
(2010) 03 KL CK 0021
In the High Court Of Kerala
Case No : Criminal M.C. No. 2926 of 2006

Dr. Vellayani Arjunan

APPELLANT

Vs

Enforcement Officer and Another

RESPONDENT

Date of Decision : 11-03-2010

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14(1A), 14A, 17(3), 2, 6

Citation : (2010) 125 FLR 904 : (2010) 2 KLT 335 : (2010) 4 LLJ 251

Hon'ble Judges : K. Hema, J

Bench : Single Bench

Advocate : Suman Chakravarthy, for the Appellant; N.N. Sugunapalan T.N. Girija, S.C. for EPF Organisation and B. Jayasurya, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

K. Hema, J.—Can the Chairman of a Public School be prosecuted for non-payment of provident fund contributions and administrative charges, u/s 14A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("the Act" for short)? Can an "establishment" be prosecuted u/s 14(1A), for such non-payment? Can any person be prosecuted u/s 14(1A) of the Act, on the ground that he is "in-charge of and responsible for the business of the establishment"?

2. Enforcement Officer, Employees' Provident Fund Organization filed a complaint against a Public School, its Secretary and its Chairman alleging that they failed to pay the contribution to Employees' Provident Fund and Administrative Charges for the period March 2003 to May 2003. As per the allegations in the complaint, first accused is a Public School which is an "establishment", within the meaning of the Act and "accused 1 to 3" are the persons "in-charge of the said establishment and responsible for the conduct of its affairs", during the relevant period.

3. It is further alleged in the complaint that second accused who is the Secretary

and third accused who is the Chairman of the "establishment" and "all the three accused" were required to comply with all the provisions of the Act, including payment of contributions and administrative charges, as provided in Section 6 of the Act and also paragraph 38 of the Employees' Provident Fund Scheme, 1952, (the Scheme, for short). But, they failed to do so and hence, the complaint is filed alleging that all of them committed offence u/s 14(1A) of the said Act.

4. This petition is filed to quash the complaint, Annexure A. Learned Counsel appearing for Petitioner submitted that Petitioner is the Chairman of the school and is the third accused, as per the complaint. The Petitioner is the Trustee of the "Tagore Educational Trust" and it is in such capacity that he became the Chairman of the School. Referring to the various Clauses in Annexure B, which is a copy of the Deed of Trust, in relation to "Tagore Educational Trust", it was argued that Petitioner is not liable to pay contribution. Learned Counsel for Petitioner has drawn my attention to certain Clauses in Annexure B and argued that as per the various Clauses in the Trust Deed, it is provided that the Secretary shall report directly to the Chairman and he is responsible for the day-to-day functioning of the Trust and he shall also deposit the Trust money in a scheduled Bank. Hence, it is the Secretary who is liable and not the Chairman, it is argued. Therefore, the complaint against Petitioner may be quashed, it is submitted.

5. Learned Counsel for Respondents, strongly argued that Petitioner has not produced any document to show that Secretary is the person who is in ultimate control of the school. He pointed out that in paragraph 8 of the Trust Deed, it is only stated that in consultation with the Directors, the Chairman will form an academic council, consisting of nine members to advise the Board of Directors in matters relating to course of studies. For academic and administrative purposes, the Trustee will appoint a Director of studies and an Administrative Officer. He will also appoint such other members of staff, as is required.

6. It is seen from the Trust Deed that the Secretary is responsible for the day-to-day functioning of the Trust, but it cannot be stated that he is "in ultimate control" over the establishment i.e., the school, even as per the Trust Deed, it is argued by Respondent's Counsel. Therefore, according to him, Annexure B will not be helpful to the Petitioner to substantiate his case and he cannot claim any exemption from his liability under the Act.

7. Learned Counsel for first Respondent also cited a decision reported in *Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd.* (2003) 3 S.C.C. 269 and argued that while exercising powers u/s 482 of the Code, the complaint in its entirety shall, be examined, on the basis of the allegations made in the complaint and the court shall not have an authority or jurisdiction to go into the merit of the matter or examine its correctness. The allegations made in the complaint in the entirety would constitute offence u/s 14(1A) of the Act, especially since it is specifically alleged in the complaint that Petitioner is "in charge of and responsible for the conduct of the business" of the establishment during the relevant period, it is

argued.

8. On hearing both sides and on going through the allegations in the complaint, and the relevant provisions of the Act and Scheme, I find that on the nature of the allegations made in the complaint and the provisions referred to in the complaint, the arguments advanced by both sides with reference to the Clauses in the Trust Deed, Annexure B are not quite relevant for disposal of this petition. I am not, therefore, dealing with such disputed facts.

9. A reading of the complaint will show that Petitioner is sought to be prosecuted u/s 14(1A) of the Act, for non-payment of contribution and administrative charges. Section 14(1A) reads as follows:

Section 14(1A) An employer who contravenes, or makes default in complying with, the provisions of Section 6 or Clause (a) of Sub-section (3) of Section 17 in so far as it relates to the payment of inspection charges, or paragraph 38 of the Scheme in so far as it relates to the payment of administrative charges, shall be punishable with imprisonment for a term which may extend to three years etc.

