IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 297 of 2023

Rishikesh Das.

Vs.

State of West Bengal & Anr.

For the Petitioner	:	Mr. Milon Mukherjee, Sr. Adv. Mr. Biswajit Manna, Mr. S. P. Tewary, Mr. Debajit Kundu.
For the State	:	Mr. Aditi Shankar Chakraborty, Mr. Sourav Ganguly.
For the P.F. Authority	:	Mr. Bhaskar Roy Mahapatra.
Hearing concluded on	:	23.04.2025
Judgment on	:	01.05.2025

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of the proceeding being Special Case No. 9/18 arising out of G.R. No. 2660 of 2018 pending in the Court of the Ld. Additional District & Sessions Judge, 2nd Court, Special Court, Jalpaiguri.

2. The petitioner is the Director of M/s Labannapur Tea & Agro Pvt. Ltd, having its registered office at 2nd Mile Sevoke Road, Siliguri, District Darjeeling, Pin 734401 and its garden at Post Office Newra, Baradighi, Police Station-Malbazar, District Jalpaiguri, Pin 735230.

3. The said Company is the owner of the said tea estate and the employer within the meaning of Section 2(e) of the Employees' Provident Fund & Miscellaneous Provisions Act, 1956. The said company is covered by the Employees' Provident Fund & Miscellaneous Provisions Act, 1956, and has to pay provident fund dues under the provisions of the said Act in respect of the said tea estate.

4. The financial condition of the said company depends largely on the market conditions. If the market conditions are adverse the said company is unable to make payment of wages and other statutory dues. The company suffered primarily from high cost of labour and other inputs as also low price realisation of its product. However, payment of wages has been made first as a priority to make payment of wages, rations and other statutory dues. The provident fund payment is always made thereafter.

5. The said company has not defaulted in payment of wages. The said company has however, been unable to make timely payment of provident fund contribution towards the employees' share amounting to Rs.5,91,165/- for the period from July, 2016 to May, 2018 as it has been prevented by circumstances beyond its control from making payment of the said provident fund dues in time. **However, the said company subsequently paid the total dues.**

6. On submission of charge sheet the case is now pending as Special Case No. 9 of 2018 before the learned 2nd Additional District and Sessions Judge, Special Court, Jalpaiguri.

7. The company paid a sum of Rs.5,91,165/- towards the said employees' share. The provident fund authority issued a letter dated

01.04.2021 as regards the confirmation of the aforesaid payment of Rs. 5,91,165/- for the period 07/2016 to 05/2018.

8. **Mr. Mukherjee** submits that 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.

9. In both explanations no.1 & 2 to Section 405 of Indian Penal Code, it is the person who is an employer and who deducts employees' contribution is responsible for commission of the offence.

10. It is further stated that a director cannot be termed as an ‘employer’. It has been categorically stated by the Supreme Court that the word 'employer' does not include 'director'. In view of the above, the petitioner being the Director of the company cannot be said to have committed offence under Section 405 (explanation 1) punishable under Sections 406/409 of Indian Penal code and as such the petitioner cannot be prosecuted for commission of default if any by the company, **who is not an accused in this case in the criminal prosecution under Section 405 of the Indian Penal Code.**

11. It is also submitted that a Co-ordinate Bench of this Hon'ble Court in the case of ***Satish Kumar Jhunjhunwala vs. State of West Bengal reported in (2008) 3 CAL LT 484 (HC)*** held that launching of prosecution against the directors of the establishment under Sections 406 and 409 of the Indian Penal Code for non-payment of employees' provident fund contribution is completely illegal and bad in law and the criminal proceeding was quashed. The aforesaid view was taken in the case of ***B.P. Gupta & Ors. vs. State of Bihar*** reported in 2000 Cr.L.J 781(Patna), ***R. L. Kanoria & Ors. vs. State of Another*** reported in 2003 C Cr. LR(Cal) 341 and ***Probhas Kumar Basu vs. State of West Bengal*** reported in (2012) 2 C Cr. LR(Cal) 615. Similar view was taken by this Hon'ble Court in an order dated 18.12.2017 in CRR no.2885 of 2009 ***(Babulal Nahata & Ors. vs. State & Anr.)*** and in the order dated 17.11.2017 passed in CRR No.806 of 2014 ***(Rajib Jajodia & Anr. Vs. State of West Bengal & Ors.).***

12. The petitioner being a 'Director' of the company is not an 'employer' under the Act, as it is the 'company' owning the tea estate which is the employer for the purpose of the said Act. In Indian Penal Code there is no provision for prosecution of the Directors by invoking the principle of vicarious liability.

13. The petitioner being a Director cannot be prosecuted under Sections 406 & 409 of the Indian Penal Code for non-deposit of Provident Fund Contribution of the employees' share and as such the said complaint, FIR and the charge sheet as well as the said proceeding are illegal and bad in law and as such the proceedings should be set aside/quashed.

