IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 31ST DAY OF JANUARY, 2023

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPPRASANNA

CRIMINAL PETITION No.195 OF 2020

BETWEEN:

MR.CH K.S.PRASAD @ K.S.PRASAD
SON OF R.K.PRABHAKAR RAO,
AGED ABOUT 49 YEARS,
AT NO.B-1, SHAMBU RESIDENCY,
NO.6, NORTH BOGH ROAD,
T.NAGAR, CHENNAI – 600 017.

... PETITIONER

(BY SRI NOOR UL HUSSAIN, ADVOCATE)

AND:

1. STATE OF KARNATAKA
BY KORAMANGALA POLICE,
20TH MAIN ROAD, 6TH BLOCK,
KORAMANGALA,
BENGALURU – 560 095
REPRESENTED BY S.P.P.

2. THE ENFORCEMENT OFFICER
EMPLOYEE'S PROVIDENT FUND ORGANISATIONS
SUB REGIONAL OFFICE,
BOMMASANDRA,
BHAVISHYANIDHI BHAVAN,
ANNAPOORNESHWARI COMPLEX,
NO.37-1, 6TH MAIN,
SINGASANDRA,

BENGALURU – 560 068.

... RESPONDENTS

(BY SRI K.S.ABHIJITH, HCGP FOR R-1;
SMT.B.V.VIDYULATHA, ADVOCATE FOR R-2)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO ALLOW THE PETITION AND QUASH CRIMINAL PROCEEDINGS AGAINST THE PETITIONER, IN C.C.NO.7283/2017 PENDING ON THE FILE OF THE IV ADDITIONAL CHIEF METROPOLITAN MAGISTRATE, BENGALURU AS THE RESPONDENT NO.1 HEREIN HAS INITIATED A FRIVOLOUS CRIMINAL PROCEEDINGS UNDER THE PROVISION OF SEC.409 AND 420 OF IPC IN ORDER TO SECURE.

THIS CRIMINAL PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

The petitioner is before this Court calling in question proceedings in C.C.No.7283 of 2017 pending before the IV Additional Chief Metropolitan Magistrate, Bengaluru arising out of Crime No.499 of 2015 registered for offences punishable under Sections 406 and 409 of the IPC.

2. Heard Sri Noor Ul Hussain, learned counsel appearing for petitioner, Sri K.S. Abhijith, learned High Court Government Pleader

appearing for respondent No.1 and Smt. B.V. Vidyulatha, learned counsel appearing for respondent No.2.

3. Brief facts that lead the petitioner to this Court in the subject petition, as borne out from the pleadings, are as follows:-

The petitioner claims to be an employee of M/s Vasan Healthcare Private Limited (hereinafter referred to as 'the Establishment' for short) from 2012 up to 13-09-2017. During the said period, he further claims to have donned several rolls in the Establishment and was for some time Senior Vice-President, Human Resources and was also authorized to sign certain forms in connection with the business of the Establishment including the forms of Employees Provident Fund. It appears that during the period from August 2014 to May 2015 the Establishment deducted provident fund from the wages of employees but had not deposited the said amount with the Provident Fund Organization. The amount totaled to ₹ 95,58,104/-. Based upon this, a complaint comes to be registered on 06-08-2015 before the 1st respondent alleging offences punishable under Sections 406 and 409 of the IPC. The petitioner claims to have been unaware of the said crime registered

against him. On coming to know that crime has been registered and the Police after investigation have filed a charge sheet, the petitioner on securing all the documents has knocked at the doors of this Court calling in question the proceedings in the said criminal case.

4. The learned counsel appearing for the petitioner would contend that on 15-09-2016 the 2nd respondent/Organization had registered about 21 complaints against the Establishment and its Chairman one Mr.A.M.Arun before the Special Court for Economic Offices alleging non-payment of aforesaid contributions and in all the cases the said Chairman is acquitted and the petitioner is replaced in his place pursuant to an order passed by this court. Later the petitioner is also discharged of his liability before the Special Court for Economic Offences. Now on the same set of facts, the present criminal case is sought to be continued against the petitioner alone without making the Establishment as an accused in the proceedings. He would submit that the offences alleged can never be laid against the petitioner.

