THE HON'BLE DR. JUSTICE B.SIVA SANKARA RAO

Crl.P.Nos.6181 & 6672 of 2013

COMMON ORDER:

Petitioners in Crl.P.No.6672 of 2013 are A1 to A3, A5 and A6 and petitioner in Crl.P.No.6181 of 2013 is A4 respectively in C.C.No.1121 of 2013 pending on the file of IX Metropolitan Magistrate, Kukatpally at Miyapur, Cyberabad.

2. The 2nd respondent-Hetro Drugs Ltd., is the defacto-complainant. It is in fact a private complaint filed by 2nd respondent on 9.4.2012 against six accused of whom A1 is M/s Agarwal Foundaries Pvt. Ltd., represented by its Director Pramod Kumar Agarwal who is no other than A2, A3 is Prathik Kunchal, A4-Anurag Agarwal and A5-Goutham Ganeriwal are son and brother respectively of A2 and A6 is Muthya Viay Kumar. In the private complaint, the offences alleged are under Sections 406, 420, 120-B IPC and the alleged occurrence was on 19.11.2011 and thereafter within the jurisdiction of Sanathnagar Police Station, Cyberabad.

3. The contents of the private complaint in registration of crime supra from what the learned Magistrate referred to police under Section 156(3) Cr.P.C. (in mentioning in the F.I.R. dated 11.4.2012 at paragraph 12 of received through IX Metropolitan Magistrate, Miyapur, the complaint to register the crime under Section 156(3) Cr.P.C) that the complainant is having SEZ unit in Polepalli village of Mahabubnagar district and to construct the building, complainant required iron and as A1 company was trading in iron, whose Directors are A2, A3, A4, A5 conducted transactions on behalf of A1 and A6 is the General Manager, Project Sales of A1, complainant used to place purchase orders and accused was sending iron through invoices and

described six invoices Nos.2093, 2094 dated 16.9.2010, 3538 dated 21.10.2010, 3550 dated 22.10.2010, 3626 dated 26.10.2010 and 3794 dated 3.11.2010 pursuant to the purchase orders which are for the respective amounts to a total of Rs.42,63,395/- and while so, the Deputy Commissioner of Customs, APIIC SEZ informed that for the purpose of claiming DEPB (Duty Exemption Pass Book) benefits, complainant has to procure material from DTA (Domestic Tariff Area) supplier by making payments from foreign currency account and complainant accordingly informed to the accused about the problem and requested to return payments made in Indian rupees and accept payment in US Dollars from the foreign currency account and accused informed to first deposit payment in US dollars and subsequently within one day they will issue cheque for exact amount in Indian rupees and accused also furnished proforma invoices under US Dollar by mentioning the value of the invoice in US Dollars. It is further averred that complainant remitted 94,708.57 US Dollars to the account of A1 on 19.11.2011 and after transferring the amount, complainant informed to accused about the deposit of the amount into their account and requested to issue cheque for Rs.42,63,395/- which was paid earlier and accused informed that they will arrange the amount immediately, but they dragged the matter day by day by saying one reason or other and avoided calls made by the complainant and finally when complainant insisted the accused for issue of cheque, accused declared that they will not return the amount and claimed that for the previous transactions, complainant paid the amount with certain delay, therefore they calculated interest and further informed that after adjusting interest, they will return the balance amount and accused furnished statement to the effect that accused are going to withhold Rs.33,55,447/- and in case complainant accepts about withholding, they will return the balance amount. It is further averred that there is no understanding between the complainant and accused about payment of interest in case delayed payments and accused has no lien power to withhold the amount of their company, accused is not disputing about payment of amount to the complainant after receiving payments in US Dollars from foreign currency account and said amount has been made for specific purpose that after receiving US Dollars, accused has to issue cheque in Indian currency, but taking advantage of possession of amount entrusted by complainant, accused have misappropriated and committed breach of trust and cheated the complainant. It is further averred that all accused having conspired together with an intention to cheat the complainant, induced the complainant to deposit the amount first in US Dollars by promising that within one day they will issue cheque and made the complainant company to transfer the amount of US Dollars supra, they misappropriated making false plea and committed the offences and therefore liable.

4. As many as 13 documents enclosed with private complaint dated 9.4.2012, which are true copy of certificate of incorporation of complainant in 1993, Board Resolution of February 2012, copy of the invoices supra, copy of proforma invoice dated 3.6.2011, payment receipt under rupees, bank details of A1 company, message receipt from SBH payment under USD to MS Agarwal IOB Account and mail correspondences.

5. There is no any exchange of notices even as per the complainant from the private complaint and mail correspondence details not even mentioned as to with whose mail ID the correspondence made and who responded among the accused and what all the messages received from SBH of US Dollars is shown to MS Agarwal IOB account dated 8.10.2011 i.e. M/s Agarwal

Foundaries Pvt. Ltd-A1 and nothing to show that the account is in the name of other than A1 represented by A2, much less among A3 to A6. There is no averment specifically of any of the accused lured by any specific overt-acts on any specific day and time and instance to make them liable vicariously, but for at best for A1 entity represented by A2 Director to be made liable. Even leave this apart, the alleged remittance in US Dollars was as per very complaint averments to the account of A1 on 19.11.2011 and what document No.12 message receipt from SBH is to the account of A1 that referred on 8.10.2011 and even bank account details of A1 that reflects from document No.11 and nothing to show any amount remitted to the account of other accused. Even what the complainant in the private complaint referred to police in registration of crime supra averred is there is no original understanding of remitting in US Dollars and to make equal payments and to give cheques in the purchases for iron for construction of building by complainant in SEZ, which iron is supplied by A1 entity, i.e. trading in iron business and what all mentioned is A2 and A3 Directors. To say A4 and A5 conducted transactions in A1 company, there is no proof and even by referring to A6 as employee of A1 company, there is nothing specifically averred as to he lured in entering into transaction and the purchase orders covered by the invoices by complainant is only with A1 which are covered by documents 3 to 9 of the documents enclosed with the complaint registered as F.I.R.

