2024:KER:78491

"C.R."

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

TUESDAY, THE 22ND DAY OF OCTOBER 2024 / 30TH ASWINA, 1946

CRL.REV.PET NO. 790 OF 2024

CRIME NO.49/2010 OF Yeroor Police Station, Kollam

AGAINST THE ORDER/JUDGMENT DATED 06.07.2024 CMP NO. 88 OF 2024 IN ST NO.5650 OF 2013 OF JUDICIAL MAGISTRATE OF FIRST CLASS -I, PUNALUR

REVISION PETITIONER/S:

S. MOHAMMED NOWFAL
AGED 47 YEARS
PATTATHIL VEEDU, AYATHIL, VADAKKEVILA VILLAGE,
KOLLAM, PIN - 691010

BY ADV G.KEERTHIVAS

RESPONDENT/S:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN – 682031

BY PUBLIC PROSECUTOR SRI G SUDHEER

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 22.10.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R."

K.BABU, J.

Crl.R.P.No.790 of 2024

Dated this 22nd day of October, 2024

O R D E R

The challenge in the Crl.R.P. is to the order dated 06.07.2024 in CMP No.885/2024 in ST No.5650 of 2013 on the file of the Judicial First Class Magistrate Court-I, Punalur. The accused preferred the afore petition under Section 239 Cr.PC seeking discharge. The learned Magistrate dismissed the application.

Prosection Case

2. The accused is the Proprietor of Tasty Nuts Factory, Manali. He deducted the employees' contribution to the Provident Fund from their salary from 01.01.2006 to 01.01.2008 but did not deposit the same with the authority concerned. Therefore, he committed a breach of trust as provided under Section 406 IPC.

3. I have heard the learned counsel for the revision petitioner and the learned Public Prosecutor.

4. The learned counsel for the revision petitioner submitted that even in a case of prosecution under Section 406 IPC, a prior sanction of the Central Provident Fund Commissioner as provided under Section 14-AC of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ('EPF Act' for short) is necessary because the prosecution is sought to be launched on account of the failure or default of the employer in complying with his obligation in terms of the EPF Act. The learned counsel relied on ***Deepak Maneklal Patel Vs. Natwarbhai Somabhai Patel and others*** [MANU/GJ/0376/2005] and ***Yeshwantrao Dattaji Chowgule Vs. State*** [MANU/MH/1070/1992] in support of his contentions.

5. The learned Public Prosecutor submitted that the prior sanction, as provided under Section 14-AC of the EPF Act, is required only when the Court takes cognizance of an offence punishable under the EPF Act.

The learned Public Prosecutor submitted that prosecution under both the Statutes is not barred and it is the option of the prosecution to proceed against the employer under either of the enactments.

6. The EPF Act was enacted with the intention to make some provisions for the future of the employees after they retire, or for their dependents in case of their early death. The Act stipulates compulsory contributions to the Provident Fund by employers and employees.

7. Section 6 of the Act provides the contribution which the employer shall pay to the fund. Section 14 of the Principal Act, under the head Penalties, made the acts of knowingly making false statements or false representations to avoid any payment under the Act and the scheme made thereunder punishable with imprisonment for six months or with fine (enhanced to one year or with fine by way of the Act 33 of 1988).

8. The working of the EPF Act and the schemes thereunder was subjected to study by the National Commission on Labour (the NCL) and the Estimates

Committee of the Parliament. The study revealed that the provisions of the Act and the Scheme were not effective in preventing defaults in the payment of contributions to the EPF. The NCL and the Estimates Committee made a series of recommendations that paved the way for enacting the Employees' Provident Funds and Family Pension Fund (Amendment) Act, 1973 (the Act 40 of 1973). The intention of the Parliament while enacting the Act 40 of 1973 is contained in the Statement of Objects and Reasons, which reads thus:-

