IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.40331 of 2012

Arising Out of PS.Case No. -3109 Year- 2010 Thana -null District- PATNA

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Subhash Chand Aggarwal, Managing Director, M/S SMC Global Securities Ltd. at-17, Netaji Subhash Marg, Daryaganj, Delhi – 110002

2.Mahesh Chand Gupta (Vice Chairman), M/s SMC Global Securities Ltd. at-17, Netaji Subhash Marg, Daryaganj, Delhi – 110002

.... Petitioner/s

Versus

1.State of Bihar

2.Anup Kumar Surekha son of Sh. Ashok Kumar Surekha, M/S Dropati Sales near LIC Building, Dak Bunglow Chowraha, Tariq Manzil, P.S.-Kotwali, District-Patna. Permanent resident of Main Road Alam Nagar, District- Madhepura, State-Bihar

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Priyadarshi Matni Sharan, Advocate
Mr. Santosh Kumar, Advocate

For the Opposite Party/s : None

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 17-04-2015

Heard learned counsel for the petitioners. On repeated calls, neither the counsel for the State nor the counsel for opposite party no.2 has appeared to contest the matter.

2. This application under section 482 of the Code of Criminal Procedure has been filed for quashing the order dated 22.11.2011 passed by the learned Judicial Magistrate, 1st Class, Patna in Complaint Case No.3109(C) of 2010 by which the learned Magistrate has taken cognizance of the offence punishable under sections 403, 406, 420 and 120B of the Indian Penal Code.

3. The aforesaid complaint case was instituted on the basis of a written complaint filed by the opposite party no.2 Anup Kumar Surekha in the court of Chief Judicial Magistrate, Patna on 18th November, 2010. According to the complainant, the petitioner no.1 Subhash Chand Agarwal and the petitioner no.2 Mahesh Chand Gupta were the Managing Director and Vice Chancellor respectively of the company namely, M/s SMC Global Securities Limited (hereinafter referred to as "Company No.1"). They along with three other office bearers of the Company No.1 entered into a criminal conspiracy with each other in order to cause financial loss to the complainant and several other investors and earn corresponding gain for themselves and the company no.1. In furtherance of their common object they approached the complainant at M/s Dropati Sales near LIC Building, Dak Bunglow Chauraha, Patna and also at Alam Nagar, Madhepura and highlighted the investment schemes of the Company No.1. They assured the complainant that he would earn 24% interest on deposit made with Company No.1. The complainant has further alleged that relying on the assurance given by the accused persons including the two petitioners, the complainant invested Rs.5,10,000/- in fixed deposit assured scheme in the name of his father Ashok Kumar Surekha and paid the amount by bank draft and NEFT in favour of the Company No.1 and one SMC Comtrade Limited (hereinafter referred to as "Company No.2"). The accused persons took signature of the father of the complainant on several forms of the two companies mentioned hereinabove and accepted the bank draft and NEFT made in their favour. They encashed the said amount but despite repeated requests made by the complainant, the accused persons refused to return the amount invested in the two Companies. They also failed to pay any interest even on deposited amount as promised at the time of entering into the agreement. The complainant sent registered legal notice dated 19.10.2010 to the accused persons in this regard but they did not respond to the notice given to them. The complainant has alleged that the accused persons have deliberately misappropriated the invested amount of Rs.5,10,000/- of the complainant's father.

4. In support of the complaint, the complainant made statement on oath and produced two witnesses, namely, Shanker Kumar Surekha and Anuj Kumar Surekha, who were examined in course of enquiry conducted under section 202 of the Code of Criminal Procedure. The learned Judicial Magistrate, Ist Class, Patna having perused the evidence and material available on the record found a prima facie case under sections 403, 406, 420 and 120B of the Indian Penal Code against all the five accused persons named in the complaint and accordingly, summoned them to face trial vide order dated 22.11. 2011. The aforesaid order dated 22.11.2011 is under challenge in the present application.

5. Learned counsel for the petitioners has contended that the learned Magistrate has issued process against the petitioners in the most mechanical manner and without judicial application of mind. According to him, the learned Magistrate failed to appreciate the fact that there was no specific or general allegation made against these two petitioners in the entire complaint filed by the complainant. He further submits that the allegations made in the complaint, even if they are taken on its face value and accepted in its entirety, do not constitute any offence or make out a case against the petitioners. The learned Magistrate has failed to appreciate that the Company No.1 and the Company No.2 are two different companies and separate legal entities and are run by different directors/office bearers. The liabilities of the directors/office bearers of one company cannot be fastened on the directors/office bearers of the other company. In the present complaint, the complainant has intentionally and willfully presented the name of the two companies as single entity in the complaint and succeeded in misleading the learned Magistrate. He has submitted that the complainant himself is not an aggrieved party, as according to the complainant, the entire investment with the two companies was made by his father Ashok Kumar Surekha, who has neither filed the complaint nor has he been examined by the complainant in course of enquiry conducted under Section 202 of the Code of Criminal

