

(2018) 04 CAL CK 0130
In the Calcutta High Court
Case No : CRR No. 3406 of 2015

Ajay Jalan & Ors.

APPELLANT

Vs

State Of West Bengal & Anr.

RESPONDENT

Date of Decision : 27-04-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 405, 406, 409
Code of Criminal Procedure, 1973 — Section 319
Employee's Provident Funds Miscellaneous Provisions Act, 1952 — Section 2(e), 6, 14, 14A, 17
Employees' State Insurance Act, 1948 — Section 2(17), 40
Factories Act, 1948 — Section 7(1)
Negotiable Instruments Act, 1881 — Section 138, 141
Information Technology Act, 2000 — Section 67, 85

Citation : (2018) 04 CAL CK 0130

Hon'ble Judges : MUMTAZ KHAN, J

Bench : Single Bench

Advocate : Sabyasachi Banerjee, Swaraj Shaw, Jai Kr. Surana, Anil Kr. Gupta, Imran Ali

Final Decision : Dismissed

Judgement

Md. Mumtaz Khan, J.

The instant revision has been preferred by the accused persons petitioners praying for quashing of the proceeding of G.R. Case No. 2258 of 2014

arising out of Hare Street Police Station Case No. 642 of 2014 under Section 406/409/34 of the Indian Penal Code pending before the court of learned

Chief Metropolitan Magistrate, Kolkata. On November 19, 2014, Enforcement Officer, Employees Provident Fund Organization(Opposite party no.2)

inspected the establishment M/s Ultimo Logistics Private Limited having its office at 9 Dacres Lane (1st floor), Kolkata 700069 and also at 10,

Government Place East Kolkata 69. During inspection he noticed that the petitioners being employers/Managing Director/Directors and the persons responsible for the conduct of the business of the said company though deducted a sum of Rs. 2,33,742/from the salary/wages of the employees as employees share of Provident Fund contribution for the period from March 2012 to October 2014 but not deposited the amount with the statutory fund in violation of Section 6 of the Act read with Para 38 of Employees Provident Fund Scheme. Accordingly, he lodged a complaint against the petitioners for commission of an offence punishable under Section 406/409 of the Indian Penal Code.

On the basis of above complaint a case was started against the petitioners at the Hare Street P.S. and investigation ensued and thereafter on

completion of investigation a charge sheet was submitted against the petitioners under Section 406/409/34 of the Indian Penal Code. It was submitted

by Mr. Sabyasachi Banerjee, learned Advocate appearing on behalf of the petitioners that the criminal proceeding initiated against the petitioners is not maintainable and the same is liable to be quashed for the following reasons :

(1) Though the criminal proceeding has been initiated against the petitioners for not depositing the Employees share of Provident Fund contribution but

the provisions of Employeesâ?? Provident Funds and Miscellaneous Provisions Act has not been invoked rather case was started against the

petitioners under Indian Penal Code in their personal capacity and not as the directors of the company in question,

(2) It is the company which is the principal employer but the same has not been made a party to the proceeding and as such in the absence of company

being made a party to the proceeding, the said proceeding is arbitrary and infructuous and the petitioners being directors can not be held liable for non-

payment of a statutory dues by the company,

(3) Petitioners were never connected with the day to day affairs of the accounting for the said company and its statutory compliances and as such

directors can not be made vicariously liable to the acts of the company in a penal offence unless specific overt act has been brought against the

directors and in the instant case there has been no mention of any specific role played by the petitioners in the commission of the alleged offence,

(4) the entire Employees share of Provident Fund contribution was

already deposited with the concerned authority on the very next day of the inspections of the company and the said fact of depositing of EPF contribution is clearly reflected in the charge sheet itself. Mr. Banerjee relied upon the decisions of Employeesâ?? State Insurance Corporation Vs. S.K. Aggarwal and Ors. reported in (1998)6 Supreme Court Case 288, R.L. Kanoria & 4 Ors. Vs. State of West Bengal & Ors. reported in (2003) 3 CHN 400, Prabhash Kumar Basu Vs. State of West Bengal reported in (2012)3 CHN 233, Ashoke Sadhya Vs. State of West Bengal with Inderjit Singh Oberoy Vs. State of West Bengal reported in 2015(3) CHN (Cal) 755, Aneeta Hada Vs. Godfather Travels and Tours Private Limited with Anil Hada Vs. Godfather Travels and Tours Private Limited with Avnish Bajaj Vs. State and Ebay India Private Limited Vs. State and another reported in (2012)5 Supreme Court Cases 661 and two unreported judgments of this Court, one delivered on November 17, 2017 in CRR No. 806 of 2014 in the matter of Rajiv Jajodia & Anr. Vs. The State of West Bengal & Anr. and another delivered on December 18, 2017 in CRR 2885 of 2009 in the matter of Sri Babulal Nahata & Ors. Vs. State & Anr., in support of his submissions.