> ***Amendment Act 40 of 1973-Statement of Objects and Reasons.-****(1) The working of the Employees' Provident Funds and Family Pension Fund Act, 1952 and the Employees' Provident Fund Scheme has revealed that the present provisions of the Act and the Scheme are not effective in preventing defaults in payment of contributions to the Employees' Provident Fund or in recovery of the dues on that account. The result is that the amount of Provident Fund arrears recoverable from the employers has been steadily increasing. In 1959-60, the arrears which amounted to Rs. 3.65 crores, rose to Rs. 5.96 crores as on the 31st March, 1967. The arrears stood at Rs. 14.6 crores on 31st March, 1970 and they have risen to Rs. 20.65 crores as on the 31st March, 1972.*

(2) The National Commission on Labour has recommended that in order to check the growth of arrears, penalties for defaults in payment of Provident Fund dues should be made more stringent and that the defaults should be made cognizable. In its 116th Report presented to Parliament in April, 1970 the Estimates Committee has endorsed the recommendation made by the National Commission on Labour and has further suggested that Government should consider the feasibility of providing compulsory imprisonment for certain offences under the Act. Accordingly, it is proposed to amend the Act so as to render the penal provisions more stringent and to make defaults cognizable offences. Provision is also being made for compulsory imprisonment in cases of non-payment of contributions and administration or inspection charges. As recommended by the Estimates Committee, a further provision is being made to enable levy of damages equal to the amount of arrears from a defaulting employer.

(3) The National Commission on Labour has also recommended that arrears of Provident Fund should be made the first charge on the assets of an establishment at the time it is wound up. It is, therefore, proposed to amend section 11 of the Act to provide that any amount due from an employer in respect of the employees' contribution (deducted from the wages of an employee) for a period of more than six months shall be deemed to be the first charge on the assets of the establishment and shall be paid in priority to all other dues.

(4) Further, in pursuance of the recommendations made by the National Commission on Labour and the Estimates Committee, it is proposed to empower the Employees' Provident Fund Organisation to issue recovery certificates and to sanction prosecutions under the Act.

(5) Opportunity is also being taken <u>to clarify that any contributions deducted from the employees' wages by the employer under the Act shall be deemed to be entrusted to the employer within the meaning of section 405 of the Indian Penal Code. Hence the Bill.</u>

9. Various penal sections were inserted in the Principal Act by way of the Amendment Act 40 of 1973..

10. Sub-section (1A) was inserted in Section 14 of the Principal Act, making defaults in complying with the provisions of Section 6 punishable with imprisonment for a term which may extend to six months but which shall not be less than three months in case of default of payment of the employees' contribution deducted by the employer from their wages (enhanced to three years and one year respectively by way of the Amendment Act 33 of 1988). The amendment further provided provision (Section 14-AA) for imprisonment, which may extend to

one year, which shall not be less than three months in case of repeated offences (enhanced to five years and two years, respectively by way of the Amendment Act 33 of 1988). Section 14-AB was inserted, making the offence relating to default in payment of contribution by the employer cognizable.

11. The Act 40 of 1973, inserted an explanation to Section 405 of the Indian Penal Code, which defines the offence of criminal breach of trust punishable under Section 406 IPC, so as to specifically include the deductions from the employees' contribution from the wages and default in payment of such contribution to the fund as ingredients to the offence, imposing the required *mens rea* for the offence by way of a deeming fiction.

12. By way of Act 40 of 1973, the Parliament also inserted Section 14-AC by which sanction of the Central Provident Fund Commissioner was made mandatory for taking cognizance of any offence punishable under the EPF Act and the schemes thereunder.

13. Section 14-AC reads thus:-

> **14-AC - Cognizance and trial of offences;-***(1) No court shall take cognizance of any offence punishable under this Act, the Scheme or the Pension Scheme or the Insurance Scheme except on a report in writing of the facts constituting such offence made with the previous sanction of the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf, by an Inspector appointed under section 13.*
>
> *(2) No court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act or the Scheme or the Pension Scheme or the Insurance Scheme.*

14. As per Section 14-AC, the cognizance of any offence punishable under the EPF Act shall be on a report in writing made with the previous sanction of the Central Provident Fund Commissioner.

