Sayali Upasani

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 348 OF 2021

Rajendra Savla ...Applicant

Vs.

The University of Mumbai and Others ...Respondents

Mr. Ajit Anekar with Ms. Priyanka Srivastava i/b Auris Legal, for Applicant.
Mr. Ashish Chavan, for Respondent No. 1.
Mr. S. R. Agarkar, APP for State-Respondent.

CORAM:- N. J. JAMADAR, J.
DATED:- 19th MARCH, 2024

ORDER:-

1) By this application under Section 482 of the Code of Criminal Procedure, 1973 ("the Code, 1973"), the applicant assails the legality, propriety and correctness of an order dated 23rd February, 2017, passed by the learned Metropolitan Magistrate, 64th Court, Esplanade, Mumbai, whereby process was issued against the applicant and the co-accused Nos. 1 and 3 for the offences punishable under Sections 420 and 406 read with Section 34 of the Indian Penal Code, 1860 ("the Penal Code").

2) Shorn of unnecessary details, background facts can be stated as under:-

(a) University of Mumbai, the complainant, is one of the oldest premier University of India. M/s. International Institute of Events and Management Studies (IIEMS), the accused No. 1 was conducting Diploma Courses in 'Event Management Studies'. Applicant Rajendra Savla – accused No. 2, was the Dean of IIEMS. Ketan Shah, Accused No. 3 was the President of IIEMS.

(b) IIEMS approached the University, seeking affiliation to start a programme in event management under the aegis of the University. A proposal was presented by the University before its Academic Counsel. Post approval, an agreement for conducting the Diploma Course in Event Management was executed between the University and IIEMS on 10th May, 2004. An approval letter was issued to IIEMS permitting it to conduct the Diploma Programme in Event Management as a one-year part-time course in collaboration with University of Mumbai from the Academic year 2004-2005 in accordance with the terms of the MOU dated 10th May, 2004. Under the terms of the MOU, it was, inter alia, agreed that the IIEMS would charge predetermined fees and must remit a portion of the fees to the University. IIEMS was obligated to submit a detailed report of total admissions to the course along with a statement of fees collected.

(c) The University alleged there were several discrepancies in conduct of the said course by IIEMS. Complaints were received by the University from the students. It was noticed that IIEMS had published Brochures/Prospectus in the name of the University as if the University itself conducted the said course. IIEMS allegedly charged extra money from the students by way of fees.

(d) One of the students filed a Writ Petition being WP No. 2533 of 2006. In the said Petition, this Court directed the University to proceed in accordance with law against IIEMS in the event IIEMS did not comply with the directions. Thus, an enquiry was conducted. It transpired that though in the Academic year 2004-2005, vide letter dated 5th June, 2004, the fee for the said course was fixed at Rs.25,000/- per student, the accused had charged an extra amount of Rs.4,000/- to Rs.5,000/- per student without the knowledge and approval of the University and misappropriated the said amount.

(e) The University, thus, filed a complaint for the offences punishable under Sections 120B, 420 and 406 read with Section 34 of the Penal Code. It was, inter alia, alleged that the applicants – accused Nos. 2 and 3 were the Directors of IIEMS.

Accused Nos. 2 and 3 were responsible to, and took decisions pertaining to day to day affairs of, IIEMS.

(f) By the impugned order, the learned Magistrate was persuaded to issue process against the accused for the offences punishable under Sections 420 and 406 read with Section 34 of the Penal Code, observing, inter alia, that the submissions on behalf of the University that the accused have duped many students by representing that the University was conducting the courses in question and by collecting huge fees when no such affiliation was bestowed upon the accused, was well-founded and *prima facie* called for judicial intervention.

(g) Being aggrieved, the applicant has invoked the inherent jurisdiction of this Court.

