IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.R. 3497 of 2011

Ashoke Ghosh
-Vs-
The State of West Bengal & Anr.

For the Petitioner	: Mr. Satadru Lahiri Mr. Safdar Azam Mr. Jyotirmoy Talukder
For the State	: Mr. Imran Ali
For the P.F. Authority	: Mr. Jasobanta Rakshit
Heard on	: 04.12.2023, 19.01.2024, 19.02.2024, 08.03.2024, 14.03.2024, 18.04.2024, 21.05.2024, 03.10.2024
Judgment on	: 07.05.2025

Ananya Bandyopadhyay, J.:-

1. The petitioner had preferred the instant revisional application assailing the order dated 21.09.2011 passed by the Learned Metropolitan Magistrate, 3rd Court, Calcutta in connection with G.R. Case No. 429/01, arising out of Bowbazar Police Station Case No. 47/2000 dated 14.02.2000 under Sections 406/34 of the Indian Penal Code, 1860.

2. It had been contended that the petitioner and his now-deceased mother, Late Anita Ghosh, had been arraigned as accused persons in their capacity as

directors of M/s. Calcutta Distributors Pvt. Ltd., which had been non-functional for several years. The criminal proceedings had been initiated on the basis of a complaint lodged by one Subir Sanyal, Enforcement Officer of the Employees Provident Fund Organisation of the Regional Office, West Bengal, alleging that although the employees' provident fund contributions amounting to ₹3,188/- had been duly deducted by the said company during the period December 1998 to February 1999, the same had not been deposited within the statutory time limit.

3. It had been stated that due to financial constraints, the default had occurred; however, the company had deposited the entire outstanding amount on 28.04.1999 and 23.07.1999 via three challans, and intimation thereof had been given to the authorities vide letter dated 09.12.1999. Despite such compliance, investigation had proceeded, and charge-sheet being No. 121/2001 dated 25.07.2001 had been filed under Sections 406/114 of the Indian Penal Code against the petitioner and another, accusing them of misappropriating the deducted amount.

4. The petitioner had asserted that he had not been involved in the day-to-day affairs of the company and had merely held a dormant directorial position. It had further been emphasized that the company itself had not been charge-sheeted, and that, under settled law, only the employer who had failed to deposit the employees' provident fund was liable to be prosecuted under Section 406 IPC. The petitioner had not been the employer of the concerned employees and thus, could not have been held criminally liable.

5. In light of the fact that the entire dues had been deposited much prior to the filing of the charge-sheet and that the petitioner had not played an active role in the alleged default, it had been urged that further continuance of the criminal prosecution had been unwarranted and amounted to an abuse of the process of law

6. It had been contended that the Learned Magistrate had failed to exercise the judicial discretion vested in him under Section 239 of the Cr.P.C. in a judicious manner and had instead exercised the same arbitrarily, overlooking the legal and factual submissions advanced by the petitioner. The petitioner had further asserted that the criminal proceedings had been initiated in a manifestly mala fide manner and had been pursued maliciously, in contravention of the mandatory provisions of law.

7. It had been argued that although the alleged default amount of ₹3,188/- had been duly deposited within a few months of the initiation of the proceedings, the criminal case had continued, thereby amounting to a gross abuse of the process of law. The Learned Advocate had relied upon the settled proposition that once the dues were cleared, further prosecution became redundant, particularly when the object of the proceedings was to ensure recovery of provident fund contributions.

8. It had further been submitted that the petitioner had not been the employer of the concerned employees and could not have been held liable for defaults committed by the company. He had merely been a dormant director and had not participated in the daily operations or management of the company. The

investigating agency had, without justification, proceeded only against the petitioner, while omitting to charge-sheet the company itself.

9. It had been emphasized that the petitioner did not fall within the definition of "employer" under Section 2(e) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, as he had neither been the owner nor occupier, nor had held any managerial position conferring control over the company's affairs. The concept of vicarious liability, being alien to the domain of Indian criminal jurisprudence, could not have been imported to prosecute the petitioner in the absence of specific statutory mandate or personal culpability.

10. It had also been pointed out that since the company had not been charge-sheeted and had effectively been discharged, prosecution against the petitioner for the same alleged offence was untenable in law. The petitioner had further claimed entitlement to protection under Section 14AC of the EPF Act, which mandates that no court shall take cognizance of any offence under the said Act without prior sanction of the Provident Fund Commissioner. Such protection, it had been contended, extended even to prosecution under other laws such as Section 406 of the Indian Penal Code, if the offence had arisen out of a violation of the EPF Act.

11. Lastly, it had been submitted that the Learned Magistrate had presumed the existence of facts not borne out by the record, particularly as regards the petitioner's status as employer, and had thereby erroneously held that a prima facie case had been made out. The Hon'ble Supreme Court had repeatedly held that to prevent judicial process from degenerating into an

instrument of oppression, exercise of inherent power was not only permissible but imperative. It had thus been urged that the criminal proceedings against the petitioner be quashed in the interest of justice.