15. I have discussed above the objects and reasons for enacting Act 40 of 1973. The legislature had taken note of the vast arrears due to the Provident Fund due to the defaults in payment of contributions. The legislature provided stringent punishment for the offence related to default in the contributions to the EPF. Section 14-AC

was inserted as protection from frivolous prosecution of the offences under the Act with the enhancement of punishment for various offences.

16. It is pertinent to note that Explanation 1 was inserted into Section 405 of the IPC by way of Act 40 of 1973 itself.

17. Section 405 reads thus:-

> **"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 wilfully suffers any other person so to do, commits "criminal breach of trust".*
>
> *Explanation 1.--A person, being an employer of an establishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount 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.*

18. *Mens rea* is a *sine qua non* for attracting the offence under Section 406 r/w 405 of IPC. To attract this offence, the offender has to dishonestly misappropriate or convert the property involved for his own use or dispose of the same in violation of the trust reposed on him.

19. To attract the offences under Sections 14 and 14-AA *mens rea* is not a necessary ingredient. Therefore, the offence under Section 406 r/w 405 IPC and the offences under Sections 14 and 14-AA of the EPF Act are distinct and different. When ingredients are not identical, and the offences are distinct, there is no question of the rule as to double jeopardy as embodied in Article 20(2) of the Constitution being applicable. [vide: *State of Bombay v. S.L. Apte and Another* (AIR 1961 SC 578)].

20. With the insertion of the Explanation, the required *mens rea* for the offence of criminal breach of trust, as I mentioned above, has been imposed by way of deeming fiction to the effect that an employer who deducts the employees' contribution from the wages payable to the employees for credit to a Provident Fund or Family Pension Fund shall be deemed to have been entrusted with the amount and if he makes default in the payment of such contribution to the fund, shall be deemed to have dishonestly used the amount of the said contribution in violation of the direction of law. Therefore, deduction of the contribution from the wages of the employees for credit to a Provident Fund shall be deemed to have been entrusted within the meaning of the term 'entrustment', and when he commits default in the payment of such contribution to the fund, he shall be deemed to have 'dishonestly' used the amount as required to constitute the offence of criminal breach of trust under Section 406 IPC.

21. The Parliament had taken note of the fact that the scheme under the Act was not effective in preventing the defaults in payment of contribution to the Employees' Provident Fund even after the deduction of the same from the wages of the employees. The Parliament considered the fact that in 1959-60, the arrears, which amounted to Rs.3.65 crores, rose to Rs.5.96 crores on 31.03.1967. The arrears stood at Rs.14.6 crores on 31.03.1970, and it has risen to Rs.20.65 crores on 31.03.1972.

22. The intention of the legislature to make the act of default on the part of the employers in contributing the amounts deducted from the wages of the employees a separate and distinct offence from the offences under the EPF Act is vivid with the insertion of the Explanation 1 to Section 405 IPC. The legislature consciously wanted to permit prosecution of this offence without the sanction as provided in Section 14-AC of the Act.

23. The Parliament inserted Explanation 1 to Section 405 to make the act of default in paying

contributions by the employers after deducting the same from the wages of the employees an offence cognizable and non-bailable. The legislature wanted to dilute the procedural rigours like the report of the competent officer and previous sanction from the Central Provident Fund Commissioner in the prosecution of that offence. The Parliament wanted that the offence of default in contributions to the Employees' Provident Fund by the employers after deducting the same from their wages is to be taken out of the rigour of Section 14-AC of the Act. A literal interpretation of Section 14-AC of the EPF Act makes it clear that sanction is contemplated only for prosecuting the offences under the EPF Act, and no sanction is required for prosecuting the offence under Section 406 r/w 405 IPC.

24. The learned counsel for the revision petitioner relied on ***Deepak Maneklal Patel v. Natwarbhai Somabhai Patel and others*** (supra), wherein the High Court of Gujarat held that prior permission of the Provident Fund Commissioner is required for the

Provident Fund Inspector to lodge prosecution against the employer for the offence under Section 406 IPC. This view was followed by the Bombay High Court in ***Yeshwantrao Dattaji Chowgule V. State*** (supra) holding that as the prosecution is sought to be launched on account of the failure of the employer in relation to the obligation in terms of the Act sanction is required.

