 was registered in the year 2012. Against this averment, the Respondent No.1 did not offer any comment in its Affidavit in reply. Thus, the said fact remained unchallenged. As directed in the D.O. letter (*supra*), the Government of India has launched a 'Start-Up India Action Plan' for

promoting the Start-Up ecosystem in the country to incentivize the entrepreneurs in setting up new start-up ventures and thus catalyze the creation of employment opportunities through them. In this connection, various incentives and ease in regulatory compliance provisions have been conceptualized. Start-up are defined by Department of Industrial Policy & Promotion (DIPP), as an entity, incorporated or registered in India not prior to five years with annual turnover not exceeding Rs.25 crores in any preceding financial year, working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property.

12.3) For the first year of setting up of the Start-Ups such establishments may not be inspected under any of the 6 Labour laws (viz. BoCW Act, ISMW Act, Payment of Gratuity Act, Contract Labour Act, EPF Act and ESI Act). These start-ups may be asked to submit an online self-declaration instead.

13) Start-ups may be allowed to submit self-certified returns (as is being done under *Shram Suvidha* Portal under these Acts for the Central sphere) under aforesaid Acts. From the second year onwards, upto five year from the setting up of the unit such Start-ups may be taken up for inspection only when very credible and verifiable complaint of violation is filed in

writing and the approval has been obtained from at least one level senior to the inspecting officer or from the Central Analysis and Intelligence Unit (CAIU), as the case may be.

14) In the case in hand, the Respondents could not point out from the record that, there was very credible and verifiable written complaint of violation of the relevant provisions of the EPF Act by the Petitioners and hence, with the approval of an officer, who is one level senior to Seema Das-Respondent No.1, the inspection was held in this case. Looking at the D.O. letter, it can be easily gathered that, the said letter has been issued to encourage and promote the Start-Ups. However, the way in which the Respondent No.1 held the inspection in this matter, it would discourage the Start-ups and thus, cause an adverse effect on the employment to be generated and the economy of the India.

15) In view of the above discussion, continuation of the impugned F.I.R. would be an abuse of process of law. As a result, said F.I.R. is liable to be quashed and is accordingly, quashed and set aside.

16) Criminal Writ Petition is allowed in the aforesaid terms. Rule is made absolute.

(SHYAM C. CHANDAK, J.)

(A. S. GADKARI, J.)