

CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI
CRIMINAL REVISIONAL JURISDICTION

PRESENT:

THE HON'BLE JUSTICE BIVAS PATTANAYAK

CRR 72 of 2019

Sudipto Banerjee

Versus

State of West Bengal

For the petitioner: Mr Ranadeb Sengupta, Advocate.

Mr Debasish Mukhopadhyay, Advocate.

Mr Anirban Banerjee, Advocate.

Ms Madhusri Dutta, Advocate.

For the State: Mr Aditishankar Chakraborty, Additional Public Prosecutor.

Mr Sourav Ganguly, Advocate.

Heard on: 10.08.2022, 11.08.2022

Judgment on: 11.11.2022.

BIVAS PATTANAYAK, J. : –

1.The present revisional application has been filed by the petitioner under Section 482 of the Code of Criminal Procedure (hereinafter referred to as the Code) for quashing of proceeding being GR case no. 727 of 2018 (arising out of Birpara Police Station Case no. 47 of 2018 dated 05.05.2018 under Sections 420/120 B of the Indian Penal Code and under Sections 3/7 of the

Essential Commodities Act, 1955 and Section 23 of the Petroleum Act, 1934) pending before the learned Additional Chief Judicial Magistrate, 2nd court, Alipurduar, Jalpaiguri.

2. The brief fact of the case is that one Suraj Kumar Thakur, Inspector, Detective Department, Jalpaiguri lodged a written complaint with officer-in-charge, Birpara Police Station on 5 May 2018 alleging, *inter alia*, as follows.

(i) On 4 May 2018 the complainant received source information that an oil tanker bearing registration no. WB-71A-9909 containing solvent will arrive at *Himalaya Agency*, Birpara (an authorised petrol pump of Bharat Petroleum) and deliver huge quantity of solvent in order to adulterate the same with petrol and sell it to common people. Accordingly the complainant in order to work out the source information took necessary steps and proceeded to the spot along with raiding team.

(ii) At about 21.05 hours the oil tanker bearing registration no. WB-71A-9909 arrived at *Himalaya Agency*, Birpara and started unloading solvent in the underground reservoir of the aforesaid petrol pump.

(iii) The raiding team apprehended the driver of the tanker namely Bijoy Das and upon interrogation he disclosed that as per direction of one person he was unloading the industrial solvent from the tanker and on his identification

one Vikash Mittal , brother of licence holder of the aforesaid petrol pump, was also apprehended.

(iv) The driver of the said tanker further disclosed that about 5000 L of solvent were being carried in the oil tanker from Dankuni as per instruction of one Pankaj Kumar Agarwal @ Tinku of Siliguri and that he had been called to the petrol pump by Vikash Mittal for mixing the solvent with the petrol at the petrol pump.

(v) Thereafter the oil tanker was seized along with a retail outlet sale register, samples of underground oil, delivery pipe, documents of the offending vehicle in presence of witnesses.

(vi) On measurement the contents of the oil tanker was found to be 7487 L and the underground of the pump was found to contain 5026 L of fuel.

(vii) On the basis of aforesaid complaint FIR was registered at Birpara Police Station being no. 47 of 2018 dated 05.05.2018 under Sections 420/413/414/467/120B of Indian Penal Code and Sections 3/7 of Essential Commodities Act and Section 23 of Petroleum Act against one Vikash Mittal (brother of the licence holder), Bijoy Das (driver of the tanker), Ashish Mittal (licence holder), *M/s Himalaya Agency* and the petitioner herein.

(vii) Upon completion of investigation the investigating agency submitted charge sheet against the petitioner and nine others under Sections 420/120B

of Indian Penal Code, Sections 3/7 of Essential Commodities Act and Section 23 of Petroleum Act.

