

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/CRIMINAL MISC.APPLICATION (FOR QUASHING & SET ASIDE
FIR/ORDER) NO. 9538 of 2012****With****R/CRIMINAL MISC.APPLICATION NO. 3990 of 2014****With****R/CRIMINAL MISC.APPLICATION NO. 1974 of 2022**=====
I C MAHIDA - M.D. OF SURAT DISTRICT CO-OP BANK LTD**Versus****STATE OF GUJARAT & ORS.**
=====**Appearance in CR.MA No.9538/2012:**

MR BS PATEL, SR. ADVOCATE for MS DHARA M SHAH(5546) for the Applicant

MS E.SHAILAJA(2671) for the Respondent(s) No. 2

MR UT MISHRA(3605) for the Respondent(s) No. 3

Appearance in CR.MA No.3990/2014:

MR PH PATHAK with MS REENA M KAMANI for the Applicant

MS E.SHAILAJA(2671) for the Respondent(s) No. 2

Appearance in CR.MA No.1974/2022:

MR CHIRAG B. PATEL for the Applicant

MS E.SHAILAJA(2671) for the Respondent(s) No. 2

MR TRUPESH KATHIRIYA, ADDL. PUBLIC PROSECUTOR for the Respondent(s) No. 1
=====**CORAM:HONOURABLE MR. JUSTICE HASMUKH D. SUTHAR****Date : 11/09/2024****ORAL ORDER**

[1.0] Since all these petitions are filed by separate petitioners - accused seeking quashing of one common FIR, all these petitions are heard, decided and disposed of by this common oral order.

[2.0] By way of present petitions under Section 482 of the Code of Criminal Procedure, 1973 (for short "CrPC"), respective petitioners are seeking quashing of FIR being **CR No.I-80 of 2012 registered with Vyara Police Station, District Tapi** for the offence punishable under Sections 405, 406



and 409 of the Indian Penal Code, 1860 (for short "IPC") alongwith all its consequential proceedings. The details of petitioner vis-a-vis respective petition are as follows:

CR.MA No.	Petitioner's Name	Accused No.
9538/2012	I.C. Mahida General Manager, Surat District Cooperative Bank Ltd. Surat	Ori. Accused No.9
3990/2014	A.P. Asari District Registrar	Ori. Accused No.8
1974/2022	Mansinhbhai Kalyanbhai Patel Chairman, Gujarat Rajya Sahakari Khand Udyog Limited	Ori. Accused No.10

For the sake of brevity, Criminal Misc. Application No.9538 of 2012 is taken as a lead matter and facts of the said petition are considered.

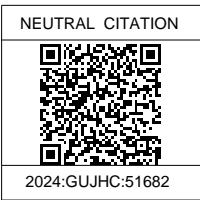
- [3.0] The impugned FIR is filed at the instance of Provident Fund Inspector alleging therein that the owners and responsible persons of Shree Ukai Pradesh Sahakari Khand Udyog Mandli Limited have not deposited the amount of provident fund of the employees working with the said society. It is further alleged that though the owners and responsible persons had deducted amount of provident fund from the salary of the employees as per paragraph 38 of the scheme of the EPF Act. The society had not deposited the said amount in the provident fund accounts with State Bank of India, which was required to be



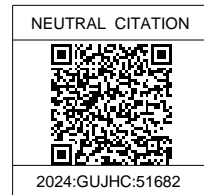
deposited by them on or before 15th day of each English calender month however, the same was not deposited from March, 2010 till March, 2012 which is aggregating to Rs.56,94,887/-. It is further alleged that in the pay register, deduction towards provident fund is mentioned and even the signature of the concerned employee and labourers have been taken on the same. Thus, it is alleged that by not depositing the said amount, accused have committed offence punishable under Sections 405, 406 and 409 of the IPC. It is under these circumstances that the FIR has been filed. After filing of the FIR, charge-sheet came to be filed for the offence punishable under Sections 405, 406, 409 and 114 of the IPC.

[4.0] Heard learned Senior Advocate Mr. B.S. Patel assisted by learned advocates Ms. Dhara Shah, Mr. P.H. Pathak and Mr. Chirag Patel for the petitioners, learned APP Mr. Trupesh Kathiriya for respondent No.1, learned advocate Ms. E. Shailaja for respondent No.2 and learned advocate Mr. U.T. Mishra for respondent No.3.

