(2015) 02 KAR CK 0154

In the Karnataka High Court

Case No : Criminal P. Nos. 101057, 101105/2014 and 100200/2015

Ashwathnarayan Singh & Company and Others APPELLANT

Vs

The State of Karnataka RESPONDENT

Date of Decision : 20-02-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 173(8), 200, 227, 239
Penal Code, 1860 (IPC) — Section 10, 120B, 34, 35, 379
Prevention of Corruption Act, 1988 — Section 13(1), 13(2)

Citation : (2015) 02 KAR CK 0154

Hon'ble Judges : Rathnakala, J.

Bench : Single Bench

Advocate : K.S. Patil, High Court Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Rathnakala, J.—These three petitions since arise out of common case in Crime No. 1/2014 registered by the respondent police, are taken up together for final disposal.

2. Petitioners in Crl.P. No. 101105/2014 are the partners of accused No. 3 viz. M/s. Muneer Enterprises, directors of accused No. 5 viz. M/s. Printex Exports India Ltd. and Managing Directors and Directors of 4th accused viz. M/s. Dream Logistic India Pvt. Ltd.

3. Petitioners in Crl.P. No. 101057/2014 are Executive Partner, Managing Partner, Partners and Supervisor of accused No. 6 viz. M/s. Ashwathnarayan Singh & Company, a partnership firm.

4. Petitioners in Crl.P. No. 100200/2015 are Managing Partner and Partners of accused No. 2 viz. M/s. Alvares and Thomas Company, a partnership firm.

5. Briefly stated, the respondent-Police registered a case against the accused No. 1/Port Officer, accused Nos. 2 to 9 partnership firms and companies. That apart, the Managing Directors and Directors in respect of partnership firms and all its

partners are charge sheeted for the offence punishable under Sections 120B , 379 , 409 read with Sections 34 and 35 of Indian Penal Code, 1860.

6. Learned counsel for the petitioners at the first instance assails the very cognizance taken by the Magistrate and points towards the order passed by the learned Magistrate registering the case and issuing summons without referring to the offence, for which he is taking cognizance. Secondly, his attack is against naming the persons who are not bound over either by the Articles of Association of the company or by the registered partnership deeds of the partnership firms to answer the charges alleged against respective company or firm. He further submits that as regards second accused/partnership firm is concerned, accused Nos. 2(a) 2(b) and 2(c) are all ladies, having no hands in the business, management and day today conduct of the partnership firm. The accused No. 2(d) is their local Manager at Karwar who is responsible for the entire activities of the Company at Karwar. The names of accused No. 2(b) and 2(c) were not included in the first charge sheet, it is only after further investigation, the additional charge sheet was filed to naming the accused Nos. 2(b) and 2(c). As such, none of the petitioners of in Crl. P. No. 100200/2015 can be saddled for the alleged offence. They are not at all the residents of Karwar.

7. In respect of the petition No. 101105/2014, the submission of the learned counsel is that the accused No. 3 is M/s. Muneer Enterprises, a Partnership Firm, its Manager is shown in the charge sheet as accused Nos. 3(b). The petitioners 1 to 4 are only sleeping partners having no role in the business conduct and day to day administration of the Partnership Firm. They are not the residents of Karwar. The Manager of the Firm-accused No. 3 (b) has already appeared before the Court. The petitioner Nos. 2 to 4 for the first time named in the second charge sheet. The 4th accused is M/s. Dream Logistic Company Pvt. Ltd., registered under the Companies Act. The petitioner Nos. 5 to 8 are its Managing Director and Directors respectively. The accused No. 4 (e) being the Export Manager of the Company, is nominated as the person responsible for various activities of the company in accordance with the provision of the Air (Prevention and Control of Pollution) Act, 1981 and The Water (Prevention and Control of Pollution) Act, 1974 and he has already appeared before the Court. The fifth accused- the Printex Exports India Pvt. Ltd., is a Partnership Firm. The petitioner Nos. 9 to 11 are its partners, but, having no role in day to day administration and business of the Firm. The accused No. 5(d) is their Export Manager, at Karwar and he has already appeared before the Court.