3. Being aggrieved by and dissatisfied with the aforesaid proceeding the petitioner has preferred the present revision.

4. Mr Ranadeb Sengupta, learned advocate appearing on behalf of the petitioner submitted that the firm under the name and style of *Himalaya Agency* used to run petrol pump for the last 50 years on the basis of licence obtained from Bharat Petroleum Corporation Limited. The aforesaid petrol pump was developed over government leasehold land. The lease was given jointly in the name of father of the petitioner namely Sri Subrata Kumar Banerjee (since deceased) and grandmother of the petitioner namely Smt Renukana Banerjee (since deceased) and the said leasehold was renewed from time to time by the concerned authority and lastly it was renewed on 21st of November 1993 for a period of 30 years. Since 1990 the petitioner herein along with his father and brother were partners of the aforesaid firm and the petrol pump was run by a manager. However in the year 2002 *M/s Himalaya Agency* decided to hand over the petrol pump to a third-party, as certain defalcation of sale proceeds were detected in the due course of time in the report of chartered accountant. Accordingly, the father of the petitioner obtained approval from the concerned authority for transferring the beneficial right of the remaining lease period over the leasehold property on condition

that on expiry of the lease period the assignees shall have to obtain fresh lease by paying requisite fees. Furthermore one Madanlal Mittal approached the father of the petitioner to take over the charge of the petrol pump by discharging their assignment consideration of the land and thereafter a deed of assignment was executed between the father of the petitioner and the said Madanlal Mittal and his two brothers namely Subhash Agarwal and Pradip Agarwal. Since the date of execution of the aforesaid deed of assignment the petitioner and the then partners of *M/s Himalaya Agency* authorised one of the sons of Madanlal Mittal as manager of the petrol pump. Further the petitioner, his father and younger brother who were at the material point of time existing partners of *M/s Himalaya Agency* made prayer before the Territory Manager of BPCL for making necessary changes in the constitution of partnership of *M/s Himalaya Agency* by introducing a new partner, however no action was taken by BPCL in that regard till 2015. On 2 November 2015 the BPCL authority allowed the joint prayer/application dated 05.02.2005 and reconstituted the dealership on condition that the same shall continue in the name of *M/s Himalaya Agency* and the petitioner and Ashish Mittal (son of Madanlal Mittal) shall be signatories to the DPSL (Dispensing pump and Selling licence) with their share of 51% and 49% respectively. Accordingly in place of late Subrata Kumar Banerjee (since deceased), father of the petitioner and Soumitra Banerjee, brother of the petitioner, the name of Ashish Mittal was introduced as a new partner and a

fresh license agreement was entered into by the BPCL authority and the existing partners of *M/s Himalaya Agency*. Furthermore although the petitioner is one of the partners of the partnership firm namely *M/s Himalaya Agency* yet he was never actively involved in the day to day affairs and management of the said firm in running the petrol pump. The petrol pump was completely managed and run by Ashish Mittal and his brother Vikash Mittal and therefore the implication of the petitioner in the alleged offence is absolutely unnecessary and uncalled for. Moreover as the petitioner did not play any active part in the alleged offence hence no specific role of the petitioner transpired during the course of investigation. Furthermore if 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 is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless a statute specifically provides therefor, by specifically incorporating such a provision. If there is no such provision specifically providing for vicarious liability, the individual either as director or managing director or chairman of the company can be made an accused, along with the company, if there is sufficient evidence to prove his active role coupled with criminal intent which must have a direct nexus with the accused. In support of his contention he relied on the following decisions of Hon'ble Supreme Court namely **(i) *Sunil Bharti Mittal versus Central Bureau of Investigation*** reported in **(2015)4 SCC 609**; **(ii) *Maksud Saiyed versus***

State of Gujarat and others reported in **(2008) 5 SCC 668**; (iii) ***Managing Director, Castrol India Limited*** reported in **(2018)17 SCC 275**; (iv) ***Shiv Kumar Jatia versus State of NCT of Delhi*** reported in **(2019) 17 SCC 193**.

Further referring to the decision of Hon'ble Supreme Court passed in ***State of Haryana and Others versus Bhajanlal and Others*** reported in **1992 Supp. (1) SCC 335** he submitted that as the FIR does not disclose any cognizable offence against the petitioner hence the proceeding against him is liable to be quashed.