5. On the other hand, the learned counsel appearing for the 2nd respondent/Organization would seek to contend that this Court clearly found that it was the petitioner who was responsible for non-deposit of the funds to the Organization and mere discharge in the proceedings for economic offences will not absolve the petitioner of the offences under the IPC. Therefore, she would seek dismissal of the petition.

6. I have given my anxious consideration to the submissions made by the respective learned counsel and perused the material on record.

7. The afore-narrated facts are not in dispute and are, therefore, not reiterated. The position of the petitioner as being the Vice-President of the Establishment at the relevant point in time is again a matter of record. What is germane to be noticed is the genesis of the problem. The Establishment between August 2014 and May 2015 did not remit contributions that were deducted from the salaries of employees of the Establishment to the Organization. The reason behind non-remittance is that the Bank accounts of the

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Establishment were attached by the Income-Tax Department in several cases. On the ground that the Establishment had not remitted the amounts, two proceedings were initiated – one, setting the criminal law in motion by registering Crime No.499 of 2015 for offences punishable under Sections 406 and 409 of the IPC and the other, registering a criminal case before the Special Court for Economic Offences under Paragraph 76(d) of the Employees' provident Fund Scheme, 1952 read with Sections 14(1A) and 14A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ('the Act' for short) for contravention of Section 6 of the Act r/w Para 30 and 38 of the Employees' Provident Fund Scheme, 1952. The proceedings before the Special Court under the provisions of the Act were instituted against the Establishment and one Mr. A.M.Arun, the Chairman. This was called in question before this Court in Criminal Petition No.5657 of 2017 and connected cases as there were 21 complaints registered. This Court in terms of its order dated 18-02-2019 observed that it was the petitioner who was at the helm of affairs and not the Chairman Mr.A.M.Arun and accordingly the proceedings against the Chairman were quashed. While doing so, this Court rendered the following reasons:

"12. In the aforesaid analysis of the statutory provisions governing the issue and case laws referred to herein supra, when the facts on hand are examined it would indicate that in the complaint in question an omnibus statement has been made against accused persons. The averment or allegation made in the complaint reads as under:

> *"3. That the accused are persons in-charge of said establishment and are responsible to it for conduct of its business. They are required to comply with all the provisions of the said Act and the Scheme framed thereunder in respect of the said establishment."*

Smt. B.B. Vidyulatha, learned counsel for respondent by referring to Form No.5A filed on 19-03-2015 – Annexure R1 has contended that employer, who is required to give declaration of the ownership as contemplated under Paragraph 36A of the Scheme, had filed such declaration and as such, second petitioner had been arrayed as an accused, though at first blush said agreement looks to be an attractive argument, it is not so for the simple reason that respondent-complainant themselves admit in their statement of objections about revised Form No.5A having been filed by the covered establishment on 21-07-2015 – Annexure-R2, whereunder it is clearly indicated that Sri CH. K.S.Prasad, who is Senior Vice-President HR is declared to be the owner, who can be brought within the four corners of "person responsible to the company for the conduct of the business of the company, as well as the company".

13. Though it might be true that in the declaration dated 21-07-2015 –Annexure-R2, which had been filed by the 'covered establishment' came to be rejected by communication dated 27-05-2016 – Annexure-R3, fact remains a declaration as required under Paragraph 36A of the Scheme had been furnished and thereby complainant ought to have arrayed such person, who was declared to be a person in-charge of the company to fasten vicarious liability on such person. Said exercise having not been undertaken by the complainant, this Court is of the considered view that proceedings initiated against second petitioner is contrary to Section 14A of the Act. Thus, in the facts obtained on hand it is not the second petitioner, who is the employer as defined under Section 2(e) of the Act and it was Sri CH K.S. Prasad Rao. Accordingly, Point

No.1 is answered in favour of second petitioner and against the respondent. Hence, proceedings against second petitioner are liable to be quashed. However, quashing of the proceedings against second petitioner would not come in the way of respondent-complainant taking appropriate steps for impleading such person who would be responsible for the company to fix vicarious liability subject to such limitati0on s as prescribed under the Act."