25. I do not to agree with the views expressed by the learned Judges of the Gujarat High Court and Bombay High Court.

26. The view that previous sanction as provided under Section 14-AC of the EPF Act is not required in a prosecution for the offence under Section 406 IPC is supported by the decision of this Court in ***DR. K.S. Subhash v. State of Kerala*** [Crl.M.C. No.3389 of 2009 : 2009:KER:43708] wherein this Court held that when the case is registered and being investigated only for the offence under Section 406 IPC and not an offence under the EPF Act, Section 14-AC has no application.

27. The Calcutta High Court in ***Sushil Kumar Bagla v. State*** [2003 SCC Online Cal 62] held that for the prosecution of the offence under Section 406/409 IPC, no sanction under Section 14-AC is required. The Calcutta High Court held that if an act or omission amounts to offences under two enactments and under one such enactment, sanction is required for prosecution of the offender, it is the option of the prosecution to prosecute him under either of the enactments. The Court or the accused cannot insist that the prosecution must be under the enactment which requires sanction. The view expressed by the Calcutta High Court was followed by the Punjab and Haryana High Court in ***Dhirendra Kumar Rajak v. State of Haryana and Another*** [2023:PHHC:027300] and the Karnataka High Court ***in Shri Shashikant C Madanna V. State of Karnataka*** [MANU/KA/4628/2019]***.*** Therefore, the challenge of the revision petitioner that the prosecution will not sustain in the absence of sanction has not merit.

28. The prosecution alleges that the establishment of the petitioner/accused comes under the statutory scheme. It is specifically alleged that the petitioner/accused, the proprietor of Tasty Nuts Factory, Manali, deducted the employees' contribution to the Provident Fund of the employees concerned out of their salary from 01.01.2006 to 01.01.2008 but failed to deposit with the competent authority. *Prima facie*, the ingredients of the offence under Section 406 are revealed.

29. The obligation to discharge the accused under Section 239 Cr.PC arises when the Magistrate considers the charge against the accused to be groundless. The primary consideration at the stage of framing charge is the test of existence of a *prima facie* case.

30. While framing charges, the Court is required to evaluate the materials and documents on record to decide whether the facts emerging therefrom taken at their face value would disclose existence of ingredients constituting the alleged offence. The Court cannot speculate into the truthfulness or falsity of the

allegations, contradictions and inconsistencies in the statement of witnesses at the stage of discharge. [Vide: ***Sheoraj Singh Ahlawat and others v. State of Uttar Pradesh and another*** [(2013) 11 SCC 476],

31. I have gone through the records made available. The learned Magistrate has carefully considered the relevant materials and contentions.

32. Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable, or there is non-consideration of any relevant material, or there is palpable misreading of records, the revisional Court is not justified in setting aside the order, merely because another view is possible. The revisional Court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. The revisional power of the court under Sections 397 to 401 Cr.P.C is not to be equated with that of an appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is

grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with the decision in exercise of their revisional jurisdiction. {Vide: ***Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke*** [(2015) 3 SCC 123] and ***Munna Devi v. State of Rajasthan & Anr*** [(2001) 9 SCC 631) and ***Asian Resurfacing of Road Agency Pvt. Ltd. v. Central Bureau of Investigation*** [(2018) 16 SCC 299)]}.

33. In ***Asian Resurfacing of Road Agency Pvt. Ltd. v. Central Bureau of Investigation*** [(2018) 16 SCC 299)], the Apex Court held that interference in the order framing charges or refusing to discharge is called for in the rarest of rare cases only to correct a patent error of jurisdiction.

34. The finding of the Court below, therefore, requires no interference in the revisional jurisdiction. The order impugned is not affected by any patent error of jurisdiction. All the challenges in this revision petition fail.

This Court fails to find that the impugned order is untenable, grossly erroneous or unreasonable. The revision petition stands dismissed.

The trial Court shall proceed with the trial of the case and dispose of the same as expeditiously as possible at any rate within two months from this day. The Registry shall forward the copy of the order forthwith to the Chief Judicial Magistrate concerned for necessary action.

Sd/-

K.BABU,
JUDGE

Kkj