In the light of his aforesaid submissions he prayed for quashing of the proceeding initiated against the petitioner.

5. Mr Aditishankar Chakraborty, Additional Public Prosecutor along with Mr Sourav Ganguly, learned advocate for the State, in reply to the contentions raised on behalf of the petitioner, submitted that the petrol pump where the industrial solvent was mixed with the petrol is a partnership firm under the name and style of *M/s Himalaya Agency* and in the said partnership the petitioner has a considerable share of 51% and therefore the petitioner cannot abandon his liability arising out the illegal activities carried on in the said petrol pump. Being one of the partners of the said partnership firm he is jointly liable and responsible along with other partners of any such wrongful activities undertaken in the petrol pump. Furthermore upon completion of investigation and on the basis of available materials collected during the

course of investigation the investigating agency has submitted charge sheet disclosing *prima facie* case against the petitioner and others. Moreover the issues raised on behalf of the petitioner are precisely question of facts which are required to be gone into on taking of evidence in a full-fledged trial.

In the light of their aforesaid submissions they prayed for dismissal of the revisional application.

6. Having heard the learned advocates and the rival contentions raised on behalf of the parties I now proceed to decide the prayer of the petitioner made in present application for quashing of the proceeding. It is undisputed that petitioner is one of the partners of the partnership firm under the name and style of *M/s Himalaya Agency* which was running the petrol pump where the industrial solvent was allegedly been mixed with petrol in the underground reservoir. The letter dated 2 November 2015 issued by Territory Manager, Bharat Petroleum Corporation Limited shows that it approved reconstitution of dealership to operate under the name and style of *M/s Himalaya Agency* and the petitioner and one Sri Ashish Mittal were made signatories to the DPSL with share in partnership to the extent of 51% and 49% respectively. Thus in the said partnership the petitioner is having a larger share. As a partner of the partnership firm the petitioner is jointly responsible for the activities undertaken within the partnership firm and the liabilities accruing from such activities. There is no case made out that industrial solvent was

not mixed with petrol in said petrol pump. The result of laboratory analysis shows variation between the Retail Outlet Sample lab density and Supply location Sample Lab density beyond the permissible limit and Retail Outlet (RO) sample was found to be failing. Furthermore upon completion of investigation and on the basis of primary materials collected during the course of investigation, the investigating agency filed chargesheet against the petitioner and 9 others under Section 420/120B of the Indian Penal Code and Section 3/7 of the Essential Commodities Act and Section 23 of the Petroleum Act. In the essence thus there are materials to continue with the proceeding.

6.1. Mr Sengupta, learned advocate for the petitioner has strenuously argued relying on the decisions of Hon'ble Supreme Court passed in ***Sunil Bharti Mittal (supra)***, ***Maksud Saiyed (supra)***, ***Managing Director Castrol India Limited (supra)*** and ***Shiv Kumar Jatia (supra)*** that as no specific role has been attributed to the petitioner in relation to the alleged activities undertaken in the said petrol pump and further in the absence of criminal intent, the petitioner cannot be fastened with vicarious liability.

6.2. In ***Sunil Bharti Mittal (supra)***, the allegation against the appellants, in a nutshell, was for grant of additional spectrum by lowering the condition of 9 lakhs subscribers to 4/5 lakhs subscribers, by only charging additional 1% AGR instead of charging additional 2% AGR resulting in loss to the

government revenue. It was the case of the prosecution that there was conspiracy hatched between public servant and Minister concerned as well as accused cellular operator companies. Chargesheet was submitted against four accused persons however the appellants were not implicated as accused persons in the chargesheet. The appellants were Chairman cum Managing Director/Director of the cellular companies and as they were in control of affairs of the respective companies they were summoned by the learned Special Magistrate and were proceeded against being the '*alter ego*' of the respective companies. The Hon'ble Supreme Court found such order of issuance of summons by the Special Magistrate unsustainable based on an erroneous presumption in law. Whereas in the case at hand the petitioner is a partner of the firm having share in the partnership to the extent of 51% and further on completion of investigation chargesheet has been filed against the petitioner and others. Hence the fact of the cited decision is distinguishable from the case at hand.

