
(2015) 05 PAT CK 0100
In the Patna High Court
Case No : Criminal Misc. No. 47734 of 2012

N.S. Bapna and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 01-05-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 320, 482
Penal Code, 1860 (IPC) — Section 10, 120-B, 320, 405, 406

Citation : (2015) 3 PLJR 767

Hon'ble Judges : Ashwani Kumar Singh, J.

Bench : Single Bench

Advocate : Soni Srivastava, for the Appellant; Shahin Begum, for the Respondent

Final Decision : Allowed

Judgement

Ashwani Kumar Singh, J.—Heard Ms. Soni Srivastava, learned counsel for the petitioner, Ms. Shahin Begum, learned A.P.P. for the State and Mr. Kamlesh Kumar Singh, learned counsel for opposite party No. 2. The present application under Section 482 of the Code of Criminal Procedure has been filed by the petitioners for quashing of the entire criminal proceedings including the order dated 26.8.2011 passed by the learned Chief Judicial Magistrate, Patna in Gandhi Maidan P.S. Case No. 108 of 2011 corresponding to G.R. No. 1756 of 2011, whereby, finding a prima facie case to be made out under Sections 420 , 406 and 120-B of the Indian Penal Code, cognizance has been taken against the petitioners and they have been summoned to face trial.

2. The aforesaid police case has been instituted on the basis of a written report submitted by the opposite party No. 2 to the Officer-in-Charge of Gandhi Maidan Police Station on 17.4.2011. In the written report, it has been alleged that Mr. N.S. Bapna-Chief Managing Director, petitioner No. 1, Mr. Mohammed Sagir-Circle Head, petitioner No. 2, Mr. Anirban Sadhukhan-Regional Manager, petitioner No. 3, Mr. Vikrant Singhal-Director, petitioner No. 4, Mr. Paresh Pathak-

Zonal Manager, petitioner No. 5, Mr. Rajesh Subramanian- Director, petitioner No. 6, Mr. Sanjay Mathur-Accountant, petitioner No. 7, all employees of M/s. NSB BPO Solutions Pvt. Limited (hereinafter referred to as "the Company") and one Mr. Sushil Agrawal, owner of NSB BPO office premises, approached M/s. S. Tel Private Limited (hereinafter referred to as "Opposite Party No. 2") through its abovementioned officials and tried to persuade the Opposite Party No. 2 that they would be able to provide them services in terms of or pertaining to collection of prepaid customer enrollment forms/post-paid customer enrollment forms/value added service enrollment forms/customer enrollment forms (hereinafter referred to as "the CAFs") and for any other services provided, as well as verification, management, safe custody, reporting of the same in conformity with the applicable law, regulation and statutory stipulations and compliance with the directions, instructions, guidelines, to be issued by the Opposite Party, from time to time.

3. It has further been alleged that the Company, knowing fully well that they did not have the requisite infrastructure or capital or means to cater to the demands of the Opposite Party No. 2, made false representations and claims through its officers so as to get into an agreement with the Opposite Party No. 2. Thus, believing the assurances made by the Company, the Opposite Party No. 2 entered into an agreement with the Company on 1st of April, 2010 to do the aforementioned jobs relating to processing etc. of the CAFs.

4. It has been alleged that the Company through the abovenamed petitioners had promised to collect the documents, scrutinize and check their veracity and deliver the same to the Opposite Party No. 2 or its authorized agents, after first and second level scrutiny within 72 hours of the collection of the CAFs but the petitioners neglected to do the work as undertaken and as a result thereof, serious delay resulted in processing of forms and verification of documents.

5. It has further been alleged that the Opposite Party No. 2 made repeated requests, reminders and follow-ups with the Company through the abovenamed petitioners, but none of them ever tried to give any clarification or take remedial steps and the neglect of their work and undue delays on the part of the Company in processing of the CAFs has exposed the Opposite Party No. 2 to serious legal, regulatory and penal consequences. In the aforesaid factual situation, the Opposite Party No. 2 was constrained to terminate the agreement dated 1st April, 2010 with the Company, vide letter dated 18th November, 2010 sent through registered post and courier to the Company's address. Thereafter, the Opposite Party No. 2 called upon the Company through the abovenamed petitioners to return all the CAFs along with all the collected documents to the Opposite Party No. 2, as the Opposite Party No. 2 is the sole custodian of CAFs and is obliged under the licence and under applicable law to keep the same in its custody in good condition so that it can retrieve information which are sought by the Government/Security Agencies and the non-delivery of such information rendered the Opposite Party No. 2 liable for penal action and huge penalties as

regulatory measures.

