

IN THE HIGH COURT OF DELHI

Crl.R.P. No.327/2009

Date of decision: 31st July, 2009

Devender Singh & Anr. Petitioners
through: Mr. Rajat Wadhwa, Adv.

VERSUS

State ...Respondent
through: Mr. Manoj Ohri and Mr. U.L. Watwani,
APPs for the State

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

1. Whether reporters of local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

GITA MITTAL, J(Oral)

1. The complainant has alleged that he had entrusted car no.UP-63-A-9700 to M/s Harpreet Ford Motors Private Limited wherein Shri Devender Singh, petitioner no.1 was employed as service adviser and Mr. Antony Mathew was employed as General Manager. The car was entrusted on 8th December, 2000 for the purposes of getting it serviced. It is alleged that despite several telephone calls, the vehicle was not being delivered to him. Ultimately, he went to the workshop of accused persons on 19th December, 2000 to get delivery of the vehicle, whether serviced or unserviced, when the complainant has found the engine and other parts of the vehicle lying in open condition and he was told to wait till the time the vehicle gets ready for delivery. When he was asked to take vehicle, he found that battery of the

vehicle had been removed. According to the complainant, the petitioner no.1 is alleged to have told him that the battery had been removed under instructions of the petitioner no.2, General Manager of the company since the previous owner of the vehicle owed some money to it.

It is further alleged that the petitioner no.1 gave in writing that the battery of the vehicle has been removed by the company due to the non-payment by the owner of the car Shri Shyamji Mishra. A new battery is alleged to have been purchased by the complainant for a sum of Rs.3100. The further allegation is that in the next morning i.e. 20th December, 2000, the complainant inspected the vehicle and found other parts like “jack, jack liver, stepney, AC knobs, mats, switch part and spaner” missing. When he went to the petitioners on 20th December, 2000 to enquire about the matter, he was told that these parts may be lying in the workshop and he was asked to come on 22nd December, 2000. It is alleged that on 22nd December, 2000, only the AC knob and switch parts were returned. Other articles were not returned on the ground that the value of the removed battery was not enough to clear the past dues pertaining to the previous owner of the car.

2. In this background, by this petition, the petitioner has assailed an order dated 4th March, 2009 passed by the learned Additional Chief Metropolitan Magistrate directing framing of charges under Section 406/34 of the Indian Penal Code against them. It has been urged by learned counsel for the petitioners that the matter is based on an

incorrect conclusion by the trial court to the effect that the vehicle no.UP-63-A-9700 was entrusted to the petitioners whereas this is not the case of the complainant in the complaint. It has further been urged that the petitioners are mere employees of M/s Harpreet Ford Motors Private Limited which has not been implicated in the complaint or arrayed to stand trial before the learned trial court. The submission on behalf of the petitioner is that it is well settled law that employees cannot be vicariously held liable with regard to offences under Section 406 of the Indian Penal Code without implication of the employer.

3. The order is assailed on the other grounds as well. It is asserted that there is nothing before the court to show that the petitioner has any right, title or interest in the subject vehicle and consequently there could not have been any entrustment as well. My attention is also drawn to a letter dated 19th December, 2000 relied upon by the prosecution to urge that it was the case of the prosecution itself that the battery in respect of which the complaint was lodged, had been retained for the reason that amounts were owed by the owner of the vehicle to the employer company. It is urged that for this reason, the matter related to a civil dispute and did not fall in the realm of a criminal prosecution.

4. The proceedings before learned trial court have been challenged on behalf of the petitioners also on the ground that the complaint has been lodged mala fide. It is urged that the complainant first tried his luck by making a complaint dated 22nd December, 2000 in the PS Moti Nagar which having investigated the same, did not register the case.

Because the attempt of the complainant to implicate the present petitioners in criminal prosecution did not succeed, he had made a complaint under Sections 136/34 of the Cr.P.C. indicating police station Prashant Vihar as the police station having jurisdiction in the matter. It has been contended that the learned trial court has passed an order dated 26th September, 2001 in routine directing registration of the case and its investigation. The charge sheet was filed by the police station Prashant Vihar against the petitioners only and no action was taken even against the managing director of M/s Harpreet Ford Motors Private Limited who had been arrayed as respondent no.3 in the complaint under Section 156(3) of the Cr.P.C. In support of these contentions, reliance has been placed on the pronouncement of the Apex Court reported at **2009(1) JCC 576 R. Kalyani Vs. Janak C. Mehta** and the pronouncement of this court **MANU/DE/0097/2009 Jitendra Kumar Singh Vs. State through CBI.**

