

(2024) 09 SHI CK 0040
In the High Court Of Himachal Pradesh
Case No : Cr. MMO No. 206 of 2018

Umesh Phalpher	Vs	APPELLANT
State Of Himachal Pradesh & Another		RESPONDENT

Date of Decision : 04-09-2024

Acts Referred:

Constitution of India, 1950 — Article 226
Code of Criminal Procedure, 1973 — Section 155(2), 156(1), 482
Indian Penal Code, 1860 — Section 405, 406, 409
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2(17), 14A, 30

Citation : (2024) 09 SHI CK 0040

Hon'ble Judges : Rakesh Kainthla, J

Bench : Single Bench

Advocate : Y.P. Sood, Prashant Sen, Raman Sethi

Final Decision : Allowed

Judgement

Rakesh Kainthla, J

1. The petitioner has filed the present petition for quashing of FIR No. 57 of 2013, dated 6.4.2013, registered at Police Station Dhalli, District Shimla, H.P. for the commission of offences punishable under Sections 406, 409 and 120-B of IPC and the consequent proceedings against the petitioner in case No. 80-2 of 2014, titled State of H.P. Vs. Umesh Phalpher pending before learned Additional Chief Judicial Magistrate, Court No.1, Shimla, H.P.

2. Briefly stated, the facts giving rise to the present petition are that the informant/respondent No.2 made a complaint to the police asserting that M/s U.G. Hotel and Resorts Ltd., Shilon Resorts, Village Shilonbagh, P.O. Mundaghat, Tehsil and District Shimla, H.P. is an establishment covered under the provisions of Employees Provident Fund and Miscellaneous Provisions Act, 1952 and schemes framed thereunder. The employer of the establishment is under an obligation to deduct the employees' share from their wages/salaries every month

and to deposit it in the statutory fund along with the employer's share. The informant found that the Company had deducted the employees' share of contribution from their wages/salaries for the period 4/2011 to 2/2013 but failed to deposit it in the statutory fund. The employer was guilty of a criminal breach of trust. The police registered the FIR for the commission of offences punishable under Sections 406, 409 and Section 120-B of the IPC. The police seized the record and found that the petitioner was the Managing Director of Shilong Bag Resorts. The details of the expenses of the Resort were sent to the Managing Director. The Managing Director made the payment to various persons through cheques. The EPF contribution was deducted from the salaries of the employees from April 2011 till February 2013 but this amount was not deposited. The Managing Director failed to deposit the amount despite repeated calls to him. It was found that there was no negligence of any other person; hence, Sections 409 and 120-B of the IPC were deleted and a challan was filed against the petitioner for the commission of an offence punishable under Section 406 of the IPC.

3. Being aggrieved from the registration of FIR and the submission of the charge sheet, the petitioner filed the present petition asserting that the proceedings initiated against him amount to an abuse of the process of law. The petitioner is the Director of the Company and he does not fall within the definition of Employer under the EPF Act. Proceedings cannot be continued against him. No money was entrusted to him and he was not liable to deposit any money. The petitioner himself is an employee of the Company and is drawing a monthly salary. The Company had employed the employees and they are liable to deduct the provident fund contribution and deposit the same. There is nothing on record to show that the petitioner had misappropriated the money. He can not be held liable for the commission of an offence punishable under Section 406 of IPC; hence, it was prayed that the present petition be allowed and the FIR and consequent proceedings arising out of the same be quashed.

4. The petition is opposed by filing a reply by respondent No.1/State making preliminary submissions regarding lack of maintainability and the petition raising highly disputed questions of fact. The contents of the petition were denied on merits. It was asserted that the police conducted the investigation and a prima facie case was found against the petitioner; hence, the charge sheet was filed before the Court against the petitioner. The petitioner was Managing Director of U.G. Hotel and Resorts Ltd. He failed to deposit the EPF contribution of the employees and the employer. The challan has been filed before the learned Trial Court which is seized the matter. Therefore, it was prayed that the present petition be dismissed.

5. The contents of the petition were denied on merits. It was asserted that the petitioner embezzled the amount of ₹ 5,83,184/- towards the employees' share of the provident fund. He deposited ₹ 5,78,808/- after registration of the FIR. The petitioner was managing the affairs of the Company and he was responsible

for the acts of the Company. The Company had deducted the amount and thereby the petitioner committed an offence punishable under Sections 406 of IPC. The police conducted the investigation and found sufficient reasons to file a charge sheet against the petitioner before the Court. Learned Trial Court is seized of the matter; therefore, it was prayed that the present petition be dismissed.