6. It has further been alleged that a legal notice was sent to the Company through the abovenamed petitioners on 25.12.2010 to return the CAFs but this too yielded no results. As a result of the neglect and failure on the part of the Company and its officials to return the CAFs, the Opposite Party No. 2 was unable to comply the DoT guidelines of uploading of 100% scanned images on password protected website and sharing the access with DoT, as the deadline for completion of the activity was 31st March, 2011.

7. On the basis of the aforesaid allegations made in the F.I.R., Gandhi Maidan P.S. Case No. 108 of 2011 was registered against the petitioners and aforementioned Mr. Sushil Agrawal and investigation was taken up.

8. It has been contended by the learned counsel for the petitioners that the allegations levelled against the petitioners are incorrect and the petitioners are completely innocent and in no way connected with the offence far less the offences alleged in the F.I.R. and they have been falsely implicated in the instant proceedings.

9. It has been submitted that there was old business relation between the Opposite Party No. 2 and the Company and these petitioners are officials of the Company and they are arrayed as accused by virtue of their official position in the Company. She has submitted that in terms of the explanation appended to Section 405 of the Indian Penal Code, a legal fiction has been created to the effect that the employer shall be deemed to have committed an offence of criminal breach of trust. Whereas a person incharge of the affairs of the Company and in control thereof has been made vicariously liable for the offence committed by the Company along with the Company, but even in a case falling under Section 406 of the Indian Penal Code, vicarious liability has been held not to be extendable to the Directors or officers of the Company. She has submitted that the Indian Penal Code does not envisage the concept of vicarious liability. According to her, the offences alleged in the F.I.R. are under Sections 406, 420 and 120-B of the Indian Penal Code whereunder no specific liability or role has been ascribed to the officers of the Company. In absence of specific details about the same, no person can be prosecuted for the offences alleged in the F.I.R.

10. The next contention advanced by the learned counsel for the petitioner is that the Company in question never intended to cause any harassment to the Opposite Party No. 2 nor have the petitioners intentionally hurt the Opposite Party No. 2. The moment they came to know about institution of the F.I.R., they expressed their regret if any harassment has been caused to the Opposite Party No. 2 and the Opposite Party No. 2 accepted the said expression of regret. They have decided to come to a compromise in the abovementioned case outside the Court with intervention of well wishers and common friends of both the parties without any pressure, threat or fear and a compromise petition was filed before the court of learned Chief Judicial Magistrate, Patna on 5th May, 2011, which was

sent to the Gandhi Maidan Police Station. In token of compromise, both the parties have given their respective affidavits before the concerned Police Station.

11. It has been contended that the police without considering the compromise arrived at between the parties and the affidavit submitted on behalf of the opposite party No. 2 in this regard, filed charge-sheet in the court of the learned Chief Judicial Magistrate, Patna, pursuant to which the learned Chief Judicial Magistrate took cognizance of the offences punishable under Sections 420 , 406 and 120-B of the Indian Penal Code and summoned the petitioners to face trial.

12. Learned counsel for the State has contended that though the offences punishable under Sections 406 and 420 of the Indian Penal Code are compoundable, the offence punishable under Section 120-B of the Indian Penal Code is not compoundable. She has submitted that the allegations made in the F.I.R. were found to be true in course of investigation and accordingly the police have submitted charge-sheet in the case against the accused persons. She has submitted that the corporate entity is a juristic person, which acts through its officers, Directors, Managing Director, etc. The petitioners are none else but the officials of the Company. According to her, their status in the Company is not of employees but they are employers. They made false assurance to the Opposite Party No. 2 and failed to fulfill the promise, as a result of which the Opposite Party No. 2 sustained huge loss.

13. However, learned counsel for the Opposite Party No. 2 has contended that the dispute between the parties is purely a personal one and it arose out of business dealings between them and in view of the compromise arrived at between the parties, the Opposite Party No. 2 has now no grudge against the petitioners. He has submitted that since cordial relationship has been established between the parties, the Opposite Party No. 2 do not want to proceed in the matter any more.

14. I have heard the parties and perused the record. I find substance in the argument advanced by the learned counsel for the petitioners.

15. The facts of the present case clearly suggest that there was commercial transaction between the parties. They had entered into an agreement and for breach of terms of the agreement, if any dispute arose, it was essentially and purely a dispute of civil nature.

16. I further find that the Opposite Party No. 2 had entered into an agreement with the Company. The company in question is incorporated under the Indian Companies Act, 1956 and, thus, it is a juristic person having right to sue with a liability to be sued. The Company has, admittedly, not been made accused in the present case. Learned counsel for the petitioners is absolutely correct in her submission that the Indian Penal Code does not envisage the concept of vicarious liability.

