

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.04.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Crl.O.P No.718 of 2009 &
M.P.No.1 of 2009

1.R.Ramakrishnan
2.M.K.Panduranga Chetty
3.N.Tarachand Dugar

... Petitioners

vs.

1. State by
Deputy Superintendent of Police,
Economic Offences Wing-II,
Chennai - 2.

2. V.Ramakrishnan

... Respondents

Prayer: Criminal Original Petition filed under Section 482 of Criminal Procedure Code, to call for the records in C.C.No.21765 of 2005, pending trial on the file of Chief Metropolitan Magistrate, Chennai, quash the same.

For Petitioners : Mr.K.P.Anantha Krishna

For Respondents : Mr.B.Ramesh Babu (for R1)
Government Advocate (Crl. Side)

JUDGMENT

The above petition has been filed seeking to quash the final report in C.C.No.21765 of 2005 pending on the file of the Chief Metropolitan Magistrate, Chennai.

2.The learned counsel appearing for the petitioners stated that they were directors of a company by name "Dugar Finance". The company was incorporated on 13.05.1981 and amongst other businesses also did buying and selling/ Construction of Property. The learned counsel relied on the memorandum and articles of association in the typed set of papers to show that transactions with property was permitted as per the prospectus/ memorandum and Articles of association of the Company. So there is nothing wrong in real estate dealings of the company.

Whiles, the company had also borrowed deposits from public which was permitted during that time. In other words the deposits received until 03.11.1999 was spent for genuine business purpose. The receipt of the deposits were with the permission of Reserve Bank of India. The Reserve Bank of India for the first time by order dated 03.11.1999 prohibited the company from accepting any further deposit from the public. Therefore, the deposit collection was not illegal at the inception and later the audit report shows that company stopped acceptance of deposit on Reserve Bank of India direction dated 03.11.1999. In the balance sheet of the company its auditors have noted the Reserve Bank of India order. They also observed that no money was drawn by any of the directors of the company. This according to the learned counsel will take away the criminality in this case as there was no misrepresentation at the inception.

3. The learned counsel appearing for the petitioner further stated that the company then approached the CLB with a scheme to repay the depositors and thus went into liquidation. This shows bonafide of company to repay the customers as it went to Court on its own and not after issues went out of hand. Documents to this effect was placed in the typed set of papers. Then on 04.08.2000, this Court directed the appointment of statutory auditors to report if there was any misfeasance/malfeasance (misappropriation) by directors. Accordingly auditors by name M/s. Rao and Gopal were appointed as statutory auditors by the Court and the investigated the company from 1996 to 2000. The auditors gave a categorical finding that there is no misfeasance/ malfeasance. In other words the Directors of the company have not received any money from the company. This report of the auditors was accepted by this Court by order dated 10.03.2010, documents were produced to substantiate this point. It was vehemently argued that the period when the auditors were appointed was the same alleged period of conspiracy as per the final report. Therefore, it was contend that the directors of the company have not misappropriated these amounts and that the directors have not in any way benefited or enriched themselves is found out after deep scrutiny and accepted by this Court. Therefore, this fact will prove that there is no criminality in this transaction.

4. It was further stated that all banks have been repaid by way of one time settlement. It was then contended that according to the charge sheet, the outstanding of the borrowed by the company was Rs.52 Crores on its peak in 1996 which got consciously reduced to Rs.54,77,857/- (54 Lakhs), and it is easily repaid. Eight properties were attached by the administrator, three properties remain unsold. It was also stated that of these three properties, even any one of them can

fetch this amount. So the interest of the investors are also protected if the liquidators performs properly. Then one of the main borrower of the company Mr.Mohan Reddy is due more than Rs.9 Crores and against whom arbitral award for Rs.8.5 Crores has been obtained early 2000. Even if this money is collected the depositors can be repaid.

