
(2019) 09 CAL CK 0002

In the Calcutta High Court

Case No : Criminal Revision (CRR) No. 755 Of 2014

Malhati Tea & Industries Ltd. & Ors @APPELLANT @ State Of West Bengal & Anr

Date of Decision : 03-09-2019

Acts Referred:

Employees Provident Fund And Miscellaneous Provisions Act 1952 — Section 2(e), 17, 17(1)(a)
Code Of Criminal Procedure, 1973 — Section 401, 409, 482
Indian Penal Code, 1860 — Section 34, 405, 406, 409
Factories Act, 1948 — Section 7(1)(f)

Citation : (2019) 09 CAL CK 0002

Hon'ble Judges : Madhumati Mitra, J

Bench : Single Bench

Advocate : Milon Mukherjee, S.P. Tewari, Rahul Ganguly, Mihir Kundu

Final Decision : Disposed Off

Judgement

Madhumati Mitra, J

The application under Section 401 read with Section 482 of the Code of Criminal Procedure has been filed by the present petitioners praying for quashing of the criminal proceedings being Special Case No.22 of 2013 arising out of G.R. Case No. 270/11 pending before the learned 2nd Additional Sessions Judge, Special Court, Jalpaiguri. Petitioners have also challenged the legality and propriety of the orders dated 19.12.2013, 11.02.2014 and 25.02.2014 passed by the learned Judge Special Court, Jalpaiguri in connection with the criminal proceedings mentioned above.

Petitioner No.1 is a company duly registered under the Companies Act, 1956. The petitioner No.2 is the ex-Director of the said company and remaining petitioners i.e. petitioners No. 3 to 5 are the Directors of petitioner no.1 company.

The petitioners have stated that petitioners no.1company is the owner of the Tea Estate and employer within the meaning of Section 2(e) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952. It is the specific case of

the petitioners that the said company is covered by the Employees Provident Fund and Miscellaneous Provisions Act, 1952. Petitioner no.1 company is under an obligation to pay provident fund dues under the provisions of the said Act in respect of the Tea Estate namely Jogesh Chandra Tea Estate. Petitioners have claimed that petitioner no.1 company is an exempted establishment under Section 17(1)(a) of the Act and the company has a Board of Trust to which provident fund money in respect of the employees share is being deposited.

The Provident Fund Enforcement Officer lodged a complaint being FIR No. 29/2011 dated 25.01.2011 before the officer in-charge, Mal Police Station on the allegations that the petitioners have failed to deposit the employees' share of the provident fund contribution for the period from April, 2007 to October, 2007 amounting to Rs.12,72,266/- (Rupees twelve lakh seventy two thousand two hundred sixty six only) and as such the petitioners committed an offence punishable under Section 406/409 of the Indian Penal Code. On the basis of the said FIR Mal Police Station Case no.29/2011 dated 25th January, 2011 was started against the present petitioners. The investigation culminated in the submission of charge-sheet against the present petitioners on 19th December, 2013. Warrant of arrest was issued by the learned Special Judge against the petitioners No. 3 to 5. The petitioners no. 3 to 5 prayed for an order to recall the said order of warrant of arrest before the learned Special Judge but said prayer was turned down by the learned Special Judge.

The petitioner no.1 company filed a writ application being WP No.10193 (W) of 2011 praying for installments to liquidate the provident fund dues for the period from March 1998 to October 2007 and December 2007 including the period of default mentioned in the FIR. On 5th July, 2011 the said writ petition was disposed of with a direction upon the company to pay the employees' contribution for the said period within 8 weeks from the date of the said order and liberty was given to make a prayer before the Provident Fund Authority for grant of installments in respect of payment of the employees' contribution. Pursuant to that order the company paid the entire employees' share of Rs.53,54,609/- (Rupees fifty three lakh fifty four thousand six hundred nine only) for the period from March 1998 to October 2007 and December 2007 inclusive of the period mentioned in the FIR in terms of the order dated 5th July, 2011 passed by the Court in connection with above mentioned writ petition.

The short question that arises for determination in this revisional application filed by the petitioners is whether subsequent deposit of statutory dues absolves the company from the liability of the offence which has already been completed due to non-deposit of the share of provident fund of the employees within time.

Another question also arises at the same time whether the petitioner Nos. 2 to 5 are employers within the meaning of explanation to section 405 of the Indian Penal Code.

