

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
17.04.2021	28.04.2021

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

CRL. O.P. NO. 1544 OF 2018

1. Radhakrishnan Gurusamy

2. Somjit Amrit

.. Petitioners

- Vs -

M.R.Vinit Srivastava

.. Respondent

Criminal Original Petition filed u/s 482 Cr.P.C. praying this Court to call for the records in C.C. No.7725/2017 on the file of the XVIII Metropolitan Magistrate, Saidapet, Chennai and quash the same.

For Petitioners: Mr. A.Ramesh, SC, for
Mr. Edwin Prabhakar

For Respondent : No Appearance

ORDER

The petitioners have come before this Court against the summons issued by the XVIII Magistrate, Saidapet, Chennai in C.C. No.7725/17, in response to the complaint of defamation made by the respondent herein alleging defamation against the petitioners in relation to the written arguments submitted by them before the Arbitrator in the arbitration proceedings.

2. It is the case of the respondent herein that he was employed in M/s.Technosoft Global Services Pvt. Ltd. (hereinafter called the 'company') in which the 1st petitioner was the Chairman and the 2nd petitioner was the Chief Business Officer. The respondent was employed as the Vice President of the company on 5.4.2010 and functioned as such till 5.9.2014. It is the averment of the respondent herein in the complaint that he had rendered satisfactory service during his tenure with the company and was considered to be a big asset to the company and was respected by his superiors and subordinates. However, due to personal reasons, the respondent submitted his

resignation from the company through e-mail on 8.7.2014 by serving two months notice, which was accepted by the company and he was relieved on 7.9.2014 and the respondent was paid all the benefits due to him from the company.

3. It is further averred by the respondent that while joining the company, he had signed a confidentiality and Non-Disclosure agreement, which he had scrupulously adhered to. One of the clauses in the said agreement relates to the respondent not to take up any assignment with the customers of the company for a period of 24 months, which the respondent fulfilled. The respondent had, thereafter, started his own business by developing an application, which is in no way even remotely connected with any work discharged by him with his erstwhile company.

4. However, all of a sudden, during the first week of October, 2016, the respondent received a legal notice along with written arguments submitted by the company in the arbitration proceedings. The respondent was not aware of the arbitration proceedings and the written arguments submitted by the company imputed allegations that the respondent had dishonest intention and had indulged in illegal acts, which prejudiced the business of the company and that he had not adhered to the confidentiality and Non-disclosure agreement signed by him. The averments in the written argument maligned his reputation among the persons who had known him and the said allegations were not based on any material and the act of the company clearly shows that the arbitration proceedings have been taken against the respondent only with ulterior motive and to defame the respondent and the same was intentionally sent to several persons, who had personally known him, which is only an attempt to tarnish his image among such of the persons, who know him intimately. The respondent's reputation has thus been defamed and his name had been denigrated in the eyes of the persons, who had opportunity to read the written arguments. The integrity of the respondent has also been put in issue in the written argument, which is devoid of any materials and, therefore, on the above allegations, the complaint was filed u/s 199 Cr.P.C. for an offence punishable u/s 500 IPC.

5. Pursuant to the above complaint, the same was taken on file by the learned XVIII Metropolitan Magistrate and summons were issued to the petitioners herein for their appearance to answer the charge against which the present petition has been filed.

6. Interim order was granted by this Court on 22.1.2018 dispensing with the personal appearance of the petitioners before the learned XVIII Metropolitan Magistrate, which has been subsequently extended and the said interim order is in subsistence till today and no petition has been filed to vacate the interim orders.

7. Learned senior counsel appearing for the petitioners submit that the petitioners have not signed documents maligning the respondent and the written arguments have been signed by the authorised signatory of the company before the arbitrator. It is the further submission of the learned senior counsel that the written arguments and claim petition filed before the Arbitral Tribunal cannot be said to defame and malign the character of the respondent as the said documents have been filed in a judicial process having been served only to the respondent. Therefore, the said act would in no way attract an offence of defamation u/s 500 IPC.

8. It is the further submission of the learned senior counsel for the petitioners that the petitioners have no personal knowledge of the contents of the documents filed before the arbitral tribunal. It is the further submission of the learned senior counsel that the necessary ingredients to attract the offence of defamation u/s 500 IPC are not made out and the petition is bereft of any such details and only to circumvent the arbitral proceedings, the present petition for defamation has been filed by the respondent.

9. It is the further submission of the learned senior counsel that merely because the petitioners are the Chairman and Chief Business Officer of the company would not suffice to hold the petitioners guilty by filing a petition u/s 199 Cr.P.C., when the company has not been made a party to the proceedings. The company has initiated the case against the respondent and it is for the respondent to proceed with the case before the arbitral tribunal and prove his innocence and to wriggle out of the said process, the filing of the present petition for defamation is wholly unsustainable and deserves to be quashed.