5.The learned counsel appearing for the petitioner relied on the following citations to lay emphasis on his points:

1.The unreported judgment of this Court in the case of M/s.Monalisa Multiplast Ltd. v. M/s.TVS Finance and Services Ltd. In Crl.O.P.No.12130 of 2005, this Court held as follows:

"10.After the commencement of transaction, the petitioners have made payments of Rs.14 lakhs and they could not continue the payment. The allegations made in para-7 of the complaint is that there is a default in payment of lease charges and there is a delay in the payment of additional finance charges. On a perusal of the complaint, the particulars regarding the commencement of the payment, the quantum of money in default, when exactly the defaults started and such other contemporaneous materials are not made available to substantiate prima facie case against the petitioners. If such details are given, it may come to light that the dispute will lead only to civil litigation.

11.Moreover, the Supreme Court repeatedly held that dishonest intention must be shown at the inception. In the instant case, in view of the reason that the petitioners have made substantial payments, I do not find that such dishonest intention existed from the inception. Subsequent conduct of default will not constitute dishonest intention. In a case reported in AIR 2006 SC 2780 (M/s.Indian Oil Corporation v. M/s.NEPC India Ltd. & Ors.) it has been held as follows:

"A growing tendency in business circles to convert purely civil disputes into criminal cases is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors..... There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged."

12.The 8th petitioner has deposited his title deeds as security. A person having deposited his title deeds cannot be called upon to pay instalments and he has been clubbed together along with the other accused, especially, when his title deeds are in the hands of the complainant. Prima facie it appears that the dispute is purely of civil in nature and I do not find any merit in allowing the private complaint to proceed with and it will be an abuse of process of Court."

2.The 3 Judges Bench of the Supreme Court in the case of Anil Mahajan Vs. Bhor Industries Ltd. Reported in (2005) 10 SCC 228:

"8.The substance of the complaint is to be seen. Mere use of the expression "cheating" in the complaint is of no consequence. Except mention of the words "deceive" and "cheat" in the complaint filed before the Magistrate and "cheating" in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MOU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay. According to the complainant, a sum of Rs.3,05,39,086/- out of the total amount of Rs.3,38,62,860/- was paid leaving balance of Rs.33,23,774/-. We need not go into the question of the difference of the amounts mentioned in the complaint which is much more than what is mentioned in the notice and also the defence of the accused and the stand taken in reply to notice because the complainant's own case is that over rupees three crores was paid and for balance, the accused was giving reasons as above-noticed. The additional reason for not going into these aspects is that a civil suit is pending inter se the parties for the amounts in question.

3.Another judgment of the Hon'ble Supreme Court in the case of M.A.A.Annamalai v. State of Karnataka (2010) 8 SCC 524:

"21.It is submitted that the FIR merely alleged a violation under the Prize Chits and Money Circulation Schemes (Banning) Act without giving any basis or material for the same, cannot be sustained. In the instant case, a company was operating under licence from Reserve Bank of India and was so carrying on a legitimate business under a licence by the statutory authority. They mere fact that the company got into financial distress and went into liquidation would not

in any manner make the activity carried out by them unlawful so as to invoke Sections 3 to 6 of the Prize Chits and Money Circulation Schemes (Banning) Act. In fact, to fall within the mischief of the Act, it must be shown that the activity ought to be an unlawful one to make quick and easy money and a lawful activity duly approved by Reserve Bank of India cannot fall under the mischief of the said Act.

22. According to the appellant, the company started its activities only after getting licence from Reserve Bank of India and the depositors were legally invited to invest in the company thereafter and 2nd Respondent was one of the depositors. Admittedly, in the liquidation proceedings, more than 55% of the company's outstanding liabilities had been cleared despite the company having been wound up.

