

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

CRM-M-39703-2018 (O&M)
Reserved on: 09th October, 2018
Decided on: 30th October, 2018

William Scott Pinckney ..Petitioner

versus

Union Territory of Chandigarh ..Respondent

CORAM: HON'BLE MR JUSTICE RAMENDRA JAIN

Present: Mr. Amrinder Sharma, Senior Advocate
with Mr. Rohit Khanna, Advocate and
Mr. Kamal Shankar, Advocate, for the petitioner

Ms. Ashima Mor, APP, Union Territory,
Chandigarh for the respondent

RAMENDRA JAIN, J.

1. Through this instant petition under Section 482, Code of Criminal Procedure, the petitioner has assailed the legality and validity of the impugned order dated 13.7.2018 (Annexure P-1) of revisional court, affirming order dated 07.01.2017 (Annexure P-2) of trial court, framing charge-sheet against him and further order dated 11.1.2017 (Annexure P-3), whereby trial court ordered, clubbing of three supplementary challans for conducting joint trial in case FIR no.280 dated 02.12.2002, registered under sections 3 and 4 of the Prize Chits and Money Circulation Schemes (Banning), Act, 1978 (in short “PCMCS Act”) coupled with Section 420 IPC at Police Station, Sector 26, Chandigarh.

2. Put pithily, petitioner is ex-employee and former

Director/Managing Director of M/s Amway India Enterprises Private Limited (in short “Amway Company”), incorporated under the Companies Act, 1956.

3. Complainant Shri S.P. Negi, Deputy General Manager, Reserve Bank of India, Chandigarh, made a complaint to Deputy Superintendent of Police (Crime), Economic Offences, Wing, Chandigarh Police, Chandigarh, for registration of a case against petitioner, alleging that the business being carried out by M/s Amway company is violative and banned, being infringement of provision 2(c) of Section 3 of the PCMCS Act. On the basis of above referred allegations, FIR in question was registered way back in the year 2002 under sections 3 and 4 of the PCMCS Act. Subsequently, vide letter dated 01.02.2003, addressed to Chief Secretaries of all the States and Union Territories, Reserve Bank of India informed that its officials have no power to opine that the business run by M/s Amway company was not a prize chit or money circulation and that no legal proceedings may be initiated against it. On 27.11.2009 Sub Inspector Ashok Kumar, the Investigating Officer, after around seven years, filed a status report before this court in a petition filed by M/s Amway Company that on investigation, no evidence had come against it.

4. Thereafter, Sub Inspector Ashok Kumar, Investigating Officer, conscious of the fact that, by now any action against M/s Amway Company in alleged offence under PCMCS Act, has become time barred, on 1.12.2012, almost after 10 years, filed three supplementary challans against the petitioner, wherein he was, for the first time, arraigned as accused by deliberately adding offence under section 420 IPC, without assigning any cogent reason on the basis of a report dated 21.12.2011, with a view to

revive the time barred action against the petitioner under PCMCS Act.

5. The trial court, vide order dated 11.1.2017 (Annexure P-3), clubbed supplementary challans for conducting joint trial. Vide order dated 07.1.2017 (Annexure P-2), charges under sections 3 and 4 of the PCMCS Act and section 420 IPC were framed against the petitioner.

6. Being aggrieved against the said order dated 07.1.2017 of the trial court, the petitioner preferred revision, which too was dismissed vide order dated 13.7.2018 (Annexure P-1) of the revisional court.

7. Learned counsel for the petitioner has assiduously argued that the learned trial court erred in taking cognizance and framing charges against the petitioner under sections 3 and 4 of the PCMCS Act, losing sight of the fact that under provisions of Sections 468 and 469, Code of Criminal Procedure, maximum sentence prescribed is 3 years from the date of registration of FIR, i.e., 02.12.2002, which stood expired on 01.12.2005 and ignoring the status report filed before this court in the year 2009 that no offence is made out against the petitioner under the aforesaid sections of the PCMCS Act. It was only on expiry of limitation period of 03 years and after a lapse of more than 10 years, statements of some of the selected witnesses, for the first time, were recorded under section 161, Code of Criminal Procedure, to add offence under section 420 IPC.

