(2010) 153 CompCas 419

Calcutta High Court

Case No: C.R.R. No"s. 1716, 2025, 2026, 2168, 2238 and 2239 of 2006

Robin Paul		APPELLANT
	Vs	
State of West Bengal and Others		RESPONDENT

Date of Decision: March 11, 2008

Acts Referred:
Employees Provident Funds and Miscellaneous Provisions Act, 1952 â€" Section 13, 14(1A), 14A#Employees State Insurance Act, 1948 â€" Section 2, 2(17)#Factories Act, 1948 â€" Section 7(1)#Penal Code, 1860 (IPC) â€" Section 405, 406, 409

Citation: (2010) 153 CompCas 419

Hon'ble Judges: Partha Sakha Datta, J

Bench: Single Bench

Advocate: Krishnendu Gooptu, C.K. Saha, Ayan Bhattacherjee, Anirban De and Vivekananda Das, for the Appellant; Shiv Chandra Prashad, Mihir Kundu and Aparna Banerjee for Provident Fund Authorities, Krishna Ghose, 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. The 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 u/s 406/409 of the Indian Penal Code, 1860, in respect of diverse sums of money by not depositing

the employees'' 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 amount 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 u/s 406/409 of the IPC. FIRs were lodged against the petitioners u/s 406/409 of the IPC because of alleged commission of criminal

breach of trust on account of non deposit of the P.F. dues, both of the employees'' and employer''s share with the P.F. 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

the IPC the word ""employer"" does not include the ""director"". Therefore, as in the instant case the 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 the employer u/s 405 of the 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 the 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 v. State reported in [2003] Cri. LR 341, which in fact has

followed the decision in S.K. Aggarwal (supra). The decision of the Patna High Court in Gopta B.P. and Others Vs. State of Bihar, has also been

referred to. This decision also followed the decision in S.K. Aggarwal (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 of the 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 the 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. This decision also follows the

decision of the Supreme Court in S.K. Aggarwal (supra).

6. As against the decision referred to by learned Counsel for the petitioners, Mr. Shiv Chandra Prasad, the learned advocate for the opposite

party, namely, the regional provident fund 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 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;

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 provident fund dues with the appropriate authority under the E.P.F. Act, 1952.

8. I have also been taken to the 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 who would be responsible for the purpose of recovery of dues

from the establishment. The purpose of the EPF Act, 1952, has been analysed by learned Counsel for opposite party No. 2 and it is submitted that

the object of this enactment is socio welfare legislation. The decision of the Supreme Court in Rabindra Chamria and others Vs. The Registrar of

Companies, West Bengal and others, 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 arguments were identical with those 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 cognisable offence. The decision in the State of Haryana and others Vs. Ch.

Bhajan Lal and others, 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 u/s 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 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 u/s 405 of the IPC is there found anything to the effect that the directors of the company or an

establishment may be prosecuted u/s 405 of the IPC for the alleged commission of criminal breach of trust. In both the 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 different context. Their Lordships analysed the persons who are

responsible u/s 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 and as in the ESI Act, 1948, but the definition cannot cover the director when such director

is sought to be prosecuted for an offence u/s 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 guideline

of State of Haryana v. Bhajan Lal (supra).

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

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

14. Let urgent certified xerox copy of this order be made available to the learned advocates for the parties, if applied for.