

IN THE HIGH COURT AT CALCUTTA
(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 1826 of 2019

Gopal Sanei @ Gopal Kumar Sanei

Vs

The State of West Bengal & Anr.

For the Petitioner : Mr. Ayan Bhattacharjee.

For the State : Mr. Bitasok Banerjee.

For the Opposite Party No. 2 : Mr. Arunava Ganguly.

Hearing concluded on : 29.02.2024

Judgment on : 05.04.2024

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of the proceedings of G.R. No. 1250 of 2018 corresponding to Haripal Police Station Case No. 194 of 2018 dated September 22, 2018 under Sections 420/120B/34 of the Indian Penal Code, 1860 pending before the Court of the Learned Additional Chief Judicial Magistrate Chandannagore, Hooghly.

FACTS:-

2. The petitioner states that on September 29, 2018 the opposite party no.2 herein filed a complaint before the Court of the Learned Additional Chief Judicial Magistrate Chandannagore at Hooghly (hereinafter referred to as 'Learned ACJM') therein alleging commission of offences punishable under Sections 420/120B/34 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') against as many as five accused persons including the petitioner herein who were arraigned as accused no.3, 4 and 5 respectively therein praying for a direction under Section 156(3) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') for an investigation under Chapter XII of Cr.P.C.

3. **The allegations in the complaint was to the effect that:-**

The opposite party no.2 herein is the owner of a Restaurant Cum Bar under the name and style of Sangam Tourist Lodge/Hotel/Restaurant Cum Bar situated at Vill. Hamiragachi, Post Office Brahmanpara, Police Station –

Haripal, District – Hooghly (hereinafter referred to as ‘Sangam Tourist Lodge’).

On May 29, 2018 the accused came to Sangam Tourist Lodge as manager of NEXA Company under Sanei Motors Pvt. Ltd., a company within the meaning of the Companies Act, 2013, duly incorporated under the provisions of the Companies Act, 1956 having its registered office at 113, Park Street. Poddar Point, Kolkata – 700 016 (hereinafter referred to as ‘Sanei Motors’) and approached the opposite party no.2 herein to buy a vehicle bearing Model No. S CROSS VARIANT ALPHA SCRO CLS (hereinafter referred to as ‘said vehicle’). The opposite party no.2 was interested to purchase the said Model and accordingly, the Booking Requisition Form was filled up by the opposite party no.2. The co-accused person was further alleged to have handed over to the opposite party no.2 one NEXA Customer Welcome Docket as well as agreement papers. The accused person after having discussion with accused persons, stated to the opposite party no.2 that the valuation of the said vehicle was Rs. 11,32,812/- as ex-showroom price. The accused person further stated the Insurance Cost as Rs. 34,321/-, NEXA Car Charges as Rs. 1,180/-, GNA Charges as Rs. 5,868/-, Registration Charges for five years as Rs.63,810/-, Warranty for five years as Rs. 22,597/-, TCS 1% as Rs. 11,328/- aggregating Rs. 12,71,926/- as on road price of the said vehicle.

The opposite party no. 2, through the accused applied to State Bank of India, Chowringhee Branch for a loan of Rs. 10 Lakhs and the said loan amount was sanctioned by the Deputy Manager of State Bank of India, Chowringhee Branch and the said loan amount was subsequently paid by State Bank of India, Chowringhee Branch to Sanei Motors.

On May 29, 2018, the opposite party no.2 issued a cheque for Rs. 11,000/-.

On June 25, 2018, the TCS amount of Rs. 11,328/- was paid by the opposite party no.2. On June 25, 2018, a Bank Draft for Rs. 2,51,438/- was also given by the opposite party no.2 to Sanei Motors.

On June 30, 2018, an agreement was signed by the opposite party no.2 with State Bank of India, Chowringhee Branch in respect of such loan.

Sanei Motors thereafter, informed the opposite party no.2 that it had not received the amount of Rs. 2,73,766/- which the opposite party no.2 deposited. The opposite party no.2 sought for Receipt of such amount, however, Sanei Motors did not accede to the same. On account of such lackadaisical attitude of Sanei Motors, the opposite party no.2 cancelled the

agreement and demanded back Rs. 2,73,766/-. However, no amount was refunded to the opposite party no. 2 for which on August 27, 2018, the opposite party no.2 lodged a complaint with the Officer-in-Charge of Haripal Police Station and subsequently to the Superintendent of Police (Rural) Hooghly for recovery of the said sum of Rs. 2,73,766/-. Since no fruitful result yielded, on September 19, 2018, the opposite party no. 2 filed the instant complaint.

