(2011) 09 UK CK 0025

In the Uttarakhand High Court

Case No : Criminal Miscellaneous Application No. 228 of 2008

Subhankar Ganguly APPELLANT

Vs

State of Uttarakhand and Another RESPONDENT

Date of Decision : 27-09-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 203, 482
Penal Code, 1860 (IPC) — Section 34, 405, 406, 409, 420

Citation : (2011) 09 UK CK 0025

Hon'ble Judges : Servesh Kumar Gupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Servesh Kumar Gupta, J.—By way of this criminal miscellaneous application moved u/s 482 Code of Criminal Procedure, a prayer has been made to quash the order of cognizance dated 09.10.2007 passed by the Chief Judicial Magistrate, Haridwar in complaint case No. 3619 of 2007, Mahendra Pal Singh v. T. Ishikawa and Anr. The said order was passed by learned Magistrate taking cognizance for the offence of Section 406 Indian Penal Code against the Petitioner Subhankar Ganguly and Mr. T. Ishikawa.

2. Having heard the learned Counsel of both the parties, it appears that an agreement dated 10.01.2006 was entered into between the complainant Mahendra Pal Singh, Partner of M/s Sant Auto Sales, Haridwar and Yamaha Motors India Pvt. Ltd./Yamaha Motor India Sales Private Limited. M/s Sant Auto Sales is a dealer of Two-Wheeler Auto Bikes while M/s Yamaha Motors Company Ltd. is the manufacturer. For securing the dealership of Yamaha Motors Pvt. Ltd., an amount of Rs. 3.00 lacs, as security deposit, was made by M/s Sant Auto Sales and the dealership was awarded to him for selling the Two-wheelers and its spare parts in Haridwar. Within a span of 11/2 year or so, the business transactions between the duo became sour and the dealership was broken. So, M/s Santo Auto Sales sought refund of his deposit. Out of the said amount of Rs.

3.00 lacs, only Rs. 2.00 lacs were returned. Anyhow, Rs. 1.00 lacs nay the amount of Rs. 87,788/- for some other consideration was left with Yamaha Motors Pvt. Ltd. to be paid to M/s Sant Auto Sales, which they made a default.

3. Deeming it as a criminal breach of trust on the part of company, because of default in returning the amount, Respondent No. 2-Mahendra Pal Singh, Partner, Sant Auto Sales filed a complaint against T. Ishikawa, Managing Director and the Petitioner Subhankar Ganguly, Assistant Manager of the Company for the offence of Sections 406/420 Indian Penal Code. The Magistrate, after recording the statement u/s 200 Code of Criminal Procedure and perusing the other papers, denied to take cognizance in the matter and dismissed the complaint u/s 203 Code of Criminal Procedure on dated 02.08.2007.

4. Feeling aggrieved, Respondent No. 2 Mahendra Pal Singh filed a revision No. 402/2007 in the court of Sessions, Haridwar, without making the Petitioner and his associates as opposite party. The said revision was allowed by the Sessions Judge, with the result, the order of the Magistrate dated 2.8.2007 was set aside and the matter was remitted back to the concerned Magistrate for reconsideration.

5. The learned Magistrate then took cognizance in the matter and passed the impugned order dated 09.10.2007, where-against this petition has been filed.

6. It is pertinent to mention here that this petition has been filed only by Petitioner Subhankar Ganguly and not by Mr. T. Ishikawa, who is said to have left for his native place Japan after resigning the company and leaving this country. Now, there remains only the Petitioner Subhankar Ganguly to face the complaint, so he has filed this petition.

7. It has been argued on behalf of the Petitioner that Subhankar Ganguly, in person, cannot be made an accused for the offence of Sections 406/420 Indian Penal Code (if any), as he does not owe any vicarious liability on behalf of the company. Fortiori, the Company has not been made party in the complaint. Reliance in this regard has been made upon a Supreme Court''s judgment in the case of "S.K. Alagh v. State of U.P. and Ors. reported in 2008 (1) Crimes 439 (SC)", wherein it was held by the Hon''ble Apex Court that indisputably, the company is a juristic person. The demand drafts were issued in the name of the company. The company was not made an accused. The dealership agreement was by and between M/s Akash Traders and the company. It was also held that in that case, the Managing Director of the Company cannot be said to have committed an offence u/s 406 of the I.P.C. 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. The Hon''ble Apex Court further held that the Indian Penal Code, save and except some provisions specifically providing therefor, does not contemplate any vicarious liability on the part of a party who is not charged directly for

commission of an offence because a criminal breach of trust is an offence committed by a person to whom the property is entrusted.

8. Reliance has further been placed upon an of-late judgment of Hon''ble Supreme Court in the case of " Asoke Basak Vs. State of Maharashtra and Others, . The said case was between Asoke Basak and Maharashtra State Electricity Board. Mr. Basak, in order to fill up the tender floated by M.S.E.B., deposited a security of Rs. 5.00 lacs with the Electricity Board. But eventually, he did not participate in tender and withdrew the same. Then he sought the refund of his deposited amount. When the amount was not returned, he filed a complaint making the Chairman of the Board in person as a party for the offence of Section 406/409 r/w Section 34 Indian Penal Code. In that case, the Hon''ble Apex Court held that the said amount was deposited by Mr. Asoke Basak (complainant) with M.S.E.B. and there is nothing in the complaint which may even remotely suggest that complainant had entrusted any property to the Chairman of the Board in person or created any dominion of the Chairman over that money. In the absence of any such specific averments, demonstrating role of Chairman of the Board in commission of the offence, no prima facie case can be said to have been made out against the Chairman in respect of the offence u/s 409 r/w Section 405 Indian Penal Code, even with the aid of Section 34 Indian Penal Code and in the opinion of the Hon''ble Apex Court, it was a fit case where the High Court should have exercised powers u/s 482 Code of Criminal Procedure by quashing the complaint.

9. Now, it will be relevant to have a look upon the agreement dated 10.1.2006 entered between Yamaha Motors Pvt. Ltd. and the complainant Sant Auto Sales. This agreement significantly missing the name of any person who has signed on behalf of the company. Only, the illegible signatures on behalf of the company adverting the term "authorized signatory" below the signatures is mentioned. The position of signatures of M/s Sant Auto Sales is also not very clear and even the signatures are not happily legible. So, it cannot be determined as to the names of the persons who have entered into the contract on behalf of the company and also on behalf of M/s Sant Auto Sales. Even if a little value is attached to this agreement, then Clause 29, depicted in this Agreement, discloses that any dispute, difference or question regarding the rights or the obligations of the parties are to be resolved by mutual discussion failing which the matter will be resolved by arbitration by referring the same to Indian Council of Arbitration (ICA) as per the provisions of the Arbitration and Conciliation Act of 1996 and Rules made thereunder. Therewithal, Clause 17 of the said Agreement provides that the notice given to the Company will be addressed at two addresses mentioned therein.

10. In the instant case, the complainant nowhere has issued any notice to either of these addresses nor has strived to get the matter settled between the two as per Clause 29 of the Agreement (Supra). So, in view of the above, this Court is not inclined to leave the Petitioner to face the rigmarole of the trial in the court

of the Magistrate. The order of cognizance is liable to be quashed.

11. For the reasons recorded, this petition is allowed. Order of cognizance dated 9.10.2007 as well as proceedings of complaint case No. 3619 of 2007, stated above, are quashed. However, the complainant would be at liberty to take recourse to the appropriate remedy available to him under the Agreement or the Company Act what so ever.

