

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

FRIDAY, THE 05TH DAY OF JUNE 2020 / 15TH JYAISHTA, 1942

CRL.A.No.356 OF 2006

AGAINST THE JUDGMENT IN CRL.A 93/2004 DATED 30-06-2005 OF THE  
SESSIONS JUDGE, THODUPUZHA

APPELLANT/COMPLAINANT:

T.A.VARGHESE  
ENFORCEMENT OFFICER (INSPECTOR),  
EMPLOYEES PROVIDENT FUND ORGANISATION,  
2ND MILE, PALLIVASAL.P.O, IDUKKI DISTRICT.

BY ADVS.  
SRI.N.N. SUGUNAPALAN, SC, P.F.  
SMT.T.N.GIRIJA SCEPF ORGANISATION

RESPONDENTS/APPELLANTS & 2ND RESPONDENT:

- 1 M/S.RAM BAHADUR THAKUR LTD.  
THUNGAMULLAY ESTATE,  
VANDIPERIYAR-REPRESENTED BY C.B.SHARMA, CHAIRMAN.
- 2 C.B.SHARMA, CHAIRMAN,  
M/S.RAM BAHADUR THAKUR LTD., SAMUDRA MAHAL,  
25TH FLOOR, DR.ANNIE BESANT ROAD, WORLI, BOMBAY.
- 3 MANOJ SHARMA, DIRECTOR  
M/S.RAM BAHADUR THAKUR LTD., SAMUDRA MAHAL,  
25TH FLOOR, DR.ANNIE BESANT ROAD,, WORLI, BOMBAY.
- 4 S.M.SHARMA, DIRECTOR  
M/S.RAM BAHADUR THAKUR LTD., SAMUDRA MAHAL,  
25TH FLOOR, DR.ANNIE BESANT ROAD, WORLI, BOMBAY.
- 5 STATE OF KERALA  
REPRESENTED BY PUBLIC PROSECUTOR, THODUPUZHA.

R5 BY ADV. PUBLIC PROSECUTOR SR.PP.B.JAYASURYA  
THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05.06.2020,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

## **JUDGMENT**

**Dated this the 5th day of June 2020**

The above appeal is filed against the judgment dated 30.6.2005 in Crl.A No.93/2004, by which the appellate court acquitted respondent Nos.2 to 4. As per the above judgment, the conviction and sentence imposed on the 1<sup>st</sup> respondent herein was confirmed by the appellate court. (Hereinafter the parties are mentioned in accordance to their rank before the trial court). This appeal came up in the defect list earlier, showing that the service to the 1<sup>st</sup> respondent is not complete. Since the conviction and sentence of the 1<sup>st</sup> respondent herein is not challenged in this appeal, this Court directed the learned counsel for the appellant to get ready to argue the appeal and accordingly the appeal was listed today. Today, I heard Smt.Neetha N.S, who is the Standing Counsel appearing for the appellant.

2. The appellant herein filed a complaint before the lower court to prosecute respondent Nos.1 to 4 under Sections 14(IA), 14(2) and 14(A) of the Employees Provident Fund Miscellaneous Provisions Act, 1952 (for short 'EPF Act') and paragraph 76(d) of the Employees Provident Fund Scheme (for

short 'the Scheme').

3. The case of the complainant is that the 1<sup>st</sup> accused M/s.Ram Bahdur Thakur Limited, Thungamullay Estate is an establishment within the meaning of EPF Act and the Scheme. The original accused Nos.2 to 8 who were the persons in charge of the establishment were responsible for the conduct of the business of the establishment and were bound to comply with all provisions of the EPF Act and Scheme. The case of the complainant is that, the accused had to remit a sum of Rs.1,66,158/- for the month of June 1995, before 15<sup>th</sup> July and towards the provident fund amount for July 1995, a sum of Rs.1,73,855/- had to be remitted before 15<sup>th</sup> August. It is the case of the complainant that, the above amounts were to be remitted along with the administrative charges amounting to Rs.5,937/- and Rs.6,229/- respectively. It is alleged that, the accused failed to remit the amount, despite the demand and hence the accused committed the offence under the provisions quoted above. After complying with the statutory formalities and getting the sanction from the competent authority, the complaint was filed.

4. The learned Magistrate took cognizance of the

offence and issued process to the accused. All the accused except the 8<sup>th</sup> accused entered appearance before the lower court. Since the 8<sup>th</sup> accused was absconding, the case against him was split up. Subsequently, a petition was filed by accused Nos.5 to 7, stating that, they were not responsible for the conduct of the business of the establishment. Based on that, they were removed from the party array. On 20.1.2000, on finding that, this is a case in which procedure for trial of warrant cases is applicable, the learned Magistrate refiled the case as C.C.No.21/2000 and proceeded with.

5. To substantiate the case PW1 was examined and Exts.P1 to P4 were marked. After preliminary enquiry, charges were framed. Thereafter, PW1 was recalled and cross examined. No further evidence was adduced by the complainant.

6. After considering the evidence and documents, accused Nos.1 to 4 were found guilty. Accused Nos.2 to 4 were sentenced to undergo rigorous imprisonment for six months and a fine of Rs.5,000/- each for the offence under Section 14(1A) of the EPF Act and also to undergo rigorous imprisonment for a period of three months and to pay a fine of

Rs.2,000/- each for the offence under paragraph 76(d) of the Scheme with usual default clause. The 1<sup>st</sup> accused company was sentenced to pay a fine only. Challenging the conviction and sentence, the accused Nos.1 to 4 filed an appeal before Sessions Judge, Thodupuzha.