4. Accordingly the instant prosecution being Haripal Police Station Case No. 194 of 2018 dated September 22, 2018 was registered for investigation under Sections 420/120B/34 of the IPC.
5. The petitioner states that the petitioner is one of the directors of Sanei Motors, a reputed company which is the authorized dealer of Maruti Suzuki having its office at 356, Canal Street, Lake Town, Kolkata- 700 048 near Lake Town and V.I.P. Crossing.
6. On May 29, 2018, the opposite party no.2 booked the said vehicle with Sanei Motors, when considering the urgency of the opposite party no.2, Sanei Motors immediately placed orders with Maruti-Suzuki and the said vehicle was dispatched on priority basis from Gurgaon plant of Maruti Suzuki as per the request of the opposite party no.2. When the said vehicle physically reached the godown of Sanei Motors, the opposite party no. 2 was contacted and he was asked for completion of his payment procedure. Since the vehicle was priced above Rs. 10 lakhs, there is mandatory 1% TCS to be applied as per the existing rules. Such TCS amount has also to be added to the cost of the said vehicle which can be claimed back by the opposite party no.2 subsequently on submission of the TCS Certificate to the Government.

However, just two days before the date of delivery of the said vehicle and just before commencement of the registration process, the opposite party no.2 had suddenly sought for cancellation of the agreement on the ground of his unwillingness to pay the TCS amount.

- 7.** The petitioner states that Sanei Motors proceeded for cancellation of the agreement and accordingly, refunded the amount so disbursed to the concerned bank viz. State Bank of India, Chowringhee Branch through RTGS. The informant was personally called by Sanei Motors to visit its showroom for completion of paper works and for collection of his refund amount to the tune of Rs. 2,57,438/-. A cheque bearing No. 122076 dated 18.01.2019 drawn on Axis Bank, CBB Kolkata in favour of the informant was also kept ready by Sanei Motors. However, the informant did not respond to the same which will be evident from the communication through e-mail. The informant did not visit the showroom of Sanei Motors and accordingly the said cheque was lying with Sanei Motors.
- 8.** The petitioner has come to learn that the opposite party no. 2 has lodged a consumer complaint before the Learned District Consumer Forum, North 24 Parganas at Barasat which was registered as CC No. 436 of 2018.

FINDINGS:-

9. **From the materials on record** it appears that at page 52 is a copy of the cheque dated 18.01.2019 in favour of the opposite party no.2/complainant.
10. It has been issued by the Director of the Company M/s Sanei Motors Pvt. Ltd., **but in the proceeding in this case the company has not been made a party.**
11. **Vide an e-mail dated 22.10.2018 (page 55) the opposite party no. 2 was duly informed of the development.**
12. The present case has been **initiated** for offences alleged under Sections 420/120B/34 of IPC **on 22.09.2018.**
13. **During hearing, the learned counsel for the opposite party no.2/complainant has submitted that the complainant/opposite party no. 2 has received all his dues and now has no claim against the petitioner, but no documents have been filed in support of such submission by either side.**
14. The petitioner has relied upon the order of the Supreme Court in ***Lalit Chaturvedi & Ors. vs State of Uttar Pradesh & Anr., 2024 SCC OnLine SC 171, decided on February 6, 2024***, the Court held:-

“5. This Court, in a number of judgments, has pointed out the clear distinction between a civil wrong in the form of breach of contract, non-payment of money or disregard to and violation of the contractual terms; and a criminal offence under Sections 420 and 406 of the IPC. Repeated judgments of this Court, however, are somehow overlooked, and are not being applied and enforced. We will be referring

to these judgments. The impugned judgment dismisses the application filed by the appellants under Section 482 of the Cr. P.C. on the ground of delay/laches and also the factum that the chargesheet had been filed on 12.12.2019. This ground and reason is also not valid.

6. In “Mohammed Ibrahim v. State of Bihar”, this Court had referred to Section 420 of the IPC, to observe that in order to constitute an offence under the said section, the following ingredients are to be satisfied:—

“18. Let us now examine whether the ingredients of an offence of cheating are made out. The essential ingredients of the offence of “cheating” are as follows:

(i) deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission;

(ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property.

19. To constitute an offence under section 420, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived

(i) to deliver any property to any person, or

(ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security).”