8. The learned counsel further submits, the petitioners in Crl. P. No. 101057/2014 are the Executive Partners, Managing Partner and partners of accused No. 6, the registered Partnership Firm. Accused No. 6(n) and 6(o) are their supervisors at Bellary. The allegation against accused Nos. 2 to accused Nos. 5 is concerned is only to an extent of committing theft of the iron ore from the custody of the port officer/accused No. 1. As far as accused No. 6 is concerned, the allegation is without obtaining a valid licence to transport the iron

ore, they transported the ore from Bellary to Karwar, thereby committed offence. The allegation against them is under Sections 465 , 468 and 471 of IPC.

9. The learned counsel further hastens to add to his submissions that the petitioners herein who are not shown to have personally indulged in commission of the offence are unnecessarily brought to book only for the reason that they happen to be the Partners, Executive Partners, Directors and Managing Directors of the respective Partnership Firm/Companies. When they have authorised their agent at the spot to answer all the day to day activities of the Firm/Company, the Investigating Officer has unnecessarily brought the petitioners them to book. In this regard, the judgement of the Apex Court reported in Sham Sunder and Others Vs. State of Haryana, is relied. In the said judgement, the Apex Court has held at paras 9 and 10 as follows:--

"9. But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do business or not.

10. It is, therefore, necessary to add an emphatic note of caution in this regard. More often it is common that some of the partners of a firm may not even be knowing of what is going on day to day in the firm. There may be partners, better known as sleeping partners who are not required to take part in the business of the firm. There may be ladies and minors who were admitted for the benefits of partner- ship. They may not know anything about the business of the firm. It would be a travesty of justice to prosecute all partners and ask them to prove under the proviso to sub- section (1) that the offence was committed without their knowledge. It is significant to note that the obligation for the accused to prove under the proviso that the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution establishes that the requisite condition mentioned in sub-section (1) is established. The requisite condition is that the partner was responsible for carrying on the business and was during the relevant time in charge of the business. In the absence of any such proof no partner could be convicted. We, therefore, reject the contention urged by counsel for the State".

10. Above judgement was relied in the further judgement of the Apex Court in the reportable case in Crl.A. No. 34/2015 between Sunil Bharti Mittal v. Central Bureau of Investigation. The learned counsel further enumerating on the powers of this Court under Section 482 of Cr.P.C, relied on the judgement of the Apex Court reported in Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, and 2005 SCC (Cri) 415., wherein it was held "Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course". In this judgement the powers of this Court, under Section 482 of Cr.P.C. was emphasised, as to prevent the abuse of the process of law or to pass suitable orders to meet the ends of justice.

11. In the judgement reported in (2008) 5 SCC 688, Maksnd Saiyed v. State of Gujarat while elaborating on the vicarious liability of the Manager or the Directors of the Company it was observed as follows:--

"13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. Indian 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 The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. 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".

12. In S.K. Alagh Vs. State of U.P. and Others, , it was held that ''in the absence of provision laid down under the statute a Director of the Company or employee cannot be held to be vicariously liable for any offence committed by the company itself.

13. Attacking the order passed by the learned Magistrate in registering the case and issuing summons to the accused persons, the learned counsel relied on the judgement reported in Fakhruddin Ahmad Vs. State of Uttaranchal and Another, between Fakruddin Ahmad v. State of Uttaranchal and another, wherein the position of law was reiterated that before the Magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of accusations and applied his mind to the allegations made in the police report. Since the order of the learned Magistrate does not indicate that he has gone through the charge sheet materials and has applied his mind in taking cognizance same is vitiated and the entire proceedings is liable to be quashed.