8. The basic requirement for the commission of offence under section 420 IPC, i.e., intention to deceive is completely missing. That apart, M/s Amway company was not arraigned as accused in the FIR. It was registered against the petitioner only, who was former Director of the company. Therefore, no vicarious liability could be fastened upon the petitioner in the absence of the company, not being made as accused. Consequently, FIR and

consequential proceedings arising therefrom are liable to be quashed being not maintainable and hopelessly time barred.

9. On the other hand, learned counsel for Union Territory refuting submissions of learned counsel for the petitioner submits that learned revisional court has rightly affirmed order dated 07.01.2017 of the trial court, framing charges under sections 3, 4 of the PCMCS Act, and Section 420 IPC against the petitioner, on the basis of material available on the record holding that he, being the Director of the Company, at the relevant time and responsible for the conduct of its business, which amounted to money circulation scheme for the distributors as also the company, was liable to be charge sheeted as such.

10. Having given thoughtful consideration to the rival submissions, this court finds the instant petition merits acceptance for the reasons to follow:-

11. Before proceeding in the matter, it would be relevant to minutely scan the contents of FIR No.280 dated 2.12.2002 (Annexure P-5), registered against the petitioner alone. The prosecution did not bother to arraign M/s Amway company as accused for the reasons best known to it. There are no specific allegations against the Director of the Company. The business is conducted by the company only. Therefore, in the absence of arraigning M/s Amway company as accused, no vicarious liability could be fastened upon the Director of the Company.

12. Faced with this situation, the question that arises for consideration is – whether a complaint against a Director of the Company without arraigning the company as accused was maintainable? Obviously, the answer is in the negative. A similar controversy came up for

consideration before the Apex Court, due to divergence of opinion between the two Judges. The same was resolved in Aneeta Hada versus Godfather Travels and Tours Private Limited and three other connected petitions (2012) 5 Supreme Court Cases 661, wherein their Lordships quashed proceedings initiated against the appellants as well as the company. For the facility of reference, their Lordships of three-Judge Bench of the Apex Court in paras 58 and 59 of their judgment made following specific observations:-

“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.”

“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 drag-net 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, which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal does not correctly lay down the law and accordingly, is hereby overruled. The decision in Anil Hada is overruled with the qualifier as stated in para 51. The decision in Modi Distillery has to be treated to be restricted to its own facts as has been explained by us hereinabove.

13. Further, His Lordship Hon'ble the Chief Justice of the Apex Court, while resolving the same controversy, as is involved in the case in hand, relying upon the dictum laid down by three-Judge Bench of the Apex Court in Aneeta Hada's case (supra) in the case of Sharad Kumar Sanghi versus Sangita Rane 2015(2) RCR (Criminal) 120 has made the following observations in its para 9, 11 and 13.

14. “ 9 The allegations which find place against the Managing Director in his personal capacity, as we notice, are absolutely vague. When a complainant intends to proceed against Managing Director or any officer of a company, it is essential to make requisite allegations to constitute the vicarious liability. In Maksud Sajjad v. State of Gujarat MANU/SC/7923/2007 : (2008) 5 SCC 668, it has been held, thus:-

“ Where a jurisdiction is exercised on a complaint petition filed in terms of section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company, when the accused is

the Company. The learned Magistrate failed to pose unto himself the correct question viz., as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the Respondents herein were personally liable for any offence. 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.”

