

(2024) 02 GAU CK 0047

In the Gauhati High Court

Case No : Criminal Petition No. 44 Of 2019

Shridhar Amasidha Awate

APPELLANT

Vs

Maxim Infrastructure And Real Estate Pvt. Ltd.

RESPONDENT

Date of Decision : 27-02-2024

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 405, 406, 420

Code Of Criminal Procedure, 1973 — Section 482

Negotiable Instruments Act, 1881 — Section 138, 141

Citation : (2024) 02 GAU CK 0047

Hon'ble Judges : Robin Phukan, J

Bench : Single Bench

Advocate : P.J. Saikia, K. Baruah, D.K. Kothari

Final Decision : Allowed

Judgement

1. Heard Mr. P.J. Saikia, Sr. Advocate, assisted by Mr. K. Baruah, learned counsel for the petitioner and also heard Mr. D.K. Kothari, learned counsel for the respondent.

2. In this criminal petition, under section 482 Code of Criminal Procedure, the petitioner has challenged the legality, propriety and correctness of the order dated 20.04.2018, passed by the learned Judicial Magistrate First Class, Kamrup, (M) Guwahati in C.R. Case No. 4773/2017. It is to be noted here that vide impugned order the learned Court below has taken cognizance of the offence under section 138 of the N.I. Act against the petitioner and issued process to him to appear before the learned court below and to face trial.

3. The factual background leading to filing of the present application is briefly stated as under:-

"The petitioner was earlier appointed as one of the Director of Asrdeep Infotech Private Limited w.e.f. 16.11.2016, and he had discharged his duties up to the satisfaction of the management of the Company. However, due to some pre-

occupation with some other works he had resigned from the said post of Director of Asrdeep Infotech Private Limited on 03.07.2017, and communicated the same to the Board of Directors in writing and the Board of Directors has duly accepted the same on the same date and also the same is recorded by the Registrar of the Companies on the same date. Thereafter, the petitioner had received one pleaders Notice, dated 25.09.2017, issued by Advocate of the opposite party, to the effect that the opposite party has executed construction work of Five Star Hotel in Guwahati and Shillong and due to shortage of fund one Mr. Akhilesh has approached the opposite party for fund. And accordingly, on good faith, the opposite party has paid a sum of Rs. 50,00,000/, to said Akhilesh however, inspite of lapse of reasonable time, the said amount was not returned. Thereafter, Mr. Akhilesh has issued a cheque bearing No. '070544' dated 31.07.2017, drawn on Axis Bank, Pune for a sum of Rs. 25,00,000/, in favour of the opposite party towards discharging liability. But, the said cheque was dishonored due to insufficient fund. And therefore, vide said notice the opposite party demanded to make the payment along with interest @ 18% within 15 days. Thereafter, the petitioner had sent his reply to the notice dated 25.07.2027, that the petitioner had already resigned from the Asrdeep Infotech Private Limited and the same was duly accepted by the Board of Directors and thereby requested the opposite party not to entangled the petitioner into the affairs of the Company and he had furnished the names of the present Directors. And inspite of receipt of said reply, the petitioner was arraigned as an accused in the C.R. Case No. 4773/2017, filed before the learned Judicial Magistrate First Class, Kamrup, (M) Guwahati and the learned court below, vide order dated 20.04.2018, taken cognizance of the offence under section 138 of the N.I. Act read with section 406/420 IPC, against the petitioner and issued process to him to appear before the learned court below and to face trial."

4. Being highly aggrieved, the petitioner approached this Court by filing the present revision petition on the following grounds:-

[i] That, the learned court below had erred in law by failing to consider that the petitioner was not the Director of the Company while the cheque in question was issued and that cognizance was taken against him ignoring the provision of section 141 of the N.I. Act.

