

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.23245 of 2014

Arising Out of PS.Case No. -112 Year- 2012 Thana -DHURAIYA District- BANKA

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Rajeev Kumar Son of Shri Nawal Kishore Singh, Field Officer, Collection Magma Fincorp Limited Badi Post Office, P.S. - Bhagalpur Town, District - Bhagalpur.

.... Petitioner/s

Versus

1. The State of Bihar
2. Md. Idris Son of Sheakh Mohammad At.- Vill. Tahirpur, P.O. - Nanhanpur, P.S. - Dhoriya, Banka, Bihar.

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Amresh Kumar Sinha, Adv.
For the Opposite Party No.1: Dr. Indivar Kumari, APP
For the Opposite Party No.2: Mr. Satish Chandra Mishra, Adv.
Mr. Md. Nurul Haque, Adv.

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CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
ORAL JUDGMENT
Date: 26-07-2017

The present matter arises out of a Complaint bearing Complaint Case No.1631 of 2011 filed by the Opposite Party No.2 before the learned Chief Judicial Magistrate, Banka, inter alia, alleging therein that the Complainant (Opposite Party No.2) received a legal notice on 18.07.2011 from an Advocate of the Patna High Court, wherein it was stated that the complainant had got a tractor financed from Bhagalpur Branch of Magma Fincorp Limited, as such the Opposite Party No.2 should pay the monthly instalment, failing which appropriate legal action would be taken. It has been further alleged that the Opposite Party No.2 had replied to the said legal



notice, but again he received another legal notice, whereafter the Opposite Party No.2 started collecting information with regard to the actual facts. During the course of enquiry by the Opposite Party No.2, he is said to have gone to the office of the said company and met the Branch Manager and the Field Officer of the said Company at Bhagalpur where the said persons had abused him. It has also been alleged that during the course of enquiry by the Opposite Party No.2, it transpired that the vehicle has been taken by the accused No.1, who lives in Jharkhand and all the accused persons had conspired to cause loss to the Opposite Party No.2.

2. On the basis of the said complaint dated 18.06.2012, the learned trial court directed the police to register FIR and conduct investigation, leading to registration of Banka Doraiya P.S. Case No. 112 of 2012 for the offence punishable under Sections 420, 407, 467, 468, 471, 120(B), 504 and 323/34 of the Indian Penal Code.

3. The learned Trial court by an order dated 28.02.2014, pursuant to the filing of the charge sheet by the police, has taken cognizance of the offences punishable under Sections 465, 467, 468, 471 and 120(B) of the Indian Penal Code against the petitioner herein and other accused persons. The aforesaid order dated 28.02.2014 passed by the learned Chief Judicial Magistrate, Banka in Doraiya P.S. Case No. 112 of 2012 is under challenge in the present petition.



4. The learned counsel for the petitioner has submitted that the petitioner herein, who has been arrayed as accused No.4 in the complaint petition, has been described as executive of the company in the said complaint petition. It is further stated that the petitioner is working as a field staff and his job is to collect the monthly instalment from the customers of the company and he has got nothing to do with the disbursement of the loan. It has been further argued that a bare perusal of the complaint petition would show that no allegation has been levelled against the petitioner. It has been argued that the necessary ingredients for constituting the offence under Sections 420, 407, 467, 468, 471, 120(B), 504 and 323/34 of the Indian Penal Code are lacking. It has also been contended by the learned counsel for the petitioner that the entire dispute, at best, can be said to be a dispute of civil nature, hence, the criminal prosecution of the petitioner herein is malafide. The learned counsel has also referred to the judgments reported in **(2008) 5 SCC 662 [S.K.Alagh.vs. State of U.P].** and **(2012)3 PLJR 817 [Sutapa Chakroborty & Ors. vs. State of Bihar & Anr.]**, to contend that vicarious liability of the company cannot be fastened on the petitioner herein strictly in absence of the company having not been made an accused.

5. The learned counsel for the Opposite Party No. 2 has vehemently opposed the prayer made in the present petition and has



submitted that the petitioner herein is also one of the conspirator in the entire occurrence and a well thought conspiracy has been hatched to defraud the complainant.

6. I have gone through the materials available on record and considered the arguments advanced by the learned counsel for the petitioner as also the learned counsel for the opposite party No.2.

7. A bare perusal of the complaint petition would firstly show that there is no iota of allegation against the petitioner herein, nonetheless, surprisingly he has been arrayed as an accused in the complaint petition. In fact, no role has been assigned to the petitioner herein for launching the connected criminal prosecution against him at the behest of the opposite party no.2.

8. I find from a bare perusal of the complaint petition that, as far as the petitioner is concerned, the allegations made therein, even if they are taken on their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the petitioner herein as well as the said allegations do not constitute cognizable offence, hence, continuance of the connected criminal proceedings against the petitioner herein would be an abuse of the process of the court. In this regard, reference be had to a judgment reported in **1992 Supp (1) SCC 335 [State of Haryana v. Bhajan Lal]**.