3) The applicant avers that he was posted as a Dean of IIEMS and rendered services without any remuneration. There are no specific allegations of cheating or misappropriation, qua the applicant. The University has proceeded against the applicant on a factually incorrect premise that the applicant and accused No. 3 were Directors/Partners of IIEMS. There is no material to show that the applicant was either a Director or Partner of IIEMS. In fact, the University has recognized the status of the applicant as a Dean of the institute. Therefore, the prosecution of the applicant is an abuse of the process of the Court.

4) I have heard Mr. Ajit Anekar, the learned Counsel for the applicant, and Mr. Chavan, the learned Counsel for the respondent No. 1- University and Mr. Agarkar, the learned APP for the State. With the assistance of the learned Counsel for the parties, I have also perused the material on record.

5) Mr. Anekar, submitted that the learned Magistrate committed a manifest error in issuing process against the applicant without applying his mind to the facts of the case. The learned Counsel for the applicant would indicate that process was issued based on the submissions of the Advocate for the complainant, rather than upon consideration of the averments in the complaint and the documents annexed thereto. Secondly, no case for cheating and misappropriation is made out against the applicant. Thirdly, even if it is assumed that the applicant had some role in the management of IIEMS, yet the applicant cannot be roped in by invoking the principle of vicarious liability. Therefore, the impugned order deserves to be quashed and set aside qua the applicant.

6) Mr. Chavan, the learned Counsel for the respondent No. 1 would urge that the question as to whether the applicant was in charge of the affairs of the IIEMS, is a matter for adjudication at

the trial. Laying emphasis on the order passed by the Division Bench of this Court in the case of **Shraddha A. Shah Vs. University of Mumbai and Others in WP No. 2533 of 2006,** in the context of the allegations of fraud and misappropriation, Mr. Chavan submitted that the action of filing the complaint was in consonance with the directions of this Court.

7) Mr. Chavan made an endeavour to draw home the point that there is material to indicate that IIEMS had charged and collected fees at more than the approved rate and did not credit 20 % of the said fees in accordance with terms of the MOU between the University and IIEMS. Thus, a clear case of cheating and misappropriation is made out. Therefore, this Court may not be justified in exercising its inherent jurisdiction, urged Mr. Chavhan.

8) I have carefully perused the averments in the complaint and the documents annexed with it and given anxious consideration to the submissions canvassed across the bar. From the perusal of the impugned order, it appears that the learned Magistrate misdirected himself in passing the order to take cognizance of the offences and issue process on the strength of the submissions canvassed across the bar, rather than carefully examining the averments in the complaint and the documents annexed thereto. The learned Magistrate seems to have been influenced by the fact that a submission was made that sans affiliation by the University, IIEMS conducted the course and collected the fees in the absence of such affiliation. The said submission appears to be plainly incorrect in the face of the material on record.

9) In the complaint itself, the University has asserted that the affiliation was granted, MOU was executed and thereafter a letter of approval to conduct the course was issued. All these facts are borne out by the agreement dated 10th May, 2004, the approval letter dated 14th June, 2004 and the circular issued by the University on 19th June, 2004 conveying the introduction of a new Diploma course in Event Management (part-time) with the approval of Academic Council and ManagementCouncil. Ex facie, it appears that the learned Magistrate did not examine the case set up by the University in the complaint in a correct perspective.

10) The gravamen of indictment against the accused in the complaint is two fold. One, IIEMS published Brochures/ Prospectus, which gave an impression that the course was, in fact, conducted by the University itself and there were several deficiencies and inadequacies in the conduct of the said course

and IIEMS had not complied with the terms of the MOU. Two, IIEMS had collected the fees at the rate of 26,500/- for the academic year 2004-2005, (though the increase in the fees from Rs.21,000/- to Rs.26,500/- was not approved by the University), and for the academic year 2005-2006 IIEMS had collected the fees at the rate of Rs.30,000/- per student, without prior approval of the University, and did not credit 20 % additional fees in accordance with the terms of the MOU.

11) The aforesaid indictment is borne out by the averments in the complaint and the notice dated 9th October, 2006 addressed to Ketan Shah, accused No. 3, President of IIEMS to terminate the agreement dated 10th May, 2004. It further appears that vide letter dated 1st December, 2008, Ketan Shah was directed to refund the excess amount of fees of Rs.4,000/- per student collected by IIEMS, to each student within seven days from the receipt of the said notice.

