IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.45489 of 2013

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

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Smt. Bibha Prakash @ Smt. Bibha Sinha, W/o Sri Ajay Kumar Sinha, R/o 24, Kailash Babu Street, P.O.- G.P.O., P.S.- Daily Market, District- Ranchi.

.... Petitioner

Versus

1. The State of Bihar.
2. Sri Dilip Kumar Singh, S/o Late Harihar Nath Singh, R/o 244, Patliputra Colony, P.O.- Patliputra Colony, P.S.- Patliputra Thana, District -Patna.

.... Opposite Parties

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Appearance :

For the Petitioner/s : Mr. Naresh Dikshit, Advocate
Mr. Braj Bihari Tiwary, Advocate

For the Opposite Party no.2 : Mr. Ajit Kumar Singh, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 15-05-2017

This application under Section 482 of the Code of Criminal Procedure has been filed for quashing the order dated 29.05.2009 passed by the learned Judicial Magistrate-1st Class, Patna in Complaint Case No. 622(C) of 2009 whereby the petitioner along with Auric Pharmaceuticals and one Arbind Narayan, the proprietor of the aforesaid firm has been summoned to face trial for the offence punishable under Sections 420, 323, 504 and 120-B of the Indian Penal Code and Section 138 of the Negotiable

Instruments Act.

2. The short questions which arise for consideration in the present case is whether an advisor of the drawer of the cheque, who is proprietor of a firm, is liable to be prosecuted under Section 138 of the Negotiable Instruments Act (for short 'N.I. Act') and whether in absence of the ingredients of the offence, the petitioner can be tried under Sections 420, 323, 504 and 120-B of the Indian Penal Code along with the drawer of the cheques.

3. The complainant is proprietor of the firm, namely, M/s. Trans World International. The accused no.1 Auric Pharmaceuticals is a firm, accused no.2 Arbind Narayan is stated to be the proprietor and accused no.3, the petitioner Smt. Bibha Prakash @ Bibha Sinha is stated to be an advisor to the accused no.2.

4. It is stated that the complainant and accused nos. 2 and 3 were on friendly terms. The accused nos. 2 and 3 approached the complainant to become carrying and forwarding agent for the goods of the firm Auric Pharmaceuticals for the State of Bihar and Jharkhand. They assured the complainant to pay 12% amount on account of security of Rs. 5,00000/- by way of interest and to pay 5% monthly as commission on the security money. Believing their words, the complainant paid Rs.5 lakhs as security

money and, thereafter, he started working as carrying and forwarding agent for the accused firm.

5. It is stated that in course of time, a cheque of Rs.5 lakhs dated 27.06.2008 was drawn on IDBI Bank, Dak Bunglow Road, Patna in discharge of liability against security money by the accused no.2 on behalf of accused no.1 in favour of the complainant. Similarly, another cheque of Rs. 15 lakhs dated 14.11.2008 was drawn on IDBI Bank, Dak Bunglow Road, Patna in favour of the complainant by the accused no.2 on behalf of accused no.1 in discharge of the liability towards the payment of commission, interest, etc. The complainant presented the aforesaid cheques to his banker Indusind Bank, Exhibition Road Branch, Patna, but the same were returned unpaid due to insufficient balance in the account of the accused firm. On receipt of intimation from the bank regarding dishonour of cheques on 9/12th January, 2009, the complainant issued registered notice through his advocate asking the accused persons to pay the cheque amount of Rs.20 lakhs within fifteen day of receipt of the notice.

6. It is stated that despite service of legal notice, the accused persons failed to make payment of the cheque amount within the prescribed period. It is alleged that when the complainant went to accused no.2 to make an inquiry about the dishonour of the

cheques, he got enraged and abused and assaulted the complainant with fists and slaps and finally refused to pay the money.

7. After filing of the complaint, the complainant was examined on solemn affirmation and apart from the complainant, certain witnesses were examined on his behalf in course of inquiry conducted under Section 202 of the Code of Criminal Procedure. Thereafter, vide impugned order dated 29.05.2009, the learned Judicial Magistrate-1st Class, Patna summoned the petitioner along with accused nos. 1 and 2 to face trial for the offences punishable under Sections 420, 323, 504 and 120-B of the Indian Penal Code as also section 138 of the N. I. Act.

