

(2008) 03 CAL CK 0006
In the Calcutta High Court

Case No : C.R.R. No's. 2025, 2026, 2168, 2238-39 of 2006 and 1716 of 2007

Satish Kumar Jhunjhunwala

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 11-03-2008

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 13, 14, 14(1A), 2
Employees State Insurance Act, 1948 — Section 2(17)
Factories Act, 1948 — Section 7(1)
Penal Code, 1860 (IPC) — Section 405, 406, 409

Citation : (2008) 3 CALLT 484 : (2009) 120 FLR 45 : (2009) 2 LLJ 403

Hon'ble Judges : Partha Sakha Datta, J

Bench : Single Bench

Advocate : Krishendu Gooptu, C.K. Saha, Ayan Bhattacharjee, Anirban De and Bibekanada Das, for the Appellant; Shiv Chandra Prashad, Mihir Kundu and Aparna Banerjee for Provident Fund Authorities, Krishna Ghosh, R.S. Chattopadhyay and S.K. Mullick, for the Respondent

Final Decision : Allowed

Judgement

Partha Sakha Datta, J.—All the revisional applications are being disposed of by a common Judgment and order because the parties are the same and common question" of law and fact has arisen.

2. Employees Provident Fund Organisation lodged a good number of FIRs before the Police station concerned against the petitioners alleging offence of criminal breach of trust punishable under Sections 406/409 IPC in respect of diverse sum of money by not depositing the Employee's and Employer's Provident Fund Contribution with the appropriate authority and by misappropriating the same. All the prosecution were launched by, the Provident Fund Inspector who were appointed as such u/s 13 of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952. It is not necessary to advert to the details of the FIRs and amounts allegedly misappropriated in respect of each of the prosecution cases.

3. Only one question of law has been raised in this revisional application. This is whether the directors of an establishment can be made answerable to the charge under Sections 406/409 of the IPC. FIRs were lodged against the petitioners under Sections 406/409 IPC because of alleged commission of criminal breach of trust on account of non deposit of the PF dues, both of Employees and Employer's share with the PF Authorities.

4. I have heard Mr. Krishnendu Gooptu. learned advocate for the petitioner, Mr. S.C. Prasad, learned advocate appearing for O.P. No. 2 and Mr. R.S. Chatterjee and Ms. Krishna Ghose appearing for the State of West Bengal.

5. Mr. Gooptu, learned advocate appearing for the petitioners submits that decision of the Supreme Court in the case of Employees State Insurance Corporation Vs. S.K. Aggarwal and Others, has made it clear once for all that for the purpose of prosecution of an employer u/s 405 of IPC the word "employer" does not include the "director". Therefore, as in the instant case prosecution was launched against the directors and not against the establishment/the Company they as directors are not answerable to the charge. Their Lordships, of the Supreme Court took into consideration the definition of the word "employer" as it occurs in Section 2(17) of the ESI Act, 1948. According to the definition, "principal employer" in a factory means "owner" and or "occupier" of the factory and includes the managing agent of such owner or occupier or legal representative of deceased owner or occupier and where the person has been named as manager of the factory persons so named. Their Lordships held that for the purpose of prosecution of employer u/s 405 of IPC the definition of the word "employer" as it occurs in the ESI Act 1948 cannot be borrowed simply because of the fact that such definition has got no manner of application in either of the explanation to Section 405 of the IPC. Therefore it was held that in the absence of any express provision in the Indian Penal Code incorporating the definition of "Principal Employer" in Explanation 2 to Section 405 the definition in ESI Act cannot be held to apply to the term "Employer" in Explanation 2. My attention has been drawn, however, to this Court's decision in R.L. Kanoria and Ors. v. State and Anr. reported in 2003 C Cr LR (Cal)341 which in fact has followed the decision in S.K. Agarwal and Ors. (supra). The decision of the Patna High Court in Gupta B.P. and Others Vs. State of Bihar, has also been referred to. This decision also followed the decision in S.K. Agarwal (supra) which I have discussed already. Here the learned single Judge observed that the definition of the term "employer" did not include the directors of the Company and they could not be prosecuted for commission of default in the criminal prosecution u/s 405 IPC. Yet, the decision of the Bombay High Court in Sharad Mittersain Jain, Shri P.M. Jan, Shri R.R. Kumar, Shri S. Rajendran and Shri Rashmi Jatalal Zaveri Vs. State of Maharashtra, has also been cited. Here the accused persons who were prosecuted u/s 406 of IPC sought for quashing of the proceeding on the grounds that as Directors they cannot be held responsible for alleged commission of the breach of trust because they cannot be termed as "employers" of the establishment. The decision of the Supreme Court in S.K. Agarwal and Anr.