12) The material on record, prima facie, indicates that there was indeed affiliation for conducting the Diploma course. At best, in the matter of the conducting of the said course, IIEMS can be said to have committed irregularities and breached the terms of the agreement between the University and IIEMS. The element of criminality, however, does not appear in any of the alleged irregularities, save and except the allegation that IIEMS had collected the excess fees from the student and misappropriated the portion of the excess amount, which was to be credited to the University.

13) In the context of the allegation of misappropriation, it is necessary to note that in the meeting held between the Vice-Chancellor – accused No. 3 dated 15th September, 2005, disclosure regarding fees charged by IIEMS was made and duly noted. For the academic year 2004-2005, the fee charged was Rs.27,500/- and for the academic year 2005-2006 the fee was Rs.30,000/-. Minutes of the Meeting further record that IIEMS had deposited an amount of Rs.4,000/- per student towards the University's share i.e.,@ 20%, as stipulated in the agreement. It can be urged that IIEMS retained 20% of the excess fees collected from the student for the academic year 2004-2005 and 2005-2006.

14) The pivotal question that warrants consideration is 'can the applicant be prosecuted for the alleged misappropriation' ? First and foremost, it is pertinent to note that the applicant is implicated as an accused in the capacity of the Dean of IIEMS. To this end, the initial correspondence exchanged between the University and IIEMS throws light on the capacity of the applicant. The proposal dated 13th May, 2003, was addressed by the applicant in the capacity of the Dean of IIEMS. Approval to conduct the course was conveyed by the Registrar of the University to the applicant, again in the capacity of Dean of IIEMS. Conversely, apart from a bald averment in the complaint that the applicant is a Director/Partner of IIEMS, there is not a shred of material to show that the applicant was either a Director or Partner of IIEMS.

15) It is pertinent to note the correspondence in the wake of the complaint regarding discrepancies and mismanagement was addressed to accused No. 3- Ketan Shah. It further appears that, even after lodging the complaint, in the meeting held on 27th July, 2018, Mr. Ketan Shah, the President of IIEMS had offered to pay an amount to settle the dispute regarding 20% share of the additional fees collected from the students. In these circumstances, the submission on behalf of the applicant that there is no material to indicate that he was the Director or Partner of IIEMS, appears well-founded.

16) Even if the Court proceeds on the premise that in the capacity of the Dean, the applicant exercised managerial control over the affairs of IIEMS, yet the applicant cannot be roped in for the offences punishable under Sections 420 and 406 read with Section 34 of the Penal Code, without there being any averment to that effect in the complaint. In the absence of allegations of commission of offences by the applicant in the individual capacity, the principle of vicarious liability cannot be readily attracted. There must be a statutory mandate. The mere fact that the applicant was holding the position of the Dean of IIEMS would not make him liable for the offences committed by IIEMS.

17) A useful reference in this context can be made to a decision in the case of **S.K. Alagh vs State Of U.P. & Others**[1]. In the said case, the Supreme Court enunciated that the Penal Code, save and except certain provisions specifically providing therefor, does not contemplate any vicarious liability on the part of a party who is not charged directly for commission of an offence. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself. The Supreme Court observed as under:-

> "16.. Indian Penal Code, save and except some provisions specifically providing therefor, does not

1 2008 (5) SCC 662

> contemplate any vicarious liability on the part of a party who is not charged directly for commission of an offence.
> .....
> 19. As, admittedly, drafts were drawn in the name of the company, even if appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Indian Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself. {See Sabitha Ramamurthy and Anr. v. R.B.S. Channabasavaradhya.."
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> (emphasis supplied)