6. No separate reply was filed by the informant.

7. I have heard Mr Y.P. Sood, learned counsel for the petitioner, Mr Prashant Sen, learned Deputy Advocate General, for respondent No.1/State and Mr Raman Sethi, learned counsel for respondents No.2 and 3.

8. Mr. Y.P. Sood, learned counsel for the petitioner submitted that the FIR was lodged against the employer. The petitioner is not the employer. The Company is an employer. The Company is a juristic person, who can be prosecuted for the commission of the offences. The petitioner being the Director is not vicariously liable. There are other Directors of the Company. Hence, he prayed that the present petition be allowed and the FIR be ordered to be quashed. He relied upon the judgments of the Hon'ble Supreme Court in ESI Corpn. v. S.K. Aggarwal, (1998) 6 SCC 288; 1998 SCC (L&S) 1480, S.K. Alagh v. State of U.P., (2008) 5 SCC 662 : (2008) 2 SCC (Cri) 686; 2008 SCC OnLine SC 305, Mr. Shanti Kiran Bulla vs. State of Karnataka 2013 SCC Online Kar 2784, Ashoke Sadhya and another Vs. State of West Bengal and another, Cr. Revision No. 259 of 2007, decided on 13.5.2015, Sunil Kumar Panti & ors. Vs. State of Bengal and ors. 2009 SCC Online Cal 1153, Satish Kumar Jhunjhunwala Vs. State of West Bengal 2008 SCC OnLine 189, S.V. Ramaswami Vs. State of Karnataka, Cr. LP No. 3056 of 2013, decided on 15.3.2019, Malhati Tea & Industries Ltd. and others Vs. State of West Bengal and another 2019 SCC Online Cal 2274, Sharad Mittersain Jain and others Vs. State of Maharashtra 2004 (1) Mh. L.J. 776 and Supreme Paper Mills Ltd. Vs. State of West Bengal & another, Cr. Revision No. 1638 of 2016, decided on 21.6.2018 in support of his submissions.

9. Mr. Prashant Sen, learned Deputy Advocate General, for respondent No.1/State submitted that the petitioner is the Managing Director of the Company. He was responsible for deducting the amount and depositing it in the statutory funds. He failed to do so. The police found sufficient reasons to file a charge sheet against the petitioner. Therefore, he prayed that the present petition be dismissed.

10. Mr. Raman Sethi, learned counsel for respondents No.2 and 3 submitted that the Directors of the Company are liable in view of Section 14A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952. The petitioner cannot escape from the liability. He relied upon the judgment of the Hon'ble Supreme Court in Shrikanta Datta Narasimharaja Vs. Enforcement Officer, Mysore (1993) 3 Supreme Court Cases 217. Therefore, he prayed that the present petition be dismissed.

11. I have given considerable thought to the submissions made at the bar and

have gone through the records carefully.

12. The parameters for exercising jurisdiction under Section 482 of Cr.P.C. were laid down by the Hon'ble Supreme Court in *A.M. Mohan v. State*, 2024 SCC OnLine SC 339, wherein it was observed: -

9. The law with regard to the exercise of jurisdiction under Section 482 of Cr. P.C. to quash complaints and criminal proceedings has been succinctly summarized by this Court in the case of *Indian Oil Corporation v. NEPC India Limited* (2006) 6 SCC 736: 2006 INSC 452 after considering the earlier precedents. It will be apposite to refer to the following observations of this Court in the said case, which read thus:

"12. The principles relating to the exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few—*Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre* [(1988) 1 SCC 692: 1988 SCC (Cri) 234], *State of Haryana v. Bhajan Lal* [1992 Supp (1) SCC 335: 1992 SCC (Cri) 426], *Rupan Deol Bajaj v. Kanwar Pal Singh Gill* [(1995) 6 SCC 194: 1995 SCC (Cri) 1059], *Central Bureau of Investigation v. Duncans Agro Industries Ltd.* [(1996) 5 SCC 591: 1996 SCC (Cri) 1045], *State of Bihar v. Rajendra Agrawalla* [(1996) 8 SCC 164: 1996 SCC (Cri) 628], *Rajesh Bajaj v. State NCT of Delhi* [(1999) 3 SCC 259: 1999 SCC (Cri) 401], *Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd.* [(2000) 3 SCC 269: 2000 SCC (Cri) 615], *Hridaya Ranjan Prasad Verma v. State of Bihar* [(2000) 4 SCC 168: 2000 SCC (Cri) 786], *M. Krishnan v. Vijay Singh* [(2001) 8 SCC 645: 2002 SCC (Cri) 19] and *Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque* [(2005) 1 SCC 122: 2005 SCC (Cri) 283]. The principles, relevant to our purpose are:

(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint is warranted while examining prayer for quashing a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are necessary for making out the offence.