Procedure. Learned counsel for the petitioners has further contended that, as a matter of fact, the complainant's father had entered into an agreement with the Company No.2, a company incorporated under the Indian Companies Act, 1956, for availing trading facilities through it in commodity market as the Company No.2 is a broking company and member of Multi-commodity Exchange (MCX) and National Commodity and Derivative Exchange (NCDEX) and engaged in the business of rendering trading facilities in commodity to its client. The complainant's father Mr.Ashok Kumar Surekha had approached Company No.2 and expressed willingness to avail trading facilities through the company and after submitting and executing all the requisite documents entered into a written agreement with Company No.2 on 24.6.2010. After entering into an agreement, the father of the complainant was issued a Unique Client Code- CVB0036 by the company no.2 for availing trading facilities in commodity market and, accordingly, he started trading through Company no.2 thereafter. The father of the complainant lastly traded with Company No.2 on 12.10.2010 and thereafter stopped trading as he lost a lot of money in commodity trading due to his greed and want of knowledge of the commodity market. Thereafter, the complainant started making false allegation against the two companies mentioned hereinabove and has been trying to make his losses good by way of filing one or the other complaint implicating the Managing Director and the other officers of the Company No.1

6. Learned counsel for the petitioners has further argued that the entire deposit was made by the petitioners in favour of Company No.2 and no payment was ever made in favour of the accused persons including the two petitioners in their personal capacity. Hence, the offence, if any, was committed by the Company No.2 and not by the Company No.1 or its Managing Director or officers. He has submitted that in absence of the Company No.2 having been made accused, the Managing Director or the office bearers of Company No.1 could not have been prosecuted.

7. In support of his submission, the learned counsel for the petitioners relied upon decisions of the Hon'ble Supreme Court in **R. Kalyani *vs.* Janak C. Mehta and others** reported in **2009(1) SCC 516** and **S.K. Alagh *vs.* State of Uttar Pradesh and others** reported in **2008 (5) SCC 662.**

8. As noted above, despite valid service of notice neither the counsel for the State nor the counsel for opposite party no.2 has appeared to contest the matter.

9. I have heard learned counsel for the petitioners and perused the record. I find force in the submissions made by the learned counsel for the petitioners. The complainant has filed a vague complaint as the entire complaint is completely silent with respct to the role of the petitioners, who were made accused nos.1 and 2 in the complaint only because of being the Managing Director and Vice Chairman of the Company No.1 whereas, neither the Company No.1 nor the Company No.2 has made party in the complaint nor cognizance was taken against them. The complainant has made averments in the complaint by taking the name of the two companies as if both the companies are one and the same, whereas they are separate legal entities in the eye of law. Learned counsel for the petitioners is right in his submission that the liabilities of one company cannot be fastened on the other company. Both the companies in question have been incorporated under the Indian Companies Act, 1956. They are juristic persons having right to sue with a liability to be sued. The admitted case of the complainant is that the amount in question was neither entrusted to the petitioners in their personal capacity nor in the capacity of the Managing Director or the Vice Chairman of the Company No.1.

10. In **R. Kalyani *vs.* Janak C. Mehta** case (supra) the Hon'ble Supreme Court in paragraph 41 has held as under:-

> *"41. 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,"*

11. In **S.K.Alagh vs. State of Uttar Pradesh and others** (supra) the Hon'ble Supreme Court in paragraph 19 held as under:-

> *"19. As, admittedly, drafts were drawn in the name of the Company, even if the appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Penal Code. If and when a statute contemplates creation of such 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."*

12. Taking into consideration the ratio of the aforesaid two decisions of the Hon'ble Supreme Court, I am of the considered opinion that in absence of the company having been made accused, the petitioners could not have been held to be vicariously liable for any offence committed by the Company No.1 or Company No.2.

13. I further find force in the submission made by the learned counsel for the petitioners that the complainant had no locus to file the complaint as there was no transaction done by him and the same was admittedly done by his father namely, Ashok Kumar

Surekha, who made the alleged transaction, prepared drafts or done the NEFT for payment to the Company No.2. I find from the complaint that though Ashok Kumar Surekha was cited as a witness to the complainant but he was not produced as a witness in course of enquiry conducted under Section 202 of the Code of Criminal Procedure.

14. Regard being had to the facts and circumstances of the present case and the law laid down by the Hon'ble Supreme Court in R. Kalyani (supra) and S.K.Alagh (supra) the impugned order dated 22.11.2011 passed by the learned Judicial Magistrate, 1st Class, Patna cannot be upheld.

15. Accordingly, the order dated 22.11.2011 passed in Complaint Case No.3109(C) of 2010 and the entire criminal prosecution of the aforesaid complaint case are hereby quashed. The application stands allowed.

(Ashwani Kumar Singh, J)

Md.S./-

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