

(2024) 03 CAL CK 0086
In the Calcutta High Court
Case No : Criminal Revision No. 1890 Of 2019

Prithwiraj Ganguly

APPELLANT

Vs

State Of West Bengal & Anr.

RESPONDENT

Date of Decision : 22-03-2024

Acts Referred:

Copyright Act, 1957 — Section 33, 51, 63, 69
Negotiable Instruments Act, 1881 — Section 138, 141, 141(1)
Code Of Criminal Procedure, 1973 — Section 190, 190(1)(a), 319

Citation : (2024) 03 CAL CK 0086

Hon'ble Judges : Shampa Dutt (Paul), J

Bench : Single Bench

Advocate : Meghajit Mukherjee, Vidisha Gupta, Debasish Roy, Arabinda Manna

Final Decision : Dismissed

Judgement

Shampa Dutt (Paul), J

1. The present revision has been preferred praying for quashing of the proceeding in G.R. Case No. 550 of 2017 arising out of Durgapur Police Station Case No. 194 dated April 1, 2017 under Sections 63/69 of the Copyright Act, 1957 pending before the Court of the Learned Judicial Magistrate, 2nd court at Durgapur including the Order dated August 24, 2017 passed therein.

2. The petitioner states that Opposite Party no.2 as purportedly the authorized representative of one M/s Phonographic Performance Ltd. (herein after referred to as "PPL") has filed a complaint before the Officer-in-Charge, Durgapur Police Station on March 31, 2017 against the petitioner no.2, wrongly recognizing him as the Assistant General Manager of I Q City (Mani Group) of Sovapur Road, Birja, Jemua, District – Burdwan, Durgapur – 713206 and the same was received by the Durgapur Police Station on April 1, 2017 and a First Information Report was drawn up on the basis of such written complaint and the same was registered as Durgapur P.S. Case No. 194 of 2017 under Sections 63/69 of the Copyright Act, 1957

3. The allegations leveled in the written complaint are:-

"That M/s Phonographic Performance Limited (PPL) is an assignee and/or owner of copyrighted sound recording of more than 250 Sound Recording Companies and is competent to issue Public Performance License under Section – 30 of the Copyright Act, 1957 to any commercial establishment or public place wherein copyrighted music/sound recordings owned by said Phonographic Performance Limited is being used and/or communicated through any medium. PPL exclusively owns the Public Performance Right of said Sound Recording Companies which includes both national and international music, be it film music, be it film music or non-film music like Devotional/Spirituals, Gazals, Indi-pop etc.

It has come to our knowledge that one Mr. Prithwiraj Ganguly (AGM) of I Q CITY (Mani Group) of Sovapur Road, Bijra, Jemua, Dist- Burdwan, Durgapur- 713206 organized one event under the name and style of "I Q City FUN UTSAV" on 02.12.2016 to 04/12/2016 at their aforesaid premises wherein copyrighted music/sound recordings owned by Phonographic Performance Limited (PPL) was/were played/communication without obtaining Public Performance License from PPL.

By way of sending letters, emails and telephonic conversation, personal visits, it had already been communicated to said Mr. Prithwiraj Ganguly (AGM) of I Q CITY (Mani Group) Sovapur Road, Bijra, Jemua, Dist – Burdwan, Durgapur – 713206 that obtaining Public Performance License from Phonographic Performance Limited (PPL) is mandatory for usage of copyrighted music/sound recordings owned by PPL for their event "I Q CITY FUN UTSAV" held on 02.12.2016 to 04.12.2016. Therefore, it was/is within the knowledge of Mr. Prithwiraj Ganguly that obtaining Public Performance License for usage of copyrighted music controlled by PPL was/is an essential requirement for usage of copyrighted music/sound recordings controlled by PPL during their above said event as per the provisions of the Copyright Act, 1957. However willfully and deliberately Mr. Prithwiraj Ganguly has failed to apply and obtain the public performance license to be issued by Phonographic Performance Limited and thereby has infringed the public performance copyright of PPL."

4. The petitioner states that by an Office Memorandum No. F. No. 06-04/2016-CRB/LU dated October 6, 2016 issued by the Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, Copy Right Division, Government of India, the following has been put to public notice:-

i) "..... It is stated hereby for general information that M/s Indian Performing Rights Society Ltd. (IPRS) and M/S Phonographic Performance Ltd. (PPL) were registered as Societies under Section 33 of the pre-amended Copyright Act, 1957 for carrying out Copyright business in the field of Musical & Literary works and Sound Recording works respectively. However, the said registration was over w.e.f. 21.06.2013 i.e. one year from the date of enactment of the Copyright (Amendment) Act, 2012 on 21.06.2012. Both the societies have applied for re-

registration before the Central Government u/s 33 of the amended Act within the prescribed time limit and their request for re-registration as Copyright Society is under examination.

ii) Since there were allegations of malpractices against IPRS the Central Government has constituted an enquiry against it, which is currently in progress.....”