18) The aforesaid judgment was followed by the Supreme Court in **Maharashtra Electricity Distribution Company and Others Vs. Datar Switchgear Ltd.& Ors**[2]. In the said case, the appellant, who was the Chairman of MSEB, was sought to be prosecuted for the offences punishable under Section 192 and 199 read with Section 34 of the Penal Code. In that context, the Supreme Court observed, inter alia, as under:

> **"27.** There is no denying the fact that appellant No. 2 happened to be the Chairman of MSEB at the relevant time but it is a settled proposition of law that one cannot draw a presumption that a Chairman of a company is responsible for all acts committed by or on behalf of the Company. In the entire body of the complaint there is no allegation that appellant No. 2 had personally participated in the arbitration proceedings or was monitoring them in his capacity as the Chairman of MSEB and it was at his instance the subject interpolation was made in Exhibit C-64..."
> ......

2 (2010) 10 SCC 479

> **29.** In this regard, it would be useful to advert to the observations made by a three judge bench of this Court in S.M.S. Pharmaceuticals (SCC p. 98, para 8)
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> > "8. ... There is no universal rule that a director of a company is in charge of its everyday affairs. We have discussed about the position of a director in a company in order to illustrate the point that there is no magic as such in a particular word, be it director, manager or secretary. It all depends upon the respective roles assigned to the officers in a company. A company may have managers or secretaries for different departments, which means, it may have more than one manager or secretary."
>
> **30.** <u>It is trite law that wherever by a legal fiction the principle of vicarious liability is attracted and a person who is otherwise not personally involved in the commission of an offence is made liable for the same, it has to be specifically provided in the statute concerned. In our opinion, neither Section 192 IPC nor Section 199 IPC, incorporate the principle of vicarious liability, and therefore, it was incumbent on the complainant to specifically aver the role of each of the accused in the complaint</u>.
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> (emphasis supplied)

19) In the case of **Managing Director, Castrol India Limited Vs. State of Karnataka and Another**[3]**,** in the context of prosecution of the Managing Director of Castrol India for the offences punishable under Standards of Weights and Measures Act, 1976 by invoking the provisions contained in Section 74 of the said Act, 1976, which provides for vicarious liability, the Supreme Court observed, inter alia, as under:-

3 (2018) 17 SCC 275

"…7. In the present complaint petition, there is no averment or statement whatsoever that the appellant as the Managing Director of the Company was responsible or incharge of the conduct of the business of the Company in respect of which the offence in question has been alleged to have been committed. Neither there is any averment to the effect that the appellant is otherwise connected or responsible for commission of any of the acts on the basis of which the offence(s) is alleged to have been committed.

8. It will not be necessary to burden this order by a detailed reference to numerous pronouncements of this Court interpreting similar provisions of other statutes holding that a clear and categorical statement to the above effect is required to be made in the complaint petition to proceed against an officer of the Company so as to determine his vicarious liability for the offence committed by the company. In the present case the Company is not even arrayed as an accused.

9. Taking into account the provisions of Section 74 of the Act, the views expressed by this Court on pari materia provisions contained in different statutes and the absence of any specific averments in the complaint petition, as indicated above, we are of the view that the proceedings against the accused-appellant are liable to be quashed… "

(emphasis supplied)

20) The upshot of aforesaid consideration is that, firstly, the complaint proceeds on a demonstrably incorrect premise that the applicant is a Director/Partner of IIEMS; secondly, there is no allegation that the applicant had indulged in the offences punishable under Sections 420 and 406 of the Penal Code individually and, thirdly, the applicant cannot be roped in by invoking the principle of vicarious liability.

21) In these circumstances, the continuation of prosecution would be an abuse of the process of the Court. Thus, the Court would be justified in quashing the said proceedings in exercise of its inherent jurisdiction.

22) Hence, the following order:-

ORDER

1. The application stands allowed.

2. The impugned order of issue of process for the offences punishable under Sections 420 and 406 read with Section 34 of the Penal Code, stands quashed and set aside qua the applicant.

3. The complaint may proceed in accordance with law qua rest of the accused.

4. The application stands disposed.

5. No costs.

[N. J. JAMADAR, J.]