IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.18554 of 2014

Arising out of P.S. Case No.2014 Year 2012 Thana BEGUSARAI COMPLAINT CSAE District BEGUSARAI

==

1. Gora Chand Basu (since dead), son of Late Payodhi Nath Basu, resident of Flat No. 54, Pocket-B, Sukhdeo Vihar, P.O. & P.S. New Friends Colony, New Delhi, India
2. Rajendra Prasad, son of Late Punyadeo Ojha, resident of Palam, P.O. Palam, P.S. Sagarpur, Town Nasirpur, Delhi, India

.... Petitioners

Versus

1. The State of Bihar
2. Shankar Singh, son of late Tilo Singh, resident of village Sabaour, P.O. IOCL Barauni Refinery, P.S. Barauni, District Begusarai, Bihar

.... Opposite Parties

==

Appearance :

For the Petitioners	:	Mr. Jitendra Singh, Senior Advocate Mr. Piyush Lall, Advocate
For the State	:	Mr. Navin Kumar Pandey, APP
For O.P. No.2	:	Mr. Sandeep Kumar Gautam, Advocate

==

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR

ORAL JUDGMENT

Date: 31-07-2017

Heard learned counsel for the parties.

2. At the very outset it is pointed out that petitioner no.1 is dead, by way of filing supplementary affidavit, the death certificate of petitioner no.1 has been brought on record. Now petitioner no.2, namely, Rajendra Prasad is the only petitioner in this case.

3. The petitioners have filed this application under Section 482 Cr.P.C., 1973 challenging order dated 22.01.2013, passed by learned Judicial Magistrate, 1st Class, Begusarai in Complaint Case No.2014C of 2012 whereby he has taken cognizance of the offence under Sections 406 and 418 read with Section 34 of IPC.

4. The material fact in brief as stated in the complaint is that being a private contactor, he had got a work from Punj Llyod Limited through M/s Venus Erectors in MSQU Project in Barauni Refinery for doing piping, fabrication and erection work. He completed the work and the total cost of assigned work is Rs.40,00,000/-. He submitted the bill on 2.05.2010 with a copy to M/s Venus Erectors but the payment was not made. The complainant sent notices to the Company.

5. It is submitted by learned counsel for the petitioners that the Company Punj Llyod Limited had no contract of any kind with the complainant rather there was an agreement with M/s Venus Erectors for completing the laying of pipeline and fabrication works in Barauni Refinery. This fact is evident from letter dated 19.06.2010 written by the complainant (Annexure-8) stating therein that he had got the fabrication and erection work as a Contractor of M/s Venus Erectors and the Punj Llyod Limited Company has paid the total amount to M/s Venus Erectors so there is no liability with the Company to pay any amount to him. If any liability exists that exists to M/s Venus Erectors. Second contention is that petitioner no.2 Rajendra Prasad was the Senior General Manager of Punj Llyod Limited and at the relevant point of time working in the capacity of Resident Construction Manager as well as Project Incharge. He was

not even the Managing Director of the Company. In fact Punj Llyod Limited is a private company under the Companies Act, 1956 having its headquarters situated at New Delhi. Even the company Punj Llyod Limited was not made party by the complainant and has submitted that the petitioner was General Manager and there cannot be any vicarious liability fastened to the General Manager of the Company. In that connection he has placed reliance on a decision of *Shankha Banerjee Vs. The State of Bihar & Anr.*, passed in *Cr. Misc. No.17791 of 2011* by a coordinate Bench of this Court. He submits that various earlier decisions of the Apex Court was considered in this judgment and in that connection refers the case of *Aneeta Hada v. Godfather Travels and Tours (P) Ltd., (2008) 13 SCC 703* wherein it is held that the prosecution of the Company is a *sine qua non* for the prosecution of the Director or other officers of the Company. Paragraphs 51 and 54 of the said judgment read as follows:

> *"51. I have no doubt whatsoever in our mind that prosecution of the Company is a sine qua non for prosecution of the other persons who fall within the second and third categories of the candidates viz. everyone who was in charge and was responsible for the business of the company and any other person who was a Director or Managing Director or Secretary or officer of the company with whose connivance or due to whose neglect the company had committed the offence.*
>
> *54. True interpretation, in my opinion, of the said provision would be that a company has to be made an accused but applying the principle of lex non cogit ad impossibilia i.e. if for*

some legal snag, the company cannot be proceeded against without obtaining sanction of a court of law or other authority, the trial as against the other accused may be proceeded against if the ingredients of Section 138 as also Section 141 are otherwise fulfilled. In such an event, it would not be a case where the company had not been made an accused but would be one where the company cannot be proceeded against due to existence of a legal bar. A distinction must be borne in mind between cases where a company had not been made an accused and the one where despite making it an accused, it cannot be proceeded against because of a legal bar."

6. Since there was a difference of opinion in *Aneeta Hada* case (supra), the matter was referred to three-Judge bench which is reported in *(2012) 5 SCC 661* where it has been held that commission of offence by Company is an express condition precedent to attract the vicarious liability of others. Paragraph 58 of the judgment reads as follows:

"Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted."

