

(2013) 04 CAL CK 0084
In the Calcutta High Court
Case No : CRR No. 128 of 2005

In Re: M/s. Jenson Nicholson (India) Limited and Another

Date of Decision : 01-04-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482, 91
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14A, 2, 2(e), 6, 8F
Employees State Insurance Act, 1948 — Section 2(17), 40, 86A
Penal Code, 1860 (IPC) — Section 34, 405, 406, 409

Citation : (2013) 138 FLR 348 : (2013) LLR 934

Hon'ble Judges : Taufique Uddin, J

Bench : Single Bench

Advocate : Amartya Ghosh, Sandipan Ganguly and Shiladitya Banerjee, for the Appellant; Anil Kr. Gupta for the O.P. No. 2, for the Respondent

Judgement

Taufique Uddin, J.—This is an application u/s 482 of the Code of Criminal Procedure, 1973 for quashing of proceedings in G.R. No. 2131/04 pending before the learned Chief Metropolitan Magistrate, Calcutta arising out of Shakespeare Sarani P.S. Case No. 312 dated 19.8.2004 u/s 406/ 34, IPC. In the background of this revision the fact in a nutshell is that the petitioner No. 1 is a public limited company having its registered office at 7-B, Middleton Street, Calcutta-700 071. The petitioner No. 2 is a former Director in petitioner No. 1 company. At no material point of time, he was in-charge and responsible to the petitioner No. 1 company for running its day-to-day business. The O.P. No. 2 is the Enforcement Officer under the Employees Provident Fund Organisation, West Bengal. He lodged a written complaint to the Deputy Commissioner of Police, Calcutta, West Bengal alleging that during his inspection of the establishment of M/s. Jenson & Nicholson (India) Ltd. on 13.7.2004 it was noticed that the employer of the said company have deducted a sum of Rs. 9,17,883/- from the salary/wages of the employees as employees share of provident fund contribution for the period from September, 2003 to April, 2004 and have not yet deposited the amount with the statutory fund in violation of section 6 of the Employees Provident Fund & Miscellaneous Provisions Act, 1952 read with para 38 of Employees Provident

Fund Scheme. According to O.P. No. 2, non-remittance of the provident fund money after deducting the employees share from the salary tantamount to an offence of criminal breach of trust u/s 405 of (Explanation-1) of IPC. The O.P. No. 2 further alleged that the following persons are responsible for conduct of business of the establishment and have committed a cognizable offence u/s 405 of (Explanation)-1 IPC punishable u/s 406/ 409, IPC. The O.P. No. 2 as Chairman-cum-Managing Director sought his prosecution as well. In the written complaint, the O.P. No. 2 enclosed "P/1" giving details of employees share deducted from the salary of employees amounting to Rs. 9,17,883/-.

2. On the basis of written complaint, a notice u/s 91 of the Code of Criminal Procedure was issued to the petitioner No. 1 company calling upon the petitioner No. 1 company to produce salary register of the employees and Form No. 5-A in respect of petitioner No. 1 company. On 10.9.2004, the Enforcement Officer seized from registered Office of the company (i) Form No. 5-A in respect of M/s. Jenson Nicholson (India) Ltd. and (ii) Bank deposit slip of Standard Chartered Bank in favour of the petitioner No. 1 company M/s. Jenson & Nicholson (India) Ltd. Employees Provident Fund of September, 2003 to October, 2003 amounting to Rs. 2,71,255/- towards the provident fund contribution alongwith the bank transaction statement. During that period the Office of the Regional Provident Fund Commissioner, West Bengal vide letter dated 16.9.2004 issued an order to the Branch Manager, UTI Bank, Gurgaon to pay the dues of the petitioner No. 1 company u/s 8-F of the said Act. In the order dated 16.9.2004, the Office of the Regional Provident Fund Commissioner claimed a sum of Rs. 22,20,275/- for the period from July 2003 to April 2004. M/s. UTI Bank Ltd. complied with the order of the Regional Provident Fund Commissioner and paid Rs. 22,20,275/- vide two demand drafts No. 3526 dated 18.9.2004 for Rs. 14,98,618.69/- and No. 3563 dated 28.9.2004 for Rs. 7,21,676.31/- respectively. The UTI Bank vide letter dated 28.9.2004 addressed to the petitioner No. 1 company confirmed payment of the total of Rs. 22,20,275/- to the Employees Provident Fund Commissioner, Calcutta. By letter No. R-Ex-5143/WB/CA/1612(B)(i) dated 4.10.2004 Sri R.K. Sinha, Assistant Provident Fund Commissioner, W.B. informed the Branch Manager, UTI Bank, Gurgaon Branch about the revocation of the Bank attachment order u/s 8-F of the said Act. So, the Employees Provident Fund Organisation realized the outstanding contribution of the employees as well as the employer upto April, 2004. The prosecution of the petitioner for non-payment of the employees contribution of the provident fund for the period from July, 2003 to April, 2004 is an abuse of the process of the Court. It is a sheer harassment of the petitioners, particularly, petitioner No. 2 who has not any ultimate control over the affairs of the petitioner No. 1 company. The petitioner No. 1 company is facing acute financial crisis and enquiry within the meaning of section 60 of the Sick Industries (Special Provision) Act, 1985 is pending. The company is trying to rehabilitate itself. Presently, the petitioner No. 1 company has huge financial debts of the bank and financial institutions. So, there was some delay in arrangement of fund to deposit the provident fund contribution of