5. Mr. Manoj Ohri, learned APP for the State has vehemently supported the impugned order contending that the same is based on correct reading of the complaint. It is submitted that the complaint was made not only in respect of the battery but also of other instruments and parts which had been removed from the vehicle. It is the case of the complainant that the vehicle was entrusted to these petitioners and they are bound to restore the vehicle with all parts intact. It is urged that having regard to the pronouncement of the Apex Court in **(2004) 1 SCC 525 State of Maharashtra Vs. Salman Salim Khan & Anr.**, this court has a limited jurisdiction and

cannot interfere with the order directing framing of charges by the learned trial court.

6. I have heard learned counsel for the parties. A comparison of the complaint dated 22nd December, 2000 as against the complaint made under Section 156(3) Cr.P.C. by the complainant, would show that there are material improvements in the subsequent complaint. The complainant has not complained ownership of the vehicle in question. The very basis of the place of entrustment has been improved in the complaint made to court. In para 4 thereof, the complainant has stated that the vehicle was entrusted to the present petitioners for service purpose; that it was taken from his house by towing in the presence of the petitioner no.1. This is not mentioned in the complaint which was lodged by him on 22nd December, 2000.

7. In para 10 of the complaint made to the court, the complainant has specifically stated that the entrustment was made in the name of accused no.3 (Managing Director of M/s Harpreet Ford Motors private Limited) but the criminal acts have been done by the accused persons in furtherance of their common intention. The accused no.3 has not been arrayed as a person accused in the chargesheet which was filed and he was not sent up for trial.

8. The complainant himself has submitted that the petitioner no.1 was working as a service adviser while the petitioner no.2 was working as general manager with M/s Harpreet Ford Motors Private Limited. The admitted position, therefore, is that these two persons are only employees of the company to whom the entrustment was effected.

In the writing dated 19th December, 2000 attributed to Shri Devender Singh, the petitioner no.1 herein, it has been mentioned that the battery of the vehicle has been removed by the company due to non-payment of the past amount held by Shri Shyamji Mishra who had called the company for a similar breakdown of the vehicle in question on 4th December, 2000 and a brand new battery was fitted at that time, payment of which remained outstanding.

In this background, it would appear that it is the case of the prosecution itself that the battery was removed by the company against past dues for the reason that the amount in respect thereof had not been paid at the time of its installation.

9. The complaint does not dispute this assertion in any manner at all. Whether battery could have been removed justifiably or not is yet another matter. The issue in the criminal prosecution is whether the petitioners who were employees of the company could be held vicariously liable for commission of the offence under Section 406 of the Indian Penal Code.

10. In the judgment of the Supreme Court reported at **AIR 2008 SC 1731/(2008) 5 SCC 662 S.K. Alagh Vs. State of U.P. & Ors.** the court had occasion to consider as to whether the complaint petition, even if given face value and taken to be correct in its entirety, disclosed an offence as against the appellant who was a Managing Director of the company, under Section [406](#) of the Indian Penal Code. Discussing Section 405 of the IPC, the court held thus:-

“10. Appellant No. 1 is the Managing Director of the Company. Respondent No. 3 was its General Manager.

Indisputably, the company is a juristic person. The demand drafts were issued in the name of the company. The company was not made an accused. The dealership agreement was by and between M/s. Akash Traders and the company.

11. Mr. Pramod Swarup, learned Counsel appearing on behalf of Responent No. 2, in support of the order passed by the learned Chief Judicial Magistrate as also the High Court, submitted that as, prima facie, the appellant was in charge of and was in control of the business of the company, he would be deemed to be liable for the offence committed by the company.

12. Indian Penal Code, save and except some provisions specifically providing therefor, does not contemplate any vicarious liability on the part of a party who is not charged directly for commission of an offence.

A criminal breach of trust is an offence committed by a person to whom the property is entrusted.

13. Ingredients of the offence under Section [406](#) are:

- (1) a person should have been entrusted with property, or entrusted with dominion over property;
- (2) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or willfully suffer any other person to do so;
- (3) that such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.

14. As, admittedly, drafts were drawn in the name of the company, even if appellant was its Managing Director, he cannot be said to have committed an offence under Section [406](#) of the Indian Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself. {See Sabitha Ramamurthy and Anr. v. R.B.S. Channabasavaradhya [MANU/SC/8486/2006](#)}.