[5.0] Learned Senior Advocate Mr. B.S. Patel assisted by learned advocates Ms. Dhara Shah, Mr. P.H. Pathak and Mr. Chirag Patel for the petitioners has submitted that in Shree Ukai Pradesh Sahakari Khand Udyog Mandli Limited, present petitioners – accused were appointed as Custodian by the State Registrar to look after the day to day affairs of the



Society. As per the by-laws of the Society under the Act, 1961, Surat District Cooperative Bank is a Federal Bank and Bank is providing short-term and medium-term loan for development of the Society for procurement of equipment and for other purposes. Prior to appointment of the present petitioners – accused, the Managing Committee of the said Society was elected on 26.09.2009 and there were 12 Managing Committee members and factory remained in operation between the period from 01.11.2010 to 13.12.2010. Thus, in absence of any elected Committee and due to vacuum, the Custodian Committee was appointed under Section 74(D) of the Act, 1961 vide Notification dated 25.01.2011 by the State Government. Pursuant to the said notification, the Committee was constituted with (1) District Registrar, (2) General Manager of Surat District Cooperative Bank, (3) Mansinh Patel, Chairman of Gujarat Rajya Sahakari Khand Udyog Limited and (4) Managing Director, Shree Ukai Pradesh Sahakari Khand Udyog Mandli Limited as the members and subsequently six more members were appointed as members of Custodian Committee vide Resolutions dated 25.01.2011 and 10.02.2011. At that time, there was no any member or officer designated as General Manager of the said Society. Being an affiliated Society of lead Bank, petitioners used to provide the credit and being the members of other cooperative societies, as a caretaker, they were appointed as member of the Custodian



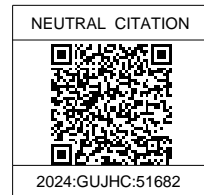
Committee. As the Committee was appointed for caretaker, they are not in any manner directly or indirectly associated with the management or affairs of Shree Ukai Pradesh Sahakari Khand Udyog Mandli Limited or for deduction or contribution of the provident fund dues of employees though for alleged breach, present petitioners are arraigned as accused. No offence under Section 405 of the IPC is committed by the present petitioners considering the provisions of Section 2(e) of the The Employees' Provident Funds And Miscellaneous Provisions Act, 1952 (for short "EPF Act") as the present petitioners are not employers of the said Society. The duty of the present petitioners was only to manage day to day affairs, to recover the dues, finance and to look after the administration of the Society. There was no property entrusted to the present petitioners and whatever default alleged in the complaint is for the period from March, 2010 to January, 2011 and thereafter, between January, 2011 to March, 2012 but as and when petitioners were able to manage the financial condition, they have deposited the amount and fulfilled other obligations. The petitioners are not guilty of any offence and they are unnecessarily roped in the offence.

- [5.1] He has further submitted that no offence much less any offence in aid of section 405 or 406 of the IPC is made out and in this regard he has relied on the decision of the



Hon'ble Supreme Court in the case of **Employees State Insurance Corporation vs. S.K. Aggarwal And Ors.** reported in **(1998) 6 SCC 288** and order passed by the coordinate Bench in the case of **Vinit Jain vs. State of Gujarat** rendered in Criminal Misc. Application No.15559/2017 and submitted that the present petitioners are arraigned as accused though they were acting only as caretaker and by virtue of their designation, there was no any active participation on the part of the present petitioners and they do not fall under the definition of 'employer'. Hence, this is a fit case to exercise jurisdiction under Section 482 of the CrPC and has requested to allow the present petitions.

[6.0] Learned advocate Ms. E. Shailaja for the original complainant has vehemently opposed the present petitions and submitted that the present petitioners are involved in the offence and are directly connected with the commission of offence. Further, it is an undisputed fact that the administration of Shree Ukai Pradesh Sahakari Khand Udyog Mandli Limited was under the control and supervision of the present petitioners and present petitioners were duty bound to fulfill their obligation and comply with the statutory provisions of employees provident fund however, the petitioners failed to comply with the said provisions though they were aware of the said provision. Even, they have deducted the



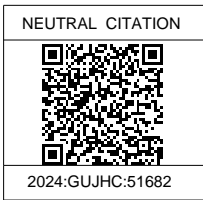
amount from the salary of the employees and then have not deposited the same within the prescribed limit with the department and thus have committed breach of statutory provisions due to which the employer have to face the consequences and loss. Thus, the petitioners have committed the offence of breach of trust and in this regard she has relied on Explanation to Section 405 of the IPC and further she has submitted that merely petitioners have subsequently deposited the amount which does not wipe out the offence. Further, the Court has to consider the benevolent object of the Act and as per Form No.5A under the EPF Act submitted by the present petitioners and their names are mentioned. Considering the said Form No.5A, petitioners are liable and responsible for their acts and omissions. Hence, no any defence is available to the present petitioners at this stage and she has requested to dismiss the present petitions more particularly relying on paragraph 32(3) of the EPF Scheme, 1952 and submitted that if any sum is deducted by the employer or the contractor from the wages of the employees under the scheme shall be deemed to have been entrusted to him and for the purpose of paying contribution which was deducted. Hence, *prima facie* offence under Section 405 of the IPC is made out.