Mr. Imran Ali, learned advocate appearing for the state submitted that even though the company has not been made a party to the instant proceeding, the court can invoke the power under Section 319 of the Code of Criminal Procedure to implicate the company. He further submitted that petitioner No. 3 has not yet appeared before the learned trial judge and as such the instant proceeding is not liable to be quashed. Mr. A. K. Gupta, learned advocate appearing for the opposite party no. 2, submitted that petitioners are the owners and persons incharge of the conduct of the business of the company as well as directors of the company which is reflected in Form no. 5A submitted by the company in compliance to para 36A of the Employees Provident Fund Scheme, 1952 and accordingly they are responsible for the conduct of business of the company and are liable to be prosecuted for the offence of criminal breach of trust.

He relied upon the decisions of Srikanta Datta Narasimharaja Wodiyar, Vs. Enforcement Officer, Mysore reported in AIR 1993 Supreme Court 1656, Sajjan Kumar Jhunjhunwala & Ors. Vs. The State of West Bengal & Anr. reported in 1999 C Cr LR (Cal) 255, Anjuman Tea Company Ltd. & Ors.

Vs. State of West Bengal & Ors. reported in 2008(1) CHN 1061 and an unreported judgment decision of the Division Bench of this Court in the matter of M/s Universal Heavy Mechanical Lifting Enterprise & Anr. Vs. Union of India & Ors. in connection with the matter no. 97 of 1993 in support of his submissions.

Admittedly, the instant criminal proceeding has been initiated against the petitioners under section 406/409 of the Indian Penal Code for commission of offence of criminal breach of trust for failure to deposit the employees share of provident fund contribution for the period from March 2012 to October 2014 to the Provident Fund Authority, though deducted. As per the complaint, the petitioners being Employers/Managing Director/ Directors and persons responsible for the conduct of the business of the establishment Ultimo Logistics Private Limited deducted a sum of Rs. 2,33,742/- from the salary/wages of the employees as employees share of Provident Fund contribution for the period from March 2012 to October 2014 but did not deposit the amount to the Provident Fund Authority thereby violated the provisions of section 6 of the Employees' Provident Funds and Miscellaneous Provisions Act read with para 38 of the Employees' Provident Fund Scheme. Payment of employee's share of Provident Fund contribution is governed under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. Section 6 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 casts a liability upon the employer to pay to the Provident Fund Authority, the employers and employees share of Provident Fund contribution at the rate prescribed therein while para 38 of the Employees' Provident Fund Scheme, 1952 prescribed the mode of payment of contribution. Section 14 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 provides for penalty in case of any contravention or default in complying with the provisions of section 6 of that Act while section 14A fasten liability on certain persons if the person committing the offence is a company. Para 76 of the Employees' Provident Fund Scheme also fastens criminal offence for non compliance of the provisions of the Schemes on the person in charge of and responsible for the management or control of the establishment.

Para 36A of the Employees Provident Fund Scheme, 1952 mandates the employer to furnish the particulars of ownership to the Regional

Commissioner in Form No.5A in relation to a factory or establishment to which the Act applies with regard to the branches of the department, owners, occupiers, directors, partners, managers or other person or persons who have ultimate control over the affairs such factory or establishment. It is seen from Form 5A, submitted on behalf of the establishment in question namely Ultimo Logistics Private Limited that the name of the petitioners appear both in column no.8 as owners and in column no.11 as persons in charge of, and responsible for, the conduct of, business of the establishment. In the complaint it was specifically stated the petitioners are the employers and persons responsible for the conduct of the business of the establishment and in the said establishment status of the petitioners has been given such as petitioner no.1, Managing director and petitioner nos.2 and 3 as directors.

Petitioners are, in fact, husband, wife and their son.

The instant proceeding was initiated against the petitioners for the offence of breach of trust under the Indian Penal Code for default in payment of contribution by the employer. The offences under Section 406 and 409 of the Indian Penal Code are cognizable. Similarly, an offence relating to default in payment of contribution by the employer punishable under of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 are cognizable. So, there is absolutely no difference between the special law and the general law with regard to the cognizability of the offence is concerned. However, in respect of the offences under the Employees Provident Fund and Miscellaneous Provisions Act, 1952, no cognizance can be taken except on a report in writing of the facts constituting such offence by an inspector with previous sanction from the authorities concerned but in respect of the offence under Section 406/409 Indian Penal Code there was no such obligation to comply with the said requirement. Therefore, prosecution has an option to proceed against the offenders under either of the enactments. In the instant case prosecution has chosen to proceed against the petitioners under the Indian Penal Code for criminal breach of contract for failure to deposit the employees share of Provident Fund contribution, though deducted, to the Provident Fund Authority.