14. It is further submitted that since the entire dues for which the said criminal case has been initiated has been paid and the same having been realized and/or accepted by the provident fund authority the said complaint and the said proceedings are illegal, bad, malafide, arbitrary, without jurisdiction and the same are issued in colourable exercise of power and the same should be withdrawn, set aside and/or cancelled/quashed.

15. The following judgments of coordinate benches of this Court has been relied upon on behalf of the petitioner:-

i) Raj Kumar Todi & Ors. vs The State of West Bengal & Anr., CRR 410 o 2019.

ii) Rajiv Jajodia & Anr. Vs The State of West Bengal & Anr., CRR 806 of 2014.

iii) Sri Anil Kumar Nahata vs State of West Bengal & Anr., CRR 425 of 2018.

iv) Malhati Tea & Industries Ltd. & Ors. vs State of West Bengal & Anr., CRR 755 of 2014.

16. The period of default in this case is from July, 2016 to May, 2018. FIR was filed on 11.07.18. Charge sheet has been filed on 31.08.18 for offence punishable under Sections 406/409 of the IPC.

17. The provident fund authority issued a letter dated 01.04.2021 as regards the confirmation of the aforesaid payment of Rs. 5,91,165/- for the period 07/2016 to 05/2018 (annexure P3) at page 41.

18. On hearing the parties and considering the materials on record the following relevant facts are before this Court.

a) **FIR has been filed against two accuseds, that is the company and its director. Charge Sheet has also been filed against them.**

b) The provision under Section 14-B of the Employees provident fund act was not applied.

19. Section 2(e) of the Employees' Provident Funds & Misc. Provisions Act (herein after referred to as 'EPF Act'), is reproduced here :-

> *"**2. Definitions.** - In this Act, unless the context otherwise requires, -*
> *(a)……………….*
> *(b)……………….*
> *(c)……………….*
> *(d)……………….*
> *(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, 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."*

20. Admittedly Sec14-B of the EPF Act (a social beneficial legislation) has not been applied by the authorities.

21. The Supreme Court in ***Horticulture Experiment Station Vs The Regional Provident Fund, Civil Appeal No(s). 2136 of 2012 on 23rd February, 2022*** **citing several precedents** held:-

> *"**17.** Taking note of three-Judge Bench judgment of this Court in Union of India and Others v. Dharmendra Textile Processors and others (supra), which is indeed binding on us, we are of the considered view that any default or delay in the payment of EPF contribution by the employer under the Act is a sine qua non for imposition of levy of damages under Section 14B of the Act 1952 and mens rea or actus reus is not an essential element for imposing penalty/damages for breach of civil obligations/liabilities."*

22. The complainant without taking recourse to the provision under Section 14-B of EPF Act opted to prosecute under Sections 406/409 of the Indian Penal Code.

23. Section 14-B of the Employees' Provident Funds & Misc. Provisions Act, lays down:-

> *"[**14B. Power to recover damages.**—Where an employer makes default in the payment of any contribution to the Fund [the [Pension] Fund or the Insurance Fund] or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 [or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of [any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, [the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf] may recover [from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme:]*
> *[Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard:]*
> *[Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), subject to such terms and conditions as may be specified in the Scheme.]"*

24. The Supreme Court in *Horticulture Experiment Station vs. The Regional Provident Fund (Supra)* further held:-

> ***"Any default or delay in payment of EPF contribution by the employer under the act is a sine qua non for imposition of levy of damages under Section 14-B of the Act".***

25. The Supreme Court in ***Dayle De' Souza Vs Government of India Through Deputy Chief Labour Commissioner (C) and Anr., in SLP (Crl.) No. 3913 of 2020, on October 29, 2021,*** held:-

> *"**27.** In terms of the ratio above, a company being a juristic person cannot be imprisoned, but it can be subjected to a fine, which in itself is a punishment. Every punishment has adverse consequences, and therefore, prosecution of the company is mandatory. The exception would possibly be when the company itself has ceased to exist or cannot be prosecuted due to a statutory bar. However, such exceptions are of no relevance in the present case. Thus, the present prosecution must fail for this reason as well."*

26. Section 14-A of the Employees' Provident Funds & Misc. Provisions Act, lays down:-

> *"[**14A Offences by companies .—***
>
> *(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 the 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.*
>
> *Explanation.—For the purposes of this section,—*
>
> *(i) "company" means any body corporate and includes a firm and other association of individuals; and*
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> *(ii) "director", in relation to a firm, means a partner in the firm.]"*

27. Paragraph 7 of ***S. K. Agarwalla & Ors. Vs ESI Corporation & Anr. (1985 (1) CHN 113)*** is reproduced once again for its relevance.