“ In this regard, reference to a three-Judge Bench decision in S.M.S. Pharmaceuticals Limited versus Neeta Bhalla and another. MANU/SC/0622/2005 : (2005) 8 SCC 89 would be apposite. While dealing with an offence under section 138 of the Negotiable Instruments Act, 1881, the Court explaining the duty of a Magistrate, while issuing process and his power to dismiss a complaint under section 203 without even issuing process observed thus:

“ ... a complaint must contain material to enable the Magistrate to make up his mind for issuing process. If this were not the requirement, consequences could be far-reaching. If a Magistrate had to issue process in every case, the burden of work before the Magistrate as well as the harassment caused to the Respondents to whom process is issued would be tremendous. Even section 204 of the Code starts with the words

“ if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding”. The words “sufficient ground for proceeding” again suggest that ground should be made out in the complaint for proceeding against the respondent. It is settled law that at the time of issuing of the process the Magistrate is required to see only the allegations in the complaint and where allegations in the complaint or the charge-sheet do not constitute an offence against a person, the complaint is liable to be dismissed.”

After stating so, the Court analysed Section 141 of the Act and after referring to certain other authorities answered a reference. The relevant part of the answer reads as follows:-

“ It is necessary to specifically aver in a complaint under section 141 that at the time the offence was committed, the person accused was in charge of and responsible for the conduct of business of the company. This averment is an essential requirement of section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of section 141 cannot be said to be satisfied.”

“10 XX XX XX XX

“11 In the case at hand as the complainant's initial statement would reflect, the allegations are against the company, but the company has not been made arrayed as a party. Therefore, the allegations have to be 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 on certain statutes. It has been so held by a three-Judge Bench in **Aneeta Hada v. Godfather Travels and Tours Private Ltd.** MANU/SC/0335/2012 : (2012) 5 SCC 661 in the context of Negotiable Instruments Act, 1881.”

“ 12 XX XX XX XX

“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.”

15 In view of the dictum laid down by the Apex Court, in the judgments referred to above, this court is of the considered opinion that without the company being arraigned as accused, no vicarious liability could be fastened upon the petitioner. Therefore, the FIR and the consequential proceedings arising therefrom qua the petitioner alone, being not maintainable, are liable to be quashed.

16 The next question that arises for consideration is – whether offence under section 420 IPC can be added after 10 years, especially when limitation to take cognizance or to submit final report under section 173(2)

Code of Criminal Procedure, for prosecuting the petitioner under sections 3 and 4 of the Act, had expired in the year 2005, i.e., after lapse of three years from the date of receipt of the complaint. According to the contention of learned counsel for the petitioner, a time barred criminal action cannot be revived by adding Section 420 IPC, by filing supplementary challans by the prosecution before the trial court.

17 A perusal of the record (in connected petition no.CRM-M-33432-2018) spells out that prosecution was launched on the complaint dated 28.11.2002 of Deputy General Manager, Reserve Bank of India, Chandigarh, lodging FIR No.280 of 2002 under sections 3 and 4 of the Act against the petitioner, a former Managing Director and CEO of M/s Amway India Enterprises Private Limited (a American Company), running a business network in India, by sponsoring distributors, sub-distributors and so on. The police carried on investigating the matter for around 5 years. Finally, on 27.11.2009 (Annexure P-7), the police filed a status report observing that “.....the said case may be investigated thoroughly to bring out all available evidence. After that the investigation had been carried out, but no evidence came to light against M/s Amway India Enterprises. The investigation is going on.” Similarly, on 27.11.2009, the police also submitted status report before this court in CRM-M-50975-2002 filed by M/s Amway India Enterprises Private Limited mentioning that no evidence had come forward against the said Company.

18 However, on 01.12.2012, after spanning over 10 years of the registration of FIR, police filed a final report (Annexure P-9) under section 173 (2) Cr.P.C against the petitioner, who was Director of the said Company at the relevant time, under sections 3 and 4 of the Act, coupled

with section 420 IPC.