12. The Learned Advocate appearing on behalf of the opposite party no.2 had submitted that M/s. Calcutta Distributors Pvt. Ltd., being an establishment governed by the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the said Act"), had been under a statutory obligation to deposit the employees' share of provident fund contributions—deducted from their salaries—on or before the 15th day of the succeeding month, as mandated under Section 6 of the said Act read with Paragraph 38 of the Employees' Provident Fund Scheme, 1952.

13. It had been brought to the Court's notice that upon inspection conducted on 25th March, 1999, it had been found that although an amount of ₹3,188/- had been deducted from employees' salaries for the period December 1998 to February 1999, the same had not been deposited within the stipulated time. The petitioner had deposited the said amount belatedly, on 28th March 1999 and 23rd April 1999, by way of three separate challans, thus violating the mandatory timeline prescribed by the Act.

14. Relying on the judgment of the Hon'ble Supreme Court in Bhagirath Kanoria & Ors. vs. State of M.P., reported in (1984) 4 SCC 222, it had been argued that such default constituted a continuing offence. The Apex Court had held therein that the failure to deposit provident fund dues within the stipulated time remained a continuing offence so long as the default persisted.

15. Further reliance had been placed on the decision of the Hon'ble Calcutta High Court in Hotel Dock Palace (P) Ltd. vs. State of West Bengal, reported in 2007 (3) LLN 766, wherein it had been held that mere subsequent payment of dues was not a sufficient ground to quash the criminal proceeding, and that such matters were to be determined by the trial court at the conclusion of trial. Similarly, in Deepak Puri vs. State of West Bengal, reported in 2010 (1) CLJ (Cal), it had been reiterated that default in payment itself constituted the offence, and that belated compliance could not obliterate the legal consequences thereof.
16. The Learned Advocate had further submitted that in the present case, the complaint had been lodged by the Provident Fund Authority with the police, and not directly before the Magistrate. Upon investigation, the police had submitted a charge sheet, whereafter the Learned Magistrate had taken cognizance under Sections 406/34 of the Indian Penal Code. Accordingly, the requirement for prior sanction under the EPF Act had not been attracted.
17. It had also been submitted that under Section 2(e)(ii) of the said Act, the term "employer" included any person or authority having ultimate control over the affairs of the establishment, and in case such affairs had been entrusted to a managing director or similar officer, the said individual would be deemed the employer. In this context, Sri Ashoke Ghosh, having been the Managing Director at the relevant time, had been squarely responsible for the delayed payment.
18. Lastly, it had been argued that the determination of the petitioner's legal status in relation to the company was a matter requiring full-fledged trial. At

the pre-trial stage, in the absence of evidence and based merely on legal submissions, it had not been legally tenable to discharge the accused solely on the presumption that he could not have been the “employer” within the meaning of the Act.

19. The Learned Advocate had thus urged that the matter deserved to proceed to trial for proper adjudication on facts and law.

20. It had been contended that the petitioner and his now-deceased mother had been arrayed as accused persons in their capacity as directors of M/s. Calcutta Distributors Pvt. Ltd., which had remained non-operational for several years. A complaint had been lodged by one Subir Sanyal, Enforcement Officer, EPFO, alleging non-deposit of provident fund contributions, amounting to ₹3,188/-, which had been deducted from employees' salaries for the period December 1998 to February 1999.

21. It had also been submitted that the complaint had been made before the police, not the Magistrate, and that after investigation, charge-sheet had been filed, obviating the need for prior sanction under Section 14AC of the EPF Act. The petitioner, having been the Managing Director at the material time, had been the person having ultimate control over the establishment, thereby satisfying the definition of “employer” under Section 2(e)(ii) of the Act.

22. Finally, it had been argued that the petitioner's actual role and status required adjudication at trial based on evidence, and that a discharge at the preliminary stage would have been premature. The continuation of proceedings had thus been justified.

23. Accordingly, both sides having raised substantial legal and factual contentions, the matter had warranted a trial on merits to determine culpability.

24. The Learned Chief Metropolitan Magistrate had transferred the case to the Learned Magistrate for further proceedings. Upon receipt and perusal of the charge-sheet, the Learned Magistrate had taken cognizance and issued warrants of arrest, subsequently releasing the petitioner on bail. An application under Section 239 of the Code of Criminal Procedure, 1973 seeking discharge had been filed by the petitioner on 10.11.2010. However, the Learned Magistrate, by order dated 21.09.2011, had rejected the said application, holding that a prima facie case had been made out against the petitioner under Section 406 IPC, and had fixed the matter for consideration of charge.

25. The Learned Advocate appearing on behalf of the petitioner had submitted that the Learned Magistrate had mechanically passed the impugned order dated 21.09.2011, without duly appreciating the true import and content of Section 239 of the Code of Criminal Procedure, 1973 and the provisions under Sections 406/114 of the Indian Penal Code, 1860.

26. The petitioner had submitted that the default had occurred owing to financial constraints, but the entire sum had been deposited on 28.04.1999 and 23.07.1999 through three challans, and the authorities had been duly informed via letter dated 09.12.1999. Despite this, the police had filed charge-sheet No. 121/2001 dated 25.07.2001 under Sections 406/114 IPC against the petitioner and another, alleging misappropriation.