[6.1] Further, as per paragraph 36(2) of EPF Scheme, it is the duty of the employer to send the said amount to the



Commissioner within 15 days of each month and as per paragraph 36, the employer has to furnish the particular of ownership. Herein, petitioners have submitted Form No.5A and particulars. Hence, *prima facie* offence is made out against the present petitioners and the petitioners cannot plead ignorance that they were merely Custodian or member of the committee and therefore, they are not liable or answerable to fulfill their obligation and offence under Sections 405 and 406 of the IPC is made out as names of petitioners reflect in Form No.5A. She has relied on the decision of Hon'ble Supreme Court in the case of **Srikanta Datta Narasimharaja Wodiyar vs Enforcement Officer** reported in **AIR 1993 SC 1656** and submitted that the accused are responsible to comply with the provisions of the Act. Hence, she has requested to dismiss the present petitions as they are indulged and having control over the affairs of the Society.

[7.0] Learned Additional Public Prosecutor Mr. Trupesh Kathiriya has vehemently opposed the present petitions and submitted that investigation in the present case is over and charge-sheet is filed and *prima facie* involvement of petitioners is there and this is not a case where jurisdiction under Section 482 of the CrPC shall be exercised as full-fledged trial in the matter is required. Hence, he has requested to dismiss the present petitions.



- [8.0] Learned advocate Mr. U.T. Mishra for respondent No.3 adopting the submissions of learned advocate for respondent No.2 and learned APP has submitted that the accused persons have not deposited the amount of provident fund after deducting from the salary of the employees and charge-sheet is filed and present petitioners have failed in discharging their duty as they did not deposit the amount of provident fund. Hence, he has requested to dismiss the present petitions.
- [9.0] Having heard learned advocates for the respective parties and going through the record it appears that it is an admitted and undisputed fact that the present petitioners are members of the Custodian Committee appointed by the Shree Ukai Pradesh Sahakari Khand Udyog Mandli Limited under Section 74 of the Gujarat Cooperative Societies Act as care takers and as stop gap arrangement due to vacuum in administration of Society. The petitioners are facing charge under Sections 405, 406 and 409 of the IPC. The Custodian Committee is appointed to look after the affairs of the Society as a stop gap arrangement due to vacuum in the administration of the Society and as per the provisions of the Gujarat Cooperative Societies Act, the management of the Society is vested in elected members of the Managing Committee. When society was running in loss since long, Managing Committee has resigned from the designation and due to



vacuum in the administration, as a care taker, the Custodian Committee was appointed and by virtue of their designation, present petitioners were appointed as members of Custodian Committee. In short, present petitioners were not full time Managing Director or salaried office bearers in the management of the Society.

- [9.1] The complaint is filed at the instance of respondent No.2 – Field Inspector, EPG Organization, Surat Office against 11 accused including the present petitioners as erstwhile members of the Custodian Committee. After the investigation, charge-sheet was filed wherein it is the case of prosecution that in Shree Ukai Pradesh Sahakari Khand Udyog Mandli Limited, in total 636 employees were working and from the salary of the said employees, provident fund at the rate of 12% came to be deducted and same shall be deposited in the provident account of individual employee by the said Society. That, during the period of 12.12.2009 to 01.12.2010, accused No.1 in the capacity of Managing Director while during the period of 17.06.2009 to 13.01.2010, accused No.2 in the capacity of Chairman, accused Nos.3 to 7 in the capacity of Directors arraigned as accused and specific allegations are levelled against them. Further, it is alleged that from March, 2010 to December, 2010, amount of provident fund came to be deducted and in the Society, Custodian Committee was appointed during the period of 25.01.2011



to 22.06.2011 and during that time, accused No.8 was the convener of the Custodian Committee and accused Nos.9, 10 and 11 were the members of the Custodian Committee. As, during the period of January, 2011 to March, 2012, though amount towards provident fund was deducted, said amount was not deposited by the Society. In this regard, the complaint came to be filed.