23. The appellant submitted that a complaint under Section 420 IPC stands on a different footing than a complaint under a special statute. Unlike special statutes, like the Negotiable Instruments Act which casts a vicarious liability on officers in charge of and responsible for the company in an offence, under the Penal code there is no role for vicarious liability. The appellant has also alleged that even assuming that the company can be said to have committed an offence, this would not be enough to sustain a complaint against any officer of the company for an offence under the Penal Code unless an allegation or material of the said officer having been involved in the commission of the offence is made out. In any special provision like Section 141 of the Negotiable Instruments Act, a deemed provision is included where if the offence is committed by a company, the officers responsible for the conduct of the business of the company are deemed to be liable and a presumption of their liability arises unless duly discharged by them. There is no such presumption under the Penal Code and while so necessary allegation/material must be available not merely against the company but also against the accused persons as having participated in such offence. In the instant case, there is not even a whisper anywhere either in the complaint or in any material collected to show a direct participation of the appellant who was merely included on the ground that, once upon a time, he was one of the Directors of the company.

24. The appellant also submitted that even assuming that there could have been a vicarious liability thrust on the appellant, even then there cannot be any such vicarious liability in the absence

of any allegations and material to show that the appellant was in charge of or responsible for the conduct of the company's business which had given rise to the offence. In the instant case, the appellant ceased to be the Director of the company w.e.f. 27-12-1997 following his resignation on 8-12-1997, which fact was also recorded in Statutory Form 32 filed before the Registrar of Companies. The complaint itself expressly stated that the offence had taken place only thereafter and in fact the FIR expressly stated that the occurrence of offence was between 24-5-1998 and 17-9-1999. At that stage, the appellant had admittedly ceased to be a Director of the company and was not even connected with the company in any manner at the time when the alleged offence was committed and cannot be prosecuted in respect of such acts of the company.

.....

37. We have carefully considered the rival contentions. It emerges that:

(a)

(b) Admittedly, there are no allegations against the appellant in the first information report.

(c) The company had invited investment from the depositors to invest in the business/benefit funds after receiving due approval of the scheme from Reserve Bank of India. Therefore, in any event, the element of cheating as alleged cannot be made out by any stretch of imagination.

(d) ...

(e) Even assuming that there could have been a vicarious liability thrust on the appellant, even then there cannot be any such vicarious liability in the absence of any allegations and material to show that the appellant was in charge of or responsible for the conduct of the company's business which had given rise to the offence. From any angle of the matter, the appellant cannot be compelled to face the criminal trial in this case.

38. The inherent power should not be exercised to stifle the legitimate prosecution but at the same time no person be compelled to face criminal prosecution if basic ingredients of the offence alleged against him are altogether absent.

39. On consideration of the totality of the facts and circumstances of this case, the impugned judgment of the High Court is set aside and the appeal is allowed and the proceedings initiated against the appellant on the basis of the complaint registered as CC.No.22656 of 2001 pending before the Xth Additional

Chief Metropolitan Magistrate, Bangalore, are quashed."

6.The learned counsel appearing for the petitioner then stated that these petitioners have been roped in only under vicarious liability of managing the company. However, the company has not been cited as an accused. The learned counsel relied the judgment on the Hon'ble Supreme Court in the case of Sharad Kumar Sanghi v. Sangita Rane, (2015) 12 SCC 781 : (2016) 1 SCC (Cri) 159:

"11.In the case at hand as the complainant's initial statement would reflect, the allegations are against the Company, the Company has not been made a party and, therefore, the allegations are restricted to the Managing Director. As we have noted earlier, allegations are vague and in fact, principally the allegations are against the Company. There is no specific allegation against the Managing Director. When a company has not been arrayed as a party, no proceeding can be initiated against it even where vicarious liability is fastened under certain statutes. It has been so held by a three-Judge Bench in Aneeta Hada v. Godfather Travels and Tours (P) Ltd. [Aneeta Hada v. Godfather Travels and Tours (P) Ltd., (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241] in the context of the Negotiable Instruments Act, 1881.

13.When the company has not been arraigned as an accused, such an order could not have been passed. We have said so for the sake of completeness. In the ultimate analysis, we are of the considered opinion that the High Court should have been well advised to quash the criminal proceedings initiated against the appellant and that having not been done, the order is sensitively vulnerable and accordingly we set aside the same and quash the criminal proceedings initiated by the respondent against the appellant."

