IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order Reserved on : 17.12.2018
Pronouncing orders on :21.12.2018

CORAM

THE HONOURABLE JUSTICE MR.N.ANAND VENKATESH

Crl.OP No.10100 of 2017 and Crl.MP.No.6689 of 2017

D.Nagasamy .. Petitioner

Versus

1. State
Represented through Inspector of Police,
Kannagi Nagar Police Station,
Chennai 600 097

2. P. Bakkiya Lakshmi .. Respondents

Prayer: Criminal Original Petition filed under Section 482 of Cr.PC to call for the entire records in CC No.1267 of 2016 on the file of Judicial Magistrate, Alandur in Crime No.62/2016 on the file of 1st respondent police and quash the same.

For Petitioner : Mr.V.Karthic, Senior Counsel for Mr.Jenasenan

For Respondents: Mr.Mohammed Riyaz, Additional Public Prosecutor for R1

ORDER

This petition has been filed seeking to quash the proceedings in CC No.1267 of 2016, pending on the file of Judicial Magistrate, Alandur.

2. The 1st respondent police registered an FIR in Crime No.62 of 2016 against three named persons and the Management of Dindugal Thalapakatti for an alleged offence under Section 288, 336 and 304(A) of IPC and Section 8 of Prohibition of employment of Manual Scavengers and their Rehabilitation Act 2013. The name of this petitioner did not figure in the FIR.

3. The case of the prosecution is that four persons died while manually cleaning the septic tank situated within the compound of Dindugal Thalapakatti Restaurant. Coming to know of the incident, the Village Administrative Officer of Thoraipakkam

Village gave a complaint to the respondent police on the ground that the accused persons without arranging for any safety or precautionary steps, have made the deceased persons do manual scavenging and due to this rash and negligent act, four persons have died by inhaling toxic gas in the septic tank.

4. The respondent police investigated the case and filed a final report before the Court below as against five accused persons and this petitioner was added as A5. The Court below took cognizance of the final report for an offence under Section 288, 336, 304(A) r/w Section 109 of IPC and Section 9 r/w 7 of Prohibition of Employment as Manual scavengers and their Rehabilitation Act 2013.

5. Mr.V.Karthic, the learned Senior Counsel, appearing on behalf of petitioner would submit that this petitioner has been added as an accused only on the ground that he is the owner of the restaurant. The learned Senior Counsel also read the final report as well as the statement given by the witnesses and submitted that no one speaks about the presence of the petitioner in the scene of occurrence and this petitioner has been added as an accused since he happens to be the owner of the restaurant. The learned Senior Counsel would submit that the concept of 'vicarious liability' is not applicable to the offence under the IPC and therefore, the various offences under IPC cannot be fastened against this petitioner.

6. The learned senior counsel for the petitioner would further submit that insofar as the offenses under the Prohibition of Employment as Manual scavengers and their Rehabilitation Act 2013, this petitioner has been made as an accused, since he was the director of the company. The learned senior counsel submitted that Section 23 of the said act provides for an offense by companies. In this case, the company is not been made as an accused and therefore, the entire prosecution as against this petitioner is not in accordance with Section 23 of the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013. The learned Senior Counsel in order to substantiate his arguments relied upon the following judgments :

i. 2013 - 1 - Law Weekly Crl.45 [Dr.Jeppiar and another Vs.The State of Tamil Nadu and another]

ii. 2010 Crl.L.J 762 [Geetha Ramesh and Ors Vs.Sub-Inspector of police, Udagamandalam.

iii. Crl.OP (MD) Nos.14113 to 14115 of 2012 vide order dated 29.06.2018.

iv. Crl.OP (MD) Nos.17573 of 2017 reported in Manu/TN/5977/2018

7. The learned Additional Public Prosecutor submitted that the allegations made in the final report makes out a prima facie case against the petitioner. The learned counsel would submit that the petitioner is the owner of the restaurant and as the Director of the Company, he must ensure the safety of others and should not have permitted the deceased persons to get into the septic tank and made them do manual scavenging. The learned counsel would further submit that the complicity of this petitioner will be revealed only during the course of the trial and this Court should not interfere with the proceedings at this stage.

8. This Court has carefully considered the submissions made on either side.

9. This petitioner has been made as an accused in the final report on the ground that only on his directions, A1 to A3 had carried out the scavenging work by utilizing the services of the deceased persons. For this purpose, the respondent police have invoked the provisions of Section 109 IPC and added this petitioner as an accused.