(v.) A given set of facts may make out: (a) purely a civil wrong; (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

13. Similar is the judgment in *Maneesha Yadav v. State of U.P.*, 2024 SCC OnLine SC 643, wherein it was held: -

12. We may gainfully refer to the following observations of this Court in the case of *State of Haryana v. Bhajan Lal* 1992 Supp (1) SCC 335: 1990 INSC 363:

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police

officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

14. It was stated in the FIR that the employer had deducted the amount but had failed to deposit the same. It was laid down by the Hon'ble Supreme Court in S.K. Aggarwal and others (supra) that the term 'employer' within the meaning of Section 2(17) of the Employees' State Insurance Act does not include the Director. It was observed:-

"9. In the case of ESI Corpn. v. Gurdial Singh [1991 Supp (1) SCC 204: 1991 SCC (L&S) 833: 1991 Lab IC 52] this Court held that the directors of a private limited company were not personally liable to pay contributions under the Employees' State Insurance Act, 1948. The Court was considering a case where a private limited company was the owner of the factory and the occupier of the factory had been duly named under the Factories Act, 1948. The Court said that the directors did not come within the definition of clause 1 of Section 2(17) of the Employees' State Insurance Act. This Court also disapproved of the decision of a Single Judge of the Bombay High Court which has been subsequently overruled by the Division Bench of the Bombay High Court in the case of Suresh Tulsidas Kilachand v. Collector of Bombay [1984 Lab IC 1614: 1984 LLN 312 (Bom)].

10. Therefore, even if we read the definition of "principal employer" under the Employees' State Insurance Act, 1948 in Explanation 2 to Section 405 of the Penal Code, 1860, the Directors of the Company, in the present case, would not

be covered by the definition of "principal employer" when the Company itself owns the factory and is also the employer of its employees at the Head Office."

15. Similarly, it was held in S.K. Alagh (*supra*) that a Director cannot be held liable for the offence committed by the Company. It was observed;_

"16. The Penal Code, save and except some provisions specifically providing therefor, does not contemplate any vicarious liability on the part of a party who is not charged directly for the commission of an offence.

17. A criminal breach of trust is an offence committed by a person to whom the property is entrusted.

18. Ingredients of the offence under Section 406 are:

"(1) a person should have been entrusted with property, or entrusted with dominion over property;

(2) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or wilfully suffer any other person to do so;

(3) that such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust."

19. 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 the creation of such a legal fiction, it provides specifically therefor. In the 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. (See *Sabitha Ramamurthy v. R.B.S. Channabasavaradhya* [(2006) 10 SCC 581: (2007) 1 SCC (Cri) 621].)"

16. It was held in *Noshir Adi Soonawala v. State of Maharashtra*, 2012 SCC OnLine Bom 714 that the definition of principal employer in Employees State Insurance Company and the definition of employer in Employees Provident Fund Scheme, 1952 are more or less similar. It was observed:-

"11. The comparison of the definition of "principal employer" in the Employees' State Insurance Act, 1948 and the definition of "employer" in the Employees Provident Funds Scheme, 1952 would show that both the definitions are more or less similar and the purpose of definitions is also similar. Section 40 of the Employees' State Insurance Act, 1948 is more or less similar to the provisions of Para 30 of the Employees' Provident Funds Scheme, 1952. As such provisions of section 40 of the Employees' State Insurance Act, 1948 and Para 30 of the Employees' Provident Funds Scheme, 1952 are *pari materia*.

12. The Single Judge of Calcutta High Court while dealing with the case in Robin Paul v. State of W.B., reported at 2008 SCC OnLine Cal 192, under the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 had occasion to refer to the judgment of the Hon'ble Supreme Court in the matter ESI Corpn. v. S.K. Aggarwal. The Single Judge of Calcutta High Court had come to the conclusion that the definition of "employer" does not include directors and that launching of prosecution against the directors of the establishment/factory was bad in law. The revision petition of the directors was allowed and proceedings initiated against them under the Act were quashed.

