

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: October 31, 2013
Judgment Pronounced on: November 18, 2013

+ **CRL.M.C.2598/2012 & Crl.M.A.13279/2012**

URRSHILA KERKAR

.....Petitioner

Through: Mr. Neeraj Kishan Kaul, Sr.
Advocate with Mr. Madhav
Khurana, Mr. Kapil Rustogi, Mr.
Sariyat Lodha, Ms. Shilpa Nair and
Ms. Aakaulesh Kaul, Advocates
Advocates

versus

MAKE MY TRIP (INDIA) PRIVATE LTD.

....Respondent

Through: Ms. Nitya Ramakrishnan, Mr.
Rajender Kumar and Mr. B.J.
Shankar, Advocates

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

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JUDGMENT

1. In criminal complaint No.1015/2010 titled *Make My Trip (India) Private Ltd. v. Ezeego One Travel & Tours Ltd. (Annexure P-1 Colly.)*, petitioner has been summoned vide impugned order of 5th May, 2011 (*Annexure P-2*) for the offence of defamation in the capacity of her being the Director of both the respondent-accused companies. Quashing of aforesaid complaint (*Annexure P-1 colly.*) and impugned order (*Annexure P-2*) is sought on merits in this petition.

2. At the hearing, learned counsel for petitioner had placed reliance upon decisions in *Anil D. Ambani & Anr. v. State of Bihar & Anr.* 2006

(4) PLJR 571; *S.A. Khan v. Union of India* Manu/TN/4165/2011; *Maksud Saiyed v. State of Gujarat and Others* (2008) 5 SCC 668; *R.C. Gupta & Ors. v. State & Anr.* MANU/DE/0239/2008; *Ashok Sikka v. State* 147 (2008) DLT 552; *Vineet Jain v. NCT of Delhi & Ors.* in Crl.M.C.2704/07 rendered on 10th October, 2011; *Dr. P.Sharma v. P.S. Popli & Anr.* 94 (20001) DLT 913; *Savera Sidhu v. Harleen Sidhu & Anr.* 2010 Law Suit (P&H) 4442; *GHCL Employees Stock Option Trust v. India Infoline Limited* (2013) 4 SCC 505 and *Raymond Ltd. & Ors. v. Rameshwar Das Dwarkadas P. Ltd.* 2013 [2] JCC 1227 to contend that it is not the case of respondent that alleged defamatory articles were got published by petitioner nor had contained any statement made by petitioner and so, no offence is made out against petitioner. It was vehemently urged that vicarious liability cannot be fastened upon petitioner as no specific role or overt act has been attributed to petitioner and so, petitioner cannot be prosecuted by virtue of being Director of accused companies.

3. It was pointed out by learned counsel for petitioner that petitioner has not been nominated in terms of Section 305 of Cr.P.C. and a person so nominated can alone be prosecuted and trial court has gravely erred in not taking notice of this vital aspect. Lastly, it was submitted that summoning of an accused for a criminal offence is a serious matter and trial court without applying its mind has summoned petitioner, which is an abuse of process of the court, and so, impugned order as well as the complaint in question deserves to be quashed.

4. To the contrary is the submission of learned counsel for respondent, who had relied upon Apex Court decision in *Swil Ltd. V.*

State of Delhi & Anr. (2001) 6 SCC 670 to contend that cognizance is taken of the offence and not of the offender. It was asserted by learned counsel for respondent that Section 305 of Cr.P.C. merely enables a company to be represented by a nominee and it does not bar summoning of a principal officer of accused company. It was pointed out that respondent's application under Section 91 of Cr.P.C. to admit evidence against petitioner is pending and no reply to it has been filed by petitioner and that impugned order discloses due application of mind and is a reasoned order. Thus, it was submitted that no case is made out by petitioner for invoking inherent jurisdiction of this Court and so, this petition deserves rejection.

5. After having heard both the sides and on perusal of the criminal complaint (*Annexure P-1 colly*) and the impugned order (*Annexure P-2*), the material on record and the decisions cited, it becomes evident that upon bare reading of complaint (*Annexure P-1 colly*), it cannot be said that no case for summoning respondent-accused companies is made out and at the stage of framing of Notice under Section 251 of Cr.P.C. only, it is required to be seen as to whether a prima facie case to continue the proceedings is made out or not. The relevant averment in paragraph No.2 of the complaint (*Annexure P-1 colly*) *qua* petitioner deserves to be taken note of and it reads as under: -

"The companies which are accused nos 1&2 are prosecuted as body corporate and are prosecuted through a common principal officer accused no.3 responsible for the conduct of its affairs and/or any person nominated by them for the purposes of Section 305 CrPC."

