

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.50689 of 2013

Arising Out of COMPLAINT CASE No. -1040 Year- 2011 Thana –BHABHUA (KAIMUR)
District- BHABHUA (KAIMUR)

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1. Sanjeev Mishra @ Sanjeev Kr. Mishra S/O Shri R.S. Mishra C.B.U., Manager of New Holland Fiat (India) Private Limited Suite No.-301, Copia Corporate Suites, Plot No.-9, Jasola, P.S.- Sarita Vihar, District- Jasola, New Delhi at Present Office 201, Apurva Radha Complex, S.K. Puri, Near Children Park, Boring Road, P.S.- Boring Road, Patna.
 2. Stefano Pampalone S/O Mr. Salvatore Pampalone at Present Director, New Holland Fiat (India) Private Limited resident of Riva Aradiso 146902 Paradiso-Lugano Luhano, P.S.- Lugano Luhano-000 Switzerland.
 3. Sanajy Kapoor S/O Late Sh. Krishan Kapoor Senior General Manager (Sales and Marketing), New Holland Fiat (India) Private Limited Suite No.-301, Copia Corporate Suites, Plot No.-9, Jasola, P.S.- Sarita Vihar, District- Jasola, New Delhi.
 4. Sandeep Gupta S/O Late Shri Bal Krishna Gupta General Manager (Sales and Marketing), New Holland Fiat (India) Private Limited Suite No.-301, Copia Corporate Suites, Plot No.-9, Jasola, P.S.- Sarita Vihar, District- Jasola, New Delhi.
 5. Swetank Bharti S/O Shri R.N. Verma, resident of D-605, Paras Apartments, Sector-30, P.S.- Sector 31, Faridabad

.... Petitioners

Versus

1. The State of Bihar
2. Sanjay Kumar S/O Shri Shiv Prasad Proprietor of Vashnavi Tractors, G.T. Road, Mohaniya, P.S.- Mohaniya, District- Kaimoor

.... Opposite Parties.

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Appearance :

For the Petitioner/s : Mr. Chitranjan Sinha, Sr. Advocate
Mrs. Soni Srivastava, Advocate
For State : Mr. Jharkhandi Upadhyay, APP
For Opposite Party no. 2 : Mr. Sudama Singh, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH



ORAL JUDGMENT

Date: 24-07-2017

Heard Mr. Chitranjan Sinha, learned Senior Advocate for the petitioners, Mr. Jharkhandi Upadhyay, learned Additional Public Prosecutor for the State and Mr. Sudama Singh, learned Advocate for opposite party no. 2.

2. By way of the instant application preferred under Section 438 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'), the petitioners have sought for quashing of the order dated 15.03.2012 passed by the learned Chief Judicial Magistrate, Bhabhua (Kaimur) in Complaint Case No. 1040 of 2011 whereby after taking cognizance of the offences punishable under Sections 420, 406 and 120-B of the Indian Penal Code (for short 'IPC'), the petitioners have been summoned to face trial.

3. The prosecution case, as per the complaint is that the complainant had opened an agency in Mohania, namely, Vaishnavi Tractors, which was dealing with sale of tractors of New Holland and Fiat (India) Private Limited (for short 'the Company'). During the course of business, the complainant introduced a company, namely, A 2 Z which needed tractor in large numbers to the CBU Manager of 'the Company', namely, Swetaank Bharti. It was decided in the meeting that an incentive of 4 % amounting to Rs.28 lakhs would be given to the complainant on the total sale of tractors to the A 2 Z by



‘the Company’ which was also confirmed by the Managing Director of ‘the Company’, namely, Stephano Pampalone. On the assurance given by the other senior officers of ‘the Company’, the complainant got the business connections made between the two pursuant to which ‘the Company’ started selling tractors to the A 2 Z. It is alleged that the complainant owes an amount of Rs.28 lakh calculated on the basis of 4 % incentive over the entire sale in regard to which a letter dated 03.11.2010 under the signature of Swetaank Bharti was issued by ‘the Company’, but the amount was never paid.

4. The complainant was examined on solemn affirmation and in course of inquiry conducted under Section 202 of the Cr.P.C., two inquiry witnesses, namely, Ashok Kumar Singh and Gopal Prasad were examined on behalf of the complainant. After holding the inquiry under Section 202 of the Cr.P.C., vide order dated 15.03.2012, the learned Chief Judicial Magistrate, Bhabhua summoned the petitioners in respect of offences under Sections 406, 420 and 120-B of the IPC. The aforesaid order, dated 15.03.2012, is under challenge in the present application.

5. It is contended by Mr. Chitranjan Sinha, learned Senior Advocate for the petitioners that ‘the Company’ is a juristic person. It is incorporated under the Indian Companies Act, 1956. It entered into a dealership agreement with the complainant on 18.03.2009. In the



said agreement, there was an arbitration clause. As the dispute arose in respect of liability of the complainant, 'the Company' invoked the arbitration clause against him and a retired judge of the Delhi High Court was appointed as the Sole Arbitrator in this regard. Despite several indulgences granted to the complainant, he failed to appear in the proceedings before the learned Arbitrator. Hence, the proceedings were carried out *ex parte* and, vide order dated 28.04.2014, an Award in the sum of Rs.19,39,623/- was passed in favour of 'the Company' and against the complainant. He has submitted that the complainant has filed the present complaint with ulterior motive. He has submitted that even if the entire allegations made in the complaint are accepted, at its face value, none of the ingredients of the offences for which the petitioners have been summoned would be attracted, as it is a pure and simple case of money claim.