13. After having gone through the definition of "employer" of the Act of 1952 and the obligation of employer under Para 30 of the Employees Provident Funds Scheme and after having gone through the judgment of the Hon'ble Supreme Court in the matter of S.K. Agrawal and the Calcutta High Court reported at, 2008 SCC OnLine Cal 192, and keeping in view the deeming provision of Explanation 1 to section 405 of the Penal Code, 1860, I have come to the conclusion that the petitioners will not fall under the definition of "employer" and therefore, they were not under obligation to comply Para 30 of the Employees' Provident Funds Scheme, 1952. It, therefore, follows that the deeming provision will not be applicable to them. Needless to say, that they could not be said to have committed a criminal breach of trust."

17. In Sushil Kumar Bagla v. State, 2003 SCC OnLine Cal 62 it was held that a Director cannot be held liable for non-depositing of an amount and is not an offence under Sections 406 and 409 of the IPC. It was observed:-

"11. Now explanation-I to section 405 provides that "a person, being an employer, 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 for 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". Once it is found that the employer deducted amounts from the wages of the employees for contribution to the Provident Fund and retaining the same without depositing it with the fund, an automatic presumption is available against the employer that he dishonestly used the amount of the said contribution in violation of a direction of law. The same view was expressed by the Supreme Court in Harihar Prasad Dubey v. Tulsi Das Mundra, (1980) 4 SCC 120. While expressing the said view Supreme Court quoted with approval following observation of Madhya Pradesh High Court in Akharbhai Nazrali v. Md. Hussain Bhai, AIR 1961 M.P. 37:—

".... the mere fact of telling the employees that it is their contribution to the Provident Fund Scheme and then making deduction or recovery and retaining it, constitutes the offence of criminal breach of trust."

12. Even before that in *J.M. Desai v. State of Bombay*, AIR 1960 SC 889, the Supreme Court held that to establish a charge of the criminal breach of trust, the prosecution is not obliged to prove precise mode of conversion, misappropriation or misapplication by the accused of the property entrusted to him or over which he has dominion. The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure, in breach of an obligation, to account for the property entrusted, if proved, may in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion.

13. In *Krishna Kumar v. Union of India*, AIR 1959 SC 1390, the Apex Court held that it is not necessary or possible in every case to prove in what precise manner the accused person dealt with or misappropriated the goods of his master. The question is one of intention and not a matter of direct proof. In the case of a servant charged with misappropriating the goods of his master the ingredients of criminal offence of misappropriation will be established if the prosecution proves that the servant received the goods, that he was under a duty to account to his master and had not done so. If the failure to account for an accidental loss then the facts being within the servant's knowledge, it is for him to explain the loss. It is not the law of this country that the prosecution has to eliminate all possible defences or circumstances which may exonerate him. If these facts are within the knowledge of the accused then he has to prove them. If under the law it is not necessary or possible for the prosecution to prove the manner in which the goods have been misappropriated then failure of the prosecution to prove facts it set out to prove the manner of misappropriation or conversion would be of little consequence.

14. It may be mentioned in this connection that both the aforesaid decisions in *Krishna Kumar* and *Harihar Prasad Dubey* (supra) were rendered by the Supreme Court long before explanation-I was inserted in section 405 I.P.C. by amendment in 1973. This explanation merely recognises the law already decided by the Apex Court. The decision of this court in *Putul Chandra Dasgupta's* case appears to be a judgment per incuriam as it was, rendered without considering aforesaid three decisions of the Apex Court and explanation-I to section 405 I.P.C.

15. The next contention of Mr Panja is that the petitioner is not the employer of the employees whose wages/salaries, and their contributions towards Provident Fund were deducted. It is the company, namely, Hanuman Tea Co. Ltd. which is the principal employer. Petitioner is merely a Director of the said company. In view of explanations 1 and 2 of section 405, I.P.C. petitioner cannot be proceeded against in this case. Only the company, being the employer, is liable to be proceeded against in this case. In this regard, it may be observed here that an FIR cannot be quashed merely on the ground that the petitioner has been wrongly shown as an offender in the FIR. If the FIR discloses a prima facie case of cognizable offence, it cannot be quashed merely on the ground that someone has been wrongly arrayed as an accused or that in law no such case is

