(1991) 05 GUJ CK 0002

In the Gujarat High Court

Case No : Criminal Revision Application No''s. 68 and 71 of 1991

Kailashkumar Radhakrishnan Kanoria and Others APPELLANT

Vs

State of Gujurat RESPONDENT

Date of Decision : 07-05-1991

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14A
Penal Code, 1860 (IPC) — Section 405

Citation : (1991) 2 GLR 933 : (1994) 3 LLJ 428

Hon'ble Judges : S.D. Dave, J

Bench : Single Bench

Advocate : A.D. Shah, for the Appellant; S.D. Patel, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Dave, J.—This common judgment shall govern the disposal of these two Criminal Revision Applications arising out of the orders pronounced by the learned Metropolitan Magistrate, Court No. 2, Ahmedabad in Criminal Case No. 178 of 1986 below the application at Ex.-6 dated 16.1.1991 ordering the impleadment of the petitioners as the accused in the case and raise a brief but an interesting question as to whether all the directors or the accused-company would be liable for the offence punishable u/s 406 of the I.P.C. on the accusation that they had not deposited the amount under the Provident Fund Scheme.

2. The present petitioners happen to be the directors of a Limited Company known as New Gujarat Synthetics Ltd. No. II. The Provident Fund Inspector had filed the complaint before the police on 30.1.1986 saying that the directors of the abovesaid Limited Company had failed to deposit the P.F. amount according to the; rules and regulations and thereby they have committed the offence punishable u/s 406 of the I.P.C. On the basis of the abovesaid complaint the offer(sic) was registered. Anyhow at the initial j(sic) the chargesheet was filed against only two persons, namely Deviprasad M. Tiberwala and Sagarmal R.

Sharma. But later on the application at Ex.-6 was submitted by the State saying that the present petitioners who also happen to be the director of the abovesaid Limited Company should be impleaded in the capacity of the accused persons. The abovesaid application at Ex.-6 came to be allowed oy the learned Trial Magistrate by the orders dated 16.1.1991. The petitioners challenged the abovesaid orders of the learned Trial Magistrate by filing the present two Criminal Revision Applications.

3. Mr. A.D. Shah the learned Advocate appears on behalf of the petitioners, while the State have been represented by learned A.P.P. Mr. S.D. Patel.

4. The contention raised by Mr. Shah for the petitioners before this Court is that the Mills Company had submitted the necessary form which is known as Form No. 5-A under the Employees* Provident Funds and Miscellaneous Provisions Act, 1952 and that the names of only two persons, namely, Deviprasad M. Tibrewala and Sagarmal R. Sharma were shown as the persons who were incharge and responsible for the conduct of the business of the establishment. Mr. Shah, therefore, has contended that looking to the provisions of the Act of 1952 the abovesaid two persons only, could be prosecuted and not the present petitioners who are only the directors of the abovesaid Limited Company. But the contention raised by Mr. Patel for the opponent State is that the Form No. 5-A shows the names of all the directors, including the present petition7 ers and, therefore, the learned Trial Magistrate was perfectly justified in his orders below application Ex.-6.

5. Mr. Shah the learned Advocate who appears on behalf of the petitioners have invited the attention of this Court to the specific provisions contained u/s 14-A of the Act of 1952 along with the provisions contained u/s 405 of the I.P.C. Firstly making a reference to the provisions contained u/s 14-A of the Act of 1952 it is clear that in case of the offence by the Company every person who at the time when the offence was committed was incharge of and was responsible for 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 under the Act. The abovesaid position becomes clear from a bare perusal of the proviso contained u/ s 14-A of the Act of 1952, which may conveniently be reproduced as under:-

"14-A. Offences by Companies :- (1) if the person committing an offence under this Act, the Scheme or (the Family Pension Scheme or the Insurance Scheme) is a Company, every person, who at the time the offence was committed was incharge 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:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence .

6. The abovesaid proviso would go to show that when the offences are alleged to have been committed by the Company, those persons only who were responsible for the conduct of the business of the Company would be liable. The proviso would go to show further that even in case of such persons, if it is shown that the offence was committed without their knowledge or that they had exercised due diligence to prevent the commission of such offence then they would not be liable. Sub-section (2) of Section 14-A of the Act of-1952 further makes it clear that the other directors of the Company may also be held liable for the offence if it is shown that the offence has been committed with the consent or connivance or neglect on the part of any other such director, manager, secretary or office-bearer of the Company.

