(2013) 10 DEL CK 0333

In the Delhi High Court

Case No : Criminal M.C. 4165 of 2013 and Criminal M.A. No. 14848 of 2013

Girdhir Lal Mohta APPELLANT

Vs

CBI RESPONDENT

Date of Decision : 21-10-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 305, 319
Customs Act, 1962 — Section 140
Income Tax Act, 1961 — Section 85
Negotiable Instruments Act, 1881 (NI) — Section 141
Penal Code, 1860 (IPC) — Section 120B, 420, 468, 471, 511
Prevention of Corruption Act, 1988 — Section 13(1)(d), 13(2), 15

Citation : (2013) 4 JCC 2649

Hon'ble Judges : Sunil Gaur, J

Bench : Single Bench

Advocate : Aman Lekhi and Mr. Ashwani Kumar in Crl.M.C. 4166/2013 and Crl.M.A. No. 14850/2013, Mr. Vijay Aggarwal and Mr. Mudit Jain, in Crl.M.C. 4165/2013 and Crl.M.A. No. 14848/2013, Crl.M.C. 4166/2013 and Crl.M.A. No. 14850/2013 and Crl.M.C. 4167/2013 and Crl.M.A. No. 14852/2013, Mr. Abhishek Manu Singhvi and Mr. Joy Basu, s, Mr. Ankur Chawla and Ms. Megha Gupta, in Crl.M.C. 4165/2013 and Crl.M.A. No. 14848/2013 and Crl.M.C. 4167/2013 and Crl.M.A. No. 14852/2013, Mr. Gurbaksh Singh, Mr. Avtar Singh and Ms. Richa Samihta, in Crl.M.C. 4167/2013 and Crl.M.A. No. 14852/2013, for the Appellant; Narender Mann, Special Public Prosecutor for CBI in All Appeals, for the Respondent

Final Decision : Disposed Off

Judgement

Sunil Gaur, J.—Vide impugned order of 6th September, 2013 petitioners have been summoned as accused in R.C. No. AC2/2010/A0001/ACU-II/CBI/New Delhi, for the offences under Sections 120B/420/511/468/471 of the IPC and under Sections 15 & 13(2) r/w Section 13(1)(d) of The Prevention of corruption Act, 1988. Since the above captioned three petitions are directed against common impugned order and as the challenge to the impugned order in these three petitions is on identical grounds, therefore, with the consent of learned counsel for the parties, these three petitions were heard together and are being disposed of by this common judgment. Petitioners in the above-captioned first two petitions are the Directors of M/S. Prakash Industries Ltd. (henceforth referred to as the accused-company) whereas petitioner of above-captioned third petition is the Chairman-cum-Managing Director of the aforesaid Company. In the original charge-sheet, there are allegations of forgery and of use of forged documents while making application on behalf of accused company for allocation of additional coal block. As per the charge-sheet filed, application and documents for allocation of additional coal block was signed by A.K. Chaturvedi as President (Corporate Affairs) and Constituted Attorney of the accused company. In the charge-sheet (Annexure-C), accused company has been prosecuted through its Chairman-cum-Managing Director. Now vide impugned order, petitioners in their individual capacity have been summoned as accused to stand the trial in this RC case after filing of the supplementary charge-sheet (Annexure-I).

2. Challenge to the impugned order by learned senior counsel for petitioners is on the ground that no material has surfaced in the supplementary charge-sheet warranting taking of cognizance for the offence in question with the aid of Section 120B of the IPC against petitioners and the impugned order proceeds on conjectures. It was next contended on behalf of petitioners that no role has been attributed to the petitioners either in the first charge-sheet or the second charge-sheet to connect them even indirectly with the commission of offences in question. Learned senior counsel for petitioners had contended during the course of arguments that if any fresh material comes on record during the recording of evidence, then trial court can summon petitioners as accused but not amidst trial. It was pointed out that deposition of three prosecution witnesses has been recorded till date and no fresh material has come in their depositions to justify summoning of petitioners as accused in this RC case.