7. Similar elucidation by this Court in “V.Y. Jose v. State of Gujarat”, explicitly states that a contractual dispute or breach of contract per se should not lead to initiation of a criminal proceeding. The ingredient of ‘cheating’, as defined under Section 415 of the IPC, is existence of a fraudulent or dishonest intention of making initial promise or representation thereof, from the very beginning of the formation of contract. Further, in the absence of the averments made in the complaint petition wherefrom the ingredients of the offence can be found out, the High Court should not hesitate to exercise its jurisdiction under

Section 482 of the Cr. P.C. Section 482 of the Cr. P.C. saves the inherent power of the High Court, as it serves a salutary purpose viz. a person should not undergo harassment of litigation for a number of years, when no criminal offence is made out. It is one thing to say that a case has been made out for trial and criminal proceedings should not be quashed, but another thing to say that a person must undergo a criminal trial despite the fact that no offence has been made out in the complaint. This Court in V.Y. Jose (supra) placed reliance on several earlier decisions in “Hira Lal Hari Lal Bhagwati v. CBI”, “Indian Oil Corporation v. NEPC India Ltd.”, “Vir Prakash Sharma v. Anil Kumar Agarwal” and “All Cargo Movers (I) (P) Ltd. v. Dhanesh Badarmal Jain”.

9. We will assume that the assertions made in the complaint are correct, but even then, a criminal offence under Section 420 read with Section 415 of the IPC is not established in the absence of deception by making false and misleading representation, dishonest concealment or any other act or omission, or inducement of the complainant to deliver any property at the time of the contract(s) being entered. The ingredients to allege the offence are neither stated nor can be inferred from the averments. A prayer is made to the police for recovery of money from the appellants. The police is to investigate the allegations which discloses a criminal act. Police does not have the power and authority to recover money or act as a civil court for recovery of money.”

15. The Supreme Court in **Shiv Kumar Jatia vs. State of NCT of Delhi**, **AIR 2019 SC 4463**, **Criminal Appeal nos. 1263, 1264 and 1265-1267 of 2019**, decided on 23 August, 2019, held:-

“27. The liability of the Directors/the controlling authorities of company, in a corporate criminal liability is elaborately considered by this Court in the case of **Sunil Bharti Mittal**. In the aforesaid case, while considering the circumstances when Director/person in charge of the affairs of the company can also be prosecuted, when the company is an accused person, this Court has held, 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. At the same time it is observed that it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless **the Statute specifically provides for**. It is further held by this Court, an individual who has perpetrated the commission of an offence on behalf of the company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Further it is also held that an individual can be implicated in those cases where statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

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 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.

30. In the judgment of this Court in the case of **Sharad Kumar Sanghi vs. Sangita Rane** while examining the allegations made against the Managing Director of a Company, in which, company was not made a party, this Court has held that when the allegations made against the Managing Director are vague in nature, same can be

the ground for quashing the proceedings under Section 482 of Cr.P.C. In the case on hand principally the allegations are made against the first accused-company which runs Hotel Hyatt Regency. At the same time, the Managing Director of such company who is accused no.2 is a party by making vague allegations that he was attending all the meetings of the company and various decisions were being taken under his signatures. **Applying the ratio laid down in the aforesaid cases, it is clear that principally the allegations are made only against the company and other staff members who are incharge of day to day affairs of the company.** In absence of specific allegations against the Managing Director of the company and having regard to nature of allegations made which are vague in nature, we are of the view that it is a fit case for quashing the proceedings, so far as the Managing Director is concerned.”

- 16. In *Dayle De’ Souza vs Government of India Through Deputy Chief Labour Commissioner (C) and Anr., in Criminal Appeal No. of 2021 (arising out of SLP (CRL.) No. 3913 of 2020), decided on October 29, 2021*, the Supreme Court held:-**

“24. In *Sharad Kumar Sanghi v. Sangita Rane, (2015) 12 SCC 781* this Court observed that:-

“11. In the case at hand as the complainant's initial statement would reflect, the allegations are against the Company, the Company has not been made a party and, therefore, the allegations are restricted to the Managing Director. As we have noted earlier, allegations are vague and in fact, principally the allegations are against the Company. There is no specific allegation against the Managing Director. When a company has not been arrayed as a party, no proceeding can be initiated against it even where vicarious liability is fastened under certain statutes. It has been so held by a three-Judge Bench in *Aneeta Hada v. Godfather Travels and Tours (P) Ltd.* in the context of the Negotiable Instruments Act, 1881.