From the materials placed on record it appears that petitioner no.1 Malhati Tea

Industry Ltd. is a company within the meaning of Companies Act, 1956. petitioner no.2 is the ex-Director of the said company. Petitioners no. 3 to 5 are the Directors of the company. In the FIR there is specific allegation against the petitioners that the sum of Rs.12,72,266/- (Rupees twelve lakh seventy two thousand two hundred sixty six only) was deducted from the salary /wages/as employees' share of provident fund contribution for the period from April 2007 to October 2007 and the said amount was not deposited with the statutory fund in violation of the statutory provision. From the charge-sheet submitted in connection with the FIR lodged by the Enforcement officer, Employees Provident Fund it appears that the petitioners no. 2 to 5 were responsible for the conduct of the business of the establishment and they committed alleged offences punishable under section 406/409 of the Indian Penal Code.

Admittedly the provident fund dues of Rs.12,72,266/- (Rupees twelve lakh seventy two thousand two hundred sixty six only) was collected from the employees as their provident fund contribution for the period from April 2007 to October 2007 and same was not deposited within the time. Now the petitioners have taken the plea that the payment has been made subsequently.

In this connection learned counsel appearing for the opposite party no.2, Regional Provident Fund Authority has submitted that non-deposit of employees' share of provident fund with the Authority within time after deduction of the same from the wages of the employees are offences within the meaning of Sections 405/406/409 of the Indian Penal Code. Subsequent deposit of the said share of provident fund with the appropriate Authority cannot exonerate the petitioners from the criminal liability of the offence already committed by the petitioners. Subsequent deposit of provident fund contribution dues after commission of the alleged offences is not a ground to quash the criminal proceedings pending against the petitioners. He has further contended that the fact of delayed deposit or subsequent deposit of statutory dues may be taken into consideration during final hearing of the case. He has forcefully contended that it would not be reasonable and justified to quash the proceedings which have been initiated for non-deposit of the shares of the provident fund of the employees and employer with the statutory Authority within time.

Learned Advocate appearing for the petitioners has forcefully submitted that the criminal proceedings pending against the petitioner nos.2 to 5 cannot be allowed to be continued as they are not the principal employer within the meaning of Explanations to Section 405 of the Indian Penal Code and the continuance of proceeding under Sections 406/409 of the Indian Penal Code against the petitioners nos. 2 to 5 would be an abuse of the process of the Court. In support of his contention learned Advocate for the petitioners has placed his reliance on the decisions of Sri Babulal Nahata and Ors. Vs. State and Ors. passed by a Coordinate Bench of this Court in CRR 2885 of 2009 on 18.12.17 and Rajiv Jajodia and Anr. Vs. the State of West Bengal and Anr. passed by Another Coordinate Bench in CRR 806 at 2014 of this Court on 17.11.2017.

On the other hand Learned Advocate appearing for the opposite party no.2 has contended that in view of the specific definition of 'employer' as contained in Section 2(e) of the Employees Provident Fund and Miscellaneous Provisions Act 1952 the Managing Directors and Directors are responsible for the affairs of the company and as such the Directors and the Managing Director are liable to be prosecuted under Section 405/406/409 of the Indian Penal Code for non-deposit of statutory dues relating to the share of the provident fund of the employees. According to his contention the present application under Section 482 of the Code of Criminal Procedure to quash the proceedings is devoid of merit and liable to be dismissed.

In support of his contention he has placed his reliance on Section 2(e) of the Employees Provident Act 1952 and on several decisions reported in 2007 (2) Cal LT 259 (M/s Hotel Dock Palace Pvt. Ltd. & Anr. Vs. State of West Bengal & Anr.); 2006(1) Cal LJ (Cal) 593 (Mr. Debi Das Dutta Vs. The State of West Bengal; 2008

(1) CHN 1061 (Anjuman Tea Co. Ltd. Vs. State of West Bengal & Ors.); 2007 (2) Cal LJ (Cal) 124 (Kamala Tea Company Limited and Ors. Vs. the State of West Bengal & Anr.); unreported Judgment/order in CRR 230 of 2014, CRR 3562 of 2013, CRR 1019 of 2009, CRR 214 of 2009, CRR 1607 of 2015, (2002) 3LLJ 1047, I have carefully gone through the decisions so cited at Bar. I have also considered the submission and rival submission of the parties.

Before going into factual details, rival contentions and the legal issues involved in the case at hand, it is useful to refer Section 405/409 of the Indian Penal Code and Section 2(e) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 which read as under:

"Section 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 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 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 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 employee's 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 deduction of law as aforesaid.

Section 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."

