(2011) 01 BOM CK 0135

In the Bombay High Court

Case No : Criminal Writ Petition No. 2951 of 2009

Sanjay Babubheri Shah — APPELLANT

Vs

State of Maharashtra and Another — RESPONDENT

Date of Decision : 17-01-2011

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2(e)
Employees State Insurance Act, 1948 — Section 2(17)
Factories Act, 1948 — Section 6, 7
Penal Code, 1860 (IPC) — Section 405, 406
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 18(4), 19(3), 3(1)(4)

Citation : (2012) BomCR(Cri) 228

Hon'ble Judges : SondurBaldota R.P., J

Bench : Single Bench

Advocate : Sayaji D. Nangre with Ranjeet M. Pawar and Suraj P. Nangre, for the Appellant; P.S. Hingorani, Assistant Public Prosecutor, for State-respondent No. 1, None, for respondent No. 2. and Mrs. Nilam Jadhav h/f. Suresh Kumar, for the Respondent

Judgement

Smt. SondurBaldota R.P., J.—Rule. Rule made returnable forthwith. Heard both the Counsel.

2. The question that arise for consideration in this petition is whether, Chairman of a company can be said to be an employer within the meaning of Explanation 2 to section 405 read with section 406 Indian Penal Code so as to make him liable for prosecution u/s 406 Indian Penal Code for non-deposit with the Provident Fund Authorities of the provident fund dues deducted from the employees salary.

3. The facts set out in the petition can be briefly stated as follows. The petitioner is the Non-Executive Chairman of a company by name M/s. Precision Fasteners Ltd. The company was declared a sick industrial unit in terms of section 3(1)(4) of the Sick Industrial Companies (Special Provision) Act, 1985 (hereinafter referred to as SICA") and a scheme of its revival passed under sections 19(3)

and 18(4) of SICA. The company has 54 employees and it''s day to day management, administration and control is vested in the Managing Director and CEO of the Company, Shri, Dilip Singh Lodha. Mr. T.M. Vishwanathan, a whole time Executive Director was looking after the overall function of the company till 15th January, 2008. The company had in compliance with section 6 and 7 of the Factories Act filed a declaration in Form 2 stating, the whole time Director of the company as the occupier and one Mr. Ravindra Jagannath Mhatre as Manager of the factory for the purposes of the Act in the year 2006. In November, 2008 respondent No. 3 Assistant Provident Fund Commissioner, Employees Provident Fund Organization issued recovery certificate dated 5th April, 2008 for a sum of Rs. 20,93,268/- in respect of the contribution from the employees. The notice was addressed to the Managing Director, Shri. D.S. Lodha. The company then approached the Board of Industrial and Financial Reconstruction which passed the order dated 9th January, 2009, inter alia directing respondent No. 3 to accept payment of the outstanding dues, upon sale of assets of the company''s Kalwe unit. In the meantime, it permitted release of an ad hoc amount of Rs. 10,00,000/-towards the part payment of the outstanding dues. Accordingly, the company deposited a sum of Rs. 10,00,000/ - vide pay order dated 27th January, 2009.

4. On 2nd November, 2009 the petitioner learnt that a complaint had been filed by one Mr. Masheri, Enforcement Officer, Employees Provident Fund Organization with the Assistant Commissioner of Police, MIDC, Mahad Police Station alleging that the petitioner in the "capacity of owner" and person responsible for all the working of the company" had committed the offence punishable u/s 406 Indian Penal Code by non-deposit of the provident fund dues deducted from the employees salary with the provident fund authorities. Based on the complaint, an FIR has been lodged with impending threat of arrest of the petitioner.

5. The petitioner, claims that, he is not in any way concerned with the day to day management of the company. The management and control of the day to day affairs of the company is vested in the Managing Director. He contends that the Director or Non-Executive Chairman of a public limited company is not employer within the meaning of section 2(e) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the Employees Provident Fund Act''). In this connection, reliance is place on the decision of Single Judge of this Court in the case of (Sharad Mittersain Jain & ors. Vs. State of Maharashtra)1, reported in 2003(Supp. 2) Bom. C.R. 572 : 2004(I) C.L.R. 971 and of the Apex Court in the case of (Employees State Insurance Corporation Vs. S.K. Aggarwal)2, reported in 1999(Supp.) Bom. C.R. 809(S.C.): 1998 DGLS (soft) 681 : 1999(1) Mh.L.J. 443. The Apex Court in S.K. Agarwal Vs case (supra) was considering the question whether directors of a Company would be covered by the definition of "Principal employer" under the Employees State Insurance Act (hereinafter referred to as the ESI Act). After noting the provision of section 405 Explanation (2) Indian Penal Code and the definition of "Principal employer" under the ESI Act it held that the directors of a Company would not be

covered by the definition of ''Principal employer''. Mr. Nangre, the learned Counsel for the petitioner, submits that, the definition of "Principal employer" in the ESI Act is pari materia to the definition of "employer" in Employees Provident Fund Act. Hence, the decision of the Apex Court would apply to the prosecution under the Employees Provident Fund Act. He submits that it has been so held by a Single Judge of this Court, in Sharad Jain''s case (supra). The provisions of section 405 Explanation (2) Indian Penal Code and the definition of "employer" u/s 2(e) of the Employees Provident Fund Act and "Principal employer" u/s 2(17) of the ESI Act read as follows:

Section 405 Explanation 2 of the Indian Penal Code:

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 disposed 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 wilfully suffers any other person so to do commits "criminal breach of trust

Explanation 1..........

Explanation 2: A person, being an employer, who deducts the employees contribution from the wages payable to the employee for credit to the Employees State Insurance Fund held and administer by the Employees State Insurance Act, 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 direction of law as aforesaid.

Section 2(e) of the Employees Provident Fund Act:

Section 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 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 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;

Section 2(17) of the ESI Act:

Section 2(17) principal Employer" means -

i) in a factory, the owner or occupier of the factory includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the Factories Act, 1948 (63 of 1948) the person so named;

(ii) in any other establishment, any person responsible for the supervision and control of the establishment.

Bare reading of the above two definitions makes it clear that the definition of "employer" in Employees Provident Fund Act, is pari materia with the definition of "principal employer" in ESI Act. Therefore, the observations of the Supreme Court that where a private limited company is the owner of the factory and the occupier of the factory has been duly named under the Factories Act, 1948, the directors do not come within the definition of Clause 1 of section 2(17) of the ESI Act, are equally applicable to the definition of the "employer" in Employees Provident Fund Act. It has been already noted at paragraph-4 above, that the company has by filing declarations in Form-II named the occupier and Manager of the factory for the purposes of the Factories Act. Therefore, the petitioner-Chairman of the company could not have been prosecuted u/s 406 Indian Penal Code for non-deposit with the Provident Fund Authorities of the provident fund dues deducted from the employees salary. Hence, Rule is made absolute.