8. This Court recorded that Form 5A submitted by the Establishment on 21-07-2015 which was appended to the petition therein clearly indicated that it was CH K.S. Prasad, Senior Vice-President, HR who is declared to be the owner and person responsible for the conduct of business of the Establishment and not the President. Based upon this finding the name of Mr. A.M.Arun was changed to the name of the Petitioner herein. The Special Court constituted for hearing Economic Offices by its order dated 17-12-2019 acquitted the Establishment of the offences. The reason rendered for acquittal of the Establishment of the offences, as rendered by the Special Court, are as follows:

*"9. **Point No.1**: The accused No.1 taken up the contention that the complaint is barred by limitation. Ld. Counsel argued that the complaint should have been filed within one year from the date of failure to comply. Ld. Counsel referred Section 468(6) of the Cr.P.C. and argued that it is applicable to the offence punishable under the provisions of the EPF & MP Act. It is true that the limitation provided under Section 468 of the Cr.P.C. is applicable to the offence made punishable under the provisions of theEPF & MP Act. The Accused No.1 had taken up*

the contention in the criminal petition that the criminal prosecution is barred by limitation. Hon'ble high Court at paragraph No.16 of the order dealt with the issue of limitation and by relying upon the ruling of the Hon'ble Apex Court, in the case of ***Bhagirath Kannan v. State of M.P.,*** *reported in (1984) 4 SCC 222, held that the offence punishable under Section 14 of the EPF and MP Act is continuous offence. Thus, the contention that complaint is barred by limitation is not sustainable in law.*

10. There is no dispute over the fact that the Accused No.1 covered under the provisions of the Employees' Provident Fund Scheme 1952, the Employees' Pension Scheme 1995 and the Employees' Deposit Linked Insurance Scheme 1976. Paragraph No.8 of the Employees' Deposit Linked Insurance Scheme 1976 deals with payment of Employees' Deposit Linked Insurance contributions and administrative charges. Paragraph No.38 deals with the mode of payment of contributions. The allegation is that accused No.1 not complied these statutory requirements. The Enforcement Officer examined as PW-1 deposed in line with complaint averments. The documents marked as Ex.P2 discloses that the Regional Provident Fund Commissioner passed the order dated 31-05-2016 under Section 7A of the EPF and MP Act determining the contributions due from the accused No.1.

11. The accused No.1 admitted the non=remittance of the contributions within time, but asserted that it had justifiable reasons for non-remittance of the contributions. The accused No.1 stated that the Income Tax Department attached the 104 accounts of the accused No.1 on 19.07.2015. The accused No.1 challenged the attaching of the accounts before the Madras High Court in W.P.No. 39484/2015. The writ petition was disposed off by the order dated 18-11-2016 and thereafter, the Income Tax Department released the accounts. The attachment of the accounts continued in view of the existence of the liability raised by the complainant. In the course of time, the due contributions were realized. The complainant levied the interest and penalty and they also recovered.

12. The Accused No.1 taken up the contention that there was no willful default in payment of contributions and default was occurred due to the unavoidable circumstances. The

representative of the Accused No.1 examined as DW-1 deposed in the line of defense raised by the Accused No.1. The Accused No.1 produced the relied documents in C.C.No.281 of 2016 marked as Ex.D1 to 5 and prayed to look into those documents.