[9.2] At the outset, it is worth to mention that as per the allegations, present petitioners have violated paragraph 38 of EPF Scheme. As per the statutory requirement, before 15th Day of each English Calendar month, deducted amount is required to be transferred to the Department and present petitioners have failed to discharge their duty and statutory obligation. Perusing the allegations in the charge-sheet, it appears that all 12 members of the Society had resigned between 19.01.2011 to 24.01.2011 and factory remained in operation between 01.11.2010 to 13.12.2010. Thereafter, issuing the Notification dated 21.01.2011 by the State Government, Custodian Committee was appointed and prior to 25.01.2011, present petitioners were not connected in any manner with the affairs of Shree Ukai Pradesh Sahakari Khand Udyog Mandli Limited.

[10.0] The main limb of argument of the learned Counsel for respondent No.2 – original complainant is that as the



present petitioners were connected in any manner with the management of the Society, in aid of explanation (2) of Section 405 of the IPC read with Section 14A of the EPF Act, they are liable to deposit the amount and contribution with the department without fail and in this regard, learned Counsel for respondent No.2 has relied on explanation (2) to Section 405 of the IPC and section 14A of the EPF Act and further she has relied on the decision of the Hon'ble Apex Court in the case of **Srikanta Datta Narasimharaja Wodiyar vs. Enforcement Officer** reported in **1993 SCC (3) 217** and submitted that as Form No.5A is submitted to the Department and declaration is made by the Society then the present accused are liable and no case is made to quash and set aside the proceeding.

[10.1] To advert the aforesaid contention, it is worth to refer to provision of section 405 of the IPC, which reads as under:

"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".

The essential ingredients of the offense of criminal breach of trust are: (1) The accused must be entrusted with the property or with dominion over it,



*(2) The person so entrusted must use that property, or;
(3) The accused must dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation, (a) of any direction of law prescribing the mode in which such trust is to be discharged, or; (b) of any legal contract made touching the discharge of such trust.*

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

"Entrustment" of property under Section 405 of the Indian Penal Code, 1860 is pivotal to constitute an offence under this. The words used are, 'in any manner entrusted with property. So, it extends to entrustments of all kinds whether to clerks, servants, business partners or other persons, provided they are holding a position of 'trust'. A person who dishonestly misappropriates property entrusted to them contrary to the terms of an obligation imposed is liable for a criminal breach of trust and is punished under Section 406 of the Penal Code.

The definition in the section does not restrict the property to movables or immoveable alone."

To make out an offence under Section 406 of the IPC, prosecution must have to prove that the accused was entrusted property or with any dominion or power over it



and there was dishonest intention, misappropriation or dishonest conversion or disposal of property in violation of directions of law or legal contract by the accused himself. Herein, in the case on hand, no any iota of evidence or allegation, which suggests entrustment of the property to the petitioners and dishonest intention on the part of the accused. In absence of any such contract of transaction or any breach of terms of agreement between the complainant and petitioner, no offence is made out. It is needless to say that liability recommends difference between the simple payment of investment of money. In absence of any fraudulent entrustment or dishonest intention, no offence is made out.

In explanation (2) to section 405 of the IPC, nowhere word “principal employer” is explained. Hence, it must be understood as in ordinary parlance. In ordinary parlance it is the company which is the employer and not its Directors either singly or collectively and said issue is also considered by the Hon’ble Apex Court in the case of **S.K. Aggarwal (Supra)** and **ESI Corpn. vs. Gurdial Singh [1991 Supp (1) SCC 204]** and the head-note reads as under:

“A. Penal Code, 1860 – 1860 – Ss.405 Expln.2 and 406 – Word “employer” occurring in Expln.2 to S.405 – Meaning and scope – Held, does not attract the definition of “principal employer” contained in S.40 of ESI Act – Word “employer” although used in Ss.85-B and 85-C of ESI Act, held, has not been defined in that Act – High Court rightly applied ordinary parlance meaning to the said word – Hence, where the factory in



question was owned by a limited company, held, the company, and not its directors singly or collectively, was the employer liable for prosecution under S.406 – Labour Law – Employees’ State Insurance Act, 1948, Ss.40, 2(17) & (15), 85-B and 85-C – Factories Act, 1948, Ss.2(n) (as it then stood) and 100(2) – Words and phrases - “Employer”.