19 The prosecution, with a view to revive the time barred criminal action, initially lodged under sections 3 and 4 of the Act, deliberately added Section 420 IPC to launch prosecution against the petitioner on the basis of the statements of some hand-picked witnesses, namely, S/Shri Gurnam Singh, Varun Sharma, Baljit Singh, Smt. Sudesh Kaur, Rajan Khera, Ramesh Dubey, Narinder Kumar, Smt. Inderjeet Kaur, and Vikrant Sihotra recorded under section 161 Code of Criminal Procedure. They made almost similar statements to the effect that they joined the company in the year 2002. They had to pay Rs.1800/- as joining fee and Rs.2600/- for the products, total amounting to Rs.4400/-. They were told that by selling products of the company, they would get incentives on the points value gained. Besides this, they would also earn more profits by getting joined more and more members in the company. Thus, they were induced by the company. Though they sold products assigned to them as kits, but could not get any benefit, inasmuch as the their products were costly. At the time of joining the company, ID numbers were issued to them, but the same were kept somewhere at home. Whenever, they asked officials of the company to refund their amount of Rs.1800/-, they used to hush up the matter on one pretext or the other. Therefore, the company had committed a fraud with them. On the basis of the statements of these witnesses, the prosecution submitted supplementary challans against the petitioner, making out a case of cheating and forgery adding Section 420 IPC.

20 The period of limitation for taking cognizance of alleged offence under sections 3 and 4 of the PCMCS Act is three years from the date of registration of the FIR under sections 468 and 469, Code of Criminal

Procedure. For the facility of reference, it would be relevant to refer to provisions of Sections 468 and 469, Code of Criminal Procedure, which read as under:-

“468. Bar to taking cognizance after lapse of the period of limitation (1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be-----

(a) six months, if the offence is punishable with fine only,

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year.

(c) three years if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.”

“469. Commencement of the period of limitation -----(1) The period of limitation, in relation to an offender, shall commence,- -----

(a) on the date of the offence; or

(b) where the commission of the offence was not known to the person aggrieved by the offence or to any police officer, the first day on which such offence comes to the knowledge of such

person or to any police officer, whichever is earlier, or

(c) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the police officer making investigation into the offence, whichever is earlier.

(2) In computing the said period, the day from which such period is to be computed shall be excluded.”

21 On perusal of Sections, quoted above, it is abundantly manifest that both the learned courts below did not appreciate that once the limitation starts, qua a particular offence, the same could not have been tried by them after expiry of period of limitation, which in the instant case, expired on 2.12.2005. Therefore, no challan under the provisions of PCMCS Act could have been filed beyond the period of limitation. Even the prosecution did not file any application for condonation of delay, explaining plausible reason for not filing the challan against the petitioner within the time limit prescribed under the statute.

22. The learned counsel appearing for the Union territory has not been able to dispel the contention raised by the learned counsel for the petitioner that it was a time barred criminal action launched by the prosecution under the garb of adding Section 420 IPC in the supplementary challans submitted before the trial court. Therefore, the impugned order passed by the trial court framing charge-sheet against the petitioner after a long period, despite there being not sufficient material on record, to my mind, is cryptic in nature. This court finds support from the judgment rendered in State of Punjab versus Sarwan Singh, (1981) 3 Supreme Court

Cases 34, wherein their Lordships of the Apex Court have held as under:-

“.....The object of Criminal Procedure Code in putting a bar of limitation on prosecutions was clearly to prevent the parties from filing cases after a long time, as a result of which material evidence may disappear and also to prevent abuse of the process of the court by filing vexatious and belated prosecutions long after the date of the offence. The object which the statutes seek to subserve is clearly in consonance with the concept of fairness of trial as enshrined in Article 21 of the Constitution of India. It is, therefore, of the utmost importance that any prosecution, whether by the State or a private complainant must abide by the letter of law or take the risk of the prosecution failing on the ground of limitation. The prosecution against the respondent being barred by limitation, the conviction as also the sentence of the respondent as also the entire proceedings culminating in the conviction of the respondent herein become non-est. For these reasons given above, we hold that the point of law regarding the applicability of section 468 of the Code of the Criminal Procedure has been correctly decided by the Punjab and Haryana High Court. This court has also taken the same view in a number of decisions. The result is that the appeal fails and is dismissed. The respondent will now be discharged from his bail bonds.”