the employees. It is not a case where the company converted the provident fund contribution of the employees for its own gain.

3. The learned Counsel for the petitioner contended inter alia that whatever has been done has no connection with the petitioner No. 2 because he is not the employer and has no control over the state of affairs of the petitioner No. 1 company. So, the proceedings against the petitioner No. 2 may be quashed whereas petitioner No. 1 may face trial. Further, it was contended that the payment has already been made and as such the Director, petitioner No. 2 cannot be responsible in any manner whatsoever.

4. The learned Counsel for the petitioner in support of his contention cited before me following decisions:

(i) In the case of Employees State Insurance Corporation Vs. S.K. Aggarwal and Others,) in regard to sections 2(17) and 40 of the Employees State Insurance Act it was held as follows:

...in absence of any express provision in the Indian Penal Code incorporating the definition of "principal employer" in Explanation II to section 405, this definition cannot be held to apply to the term "employer" in Explanation II. As the High Court has observed the term "employer" in Explanation II 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.

The owner will be the principal employer u/s 40 of the said Act.

(ii) In the case of R.L. Kanoria and Others Vs. State and Another, it was held that in terms of sections 86-A and 40 of the Employees State Insurance Act, 1948, Directors of the Company are not principal employer and hence not liable for failure of the company to deposit the contribution of the employees towards E.S.I. Fund.

(iii) In the case of Sunil Kumar Pant and Others Vs. Stte of West Bengal and Others) it was held that the word "employer" does not include "Director". So, prosecution against Directors was quashed.

5. On the other hand, the learned Counsel for the State strongly countered the argument of the learned Counsel for the appellant and referred to me the Scheme of Employees Provident Fund specially section 2-E of the said Act and stated that the present petitioner may very well be made accused and prosecuted and in support of his contention the learned Counsel cited before me some decisions.

6. In one unreported judgment passed on 15.12.1995 in matter No. 97 of 1993 M/s. Universal Heavy Mechanical Lifting Enterprises v. Union of India it was held that non-payment of contribution by the employer to provident fund is a continuing offence. Subsequent payment even though accepted by the Provident Fund Commissioner will not constitute condonation of the offence fully but then if

the Trial Court ultimately finds that the amount of contribution which was due and on account of prosecution which was launched has been finally paid before the lodging of the prosecution or even immediately thereafter, the Trial Court may pass minimum sentence in accordance with law.

7. In the case of Anjuman Tea Company Ltd. and Others Vs. State of West Bengal and Others, it was propounded that (i) it clearly emerges from the aforesaid discussion that there is no such law, nor any decision which conclusively dictates that in case of subsequent payment of the amount of employees' share of contribution towards P.F., however, belated it might be, the criminal prosecution must be quashed. It is rather the settled position of law that subsequent payment does not by itself condone the lapse but certainly is a factor to be taken into consideration at the subsequent stage and most certainly at the time of imposition of punishment, if at all; (ii) This Court is, however, of the firm opinion that subsequent deposit though welcome, as it is better late than never, cannot and does not absolve the accused persons of the liability of the criminal offence. Ours is a welfare State and the EPF and Miscellaneous Provisions Act is undoubtedly a welfare legislation. It helps the weak, the exploited, the oppressed and the wretched of the earth to survive in the midst of the turmoil created by stagflation in our economy. It attempts to take care of the future of the employees. The scheme cultivates among the workers spirit of saving something regularly. The employees cannot be left to the mercy of their masters. The legislation attempts to ensure that the future of the employees is not thrown into an ocean of uncertainty.

