

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : 09.12.2019

Decision on : 24.12.2019

IN THE MATTER OF:

+ CRL.M.C. 4348/2019 & Crl. M. A. 34799/2019

RAMESH CHANDRA KATHURIA

..... Petitioner

Through: Mr. Muneesh Malhotra, Ms. Vanya
Khanna and Ms. Manpreet Kaur,
Advocates.

versus

STATE

..... Respondent

Through: Ms. Manjeet Arya, APP for State with
SI S. P. Mamaria from PS-Vasant
Kunj (S).

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. The present proceeding impugns order dated 15.07.2019 passed by Metropolitan Magistrate in Crl. Case No.8592/2017 as well as seeks quashing of FIR No. No.781/2014 registered under Section 33 of Delhi Excise Act and the consequent proceedings.
2. Learned counsel for the petitioner has submitted that the present case arose out of an incident dated 13.08.2014 where one Lakhmi Chand, driver of car No. DL-4CNA-3251 was caught in possession of 15 bottles of different liquor brands and two cases of beer of Kingfisher Brand. He was apprehended on the basis of secret information and during interrogation disclosed the name of the present petitioner who was Managing Director of

the company who owned the car.

3. Learned counsel for the petitioner has submitted that on receipt of notice u/s 160 Cr.P.C, the petitioner had replied that the co-accused, Lakhmi Chand went to drop an employee who had used the vehicle for unlawful purpose. It was further contended that the petitioner has been summoned in his individual capacity whereas the company has not been made accused in the present case.

4. Per contra, learned APP for the State submitted that the name of the petitioner has come in the disclosure statement of the accused Lakhmi Chand where he had stated that he had purchased the seized liquor bottles at the asking of the present petitioner.

5. I have heard learned counsel for the petitioner and learned APP for the State and have gone through the records.

6. The present case is registered for the offence punishable under Section 33 Delhi Excise Act and during investigation Section 58 Delhi Excise Act was also added. On 25.03.2017, the chargesheet was filed under the aforesaid sections against Lakhmi Chand and the present petitioner. The Investigating Officer along with the chargesheet, also filed site plan and seizure memo of the car, its registration certificate, insurance cover note & policy papers alongwith other documents.

7. It is the grievance of the petitioner that he was not the owner of the car and in fact it was the company who was the registered owner of the car in all the documents seized during the investigation. There is no investigation carried out whether the seized bottles were purchased on that day as stated by Lakhmi Chand in his disclosure statement.

8. The relevant portion of the chargesheet so far as the role of the

present petitioner is concerned is reproduced below:

“... disclosure statement of accused Lakhmi Chand was taken and owner of the car accused Ramesh Chand Kathuria was also interrogated ...”

9. From the material collected during investigation and filed along with the chargesheet i.e., the seizure memo of the car, its RC and insurance papers show that ‘Norma Ispat Pvt. Ltd.’ (hereinafter referred to as ‘company’) was the registered owner of the car.

10. The trial court vide order dated 15.07.2019 framed charge under Section 52(2) read with 58 of Delhi Excise Act against the present petitioner and under Section 33 of Delhi Excise Act with respect to accused Lakhmi Chand. The impugned order, while noting the argument on behalf of the prosecution, passed the following order:-

“It is argued by Ld. APP for the State that as per provision of Section 52.2 of Delhi Excise Act, as accused Ramesh Chand was working as MD of the above said company, therefore, he is presumed to be in-charge of day to day affairs and the above said provision of law presumes that the owner of the vehicle is deemed to be guilty for unlawful use of the vehicle.

After hearing the arguments and considering the record, this Court is of the view that there is requirement of making company liable in such cases where any act is done on behalf of the company. In the case in hand, the notice which was given to Ramesh Chand U/s 160 Cr.P.C. is available on record, wherein it is specifically mentioned by him sent the driver i.e. Accused Lakhmi Chand for dropping an employee whereas accused Lakhmi used the vehicle for above said unlawful purpose. From the said reply it is evident that the vehicle was at that point of time under control of accused Ramesh Chand. The fact that accused Lakhmi Chand had or had not used the vehicle on the direction of accused Ramesh

Chand is a defence on the part of accused Ramesh Chand which can be adjudicated at the stage of the trial by leading of evidence. Thus, prima facie role of accused Ramesh Chand in respect to ownership of the vehicle brought on record and there is no bar in proceeding against him irrespective of the fact that company has not been made accused in the present matter. The judgment relied upon by the Ld. Counsel for accused are not applicable to the facts of the present case as in the said cases the fraud was committed by company itself therefore no prosecution of the Directors in absence of the company could have taken place who were acting on behalf of the company, whereas in the case in hand, accused Lakhmi Chand was acting on behalf of accused Ramesh Chand.

