

**(2015) 05 CAL CK 0008**  
**In the Calcutta High Court**  
**Case No : C.R.R. Nos. 259 and 1036 of 2007**

Ashoke Sadhya and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

**Date of Decision :** 13-05-2015

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 482  
Employees State Insurance Act, 1948 — Section 2(17)  
Factories Act, 1948 — Section 7  
Penal Code, 1860 (IPC) — Section 405, 405, 406, 406, 407

**Citation :** (2015) 3 CHN 755 : (2015) 146 FLR 273 : (2015) 4 LLN 636 : (2015) LLR 927

**Hon'ble Judges :** Shib Sadhan Sadhu, J

**Bench :** Single Bench

**Advocate :** Debasish Roy, Kaushik Chatterjee and Partha Baidya, for the Appellant; Amarta Ghose, Advocates for the Respondent

**Final Decision :** Allowed

## Judgement

Shib Sadhan Sadhu, J.—The aforesaid two revisions are being disposed of by a common judgment as common issue of law based on similar facts arises for consideration.

2. By filing this application under Section 482 of the Code of Criminal Procedure, 1973 the petitioners seek to quash the entire proceedings in GR Case No. 620 of 2006 arising out of Naxalbari P.S. Case No. 85/06 dated 05.07.2006 under Section 406 of the Indian Penal Code including the order dated 16.08.2006 pending before the Court of Learned Chief Judicial Magistrate, Siliguri, Darjeeling.

3. The factual background is that the petitioner No. 1 was the General Manager of M/S. Tirrihannah Company Limited who resigned on 31.07.2006 and the petitioner No. 2 was the Managing Director of the said Company who relinquished on 31.08.2006. The other petitioner was a Manager of the said company who resigned on 16.01.2006. A written complaint was lodged by one

Dil Bahadur Sherpa, Enforcement Officer, Siliguri alleging that the petitioners deducted a sum of Rs. 9,06,200/- from the wages of the employees of the said company towards the Employees' Share of Provident Fund Contribution from the period from December 2005 to May 2006 and had not deposited the said amount with the Statutory Authority in violation of Section 6 of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 read with Paragraph 38 of the Employees' Provident Fund Scheme which tantamounts to offence of criminal breach of trust as defined in Section 405 of the Indian Penal Code. It was further alleged that the petitioners were responsible for the day to day running of the business of the said company and so they have committed offence punishable under Section 406/409 of the IPC. On the basis of such complaint the aforesaid P.S. case was registered and investigation was taken up. On completion of investigation charge sheet was submitted against the present petitioners and another co-accused under Section 406 of the IPC.

4. Mr. Debasish Roy, Learned Counsel appearing for the petitioners submitted that within one week of the initiation of the instant case the petitioners have deposited the entire amount of Rs. 9,06,200/- with the O.P. No. 2 Authority. He referred to the relevant challans which have been annexed and marked P-2. Therefore, the proceeding cannot continue any more and the same is liable to be quashed. He further submitted that the petitioners being the Directors of the Company cannot be held liable for such alleged offence and they being not covered within the definition of "principal employer" no criminal proceeding under Sections 406/409 can lie against them. He, therefore, concludingly submitted that the instant Criminal Proceeding is an abuse of process of law and is liable to be quashed. He relied on the decisions reported in Employees State Insurance Corporation Vs. S.K. Aggarwal and Others, (1998) 5 AD 588 : AIR 1998 SC 2676 : (1998) 94 CompCas 75 : (1998) CriLJ 4027 : (1998) 5 JT 233 : (1998) 2 LLJ 794 : (1998) 4 SCALE 328 : (1998) 6 SCC 288 : (1999) 2 SLJ 119 : (1998) AIRSCW 2717 : (1998) 6 Supreme 197 , 2003 C Cr LR (Cal) 341 (R.L. Kanoria and Ors. V. State and Anr.), Satish Kumar Jhunjhunwala Vs. The State of West Bengal, (2008) 3 CALLT 484 : (2009) 120 FLR 45 : (2009) 2 LLJ 403 , Prabhash Kumar Basu Vs. State of West Bengal, (2012) 3 CHN 233 and Sunil Kumar Panti and Others Vs. Stte of West Bengal and Others in order to substantiate his submission.

5. Mr. Mihir Kundu, Learned Advocate appearing on behalf of the Enforcement Officer, EPFO (O.P. No. 2), on the other hand, referred to the definition of "employer" as laid down in Section 2(e) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 which reads as follows:

"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 deceased owner or occupier and, where a person has been named as a manager of the factory under clause (f) sub-section (1) of section 7 of the Factories Act,

1948, (63 of 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 are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent;"

and submitted that the Manager or Managing Agent or Director or Managing Director can very well be prosecuted for non-payment of Provident Fund dues with the Appropriate Authority under the said Act. He further submitted that by making subsequent payment/deposit of the defaulted amount of employees" share of contribution towards Provident Fund cannot exonerate the petitioners at all from the criminal liability of the offence already committed. Therefore, the proceedings cannot be quashed and the instant Revisional Application is liable to be dismissed. He cited the decision reported in 2007 (2) CLJ (Cal) 124 (Kamala Tea Co. Ltd. V. State of West Bengal etc.) Satish Kumar Jhunjhunwala Vs. The State of West Bengal, (2008) 3 CALLT 484 : (2009) 120 FLR 45 : (2009) 2 LLJ 403 and Sunil Kumar Panti and Others Vs. Stte of West Bengal and Others in support of his submission.

