

(2018) 10 BOM CK 0184

In the Bombay High Court

Case No : Criminal Writ Petition No. 957 Of 2016

Dr Ramprasad Ganeshlal Bajaj APPELLANT @Hash State Of Maharashtra

Date of Decision : 26-10-2018

Acts Referred:

Indian Penal Code, 1860 — Section 406, 408
Employees Provident Fund and Miscellaneous Provisions Act, 1952 — Section 2(e),
7(A), 7(1)(f)
Factories Act, 1948 — Section 2(n)

Citation : (2018) 10 BOM CK 0184

Hon'ble Judges : T.V. Nalawade J;Vibha Kankanwadi, J

Bench : Division Bench

Advocate : V. J. Dixit, P. V. Diggikar, K. B. Choudhari

Final Decision : Dismissed

Judgement

T.V. Nalwade, J

[1] Rule. Rule made returnable forthwith. By consent, heard both the sides for final disposal.

[2] The petition is filed for relief of quashing of charge sheet filed in Crime No. 168/2006. The crime was registered with Majalgaon Police Station,

District Beed for the offences punishable under Sections 406, 408, etc of the Indian Penal Code.

[3] Both the sides are heard.

[4] The petitioner is the Chairman of a Private Sugar Factory/ Company by name Jai Mahesh Sugar Industries. This factory has employed many

employees and it has been deducting the statutory amount from the salary of the employees for provident fund contribution. For the period October

2003 to December 2005, the factory had deducted the amount from the salary for contribution to the provident fund, but this amount of employees was

not deposited with Provident Fund Office. In the complaint, the amount is said to be Rs. 4,55,334/Â but the amount was found to be more and further, the contribution of the employer was also not deposited.

[5] The respondent Shri. Kishore Sonkusare, Inspector of the Department noticed the aforesaid irregularities and he gave report to the Police Station, on the basis of which, the present crime is registered. The report was given on 27.06.2008.

[6] The proceeding under Section 7(A) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 came to be initiated after noticing aforesaid irregularities. After giving an opportunity to the factory, the factory is directed to deposit total amount of Rs. 14,92,770/Â?.

[7] It is case of the petitioner that the factory had deposited an amount of Rs. 2,88, 822/Â on 12.07.2006, before the order made by the office of provident fund and then it deposited remaining amount of Rs. 12,03,948/Â. It is the contention of the petitioner who is the chairman of the factory that as the amount is deposited, the department ought not to have launched the prosecution and further when the inquiry was pending, the report ought not to have been given. It is also contended that for such irregularities, the Chairman cannot be held responsible as the lapse can be of a staff member. It is contended that the Chairman was not the person responsible for day to day administration of the company. Surprisingly, it is contended that the department needs to show the certificate in respect of the occupier when the Chairman, present applicant, ought to have shown the record to escape from the liability.

[8] The petitioner had filed discharge application below ExhibitÂ14 in the Court of the learned Judicial Magistrate, First Class, Majalgaon on the aforesaid ground but the learned J.M.F.C rejected the discharge application on 02.12.2015. The Criminal Revision Petition No.2/2016 filed in the Court of learned Additional Sessions Judge, Majalgaon District Beed against the order made by the learned J.M.F.C came to be dismissed by the Sessions Court.

[9] It is specific contention of the Provident Fund Department that prior to October 2003 also, the factory was deducting amount of employees provident fund contribution and the said amount was deposited in the past for many years but after October 2003, the factory had stopped depositing

the amount for no reason. It is contended that it cannot be disputed that the factory was covered by aforesaid special legislation and when the amount was already deducted, the amount could not have been kept by the petitioner with him. It is contended that it was the responsibility of the petitioner as the Chairman to see that not only the amount of employees is deposited with office of provident fund, but the contribution of the employer is also deposited and as such steps were not taken for a long period, the aforesaid offences under Indian Penal Code are committed. It is contended that even after giving notice by the department in writing, the Chairman avoided to deposit the amount and so he has committed the offence.