10. None of the witnesses speak about the presence of this petitioner in the scene of occurrence. In order to invoke the provisions of Section 109 of IPC, prima facie material must be available to show that this petitioner has instigated or engaged in conspiracy or intentionally aided any person who committed the offense. It is a settled principle of law that some positive action on the part of the accused is essential to constitute an offense of abatement. A person by being the owner of an establishment, by itself cannot give raise to a presumption that he had abutted the commission of the offense. There is nothing to show any positive act on the part of this petitioner in order to invoke the provisions of Section 109 of IPC.

11. In the same way, the petitioner cannot be made responsible for the act of his subordinates by invoking the principle of “vicarious liability”. In fact, the concept of vicarious liability is alien to IPC offense. The Hon'ble Supreme Court in the Judgment reported in 2008 5 SCC 662 [S.K.Alagh Vs.State of Uttarpradesh] and 2008 5 SCC 668 [Maksud Syed Vs.State of Gujarat] has categorically held that 'Vicarious liability' cannot be fastened against the Director of the company automatically where the company is charged for the commission of the offense.

12. It will be relevant to rely upon the Judgment of this Court in the case of [Dr.Jeeppiar and another Vs. The state of Tamil Nadu and another] reported in 2013 1 law weekly Crl. 45. The relevant portions are extracted hereunder :-

9. The learned counsel appearing for the petitioner contended that the present petitioners are only Trustees. It appears that FIR has been registered against the petitioners for the offence punishable under Section 304(ii) of IPC for vicarious liability. Since the petitioners are Trustees as per the principle the Trustees of the Trust are not liable for vicarious liability. Hence, the charges against the petitioners has to be quashed.

11. The legal objections raised by the learned counsel appearing for the petitioners has to be seen. It is not in dispute that the petitioners are trustees and they have been figured as accused only because they happen to be the trustees of the Trust. Even though the petitioners are the Trustees of the Jeppiar Remibai Trust, there is no iota of evidence to show that the petitioners have played a vital role in the construction of the building in question. Further, the perusal of the Trust Deed it is seen that the petitioners/Trustees have no role in decision making and there is no evidence to show that under their supervision the building construction work was going on. On the mere trusteeship, without any evidence regarding the specific role played by them whether in the capacity of Trustees the prosecution can lay charge sheet against them has to be seen.

Whether the prosecution can lay charge sheet against the petitioners in the capacity of trustees has to be seen.

12. In the case of B.Jagadeesh and 5 others vs. The Deputy Superintendent of Police, EOW II, Namakkal, reported in 2011(2) MWN (Crl.) 494, in para 20 and 21 it has been held as follows:

"20. ....The Hon'ble Supreme Court in Maksud Syed vs. State of Gujarat and others reported in (2008) 5 SCC 668 wherein in paragraph No.13, it is held as follows:

#...The bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.#

21. A close reading of the above judgments would make it clear without any doubt that unless and until, a provision is made, making the Directors of a company vicariously liable for the offence committed by the company, it is not legal to prosecute the directors of the company."

In paragraph 23 of the judgment this Court held as follows:

"23. ....as I have already stated, in so far as the Indian Penal Code is concerned, there can be no vicarious liability fastened on the Directors of the company for the offence committed by the company for want of any penal provision making the directors also vicariously liable for punishment. That is the view consistently taken by the Honourable Supreme Court in the judgments which I have referred to supra."

This Court has held on previous occasion in the TANPID case it has been held that except under the special enactment there is no vicarious liability against the person who is the trustee. Exception is under Section 34 and 149 of IPC.

13. This Court has taken a same view in the case of M/s. Abraham Memorial Educational Trust, and Ors., Vs. C.Suresh Babu reported in 2012 (2) L.W. (Crl.) 196 in a case under Section 138 of the Negotiable Instruments Act that there is no vicarious liability against the Trustees as the trust is only a juristic personality and the Trustees are only the beneficiaries in the subject matter of the trust property or trust money, he is having only beneficial interest.

14. In this case also same view has been taken by this Court. The trust is a charitable or otherwise juristic person, special enactment alone can convict the directors. Not under IPC. Therefore, as the trust even though all the three trustees have been figured as accused only for the two trustees alone this petition has been filed and no petition has been filed for the Managing Trustee. Therefore, this Court is not expressing any opinion on this aspect. This Court ultimately opined that in view of the Judgment of the Hon'bls Apex Court and the judgments rendered by this Court reported in 2011 (2) MWN (Crl.) 494 and 2012(2) L.W. (Crl.) 196 (supra) it has been specifically held that except under the exceptional enactment the offeence under Indian Penal Code will not attract the vicarious liability. Except Section 34 and 149 of IPC,

there is no other provision in the Indian Penal Code making constructive liability.

