

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1012 OF 2019

1. Ms.Rachana Sharma
Adult Indian Inhabitant
Having address at
Hiranandani Towers CHS,
Maitri Park Near R.K.Studio,
Chembur (East), Mumbai – 400071.
2. Ms.Ranjana Sharma,
Adult Indian Inhabitant
Having address at
Hiranandani Towers CHS,
Maitri Park Near R.K.Studio,
Chembur (East), Mumbai – 400071. ... **Applicants**

Versus

1. State of Maharashtra
2. Municipal Corporation of Greater
Mumbai, Municipal Building,
Opposite CSMT Station,
Mahapalika Marg, Dhobi Talao,
Chhatrapati Shivaji Terminus Area,
Fort, Mumbai, Maharashtra – 400001. ... **Respondents**

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Mr.Karansingh B. Rajput, Advocate for the Applicants.

Mr.R.M.Pethe, the Additional Public Prosecutor for the Respondent
No.1/State.

Mr.Prashant Kamble with Mr.Kunal Waghmare, Advocate for the
Respondent No2/MCGM.

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CORAM : A.M.BADAR J.

DATED : 5th FEBRUARY 2020.

ORAL JUDGMENT :

1 Heard.

2 Rule. Rule is made returnable forthwith. Heard finally
by consent of parties.

3 By this application, applicants are challenging the
Order of issuance of process passed by the learned trial Magistrate
on 24th January 2018.

4 Facts in brief leading to the institution of the present
petition can be summarized thus :

Premises of M/s.R Squire Shri Sai Baba Adhikaran Pvt.
Ltd. on C.T.S.No. 327, opposite Govandi Station Road, Deonar,
Mumbai – 88 came to be inspected by the Officer of the Municipal
Corporation of Greater Mumbai/respondent No.2 herein (herein
after referred to as “the MCGM” for the sake of brevity).
Inspection report was then came to be recorded by the Inspecting

Officer. It was revealed that an offence punishable under Section 394(1)(b) read with Section 471 of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as “the MMC Act” for the sake of brevity) is committed as Nitrogen Gas Cylinder, 1 Nos. (120kg) other than of domestic use was being kept in that premises without license. That is how a complaint came to be lodged by the respondent No.2/MCGM through the Assistant Law Officer – II (Zone-V), M- East Ward in the 42nd Court of Metropolitan Magistrate, Shindewadi, Dadar, Mumbai. Applicants herein are arraigned as Accused Nos.1 and 2 in the said complaint by stating that they are the Directors of the Company. The learned Metropolitan Magistrate on 24/01/2018, after hearing the complainant was pleased to pass the following summoning Order :

“Perused complaint and documents on record. Heard complainant side at considerable length. Prima facie case is made out against the accused, therefore, issue process against the accused as prayed, returnable on

_____”

5 Heard the learned Counsel appearing for the applicants. By drawing my attention to the complaint lodged by the Assistant

Law Officer, it is argued that Company which is keeping Nitrogen Gas Cylinder, 1 Nos. (120kg) other than of domestic use in that premises without license is not arraigned as an accused in the complaint. It is further argued that the active role is not attributed to the applicants herein/original accused Nos.1 and 2 in the entire complaint. The learned Counsel further argued that the impugned Order of summoning is suffering from total non-application of mind and, therefore, the said Order is required to be quashed and set aside.

6 The learned Counsel appearing for the respondent No.2/MCGM vehemently opposed the application by contending that paragraph 2 of the complaint shows that the applicants were allowing commission of offence of carrying on the trade by keeping Nitrogen Gas Cylinder, 1 Nos. (120kg) other than of domestic use in that premises without license and, therefore, they are certainly liable to answer the charge in that regard.

7 I have considered the submissions so advanced and also perused the complaint as well as the summoning Order apart

from the Inspection Report.

8 In the complaint, the Company which was allowing the Nitrogen Gas Cylender, 1 Nos. (120kg) other than of domestic use to be kept in that premises without license is not made an accused. Paragraph 1 of the complaint mentions that premises of the said Company named M/s.R Squire Shri Sai Baba Adhikaran Pvt. Ltd. has been inspected. In paragraph 2 of the complaint, it is averred that during inspection, it was observed that Pravin Shankar (Admin) was present at the time of inspection and he told that Ranchana Sharma and Ranjana Sharma (applicants herein) are Directors and Arun Kumar is the General Manager. It is averred that they committed offence of carrying on or allowing or suffering to be carried on the trade by keeping Nitrogen Gas Cylender, 1 Nos. (120kg) other than of domestic use in that premises without license. Said Pravin Shankar and Arun Kumar are made an accused Nos.4 and 3 in the subject complaint.

9 Upon being questioned, the learned Counsel appearing for the respondent No.2/MCGM has fairly admitted that there is

no provision in the statute i.e. the MMC Act rendering the Directors vicariously liable for the acts and omissions of the Company. Except bare averments in the complaint that one of the accused has told names of the Directors and General Manager of the Company, there is nothing to infer in the complaint that Nitrogen Gas Cylinder, 1 Nos. (120kg) other than of domestic use was being kept in that premises without license with active role of applicants herein/accused Nos.1 and 2.

