

IN THE HIGH COURT AT CALCUTTA
(Criminal Revisional Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 234 of 2020

Mita Chowdhury & Anr.

Vs.

The State of West Bengal & Anr.

For the petitioners : Mr. Sourav Chatterjee,
Ms. Namrata Chatterjee.

For the State : Mr. Madhusudan Sur,
Mr. Anowar Hossain,
Mr. Manoranjan Mahata.

Hearing concluded on : 16.08.2023

Judgment on : 13.09.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of the proceeding being C.G.R. Case No.3034 of 2012 pending before the learned Judicial Magistrate, 4th Court, Alipore, South 24 Parganas arising out of Lake Police Station case No.220 of 2012 dated 19.06.2012 under Sections 420/406/120B of the Indian Penal Code and all orders passed therein including order dated 12.06.2019 passed by the learned Chief Judicial Magistrate, Alipore, South 24

Parganas thereby taking cognizance of offences punishable under Sections 420/406/120B of the Indian Penal Code against the petitioners in connection with the aforesaid case.

2. The petitioner no.1 and the complainant have expired.
3. **The petitioner's case** is that the opposite party no.2 in gross abuse and/or misuse of the process of criminal law filed a purported application under Section 156(3) of the Code of Criminal Procedure before the learned Chief Judicial Magistrate, Alipore, South 24 Parganas on 29th May, 2012 against the petitioner no.2. The said application under Section 156(3) of the Code of Criminal Procedure was entertained by the learned Chief Judicial Magistrate, Alipore, South 24 Parganas and vide a purported and illegal direction dated 29th May, 2012, the learned Magistrate mechanically and without application of his judicial mind filled up blanks in a cyclostyled order in flagrant violation of the provisions of Rule 183 of the Criminal Rules and Orders of the Hon'ble Court and directed the Officer-in-Charge of Lake Police Station to treat such application as the First Informaton Report and commence investigation thereon.
4. Pursuant to such illegal direction of the learned Magistrate, the instant case was registered for investigation and was numbered as Lake Police Station Case No. 220 of 2012 dated 19.06.2012 under Sections 420/406/504/506/342/34 of the Indian Penal Code.
5. **The allegations in the First Information Report were,** inter alia, to the following effect:-

“That the opposite party no.2 is a shareholder in a company named and styled as ‘Joy Gopal Board Industries Private Limited’, having 25% share/voting rights of such company. That the opposite party no.2 obtained copies of audited balance sheet and profit and loss account for the years ended 31st March, 2010 and 31st March, 2011 but he did not get any opportunity to attend the Annual General Meeting of the said company for two consecutive years since no notice was served upon him and the audited accounts were passed in the Annual General meetings behind the back of the opposite party no.2. That in the final accounts for financial year 2009-2010 the opposite party no.2 found that in Schedule 5 of the Balance sheet under the head ‘Fixed Assets’, Sub-head ‘Addition During the Year to Machinery and Equipment’ was to the tune of Rs.8,50,000/- and in the balance sheet for the financial year 2010-2011 ‘Addition to Machinery and Equipment’ during the year in the Schedule of Fixed Assets was to the tune of Rs.9,27,000/-. That the above figures are far from truth since the opposite party no.2 came to know from the staff of the factory that there had been no addition to machinery and equipment during the said financial years. That upon coming to know about such foul play on the part of the petitioner no.2 and his associates, the opposite party no.2 intended to visit the factory situated at Berhampore, Murshidabad, but he was not allowed such visit by the petitioner no.2. That such conduct confirmed the suspicion of the opposite party no.2 and upon further enquiries he came to know that the petitioner no.2 in conspiracy with the proprietor of M/s. M. S. Engineering Corporation purchased the above fake machinery from the said concern only by

way of paper work and there has been no physical transfer of the machinery and as such the petitioner siphoned a sum of Rs.17,77,000/- thereby depriving shareholders like the opposite party no.2 from legitimate profit being passed on to them. That moreover, the petitioner no.2 and others have been siphoning money of the company thereby depriving shareholders including the opposite party no.2 in a novel modus operandi by way of selling out products of the petitioner at a price which is 40% lower than the actual market price and taking the balance amount in cash. That on 18.05.2012 at 2:30 p.m the opposite party went to the registered office of the company to meet the petitioner no.2 and settle the disputes amicably but he misbehaved with the opposite party no.2 and subjected him to abusive behaviour and as a result thereof, the opposite party no.2 became perplexed and traumatized and subsequently lodged a written complaint to the local Police Station on 22.05.2012.”

6. **The Investigating Agency** filed a final report being Final Report No.301 of 2013 dated 1st December, 2013 thereby **closing the case on the ground that the disputes were “civil in nature”**.
7. On 15th October, 2015 (that is, **after almost two years of filing of the Final Report**) the opposite party no.2 took out a **Narazi petition** before the learned Magistrate.
8. It is stated that by an order dated 22nd December, 2015, the learned Magistrate mechanically and without application of his judicial mind had directed further investigation into the present case and also directed the Officer-in-Charge, Lake Police Station to

conduct further investigation either by himself or by deputing another competent officer except the previous investigation officer.