maintainable against a particular accused though it is maintainable against some other accused. In such a case only remedy available to an accused is to pray for discharge after a charge sheet is filed against him. That apart section 14A of the said EPF & MP Act, inter alia, provides that "If the person committing an offence under this Act, the Scheme or the Pension Scheme or the Insurance Scheme is a company, every person, who at the time the offence was committed was in charge 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." Sub-section (2) of section 14A further provides that "Notwithstanding anything contained in sub-section (1), where an offence under the Act or the Scheme or the pension scheme or the insurance scheme has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any Director or Manager, Secretary or other officer of the company, such Director, Manager, Secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly." Therefore, the Director of a company can very well figure as an accused in an FIR for such offences. Of course, ultimately if no material is found against the Director in the course of the investigation about his involvement, he may not be charge-sheeted. That apart a company cannot act on its own. It always acts through human agency. A company being a juristic person is incapable of having a particular state of mind, namely, the mens rea under section 405 I.P.C. Essential ingredient of the offence under section 405 is a particular state of mind, namely, dishonest misappropriation or conversion or use or disposal of the property in question. A company, being a juristic person, is incapable of having such a state of mind and hence the company cannot be proceeded against for the offences under sections 406 and 409 I.P.C. where particular mens rea is an essential ingredient. Therefore, it is only the natural persons through whom the company committed the offences in question are liable to be proceeded against for offences under sections 406 and 409. It may be pertinent to mention here that mens rea like dishonest misappropriation or conversion or use or disposal of the property in question is not an ingredient for the offences contemplated under the provisions of EPF & MP Act and hence, for offences under the said Act, a company can be proceeded against though it cannot be proceeded against for the offences under the Penal Code, 1860. Therefore, the contention of Mr Panja that the petitioner being a Director only cannot be proceeded against and it is the company only which can be proceeded against for the offences under sections 406/409 sounds like an absurd proposition and the same is untenable in law. Accordingly same is rejected.

16. However, Mr. Panja referred to a decision of the Apex Court in *Employee's State Insurance Corporation v. S.K. Agarwal*, (1998) 6 SCC 288: AIR 1998 SC 2676. In the said decision it was held that in view of the definition of 'principal employer' as provided under section 2(17) read with section 40 of the

Employee's State Insurance Act and explanation 2 to section 405 I.P.C., it is the company alone which can be proceeded against for offences under sections 406/409 and not its Director. But the EPF & MP Act does not contain any such provision in section 2(17) and section 40 of the Employee's State Insurance Act. However, section 2(e) of EPF & MP Act defines the term "Employer" which provides that "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 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 Managers, Managing Director or managing agent.

17. As the EPF & MP Act does not contain any such provision similar to sections 2(17) and 40 of the Employee's State Insurance Act, there is no justification to apply the decision of the Apex Court reported in (1998) 6 SCC 288. That apart this decision does not answer the question as to how a juristic person like a company can be prosecuted in respect of an offence under the Penal Code where mens rea or particular state of mind is an essential ingredient of such an offence. Otherwise, many decisions of the Apex Court on this point will be rendered devoid of any application. One can understand that in respect of offences where mens rea or particular state of mind is not an essential ingredient like these under the provisions of the Employee's State Insurance Act or EPF & MP Act, it may be possible to prosecute a company. A company being not a natural person cannot have a mind and hence it can not have any particular state of mind or mens rea. For all offences under the Penal Code, mens rea is always invariably an essential ingredient and hence for such offences none except natural persons can be prosecuted. That a juristic person like a company cannot have a mind is an undeniable fact of natural science and, therefore, on the strength aforesaid decision of the Apex Court reported in (1998) 6 SCC 288, I cannot be asked to deny this basic proposition of natural science."

18. This position was reiterated in Joydeb Basak v. State of W.B., 2024 SCC OnLine Cal 5310, wherein it was held:-

"26. On the contrary, Ld. Counsel, Mr. Gupta appearing on behalf of the opposite party no. 2 relied mainly on the observation of the Hon'ble Apex Court in the case of Srikanta Datta (supra) wherein it was held that the expression 'in charge of and responsible to the company for the conduct of business' is very wide and it includes not only the owner or occupier but all those who have control or are responsible for the affairs of the company. The declaration, therefore, in form 5A including the appellant therein as one of the persons in charge and responsible

for the affairs of the company means that he can be prosecuted for violation of any provision of any scheme.

27. In our case, a careful perusal of columns 8 and 10 of form no. 5A under the EPF Scheme, 1952 shows that petitioner no. 2 has given a self-declaration claiming himself to be the owner as well as the occupier of the establishment/petitioner no. 1.