7. The reference also requires to be made to Form 5-A prescribed under the Act of 1952- Column No. 8 is in respect of the particulars of the owners and the names of owners of the establishment or of the directors of the Limited Company shall have to be shown in Col. No. 8 of the Form. But Col. No. 11 of the Form also requires to be taken into consideration. This Col. No, 11 is in respect of those persons who are incharge of and responsible for the conduct of the business of the establishment. It appears on a perusal of the xerox copy of Form No. 5-A supplied to this Court by the learned Advocate Mr. A.D. Shah, that under Col. No. 8 the names of all the directors etc. of the Company including the present petitioners have been shown. But under Col. No. 11 of the Form the names of only 2 persons, namely, Deviprasad M. Tibrewala and Sagarmal R. Sharma have been shown. It, therefore, becomes clear that though the present petitioners were working as the directors of the Limited Company the abovesaid two persons only were incharge of and responsible for the conduct of the business of the Mills Company.

8. Mr. Patel the learned A.P.P. who appears on behalf of the opponent State has tried to urge that both the columns, namely, Col. No. 8 and Col. No. 11 have to be seen but even doing so it appears very clearly that by filing the Form 5-A the establishment which would be the Limited Company in the instant case was required to notify the names of those persons who were incnarge of and responsible for the business of the establishment, namely, the Mills Company, if all the persons who were the directors etc. of the establishment, namely, the Limited Company were to be made liable for the offence punishable u/s 14-A of the Act of 1952, then there was no necessity of the insertion of Col. 11 in the abovesaid Form. The very fact that a special column, namely, Column No. 11 has been inserted in the abovesaid Form 5-A, would go to show that only those persons would be liable who were incharge of and responsible for the conduct of the business of the establishment.

9. When the reference is made to Section 405 of the I.P.C. along with Section 406 of the same Code it becomes clear that the later section is a penal provision providing the punishment for the offence or criminal breach of trust. Section 405 I.P.C. defines the offence known as criminal breach pf trust but before invoking

the provisions contained under the abovesaid two sections of the I.P.C. it requires to be appreciated that only that person who deducts employees'' contribution from the wages payable to the employees for credit to provident fund or family pension fund would be liable for the offence punishable u/s 405 of the I.P.C. This position becomes clear from the explanations annexed to Section 405 of the Code. Therefore also, it becomes clear that, only those persons would be liable who actually deducts the employees'' contribution for the credit to fund and not the other persons.

10. The position emerging from Section 14-A of the Act, 1952 from the Form 5-A under the said Act and Section 405 are so eloquently clear that the contention raised by Mr. A.D. Shah could have been accepted without the support of any case law on this point. Anyhow Mr. Shah was able to press in service the Supreme Court decision in Sham Sunder and Others Vs. State of Haryana, . In the abovesaid decision the Supreme Court was concerned with the provisions contained u/s 10 of the Essential Commodities Act, 1955. The said provisions have been reproduced at para 5 on page 1983 and the reference to the same would go to show that the provisions contained u/s 10 of the Essential Commodities Act, 1955 and u/s 14-A of the Act of 1952 are in pan materia . While considering the abovesaid provisions under the Essential Commodities Act, 1955 the Supreme Court has taken a view that the requisite condition would be that the partner was responsible for carrying the business and was during the relevant time incharge of the business. The Supreme Court has also pointed out that in the absence of any such proof no partner could be convicted. It is also emphatically stated by Supreme Court that it would be a travesty of justice to prosecute all persons and especially when the proof under the proviso to Sub-section(1) of Section 10 of the Act of 1955 shows that the offence was committed without their knowledge.

11. Placing reliance upon the abovesaid Supreme Court decision tn the instant case also it can be said that only two persons were incharge of the business of the Limited Company and their names were duly notified under the statutory form by the Mills Company. If other directors who were not incharge of and responsible for the conduct of the business of the establishment are to be imp leaded as the accused persons it would be nothing but "a travesty of justice" as pointed out by the Supreme Court of India.

12. It, therefore, becomes categorically clear that only those persons whose names were shown in Col. No. 11 could have been prosecuted for the alleged commission of the offence punishable u/s 406 of the I.P.C. It is, therefore, further clear that the learned Trial Magistrate was at an error in coming to the conclusion that the present petitioner accused required to be prosecuted along with the abovesaid two persons whose names were notified in Column No. 11 of the above said Form. In view of this position the present two Criminal Revision Applications require to be allowed and the orders under challenge are required to be set aside. These two Criminal Revision Applications, therefore, are hereby

accordingly allowed and the orders under challenge are hereby set aside. Now the trial shall proceed further according to law and on merits only against those two persons, namely, Deviprasad M. Tibrewala and Sagarmal R. Sharma, whose names have been notified under Column No. II of the Form 5-A. The rule is made absolute accordingly.