Section 405 of Indian Penal Code defines the offence of criminal breach of trust. Section 406 provides for punishment for offence committed under section 405 of the Act while section 409 provides for punishment for offence

committed under section 405 of Indian Penal Code by public servant or by banker, merchant or agent. Section 405 of Indian Penal Code reads as follows:-

405. Criminal Breach of trust. "Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits criminal breach of trust."

Explanation 1. "A person being an employer, of an establishment whether exempted under Section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952) or not who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, 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 said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid."

Explanation 2. "A person, being an employer who deducts the employee's contribution from the wages payable to the employee for credit to the Employee's State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948) 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 said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid."

The Explanation 1 above relates to Employees' Provident Funds and Miscellaneous Provisions Act, 1952 while the Explanation 2 relates to Employees' State Insurance Act, 1948. Thus, from the above Explanations, it is evident that a person liable should be an employer who deducts the employee's contribution from the wages payable to the employees. Since

the term 'employer' as mentioned in the Explanation 2

has not been defined in the Indian Penal Code and since the matter related to non-deposit of employee's share of contribution in the

Employee's State Insurance Fund, the Hon'ble Supreme Court in the matter of Employees' State Insurance Corporation Vs. S.K.

Aggarwal (supra) took into consideration the definition of word 'principal employer' defined in section 2(17) of the ESI Act and views that

'..... in the absence of any express provision in the Indian Penal Code incorporating the definition of principal employer in Explanation 2 to section

405, the definition in the ESI Act can not be held to apply to the term 'employer' in Explanation 2. As the High Court has observed, the term

'employer' in Explanation 2 must be understood as in ordinary parlance. In ordinary parlance, it is the company which is the employer and not its

directors, either singly or collectively.'

Under the ESI Act a duty has been cast upon the 'principal employer' to pay the employee's share of contribution whereas Explanation 2

referred to the term 'employer' only and there was no definition of 'employer' either in the ESI Act or in the Indian Penal Code and as such the

definition of word 'principal employer' defined in section 2(17) of the ESI Act was taken into account to consider as to whether the directors can

be held liable for failure to pay the employee's share of contribution. The case in hand relates to non-deposit of employees share of provident fund

dues with the Provident Fund Authority, though deducted.

Under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 a duty has been cast upon the 'employer' to pay the

employee's share of contribution and in case of failure to do so penalty has been provided therein. In the case in hand, employee's share of

Provident Fund contribution was already deducted but not deposited to the Provident Fund Authority. In this regard Explanation 1 to section 405 of the

Indian Penal Code is very specific. Explanation 1 clearly speaks that an employer of an establishment who deducts the employee's contribution

from the wages payable to the employee for 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 said law, shall be deemed to have

dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Thus, it is apparent that Explanation 1 refers to the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and payment of

employees share of Provident Fund contribution under that Act. So, in the absence of definition of 'employer' in the Indian Penal Code, the

definition of 'employer' in section 2(e) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 can very well be taken

into account, since the Explanation 1 refers to the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and the instant case

relates to the credit of employee's share of Provident Fund contribution to the Provident Fund Authority. As the Employees' Provident Funds

and Miscellaneous Provisions Act, 1952 does not contain any provision similar to section 2(17) and 40 of the Employees' State Insurance Act,

1948, there is no justification to apply the said decision of the Apex Court in the matter of S.K. Aggarwal (supra). Such conclusion was arrived at by

this court in the matter of Sushil Kumar Bagla vs. State reported in 2003 C Cr LR (Cal) 274. I find no reason to differ with such conclusion arrived at

by this court. The decision of this court in the matter of Sushil Kumar Bagla (Supra) inadvertently escaped attention of their Lordships while deciding

the above issue in the matter of Satish Kumar Jhunjunwala (Supra), Prabhash Kumar Basu (Supra), Ashoke Sadhya (Supra) and Rajiv Jajodia &

Anr. (Supra). The decision in the matter of R.L. Kanoria & Ors. (Supra), is also not applicable in this case as the issue involved there was non-deposit

of the Employee's State Insurance Corporation's contribution and not the Employees Provident Fund contribution.