[ii] That, the learned court below had failed to appreciate the fact that the petitioner was serving as Director of the Company since 16.11.2015 to 03.07.2017;

[iii] That, the learned court below also failed to consider that there is not a single averment in the complaint against the present petitioner to the effect that he was in-charge and responsible for the day to day conduct of the company during the relevant period of time which is the basic ingredient of the offence under section 141 N.I. Act;

[iv] That, the learned court below had failed to consider the fact that the

petitioner had resigned as Directorship of Asrdeep Infotech Pvt. Ltd. on 03.07.2017 which was much prior to issuance of the cheque in question on 31.07.2017 and that he had no knowledge about any transaction that had taken place between the opposite party and other accused;

[v] That, bare perusal of the complaint reveals that the cheque in question was issued by Mr. Akhilesh in the capacity as Director of Asrdeep Infotech Pvt. Ltd. but it appears that Mr. Akhilesh had did the same in his individual capacity, as admittedly money was paid to him;

5. Mr. Saikia, the learned Senior Counsel, appearing for the petitioner, submits that the learned court below had erred in law by failing to consider that the petitioner was not the Director of the Company while the cheque in question was issued and that cognizance was taken against him ignoring the provision of section 141 of the N.I. Act. Mr. Saikia, further submits that the petitioner was serving as Director of the Company since 16.11.2015 to 03.07.2017 and that he had resigned as Directorship of Asrdeep Infotech Pvt. Ltd. on 03.07.2017 which was much prior to issuance of the cheque in question on 31.07.2017 and that he had no knowledge about any transaction that had taken place between the opposite party and other accused. It is the further submission of Mr. Saikia that there is not a single averment in the complaint against the present petitioner to the effect that he was in-charge and responsible for the day to day conduct of the company during the relevant period of time which is the basic ingredient of the offence under section 141 N.I. Act. Mr. Saikia also referred to a case law, Harshendra Kumar D. v. Rebatilata Koley, reported in (2011) 3 SCC 351, in support of his submission.

6. Per contra, Mr. D.K. Kothari, learned counsel for the respondent submits that the petitioner has received notice in his present residential address and that the address of the said company is still shown in the website of Ministry of Corporate Affairs at the residence of the petitioner. And as such, there is doubt about the claim of the petitioner that he had resigned from the directorship of the Company, and that whether the petitioner has resigned from the directorship of the Asrdeep Infotech Pvt. Ltd. or not is a matter of fact and the same has to be decided during trial only. Mr. Kothari, therefore, contended to dismiss the petition.

7. Having heard the submission of the learned Advocates of both the parties, I have carefully gone through the petition and the documents placed on record and also gone through the records of learned court below. Also, I have carefully gone through the case law referred by Mr. Saikia, learned Senior Counsel for the petitioner.

8. It is to be noted here that in the case of Harshendra Kumar D. (supra), while dealing with the issue has held as under:-

"26. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In our opinion, the High Court fell into grave error in not

taking into consideration the uncontroverted documents relating to the appellant's resignation from the post of Director of the Company. Had these documents been considered by the High Court, it would have been apparent that the appellant has resigned much before the cheques were issued by the Company.

27. As noticed above, the appellant resigned from the post of Director on 2-3-2004. The dishonoured cheques were issued by the Company on 30-4-2004 i.e. much after the appellant had resigned from the post of Director of the Company. The acceptance of the appellant's resignation is duly reflected in the Resolution dated 2-3-2004. Then in the prescribed form (Form 32), the Company informed to the Registrar of Companies on 4-3-2004 about the appellant's resignation. It is not even the case of the complainants that the dishonoured cheques were issued by the appellant. These facts leave no manner of doubt that on the date the offence was committed by the Company, the appellant was not the Director; he had nothing to do with the affairs of the Company. In this view of the matter, if the criminal complaints are allowed to proceed against the appellant, it would result in gross injustice to the appellant and tantamount to an abuse of process of the court."

9. Thereafter, in the case of GHCL Employees Stock Option Trust v. India Infoline Ltd., reported in (2013) 4 SCC 505 Hon'ble Supreme Court has held that :-

"19. In the order issuing summons, the learned Magistrate has not recorded his satisfaction about the prima facie case as against Respondents 2 to 7 and the role played by them in the capacity of Managing Director, Company Secretary or Directors which is sine qua non for initiating criminal action against them. Recently, in Thermax Ltd. v. K.M. Johny [(2011) 13 SCC 412 while dealing with a similar case, this Court held as under:

"38. Though Respondent 1 has roped all the appellants in a criminal case without their specific role or participation in the alleged offence with the sole purpose of settling his dispute with the appellant Company by initiating the criminal prosecution, it is pointed out that Appellants 2 to 8 are the ex -Chairperson, ex-Directors and senior managerial personnel of Appellant 1 Company, who do not have any personal role in the allegations and claims of Respondent 1. There is also no specific allegation with regard to their role.