B. Labour Law – Employees’ State Insurance Act, 1948 – Ss.40 and 2(17) & (15) – Principal employer – Who is – Where the factory in question was owned by a limited company, held, the owner and not the occupier of the factory would be the principal employer – Further held, S. 2(17) uses the words “owner” and “occupier” disjunctively – Hence, where the factory in question was owned by a limited company, which was also the employer of the employees, the definition of principal employer under the ESI Act even if applied in Explan. 2 to S. 405, IPC, the directors of that company, held, would not be covered by that definition so as to render them liable to prosecution under S. 406 – Penal Code, 1860, Ss. 405 Explan.2 and 406 – Interpretation of Statutes – Subsidiary rules – Conjunctive or disjunctive.”

As the Employees’ State Insurance Act does not define the term “employer”, the term “employer” is used in Section 2(17) of the ESI Act, which defines the term “principal employer” as either “owner” or “occupier”. The word “owner” and “occupier” have used disjunctively where the owner of the factory is a “principal employer”, there is no need to examine as to who is the occupier. The owner will be the “principal employer”.

[10.2] At this stage, definition of “employer”, as provided in section 2(e) of the EPF Act is required to be referred to,



which reads as under:

“2(e) “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 manager, managing director or managing agent;”

Hence, the present petitioners who were the members of the Custodian Committee cannot be regarded as “principal employer”. Hence in aid of Explanation 2 to Section 405 of the IPC, no criminal proceeding for the offence of criminal breach of trust against the present petitioners is maintainable.

[10.3] Further, section 14A of the EPF Act reads as under:

“14A. Offences by companies.—

(1) 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:



Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

- (2) *Notwithstanding anything contained in sub-section (1), where an offence under the Act , 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.*

Explanation.— For the purposes of this section,—
(a) “company” means any body corporate and includes a firm and other association of individuals; and
(b) “director”, in relation to a firm, means a partner in the firm.]

Section 34 of the Drugs and Cosmetics Act, 1940 reads as under:

34. Offences by companies.—*(1) Where an offence under this Act has been committed by 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:*

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act 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, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence** and shall be liable to be proceeded against and punished accordingly.*

Explanation.—For the purposes of this section—(a)“company” means a body corporate, and includes a firm or other association of individuals; and(b)“director” in relation to a firm means a partner in the firm.”

At this stage, section 141 of the Negotiable Instruments Act, 1881 is also relevant to be referred to, which reads as under:

“141. Offences by companies. — (1) If the person committing an offence under section 138 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:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act 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, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence** and shall be liable to be proceeded against and punished accordingly.*

*Explanation.—For the purposes of this section,—
(a)“company” means any body corporate and includes a firm or other association of individuals; and(b)“director”, in relation to a firm, means a partner in the firm.*

[11.0] Now, coming back to the provision of section 14A of the EPF Act, the provision is *pari materia* to section 34 of the Drugs and Cosmetics Act and Section 141 of the Negotiable Instruments Act, 1881 is also required to be considered.

[11.1] Merely because present petitioners are members of the Custodian Committee, the petitioners cannot be held vicariously responsible and prosecuted in aid of Section 14A of the EPF Act. To connect the accused persons with an offence, complainant must have to show that how and in what manner the present petitioners being the members of the Custodian Committee and are answerable for the conduct and business of the Society. Herein, in the complaint, nowhere the specific role of the present petitioners is alleged and merely their names are mentioned in Form No.5A in declaration and by virtue of designation the petitioners are arraigned as accused in



their individual capacity. The petitioners are not full time salaried employees or also not getting any remuneration from the Society and only by virtue of their designation, as a care taker, they are arraigned as accused. To make answerable or responsible the Director or members of the Society for the administration of the Society, complainant must have to show that present petitioners were responsible for the day to day affairs of the Society. Mere bald statement in the complaint is not enough for proceeding against the petitioners.

In this regard, I lay my hand on *pari materia* provision of section 141 of the Negotiable Instruments Act, 1881 *qua* responsibility and prosecution against Directors in case of company, firm or association and reference is required to be made to the decision of the Hon'ble Supreme Court in the case of **S.M.S. Pharmaceuticals Ltd vs Neeta Bhalla & Anr.** reported in **(2005) 8 SCC 89; Ashoke Mal Bafna vs. M/s. Upper India Steel Mfg. & Engg. Co. Ltd.** reported in **(2018) 14 SCC 202** and **Susela Padmavathy Amma vs. Bharti Airtel Limited** reported in **2024 SCC OnLine (SC) 311** wherein dealing with provisions under Section 34 of the Drugs and Cosmetics Act, 1940 has observed in paragraph 18 as under:

"18. In the case of State of Haryana vs. Brij Lal Mittal and others [(1998)5 SCC 343], this Court observed thus:

"8. Nonetheless, we find that the impugned judgment of the High Court has got to be upheld for an altogether different reason. Admittedly, the three



respondents were being prosecuted as directors of the manufacturers with the aid of Section 34(1) of the Act which reads as under:

“34. Offences by companies.—(1) Where an offence under this Act has been committed by 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:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.”