15. We may, in this regard, notice that the provisions of the Essential Commodities Act, Negotiable Instruments

Act, Employees' Provident Fund (Miscellaneous Provision) Act, 1952 etc. have created such vicarious liability. It is interesting to note that Section [14A](#) of the 1952 Act specifically creates an offence of criminal breach of trust in respect of the amount deducted from the employees by the company. In terms of the explanations appended to Section [405](#) of the Indian Penal Code, a legal fiction has been created to the effect that the employer shall be deemed to have committed an offence of criminal breach of trust. Whereas a person in charge of the affairs of the company and in control thereof has been made vicariously liable for the offence committed by the company along with the company but even in a case falling under Section [406](#) of the Indian Penal Code vicarious liability has been held to be not extendable to the Directors or officers of the company. {See Maksud Saiyed v. State of Gujarat and Ors. [MANU/SC/7923/2007](#)}."

11. It appears that the material which was placed before the trial court would disclose that it was the case of the prosecution that the removal of the battery was by the company. The company has not been arrayed as the person accused. At this stage, it would be useful to consider the observations of this court on a consideration of similar contention. I find that in the pronouncement reported at ***MANU/DE/0097/2009 Jitendra Kumar Singh Vs. State through CBI*** wherein the chairman of a company was arrayed to stand trial without implication of the company and that there was no allegation against the company in question. In this regard, the court held thus:-

"12. The first issue to be considered is whether the petitioner, in his capacity as Chairman of MISL, could be prosecuted for an IPC offence in the absence of the company MISL being prosecuted. A perusal of the order dated 7th February 2005 passed by the learned MM shows that although the court was satisfied that there was sufficient ground to proceed under Section [120B](#) read with Section [420](#) IPC against the MISL, J.K. Singh Chairman, Ms. Rita Singh, MD and I.B. Singh DGM, process was issued only to J.K. Singh, Rita Singh and I.B. Singh. In other

words, not only was MISL not named as an accused in the charge sheet filed by the CBI, but even process was not issued to it by the learned MM. For all purposes therefore MISL itself is not being prosecuted as an accused in the case.

13. The offence with which the Petitioner is charged is under Section 120B read with Section 420 IPC and he has been roped in as an accused in his capacity as Chairman of MISL, without MISL itself being named as an accused. In a recent judgment in R. Kalyani v. Janak C. Mehta 2008 XII AD (SC) 277 the Supreme Court has observed thus:

27. If a person, thus, has to be proceeded with as being variously liable for the acts of the company, the company must be made an accused. In any event, it would be a fair thing to do so, as legal fiction is raised both against the Company as well as the person responsible for the acts of the Company. Earlier in S.K. Alagh v. State of U.P. 2008 (II) SCC (CrI) 686 the Court reiterated this aspect when it held, in the context of an IPC offence, that a Director of a Company or an employee cannot be held to be vicariously liable for any offence committed by the Company itself. Further in Maksud Saiyed it was explained that: The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the company when the accused is the company.

14. In the case on hand, it requires to be noticed that the Petitioner is sought to be roped in only in his capacity as Chairman, MISL and not even as a Director. Without going into the question whether under the Companies Act, 1956 any liability attaches to a Chairman, it requires to be noted that MISL has in any event not been arraigned as an accused. On the strength of the law explained by the Supreme Court in Maksud Saiyed, S.K. Alagh and R. Kalyani it is held that in the absence of MISL being itself named as an accused, and where the offences are only under the IPC, the Petitioner, in his capacity as Chairman of MISL cannot be sought to be roped in as an accused.

12. It is trite that a penal statute has to receive strict construction. So far as the vicarious liability is concerned, the Apex Court has laid down the applicable principles authoritatively in the pronouncement reported at **2009(1) JCC 576 R. Kalyani Vs. Janak C. Mehta**, the Apex Court held thus:-

“Allegations contained in the FIR are for commission of offences under a general statute. A vicarious liability can be fastened only by reason of a provision of a statute and not otherwise. For the said purpose, a legal fiction has to be created. Even under a special statute when the vicarious criminal liability is fastened on a person on the premise that he was in-charge of the affairs of the company and responsible to it, all the ingredients laid down under the statute must be fulfilled. A legal fiction must be confined to the object and purport for which it has been created.