Section 2(e) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 defines 'employer' which means____ 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 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.

So, the employer means, in relation to an establishment which is a factory, the owner or occupier of the factory and where a person has been named

as a manager of the factory, the person so named and 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. In Form 5A, as seen earlier in column no.8 and 11, it was specifically stated the petitioners not only

owners of the company but also the persons in charge of, and responsible for, the conduct of, business of the establishment Ultimo Logistics Pvt. Ltd.

In the said establishment status of the petitioners has been given as____ petitioner no.1, Managing director and petitioner nos.2 and 3 as directors.

Column no.10 of the said Form having heading 'If registered under the Factories Act, particulars of the Manager/Occupier' has been left blank

which means it is not registered under the Factories Act.

In the complaint, as already discussed earlier, it was specifically stated the petitioners are the employers and persons responsible for the conduct of

the business of the establishment who though deducted a sum of Rs. 2,33,742/- from the salary/wages of the employees as employees share of

Provident Fund contribution for the period from March 2012 to October 2014 but did not deposit the amount to the Provident Fund Authority. So, from

the above it is evident that petitioners have been arraigned as accused as being employer and persons responsible for the conduct of the business of

the establishment simply describing their status such as____ petitioner no.1, Managing director and petitioner nos.2 and 3 as directors. In view of the

above and the declarations made in Form 5A, I am unable to accept the submissions of the learned Advocate for the petitioners that Petitioners were

never connected with the day to day affairs of the company and as such they can not be held liable for any default in payment of employees share of

Provident Fund contribution. Moreover, nothing has also been brought on record by the petitioners/owners to draw any inference nor it is the case of

the petitioners that the affairs of the establishment have been entrusted to any manager, managing director or managing agent. There is no doubt true

that the case before the Hon'ble Apex Court in the matter of Srikanta Datta

Narasimharaja Wodiyar (Supra) arose from the prosecution under section 14 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 but the points of law decided in the above judgment is squarely applicable in the facts and circumstances of the present case.

Admittedly, the company in question was not impleaded as an accused in the instant case. I find no reason to differ with the conclusion arrived at by this court in Sajjan Kumar Jhunjhunwala and Ors. (Supra) that non-inclusion of the company does not affect the case in anyway. Furthermore, Explanation 1 of section 405 IPC clearly speaks that an employer of an establishment who deducts the employee's contribution from the wages payable to the employee for 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 said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid. So once it is found employer deducted the amount from the wages of the employees for contribution of the provident fund and retaining the same without depositing it with the fund, an automatic presumption is available against the employer that he dishonestly used the amount of said contribution in violation of a direction of law. It has already been observed that it was the petitioners who are the employers and persons responsible for the conduct of the business of the establishment. Under the circumstances absence of the company/establishment being made a party to the proceeding, the said proceeding cannot be become infructuous.

The decision of the Hon'ble Apex Court in the matter of Aneeta Hada (Supra) was with regard the prosecution under section 138 of the NI Act read with section 141 of that Act as also offence under section 67 read with section 85 of 2000 Act. Both the offences under section 141 of the NI Act and under section 85 of 2000 Act relates to the offences by companies. The principles of law laid by the Hon'ble Apex court in the above decision will be squarely applicable in the case instituted under section 14A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 which also relates to offences by companies but the instant case relates to the offences under section 406/409 of the IPC and the declaration made in Form 5A shows the petitioners to be owners and persons responsible for

the conduct of the business of the establishment.

In the instant case, admittedly, there was a default in deposit of employees share of Provident Fund contribution for the period in question which was

deposited subsequently after initiation of the instant proceeding. But mere payment of the contributions after filing of the case will not absolve the

employer from his liability. Moreover, there is also neither any law nor any decision that in case of subsequent payment of employees share of

Provident Fund contribution would result in quashing of the proceeding though it can be a mitigating circumstances to be taken into consideration in the

event of the employer/accused found guilty by the trial court. In the matter of Sajjan Kumar Jhunjhunwala and Ors. (Supra) and Anjuman Tea

Company Ltd. and Ors.(Supra) also this court held that subsequent deposit will not absolve the defaulter nor lead to quashing of the proceeding.

Having considered the entire aspects, I am not inclined to quash the criminal proceeding under reference. Accordingly, the instant criminal revision is

liable to be dismissed and the same is dismissed. No order as to costs. The interim order of stay, if any, stands vacated. The trial court shall not be

prejudiced about the merits of the case by the observations made in this judgment. Urgent photostat certified copy of this judgement, if applied for, be

given to the parties expeditiously upon compliance with the necessary formalities in this regard.