6. I have considered the submissions made by the Learned Advocates appearing for the parties in the light of the decisions placed by them. I have also perused the entire materials available on record.

7. The moot question which now arises for consideration is whether the petitioners being the General Manager, Managing Director and Manager can be prosecuted under Sections 406/409 IPC and be held liable for commission of criminal breach of trust for non-deposit of the statutory dues in respect of the employees" share towards provident fund with the statutory Authorities.

8. Section 405 of the 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 willfully 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 for 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 employees' contribution from the wages payable to the employee for credit to the Employees' 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."

9. Thus it is apparent that there is no material difference between the aforesaid two explanations. The explanation 1 relates to Employees' Provident Funds and Miscellaneous Provisions Act, 1952, the latter is in respect of Employees' State Insurance Act, 1948.

10. In case of both the aforesaid Acts the person to be liable must be an employer who deducts the employees' contribution from the wages payable to the employee for credit to a provident fund or to the Employees' State Insurance Fund.

11. Admittedly and undisputedly the FIR has been lodged under Sections 406/409 IPC against the present petitioners in their capacity as General Manager, Managing Director and Manager. The Hon'ble Supreme Court in the case of Employees' State Insurance Corporation Vs. S.K. Aggarwal and Ors. (supra) cited by the Learned Advocate appearing for the petitioners has set such controversy at rest forever by holding that in the definition of "principal employer" under the Employees' State Insurance Act, 1948 in Explanation 2 to Section 405 of the Indian Penal Code, the Directors of the Company, would not be covered by the definition of "principal employer" when the company itself owns the factory and is also the employer of its employees at the head office. Their Lordships took into consideration the definition of the word employer laid down under Section 2(17) of the ESI Act, 1948 which defines "principal employer" in a factory as the owner and "owner" and/or "occupier" of the factory and includes the Managing Agent of such owner or occupier or legal representative of declared owner or occupier and where the person as has been named as Manager of the factory persons so named. Their Lordships further held 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, this definition cannot be held to apply to the term "Employer" and Explanation 2.

12. There cannot be any scope for controversy to accept the legal proposition that the word "employer" as has been defined in EPF Act, 1952 is in pari materia with the ESI Act, 1948 which does not include Managing Director or Manager

within any explanation of Section 405 of the IPC. The same person cannot be an employer as well as employee at the same time. Therefore, the present petitioners cannot be termed as employers of the establishment.

13. Section 409 of the IPC reads as follows:

"409. Criminal breach of trust by public servant, or by banker, merchant or agent.- Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Thus it is apparent that "entrustment is the basic essential of the aforesaid Section 409 IPC.

14. The exact connotation of the expression "entrustment" as used in Section 405 to 409 of the IPC has been settled by the decisions of the Hon'ble Supreme Court in *Jaswantraai Manilal Akhaney Vs. The State of Bombay*, AIR 1956 SC 575 : (1956) CriLJ 1116 : (1956) 1 SCR 483 and *The State of Gujarat Vs. Jaswantlal Nathalal*, AIR 1968 SC 700 : (1968) CriLJ 803 : (1968) 2 SCR 408 . According to the said decisions, "entrustment" contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. The person who transfers possession of the property to the second party still remains the legal owner of the property and the person in whose favour possession is so transferred has only the custody of the property to be kept or disposed of by him for the benefit of the other party. The expression "Entrustment" also carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another continues to be its owner.

15. It has already been held that the petitioners cannot be termed as employers of the establishment. Therefore, applying the aforesaid tests for determining whether there is "entrustment" as laid down in the above referred decisions to the facts and circumstances of the instant case as made out in the FIR, I am unable to persuade myself to hold that there was any "entrustment" within the meaning of Section 405 IPC with the petitioners in the instant case. Also there is no such scope for any entrustment by law in terms of the explanation 1 and 2 of Section 405 IPC. That being so no offence under Section 409 IPC can be said to have been made out by the averment made in the FIR.

16. Before I part with the discussion I would like to mention that the Hon'ble Supreme Court while passing the judgment in connection with Criminal Appeal No. 1868 of 2011 arising out of SLP (Crl) No. 590 of 2008 on 27.09.2011 in the case of *M/s. Thermax Ltd. and Ors. Vs. K.M. Johny and Ors.* held that the concept of "vicarious liability" is unknown to criminal law and the Directors of the

company are not vicariously liable for crime of the company.

17. For the aforestated reasons, I think that the continuation of the criminal proceedings against the present petitioners would be a travesty of justice and a gross misuse of judicial process. Accordingly the Revisional Applications are allowed and the Criminal proceeding being G.R. Case No. 620 of 2006 arising out of Naxalbari P.S. Case No. 85/06 dated 05.07.2006 under Sections 406/409 IPC is hereby quashed. No order as to costs.

18. Let a copy of this judgment be sent to the Learned Chief Judicial Magistrate, Siliguri for information and action.

19. Criminal Section is directed to deliver urgent photostat certified copy of this judgment to the parties, if applied for, as early as possible.