9. It is further stated that upon conclusion of a purported further investigation, the Investigating Agency filed a charge sheet being charge sheet no.18 of 2019, dated 7th June, 2019 under Sections 420/406/120B of the Indian Penal Code against the present petitioners.
10. The petitioners submit that the very initiation of the instant case is illegal inasmuch as the application under Section 156(3) of the Code of Criminal Procedure was filed without having complied with the mandatory provisions of Section 154(3) of the Code of Criminal Procedure, in flagrant violation of the law laid down by the Hon'ble Supreme Court of India in the case of Priyanka Srivastava vs. State of Uttar Pradesh, reported in 2015 (6) SCC 287.
11. **Mr. Sourav Chatterjee, learned counsel for the petitioners** has submitted that the filling up of such blanks by hand in a cyclostyled printed order sheet by itself indicates non application of judicial mind which is apparent from the fact that the learned Magistrate did not even consider the averments made in the application under Section 156(3) of the Code of Criminal Procedure and also ignored the fact that Section 154(3) of the Code of Criminal Procedure was not complied with at all before approaching the learned Magistrate for a direction in terms of Section 156(3) of the Code of Criminal Procedure. Such illegality strikes at the very root of the instant case and as such the proceedings is liable to be quashed.

12. Mr. Chatterjee has further submitted that the impugned proceedings is out and out harassment proceedings aimed at settling disputes with regard to settlement of accounts of a company which do not and cannot attract any criminal intent and as such, no case under Sections 420/406/120B of the Indian Penal Code can be said to have been made out.
13. It is also stated that the subsequent and belated charge sheet do not disclose the reasons which impelled the investigating agency to form a different opinion with regard to the self-same factual backdrop and as such, the proceedings including the impugned charge sheet is liable to be quashed.
14. It is also stated that the disputes by and between the parties are predominantly civil in nature and relate to settlement of accounts between a company and its shareholder.
15. It is thus stated that no case under Sections 420/406/120B of the Indian Penal Code has been made out and as such the impugned proceedings is otherwise bad in law and is liable to be set aside and/or quashed.
16. The applicant who appeared on behalf of the deceased opposite party no.2 is no more representing the opposite party no.2
17. **Mr. Madhusudan Sur, learned counsel for the State** has placed the case diary along with a memo of evidence and has submitted that there is sufficient materials on record to proceed against the petitioner no.2

18. From the petition of complaint, it appears that the opposite party no.2 had gone to the office of the petitioner on 18.05.2012 to amicably settle the dispute but was allegedly abused and wrongfully confined. Hence, the complaint.

19. On perusal of the petition of complaint, it also appears that prima facie the mandatory provision of Section 154(3) of Cr.P.C. has not been complied with by the complainant.

20. Mr. Chatterjee has relied upon the judgments of the Supreme Court in:-

i) Priyanka Srivastava & Anr. v. State of Uttar Pradesh & Ors. reported in (2015) 6 SCC 287.

“30. In our considered opinion, a stage has come in this country where Section 156(3) CrPC applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.

31. We have already indicated that there has to be prior applications under Sections 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an

application under Section 156(3) be supported by an affidavit is so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari [(2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR.”

ii) Babu Venkatesh & Ors. v. State of Karnataka & Anr. reported in (2022) 5 SCC 639.

“26. This Court has further held that, prior to the filing of a petition under Section 156(3)CrPC, there have to be applications under Sections 154(1) and 154(3)CrPC. This Court emphasises the necessity to file an affidavit so that the persons making the application should be conscious and not make false affidavit. With such a requirement, the persons would be deterred from causally invoking authority of the Magistrate, under Section 156(3)CrPC. Inasmuch as if the affidavit is found to be false, the person would be liable for prosecution in accordance with law.

27. In the present case, we find that the learned Magistrate while passing the order under Section 156(3)CrPC, has totally failed to consider the law laid down by this Court.

28. From the perusal of the complaint it can be seen that, the complainant Respondent 2 himself has made averments with regard to the filing of the original suit. In any case, when the complaint was

not supported by an affidavit, the Magistrate ought not to have entertained the application under Section 156(3)CrPC. The High Court has also failed to take into consideration the legal position as has been enunciated by this Court in Priyanka Srivastava v. State of U.P. [Priyanka Srivastava v. State of U.P., (2015) 6 SCC 287 : (2015) 3 SCC (Civ) 294 : (2015) 4 SCC (Cri) 153] , and has dismissed the petitions by merely observing that serious allegations are made in the complaint.”

21. The petition of complaint in this case is neither supported by affidavit nor is the content in the petition in compliance with the mandatory provision of 154(3) of Cr.P.C.
22. **It is further seen that a part of the allegations relate to the matters connected to the company. But the company has not been made an accused in this case.**
23. Mr. Chatterjee has relied upon the judgment in **Sushil Sethi & Anr. v. State of Arunachal Pradesh & Ors. reported in (2020) 3 SCC 240**, the Supreme Court held:-

“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 Maksud Saiyed v. State of Gujarat [Maksud Saiyed v. State of Gujarat, (2008) 5 SCC 668 : (2008) 2 SCC (Cri) 692] , 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 the 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.”