6.3. In ***Maksud Saiyed (supra)***, the brief fact was that the respondent no.2 a former Chairman cum Managing Director of Dena Bank and respondent no.3 to 11 were the Directors of the said Bank. The appellant was a Director of a Company which borrowed loans from the Bank and as loans were not paid application was filed before the Debts Recovery Tribunal for recovery of the unpaid amount from the company. Criminal proceeding was initiated at the

instance of appellant-company against the respondent. The respondent filed an application under Section 482 of the Code for quashing and the said application was allowed by the High Court. The aforesaid order was assailed in appeal before the Hon'ble Supreme Court, which upon consideration dismissed the appeal. In the aforesaid decision the Hon'ble court observed that vicarious liability of the Managing Director and Director of a company would arise provided any provision exist in that behalf in the statute and it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability. The facts involved in the said case is quite dissimilar to the case at hand inasmuch as the petitioner herein is the partner of the firm where the alleged incident of mixing industrial solvent with the petrol was undertaken and accordingly the decision of the Hon'ble Supreme Court stands distinguished.

6.4. In *Managing Director, Castrol India limited (supra)* and *Shiv Kumar Jatia (supra)* as well it is found that the appellant accused was the Managing Director of the company and was made vicariously liable for offences punishable without attributing any specific act. Whereas in the case at hand the petitioner is the partner of the firm having 51% share and therefore the decision of the Hon'ble Supreme Court stands distinguished.

6.5. It has been strenuously argued relying on the decision of Hon'ble Supreme Court passed in *Bhajan Lal's Case (supra)* that as the FIR does

not disclose any cognizable offence against the petitioner hence the proceeding against him should be quashed. Undisputedly the agency where the industrial solvent was mixed with petrol is a partnership firm of which the petitioner is a partner having 51% share therein. Therefore having such larger share in the aforesaid partnership the petitioner cannot disown the liabilities arising out of illegal activities undertaken in the partnership firm. On the basis of primary materials collected during the course of investigation chargesheet has been submitted against the petitioner and others. The Hon'ble Supreme Court in the aforesaid decision observed in paragraph no.103 as follows.

“ We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice.”

Now the bearing in mind the aforesaid observation of the Hon'ble court and also taking into consideration that the petitioner is the partner of the firm where such alleged illegal activities has been undertaken and upon completion of investigation chargesheet has been submitted, the issues

whether the petitioner had the knowledge of such illegal activities undertaken in the partnership firm or whether he was directly involved in such activities are the only questions of fact which are to be gone into after taking evidence in the trial. Further the case at hand cannot be categorised as the rarest of rare case for invoking power of quashing under Section 482 of the Code. Moreover, at the stage of quashing FIR or complaint it is not justified in embarking upon an enquiry as to the probability, reliability or genuineness of the allegations made therein unless they are so absurd and inherently improbable that no prudent man can ever reach to just conclusion. **(See Rupan Deol Bajaj (Mrs) and Another versus Kanwar Pal Singh Gill and Another reported in (1995) 6 SCC 194).** It is placed on record that there is neither any absurd or inherent improbability noted in the facts of the present case nor the facts alleged in the complaint on its face value fail to disclose an offence. As it is already found that there are primary materials to proceed, hence invoking inherent power will lead to stifling of a legitimate litigation.

7. Accordingly, in the light of above discussion the instant criminal revision being **CRR no. 72 of 2019** stands dismissed on contest.

8. However, it is made clear that the observations made hereinabove shall not have any bearing on the rights and contentions of the petitioner before the trial court and the petitioner would be at liberty to raise all available issues at the appropriate stage of trial.

9. All connected applications if any stands disposed of.

10. Interim orders, if any, stand vacated.

11. Let a copy of this judgment be sent to the learned trial court for information.

12. Urgent Photostat Certified copy of this judgment, if applied for, be supplied to the parties expeditiously after complying with all necessary legal formalities.

(Bivas Pattanayak, J.)