

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

SATURDAY, THE 5TH DAY OF OCTOBER 2013/13TH ASWINA, 1935

Crl.Rev.Pet.No. 665 of 2013 ()

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CMP NO. 589/2012 IN CC NO. 274/2006 OF
JUDICIAL FIRST CLASS MAGISTRATE'S COURT-II, ALAPPUZHA
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PETITIONER :

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1. DINESH AGARWAL
605 A ASISH COMPLEX-I,
CSC ROAD NO.4, DAHISA
MUMBAI-400 068.**

BY ADV. SRI.R.AZAD BABU

RESPONDENT :

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ENFORCEMENT OFFICER
DISTRICT OFFICE
EMPLOYEES' PROVIDENT FUND ORGANISATION
MINISTRY OF LABOUR, GOVT.OF INDIA, ALAPPUZHA-688 011.**

**BY SENIOR ADVOCATE DR.S.GOPAKUMARAN NAIR
BY ADV. SRI.A.RAJASIMHAN, SC, EPF ORGANISATION**

**THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON
05/10/2013, ALONG WITH CRL.RP. 681/2013, THE COURT ON THE SAME DAY
PASSED THE FOLLOWING:**

Mn

...2/-

Crl.Rev.Pet.No. 665 of 2013 ()

APPENDIX

PETITIONER'S ANNEXURES :

**ANNEXURE A1 : COPY OF FORM 5A FILED BY THE 1ST ACCUSED BEFORE THE
RESPONDENT DATED 19-6-2001.**

RESPONDENT'S EXHIBITS : NIL

//TRUE COPY//

P.A. TO JUDGE

Mn

K. HARILAL, J.

Crl.R.P. Nos.665 & 681 of 2013

Dated this the 5th day of October, 2013

COMMON ORDER

The Revision Petitioner in Crl.R.P.No.665 of 2013 is the 3rd accused and the Revision Petitioner in Crl.R.P.No.681 of 2013 is the 4th accused respectively in C.C.No.274 of 2006 on the files of the Judicial First Class Magistrate Court-II, Alappuzha. These Revision Petitions are filed challenging a common order passed in CMP No.589/2012 and CMP No.590 of 2012 filed by the Revision Petitioners, respectively, in the above Calender Case. These CMP's were filed praying discharge of the Revision Petitioners/accused Nos. 3 and 4 from prosecution of the above offences. But the learned Magistrate dismissed both petitions by a common order and that common order is under challenge in these Revision Petitions.

2. The above Calender Cases were filed by the respondent herein as complainant for prosecuting the

Revision Petitioners and others for the alleged offences committed under Section 6 read with Section 14(1A) and 14(A) of the Employees Provident Fund and Miscellaneous Provisions Act 1952 (herein after referred as "the Act"). The complaint was against the 1st accused M/s.Kerala Spinners Ltd. and four others including the Revision Petitioners. Thus altogether, there are five accused in the above case.

3. The accused Nos. 2 to 5 are arraigned as Directors of the 1st accused company. The averments in the complaint is that accused Nos.2 to 5 were, during the relevant period, in charge of the said establishment as directors of the company and were responsible to it for the conduct of its business and as the aforesaid offences were committed by the said establishment due to the negligence of the accused persons and thereby they have committed the offences alleged against them. It is further alleged that under Paragraph 6C of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and under Paragraph 7 and 8 of

the Employees' Deposit Linked Insurance Scheme, 1976, the accused are required to pay the contributions for every month in respect of the employees of the said establishment. But the accused failed to pay in the manner mentioned stated above, the employees Deposit Linked Insurance contribution. In spite of several requests, the accused failed to pay the said contribution for the month of January and February 2003 and thereby they have committed the said offences.

4. CMP No.589 of 2012 and CMP No.590 of 2012 were filed praying for discharge, on the following grounds.

5. The petitioners were not in charge of and responsible for the conduct of business of the first accused company. The petitioners were not in any way connected with the actual day today conduct of business. The entire business was carried out by the 2nd accused, the whole time Director. The 3rd accused is a practicing Chartered Accountant in Mumbai and he is a Director of several Companies in his professional

capacity. His office is in Mumbai and hence he could not visit Kerala for the day today business administration of the company. The 4th accused was the whole time Director of another company GSL India Ltd. having registered office in Gujarat. It was physically not possible for him to visit Kerala for the day today affairs of the 1st accused. The third accused resigned from the first accused Company on 27.8.2004 and the 4th accused resigned on 2.9.2004. The petitioners are producing documentary evidence to prove their absence of involvement in the affairs of the first accused.