5. It was also contended on behalf of the Petitioner that since the Opposite Party no.2 has no registration under the Act, it could not have been possible for the petitioner to obtain such license. It was also informed that one M/S Event and Entertainment Management

Association (EEMA) had filed a Writ Petition before the Hon”ble High Court, New Delhi and the same was registered as W.P.(C) No. 12076 of 2016 and by an order dated December 23, 2016 the Hon”ble High Court was pleased to restrain the PPL and other bodies parties therein from acting in contravention of section 33 of the Act and the Union of India and the Copyright Office were directed to take action in accordance with law for any breach of provisions of Section 33 of the Act by PPL and other bodies.

6. The petitioner further states that the Learned ACJM had taken cognizance of the impugned charge sheet without appreciating the fact that necessary ingredients of the offences as has been alleged, in the impugned charge sheet are completely missing. The Learned ACJM failed to appreciate that the very foundation on which the allegations have sought to be made by the opposite party no. 2 is baseless and frivolous. The opposite party no.2 in his written complaint has sought to make out a case that it is the owner and/or the assignee of the Copyright of the music/sound recordings in respect of which it claimed that the petitioner are bound to seek the public performance License from it. This contention of the opposite party no.2 is baseless and false as only a registered society which is a collective administration which works towards the management and protection of the copyright works and is registered under Section 33 of the Copyright Act 1957 can issue such license, whereas by virtue of the documents already annexed to this application it is crystal clear that by most stretch of imagination the opposite party no. 2”s claim of being an owner and/or assigned cannot be sustained in law.

7. On the perusal of the First Information Report and the Charge Sheet, it would be evident that the Opposite Party No.2 has claimed to be the owner/assignee of music/sound recordings for which it claims that a public performance license as provided under the provisions of the Copyright Act, 1957 was to be obtained by the petitioner is completely false by virtue of the government notification and the order passed by the Hon”ble Delhi High Court which clearly demonstrate that the opposite party No.2 is neither the owner nor a copyright society having valid registration to issue such license. The provisions are amply clear that only the owner or a registered society under Section 33 of the Copyright Act can claim

any person using the same in a public performance to seek proper license from them, but since it was within the knowledge of the petitioner that PPL/Opposite Party No. 2 had no valid registration under Section 33 of the Act and that it was restrained by the order of the Hon'ble High Court at Delhi from acting in contravention with the provision of Section 33 of the Copyright Act, in no manner could it be perceived by the petitioner that the opposite party no.2 would be a competent authority to issue such a public performance license as claimed.

8. From the materials on record is seen that:-

i) The written Complaint in this Case has been filed against the petitioner as the (AGM) of I Q CITY (Mani Group) for the offence alleged.

ii) From the allegations made in the Written Complaint it appears that the petitioner organized the disputed event in his official capacity on behalf of the Company he represents as "AGM".

iii) The formal FIR has also been registered against the petitioner in his official capacity.

iv) Offence alleged is under Section 51 of the Copyright, Act.

9. In spite of due Service there is no representation on behalf of the opposite party no.2 /Complainant.

10. The State is represented.

11. The petitioner has relied upon the Judgment of the Supreme Court in Dayle De'Souza vs Government of India Through Deputy Chief Labour Commissioner (C) and Anr., Criminal Appeal No. Of 2021 (arising out of SLP (CRL.) No. 3913 of 2020), decided on October 29, 2021, where the Court held:-

"22. However, subsequent decisions of this Court have emphasised that the provision imposes vicarious liability by way of deeming fiction which presupposes and requires the commission of the offence by the company itself as it is a separate juristic entity. Therefore, unless the company as a principal accused has committed the offence, the persons mentioned in sub-section (1) would not be liable and cannot be prosecuted. Section 141(1) of the Negotiable Instruments Act, extends vicarious criminal liability to the officers of a company by deeming fiction, which arises only when the offence is committed by the company itself and not otherwise. Overruling Sheoratan Agarwal and Anil Hada, in Aneeta Hada v. Godfather Travels and Tours Private Limited, a 3-judge bench of this court expounding on the vicarious liability under Section 141 of the Negotiable Instruments Act, has held:

"51. We have already opined that the decision in Sheoratan Agarwal runs counter to the ratio laid down in C.V. Parekh which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the decision in Anil Hada has to be treated as not laying down the correct law as far as it states that the Director or any other officer can be prosecuted without impleadment of the

company. Needless to emphasise, the matter would stand on a different footing where there is some legal impediment and the doctrine of *lex non cogit ad impossibilia* gets attracted.