10. It is the further submission of the learned senior counsel that the 2nd petitioner had left the employment of the company even before the lodging of the complaint and much before the alleged written statement was filed. Likewise, the 1st petitioner had also left the services of the company in December, 2016 and the allegation made by the respondent against the petitioners is wholly unwarranted and unsustainable and is not supported through any documentary evidence and, therefore, the said present complaint based on which process has been issued by the court below deserves to be interfered with.

11. In support of his contentions, learned senior counsel for the petitioners relied on the following decisions :-

- i) K.A.Krishnan - Vs . M.Preston (2019 SCC OnLine Mad 32118);
- ii) Sivaji Rao Gaikwad - Vs - S.Mukunchand (2018 SCC OnLine Mad 3541);
- iii) Alli Rani Joseph Mathew - Vs - P.Arun Kumar (2012 SCC OnLine Mad 2933);

- iv) Shanmugam - Vs - Inspector of Police (2019 SCC OnLine Mad 2667);
- v) Sunil Bharti Mittal - Vs - CBI (2015 (4) SCC 609);
- vi) Pepsi Foods Ltd. - Vs - Special Judicial Magistrate (1998 (5) SCC 749);
- vii) S.K.Alagh - Vs - State of UP (2008 (5) SCC 662);
- viii) Makusd Saiyed - Vs - State of Gujarat (2008 (5) SCC 668);
- ix) Sharad Kumar Sanghi - Vs - Sangita Rane (2015 (12) SCC 781); and
- x) R.Kalyani - Vs - Janak C.Mehta (2009 (1) SCC 519)

12. Though notice was ordered on the respondent as early as on 19.2.18 and interim order dispensing with the appearance of the petitioners was also granted, however, till date, no petition to vacate the interim order has been filed nor the respondent has chosen to appear before this Court and defend his actions in filing the complaint before the trial court. Therefore, in such a scenario, this Court is constrained to decide the matter in the absence of the respondent.

13. This Court heard the learned senior counsel appearing for the petitioners and also perused the materials available on record as also the decisions relied on by the learned senior counsel for the petitioners.

14. A perusal of the complaint reveals that the respondent has raised many castigating remarks against the petitioners herein and other accused in relation to the written arguments and claim petition submitted before the Arbitrator in the arbitral proceedings and based on the said complaint, process has been issued by the court below.

15. In Shanmugam & Ors. - Vs - Inspector of Police & Anr. (2019 SCC OnLine Mad 2667), learned single Judge of this Court, advertent to various decisions of the Hon'ble Supreme Court with regard to taking cognizance and issuing summons, held as under :-

"19. It has been repeatedly held that taking cognizance is a judicial act which requires application of mind and the Court must give some reasons for taking cognizance. Failing which, the cognizance itself becomes bad in the eye of law. Unfortunately in this case, the Court below has resorted to "Rubber Stamp" cognizance without assigning any reason.

20. The Hon'ble Supreme Court in [Pawan Kumar Sharma v. State of Uttaranchal] in CrI. Appeal No. 1692 of 2007 (ASLP (CrI.) No. 4701 of 2007, has dealt with this issue and the relevant portions of the judgment is extracted hereunder :

"In the State of Uttaranchal (now known as State of Uttarkhand) there exists a strange practice. The Magistrate take cognizance of offence and issue summons in terms of Section 202 of the Code of Criminal Procedure on "rubber stamped" orders.

A distinction exists between an order taking cognizance and an order issuing process. Before process is issued, the Court concerned must apply its judicial mind. It may, not only apply its mind as to whether on the basis of the allegations made in the complaint petition and the statements made by the complainant and his witnesses, a prima facie case has been made out for issuing processes but also must consider as to whether a case has been made out in terms of proper provisions of the Penal Statute for issuance of process for alleged commission of the offences vis-a-vis, the allegations made.

Appellant herein seriously contend that even if the submissions made in the complaint petition are given face value and taken to be correct in their entirety, no case has been made out for taking cognizance under Section 304(B) of the IPC.

In State of Karnataka v. Pastor P. Raju (2006) 6 SCC 728, this Court has clearly made out a distinction between an order taking cognizance of an offence and an order of issuance of process stating:

"13. It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the Court decides to proceed against the offenders against whom a prima facie case is made out."

21. The Hon'ble Supreme Court in [Sunil Bharti Mittal v. Central Bureau of Investigation] reported in (2015) 4 SCC 609 has held as follows :-

"51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient

ground for proceeding. This Section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e., the complaint, examination of the complainant and his witnesses if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into Court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

53. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect."