13. The complainant admitted that during the pendency of the proceedings, the accused No.1 paid the contributions. It is settled legal proposition that once the offence being committ4d, the making of the contributions subsequent to this, would not absolve from the criminal liability. The Accused No.1 taken up the contention that attachment of the account by the Income Tax Department led to the non-remittance of the contributions and the administrative charges. The evidence on record did show that the Income Tax Department had attached the 104 accounts of the Accused No.1. The failure to pay the Employees' Deposit Linked Insurance contributions and administrative charges by itself will not result in commission of the offence punishable under Section 14(1B) of the EPF and MP Act. Unless, it is specifically not stated in the statute, in criminal proceedings, the willful failure (mens-rea) is to be proved to attract the criminal consequences.

14. The Accused No.1 produced the documents to the effect that its 104 accounts were attached much earlier to the date due for remitting the contributions. PW-1 in the cross-examination stated that he is not aware of the attaching of the accounts. When it was suggested that there was sufficient funds in the accounts of the accused No.1 and it had the intention of paying the contributions, but because of freezing of the accounts, the accused No.1 could not make the contributions, PW-1 not denied it, but shown the ignorance. The complainant not produced the evidence to the effect that the Accused No.1 willfully did not pay the contributions. The oral evidence of DW-1 that there was no willful failure and the non-remittance of the contributions was due to the attachment order, remained unchallenged. Had, it been shown that in spite of attachment of 104 accounts, the Accused No.1 had other accounts to pay the contributions, then the defense taken by the Accused No.1 could not have been held sufficient and justifiable reasons for the failure to pay the contributions and administrative charges. However, in the absence of such evidence, it has to be held that the accused No.1 is prevented

by the justifiable reason for not depositing the contributions and administrative charges.

15. Thus, on appreciation of evidence on record, the Court holds that though the complainant succeeded in proving that Accused No.1 failed to comply with the Section 6C and paragraph No.8 of the Employees' Deposit Linked Insurance Scheme 1976, there is evidence on record to probablise the contention of the Accused No.1 that there is no willful default, but for the reasons which were not under the control of the Accused No.1, the default occurred. Consequently, it has to be held that the complainant failed to prove the charges leveled against the Accused No.1. Accordingly, this point is answered in negative."

9. The finding is that there was no willful default in payment of contributions as the account of the Establishment was attached by the Income Tax Department and no transaction could take place for remittance of the amount as non-remittance was beyond the control of the Establishment. This finding has become final. The concerned Court even before it took up the issue against the Establishment had considered the application of the present petitioner for discharge and in terms of its order dated 31-08-2019 it was held that the criminal proceedings against the petitioner was not sustainable and it accordingly discharged and directed framing of charge only against accused No.1. The order of discharge of the petitioner reads as follows:-

"5. It is argued that accused No.1 paid the entire contributions with penalty was and due to unavoidable circumstances, the contributions were not remitted. The remittance of contributions will not absolve the accused No.1 from the criminal liability. There are sufficient evidence to frame the charge against the accused No.1 for the offence punishable under Section 14(1A) of the Act. Whether there was justifiable reasons for non-remittance of contributions are the aspects to be looked into after trail.

6. The accused No.2 contended that there is no sanction against him; hence, the complaint against him is not sustainable. The complainant in the cross-examination admitted that sanction was not obtained to prosecute accused No.2. Section 14-AC of the Act mandates that no court shall take the cognizance of the offence punishable under the EPF Act, without previous sanction of officer notified in the Official Gazette. In view of this, the initiation of proceedings without sanction is not sustainable. Consequently, no charge can be framed against accused No.2 for the offence punishable under Section 14(1A) of the Act. Accordingly, I pass the following:

ORDER

It is held that criminal proceedings against accused No.2 is not sustainable, accordingly, he is discharged and case is posted to frame the charge against accused No.1."

Therefore, the present scenario is that the Establishment is absolved of all the economic offences on the ground that there was no willful default on its part in non-remittance of the provident fund and the petitioner had been discharged holding that criminal proceedings under the provisions of the Act are not sustainable. Both these findings have become final.