(supra).

6. As against the decision referred to by the learned Counsel for the petitioners, Mr. Shiv Chandra Prasad, the learned advocate for O.P., namely, the Regional P.F. authorities takes me to the definition of the word "Employer" as is occurring in Section 2(e) which reads as follows:

employer "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;

7. Accordingly, it is submitted that the manager or managing agent or director or managing director can very well be prosecuted for non-payment of PF dues with the appropriate authority under EPF Act, 1952.

8. I have also been taken to Special Bench Decision in the case of Dalgaon Agro Industries Ltd. (Now known as Tasati Tea Ltd.) Vs. Union of India (UOI) and Others, where it was observed that the word "employer" is not an abstract idea and the definition in the 1952 Act created a fiction to identify the establishment with the employer who has got no existence without the establishment. It was further held that the purpose of defining employer is to identify the person upon whom the liability can be fixed, and would be responsible for the purpose of recovery of dues from the establishment. The purpose of EPF Act 1952 has been analysed by the learned Counsel for the O.P. No. 2 and it is submitted that the object of this enactment is socio welfare legislation. The decision of the Supreme Court in Rabindra Chamarla and Ors. v. State of West Bengal reported in AIR 1992 SC 3980 has also been referred to.

9. Mr. R.S. Chatterjee learned Counsel for the State submits that the Court cannot quash the proceeding at this stage because charge sheet has been submitted after completion of investigation.

10. I have heard other learned advocates for the State whose argument were identical with that of Mr. R.S. Chatterjee.

11. Having heard the learned advocates for the parties I must say at the outset that criminal proceeding can, only be quashed and that too after submission of charge sheet only when it fails to disclose prima facie cognizable offence. The decision in the R.S. Raghunath Vs. State of Karnataka and another, and R.P. Kapur Vs. The State of Punjab, are the guidelines in the matter of quashing of

criminal prosecution. The only question that has been argued is as to whether for the purpose of prosecution of the petitioners under Sections 406/409 IPC they can be prosecuted in the capacity of director or not, and no other point has been agitated in this revisional application. Having considered a good number of decisions cited by the learned advocates for the parties, I am clearly of the opinion that judgment of the Supreme Court in the case of S.K. Agarwal and others has given a complete answer to the question and this Court is bound by such decision. It has been held by their Lordships in the said decision that in neither of the explanation u/s 405 IPC there is found anything to the effect that the directors of the company or an establishment may be prosecuted u/s 405 IPC for the alleged commission of criminal breach of trust. In both the explanations 1 and 2 to Section 405 it is the person who is employer, and who deducts employees' contribution that is responsible for the commission of the offence. Necessarily the question is whether the person acting as Director can be termed as "Employer" of the establishment and Their Lordships in the Supreme Court in the case of S.K. Agarwal (supra) has categorically stated that the word "employer" does not include director. This decision has been followed by other High Courts in the decisions which have been referred to above. And the Supreme Court decision in the case of R.K. Chamaria v. State (supra) is in different context. Their Lordships analysed the persons who are responsible u/s 14A and Section 14(1A) of EPF Act 1952 for non payment of PF dues with the PF Authority. This decision has no manner of application to the fact of the present cases. The Special Bench decision is in relation to the case of Employees Provident Fund and Miscellaneous Provisions Act, 1952 and observation of Their Lordships of this Court in paragraph 66 is virtually exposition of the word "employer" and as such that exposition does not help us in any manner whatsoever. The word "employer" as has been defined in EPF Act, 1952 is *pari materia* the same and as in ESI Act, 1948 but the definition can cover the director when such director is sought to be prosecuted for offence u/s 405 IPC as it has been held by the Supreme Court that the word "employer" does not include Director within any of the explanation 1,2 of Section 405 IPC. This being the legal position I am constrained to hold that launching of the prosecution against the petitioners as directors of the establishment is completely illegal and bad in law. They could have been prosecuted under the Special Act but that has not been done. In the circumstances, I find the revisional applications are quite maintainable within the guideline of Haryana v. Bhajanlal

12. Accordingly, I allow the revisional applications and quash the criminal proceedings.

13. Let a copy of this judgment be sent to the learned C JM, concerned for his information and necessary action.

Let urgent certified Xerox copy of this order be made available to the learned Advocates for the parties, if applied, for.