16. From the above, it is implicitly evident that before taking cognizance, recording of prima facie satisfaction by the Magistrate, based on the materials placed before the court, is of paramount importance, lest the act of the court would be nothing but a 'Rubber Stamp' order. Though it is not necessary that detailed reasons need to be recorded, nevertheless, sufficient satisfaction has to be recorded for issuing process, else the issue of process would be nothing but a futile and frustrated exercise.

17. Summons in this case have been issued to the petitioners based on the complaint lodged by the respondent. A perusal of the complaint filed by the respondent u/s 199 Cr.P.C., reveals that the respondent herein has imputed

allegations against three individuals, which includes the petitioners herein. The sum and substance of the allegation levelled is that the written statement and the claim petition which have been filed in furtherance of the arbitral proceedings initiated against the respondent herein have tarnished the image of the respondent in the eyes of his superiors and subordinates at the company, in which the respondent was working and, therefore, the said act has maligned and defamed the respondent in the eyes of the general public.

18. A perusal of the written statement and claim petition reveals that very many allegations have been raised against the respondent herein. However, those allegations have to be tested in the arbitration proceedings in which the company has to table credible materials with which to sustain its case. Equally, the respondent herein has to table materials in contra to the said allegations before the arbitral tribunal to justify his cause that the claim petition and the written statement are frivolous and vexatious and cannot be sustained. Just because the claim petition and the written statement contain certain statements, which are not to the liking of the respondent, the respondent herein cannot claim that those allegations are made just for the purpose of discrediting him in the eyes of the persons, who know him and such an act has maligned his reputation.

19. In *Alli Rani Joseph Mathew & Ors. - Vs - P.Arun Kumar* (2013 (1) CTC 661), similar issue arose as to whether statements made in pleadings in civil suit could be termed to be defamatory and in that regard it was held that so long as there exists a connection with the issues involved in the suit, the said statements could not be said to be defamatory. In that context, it was held as under :-

"17. As has been held by this Court in those two judgments, if the averments made in the pleading have got nothing to do with the issues involved in the suit and they are per se defamatory, certainly, the aggrieved shall have a right to file a private complaint for defamation against the accused who had made the defamatory averments in the pleadings before the Civil Court without waiting for the final outcome of the suit. As I have already concluded, if the averments in the pleadings have got some relevance to the issues involved in the suit, it cannot be said that they are per se defamatory. It is because of this reason, I hold that the present prosecution is not maintainable."

20. Therefore, only after the arbitration proceedings, could it be ascertained whether the averments made in the written statement and the claim petition have a bearing on the issues involved and whether they have relevance to the case.

Without an adjudication on the said aspect, foreclosing the case of the petitioners that prima facie the written statement and the claim petition are per se defamatory would be putting the cart before the horse. Such an act cannot be allowed to stand.

21. Further, it is to be pointed out that the respondent had roped in the accused as the persons, who had filed the written statement and claim petition, without there being any iota of material to substantiate the said allegation. The respondent has not made the company a party to the proceeding, but has made only the petitioners as party. The petitioners are acting in a fiduciary capacity and it is incumbent on the part of the respondent to make the company a party to the proceeding, if a complaint is to be maintained against the individual as well. It is true that a proceeding u/s 199 Cr.P.C. can be maintained against the individuals in the company, provided that materials are placed to show that such of those statements have been made by the individuals. The written statement and claim petition, even according to the respondent, is based on the association of the respondent with the company of which the petitioners are Chairman and Chief Business Officer. It is not the case of the respondent that the petitioners, acting in their individual capacity, had filed any written statement and claim petition against the respondent, which has tarnished his image. But it is the company, which has initiated the arbitration proceedings and without making the company a party to the complaint, maintaining the complaint against the petitioners alone, who are acting in a fiduciary capacity, cannot be permitted. Further, an individual, who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. In this regard, useful reference can be had to the decision of the Hon'ble Apex Court in *Sunit Bharti Mittal - Vs - CBI* (2015 (4) SCC 609), wherein it has been held as under :-

"(iii) Circumstances when Director/person in charge of the affairs of the company can also be prosecuted, when the company is an accused person

42. No doubt, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company

can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

44. When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In *Aneeta Hada* [*Aneeta Hada v. Godfather Travels & Tours (P) Ltd.*, (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241], the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company."

22. From the above decision, it is crystal clear that a person can only be made an accused along with the company, only if there is sufficient evidence of his active role coupled with criminal intent. However, in the case on hand, no such material has been annexed along with the complaint so as to enable the court below to arrive at a finding as to there being prima facie material to take cognizance of the matter by issuing summons. However, it is the case of the petitioners that on the date of filing of the written statement, the 2nd petitioner was no longer in the service of the company and that the 1st petitioner had left the service of the company in Dec., 2016. In the above scenario, it is incumbent upon the respondent to show the basis on which he is imputing allegations of defamation against the petitioners.