10. The issue, in the teeth of the findings in both these cases is, *whether the impugned proceedings in C.C.No.7283 of 2017 should be permitted to be continued?*

11. The crime that is registered against the petitioner in Crime No.499 of 2015 is for offences punishable under Sections 406 and 409 of the IPC. The concerned Court took cognizance of the offence punishable under Sections 409 and 420 of the IPC against the petitioner and drops the offence punishable under Section 406 of the IPC. Section 420 of the IPC has its ingredients in Section 415 of the IPC. The ingredients are that an accused should lure the complainant/firm to part with certain property with dishonest intention. The case at hand is concerning contribution towards provident fund and its non-remittance to the Organization. It cannot be imagined as to how contribution of provident fund can be lured by the petitioner over the employees when it is a statutory deduction. Therefore, the cognizance for offence punishable under Section 420 of the IPC is recklessly taken, as none of the ingredients that are necessary to be proved for offence punishable under Section 420 as obtaining under Section 415 of the IPC are

remotely present in the case at hand. Therefore, the cognizance being taken for the said offence is fundamentally flawed.

12. What remains is cognizance being taken under Section 409 of the IPC. Section 409 directs breach of trust by a servant or a banker or whoever being entrusted with some property. Even if it is construed of entrustment of property *qua* the deposit of provident fund against the petitioner, the finding rendered by the Special Court *qua* the Establishment and the discharge of the petitioner in those cases would clearly have a bearing on the offence so alleged under Section 409 of the IPC. If ingredients of Section 409 of the IPC are alleged element of *mens rea* would become mandatory. The finding of the Special Court in favour of the Establishment was that there was no willful default on the part of the Establishment and it was a circumstance which was beyond the control of the Establishment, as the Income Tax Department authorities had attached the properties of the Establishment. If that be the finding and the said finding having become final, the petitioner cannot be hauled into the web of crime for an offence under Section 409 of the IPC, as if there is willful default against

the Establishment. There cannot be anything willful laid against the petitioner. There is no iota of element of *mens rea* that is alleged against the petitioner.

13. Reference being made to the judgment of the Apex Court in the case of ***N.RAGHAVENDER v. STATE OF ANDHRA PRADESH, CBI***[1] would be apposite. The Apex Court has held as follows:

> "***41.*** *Section 409 IPC pertains to criminal breach of trust by a public servant or a banker, in respect of the property entrusted to him. The onus is on the prosecution to prove that the accused, a public servant or a banker was entrusted with the property which he is duly bound to account for and that he has committed criminal breach of trust. (See: Sadupati Nageswara Rao v. State of Andhra Pradesh).*
>
> ***42.*** *The entrustment of public property and dishonest misappropriation or use thereof in the manner illustrated under Section 405 are a sine qua non for making an offence punishable under Section 409 IPC. The expression 'criminal breach of trust' is defined under Section 405 IPC which provides, inter alia, that whoever being in any manner entrusted with property or with any dominion over a property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property contrary to law, or in violation of any law prescribing the mode in which such trust is to be discharged, or contravenes any legal contract, express or implied, etc. shall be held to have committed criminal breach of trust. Hence, to attract Section 405 IPC, the following ingredients must be satisfied:*

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[1] 2021 SCC OnLine SC 1232

> ***(i)*** ***Entrusting any person with property or with any dominion over property;***
>
> ***(ii)*** ***That person has dishonestly mis-appropriated or converted that property to his own use;***
>
> ***(iii)*** ***Or that person dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation of any direction of law or a legal contract.***

43. It ought to be noted that the crucial word used in Section 405 IPC is 'dishonestly' and therefore, it pre-supposes the existence of mens rea. In other words, mere retention of property entrusted to a person without any misappropriation cannot fall within the ambit of criminal breach of trust. Unless there is some actual use by the accused in violation of law or contract, coupled with dishonest intention, there is no criminal breach of trust. *The second significant expression is 'mis-appropriates' which means improperly setting apart for ones use and to the exclusion of the owner.*

44. *No sooner are the two fundamental ingredients of 'criminal breach of trust' within the meaning of Section 405 IPC proved, and if such criminal breach is caused by a public servant or a banker, merchant or agent, the said offence of criminal breach of trust is punishable under Section 409 IPC, for which it is essential to prove that:*