7. So in case of commission of any offence by the

Company unless the Company is made accused and prosecuted being a juristic person, no other officials of the company may be prosecuted by fastening vicarious liability of any commission of offence committed by the Company. Third contention is that being an admitted position that the petitioner was a resident of New Delhi and not residing within the territorial jurisdiction of the learned Magistrate, the enquiry in proper perspective was required to be done by the Magistrate following procedure of Section 202 Cr.P.C. only after postponing the issuance of process to become satisfied for further proceeding in the matter. In the present case the Magistrate has not followed that procedure and not made an enquiry in view of the amended provision of 2006. The issue was decided by the Supreme Court in the case of *National Bank of Oman v. Barakara Abdul Aziz and Another, (2013) 2 SCC 488*. Paragraphs 9 to 11 read as follows:

> *"9. The duty of a Magistrate receiving a complaint is set out in Section 202 CrPC and there is an obligation on the Magistrate to find out if there is any matter which calls for investigation by a criminal court. The scope of enquiry under this section is restricted only to find out the truth or otherwise of the allegations made in the complaint in order to determine whether process has to be issued or not. Investigation under Section 202 CrPC is different from the investigation contemplated in Section 156 as it is only for holding the Magistrate to decide whether or not there is sufficient ground for him to proceed further. The scope of enquiry under Section 202 CrPC is, therefore, limited to the ascertainment of truth or falsehood of the allegations made in the complaint:*

(i) on the materials placed by the complainant before the court;

(ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and

(iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have.

10. Section 202 CrPC was amended by the Code of Criminal Procedure (Amendment) Act, 2005 and the following words were inserted:

"and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction."

The notes on clauses for the abovementioned amendment read as follows:

"False complaints are filed against persons residing at far off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-Section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused."

The amendment has become into force w.e.f. 23-6-2006 vide Notification No. S.O.923(E) dated 21-6-2006.

11. We are of the view that the High Court has correctly held that the abovementioned amendment was not noticed by the CJM, Ahmednagar. The CJM had failed to carry out any enquiry or order investigation as contemplated under the amended Section 202 CrPC. Since it is an admitted fact that the accused is residing outside the jurisdiction of the CJM, Ahmednagar, we find no error in the view taken by the High Court."

8. Complainant Shankar Singh and two other witnesses, namely, Navin Kumar Singh and Rajnish Kumar were subsequently examined in this case on 08.10.2012, 26.11.2012 and 17.12.2012 respectively and thereafter process was issued by order dated 22.01.2013. It is explicit that the issuance of process was not suspended for making enquiry under Section 202 Cr.P.C. as the petitioners were not residence of the territorial jurisdiction of the court concerned. The Supreme Court in the case of *Udai Shankar Awasthi v. State of Uttar Pradesh and Another, (2013) 2 SCC 435* has held that suspension of issuance of process is mandatory where the accused resides in an area beyond the territorial jurisdiction of the Magistrate concerned. The relevant paragraph is 40 which reads as follows:

> *"The Magistrate had issued summons without meeting the mandatory requirement of Section 202 CrPC, though the appellants were outside his territorial jurisdiction. The provisions of Section 202 CrPC were amended vide the Amendment Act, 2005, making it mandatory to postpone the issue of process where the accused resides in an area beyond the territorial jurisdiction of the Magistrate concerned. The same was found necessary in order to protect innocent persons from being harassed by unscrupulous persons and making it obligatory upon the Magistrate to enquire into the case himself, or to direct investigation to be made by a police officer, or by such other person as he thinks fit for the purpose of finding out whether or not, there was sufficient ground for proceeding against the accused before issuing summons in such cases."*

9. Lastly, it is submitted that reading the entire contents

of the complaint and taken in its entirety, no *prima facie* case of criminal breach of trust and cheating is made out against the petitioners.

10. Learned counsel appearing on behalf of opposite party no.2 supporting the impugned order submits that though the complainant had no agreement with the Punj Llyod Limited but he had completed the work of fabrication, laying of pipes being a shop contractor of M/s Venus Erectors.

11. Having considered the rival submissions of both sides as well as on perusal of the records, it is an admitted position that the complainant had no agreement with Punj Llyod Limited with respect to any kind of work relating to laying of pipelines and fabrication work in Barauni Refinery rather there was an agreement with M/s Venus Erectors so in such background of fact no criminal liability of breach of trust can be fastened to the petitioners. Moreover, it is also an admitted position that Punj Llyod Limited a registered company under the Company Act having juristic person in status was not implicated as a party in this case. In view of already settled proposition of law, as laid down by the Apex Court in Aneeta Hada case (supra) there cannot be any vicarious criminal liability to its Managers or Directors unless the company is impleaded and prosecuted. Moreover, the impugned order dated 22.01.2013

explicitly shows that enquiry was not conducted as per procedure laid down in Section 202 Cr.P.C., which was amended in the year 2006 specially with reference to such accused persons who reside outside the territorial jurisdiction of the court concerned, therefore, for the reasons aforesaid, no prima facie case against the petitioners is made out even taking into account the entire facts alleged in the complaint so continuation of the present proceeding would be abuse of the process of the Court hence, the entire criminal proceeding including the impugned order of cognizance dated 22.01.2013, passed in Complaint Case No.2014C of 2012, pending in the court of learned Judicial Magistrate, 1st Class, Begusarai is hereby set aside.

12. The application stands allowed.

(Arun Kumar, J.)

S.Kumar/-

AFR	NAFR
CAV DATE	NA
Uploading Date	31.08.2017
Transmission Date	31.08.2017