23. Now coming to section 420 IPC, which was added in the supplementary challans clearly is an after-thought attempt, just to revive the alleged offences of the PCMCS Act only on the basis of the statements of

the above said persons, who had made almost similar statements (cut and paste). Having gone through the statements of the above-referred witnesses/persons recorded under section 161, Code of Criminal Procedure, it clearly reveals that no case is made out under section 420 IPC, inasmuch as the basic ingredient of the offence of alleged cheating, i.e., the element of deception, and misrepresentation, as enumerated therein, is completely missing in the instant case. The so-called witnesses, referred to above, did not produce any distributor ID numbers, which were, allegedly, issued to them at the time of joining the company, providing them kits of sale products for an amount of Rs.2600/- along with joining fee of Rs.1800/-, making them aware of refund of the amount within 90 days from their enrollment as distributors in the event of the products of the company being not sold out by such indolent /passive members, who are quite reluctant in not making any endeavour to join new members under them, that too finding fault with the products being costly by investing a paltry sum of Rs.4400/- in the company, therefore, did not make out a case against the petitioner under section 420 IPC. In fact, this business, on the face of it, is a smart one, of such distributors who are, in reality, keen to gain extra monetary benefits by joining new distributors and selling their qualitative products in the market, enabling them to earn points assigned to each product and determine their incentives on the basis thereof. This business is so transparent that seminars are organised by the company under the able guidance of their highly experienced distributors, who give tips of the business, how to carry out, to new entrant distributors, desirous of flourishing their business and with their able assistance, they earn extra-incentives on the strength of their ability.

24. Only on the basis of few of the alleged witnesses, who were idle and indolent, having in mind to earn easy money, without doing hard work in their life, lowered down the reputation of the company, stating that the amount of Rs.1800/- as subscription fee was not refunded to them. The statements of the witnesses do not disclose as to whether they ever applied for the refund of money. It is not a money circulation scheme. Rather, the entire concept of the company is based on selling products directly in the market through distributors or sub-distributors. None of the witnesses had stated that despite demand, money was not paid to them by the company. No material has been brought on the record on the basis of which, it could be determined that there was any allurement on the part of the company to constitute an offence of cheating against it or its functionaries by not providing products to the distributors to sell them in the market. In the considered opinion of this court, this court does not find any deception or misrepresentation, which is essential for making out an offence under section 420 IPC against the petitioner.

25 It is not the case of the prosecution that kits of the sale products were not supplied to the distributors, in lieu of the meagre amount of Rs.2600/- paid by any of the above persons, referred to above, to the company. If the above-referred persons could not sell products of the company on account of their inability or otherwise, there was a provision in the scheme to return kits of products to the company within 90 days of their enrollment as members/distributors and get the amount refunded back. But surprisingly enough, they did not produce on record even a single application in writing to the company for return of their subscription charges. Therefore, on the basis of bald allegations, without any supportive

documents, in my considered opinion, offence under section 420 IPC is not made out in any manner. Moreso, no specific allegations have been levelled against the petitioner, who was a Director of the Company at the relevant time, for cheating any of the distributors. The alleged allegations with respect to nature of business were related to the company only, which, as discussed above, was not made as accused in the FIR.

26. The contention of the learned counsel for the Union Territory that it was a money circulation scheme and there was allurements on the part of the company by organising seminars with the sole motive to attract more customers for joining more and more members earning huge profits and not on account of sale of products showing them a path of green pasture, so as to make them millionaires in a night, does not find force and the same, being bereft of merit, is not sustainable in law.

27 In view of the discussion made above, this petition succeeds and is accepted qua the petitioner only. Accordingly, FIR No.280 dated 02.12.2002 and consequential proceedings arising therefrom, including that of impugned orders dated 13.7.2018 (Annexure P-1), dated 07.01.2017 (Annexure P-2) and dated 11.01.2017 (Annexure P-3) passed by the courts below are set aside.

30th October, 2018
VK

(RAMENDRA JAIN)
JUDGE

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| 1. | Whether speaking/reasoned | Yes/No |
| 2. | Whether Reportable | Yes/No |