28. Therefore, petitioner no. 2 is the owner and the occupier of the company/petitioner no. 1 is the employer within the meaning of Section 2 (e) of the EPF Act and also explanation 1 to Section 405 of the IPC clearly speaks that an employer of an establishment who deducts the employee's contribution from the wages payable to the employee for the credit to a Provident Fund 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 aforesaid Act, he shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law.

29. In the aforesaid view of the matter, I am unable to quash the proceeding as subsequent payment of the due amount made by the petitioner does not absolve his liability which, at best, could be considered as a mitigating circumstance only at the time of imposition of sentence."

19. It was held in *Robin Paul v. State of West Bengal*, 2008 SCC OnLine Cal 192 that the proceedings initiated against the Director for non-depositing of the provident fund were liable to be quashed under Section 482 of Cr.P.C. It was observed:-

"10. Having heard the learned advocates for the parties I must say at the outset that criminal proceedings can only be quashed and that too after submission of a charge sheet only when it fails to disclose prima facie cognisable offence. The decision in the *State of Haryana v. Bhajan Lal* reported in 1992 Supp (1) SCC 335 and *R.P. Kapur v. State of Punjab* reported in AIR 1960 SC 866, 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 section 406/409 of the 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 the judgment of the Supreme Court in the case of *S.K. Aggarwal* (supra), 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 Explanations under section 405 of the IPC is there found anything to the effect that the directors of the company or an establishment may be prosecuted under section 405 of the IPC for the alleged commission of criminal breach of trust.

11. In both Explanations 1 and 2 to section 405 of the IPC, it is the person who is the employer, and who deducts the 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. Aggarwal (supra) have 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 Rabindra Chamaria v. Registrar of Companies, West Bengal (supra) is in a different context. Their Lordships analysed the persons who are responsible under section 14A and section 14(1A) of the EPF Act, 1952 for non-payment of provident fund dues with the provident fund authority. This decision has no manner of application to the facts of the present cases. The Special Bench decision is in relation to the case of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, and the observation of their Lordships of this court in paragraph 66 is virtually an 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 the EPF Act, 1952, is *pari materia* the same as in the ESI Act, 1948, but the definition cannot cover the director when such director is sought to be prosecuted for an offence under section 405 of the IPC as it has been held by the Supreme Court that the word "employer" does not include director within any of the Explanations 1 and 2 to section 405 of the 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 guidelines of State of Haryana v. Bhajan Lal (supra)."

20. Karnakata High Court also took a similar view in S.V. Ramaswami (supra) and observed as under:-

"5. A reading of the charge sheet indicates that the alleged offences have been committed by Vishnu Textiles Limited, Kampalapura, which is a company registered under the Companies Act. The said company is not made as an accused. The petitioner herein is prosecuted in his capacity as the Managing Director of the said company. The specific allegation in the charge sheet are that the company has deducted the Employee contribution amounting to Rs.2,10,665/- and failed to deposit the same in the Provident Fund and Family Pension Fund. There is no allegation that the petitioner herein collected the said amount and failed to deposit the said amount. In this context, the exposition of law made by the Hon'ble Supreme Court in the case of S.K. Alagh Vs. State of Uttar Pradesh and others reported in (2008) 5 SCC 662, referred to supra would in my view could be squarely applies to the facts of the case. Dealing with Sections 405 and 406 of IPC, in the context of the provisions of the Act, in para 20 of the above judgment, the Hon'ble Supreme Court has held as under:

"20. We may, in this regard, notice that the provisions of the Essential

Commodities Act, the Negotiable Instruments Act, the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, etc. have created such vicarious liability. It is interesting to note that Section 14-A of the 1952 Act specifically creates an offence of criminal breach of trust in respect of the amount deducted from the employees by the company. In terms of the Explanations appended to Section 405 of the Penal Code, a legal fiction has been created to the effect that the employer shall be deemed to have committed an offence of criminal breach of trust. Whereas a person in charge of the affairs of the company and control thereof has been made vicariously liable for the offence committed by the company along with the company but even in a case falling under Section 406 of the Penal Code vicarious liability has been held to be not extendable to the Directors or officers of the company."

As the prosecution is launched only against the petitioner in his capacity as the Managing Director of the said company, in my view, the facts alleged in the charge sheet do not make out the offences under Sections 406 and 409 of IPC. Consequently, the prosecution initiated against the petitioner cannot be sustained."