Hence prima facie charge under Section 33 of Delhi Excise Act is made out against accused Lakhmi Chand and Section 52.2 r/w 58 of Delhi Excise Act is made out against the accused Ramesh Chand". (emphasis added)

11. The chargesheet as well as the order on charge, despite noting that the petitioner is the Managing Director of the company, proceed on the ground that the petitioner is the owner of the car and hence liable to be proceeded against in the case. The documents collected during investigation, on the other hand, establish that the car was rather owned by the company.

12. I deem it profitable to reproduce Sections 56 & 52 of Delhi Excise Act relates to commission of offence by a company. The same reads as under:-

"56. Commission of offence by companies

(1) If the person committing an offence under this Act is a company, the company as well as every person in charge of and responsible to, the company for the conduct of its business at the time of the commission of the offence, shall be deemed to be guilty of offence, and shall be liable to be proceeded against and punished accordingly:

PROVIDED that where a company has different establishments or branches or different units in any establishment or branch, the concerned Chief Executive and the person in charge of such establishment, branch, unit nominated by the company as responsible for the conduct of the business shall be liable for contravention in respect of such establishment, branch or unit:

PROVIDED FURTHER that nothing in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or that the commission of the offence 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 shall be liable to be proceeded against and punished accordingly.

Explanation: For the purpose of this section—"company" means anybody corporate and includes a firm or other association of individuals; and "director", in relation to firm, means a partner in the firm.

52. Presumption as to commission of offence in certain cases

(1) In prosecution under section 33, it shall be presumed, until the contrary is proved, that the accused person has committed the offence punishable under that section in respect of any intoxicant, still, utensil, implement or apparatus, for the possession of which he is unable to account satisfactorily.

(2) Where any animal, vessel, cart or other vehicle is used in the commission of an offence under this Act, and

is liable to confiscation, the owner thereof shall be deemed to be guilty of such offence and such owner shall be liable to be proceeded against and punished accordingly, unless he satisfies the court that he had exercised due care in the prevention of the commission of such an offence.”

13. A perusal of Sections 52(2) & 56 of Delhi Excise Act leaves no doubt that wherever an offence is committed by the company, the company has to be necessarily made an accused. The liability, of the person in charge of and responsible to the company for conduct of its business, is only vicarious in nature. The material placed on record along with the chargesheet shows that the seized car was owned by the company. A bare reading of the impugned order on charge, would show that although, the trial court recorded its view that there was requirement of making the company liable in such cases, but still went on to hold that the petitioner was the owner of the vehicle. Admittedly, the petitioner was not present in the car at the time of its seizure. The company has not been made an accused in the charge sheet. Whether, in the absence of adding the company as an accused, the Managing Director/Director can be made vicariously liable has come up for consideration before the courts on more than one occasion.

14. Section 56 of the Delhi Excise Act is pari materia with Section 85 of Information Technology Act, 2000. The Supreme Court (three Judge Bench), in Aneeta Hada v. Godfather Travels & Tours Pvt. Ltd., reported as **(2012) 5 SCC 661**, while considering a similar controversy with respect to the offence under Information Technology Act drew an analogy with Section 141 of the Negotiable Instruments Act, 1881 and held that a director cannot be held liable for the offence under Section 85 of the IT Act in

absence of the Company being arraigned as an accused. The observations made by the Supreme Court are reproduced hereinunder: -

“32. We have referred to the aforesaid authorities to highlight that the company can have criminal liability and further, if a group of persons that guide the business of the companies have the criminal intent, that would be imputed to the body corporate. In this backdrop, Section 141 of the Act has to be understood. The said provision clearly stipulates that when a person which is a company commits an offence, then certain categories of persons in charge as well as the company would be deemed to be liable for the offences under Section 138. Thus, the statutory intendment is absolutely plain. As is perceptible, the provision makes the functionaries and the companies to be liable and that is by deeming fiction. A deeming fiction has its own signification.