In *Sham Sunder and Ors. v. State of Haryana* (1989) 4 SCC 630, this Court held:

9. But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do business or not.

Yet again, in *Radhey Shyam Khemka and Anr. v. State of Bihar* [MANU/SC/0896/1993](#), the law has been laid down by this Court, thus:

6. But, at the same time, while taking cognizance of alleged offences in connection with the registration, issuance of prospectus, collection of moneys from the investors and the misappropriation of the fund collected from the share-holders which constitute one offence or other under the Penal Code, court must be satisfied that prima facie an offence under the Penal Code has been disclosed on the materials produced before the court. If the screening

on this question is not done properly at the stage of initiation of the criminal proceeding, in many cases, some disgruntled share-holders may launch prosecutions against the promoters, directors and those in charge of the management of the company concerned and can paralyse the functioning of such company. It need not be impressed that for prosecution for offences under the Penal Code the complainant has to make out a prima facie case against the individuals concerned, regarding their acts and omissions which constitute the different ingredients of the offences under the Penal Code. It cannot be overlooked that there is a basic difference between the offences under the Penal Code and acts and omissions which have been made punishable under different Acts and statutes which are in nature of social welfare legislations. For framing charges in respect of those acts and omissions, in many cases, mens rea is not an essential ingredient; the concerned statute imposes a duty on those who are in charge of the management, to follow the statutory provisions and once there is a breach or contravention, such persons become liable to be punished. But for framing a charge for an offence under the Penal Code, the traditional rule of existence of mens rea is to be followed.

In *Hira Lal Hari Lal Bhagwati v. CBI, New Delhi* [MANU/SC/0371/2003](#), it has been held:

32. Likewise the ingredients of Section [420](#) of the Indian Penal Code are also not made out. There is no reason as to why the appellants must be made to undergo the agony of a criminal trial as has been held by this Court in the case of *G. Sagar Suri and Anr. v. State of U.P. and Ors.* [MANU/SC/0045/2000](#). In this, this Court held that.

Jurisdiction under Section [482](#) of the Code has to be exercised with great care. In exercise of its jurisdiction the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of

criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused, it is a serious matter.

39. It is settled law, by catena of decisions, that for establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise of representation. From his failure to keep up promise subsequently, such a culpable intention right at the beginning that is at the time when the promise was made cannot be presumed.

See also *Vir Prakash Sharma v. Anil Kumar Agarwal and Anr.* (2007) 7 SCC 373.”

13. The Apex court has placed reliance on other judicial pronouncements as well.

14. Applying the principles laid down in the afore-noticed judicial pronouncements to the instant case, there can be no manner of doubt that the prosecution has been unable to make out a case of entrustment of the vehicle or parts in question to the present petitioners. Even as per the chargesheet, they have been implicated for the reason that they are employees of the company.

15. The correspondence relied upon by the prosecution would show that the battery has been removed by the company. There is no allegation that the petitioners are responsible for the same or are holding the same.

16. A dishonest user or disposition of entrusted property is an essential ingredient which is required to be satisfied in order to attract culpability of an offences of criminal breach of trust under Section 406

of the Indian Penal Code. Section 24 IPC which defines “dishonesty” requires that something must be done with the intention of causing wrongful gain to one person and wrongful loss to another person. The expression “fraudulently” as defined under Section 25 of the Indian Penal Code is something done with the intent to defraud but not otherwise. According to the case set up by the prosecution, the battery was removed in order to recover the dues of the very battery which was supplied by the company. There is nothing to show that the petitioners in the instant case had dishonest or fraudulent intention to make any dishonest gain.

17. I also find substance in the contention of learned counsel for the petitioner that having regard to the dispute with regard to the payment of battery, the matter was clearly in the realm of civil dispute and had no nuance of criminality.

18. In view of the foregoing discussion, it has to be held that no charge under Section 406 or 34 IPC could have been made out against the accused persons.

19. Learned APP for the State has placed reliance on the pronouncement of the Apex Court in **(2004) 1 SCC 525 State of Maharashtra Vs. Salman Salim Khan & Anr.** Reading of this judgment would show that there is no absolute prohibition laid down by the Apex Court to High Court entertaining a petition under Section 482 of the Criminal Procedure Code to quash charges framed by the trial court. The High Court is required to bear the character or

sufficiency of the evidence before the trial court while considering such a petition.

20. The material placed before the trial court has been examined in the context of the applicable legal principles. In view of the foregoing discussion, it has to be held that no charge under Section 406 or 34 IPC could have been made out against the accused persons.

In view of the above, the order dated 4th March, 2009 directing framing of charges on the same date is hereby set aside and quashed.

July 31, 2009
aa

Gita Mittal, J.