> *(i)* *The accused must be a public servant or a banker, merchant or agent;*
>
> *(ii)* *He/She must have been entrusted, in such capacity, with property; and*
>
> *(iii)* *He/She must have committed breach of trust in respect of such property.*

45. *Accordingly, unless it is proved that the accused, a public servant or a banker etc. was 'entrusted' with the property which he is duty bound to account for and that such a person has committed criminal breach of trust, Section 409 IPC may not be attracted. 'Entrustment of property' is a wide and generic expression. While the initial onus lies on the prosecution to show that the property in question was 'entrusted' to the accused, it is not necessary to prove further, the actual mode of entrustment of the property or misappropriation thereof. Where*

the 'entrustment' is admitted by the accused or has been established by the prosecution, the burden then shifts on the accused to prove that the obligation vis-à-vis the entrusted property was carried out in a legally and contractually acceptable manner.

<u>Ingredients necessary to prove a charge under Section 420 IPC:</u>

46. Section 420 IPC, provides that whoever cheats and thereby dishonestly induces a person deceived to deliver any property to any person, or to make, alter or destroy, the whole or any part of valuable security, or anything, which is signed or sealed, and which is capable of being converted into a valuable security, shall be liable to be punished for a term which may extend to seven years and shall also be liable to fine.

47.** It is paramount that in order to attract the provisions of Section 420 IPC, the prosecution has to not only prove that the accused has cheated someone but also that by doing so, he has dishonestly induced the person who is cheated to deliver property. **There are, thus, three components of this offence, i.e., (i) deception of any person, (ii) fraudulently or dishonestly inducing that person to deliver any property to any person, and (iii) mens rea of the accused at the time of making the inducement. It goes without saying that for the offence of cheating, fraudulent and dishonest intention must exist from the inception when the promise or representation was made.

48.** It is equally well-settled that the phrase 'dishonestly' emphasizes a deliberate intention to cause wrongful gain or wrongful loss, and when this is coupled with cheating and delivery of property, the offence becomes punishable under Section 420 IPC. Contrarily, the mere breach of contract cannot give rise to criminal prosecution under Section 420 unless fraudulent or dishonest intention is shown right at the beginning of the transaction. It is equally important that for the purpose of holding a person guilty under Section 420, the evidence adduced must establish beyond reasonable doubt, mens rea on his part. Unless the complaint showed that the accused had dishonest or fraudulent intention '**at the time the complainant

> ***parted with the monies****', it would not amount to an offence under Section 420 IPC and it may only amount to breach of contract."*
>
> *(Emphasis supplied)*

The Apex Court, in the aforesaid judgment, has clearly held that for an offence punishable under Section 409 of the IPC, the ingredients under Section 405 are *sine qua non*. The ingredients are that the accused should have dishonestly misappropriated or converted that property to his own use. Dishonestly, therefore, is what is required to be present in any transaction where the offence alleged is that of Section 409 of the IPC which pre-supposes existence of *mens rea,* which I do not find anywhere in the case at hand.

14. It is also germane to notice that the proceedings are instituted only against the petitioner. The petitioner was an employee of the Establishment. For proceedings to be instituted for offences under Sections 406 or 420 of the IPC, the Establishment ought to have been made a party. Without the Establishment being an accused, the proceedings against the petitioner cannot be permitted to be continued. For these reasons, permitting further proceedings to be continued against the petitioner would

degenerate into harassment, becomes an abuse of the process of law and ultimately result in miscarriage of justice.

15. For the aforesaid reasons, I pass the following:

O R D E R

(i) The Criminal Petition is allowed.

(ii) The proceedings initiated against the petitioner in C.C.No.7283 of 2017 pending before the IV Additional Chief Metropolitan Magistrate, Bengaluru stand quashed.

Consequently, I.A.No.1 of 2019 also stands disposed.

Sd/-
JUDGE

bkp
CT:MJ

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