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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. We say so on the basis of the ratio laid down in *C.V. Parekh* which is a three-Judge Bench decision. Thus, the view expressed in *Sheoratan Agarwal* does not correctly lay down the law and, accordingly, is hereby overruled. The decision in *Anil Hada* is overruled with the qualifier as stated in para 51. The decision in *Modi Distillery* has to be treated to be restricted to its own facts as has been explained by us hereinabove."

23. The proposition of law laid down in *Aneeta Hada* (*supra*) was relied upon by this Court in *Anil Gupta v. Star India Private Limited and Another*.

"13. In the present case, the High Court by the impugned judgment dated 13-8-2007 [*Visionaries Media Network v. Star India (P) Ltd.*, Criminal Misc. Case No. 2380 of 2004, decided on 13-8-2007 (Del)] held that the complaint against Respondent 2 Company was not maintainable and quashed the summons issued by the trial court against Respondent 2 Company. Thereby, the Company being not a party to the proceedings under Section 138 read with Section 141 of the Act and in view of the fact that part of the judgment referred to by the High Court in *Anil Hada* has been overruled by a three-Judge Bench of this Court in *Aneeta Hada*, we have no other option but to set aside the rest part of the impugned judgment [*Visionaries Media Network v. Star India (P) Ltd.*, Criminal Misc. Case No. 2380 of 2004, decided on 13-8-2007 (Del)] whereby the High Court held that the proceedings against the appellant can be continued even in absence of the Company. We, accordingly, set aside that part of the impugned judgment dated 13-8-2007 [*Visionaries Media Network v. Star India (P) Ltd.*, Criminal Misc. Case No. 2380 of 2004, decided on 13-8-2007 (Del)] passed by the High Court so far as it relates to the appellant and quash the summons and proceeding pursuant to Complaint Case No. 698 of 2001 qua the appellant."

24. In *Sharad Kumar Sanghi v. Sangita Rane*, 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.

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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. 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* 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.”

12. The findings of the Court thus makes it clear that in a case where prior compliance of mandatory provision is required eg. under Section 138 N.I. Act, and if not done, the company could not be added as an accused subsequently. But in a case where no such prior compliance is required and there are specific averments against the company, there is no bar to add the company as a party subsequently by way of amendment.

13. The contention of the petitioner is that without the Company being made an accused, the petitioner cannot be held liable, as the petitioner had acted on behalf of the Company, being in charge of its day to day affairs as its AGM.

14. The Company herein being a separate juristic entity is the principal accused and the persons in charge of the day to day affairs of the Company are vicariously liable as the Company cannot act on its own being a juristic entity.

15. The Judgment in Dayle De’Souza vs Government of India Through Deputy Chief Labour Commissioner (C) and Anr. (Supra) was passed in respect of Section 141 N.I. Act in a proceeding under Section 138 N.I. Act.

16. In Himanshu vs B. Shivamurthy & Anr., AIR 2019 SC 3052, Criminal Appeal No. 1465 of 2009, decided on 17 January, 2019, the Supreme Court in a proceedings under Section 138 N.I. Act., held:-

“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.”

17. But the present case is not under Section 138 N.I. Act. The proceedings in this case is under the Copyright Act. Thus no prior mandatory compliance in the present case is required prior to filing of a case under the Copyright Act unlike a proceeding under Section 138 N.I. Act, which requires compliance to the proviso to Section 138 N.I. Act like service of Notice etc.