6. It is averred, complainant used to place purchase orders to A1 company and they used to send the iron, it is practically from page 2 of the complaint last para that the purchase orders placed with A1, the iron is sending by A1. What further stated in page 3 of the complaint is it was while supplying as usual, the Deputy Commissioner of Customs informed the

complainant to claim Duty Exemption Pass Book benefits, complainant to procure material from DTA supplier by making payments from foreign currency account and then complainant approached the supplier of iron i.e. A1 entity and explained the problem to return payments in Indian rupees by accepting payment in US Dollars. Even from the complaint further averments, there were delayed payments and what stated is A1 entity wants to retain some amounts towards interest, there dispute arises, which is civil in nature and from these facts, there is nothing to say any dishonest intention from the inception much less any of accused specifically lured including A1 to enter into purchase dealings of iron from A1 entity by complainant to attract any offence of Section 420 IPC and there is no any entrustment to attract any offence of breach of trust, much less to rope other than A1, represented by A2 individually and A3 to A6 supra.

7. After registration of the crime, the police filed charge sheet by citing only (7) witnesses of whom, complainant is L.W.1 and four more witnesses are Manager, Excise Department at Hetro, Assistant Manager, Assistant Manager (Accounts) at Hetro, Assistant Manager (Stores) at Hetro respectively and even from the police investigation with reference to their examination, what is described in the charge sheet from last para page 3 of the (7) pages charge sheet is by referring to invoices and purchase orders, not even mentioned any role of any of other accused with specific overt-acts among A2 to A6, but for A1 entity represented by A2. In saying further of A1 to A3 and A5, A6 allegedly surrendered or they were arrested or their disclosure statements, if any, recorded. There is nothing even to say any disclosure leading to discovery of a fact to admit within the exception under Section 27 of Indian Evidence Act, otherwise hit by any disclosure to police under Section 25 of the Indian Evidence Act from the said investigation

material even on its face value for same as if the investigation supra established any role specifically among A2 to A6 with A1, to lookafter transactions on behalf of A1 in page 5 line 4 of the sheet which is perfunctory and baseless and even in page 5 of the charge sheet further states to claim Duty Exemption Pass Book from Domestic Tariff Area procurement of material complainant asked A1 about the problem for payment in US Dollars and to give cheque and pay in Indian currency and what stated is complainant remitted US dollars to the account of A1 on 19.11.2011. It is thereby at best A1 entity that is liable the remittances to A1 represented by A2 or others even as Directors or Managing Directors or otherwise. In the absence of further averment on investigation material as to any role of specifically of other Directors, mere happened to be Directors others among A2 to A5 cannot be mulcted with vicarious liability. What all further stated in page 5 of the charge sheet is in the reply notice and email transactions, A1 admitted about the amount sent by complainant in US Dollars and A1 admitted to repay after adjustment with interest. If at all thereby A1 alone liable and not others including from the entire investigation material for the learned Magistrate to take on file any of the offences against other than A1.

8. Having regard to the above, there are no sustainable allegations particularly against A3 to A6 and even individually against A2, but for against A1 represented by A2 and there is no any vicarious liability for the IPC offences in the absence of any specific pleading with specific overt-acts to be made liable as held by the Constitution Bench of the Apex Court in Sunil Bharti Mittal v. Central Bureau of Investigation[1] and even subsequent specific averments must be there indicating how and in what manner there is any role with description and specific allegation against the persons to be

[1] 2015(4) SCC 609

made vicariously liable if at all to seek from any specific role shown played by any incriminating act, otherwise, not liable with vicarious liability, that was also the law in earlier on several expressions in Saroj Kumar Poddar v. State (NCT of Delhi)[2], Keki Hormusji Gharda and others V. Mehervan Rustom[3], particularly National Small Industries v. Harmeet Singh Paintal[4] and Iridium India Telecom Ltd v. Motorola Incorporated[5].

9. Having regard to the above, there is nothing to rope A2 either individually other than representing A1 or A3 to A6. Therefore, both the Criminal Petitions are allowed in part, by quashing the proceedings insofar as A2 to A6 are concerned.

10. In the result, Crl.P.No.6181 of 2013 is allowed, quashing the proceedings in C.C.No.1121 of 2013 on the file of IX Metropolitan Magistrate, Kukatpally at Miyapur insofar as A4 is concerned. Crl.P.No.6672 of 2013 is dismissed insofar as A1 is concerned and allowed by quashing the proceedings in C.C.No.1121 of 2013 on the file of IX Metropolitan Magistrate, Kukatpally at Miyapur insofar as A2, A3, A5 and A6 are concerned. As a sequel, the miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

Dr.SSRB,J

Date: 28.3.2019
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[2] (2007) 3 SCC 693
[3] (2009) 6 SCC 475
[4] (2010) 3 SCC 330
[5] (2011) 1 SCC 74

THE HON'BLE DR. JUSTICE B.SIVA SANKARA RAO

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