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39. The word “deemed” used in Section 141 of the Act applies to the company and the persons responsible for the acts of the company. It crystallises the corporate criminal liability and vicarious liability of a person who is in charge of the company. What averments should be required to make a person vicariously liable has been dealt with in S.M.S. Pharmaceuticals Ltd. In the said case, it has been opined that the criminal liability on account of dishonour of cheque primarily falls on the drawee (sic drawer) company and is extended to the officers of the company and as there is a specific provision extending the liability to the officers, the conditions incorporated in Section 141 are to be satisfied.

40. It has been ruled as follows: (S.M.S. Pharmaceuticals Ltd. case, SCC pp. 95-96, para 4)

“4. ... It primarily falls on the drawer company and is extended to officers of the company. The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of

another. This normal rule is, however, subject to exception on account of specific provision being made in the statutes extending liability to others. Section 141 of the Act is an instance of specific provision which in case an offence under Section 138 is committed by a company, extends criminal liability for dishonour of a cheque to officers of the company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable.”

41. After so stating, it has been further held that while analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. In para 18 of the judgment, it has been clearly held as follows: (S.M.S. Pharmaceuticals Ltd. case, SCC p. 102)

“18. ... there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability.”

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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 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 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.

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64. Keeping in view the anatomy of the aforesaid provision, our analysis pertaining to Section 141 of the Act would squarely apply to the 2000 enactment. Thus adjudged, the Director could not have been held liable for the offence under Section 85 of the 2000 Act. Resultantly, Criminal Appeal No. 1483 of 2009 is allowed and the proceeding against the appellant is quashed. As far as the Company is concerned, it was not arraigned as an accused. Ergo, the proceeding as initiated in the existing incarnation is not maintainable either against the company or against the Director. As a logical sequitur,

the appeals are allowed and the proceedings initiated against Avnish Bajaj as well as the Company in the present form are quashed.”

15. Again, in Anil Gupta v. Star India Pvt. Ltd., reported as (2014) 10 SCC 373, Ajit Balse v. Ranga Karkere, reported (2015) 15 SCC 748, Charanjit Pal Jindal v. L. N. Metalics, reported as (2015) 15 SCC 768 and Himanshu v. B. Shivamurthy & Ors., reported as (2019) 3 SCC 797, the Supreme Court while relying on its decision in Aneeta Hada (supra) reiterated that the proceeding against the Managing Director/Director cannot be continued in absence of making the company a party to the proceedings.

16. A Coordinate Bench of this Court in Matrix Cellular Services Pvt. Ltd. v. Sanjay Mukerji reported as (2013) 196 DLT 649, while considering the offence of contempt of Court committed by a company within the meaning of Section 12(4) of the Contempt of Court Act, 1971 relied on the decision in Aneeta Hada (Supra) and held that the officers of the company cannot be prosecuted in the absence of company being arraigned as an accused.

17. Similarly, another Coordinate Bench of this Court in Rakesh Jain v. Union of India, reported as (2014) 145 DRJ 449, while considering the scope of Section 68 of FERA, 1973 drew parallels with Section 141 of the Negotiable Instruments Act, 1881 came to the conclusion that vicarious liability cannot be fastened on the Directors without making the company an accused.

18. A Single Judge Bench of Gujarat High Court at Ahmedabad in Managing Directors Sanghi Industries Limited v. State of Gujarat, reported as 2016 SCC Online Guj 6303, while dealing with the offence committed

by the company under Section 199 of Motor Vehicle Act, 1998 for over loading the vehicle used for transportation of the material from one factory to another held that provision of Section 141 of the NI Act is identical/pari materia with Section 199 of Motor Vehicle Act and in the absence of joining the company as an accused, the complaint against the Managing Director of the company cannot be continued.

19. As already noted above, the seized car was owned by the company. The company has not been made an accused. The case of the investigating agency itself is that the petitioner is not the owner of the car and is only the Managing Director of the company. Further, the trial court in the impugned order dated 15.07.2019 itself notes that there was requirement of making the company liable in such cases however, still goes on to hold that the present petitioner is the owner of the car.

20. Accordingly, I am of the view that in the facts and circumstances of the case, the proceedings against the present petitioner are liable to be set aside. Consequently, the aforesaid FIR and consequent proceedings against the present petitioner are quashed.

21. The petition is accordingly disposed of along with the pending application.

(MANOJ KUMAR OHRI)
JUDGE

DECEMBER 24, 2019
ssc/p'ma