It is thus seen that the vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the company it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without being a director a person can be in charge of and responsible to the company for the conduct of its business. From the complaint in question we, however, find that except a bald statement that the respondents were directors of the manufacturers, there is no other allegation to indicate, even prima facie, that they were in charge of the company and also responsible to the company for the conduct of its business.”

[11.2] Further, dealing with section 138 read with Section 141 of the Negotiable Instruments Act, 1881, considering the decision of Hon'ble Supreme Court in the case of **S.M.S. Pharmaceuticals Ltd. (Supra)**, the Hon'ble Supreme Court



paragraph 20 observed thus:

“20. In the case of S.M.S. Pharmaceuticals Ltd. (supra), this Court was considering the question as to whether it was sufficient to make the person liable for being a director of a company under Section 141 of the Negotiable Instruments Act, 1881. This Court considered the definition of the word “director” as defined in Section 2(13) of the Companies Act, 1956. This Court observed thus:

“8. There is nothing which suggests that simply by being a director in a company, one is supposed to discharge particular functions on behalf of a company. It happens that a person may be a director in a company but he may not know anything about the day-to-day functioning of the company. As a director he may be attending meetings of the Board of Directors of the company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint sub-committees consisting of one or two directors out of the Board of the company who may be made responsible for the day-to-day functions of the company. These are matters which form part of resolutions of the Board of Directors of a company. Nothing is oral. What emerges from this is that the role of a director in a company is a question of fact depending on the peculiar facts in each case. There is no universal rule that a director of a company is in charge of its everyday affairs. We have discussed about the position of a director in a company in order to illustrate the point that there is no magic as such in a particular word, be it director, manager or secretary. It all depends upon the respective roles assigned to the officers in a company.”

[11.3] Further, the principle of vicarious liability is inserted to make sure that the real perpetrators of the offence are punished. The Courts while recognizing the principle of



vicarious liability in criminal jurisprudence have time and again laid down some ratio so as to prevent the misuse of the principle. The Hon'ble Supreme Court has also laid down guidelines to prevent the misuse of the section. One of the foremost requirement is the presence of specific averment. In the case of SMS Pharmaceuticals (Supra) and other all cases referred above, the Hon'ble Supreme Court has held that **“with a view to make the Director of a Company vicariously liable for the acts of the company, it was obligatory on the part of the complainant to make specific allegations and in the absence of same, the complaint should not be entertained”**. Merely simply stating that the accused in charge of the firm or company will not satisfy the contours of the Act. To launch a prosecution, it has to be showcased that accused were involved and this has to be done in a clear and unambiguous manner. The test of “factual and legal requirement” is that, accused “was in charge of, and was responsible to the company for the conduct of the business of the company”. To impose vicarious liability on an individual, “person should fulfill the ‘legal requirement’ of being a person in law (under the statute governing companies) responsible to the company for the conduct of the business of the company and also fulfill the “factual requirement’ of being a person in charge of the business of the company”. In the same case, while referring to sub-clause 2 of the same section, the Apex Court had



reiterated that, to impose liability under the said sub-clause, it has to be showcased that there is some “consent, connivance or negligence” on the part of the accused which led to the commission of the offence.

[11.4] Further, the Hon’ble Supreme Court delivered a crucial interpretation of vicarious liability under Section 141 of the Negotiable Instruments Act, 1881, in its judgment in the case of **Ashok Shewakramani & Ors. vs. State of Andhra Pradesh** reported in **2023 INSC 692 : (2023)8 SCC 473** by which multiple criminal appeals were decided. The Supreme Court observed that the most important averment which is required by Section 141(1) of the NI Act is that the Directors / persons accused were in charge of and were responsible for the conduct of the company. The Hon’ble Supreme Court held that every person who is sought to be roped in by virtue of Section 141(1) of the NI Act, must be a person, who at the time of the offence committed, was in-charge of and was responsible to the company for the conduct of the business of the company. A person who is merely managing the affairs of the company does not become the person in-charge of the company or the person responsible for the business and conduct of the company. The Hon’ble Supreme Court further observed that the words “was in charge of” and “was responsible to the company for the conduct of the business of the company” cannot be read disjunctively and



the same ought to be read conjunctively in view of the use of the word “and” in between. The Hon’ble Supreme Court held that an individual could be held vicariously liable for an offence solely if they fulfill the dual criteria of being “in charge of” and “responsible to the company for the conduct of its business” at the precise time the alleged offence was committed. This will come as a relief to persons who are directors not in charge of the conduct of business such as nominee or independent or other such Directors.