6. Sri.Azad Babu the learned counsel for the Revision Petitioner advanced arguments, based on the grounds raised in the petition for discharge. The crux of the arguments is that these Revision Petitioners are not full time Directors of the Company, and they are always engaged at Bombay and Gujarat as a practicing Chartered Accountant, and a full time director of another company respectively. Though it is not raised as a ground in the petition for discharge, the learned

counsel for the Revision Petitioner contends that the company had already filed form 5A, and drew my attention to Annexure A, a photocopy of a Form A, allegedly filed by the Company. The learned counsel cited decisions in **K.K.Ahuja V. V.K.Vora and Another [(2009 (7) UJ (SC)3229)]**, **S.M.S.Pharmaceuticals Ltd. V. Neeta Bhalla and Another (AIR 2005 SC 3512)** and in **Srikanta Datta Narasimharaja Wodiyar V. Enforcement Officer, Mysore (AIR 1993 SC 1656)**.

7. Per contra, the standing counsel for the respondent advanced arguments to justify the impugned order. According to him, the averments in the complaint are sufficient to constitute the offence alleged against the Revision Petitioners. The learned counsel drew my attention to statutory liability cast on the Directors of the company under the said Act unless Form 5A, excluding their liability, is submitted in time. The learned counsel strongly contended that, the 1st accused Company had not filed Form 5A, so as to

exonerate the Revision petitioners from the statutory liability and Annexure A photocopy of Form 5A is a fabricated document, which was not filed before the respondent. In short: the company has not filed form 5A.

8. In view of the Rival contentions the question to be considered under this revisional jurisdiction is whether there is any illegality, impropriety or incorrectness in the impugned order dismissing the petition for discharge. Put it differently, whether the averments in the complaint and the materials produced before the court make out a case against the Revision Petitioners, if unrebutted, would warrant their conviction.

9. The complaint is filed under Section 190(a) read with 200 of the Code of Criminal Procedure. So the first point to be considered is whether the facts averred in the complaint constitute the offences alleged against the Revision Petitioners. According to Section 14 A of the said Act, which deals with offences by companies if the

person committing the offence is a company, every person who at the time of 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. As per the proviso, if a person proves that the offence was committed without his knowledge or that he exercised due diligence to prevent the offence, he will not be liable for the offence.

10. In view of the above provision, let us examine the facts averred in the complaint. Going by the complaint it could be seen that there are specific averments in the complaint that these Revision Petitioners are Directors of the Company, at the relevant time of the commission of offences and they are persons in charge of the said business of the company. Even according to the Revision Petitioners they were directors of the company till 27/08/2004 and 02/09/2004 respectively. Thus they were directors of the company during the relevant period of January and

February 2003 in which the offences were committed.

Para 3 and 5 of the complaint in ST 274 of 2006 reads as follows.

3. That accused Nos.2 to 5 were the person in charge of the said establishment and is responsible to it for the conduct of its business. They are thus required to comply with all the provisions of the said Act and the EDLI Scheme, 1976 in respect of the said establishment.

5. That I further submit that as the accused No.2 to 5 were during the relevant period in charge of the said establishment and is responsible to it for the conduct of its business and as the aforesaid offences were committed by the said establishment due to their neglect of said accused persons on or about the dates mentioned in Paragraph 7 and 8 of the said Scheme read with section 6C, 14 (1B) and 14A of the said Act.

11. Going by the complaint I am of the opinion that the act alleged in the complaint prima facie constitute the offence alleged against them and the complaint is filed in accordance with Sections 190(a) read with 200 of the Code of Criminal Procedure.

12. It is the definite case of the complainant in

Para 3 and 5 that, the accused No:2 to 5 were during the relevant period in charge of the said establishment and were responsible to it for the conduct of its business and offences were committed due to their negligence. But according to the Revision Petitioners the 3rd accused is a practicing Chartered Accountant in Mumbai and his office is in Mumbai. So it was not possible for him to visit Kerala for the day to day affairs of the 1st accused. Similarly 4th accused is a whole time director of another Company GSL India Ltd. having registered office in Gujarat and it is not possible for him also to administer day to day affairs of the company. Both Revision Petitioners have produced documents to substantiate above contentions.