10 The learned Counsel for the applicants has rightly relied on the Judgment of the Honourable Apex Court in the matter of *Shiv Kumar Jatia versus State of NCT of Delhi*¹ and particularly on the observations made in paragraph 29 of the said Judgment. The paragraph 29 reads thus :

“29. By applying the ratio laid down by this Court in the case of Sunil Bharti Mittal, it is clear that an individual either as a Director or a Managing Director or Chairman of the company can be made an accused, along with the

1 2019 SCC OnLine SC 1090.

company, only if there is sufficient material to prove his active role coupled with the criminal intent. Further the criminal intent alleged must have direct nexus with the accused. Further in the case of Maksud Saiyed vs. State of Gujarat & Ors. this Court has examined the vicarious liability of Directors for the charges levelled against the Company. In the aforesaid judgment this Court has held that, 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 a Company. It is held that vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the Statute. It is further held that Statutes indisputably must provide fixing such vicarious liability. It is also held that, 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.”

11 Similarly, reliance is also placed on the Judgment of the Honourable Apex Court in the matter of ***Sushil Sethi & Anr. Versus The State of Arunachal Pradesh & Ors.***² and particularly on

2 Criminal Appeal No.125 of 2020 decided on 31st January 2020.

the observations made in paragraph 8.2 of the said Judgment.

The paragraph 8.2 reads thus :

“8.2 It is also required to be noted that the main allegations can be said to be against the company. The company has not been made a party. The allegations are restricted to the Managing Director and the Director of the company respectively. There are no specific allegations against the Managing Director or even the Director. There are no allegations to constitute the vicarious liability. In the case of Maksud Saiyed v. State of Gujarat (2008) 5 SCC 668, it is observed and held by this Court that 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. It is further observed and held that the vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. It is further observed that statute indisputably must contain provision fixing such vicarious liabilities. It is further observed that 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

the present case, there are no such specific allegations against the appellants being Managing Director or the Director of the company respectively. Under the circumstances also, the impugned criminal proceedings are required to be quashed and set aside.”

If these observations of the Honourable Supreme Court are considered in the light of pleadings made in the complaint, then it becomes clear that the pleadings in the complaint are totally silent about averments casting vicarious liability on the part of the applicants for keeping the Nitrogen Gas Cylinder, 1 Nos. (120kg) other than of domestic use in that premises without obtaining license from the respondent No.2/MCGM. Similarly, the MMC Act is not containing any provision for imposing vicarious liability on the Director of the Company for keeping Nitrogen Gas Cylinder, 1 Nos. (120kg) other than of domestic use in that premises without license particularly when no active role is assigned to the applicants in the complaint filed before the Metropolitan Magistrate.

12 I have already quoted the summoning Order passed by

the learned trial Magistrate. The summoning Order is not disclosing the penal provision of the MMC Act under which the process came to be issued against the applicant herein. Even it is not mentioning the fact that the process is issued in the light of provisions of Section 204 of the Code of Criminal Procedure. In normal course, these lacunae would not have any overbearing importance. However, in the light of cryptic averments made in the complaint which are totally silent about the role of the applicants in the alleged offence and as even from averments made in the complaint it is clear that applicants were not even present at the site at the time of the inspection, the manner in which the impugned summoning Order is passed assumes importance. At this juncture, it is apposite to quote the observations of the Honourable Apex Court in paragraph 35 of its Judgment in the matter of *Birla Corporation Limited Versus Adventz Investments and Holdings Limited & Ors.*³. It reads thus :

“35. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the

³ 2019 SCC OnLine SC 682.

facts of the case and the law applicable thereto. The application of mind has to be indicated by disclosure of mind on the satisfaction. Considering the duties on the part of the Magistrate for issuance of summons to accused in a complaint case and that there must be sufficient indication as to the application of mind and observing that the Magistrate is not to act as a post office in taking cognizance of the complaint, in Mehmood Ul Rehman, this Court held as under:-

“22. the Code of Criminal Procedure requires speaking order to be passed under Section 203 Cr.P.C. when the complaint is dismissed and that too the reasons need to be stated only briefly. In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 Cr.P.C., if any, the accused is

answerable before the criminal court, there is ground for proceeding against the accused under Section 204 Cr.P.C., by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where the Magistrate proceeds under Sections 190/204 Cr.P.C., the High Court under Section 482 Cr.P.C. is bound to invoke its inherent power in order to prevent abuse of the power of the criminal court. To be called to appear before the criminal court as an accused is serious matter affecting ones dignity, self-respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment.”

13 Perusal of the impugned Order of issuance of summons makes it clear that it is not disclosing application of mind by disclosure of mind. There is no indication in the summoning Order that the learned trial Magistrate had found the averments in the complaint fit for issuing summons for the offence under Section 394 (1)(b) punishable under Section 471 of the MMC Act.

The learned trial Magistrate has not bothered even to mention in the summoning Order as to for what offence the *prima facie* case is made out and the process is issued for which offence. These omissions indicate non-application of mind by the learned trial Magistrate. That apart, even the contents of the complaint are conspicuously silent about the active role, if any, played by the applicants herein/accused Nos.1 and 2 in commission of the alleged crime of keeping Nitrogen Gas Cylinder, 1 Nos. (120kg) other than of domestic use in that premises without license by M/s.R Squire Shri Sai Baba Adhikaran Pvt. Ltd. In the result, the application succeeds and, therefore, the Order :

ORDER

- (i) The Application is allowed by making rules absolute in terms of prayer clause (a) qua the present applicants only.
- (ii) The Application is disposed of accordingly.

(A.M.BADAR, J.)

Raju D.
Gaikwad

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Gaikwad RD