[10] Along with charge sheet, there are statements of the employees who have been working with the factory since the year 2002. The statements are to the effect that 12% of the salary amount was deducted by the Chairman towards the provident fund contribution, but that amount was not deposited with the department of Provident Fund. It is contended by them that no separate receipts were given to them in respect of the deduction and further pay slip showing such deduction was also not supplied. From the contentions made in the petition, it can be said that the Chairman is not disputing that the deduction was made from the salary of the employees and the factory was covered by the aforesaid special legislation. In view of this circumstances, it was necessary for the Chairman to give plausible explanation to escape from the liability.

[11] From submissions made and the record it appears that there was employees' contribution of Rs. 6,57,376/Â which was deducted from their salary, but that amount was not deposited in Provident Fund Account. The amount of employers contribution is said to be 5,01,994/Â and this amount was also not deposited by the Chairman. Only after making of the order by the department, the amount was deposited i.e. on 29.07.2006.

[12] In support of aforesaid defence taken by the Chairman, the learned counsel cited some cases of the Supreme Court. The aforesaid circumstances need to be kept in mind while considering the ratio of the Supreme Court. It is not disputed that during the relevant period, the petitioner was the Chairman. The record shows that after order made by the department, amount was deposited with Challan by the factory and this record bears signature of the Chairman. In view of nature of the defence taken by the Chairman, the meaning of "employer" given in Section 2(e) needs to

be seen. The provision is as under :Â?

2(e) "employer" means

(I) in relation to an establishment which is a factory, the owner or the 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 subÂsection(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 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."

As per Section 2(n) of Factories Act, 1948, the person who has actual and ultimate control over the affairs of company/factory is the ' occupier' and

so, the Chairman is the Occupier for the present purpose. No record is produced to show that affairs were entrusted to any other person.

13] TheÂ aforesaidÂ provisionÂ showsÂ thatÂ theÂ ChairmanÂ worksÂ as occupier and he is representing the factory. The fact that he

signed the record of deposit of both the contributions with the department, is sufficient to infer at this stage that he was responsible for dayÂtoÂday

business of the factory. In view of nature of aforesaid provisions, it was necessary for the Chairman to produce the record of entrustment to some

other persons by the factory authority conducting dayÂto day business. Further, the provisions of special enactment show that not only the factory, but

every person who was in charge of and was responsible for the conduct of the business, is also deemed to be guilty of the offences committed under

the special enactment (Section 14Â?A).

[14] One more argument was advanced by the learned counsel that only the provisions of the special enactment can be used and the provisions of the

Indian Penal Code cannot be used. This submission is not at all acceptable as it is a private company and the amount is actually used, which was

belonging to the employees. Further it will be a matter of evidence as to for what purpose the amount was utilized and for that the burden will be on

the Chairman.

[15] The reliance is placed on the following cases for petitioner.

[I] Asoke Basak Versus State of Maharashtra and others 2010 DGLS (Supreme Court) 814

[II] S. K. Alagh Versus State of U. P. and Others 2008 DGLS (Supreme Court) 230

[III] Employees State Insurance Corporation Vs. S. K. Aggarwal And Others (1998) 6 S.C.C. 288

[16] The facts of the first case were different in which the Corporation of the State Government, the Maharashtra State Electricity Board (MSEB),

was involved and the regulations specify the duty of every officer. In the present matter, there are different facts and no record is produced by the

chairman. In case of M.S.E.B, the Chairman of the Board has no direct control over the affairs and day to day affairs are required to be conducted by

the employees appointed for those purposes. In the second case, the relevant provisions are mentioned on the basis of which inference was available

as to who was in charge of business and who was responsible. The third case is totally on a different point. In the present matter, no point like, who is

the " principal employer" and who is 'employer' is involved. All the employees are directly appointed in the factory and it can be said that they are

appointed by the Chairman who is heading the Board of Directors. Thus, all the three cases are of no help to the petitioner.

[17] It is already observed that it is a matter of evidence and the burden is on the Chairman to show that he was not responsible for the conduct of the

business of the factory. There are specific allegations of aforesaid nature against him and there is also the record, due to which charge can be framed

against him and that is why, the trial Court has rejected the application filed for discharge. In the result, petition stands dismissed.

Rule is discharged. Interim relief is vacated.