> *"**7.** Under S. 85 (a) of the Act any person who fails to pay any contribution which under the Act, he is liable to pay, may be prosecuted and it may be prosecuted and it may be argued that since the liability to pay the contribution under S 40 of the Act is upon the 'Principal employer' anybody who comes within the definition of the 'principal employer' under the Act including a director who may answer to the description of 'occupier' may be prosecuted. Under S 406 of the Indian Penal Code however the deeming provision of explanation 2 to S 405 would apply only to an 'employer' and not to a 'Principal employer'. In absence of any definition of 'employer' under the Indian Penal Code the ordinary meaning to the term 'employer' has to be given and that necessarily means the person who employs. Under S. 11 of the Indian Penal Code the word 'person' includes any Company or association or body of persons whether incorporated or not and it necessarily follows that the Indo Japan Steel Ltd. which is an incorporated company will be the employer in respect of its employees."*

28. Accordingly under Section 14A of the Employees' Provident Funds & Misc. Provisions Act, 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.

29. Thus it is the company 'M/s. Labannapur Tea & Agro Pvt. Ltd.' herein who is 'employer' in respect of its employees and the petitioner who was the director at the relevant time was responsible being in charge of the affairs of the company.

30. In ***Ramesh Chandra Gupta vs. State of Uttar Pradesh and Ors., 2022 LiveLaw (SC) 993, Criminal Appeal No(s). .... of 2022 (Arising out of SLP (Crl.) No(s). 39 of 2022),*** the Supreme Court held:-

> *"**15.** This Court has an occasion to consider the ambit and scope of the power of the High Court under Section 482 CrPC for quashing of criminal proceedings in **Vineet Kumar and Others vs. State of Uttar Pradesh and Another**, **(2017) 13 SCC 369** decided on 31st March, 2017. It may be useful to refer to paras 22, 23 and 41 of the above judgment where the following was stated:*
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> *"22. Before we enter into the facts of the present case it is necessary to consider the ambit and scope of jurisdiction under Section 482 CrPC vested in the High Court. Section 482 CrPC saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice.*
>
> *23. This Court time and again has examined the scope of jurisdiction of the High Court under Section 482 CrPC and laid down several principles which govern the exercise of jurisdiction of the High Court under Section 482 CrPC. A three-Judge Bench of this Court in State of Karnataka v. L. Muniswamy (1977) 2 SCC 699 held that the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought*

to be quashed. In para 7 of the judgment, the following has been stated :

'7. … In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction.'

41. Inherent power given to the High Court under Section 482 CrPC is with the purpose and object of advancement of justice. In case solemn process of Court is sought to be abused by a person with some oblique motive, the Court has to thwart the attempt at the very threshold. The Court cannot permit a prosecution to go on if the case falls in one of the categories as illustratively enumerated by this Court in State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335. Judicial process is a solemn proceeding which cannot be allowed to be converted into an instrument of operation or harassment. When there are materials to indicate that a criminal proceeding is manifestly attended with mala fides and proceeding is maliciously instituted with an ulterior motive, the High Court will not hesitate in exercise of its jurisdiction under Section 482 CrPC to quash the proceeding under

Category 7 as enumerated in State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335 which is to the following effect :

'102. (7) Where a criminal proceeding is manifestly attended with mala fides 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.' Above Category 7 is clearly attracted in the facts of the present case. Although, the High Court has noted the judgment of State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335 but did not advert to the relevant facts of the present case, materials on which final report was submitted by the IO. We, thus, are fully satisfied that the present is a fit case where the High Court ought to have exercised its jurisdiction under Section 482 CrPC and quashed the criminal proceedings."

16. *The exposition of law on the subject relating to the exercise of the extra-ordinary power under Article 226 of the Constitution or the inherent power under Section 482 CrPC are well settled and to the possible extent, this Court has defined sufficiently channelized guidelines, to give an exhaustive list of myriad kinds of cases wherein such power should be exercised. This Court has held in para 102 in* ***State of Haryana and Others v. Bhajan Lal and Others, 1992 Supp. (1) 335*** *as under :*

*"**102.** In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of*

myriad kinds of cases wherein such power should be exercised.

(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.

(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.

(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."*
>
> ***17.*** *The principles culled out by this Court have consistently been followed in the recent judgment of this Court in* ***Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra and Others, 2021 SCC Online SC 315****."*

31. The present case falls under category 1 and 3 of ***Para 102 of Bhajan Lal (Supra).***

32. Thus the prosecution initiated against the petitioners herein being not in accordance with law is liable to be quashed.

33. The revisional application being CRR 297 of 2023 is allowed.

34. The proceeding being Special Case No. 9/18 arising out of G.R. No. 2660 of 2018 pending in the Court of the Ld. Additional District & Sessions Judge, 2nd Court, Special Court, Jalpaiguri, **is hereby quashed.**

35. All connected applications, if any, stands disposed of.

36. Interim order, if any, stands vacated.

37. Copy of this judgment be sent to the learned Trial Court for necessary compliance.

38. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)