10. As per the allegations in the complaint, all the three accused contravened Section 6 and paragraph 38 of the Scheme. Contravention of Section 6 and paragraph 38 of the Scheme is punishable u/s 14(1A) of the Act. Section 6 reads as follows:

Section 6. Contributions and matters which may be provided for in Schemes.-- The contribution which shall be paid by the employer to the Fund shall be ten per cent of the basic wages, dearness allowance and retaining allowance (if any) for the time being payable to each of the employees, whether employed by him directly or by or through a contractor, and the employees' contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires, be an amount exceeding ten per cent of his basic wages, dearness allowance and retaining allowance, (if any), subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section.

11. Paragraph 38 of the Scheme reads as follows:

38. Mode of payment of contributions.--(1) The employer shall, before paying the member his wages in respect of any period or part of period for which contributions are payable, deduct the employee's contribution from his wages which together with his own contribution as well as an administrative charge of such percentage [of the pay (basic wages, dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than an excluded employee, as the Central Government may fix. He shall within fifteen days of the close of every month pay the same to the Fund by separate bank drafts or cheques on account of contributions and administrative charge]:

[Provided that if the payment is made by a cheque, it should be drawn only on

the local bank of the place in which deposits are made]:

Provided further that where there is no branch of the Reserve Bank or the [State] Bank of India at the station where the [factory or other establishment] is situated, the employer shall pay to the Fund the amount mentioned above by means of Reserve Bank of India [Governmental Drafts at par] separately on account of contributions and administrative charge.

12. Section 14(1A) of the Act provides that an "employer" who contravenes, or makes default in complying with, the provisions of Section 6 of the Act or paragraph 38 of the Scheme, in so far as it relates to the payment of contribution or administrative charges, shall be punishable under the said section. A reading of Section 6 of the Act and paragraph 38 of the Scheme also shows that the liability to pay contribution and administrative charges is on the "employer" and not on any other person. Therefore, in case of contravention of Section 6 of the Act or paragraph 38 of the Scheme, the "employer" alone can be prosecuted u/s 14A of the Act.

13. There is no allegation in the complaint that Petitioner is the "employer" in respect of the School, as defined under the Act. Section 2(e)(ii) of the Act defines "employer". It can be extracted as hereunder:

2. Definitions.--In this Act, unless the context otherwise requires,--

(e) "employer" means--

(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.

14. As per Section 2(e)(ii) of the Act, "employer" means, in relation to any establishment other than factory 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. There is absolutely nothing in the complaint to show that Petitioner is an "employer" as defined Section 2(e)(ii) of the Act.

15. It is also to noted that as per the allegations in the complainant, first accused is the "establishment" and Petitioner is its Chairman. It appears from paragraph 3 of the complaint that Petitioner is arrayed as accused on the ground that his vicarious liability, for the alleged non-compliance of the relevant provisions of the Act, by the "establishment". It is alleged in the complaint that Petitioner is in charge of, and responsible for the conduct of its business of the "establishment".

16. But, a reading of Section 14(1A), Section 6 of the Act and paragraph 38 of the Scheme reveals that there is no liability for an "establishment" to pay contribution or administrative charges under the above Sections. An

"establishment" cannot be proceeded against, u/s 14(1A) of the Act, for non-payment of contribution or administrative charges in violation of Section 6 or paragraph 38 of the Scheme. The only person who can be proceeded against for such violation is the "employer" as defined under the Act and not an "establishment". Therefore, no person can be prosecuted u/s 14(1A) of the Act, as a person "in charge of and responsible for the business of the establishment".

17. It also follows that the Chairman of a Public School cannot be proceeded against u/s 14(1A) of the Act, unless he is an "employer", as defined under the Act. There must be specific allegation in the complaint that the person who is sought to be prosecuted u/s 14(1A) is the "employer", who has the "ultimate control over the affairs of the establishment" etc. In such circumstances, Petitioner who is the Chairman, cannot be prosecuted u/s 14(1A) of the Act, either as an "employer" or as a person "in charge of and/or responsible for the conduct of the business of the establishment".

18. It is true, that while considering a petition u/s 482 of the Code, this Court can only examine the allegations made in the complaint and it cannot consider the correctness of the allegations made therein. Whatever appears on the face of the complaint shall be taken into consideration, without any critical examination of the same, to find out whether, the allegations made therein, prima facie, constitute an offence. While doing so, I find that none of the relevant allegations which are necessary for prosecuting Petitioner u/s 14(1A) are available in the complaint. In the above circumstances, I am satisfied that continuance of proceedings against Petitioner, on the basis of Annexure A complaint will result in abuse of process of court.

19. Hence, the following order is passed.

1. Annexure A complaint, in so far as it relates to Petitioner, is hereby, quashed.
2. Petitioner shall not be proceeded against any further, on the basis of Annexure A.

Petition is allowed.