3. To contend that Indian Penal Code does not contain any provision making the Directors of the company vicariously liable, when accused is a company, reliance was placed on behalf of petitioners upon decisions in Maksud Saiyed Vs. State of Gujarat and Others, ; C. Parthasarthy Vs. Bulls and Bears (Stock Brokers) Ltd., ; S.K. Alagh Vs. State of U.P. and Others, ; R.C. Gupta and Others Vs. State and Another & Avinash Bajaj Vs. State 2008 [IV] AD [CR] [DHC] 53 . To further contend that a person can be summoned as an additional accused while invoking Section 319 of the Cr.P.C. and not prior thereto, reliance was placed by learned senior counsel for petitioners upon decisions in Anirudh Sen Vs. State (N.C.T. of Delhi), & Kishun Singh and Others Vs. State of Bihar, . Impugned order is assailed by learned senior counsel for petitioners also on the ground that petitioners have been summoned as accused in this case without any application of mind and in an arbitrary manner. To assert so, reliance is placed upon decisions in Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, & LPA No. 810/2010 Naveen Kaushik vs. Central Bureau of Investigation decided by a Division Bench of this Court on 30th March, 2011. Thus, quashing of impugned order is sought in the above captioned three petitions.

4. At the hearing, Mr. Narender Mann, learned Special Prosecutor for respondent-CBI had staunchly supported the impugned order and had relied upon Apex Court''s decision in S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, to contend that petitioners are the persons who are Incharge and responsible for day to day affairs of the accused company and without their knowledge or approval, President (Corporate Affairs) and Constituted Attorney of the accused company could not have submitted application of 12th January, 2007 along with forged documents and ER-I forms for allocation of additional coal mining block. Finally, it was submitted on behalf of respondent-CBI that the decisions relied upon by petitioners have no application to the facts of the instant case, as upon taking of cognizance of the offences in view of the supplementary charge-sheet, additional accused can be always summoned to face the trial and there is no need of waiting for the stage to invoke Section 319 of the Cr.P.C. Thus, dismissal of these three petitions is sought.

5. Upon considering the contentions advanced by both the sides, on perusal of the impugned order, copies of charge-sheet and supplementary charge-sheet filed, the material on record and the decisions cited, it emerges that neither in the charge-sheet nor in the supplementary charge-sheet, any material has surfaced to justify taking of cognizance for the offences in question against petitioners in their individual capacity, especially when accused company is being already prosecuted in this case. No doubt, court is empowered to take cognizance of the offences against additional accused when supplementary charge-sheet is filed but it can be only done when prima facie material surfaces against proposed additional accused.

6. Relevantly, respondent in the supplementary charge-sheet has not sought to prosecute petitioners as additional accused and trial court suo motto has chosen to do so. Infact, in the supplementary charge-sheet what has been disclosed runs counter to the impugned order. The conclusion drawn in the supplementary charge-sheet is extracted as under:-

However, the investigation has not been able to establish the destination of this purportedly diverted coal. Investigation could also not establish the role of individuals responsible for such a purported diversion of coal.

7. Operative portion of the impugned order reads as under:-

A-3 A.K. Chaturvedi is simply an employee of A-4 M/s. Prakash Industries Ltd. and as an employee not in a position to do anything of his own. Moreover, he is not at all the beneficiary of the allocation and the beneficiary if at all was, it was the company and from the allegations it is quite evident that submission of these forged documents to the Ministry of Coal for allocation of the coal block was within the knowledge and had the approval of the Directors of the Company.

8. The reasoning adopted by the trial court in the impugned order is reproduced as under:-

Cognizance in the matter has been taken, however, the CMD Shri V.P. Agarwal and the Directors Shri G.L. Mohta and Shri Vipul Agarwal who are in-charge of and responsible for day to day affairs of the company have not been summoned so far.

Since the application dated 12.01.2007 has been submitted on behalf of the company using forged documents and ER-I forms, which in the circumstances was within the knowledge and had the approval of their directors, I find sufficient grounds on record to proceed against Shri V.P. Agarwal, Shri G.L. Mohta and Shri Vipul Agarwal.

9. During the course of hearing, it was put to learned Special Prosecutor for the CBI as to on what basis afore-referred conclusion has been drawn by the trial court and learned Special Prosecutor could not draw attention of this Court to any material in the charge-sheet or the supplementary charge-sheet to support the afore-referred reasoning or the conclusion drawn by the trial court. Infact, it was pointed out by learned senior counsel for petitioners that petitioners had no knowledge about the documents submitted by A.K. Chaturvedi, President (Corporate Affairs) and Constituted Attorney of the accused company nor they had accorded their approval for submission of application dated 12th January, 2007, which is purportedly accompanied by the forged documents. It was also pointed out by learned senior counsel for petitioners that Apex Court''s decision in SMS Pharmaceuticals (Supra), relied upon by respondent-CBI has no application as it pertains to prosecution under the Negotiable Instruments Act in which Section 141 permits prosecution of persons who are incharge of the affairs of the company or responsible to it for the conduct of its business whereas there is no such provision in the Indian Penal Code creating deemed criminal liability.