13. When the company has not been arraigned as an accused, such an order could not have been passed. We have said so for the sake of completeness. In the ultimate analysis, we are of the considered opinion that the High Court should have been well advised to quash the criminal proceedings initiated against the appellant and that having not been done, the order is sensitively vulnerable and accordingly we set aside the same and quash the criminal proceedings initiated by the respondent against the appellant.”

25. This position was again clarified and reiterated by this Court in **Himanshu v. B. Shivamurthy and Another, (2019) 3 SCC 797**. The relevant portion of the judgment reads thus:

“6. The judgment of the High Court has been questioned on two grounds. The learned counsel appearing on behalf of the appellant submits that firstly, the appellant could not be prosecuted without the company being named as an accused. The cheque was issued by the company and was signed by the appellant as its Director. Secondly, it was urged that the observation of the High Court that the company can now be proceeded against in the complaint is misconceived. The learned counsel submitted that the offence under Section 138 is complete only upon the issuance of a notice of demand and the failure of payment within the prescribed period. In absence of compliance with the requirements of Section 138, it is asserted, the direction of the High Court that the company could be impleaded/arraigned at this stage is erroneous.

7. The first submission on behalf of the appellant is no longer res integra. A decision of a three-Judge Bench of this Court in *Aneeta Hada v. Godfather Travels & Tours (P) Ltd.* governs the area of dispute. The issue which fell for consideration was whether an authorised signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 without the company being arraigned as an accused. The three-Judge Bench held thus: (SCC p. 688, para 58)

“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.”

In similar terms, the Court further held: (SCC p. 688, para 59)

“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 drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself.”

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12. The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.

13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.”

26. Applying the same proposition of law as laid down in **Aneeta Hada** (supra), this Court in **Hindustan Unilever Limited v. State of Madhya Pradesh, (2020) 10 SCC 751** applying *pari materia* provision in Prevention of Food Adulteration Act, 1954, held that:

“23. Clause (a) of sub-section (1) of Section 17 of the Act makes the person nominated to be in charge of and responsible to the company for the conduct of business and the company shall be guilty of the offences under clause (b) of sub-section (1) of Section 17 of the Act. Therefore, there is no material distinction between Section 141 of the NI Act and Section 17 of the Act which makes the company as well as the nominated person to be held guilty of the offences and/or liable to be proceeded and punished accordingly. Clauses (a) and (b) are not in the alternative but conjoint. Therefore, in the absence of the company, the nominated person cannot be convicted or vice versa. Since the Company was not convicted by the trial court, we find that the finding of the High Court to revisit the judgment will be unfair to the appellant-nominated person who has been facing trial for more than last 30 years. Therefore, the order of remand to the trial court to fill up the lacuna is not a fair option exercised by the High Court as the failure of the trial court to convict the Company renders the entire conviction of the nominated person as unsustainable.”

27. In terms of the ratio above, a company being a juristic person cannot be imprisoned, but it can be subjected to a fine, which in itself is a punishment. Every punishment has adverse consequences, and therefore, prosecution of the company is mandatory. The exception would possibly be when the company itself has ceased to exist or cannot be prosecuted due to a statutory bar. However, such exceptions are of no relevance in the present case. Thus, the present prosecution must fail for this reason as well.”

17. In **Sunil Bharti Mittal Vs Central Bureau of Investigation, (2015)**

4 SCC 609, decided on January 9, 2015, the Supreme Court held:-

“**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.”*

- 18. It is thus clear from the petition of complaint that neither the Company nor the persons, who were in-charge of the day affairs of the company, have been made parties in the case. Without the Company and the persons responsible for the day to day affairs of the Company, the prosecution of the petitioner alone, who acted on behalf of the company is bad in law and thus clearly an abuse of the process of law.**

19. CRR 1826 of 2019 is thus allowed.

20. The proceedings of G.R. No. 1250 of 2018 corresponding to Haripal Police Station Case No. 194 of 2018 dated September 22, 2018 under Sections 420/120B/34 of the Indian Penal Code, 1860 pending before the Court of the Learned Additional Chief Judicial Magistrate Chandannagore, Hooghly, **is hereby quashed in respect of all the accused persons including the petitioner.**

21. All connected applications, if any, stand disposed of.

22. There will be no order as to costs.

23. Interim order, if any, stands vacated.

24. Copy of this judgment be sent to the learned Trial Court for necessary compliance.

25. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)