15. In certain special enactments like Motor Vehicles Act, Industrial Disputes Act, Customs Act, Excise, Negotiable Instruments Act etc., there are specific provisions creating vicarious liability for example if an offence punishable under Section 138 of the Negotiable Instruments Act has been committed by a company, the company is punishable. But the vicarious liability has been created under Section 141 of the Negotiable Instruments Act states that if the person committing the offence under the Act is a company, the company as well as the person in charge of the day to day affairs of the company also liable for punishment. Thus, in respect of the Director or other persons in charge of the day to day affairs of the company, they were vicariously made liable for punishment. But the offence so committed by the person is punishable under any one of the provisions of Indian Penal Code, unless the other person falls within the obiter of Section 34 or 149 of IPC., he cannot be held incriminatingly liable for punishment for the offence committed by the other.

13. The principles enunciated in the above judgment will squarely apply to the facts of the present case. This petitioner has been added as an accused only on the ground that he was the owner / Director of the Company which runs the restaurant. Therefore, the final report filed against the petitioner for the offense under the IPC is clearly unsustainable.

14. The next ground raised by the learned senior counsel for the petitioner is with regard to the offense under Section 9 r/w 7 of Prohibition of Employment as Manual scavengers and their Rehabilitation Act 2013.

15. It will be relevant to extract the provisions of Section 23 of the said act.

23. offenses by Companies :-

i. Where an offense under this Act has been committed by a Company, every person who, at the time the offense was committed, was in charge of, and was responsible to, the company for the conduct of the business of the Company, as well as the Company, shall be deemed to be guilty of the offense and shall be liable to be proceeded against and punished accordingly.

ii. Not withstanding anything contained in Sub-section (1), where any offense under this Act has been committed by a company and it is proved that offense has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offense and shall be liable to be proceeded against and punished accordingly.

Explanation - For the purpose of this Section, -

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director" in relation to a firm , means a partner in the firm.

16. The above provisions makes it clear that if a person who commits the offense is a company, the company as well as any other person who is in charge and responsible for the conduct of the day today affairs of the company, shall be deemed to be guilty of the offense. For the purpose of invoking this provision, the company must be made as an accused and a final report cannot be filed against the officer alone.

17. It will be relevant to rely upon the Judgment reported in Manu/TN/5977/2018 [HCL Technologies Ltd., Vs. State of Tamil Nadu]. The relevant portions are extracted hereunder :

> 9. It will be relevant to refer to the Judgment of the Hon'ble Supreme Court in Aneeta Hada Vs. Godfather Travels and Tours Private Limited reported in MANU/SC/0335/2012 : (2012) 5 SCC 661 and the relevant portions of the Judgment are extracted hereunder :-
>
> "58. 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. 5

> 59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh (supra) which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal (supra) does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada (supra) is overruled with the qualifier as stated in paragraph 51. The decision in Modi Distilleries (supra) has to be treated to be restricted to its own facts as has been explained by us hereinabove.

10. Even though, the above Judgment was passed taking into consideration of the Provisions Section 141 of the NI Act, the provision under Section 25 of the Contract Labout Act is in pari materia with Section 141 of the NI Act and therefore, the above judgment will squarely apply to the facts of the present case. Admittedly, in this case, the company has not been made as an accused therefore, the complaint has to be quashed on this sole ground.

18. The above judgment will directly cover the facts of the present case. In this case, ultimately the company has not been made as an accused and therefore, the final report filed only as against the director of the Company is clearly unsustainable.

19. In view of the above, the final report filed against this petitioner requires interference. The continuance of the proceedings as against this petitioner will amount to an abuse of process of Court.

20. In the result, the proceedings in CC No.1267 of 2016 on the file of Judicial Magistrate, Alandur is hereby quashed. Accordingly, this Criminal Original Petition is allowed. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1. The Judicial Magistrate,
   Alandur

2. -do- Thro' Chief Judicial Magistrate,
   Chengalpet.

3. The Inspector of Police,
   Kannagi Nagar Police Station,
   Chennai - 600 097.

4. The Public Prosecutor,
   High Court of Madras.

+1cc to Mr.A.Jenasenan, Advocate, S.R.No.89694

Crl.OP.No.10100 of 2018

SVN(CO)

rrs 24/01/2019