21. Mr. Raman Sethi, learned counsel for respondents No.2 and 3 heavily relied upon the following paragraph of S.K. Alagh (supra), which reads as under:-

"20. We may, in this regard, notice that the provisions of the Essential Commodities Act, the Negotiable Instruments Act, the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, etc. have created such vicarious liability. It is interesting to note that Section 14-A of the 1952 Act specifically creates an offence of criminal breach of trust in respect of the amount deducted from the employees by the company. In terms of the Explanations appended to Section 405 of the Penal Code, a legal fiction has been created to the effect that the employer shall be deemed to have committed an offence of criminal breach of trust. Whereas a person in charge of the affairs of the company and control thereof has been made vicariously liable for the offence committed by the company along with the company but even in a case falling under Section 406 of the Penal Code vicarious liability has been held to be not extendable to the Directors or officers of the company. (See *Maksud Saiyed v. State of Gujarat* [(2008) 5 SCC 668 : (2007) 11 Scale 318] .)"

22. He submitted that the Hon'ble Supreme Court has recognized the vicarious liability of the Director in view of Section 14A of the Act. He also relied upon the judgment of the Hon'ble Supreme Court in *Shri Kanta* (supra) in support of his submission. This submission is not acceptable. The complaint has not been filed under the provisions of the EPF Act but under Section 406 of IPC. It was held by the Bombay High Court in *EPFO Vs. State of Maharashtra* 2018 SCC Online Bombay 21291 that where the person was not being prosecuted under the EPF Act but under the provisions of IPC, the principle of vicarious liability cannot be incorporated. It was observed:-

"11. I have carefully gone through the impugned order and the judgments cited by the two sides and the ones referred to by the learned Magistrate in the impugned order. In my considered view, the foremost fact that needs to be borne in mind is that admittedly, the respondents are not being sought to be implicated for any offence provided for under the EPF Act and are merely sought to be prosecuted under the general law for allegedly committing offences punishable under Sections 406 and 409 of the IPC. The purpose for emphasising this aspect is that the offence provided for under Section 14A of the Employees Provident Fund Act being a special statute is a technical offence. It seeks to punish for violation of various provisions of the Act and would therefore, need not have any mens rea on the part of the persons responsible for committing such breach. Whereas the offences punishable under Sections 409 and 406 of the IPC essentially require the existence of mens rea. Suffice for the purpose to respectfully refer to and rely upon the observations of the Supreme Court in the case of S.K. Alagh (supra) in paragraph no. 20, which read as under:

"20] We may, in this regard, notice that the provisions of the Essential Commodities Act, the Negotiable Instruments Act, the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, etc. have created such vicarious liability. It is interesting to note that Section 14-A of the 1952 Act specifically creates an offence of criminal breach of trust in respect of the amount deducted from the employees by the company. In terms of the Explanations appended to Section 405 of the Penal Code, a legal fiction has been created to the effect that the employer shall be deemed to have committed an offence of criminal breach of trust. Whereas a person in charge of the affairs of the company and in control thereof has been made vicariously liable for the offence committed by the company along with the company but even in a case falling under Section 406 of the Penal Code vicarious liability has been held to be not extendable to the Directors or officers of the company."

12. As can be seen, these observations refer to the provisions of the special enactments including the Employees' Provident Funds Act 1952 and even by referring to the Explanation appended to Section 405 of the IPC, it has been observed that a person incharge of the affairs of the company has been made vicariously liable for the offence committed by the company but in a case falling under Section 406 of the IPC, the vicarious liability is not extendable to the Director or Officer of the company. The observations of the Supreme Court in the earlier decision in the case of Maksud Saiyed v. State of Gujrat, (2008) 5 SCC

668 are referred to while arriving at such a conclusion. It is to be noted that though these observations in the case of S.K. Alagh pertain to the Director of a Company registered under the Companies Act, the facts in the matter in hand do not make material difference merely because the respondent no. 1 is a factory registered under the Maharashtra Cooperative Societies Act 1960. By virtue of Section 36 of that Act, such a factory/society is also a body having perpetual succession and a common seal and is a legal entity like a company registered

under the Companies Act. Therefore, at first blush the fact situation in the matter in hand can be said to be governed by the decision of the Supreme court.