39. Apart from the fact that the complaint lacks necessary ingredients of Sections 405, 406, 420 read with Section 34 IPC, it is to be noted that the concept of 'vicarious liability' is unknown to criminal law. As observed earlier, there is no specific allegation made against any person but the members of the Board and senior executives are joined as the persons looking after the management and business of the appellant Company."

10. This issues was again dealt with by Hon'ble Supreme Court in the case of Sunil Bharti Mittal v. CBI, reported in (2015) 4 SCC 609 as under:-

(iii) Circumstances when Director/person in charge of the affairs of the company can also be prosecuted, when the company is an accused person:-

42. No doubt, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

44. When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In *Aneeta Hada v. Godfather Travels & Tours (P) Ltd.*, (2012) 5 SCC 661, the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company.

11. In the instant case, having gone through the petition and also from the documents placed on the record, it appears that the petitioner was appointed as Director of Asrdeep Infotech Pvt. Ltd. and he served as Director of the said Company since 16.11.2015 to 03.07.2017. It also appears that he had resigned as Directorship of Asrdeep Infotech Pvt. Ltd. on 03.07.2017, and ANNEXURE-'A' is the said letter. And his resignation was accepted on the same day by the Board of Directors of said Company and 'Page 12' is the certified copy of the said resolution of the Board of Directors. And the same was informed to the Ministry of Corporate Affairs and it was duly reflected in 'Page No.17' of the petition. But, it also appears that the cheque-in-question - ANNEXURE- 'F' was issued on 31.07.2017, i.e. after resignation of the petitioner as Director of the said Company. And as such he had no knowledge about any transaction that had taken place between the opposite party and other accused. The legal notice -

ANNEXURE-‘B’ was issued to the petitioner on 25.09.2017, and the petitioner had sent his reply of the said notice which is available in ‘Page No. 27’ of the petition. That being so I find force in the submission of Mr. Saikia, the learned counsel for the petitioner. And the ratio laid down in the case referred by him also strengthened his submission. It is to be noted here that the respondent side has not disputed the aforementioned documents.

12. Further, from a bare perusal of the complaint petition, which is annexed with the petition at ‘Page No. 39’ it appears that not a single averment was made in the complaint against the present petitioner as to how and in what manner he is responsible for the day to day conduct of the Company, during the relevant period of time which is the basic requirement to attract section 141 N.I. Act. Mr. Saikia, the learned Sr. Counsel for the petitioner has rightly pointed this out during hearing and I find substance in the same. Having not disputed the ANNEXURE- ‘A’ and also having not made any averment in the complaint against the present petitioner as to how and in what manner he was responsible for the day to day conduct of the Company, he cannot be arraigned as an accused in a criminal proceeding solely on the ground of showing the address of the said Company in the residence of the petitioner, as contended by Mr. Kothari, learned counsel for the respondent. Therefore, the submission of Mr. Kothari cannot be accepted in the given facts and circumstances on the record.

13. Thus, having examined the impugned order, dated 20.04.2018, so passed by the learned Judicial Magistrate First Class, Kamrup, (M) Guwahati in C.R. Case No. 4773/2017, in the light of the ratios, laid down in the cases discussed herein above, specially in the case of Harshendra Kumar D. (supra) and in India Infoline Ltd. (supra), this court is of the view that the impugned order, so passed, has failed to withstand the legal scrutiny. And accordingly, the same stand set aside and quashed.

14. In the result, I find this criminal petition well-merited and accordingly, the same stands allowed. The impugned order dated 20.04.2018, so passed by the learned Judicial Magistrate First Class, Kamrup, (M) Guwahati in C.R. Case No. 4773/2017, so far it relates to the present petitioner, stands set aside and quashed. The parties have to bear their own cost.