8. In the case of Sajjan Kumar Jhunjhunwala and others v. State of W.B., 1999 Cr LR 255 (Cal) it was held that in a case under the Act as provided u/s 14-A of the said Act, maintainability of the case is not affected in absence of the company, as the section provides that if the person committed an offence under this Act, the scheme or the Family Pension Scheme or 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. Non-inclusion of the company, therefore, does not affect the case in any way and the directors if they were in charge of the company can be prosecuted independent of inclusion or non-inclusion of the company in the prosecution. Admittedly, the present petitioners are and also wherein the relevant time of default the directors of the company. As the directors they having been held in the helm of the administration of the company, prima facie it may be presumed that they were responsible to and for discharging the business of the company, and as held by the Supreme Court, the Trustee of the company. The question whether they were actually in charge of the business or someone else, like the manager, was in the helm of the administration is a matter of evidence and cannot be thrashed out at this stage without full scale evidence before the Trial Court. The law provides that the onus is upon the petitioners to show that they were not responsible for the

business and somebody else were in charge of the administration.

9. It must be presumed that the person who is the director of the company is the employer in the term it is understood in Clause (e) of section 2 or an occupier of the factory as provided in clause (k) of section 2, which means that the person concerned must be the owner or occupier of the factory including agent of such owner or occupier. Unless it is proved by cogent evidence that the affairs of control of the company was entrusted with some other person, a director cannot but be held to be the occupier of the company, or by that implication, the employer, in respect of the employees.

10. It requires no discussion that deposit of the defaulted amount long after lapse of time does not absolve the defaulters for the prosecution and punishment. A Division Bench of this Court has held that by virtue of amendment brought in this statute non-payment of the employers' share of the contribution amounts to criminal misappropriation within the meaning of penal statute, and temporary misappropriation is also criminal misappropriation within the meaning of law. Subsequent payments even though accepted will not constitute condonation of the offence itself.

11. Lastly, in the case of Srikanta Datta Narasimharaja Wodiyar Vs. Enforcement Officer, Mysore, was held that a Director of a private company who is neither an occupier nor a manager can be prosecuted u/s 14-A of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 for violation of the Provident Fund Scheme when in Form 5-A, Columns 8 and 11 the Director has declared himself as one of the persons in charge of and responsible for conduct of the business of the establishment or the factory. Sub-sections (1) and (2) of section 14-A extend the liability for any offence by any person including a partner by virtue of explanation if he was in charge or was responsible to the company at the time of committing the offence. The expression, "was in charge of and was responsible to the company for the conduct of the business" are very wide in their import. It could not, therefore, be confined to employer only.

12. Both Clauses (i) and (ii) of section 2(e) again are wide in their sweep. In Clause (i) are included not only owner or occupier but even the agent or manager. When it comes to establishments other than factory it is not confined to owner or occupier but to all those who have control or are responsible for the affairs of the company. It includes even the Director. Therefore, every such person who has the ultimate control over the affairs of company becomes employer. To say therefore that since paragraph 36-A requires an employer to do certain acts the responsibility for any violation of the provision should be confined to such employer or owner would be ignoring the purpose and objective of the Act and the extended meaning of employer in relation to establishments other than the factory.

13. Why I am unable to accept the contention made by the learned Counsel for the petitioner in the light of the decisions referred to me is due to following

reasons.

14. The decisions referred to above by the learned Counsel for the petitioner appears to be distinguishable here mainly because of the fact that the present petitioner No. 2 has been shown as Chief Executive and not the Director. It is true that the Directors might have played a different role but what is the role of the Chief Executive has not been disclosed. It is expected that the Chief Executive of a concern is to share the well and woe of the company. He is not a titular head of the company. The nature of the job definitely comes within the purview of responsibilities. In case of any departure, the reservation clause as regards such departure is required to be elaborated. In the instant case, in absence of any such evidence it is difficult to distinguish the role played by a Director or a Chief Executive. The dispute here regarding non-payment of Provident Fund contribution and subsequent payment of the same has to be gone into through evidence inasmuch as it is a mixed question of fact and law. While treating a case u/s 482 of the Code of Criminal Procedure initially the Court is not supposed to go into any merit. Prima facie it does not show any ground to exonerate petitioner No. 2. He is supposed to be responsible for the day-to-day works of the company because there is nothing available in the record to show that there is other management officials who are at the helms of deducting the portion of the provident fund from the employees and the remittance of the same to the provident fund authority.

15. This being the position, I am of the opinion that the decision referred to above by the learned Counsel for the State are quite applicable in the present case.

16. For further appreciation if such type of prayer for quashing of proceeding, the test may be available from the findings of the Hon"ble Apex Court in Amit Kapoor Vs. Ramesh Chander and Another, as follows:

Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

17. The revision appears to be meritless in view of the discussion above.

18. Accordingly, the revision stands dismissed. Let a copy of the judgment alongwith the LCR be sent down to the learned Court below immediately for necessary action.

Urgent Photostat certified copies, if applied for, be supplied according to rules.