8. It is contended by the learned counsel for the petitioner that the petitioner being an advisor to the proprietor of the accused firm is not liable to be prosecuted for the offences alleged. He contended that the petitioner is not the drawer of the cheques in question and, hence, the ingredients of the offence under Section 138 of the N.I. Act are clearly not attracted against her. He contended that so far as the other offences under the penal code are concerned, they are not at all attracted against the petitioner as there is no allegation of dishonest inducement on the part of petitioner right from the inception of the contract nor the petitioner is alleged to have abused or assaulted the complainant.

9. On the other hand, learned counsel appearing on behalf of the complainant submitted that the petitioner was not only an advisor to the proprietor of the accused firm rather she also happens to be his own sister. He contended that the petitioner is alleged to have actively participated at the initial stage of negotiation of contract between the complainant and the accused firm. He contended that by virtue of the legal fiction created by the legislature as per section 141 of the N.I. Act, the petitioner has rightly been summoned by the learned Magistrate to face trial for the offence under Section 138 of the N.I. Act.

10. I have heard learned Advocates for the parties and perused the record.

11. The admitted case of the complainant is that it is the accused no.2 Arbind Narayan, who is the sole proprietor of the accused firm Auric Pharmaceuticals. It is also an admitted fact in the complaint that the petitioner was working in the capacity of an advisor to accused no.2 and she did not draw the cheques in question.

12. The essential ingredient for attracting the liability under Section 138 of the N.I. Act is: (a) that the person who is made to be liable should be drawer of the cheque and; (b) should have drawn the cheque on an account maintained by him with a

banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability.

13. In **Krishna Taxport and Capital Markets Ltd.** vs. **Ila A. Agrawal and Ors. [AIR 2015 SC 2091]**, the Supreme Court observed: *"the notice under Section 138 is required to be given to the 'drawer' of the cheque so as to give the drawer an opportunity to make the payment and escape the penal consequences. No other person is contemplated by Section 138 as being entitled to be issued such notice. The plain language of Section 138 is very clear and leaves no room for any doubt or ambiguity. There is nothing in Section 138 which may even remotely suggest the issuance of notice to anyone other than the drawer".*

14. As noted above, the Auric Pharmaceuticals is a proprietorship firm. It is true that vicarious liability under Section 141 of the N.I. Act is applicable in cases of a company as defined in that section.

15. It is equally true that by virtue of an explanation to Section 141 of the N.I. Act, theory of vicarious liability is also extended to bodies corporate, firms and association of individuals. However, such vicarious liability, by no stretch of imagination, can

be extended to an advisor to the proprietor of a firm.

16. Thus, even by invoking Section 141 of the N.I. Act, a person, who is not the drawer of the dishonoured cheques or the proprietor of the firm, cannot be made liable for an offence under Section 138 of the N.I. Act.

17. In **Raghu Lakshminarayanan** vs. **M/s. Fine Tubes [AIR 2005 SC 3512]**, the Supreme Court observed: "*that if the drawer of the cheque in question is not a company within the meaning of Section 141 of the N.I. Act, the question of an employee being proceeded against in terms of Section 141 of the N.I. Act would not arise*".

18. In that view of the matter, I am of the opinion that the petitioner not being a signatory of the cheques in question and not being the proprietor of the accused firm could not have been summoned to face trial for the offence punishable under Section 138 of the N.I. Act. Thus, the first question involve in the present is answered in negative.

19. So far as the second question is concerned, there is no allegation in the complaint that the petitioner had dishonestly induced complainant to enter into an agreement with the accused firm. In that view of the matter, ingredients of the offence punishable under Section 420 of the Indian Penal Code are clearly

wanting in the present case. The allegation of having abused and assaulted the complainant is strictly confined against the accused no.2 Arbind Narayan and in that view of the matter, the petitioner could not have been summoned for the offences under Sections 323 and 504 of the Indian Penal Code. Thus, the second question is also answered in negative.

20. In that view of the matter, the order impugned taking cognizance of the offence as against the petitioner in complaint Case No.622(C) of 2009 is hereby quashed.

21. The application stands allowed.

(Ashwani Kumar Singh, J.)

Sanjeet/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	22.05.2017
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