[11.5] In the case of **Pooja Ravinder Devidasani vs. State of Maharashtra & Ors. reported in (2014) 16 SCC 1**, the Hon’ble Supreme Court, while following the ratio in case of **National Small Industries Corp. Ltd. vs. Harmeet Singh Paintal** reported in **(2010) 3 SCC 330** made the following observations with regard to fastening vicarious liability on Directors who are not in charge of the day to day affairs of the company:

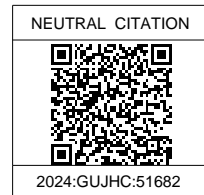
“17.Non-executive Director is no doubt a custodian of the governance of the Company but does not involve in the day-to-day affairs of the running of its business and only monitors the executive activity. To fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the Company, one who actively looks after the day-to-day activities of the Company and particularly responsible for the conduct of its business. Simply because a person is a Director of a Company, does not make him liable under the N.I. Act. Every person connected with the Company will not fall into the ambit of the provision. Time and again, it has been asserted by this Court that only those persons



who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, who was not in charge of and was not responsible for the conduct of the business of the Company at the relevant time, will not be liable for an offence under Section 141 of the N.I. Act. In National Small Industries Corporation (supra) this Court observed:

“Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.”

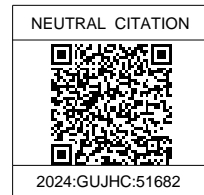
[11.6] Further, it is worth to mention that, amendment of Section 141, in sub-section (1) after the *proviso*, the following *proviso* inserted, “provided that there were a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter”. No such amendment or provisions are found in EPF Act but prior to amendment in NI Act as provisions of NI Act as provisions of Section 14 of EPF Act and 34 of Drugs and



Cosmetics Act and Negotiable Instruments Act is *pari materia*. Keeping in mind the settled position of law on vicarious liability of person in charge of company, firm or association, if it is proved that the offence was committed without or with knowledge or that he had exercised all due diligence to prevent the commission of such offence, herein person is nominated as a Director of a company by virtue of his holding an office by the order of State Government officer and head of financial institution as a care taker are not liable for prosecution. The intention was to make vicariously liable the Director who is having managerial control actively performs and oversees the financial operations and must adhere to legal standards to avoid legal consequences which helps in mitigating the risks associated with non-compliance with statutory obligation. Herein, in the case on hand, no any specific averment is also made as to how present petitioners are responsible for the day to day affairs of the "Society".

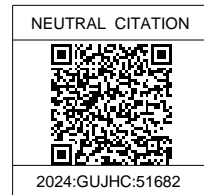
Thus, considering the aforesaid proposition of law, merely because the present petitioners are holding the post of member of Custodian Committee, they cannot be held liable to make the payment or to prosecute and they cannot be treated as "principal employer" of the Society.

[12.0] Even, perusing the facts of the case, Form No.5A of the EPF Scheme submitted to the Society on various dates i.e. 08.10.2010, 21.12.2011 and 18.01.2019. Present



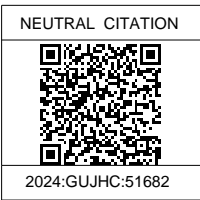
petitioners are appointed as members of the Custodian Committee in January, 2011. Prior to initiation of proceeding, a notice came to be issued for the default in making the deposit of contribution of provident fund for the period between 2007 to 2012. It is not the case wherein the present petitioners have deducted the amount of provident fund and not deposited the same with the government and misused the said fund and siphoned away the said funds as said period is also prior to their appointment as a member of Custodian Committee.