In view of Section 2(e) of the Employees Provident Fund and Miscellaneous Provisions Act 1952, 'Employees' 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.

Having regard to the materials placed on record and considering the submissions as made by the learned Counsel for the parties it appears to me that the only question which requires to be considered is whether the Directors of a company can be termed as the owner of a company or the principal employer of the company and they can be fastened with criminal liability for non-deposit of provident fund dues with the authorities.

So far as explanations 1 and 2 to Section 405 of the Indian Penal Code are concerned, it can be said that both the explanations are same. Explanation 1 is applicable to Employees' Provident Funds and Miscellaneous Provisions Act 1952, and on the other hand explanation 2 relates to Employees' State Insurance Act 1948.

Explanations to Section 405 of the Indian Penal Code clearly indicate that the employer who deducts the employees' contribution from the wages payable to them for credit to the provident fund or to the Employees' State Insurance Fund is liable to face penal consequences if he makes default in the payment of such contribution.

After going through the several judgments as referred by the Learned Advocates

for both sides, I am of the view that Law on this point is quite explicit. Our Apex Court in the case of Employees' State Insurance Corporation Vs. S. K. Aggarwal and Others specifically opined that the term 'employer' does not include the Director of the company. It is the company which is the employer and not its Directors either singly or collectively. It has been specifically mentioned in both the explanations 1 and 2 to Section 405 that the employer who has the responsibility to deduct employees' contribution is only liable for commission of the offence of criminal breach of trust if the share of provident fund of the employees after deduction is not deposited with the statutory Authority. It can be safely held that the Director is not the employer within the meaning of Explanations 1 or 2 to Section 405 of the Penal Code. Directors of a company can never be regarded as principal employer as to rope in connection with the offences under Sections 405/406/409 of the Indian Penal Code for non-deposit of statutory contribution of the provident fund of the employees' share or the share of the employer with the appropriate Authority.

In the instant case, prosecution has been initiated under Section 405/406/409/34 of the Indian Penal Code against the company and its Directors. In view of the principle as laid down by our Apex Court the company is the principal employer.

In the present case prosecution has been launched against the company and its Directors. Investigation ended in submission of charge-sheet for commission of alleged offences against the Directors of the company.

Argument advanced by the Learned Advocate for the petitioners in support of quashing of the entire criminal proceedings has been based on two grounds mainly; i) the Directors of the Company i.e. present petitioner nos.2 to 5 are not principal employers and ii) the provident fund dues have already been deposited.

Having regard to the decisions as cited by the Learned Advocates appearing for the parties, I have no hesitation to observe that in view of the principles as laid down by our Apex Court in the decision of S.K. Agarwal and Others, the Directors of the company cannot be termed as employers/owners for the purpose of prosecution for the commission of criminal breach of trust under Section 405/406/409 of the Indian Penal Code. In the decision of Maksud Saiyed Vs. State of Gujrat and Others reported in (2008)5 Supreme Court Cases 668 at Para 13 our Hon'ble Apex Court was pleased to observe as under:-

"The penal code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the company when the accused is the company. The Learned Magistrate failed to pose unto himself the correct question viz as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably

must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability".

In another decision of S.K. Alagh Vs. State of Uttar Pradesh and Others reported in (2008) 5 SCC 662 the Supreme Court was pleased to observe as under:-

"As, admittedly, drafts were drawn in the name of the Company, even if the appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a Company or an employee cannot be held to be vicariously liable for any offence committed by the Company itself".

So far as petitioners nos.2 to 5 are concerned it can be said that they are not the principal employers in view of Explanations 1 and 2 to Section 405 of the Indian Penal Code and they cannot be held to be vicariously liable for the alleged offences committed by the company.

In view of the guidelines as laid down by our Apex Court in the State of Haryana Vs. Bhajanlal reported in 1992 Supp(1) SCC 335 and R.B.Kapoor Vs. State of Punjab reported in AIR 1960 SC 866, I am of the opinion that continuance of criminal proceedings against the petitioner nos.2 to 5 would be an abuse of the process of the Court and quashing of the impugned proceedings against the petitioner nos. 2 to 5 would secure the ends of justice.

The criminal proceedings being SPL Case no. 22 of 2013 arising out of Mal Police Station Case No.29 of 2011 dated 25.01.2011 under Sections 406/409 of the Indian Penal Code is hereby quashed in respect of petitioner nos. 2 to 5.

The application under Section 482 of the Code of Criminal Procedure is disposed of accordingly.

Urgent certified photocopy of this judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.