6. Mr. Chitranjan Sinha, learned Senior Advocate has submitted that the present case is duly covered by decision of the Supreme Court in *State of Haryana & Ors. vs. Bhajan Lal & Ors. [(1992) Supp. 1 SCC 335]*. He has submitted that from perusal of the complaint and the documents, no offence is made out against the petitioners. According to him, there was no fraudulent or dishonest intention at any point of time and there was no inducement on the part of the petitioners. He has submitted that since 'the Company'



has not been made accused, the petitioners cannot be prosecuted in their individual capacity, as there is no concept of vicarious liability in criminal law. He has submitted that the complainant has deliberately suppressed the fact that the dispute between the parties was referred to the Sole Arbitrator and the learned Arbitrator had passed an Award in the sum of Rs.19,39,623/- in favour of 'the Company' and against the complainant.

7. On the other hand, learned counsel appearing on behalf of the complainant has submitted that the complainant had no knowledge about the arbitration proceedings going on against him and, thus, he did not appear and the award has been passed by the learned Arbitrator against him *ex parte*. He has submitted that as a matter of fact, the petitioners have cheated the complainant to tune of Rs.28 lakh, which was promised to be paid by 'the Company' to the complainant by way of incentive for facilitating sale of tractors to the A 2 Z. He has submitted that allegations made in the complaint clearly attract the ingredients of the offence alleged. Hence, the summoning order cannot be held to be bad.

8. I have heard learned counsel for the parties and perused the materials available on record.

9. The complaint is based on the alleged commitment to pay incentive to the complainant. The case of the petitioners is that



no such commitment was ever made to the complainant. It has also been submitted that the complainant had no role to play in the said transactions pertaining to sale of tractors to the A 2 Z. It would be evident from the record that the complainant had entered into a dealership agreement dated 18.03.2009 with 'the Company' for sale and purchase in the region of district Bhabhua, Bihar. There is no mention of payment of incentive to the complainant in case of direct sale of tractors by 'the Company' to customers in the dealership agreement. The allegation is made on the basis of oral assurance given to the complainant. The dealership agreement contains clause of arbitration. 'The Company' had invoked the arbitration clause by way of a notice and a retired judge of the Delhi High Court had been appointed as a Sole Arbitrator to adjudicate upon the dispute between 'the Company' and the complainant. The learned Arbitrator, vide Award dated 28.04.2014, decided the dispute in favour of 'the Company' and against the complainant and an Award in the sum of Rs.19,39,623/- was passed in favour of 'the Company'.

10. Learned Senior Advocate appearing for the petitioners has rightly submitted that the complainant deliberately suppressed the facts about the arbitration proceedings in the present case. Evidently, the complaint has been lodged maliciously with ulterior motive to avoid the payment of the award amount. Moreover, the



basic ingredients of the relevant Sections of the IPC under which cognizance has been taken, are also not satisfied. The offence of criminal breach, as alleged, is not made out. Apart from the *mens rea*, dishonest misappropriation or dishonest use is not *prima facie* made out from the facts narrated in the complaint.

11. Even if, there is any dispute between the parties, the same would amount to breach of contract. It is a settled position in law that every breach of contract does not give rise to the offence of cheating. In order to establish the offence of cheating, it is required to establish deception at the very inception of the transaction. The complainant has not produced any document or any evidence to suggest deception by the petitioners. Mere averments saying that the petitioners had agreed to give incentive to the complainant would not be sufficient and cannot form basis for summoning order. Furthermore, the case of the complainant is that the tractors were sold directly by 'the Company' to the A 2 Z. In absence of 'the Company' being named in the complaint, no case against the petitioners of the present case for vicarious liability can be fastened. It is well settled position in the IPC that save and except provisions specifically provided, the IPC does not contemplate any vicarious liability on the part of a party, who is not charged directly for commission of an offence. Thus, in absence of 'the Company' being



made an accused in the complaint, the prosecution of the petitioners, who are alleged to be office bearers of ‘the Company’ would be impermissible.

12. In view of the discussions made above and in the light of the principles relating to exercise of the jurisdiction under Section 482 of the Cr.P.C. to quash the complaint as laid down in the *State of Haryana vs. Bhajan Lal* (Supra), in the considered opinion of this Court, the instant application deserves to be allowed. Accordingly, the impugned order, dated 15.03.2012, passed by the learned Chief Judicial Magistrate, Bhabhua (Kaimur) in Complaint Case No. 1040 of 2011 and the entire criminal proceedings arising from the said complaint, are hereby quashed.

13. The application stands allowed.

(Ashwani Kumar Singh, J.)

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AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	25.07.2017
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