9. Another aspect of the matter is that the allegations levelled in the complaint petition are purely in the nature of a civil dispute and the petitioner could have well taken recourse to a civil proceeding. In this connection reference be had to a case reported in **(2006) 6 SCC 736 (Indian Oil Corporation v. NEPC India Ltd.)** as also to a case reported in “**Joseph Salvaraja v. State of Gujarat and others**, reported in **(2011) 3 SCC (Crl.) 23**. It may be appropriate to quote relevant paragraphs of the said judgment reported in (2011)3 SCC (Crl.) 23 as under:-

“In our opinion, the matter appears to be purely civil in nature. There appears to be no cheating or a dishonest inducement for the delivery of property or breach of trust by the appellant. The present FIR is an abuse of process of law. The purely civil dispute, is sought to be given a colour of a criminal offence to wreak vengeance against the appellant. It does not meet the strict standard of proof required to sustain a criminal accusation. In such type of cases, it is necessary to draw a distinction between civil wrong and criminal wrong as has been succinctly held by this Court in *Devendra v. State of U.P.*, (2009) 7 SCC 495, in which, it was held (para-27) that a distinction must be made between a civil wrong and a criminal wrong. When dispute between the parties constitute only a civil wrong and not a criminal wrong, the courts would not permit a person to be harassed although no case for taking cognizance of the offence has been made out.”

10. Yet another aspect of the matter is that the company in question has not been made a party wherein admittedly, the legal notice has been sent on behalf of the aforesaid company, hence, the



petitioner herein cannot be made vicariously liable. In this connection, the learned counsel for the petitioner has referred paragraphs No. 13, 14, and 16 to 20 of the judgment reported in **(2008) 5 SCC 662 [S.K.Alagh.vs. State of U.P.]** The aforesaid paragraphs of the judgment in the case of **S.K. Alagh vs. State of U.P.** (supra) are re-produced herein below:-

“13. Section 405 defines “criminal breach of trust” to mean:

“405. *Criminal breach of trust.*—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits ‘criminal breach of trust’.”

14. Appellant 1 is the Managing Director of the Company. Respondent 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.

16. The 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.

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

18. 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 wilfully 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.”

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 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 v. R.B.S. Channabasavaradhya*¹.)

20. We may, in this regard, notice that the provisions of the Essential Commodities Act, the Negotiable Instruments Act, the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, etc. have created such vicarious liability. It is interesting to note that Section 14-A 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 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 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*².)”



II. The learned counsel for the petitioner has further averred to a judgment of this Court reported in **(2012)3 SCC 817 [Sutapa Chakroborty & Ors. vs. State of Bihar & Anr.]**, paragraphs no. 27 to 31 of the judgment in the case of **Sutapa Chakroborty** (supra) are quoted herein below:

“27. Now I shall examine as to whether the petitioners can be held vicariously liable for the aforesaid offence. As noted above, learned counsel for the petitioners has submitted that Rs. 2 lakhs was never entrusted to the petitioners either in their personal capacity or in the capacity of the office bearers of the company. The security deposit was deposited in the account of the company. In fairness of the matter, I may point out that learned counsel for opposite party No. 2 though admits that the security deposit was deposited in the account of the company but according to him petitioner nos. 1 and 2 are none else but owners and beneficiaries of the company and their status in the company is not of an employee but they are employers. So far as petitioner no. 3 is concerned, it has been contended that he too is an active sleeping partner of the company. He has also drawn my attention to the agreement dated 15.4.2004 made between the parties which has been brought on record by the petitioners as Annexure-5 to the petition and in that agreement, petitioner no. 1 has signed in the capacity of Managing Director.

28. Having noticed the aforesaid submissions, first of all, I would like to say that in case of company registered under the Companies Act, there is no concept of partnership or ownership as an incorporated company is limited by shares. There may be a Board of Directors and the Directors from amongst themselves may appoint some one as Managing Director but simply because some one acts as Managing Director of the Company he cannot be made vicariously liable for any offence by the company.



29. In *R. Kalyani vs. Janak C. Mehta* since reported in (2009)1 SCC 516 the Apex 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 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”.

30. In *S.K. Alagh vs. State of U.P.* since reported in (2008)5 SCC 662 in paragraph 19 the Apex Court 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 conflates creation of such a legal fiction, it provides, specifically therefore. 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.”

31. Taking into consideration the aforesaid decisions of the Apex Court, the prosecution of the petitioners being vicariously liable for the acts of the company cannot be justified”.

12. Apart from the fact that no prima facie case is made out against the petitioner herein in respect of the offence under Section 465, 467, 468, 471 and 120(B) of the Indian Penal Code, I further find that absolutely no reason whatsoever has been assigned by the learned Chief Judicial Magistrate, Banka for passing the cognizance order dated 28.02.2014 and the same does not reflect any



application of mind.

13. For the reasons stated herein above, the instant application is allowed, the order taking cognizance dated 28.02.2014 passed by the learned Chief Judicial Magistrate, Banka in Doraiya P.S. Case No. 112 of 2012, in so far as the same pertains to the petitioner herein, is set aside along with the criminal proceedings emanating therefrom.

14. There shall be no order as to cost.

(Mohit Kumar Shah, J)

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