10. On the aforesaid aspect, the Apex Court in Maksud Saiyed (supra), has reiterated as under:-

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.

11. The aforesaid dictum of the Apex Court has been followed by a Coordinate Bench of this Court in Avnish Bajaj (supra), to hold that the law as it presently stands does not envisage an automatic liability attaching to a Director for the offences committed by a company. The pertinent observations made in this regard in Avnish Bajaj (supra) are as under:-

It requires to be noted that unlike some other statutes containing penal provisions, the IPC does not incorporate the concept of criminal liability of a Director or an employee where the principal accused is a company. In other words, there is no provision similar to Section 141 of the Negotiable Instruments Act, 1881 (''NI Act) or Section 140 of the Customs Act, 1962 or Section 85 of the

IT Act. These are provisions that provide for a deemed criminal liability of a person who, at the time of commission of the offence by the company, was in charge of the affairs of the company or responsible to it for the conduct of its business. The proviso to such provision makes it possible for such person to escape liability by proving at the stage of trial that the offence was committed by the company without his or her knowledge. Therefore once the deemed criminal liability gets attracted under the substantive provision, the burden shifts to the accused under the proviso to rebut such presumption. However, there is no such provision in the IPC.

12. Recently, another Coordinate Bench of this Court in C.P. Parthasarthy (supra) while applying the dictum of the Apex Court in Maksud Saiyed (supra), had held that it is not permissible to prosecute Chairman-cum-Managing Director in individual capacity by pertinently observing as under:-

There is no dispute about the fact that the company is a juristic person and can be sued and can sue also. It can be an accused also. Section 305 of the Cr.P.C. clearly lays down that when a company is an accused, it has to be made as an accused through its CMD or a Company Secretary or Chief Executive Officer but nevertheless the accused remains the company and not the CMD in its individual capacity. While as in the instant case, the respondent/complainant has sought to prosecute the CMD of both these companies as individuals as if they are vicariously liable for the acts of the company. This cannot be permitted to be done. The Supreme Court in Maksud Saiyed''s case (supra) has reiterated this very point that unless and until there is a specific provision in the statute which fastens vicarious liability on the principle officer of the company, he cannot be held liable and admittedly, under the IPC, there is no provision which would make the CMD or a principle officer of a company vicariously liable for an offence of cheating, breach of trust, forgery or using forged documents as genuine. Therefore, on this point, the complaint of the respondent/complainant deserves to be quashed.

13. Since there is no deeming provision in the Indian Penal Code creating deemed criminal liability, as in Section 141 of The Negotiable Instruments Act, therefore, finding returned in the impugned order of petitioners being liable to be prosecuted for the offences in question by virtue of being incharge of and responsible for the conduct of the business of the company and summoning of petitioners as additional accused, is rendered unsustainable.

14. This Court is conscious of the fact that petitioners have been summoned as additional accused with the aid of Section 120B of the IPC and that direct evidence of conspiracy is seldom available. However, to infer that petitioners had the knowledge of submission of application dated 12th January, 2007 or of their approving submission of aforesaid application along with forged document, there has to be some material on record on the basis of which it can be so inferred. It was neither pointed out during the course of hearing, nor upon scanning of charge-sheet and supplementary charge-sheet, it can be reasonably inferred that

petitioners had the knowledge of submission of application dated 12th January, 2007 with forged documents or they had approved it.

15. There has to be legitimate basis to draw inferences of petitioners having conspired to commit the offences in question. Attention of this Court was also not drawn by learned Special Prosecutor for respondent-CBI to any Board Resolution of accused company on record or for that matter, to any material on record, to justify the conclusion in the impugned order of petitioners having knowledge of submission of application dated 12th January, 2007 along with forged documents or of their approving it. Thus, finding returned in the impugned order of petitioners having knowledge about application dated 12th January, 2007 being submitted with forged documents or of their approving it cannot be sustained.

16. In light of the aforesaid, impugned order summoning petitioners in their individual capacity as accused is rendered unsustainable and is accordingly quashed while not commenting upon the merits. Needless to say that it would be open to the trial court to summon petitioners as additional accused while invoking Section 319 of the Cr.P.C. if any evidence comes on record about petitioners having knowledge of submission of application dated 12th January, 2007 along with forged documents or of their having approved it. With aforesaid observations, the above captioned three petitions and applications are accordingly disposed of.

