(2019) 06 CAL CK 0027

In the Calcutta High Court

Case No : Criminal Revision (CRR) No. 1638 Of 2016

Supreme Paper Mills Limited & Others — APPELLANT

Vs

State Of West Bengal & Ors — RESPONDENT

Date of Decision : 21-06-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 405, 406, 409
Code Of Criminal Procedure, 1973 — Section 227, 409, 482
Employees Provident Fund And Miscellaneous Provisions Act, 1952 — Section 2(e)
Factories Act, 1948 — Section 7(1)(f)

Citation : (2019) 06 CAL CK 0027

Hon'ble Judges : Madhumati Mitra, J

Bench : Single Bench

Advocate : Y. J.Dastoor, Devi Priya Mitra, Mihir Kundu, Anasuya Sinha

Final Decision : Disposed Off

Judgement

Madhumati Mitra, J

Opposite party no.2, the Enforcement Officer, Employees Provident Fund Organization lodged an FIR with Chakdaha Police Station against the present petitioners on 23.07.2012, alleging offence of criminal breach of trust punishable under Sections 405/406/409/34 of the Indian Penal Code for non-deposit of a sum of Rs.9,17,448.00/- as the Employees and Employer's Share of Provident Fund contribution with the appropriate Authority after deducting the employees' share from their salary/wages for the period from 02/2012 to 06/2012. After completion of investigation charge-sheet was submitted against the present petitioners for commission of the alleged offences punishable under Section 405/406/409/34 of the Code of Criminal Procedure.

Learned Additional Chief Judicial Magistrate, Kalyani sent the case record to the Court of Learned Special Judge, Nadia, at Krishnagar for trial.

The Petitioners prayed for an order of their discharge under Section 227 of the

Code of Criminal Procedure before the Learned Special Judge, Krishnagar, Nadia.

On 02.04.2016, Learned Special Judge heard both the parties, with regard to the prayer of the petitioners to discharge and fixed on 18.05.2016 for order regarding the prayer for discharge of the petitioners and framing of charge.

Thereafter, the petitioners have filed the present application being CRR 1638 of 2016 under Section 482 of the Code of Criminal Procedure praying for an order to quash the entire proceeding being S.P.L Case No.5 of 2014 arising out of Chakdaha Police Station Case No.522 of 2012, dated 23.09.2012 under Sections 405/406/409/34 of the Indian Penal Code. Petitioners have also challenged the order dated 02.04.2016, passed by the Learned Special Judge in connection with that case.

Present petitioner no.1, Supreme Paper Mills Limited is a company duly incorporated under the provisions of the Companies Act. Petitioner no.2 is the Chairman-Cum-Managing Director of the said company. Petitioner no.3 and 4 are the Directors and Petitioner no.5 is the General Manager of the petitioner no.1 Company.

From the materials placed on record it appears that the present petitioner nos.2 to 5 are the Managing Director, Directors and General Manager of the petitioner no.1 i.e the Company. In the First Information Report there is specific allegation that the petitioners deducted the employees' share from their salary and thereafter did not deposit the said employees' share as well as the share of the employer with the appropriate Authority.

From the averments made in the petition under Section 482 of the Code of Criminal Procedure, it appears that the petitioners have taken specific plea that they subsequently deposited the alleged dues i.e employers and employees' share of Provident Fund with the appropriate Authority.

From the charge-sheet which was submitted after completion of investigation against the present petitioners under Section 405/406/409/34 of the Indian Penal Code it transpires that the employees and employer's contribution of Rs.9,17,448.00/- for the period from 02/12 to 06/12 had not been deposited within time. Now the petitioners have taken the plea that the payment had been made subsequently. In this connection learned Advocate 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 proceeding 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 proceeding which has 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 State has shared the same view as expressed by Learned Advocate for the opposite party no.2. Learned Advocate appearing for the State has vigorously argued that it is not a fit case to quash the proceeding.

Learned Advocate appearing for the petitioners has forcefully submitted that the criminal proceeding 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 continuation 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 several decisions reported in 1985 (1) CHN 113 (S.K.Agarwalla & Others Vs. Employees' State Insurance Corporation & Anr.), 2009 (4) CHN 364 (Sunil Kumar Panti & Ors. Vs. State of West Bengal & Ors.); 2003 C Cr LR (Cal) 341 (R.L.Kanoria & Ors. Vs. State & Anr.), (2012) 2 C Cr LR (Cal) 615 (Prabhash Kumar Basu Vs. The State of West Bengal); (2008)5 Supreme Court Cases 662 (S.K.Alah Vs. State of Uttar Pradesh and Others); (2008) 5 Supreme Court Cases 668 (Maksud Saiyed Vs. State of Gujarat and Others), 1998 C Cr.LR (SC) 396 (Employees State Insurance Corporation Vs. S.K.Aggarwal and Ors.; (2008) 3 CAL LT 484(HC) (Satish Kumar Jhunjhunwala Versus The State of West Bengal); 2015 (3) CHN (CAL) 755 (Inderjit Singh Oberoy Vs. State of West Bengal).

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 proceeding 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 2006(1) CLJ (Cal) 593 (Mr.Debidas Dutta Vs. The State of West Bengal; 2018 (2) LLJ (Cal) 112 (Tapan Biswas Vs. The State of West Bengal & Anr; 2007 (2) CLJ (Cal) 124 (Kamala Tea Company Limited and Ors.); 2019 (161) FLR 156 (Supreme Court) (Employees State Insurance Corporation and Venus Alloys Pvt. Ltd.).

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 on 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 company and its Directors.

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 various decisions of our Apex Court and various High Courts as cited by the Learned Advocates of 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 employer/owner 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 entirely, 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) 5 662 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 employer 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 continuation 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 proceeding against the petitioner nos. 2 to 5 would secure the ends of justice.

The criminal proceeding being SPL Case no.5 of 2014 arising out of Chakdaha Police Station Case No.522 of 2012, dated 23.09.2012 under Sections 405/406/409/34 of the Indian Penal Code is hereby quashed in respect of petitioner nos.2 to 5.

A plea has been raised by the petitioners that the statutory dues have been deposited subsequently. Deposit of statutory dues subsequently does not absolve the company from the liability of the offence which has already been completed due to non-deposit of share of provident fund of the employees within time. This plea may be taken at the time of trial and if such plea is raised then the same can be treated as mitigating circumstances at the time of final hearing of the case.

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.