27. Pursuant to the filing of the charge-sheet, the case had been transferred, and the Learned Magistrate had taken cognizance and issued warrants of arrest. Upon release on bail, the petitioner had filed an application under Section 239 Cr.P.C. seeking discharge. The same had been rejected on 21.09.2011, the Learned Magistrate having held that a prima facie case had been established under Section 406 IPC and had fixed the matter for consideration of charge.

28. The petitioner had argued that he had neither managed the daily affairs of the company nor had been in control thereof, being merely a dormant director. He had further pointed out that the company itself had not been charge-sheeted, and that criminal liability under Section 406 IPC could only have attached to the "employer," which he had not been.

29. It had been submitted that the continuance of criminal proceedings despite full payment and the petitioner's limited role had constituted an abuse of process. The petitioner had further contended that the impugned order had been passed mechanically, without due appreciation of Section 239 Cr.P.C. and the ingredients of Sections 406/114 IPC.

30. It had also been asserted that the prosecution had proceeded in a mala fide manner, without proper application of mind, and that since the entire dues had been cleared prior to filing of the charge-sheet, no purpose would have been served by continuing the proceedings. The petitioner had denied being an "employer" under Section 2(e) of the EPF Act, 1952 and had contended that vicarious liability, not being recognised in criminal law absent specific provision, could not have been foisted upon him.

31. Additionally, the petitioner had invoked the protection under Section 14AC of the EPF Act, contending that no cognizance could have been taken without prior sanction from the Provident Fund Commissioner, which had not been obtained. He had also urged that the Learned Magistrate had erroneously presumed facts not supported by the record while rejecting the discharge application.

32. Conversely, the Learned Advocate for the opposite party no.2 had submitted that M/s. Calcutta Distributors Pvt. Ltd. had been under a statutory obligation to deposit the provident fund contributions deducted from employee wages by the 15th of the succeeding month as per Section 6 of the EPF Act and Para 38 of the Scheme.

33. Upon inspection on 25.03.1999, it had been revealed that the amount in question had not been deposited in time. The belated payments made on 28.03.1999 and 23.04.1999 had not absolved the company of default. Relying on Bhagirath Kanoria vs. State of M.P. [(1984) 4 SCC 222], it had been argued that the default constituted a continuing offence. The Calcutta High Court in Hotel Dock Palace (P) Ltd. [2007 (3) LLN 766] and Deepak Puri vs. State of West Bengal [2010 (1) CLJ (Cal)] had similarly held that subsequent payment did not negate criminal liability.

34. In the instant case, the charge-sheet had been filed under Section 406 of the Indian Penal Code, 1860. The petitioner denied his role to have been covered under the definition of 'employer' under Section 2(e) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, as he had neither been the owner or occupier of the said company nor he was the manager or

managing director or managing agent of the company who had the ultimate control over the affairs of the company. The petitioner further objected to be vicariously liable contrary to its concept in criminal law prevalent in India.

35. Petitioner was entitled to get benefit of the protection as available under Section 14AC of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. It was the settled principle of law that no court could take cognizance of any offence punishable under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 against the alleged defaulted employer without prior permission of the commissioner. That protection was liable to be extended to any other offences punishable in any other law such as an offence punishable under Section 406 of the Indian Penal Code, 1860 if the said employer was prosecuted under the Section for alleged violation of any provision of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

36. Admittedly there had been a default in deposit of employees' share towards their provident fund during the period of December 1998 to February 1999 as aforesaid. The offence allegedly to have committed by the petitioner is of criminal breach of trust. The petitioner at the stage of rejection of a petition of discharge and in the instant criminal revision did not produce any unimpeachable document to sacrosanct his claim of innocence precluding him to be an 'employer' as aforesaid absolving him from discharging his responsibility. Moreover, this Court in deciding an application of criminal revision cannot assume or usurp the powers of a trial court, where the disputed issues can only be resolved on recording both oral and

documentary evidence whether necessary sanction was obtained or necessarily required to be obtained from the commissioner should be dealt on evidence before the trial court.

37. The failure or default in depositing the employees' contribution of the provident fund is distinct and distinguishable from the act of criminal breach of trust, attracting two different provisions of law.

38. Mere assertion of the part of the petitioner disclaiming himself to be an 'employer' without proof of his claim does not entitle him to a discharge at the nascent stage. Since there are *prima facie* issues to be dealt with through the trial, this Court is not inclined to interfere with the impugned order of refusal to grant 'discharge' and further to quash the proceedings pending before the Trial Court.

39. In view of the above discussions, the instant criminal revisional application being CRR 3497 of 2011 stands dismissed.

40. There is no order as to costs.

41. Case diary, if any, to be returned forthwith.

42. Let the copy of this judgment be sent to the Learned Trial Court for necessary information and compliance.

43. All parties shall act on the server copy of this judgment duly downloaded from the official website of this court.

(Ananya Bandyopadhyay, J.)