13. I am of the opinion that these contentions are unsustainable and liable to be rejected, at this time, while considering the petition claiming discharge under Section 245 Cr.P.C. Admittedly, they are directors of the 1st accused company during the relevant period. If that be so, under Section 2(e) of the EPF and

Miscellaneous Provisions Act, 1952, they are liable as directors, especially when they have not filed return of ownership. It is the definite contention of the complainant that the 1st accused company had not filed Form 5A return of ownership mandated under Clause 36 A of the EPF Scheme 1952. In **S.M.S.Pharmaceuticals Ltd. V. Neeta Bhalla and Another (AIR 2005 SC 3512)**, the Apex Court held as follows:

The officers responsible for conducting affairs of companies are generally referred to as Directors, Managers, Secretaries, Managing Directors etc. What is required to be considered is: is it sufficient to simply state in a complaint that a particular person was a director of the Company at the time the offence was committed and nothing more is required to be said? For this, it may be worthwhile to notice the role of a director in a company. The word 'director' is defined in Section 2 of the Companies Act 1956 as under:

“ “director” includes any person occupying the position of director, by whatever name called”;

14. Secondly, the Revision Petitioners have produced documents to show that both are always at Bombay and in Gujarat in connection with their

profession, and full time engagements. But these documents cannot be considered, while considering the application for discharge in view of the decision of the Apex Court in **State of Orissa V. Debendra Nath Padhi (AIR 2005 SC 359)**. In this decision the Supreme Court held that "At the stage of framing charge, hearing the submissions of the accused has to be confined to materials produced by prosecution."

15. All the contentions raised are defensive contentions only. Can that defensive arguments be considered in a petition for discharge? what is the scope and extent of considerations in a petition claiming discharge? The Apex Court while considering the scope and extent of considerations at the time of considering discharge petition in **AIR 2005 SC 359** (supra) held as follows:

18. " If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for

the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence”.

16. The learned counsel for the Revision Petitioners contends that these Revision Petitioners had filed form 5A which is invoking the clause 36A of the Provident Fund scheme and they have produced photostat copy of a Form 5A which said to have been filed on 19/06/2001 along with an affidavit.

17. Per contra, the respondent filed a counter affidavit specifically denying the claim that they have filed form 5A. It is pertinent to note that the absence of filing of form 5A was considered by the trial court also. According to respondents the documents produced before the court is only a fabricated document. The photostat copy of form 5A is not a legible copy and it does not show the receipt of the same by the EPF office. In view of the rival contentions challenging the genuineness and credibility of the document this Court

is not inclined to consider or determine the credibility of that document under revisional jurisdiction, as document requires to be tested and proved through the process of trial, either through the person who is said to have filed it or received the same. Had the Revision Petitioners filed Form 5A, they could have taken steps in the trial court to call for original Form 5A from the custody of the complainant. This court is not inclined to grant order of discharge on the basis of photocopy of form 5A, which is said to have been filed.

18. The learned counsel for the Revision Petitioner drew my attention to the decision reported in **S.M.S.Pharmaceuticals Ltd. V. Neeta Bhalla and Another (AIR 2005 SC 3512), K.K.Ahuja V. V.K.Vora and Another (2009(7)UJ SC 3229)**. I am of the opinion that these decisions cannot be relied on while considering the issue involved in the instant case. In those cases the offence was under Section 138 of the Negotiable Instruments Act and the question was whether the Directors of the company have executed

and issued the cheque. The act done by the directors in execution and issuance of the cheque was the matter in issue. But here the question revolves around the statutory liability, for which the Directors are responsible, notwithstanding the specific Act done by them unless they have filed form 5(A) invoking the clause 36 A of the Provident Fund Scheme. In the above decisions the liability is a contractual liability under a commercial transaction; whereas in the instant case the liability is a statutory liability. Therefore, I am of the opinion that these decisions will not render any assistance or help to the Revision Petitioners.

19. To sum up, I am of the opinion that, going by the complaint and in view of the admission that they are Directors of the company during the relevant period, in the absence of Form 5A return of ownership excluding them from day today affairs and conduct of the company, they are liable to be prosecuted for the said offences and they cannot be discharged under 245(1) of the Cr.P.C. There are sufficient grounds to proceed with

prosecution against them. There is no illegality or impropriety in the impugned judgment under challenge.

This Revision Petition is dismissed.

**Sd/-K.HARILAL
JUDGE**

OKB/MJL