17. In R. Kalyani Vs. Janak C. Mehta and Others, , the Apex Court in paragraph

41 has held as under:---

"41. If a person, thus, has to be proceeded with as being variously liable for the acts of the company, the company must be made an accused. In any event, it would be a fair thing to do so, as legal fiction is raised both against the Company as well as the person responsible for the acts of the Company."

18. In *S.K. Alagh Vs. State of U.P. and Others*, , in paragraph 19, the Apex Court held as under:---

"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."

19. In *Hira Lal Hari Lal Bhagwati Vs. C.B.I., New Delhi*, , the Apex Court in paragraph 30 held as under:---

"30. In our view, under the penal law, there is no concept of vicarious liability unless the said statute covers the same within its ambit. In the instant case, the said law which prevails in the field i.e. the Customs Act, 1962 the appellants have been therein under wholly discharged and the GCS granted immunity from prosecution. It is a well-established principle of law that the matter which has been adjudicated and settled need not be dragged into the criminal courts unless and until the act of the appellants could have been described as culpable. The true fact and import of the Kar Vivad Samadhan Scheme, 1998, in our view, is that once the said Scheme is availed of and all the formalities complied with including the payment of the duty, the immunity granted under the provisions of the Customs Act, 1962 also extends to such offences that may prima facie be made out on identical allegations i.e. of evasion of customs duty and violation of any notification issued under the said Act."

20. Similarly, in *Sham Sunder and Others Vs. State of Haryana*, , in paragraph 9, the Apex Court held as under:---

"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."

21. In view of the aforementioned decisions of the Apex Court, I am of the considered opinion that when the Company is the offender, vicarious liability of the Managing Director, Directors or any other officer or employee cannot be imputed automatically, in the absence of any statutory provisions to this effect. The allegations contained in the present case are for commission of offences

punishable under the Indian Penal Code in which there is no concept of vicarious liability.

22. In the light of the aforesaid findings, in absence of the Company having been made accused, no prima facie case would be made out against the petitioners in respect of the offences punishable under Sections 406 , 420 and 120-B of the Indian Penal Code.

23. I further find that in the present case the parties have mutually settled their dispute outside the court and they have also filed a compromise petition in the court below. The offences for which the petitioners are being prosecuted are under Sections 406 , 420 and 120-B of the Indian Penal Code. The offences under Sections 406 and 420 of the Indian Penal Code are compoundable but Section 120-B of the Indian Penal Code is not compoundable under Section 320 of the Code of Criminal Procedure.

24. In an almost identical situation, a three Judges Bench of the Apex Court in CBI, ACB, Mumbai Vs. Narendra Lal Jain and Others, held in paragraph 13 as under:---

"In the present case, as already seen, the offence with which the respondent-accused had been charged are under Sections 120-B /420 of the Penal Code. The civil liability of the respondents to pay the amount to the Bank has already been settled amicably. The terms of such settlement have been extracted above (see para 3). No subsisting grievance of the Bank in this regard has been brought to the notice of the Court. While the offence under Section 420 IPC is compoundable the offence under Section 120-B IPC is not. To the latter offence the ratio laid down in B.S. Joshi [B.S. Joshi and Others Vs. State of Haryana and Another,] and Nikhil Merchant Vs. Central Bureau of Investigation and Another, would apply if the facts of the given case would so justify. The observation in Gian Singh [Gian Singh Vs. State of Punjab and Another, will not be attracted in the present case in view of the offences alleged i.e. under Sections 420 /120-B IPC."

25. In the present case, having regard to the fact that the Opposite Party No. 2 has amicably settled the dispute outside the court, the dispute between the parties is purely and simply of a civil nature not involving public policy and in absence of any grievance of whatsoever nature of the Opposite Party No. 2 against the petitioners, no useful purpose would be served by allowing the prosecution to continue even though Section 120-B of the Indian Penal Code is not compound-able under Section 320 of the Code. As noticed, hereinabove, apart from the amicable settlement arrived at between the parties the impugned order passed by the learned Magistrate cannot be sustained even otherwise. In the result, this application is allowed. The impugned order dated 26.8.2011 passed by the learned Chief Judicial Magistrate, Patna in Gandhi Maidan P.S. Case No. 108 of 2011, corresponding to G.R. No. 1756 of 2011 and the entire criminal prosecution arising out of Gandhi Maidan P.S. Case No. 108 of 2011

corresponding to G.R. No. 1756 of 2011 are quashed.