13. For that matter, even the observations of the Supreme Court in the case of *Employees State Insurance Corporation v. S.K. Aggarwal*, (1998) 6 SCC 288 : AIR 1998 SC 2676 are broadly on the same lines. Though in that matter the case was pertaining to the Employees' State Insurance Act, 1948 where the directions of a public limited company were prosecuted for the offence punishable under Section 406 of the IPC on their failure to deposit the contribution deducted from the employees' pay. It was held that the Directors of the Company were not covered by the definition of 'principal employer' as defined under Sub Section 17 of Section 2 of that Act and the proceeding was quashed by the High Court and was sustained by the Supreme Court. It was also held that when the owner of a factory is a company, it is the company which is the principal employer and not its Director. It was further observed that Section 40 of the Employees' State Insurance Act used the words 'owner' and 'employer' disjunctively. The Supreme Court also relied upon the Division Bench decision of this Court in the case of *Suresh Tulsidas Kilachand v. Collector of Bombay*, (1980) 2 LLJ 81 holding that the Director of a company by virtue of being a Director is not principal employer contemplated by Sub Section 17 of Section 2 of the Employees' State Insurance Act and would not be personally liable to pay employer's contribution under that Act.

14. In view of such consistent decisions of the Supreme Court, apparently no fault can be found with the impugned order passed by the learned Magistrate by referring to and relying upon the decision of the Supreme Court in the case of *S.K. Alagh* (supra).

15. True it is that in the case of *Sushilkumar Bagla* (supra) the learned Judge of the Calcutta High Court has refused to rely upon the decision in the case of *S.K. Aggarwal* (supra) by holding it to be per incuriam and in doing so he has observed that the decision was rendered without considering the statutory provisions and the decisions of the Supreme Court. According to the learned Judge the decision in the case of *S.K. Aggarwal* referred to the definition of 'principal employer' contained under Sub Section 17 of Section 2 and Section 40 of the Employees' State Insurance Act but the EPF Act does not contain similar provisions. It is observed that unlike the offence under the I.P.C. mens rea is not necessary ingredient for the offence under the provisions of the EPF Act.

16. In the matter in hand, as is pointed out at the inception the respondents are not being sought to be prosecuted for any offence punishable under the provisions of EPF Act and are being simply prosecuted for the offences punishable under Sections 406 and 409 of the IPC. The former may not require but the latter would essentially require existence of such mens rea. Precisely for these reasons, one cannot look into the definitions of 'employee' and 'employer' of a factory laid down under Clause 2(e) and 2(k) of the E.P.F. Act respectively. Had the respondents been prosecuted for violation of some provisions of that

Act, certainly those definitions could have been gone into and the role attributable to the respondents Directors and office bearers could have been assessed. Since they are being implicated merely for the offence under the Sections of the IPC, in the absence of any mens rea on their part, they cannot be allowed to face the trial. The learned Magistrate has correctly appreciated the matter in controversy and has rightly allowed the application discharging the respondents. I find no infirmity in the impugned order.”

23. Moreover, Section 14A makes the Company as well as the person in charge not responsible to the Company for its conduct liable. In the present case, the Company has not been arrayed as an accused. It was held by Calcutta High Court in *Buddhadev Acharya vs. State of W.B.*, 2023 SCC OnLine Cal 2759 that when the Company was not prosecuted, it is not permissible to prosecute the Managing Director. It was observed:-

“38. Accordingly under Section 14A of the Employees' Provident Funds & Misc. Provisions Act, every person, who at the time the offence was committed, was in charge 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.

39. Thus it is the company 'Amritapur Tea Company Ltd.' herein who is the 'employer' in respect of its employees and not the petitioner who is a director.

40. Thus the prosecution initiated against the director of the company in his official capacity without arraying the company itself as an accused cannot continue as no offence under Section 406/409 IPC can be said to have been committed by the director in his official capacity without the company being made an accused with the liability of the offence. It is trite law that vicarious liability is unknown to criminal jurisprudence unless specifically provided in the statute itself. As the Penal Code does not provide for such provision, the director/petitioner cannot be held responsible for any act of the company who is the employer and is liable for depositing the employees' share of provident fund before the provident fund authority, without making the company also an accused in the case.”

24. Therefore, the respondents cannot take advantage of the provision of Section 14A of EPF Act. First, there was no complaint under the EPF Act and secondly, the petitioner being the Director of the Company cannot be prosecuted without prosecuting the Company.

25. Consequently, the submission that the petitioner is not liable for the non-deposit of the provident fund contribution has to be accepted as correct. The continuation of the proceedings against the petitioner in these circumstances would amount to abuse of the process of the Court.

26. Hence, the present petition is allowed and FIR No. 57 of 2013, dated 6.4.2013, registered at Police Station Dhalli, District Shimla, H.P. for the

commission of offence punishable under Sections 406, 409 and 120-B of IPC and the consequent proceedings arising out of the same are ordered to be quashed qua the petitioner.