6. Upon being summoned as an accused in this complaint case, whom to nominate for the purpose of Section 305 of Cr.P.C. is an option which has to be exercised by respondent-accused companies and so, on this ground, complaint in question and the impugned summoning order cannot be quashed as cognizance is taken of the offence and not of the offender. In the absence of respondent accused companies not exercising their option under Section 305 of Cr.P.C., their prosecution through petitioner cannot be faulted with. In any case, the appropriate stage at which these aspects are required to be considered is the stage of framing of Notice under Section 251 of Cr.P.C. Such a view is taken as trial court is not expected to mechanically frame Notice under Section 251 of Cr.P.C. and has to apply its mind to find out as to whether a prima facie case is made out or not and in the event of finding that no case is made out for proceeding against a particular accused, trial court would be well within its right to drop the proceedings *qua* such an accused.

7. On this aspect, pertinent observations of Apex Court in *Bhushan Kumar & Anr. Vs. State (NCT of Delhi) & Anr.* AIR 2012 SC 1747 are as under:-

"17. It is inherent in Section 251 of the Code that when an accused appears before the trial Court pursuant to summons issued under Section 204 of the Code in a summons trial case, it is the bounden duty of the trial Court to carefully go through the allegations made in the charge-sheet or complaint and consider the evidence to come to a conclusion whether or not, commission of any offence is disclosed and if the answer is in the affirmative, the Magistrate shall explain the substance of the accusation to the accusation to the accused and ask him whether he pleads

guilty otherwise, he is bound to discharge the accused as per Section 239 of the Code."

8. Further, on this aspect, the dictum of the Apex Court in *Krishan Kumar Variar v. Share Shoppe* (2010) 12 SCC is as under:-

"4. In our opinion, in such cases where the accused or any other person raises an objection that the trial court has no jurisdiction in the matter, the said person should file an application before the trial court making this averment and giving the relevant facts. Whether a court has jurisdiction to try/entertain a case will, at least in part, depend upon the facts of the case. Hence, instead of rushing to the higher court against the summoning order, the person concerned should approach the trial court with a suitable application for this purpose and the trial court should after hearing both the sides and recording evidence, if necessary, decide the question of jurisdiction before proceeding further with the case.

5. For the reasons stated hereinabove, the impugned judgment and order is set aside and the appeal is allowed. The appellant, if so advised, may approach the trial court with a suitable application in this connection and, if such an application is filed, the trial court shall after hearing both the sides and after recording evidence on the question on jurisdiction, shall decide the question of jurisdiction before further proceeding with the trial."

9. It is no doubt true that Apex Court in *Adalat Prasad Vs. Rooplal Jindal and Ors.* (2004) 7 SCC 338 has ruled that there cannot be recalling of summoning order, but seen in the backdrop of decisions of Apex Court in *Bhushan Kumar and Krishan Kumar (supra)*, aforesaid

decision cannot be misconstrued to mean that once summoning order has been issued, then trial must follow. If it was to be so, then what is the purpose of hearing accused at the stage of framing Notice under Section 251 of Cr.P.C. In the considered opinion of this Court, Apex Court's decision in *Adalat Prasad (supra)* cannot possibly be misread to mean that proceedings in a summons complaint case cannot be dropped against an accused at the stage of framing of Notice under Section 251 of Cr.P.C. even if a prima facie case is not made out.

10. In the aforesaid view, this petition and the application are disposed of without commenting upon the merits of this case and with liberty to petitioner to urge the pleas taken herein before the trial court. Needless to say, the pleas raised by petitioner at the hearing on the point of Notice under Section 251 of Cr.P.C. shall be dealt with by the trial court by passing a reasoned order so that petitioner may avail of the remedies available in law, if need be. Since the plea pertaining to Section 305 of Cr.P.C. goes to the root of this matter, therefore, till the hearing on the point of Notice under Section 251 of Cr.P.C. is concluded by the trial court, personal appearance of petitioner before the trial court is dispensed with provided petitioner is duly represented by counsel, who does not seek adjournment.

(SUNIL GAUR)
JUDGE

NOVEMBER 18, 2013

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