18. In S.R. Sukumar v. S. Sunaad Raghuram, (2015) 9 SCC 609, the Supreme Court held:-

“17. Insofar as merits of the contention regarding allowing of amendment application, it is true that there is no specific provision in the Code to amend either a complaint or a petition filed under the provisions of the Code, but the Courts have held that the petitions seeking such amendment to correct curable infirmities can be allowed even in respect of complaints. In U.P. Pollution Control Board vs. Modi Distillery And Ors., (1987) 3 SCC 684, wherein the name of the company was wrongly mentioned in the complaint that is, instead of Modi Industries Ltd. the name of the company was mentioned as Modi Distillery and

the name was sought to be amended. In such factual background, this Court has held as follows:-

"...The learned Single Judge has focussed his attention only on the [pic]technical flaw in the complaint and has failed to comprehend that the flaw had occurred due to the recalcitrant attitude of Modi Distillery and furthermore the infirmity is one which could be easily removed by having the matter remitted to the Chief Judicial Magistrate with a direction to call upon the appellant to make the formal amendments to the averments contained in para 2 of the complaint so as to make the controlling company of the industrial unit figure as the concerned accused in the complaint. All that has to be done is the making of a formal application for amendment by the appellant for leave to amend by substituting the name of Modi Industries Limited, the company owning the industrial unit, in place of Modi Distillery.... Furthermore, the legal infirmity is of such a nature which could be easily cured..."

18. What is discernible from the U.P. Pollution Control Board's case is that easily curable legal infirmity could be cured by means of a formal application for amendment. If the amendment sought to be made relates to a simple infirmity which is curable by means of a formal amendment and by allowing such amendment, no prejudice could be caused to the other side, notwithstanding the fact that there is no enabling provision in the Code for entertaining such amendment, the Court may permit such an amendment to be made. On the contrary, if the amendment sought to be made in the complaint does not relate either to a curable infirmity or the same cannot be corrected by a formal amendment or if there is likelihood of prejudice to the other side, then the Court shall not allow such amendment in the complaint."

19. Where the Company due to inadvertence may not have been named as one of the accused(s) in the cause title of complaint, however, from a perusal of such complaint, it can be observed that specific averments/ingredients for the commission of offence against the company are made out, under such circumstances, considering the same as mere curable infirmity, Courts have permitted the complainant to amend the complaint by adding the name of Company as one of the accused(s) (Manish Kalani & Another v. Housing and Urban Development Corporation Ltd. & Anr., M.Cr.C.No. 16282/2016, Madhya Pradesh High Court, dated 30.01.2018).

20. In Manish Kalani & Another v. Housing and Urban Development Corporation Ltd. & Anr. (Supra), the Court further held:-

"31. So, in the peculiar facts and circumstances of the case the application filled by the applicants for taking cognizance against applicant No.2 company comes under the purview of Section 190 (1)(a) of the Cr.P.C. and not under Section 319 of Cr.P.C. Because the name of the applicant No.2/company as an accused and the basis of its accusation were already mentioned in the complaint at the time of its filling. It is the fault of the trial Court which only took cognizance against

the Director and did not take cognizance against the company, which can be cured by the trial Court at any time. There is no bar under Section 190 of the Cr.P.C. that once the process is issued against some accused, on the next date, the Magistrate cannot issue process to some other person against whom there is some material on record.”

21. In *Sunita Palita vs M/s. Panchami Stone Quarry*, Criminal Appeal No.of 2022 (arising out of SLP (Crl.) No. 10396 of 2019), on 1 August, 2022, the Supreme Court held:-

“43. Liability depends on the role one plays in the affairs of a company and not on designation or status alone as held by this Court in *S.M.S. Pharmaceuticals Ltd.* (supra).....”

22. In the present case, the petition of complaints starts with the allegations:-

“It has come to our knowledge that one Mr. Prithwiraj Ganguly (AGM) of I Q CITY (Mani Group) of Sovapur Road, Bijra, Jemua, Dist- Burdwan, Durgapur- 713206 organized one event under the name and style of “I Q City FUN UTSAV” on 02.12.2016 to 04/12/2016 at their aforesaid premises wherein copyrighted music/sound recordings owned by Phonographic Performance Limited (PPL) was/were played/communication without obtaining Public Performance License from PPL.”

23. It is thus clear that the petitioner has been made an accused as the (AGM) of the company I Q City (Mani Group) and the program (event) was being held under the name “I Q City Fun Utsav”.

24. As such there is clear averments in the complaint itself, against the company and also its AGM, (the petitioner herein).

25. Admittedly songs were played.

26. Whether there was any violation or not is subject to trial by way of adducing evidence, so also as to the grant or validity of license in this case.

27. Trial Court is directed to add the Company as a party to this case and then proceed in accordance with law, with the trial.

28. Quashing the proceeding in this case will clearly amount to abuse of the process of court.

29. CRR 1890 of 2019 is thus dismissed.

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

31. There will be no order as to costs.

32. Interim order, if any, stands vacated.

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

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