[13.0] Insofar as Form No.5A of EPF Scheme wherein designation of present petitioners is mentioned, is concerned, petitioners are members of the Custodian Committee by virtue of their designation and not in their personal capacity. Section 11 of the IPC defines the word "person" which includes any Company or Association or body of persons, whether incorporated or not. The said person includes juristic person and the legal entity. Under Section 37 of the Gujarat Cooperative Societies Act, Society is having the legal entity and its own existence. Persons having designation of Manager, Chairman or District Registrar are not juristic persons. It is only the designation and at the relevant point of time the holder of designation may change and in Form No.5A, no specific names of present petitioners are mentioned. Hence, question does not arise to arraign the present petitioners as accused in



aid of Form No.5A. Every charge of the holder of the said designation or post is change. As holder of a designation is not a juristic person or the legal entity, in aid of Form No.5A no proceeding could have been initiated or continued against the present petitioners. Even, in the complaint, no specific role is attributed to the present petitioners. Even if uncontroverted allegations are accepted to be true at its face value, no role of present petitioners is spelt out. Even otherwise, there is no malafide on the part of the present petitioners being the members of the Custodian Committee. Hence, no offence much less, offence of criminal breach of trust is made out in absence of any *mens rea* or any siphoning of any amount by the present petitioners.

[14.0] Herein, one more glaring aspect which is required to be considered is that during the said proceeding before the adjudicating authority, one correspondence to the Enforcement Officers of the Regional Provident Fund Office, Surat dated 17.04.2012 was made from which it appears that due to unavoidable circumstances, the Managing Director of Shree Ukai Pradesh Sahakari Khand Udyog Mandli Limited has made the communication and stated that the Society is unable to collect the sugarcane and factory is not working in full swing and due to this loss of more than 7.5 Crores is caused to the Society and employees of the Society are yet to be paid the dues of



more than 6 Crores and due to inability in making payment of the sugarcane goods, salary to employees and other operational costs, all the members of the Managing Committee resigned from their respective posts. At that time, the Society was working in tribal area and more than 90% members were farmers belonging to scheduled tribe. Considering their welfare and as only one sugar factory was operational for tribal farmers, the Government decided to continue the said Society and to prevent the said factory from going into liquidation and hence, the Custodian Committee was appointed and it took the charge of the said factory. It was assured that as and when sick factory is protected and financial arrangement being made then they will transfer and deposit the amount of provident fund contribution. Perusing the said communication itself, it appears that, there was financial crunch in the Society and as a caretaker being the members of the Custodian Committee, present petitioners were appointed and thereafter, they have deposited the amount and for the said dues of provident fund, separate machinery and provision is also provided for to recover the amount and charge is also created over the assets of the Society and subsequent to that, it appears that now the Society is regularly paying the wages and depositing the contribution of provident fund of employees. Considering the aforesaid fact, there was no malafide intention on the part of the members of the Custodian Committee. After



the petitioners took over, they have tried to make functional and operational the sugar factory which was ultimately not only in the interest of the members of the Society and tribal farmers but also in the interest of employees.

[15.0] Now, in view of above conspectus fact of the case on hand, it is necessary to consider whether the power conferred by the High Court under section 482 of the Code of Criminal Procedure is warranted. It is true that the powers under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. In the case of **State of Haryana vs. Bhajan Lal reported in (1992) Supp (1) SCC 335**, the Apex Court has set out the categories of cases in which the inherent power under Section 482 CrPC can be exercised. Keeping in mind the aforesaid proposition in consonance with the facts of the case on hand, to continue such proceeding in aid of section 14A of the EPF Act against the present petitioners who only members of the Custodian Committee and by virtue of their designation and they are not “principal employer” of the Society and they have performed their duty time being as a care taker of the Society, in view of the decision rendered in the case



of **R.L. Kanoria and Others vs. State of W.B. and Others** reported in **2004 Cri.L.J. 867 (Cal)**, when the allegations are against the Directors of company that they had not deposited ESI contributions deducted by them from wages of employees of company, Directors cannot be regarded as “principal employer” and therefore, proceedings for criminal breach of trust against them were quashed. Hence, present is a fit case to exercise powers under Section 482 of the CrPC.

[16.0] In wake of aforesaid discussion, present petitions are allowed. Impugned FIR being **CR No.I-80 of 2012** registered with **Vyara Police Station, District Tapi** alongwith all its consequential proceedings are hereby quashed and set aside *qua* the respective petitioners viz. **(1) I.C. Mahida (CR.MA No.9538/2012), (2) A.P. Asari (CR.MA No.3990/2014 and (3) Mansinhbhai Kalyanbhai Patel (CR.MA No.1974/2022) only.** Rule is made absolute to the aforesaid extent only. Direct service is permitted.

(HASMUKH D. SUTHAR, J.)

Ajay