7.Lastly, it was argued that there is no specific allegation against the petitioners to proceed in trial. Reliance was placed on the 3 Judges Judgment passed in the case of Sunil Bharti Mittal v. CBI, (2015) 4 SCC 609:

"(iii) Circumstances when Director/person in charge of the affairs of the company can also be prosecuted, when the company is an accused person

42.No doubt, a corporate entity is an artificial person which acts through its officers, Directors,

Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

44. When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In *Aneeta Hada [Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241]*, the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore,, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company."

8. On the contrary, opposing these arguments, the learned Government Advocate (Crl. Side) argued that these petitioners have been charged by the respondent police for the offences under Sections 120(B), 420, 409, 109 IPC. He mentioned that charges have been framed but the trial has not yet commenced in

this case and no witness has been examined so far. The case of the state is that these petitioners in their respective capacity as directors have misrepresented to public at large and collected money to do finance business in the name and style of "Dugar Finance". The money so collected was used by one of them to do his own private real estate business. Later when the investors asked for return of money, amounts were not repaid. Hence, a case of criminal offences of 406/420 IPC have been made out against these three directors. All directors not made accused of the company who have resigned have not been made accused. He further mentioned that only 25 lakhs was due presently to be repaid to the investors and all the remaining money has been repaid. He further argued that pending civil case and criminal cases are different from each other and they do not have any effect on this petition and the petitioners should therefore be sent up for trial as the complete facts will surface only during trial.

9.I heard Mr.K.P.Anantha Krishna, learned counsel appearing for the petitioners and Mr.B.Ramesh Babu, learned Government Advocate (Criminal Side), appearing for the 1st respondent and carefully considered the documents and arguments advanced. What emerges from the arguments are:

i.The company received deposits perusant to RBI permission and therefore it can safely be said that there was no dishonest intention at any time particularly at inception.

ii.The deposit collection was not illegal as audit report shows company stopped acceptance of deposit on RBI direction 3.11.1999.

iii.The amount collected have been utilised for purchase of properties. As per the balance Sheet of company, all the properties have been purchased in the name of company. Hence, the collection and its utilisation is not in any individuals name.

iv.The order of this Court in accepting the report of auditors in the company petition that there is no misfeasance or malfeasance has attained finality and no appeal has been filed against this order. Thus the Directors have been exonerated by the Judge of this Court as not having taken any money from the company. This order is binding on the trial Court.

v.Properties and decreed amount is sufficient to repay all depositors more so when all secured depositors have been paid.

vi.The company has in its peak borrowed 52 crores and now only 25 lakhs remain unpaid.

vii.The company has not been made an accused. If at all, the Primary offender is the company as monies were received and receipts issued in the name of the company.

viii.The directors do not have any direct overtact in the absence of impleading the company. There is no specific role given to each petitioner except for bald statement of conspiracy.

10.The inherent power should not be exercised to stifle the legitimate prosecution but at the same time no person be compelled to face criminal prosecution if basic ingredients of the offence alleged against him are altogether absent. When the facts are undisputed and the chance of conviction on those facts is bleak and when there is no useful purpose in permitting the litigation to continue, the inherent power of this Court will have to be exercised. Further, there are clear legal lacunae also in this case. Hence, on consideration of the totality of the facts and circumstances of this case, the impugned final report is set aside and the quash is allowed and the proceedings initiated against the petitioners are quashed.

11.In the result, this criminal original petition is allowed and all proceedings against the petitioners in C.C.No.21765 of 2005, on the file of the Chief Metropolitan Magistrate, Chennai, stand quashed. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

सत्यमेव जयते

Sub Assistant Registrar

vs
To
The Chief Metropolitan Magistrate,
Chennai.

Pre-Delivery Judgment made in
Crl.O.P.No.718 of 2009
and
M.P.No.1 of 2009

KS (CO)
VR(28/06/2017)