24. In *S.K. Agarwalla & Ors, Vs ESI Corporation & Anr., 1985*

(1) CHN 113, the Supreme Court held:-

“6. From the above explanation it would be abundantly clear that the employer, who deducts the employees’ contribution shall be deemed to have been entrusted with the amount of contribution so deducted and he shall be deemed to have dishonestly misappropriated the said amount. In other words, the deeming provision applies to an ‘employer’. ‘Employer’ has not been defined in the Indian Penal Code, and under the Act only ‘immediate employer’ and ‘principal employer’ have been defined, though there are some provisions like S 85 E and 85 C of the Act which speak of ‘employer’.

7. Under S. 85 (a) of the Act any person who fails to pay any contribution which under the Act, he is liable to pay, may be prosecuted and it may be prosecuted and it may be argued that since the liability to pay the contribution under S 40 of the Act is upon the ‘Principal employer’ anybody who comes within the definition of the ‘principal employer’ under the Act including a director who may answer to the description of ‘occupier’ may be prosecuted. Under S 406 of the Indian Penal Code however the deeming provision of explanation 2 to S 405 would apply only to an ‘employer’ and not to a ‘Principal employer’. In absence of any definition of ‘employer’ under the Indian Penal Code the ordinary meaning to the term ‘employer’ has to be given and that necessarily means the person who employs. Under S. 11 of the Indian Penal Code the word ‘person’ includes any Company or association or body of persons whether incorporated or not and it necessarily follows that the Indo Japan Steel Ltd.

which is an incorporated company will be the employer in respect of its employees.

8. *On behalf of the complainant a Division Bench judgment of the Punjab and Haryana High Court in the case of ESI Corporation vs Dhanda Engineering, reported in 1981 (42) FLR page 282 was relied upon to contend that the principal employer was also liable for prosecution under S. 406 of the Indian Penal Code. I have carefully gone through the judgment and I do not find any observation made therein to support the above contention. While referring to the explanation 2 to S 405 it was observed in the said judgment that by the said amendment a delinquent employer was brought within the ambit of the Indian Penal code. There cannot be any dispute about the observation so made, but the question that arises for consideration in this case was whether ‘principal employer’ can be equated with ‘employer’ in absence of any specific provision in the Indian Penal Code to warrant such equation. In that view of the matter the petitioners cannot be said to be ‘employers’ within the meaning of Explanation 2 to S 405 of the Indian Penal Code though they may be principal employers under the Act for which they might have been prosecuted under S. 85 of the Act.”*

In appeal by the ESI Corporation, the Supreme Court upheld the decision of the Calcutta High Court in (1998 C Cr LR (SC) 396).

“9. *Therefore, even if we read the definition of “principal employer” under the Employees’ State Insurance Act, 1948 in Explanation 2 to Section 405 of the Indian Penal Code, the directors of the company, in the present case, would not be covered by the definition of “principal employer” when the company itself owns the factory and is also the employer of its employees at the head office.*

10. *In any event, in the absence of any express provision in Indian Penal code incorporating the definition of “principal employer” in Explanation 2 to Section 405, this definition cannot be held to any to the term “employer” in Explanation 2. As the High Court has observed the term “employer” in Explanation 2 must be understood as in ordinary parlance. In ordinary parlance it is the company*

which is the employer and not its directors either singly or collectively.

11. *In the premises we do not see any reason to interfere with the impugned judgment of the Calcutta High Court. The appeal is therefore dismissed.”*

- 25. From the materials in the case diary** (pages not numbered), it appears that there are several documents/vouchers/etc. relating to the purchase of the machines as stated. The said Suppliers have not been interrogated.
- 26.** No complaint has been made to the Registrar of Companies.
- 27.** The main allegation as it appears from the petition of complaint is that the opposite party no.2/complainant had gone to the office of the petitioner to amicably settle the matter but was allegedly abused and wrongfully confined.
- 28.** All the above observations and findings show that there is no prima facie case made out against the petitioner as alleged, and as such the proceeding in this case, including the charge sheet is liable to be quashed.
- 29. The revisional application being CRR 234 of 2020 is thus allowed.**
- 30.** The proceeding being C.G.R. Case No.3034 of 2012 pending before the learned Judicial Magistrate, 4th Court, Alipore, South 24 Parganas arising out of Lake Police Station case No.220 of 2012 dated 19.06.2012 under Sections 420/406/120B of the Indian Penal Code and all orders passed therein including order dated 12.06.2019 passed by the learned Chief Judicial Magistrate, Alipore, South 24

Parganas thereby taking cognizance of offences punishable under Sections 420/406/120B of the Indian Penal Code is hereby quashed.

- 31.** All connected applications, if any, stands disposed of.
- 32.** Interim order, if any, stands vacated.
- 33.** Copy of this judgment be sent to the learned Trial Court for necessary compliance.
- 34.** Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)