7. The Sessions Judge considered the appeal and found that the conviction and sentence imposed on the 1<sup>st</sup> accused is correct. As far as accused Nos.2 to 4 are concerned, the Sessions Judge found that, they have not committed any offence and they are acquitted as per the impugned judgment. Now the complainant filed the above appeal challenging the acquittal order of accused Nos.2 to 4.

8. The learned Standing Counsel appearing for the appellant submitted that, the learned Sessions Judge erred in allowing the appeal. According to the learned Standing Counsel, there is evidence to show that accused Nos.2 to 4 also committed the offence. Therefore, according to the learned Standing Counsel, the findings of the appellate court acquitting accused Nos.2 to 4 is per se illegal.

9. According to accused numbers 2 to 4, they were not responsible for the conduct of the business and for remittance

of the amount.

10. PW1 had deposed that accused Nos. 2 to 4 and 8<sup>th</sup> accused were responsible for remitting the amount. They were implicated as accused alleging that they were the employers as defined in EPF Act. The “employer” is defined in the Act, which is extracted hereunder:

*“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.”*

11. The first accused is the Company. The person who are in ultimate control of the affairs of the establishment alone

is responsible as an employer and not all Directors of the Company. The learned Standing Counsel submitted that, when an offence is committed, the person responsible to the Company for the conduct of the business as well as the Company and the Directors are liable for the same.

12. The Standing Counsel brought to the notice of the Court, Section 14A of the Employees' Provident Funds Act, which is extracted hereunder:

*"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 subsection 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 subsection (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 anybody corporate and includes a firm and other association of individuals; and*
- (b) *“directors”, in relation to a firm, means a partner in the firm*

13. A reading of Section 14A Sub-clause (i), it is clear that, only the person responsible to the Company for the conduct of the business of the Company as well as the Company alone are liable to be prosecuted and not all Directors. In other words, the appellants who are Directors, cannot be prosecuted, unless there is pleadings and evidences to show that, they were in charge and responsible for the conduct of the business of the Company. This position is settled as per the judgment of the Apex Court in **SMS Pharmaceuticals Ltd. v. Neeta Bhalla (2005(4) KLT 209)**. Initially, accused Nos.2 to 7 in this case are

arrayed as Directors and the 8<sup>th</sup> accused was arrayed as the Manager. Later, the complainant himself admitted that, accused numbers 5 to 7 are not liable. Accordingly, on a motion by accused Nos.5 to 7, they were removed from the party array. From this, as stated by the appellate court, it is an indication that, there was no proper enquiry or findings as regards the persons liable. The 8<sup>th</sup> accused is not in the picture before the trial court because, he was absconding.

14. The Standing Counsel submitted that, the prosecution witness No.1 had deposed before the court below that, Ext.P1 is the copy of Form No.5A submitted by the accused in which it is stated that, accused Nos.2 to 4 were also Directors of the Company. But, as stated by the lower court, in column No.10, it is shown that, the occupier of the establishment is the Company which is shown as the first accused and the 8<sup>th</sup> accused was the Manager. Column No.2 would show that, the person responsible for the conduct of the business of the establishment is none other than the 8<sup>th</sup> accused. Therefore, as stated by the appellate court, if reliance is given to Ext.P1, accused Nos.2 to 4 could not be fastened liability. It is further contended that,

Ext.P2 proceedings of the Provident Fund Commissioner determining the liability was produced before the lower court. A reading of Ext.P2 would show that, accused Nos.2 to 4 and 8 were liable for remittance. But, on what basis, it was determined so, is not at all mentioned. According to PW1, the 4<sup>th</sup> accused represented the first accused in the proceedings by which Ext.P2 was passed. It is submitted that, Ext.P2 was issued in a proceedings under Section 7A of the EPF Act. A reading of Section 7A of the Act would show that, before issuing the proceedings under Section 7A, the employer concerned shall be given reasonable opportunity to represent his case. No document was produced to show that, a notice as contemplated under Section 7A(3) was given. This was taken note of by the appellate court while exonerating accused Nos.2 to 4. The appellate court taken note of the fact that, the consequential notice after Ext.P2, even though produced, there is no documents produced to show that, such a notice was actually dispatched or served upon the accused.

15. Ext.P4 is the order of sanction to launch the prosecution. But, so long as accused Nos.2 to 4 would not

come within the definition of the term 'employer', they are not liable to be prosecuted and consequently convicted or sentenced. This is the finding of the appellate court.

16. I think that, there is nothing to be interfered with the acquittal order passed by the appellate court. The appellate court considered all the evidences and documents in detail and exonerated accused 2 to 4 in this case. Therefore, there is nothing to be interfered in an appeal against acquittal filed by the complainant.

Hence, this Crl.Appeal is dismissed confirming the judgment dated 30.06.2005 in Crl.Appeal No.93 of 2004 of the Sessions Judge, Thodupuzha, against accused Nos.2 to 4.

**Sd/-**

**P . V . KUNHIKRISHNAN**

**JUDGE**

**ab/pkk**