23. Further, the respondent is alleged to have not taken active participation, but only after filing of the written statement and complaint and on the issuance of paper publication only, legal notice has been issued by the respondent. It is

evident from the materials available on record that notice was issued by the Arbitrator to the respondent twice, without evoking any response from the respondent. Even after issuance of legal notice by the respondent, the Arbitrator had afforded an opportunity to the respondent to put forth his case, but the respondent has not come forward to file his response to contest the case, which is evident from the letter of the Arbitrator dated 10.5.2017. However, the respondent has filed the present complaint on 27.11.17, after a period of six months from the letter of the Arbitrator. There is no explanation offered by the respondent for not taking part in the arbitration proceedings. Even if it is to be presumed that the respondent intend to take defamation proceedings against the petitioners, nothing prevented the respondent from taking part in the arbitration proceedings. This clearly shows the devious mind of the respondent. Further, even before this Court, the respondent, inspite of service of notice, has not taken any effort to appear before this Court. This clearly shows that the respondent is not inclined to proceed with the matter but only wants the Damocles sword to hang over the head of the petitioners so that the arbitration proceedings could be stalled.

24. It is to be pointed out at this juncture that the petitioners are no longer with the company and that the 2nd petitioner had left the services of the company even before the filing of the written statement and the filing of the complaint and the 1st petitioner has also quit the services of the company in December, 2016. However, the company having not been made a party to the defamation proceedings, the stage of the arbitration proceedings is not known to the Court and further the respondent having been absent before the arbitrator as also before this Court leaves this Court to the only inescapable conclusion that the proceedings initiated by the respondent is only with an vindictive attitude to stall the arbitration proceedings and in the absence of the company being made a party, the defamation proceedings against the petitioners will have no legs to stand and, accordingly, the same has to be set aside.

25. For the reasons aforesaid, C.C. No.7725/2017 on the file of the learned XVIII Metropolitan Magistrate, Saidapet, Chennai is quashed and this criminal original petition is allowed.

Sd/-

Assistant Registrar (CS-VII)

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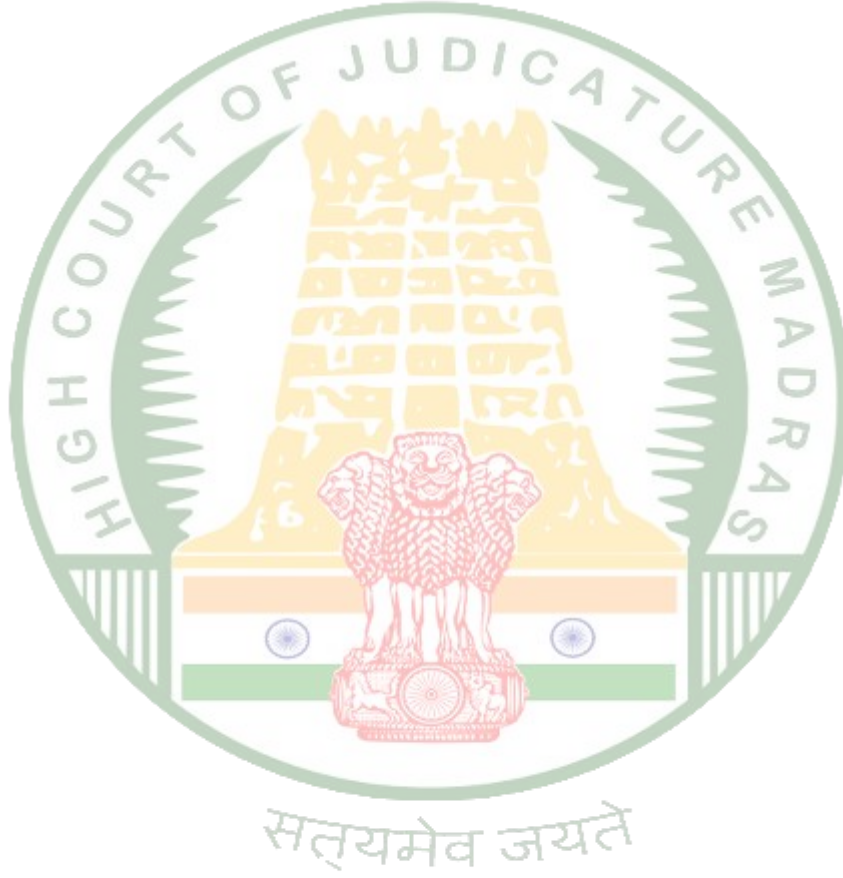
Sub Assistant Registrar

To

The XVIII Metropolitan Magistrate
Saidapet, Chennai.

CRL. O.P. NO. 1544 OF 2018

KV (CO)
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