14. In reply the learned Government Pleader submits that the petitioners herein are the Partners, Manager, Directors and Managing Directors have already appeared before the concerned Court through their Manager/Directors/agent. That being so, now, it does not lay in their mouth of the petitioners to question the cognizance taken by the Magistrate. Now, the stage having already been crossed and the charge sheet having been filed it is for the petitioners to appear before the said Court and they have remedy before the trial Court to seek discharge from Section 239 of Cr.P.C. When a similar petition was moved by accused No. 7, who is the sole Proprietor of the Proprietorship concern in Crl.P. No. 101566/2014, this Court rejected his contention and directed him to resort to Section 227 of Cr.P.C, before the concerned Court. Now, the case of these petitioners cannot be distinguished from that of the petitioners of Crl.P. No.

101566/2014 to quash the proceedings against them. The Partnership Firm in accordance with law is not a juridical person by legal fiction, it has no identity separate from that of his partners.

15. In the absence of any documentary proof, act of one amounts to act of all. The Partnership Firm may issue or defend in its name for civil liability in Civil Court. But, when it comes to the question of criminal liability, all the partners are necessarily to be held vicariously liable to the alleged offence in respect of the company registered under the Companies Act. In the absence of any rules or regulation governing the company under which a person can be held responsible for all the acts done on behalf of the company, it is inevitable to prosecute all its Directors and Managing Directors. Hence, there is no merit in the case of the petitioners and the circumstances do not warrant invoking the extra ordinary jurisdiction of this Court under Sections, 482 of Cr.P.C. The Special Judge before whom the charge sheet is filed is the District and Sessions Judge and any order passed by him is amenable to the revisional jurisdiction, and shall be challenged before this Court under revision. The order of taking cognizance though not challenged by way of a revision, is how challenged under the premise of Section 482 of Cr.P.C, which is not permissible. The order dated 18/6/2014 passed by the learned District Judge which is vexed in these petitions reads as under:--

"The entire records in CC No. 283/2011 relating to Cr. No. 154/2010 of Karwar Town Police station are received from PRL. Civil Judge and C.J.M. Karwar as per his letter No. 582/2014 dated 14/5/2014 criminal case is registered against the accused persons and the companies for the offences punishable under Sections 13(1) and (d) r/w Section 13(2) of PC Act 1988.

The accused persons are on bail.

Documents as per list are produced and verified cognizance is taken in respect of alleged offences Resister as a special case.

Issue Summons to all the accused and the companies and call on 31/7/2014"

16. It is the submission at the bar, that firstly charge sheet was filed before the C.J.M. Karwar. Thereafter, further investigation was conducted under Section 173(8) of Cr.P.C. and since additional offence under the Prevention of Corruption Act was invoked against accused No. 1, the charge sheet was submitted before the CJM were transferred to the Special Court. On a reading of the order of 18/6/2014 it is not possible to infer that the Special Judge before taking cognizance applied his mind to the materials available in the charge sheet and was convinced about availability incriminating materials against the accused in respect of alleged offence quoted in the charge sheet.

17. A bald recording to the effect that cognizance is taken in respect of the alleged offence will not suffice to infer that he had gone through the material available before him and came to the conclusion that prima facie case was available from the charge sheet papers to register the special case. That vitiates

the order of taking cognizance. In that view of the matter, consequential proceeding has no validity and illegal barring. Of course, the order of the learned Special Judge in taking cognizance against the petitioners was not challenged within stipulated period under revision. Still when the illegality committed at the threshold is brought to the notice of this Court, the petitioners cannot be non-suited by showing their way to trial Court. It is in the interest of justice that the order dated 18/6/2014 needs to be quashed and the matter shall be remitted back to the concerned Court for doing needful in accordance with the established procedure. At the time of taking cognizance, it is for the learned Magistrate to apply his mind in accordance with the observation made by the Apex Court in the above quoted judgements and pass suitable orders.

18. Accordingly, the petitions are allowed. The order of the Special Judge in Special Case No. 15/14 in respect of Crime No. 154/2010 of Karwar Police Station, taking cognizance and issuing summons to the petitioners herein so also the co-accused is quashed. The matter is remitted to the Special Court to proceed from the stage of taking cognizance in the light of the observation made above.

19. The petitioners are given liberty if so necessities to move for discharge before the trial Court under Section 327 of Cr.P.C. All the contentions are left open.

