

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

CRMC no.56/2019

Reserved on: 27.08.2021

Pronounced on: 08.10.2021

Branch Head, J&K Bank Ltd. and another

.....Petitioner(s)

Through: Mr Z.A.Shah, Senior Advocate
with Mr A. Hanan, Advocate

Versus

Arjumand Shafi

.....Respondent(s)

Through: Mr S.F.Qadri, Senior Advocate
with Ms Lyba Rasool, Advocate

CORAM:

HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGEMENT

1. In this petition, preferred under Section 561-A of the Code of Criminal Procedure, quashment of complaint bearing File no.23/A pending before the court of Forest Magistrate, Srinagar (for short "Trial Court") is sought for on the grounds made mention of therein.
2. Heard and considered. Perused the record.
3. A complaint, as is discernible from perusal of the file as also Trial Court record, has been filed by respondent before the Trial Court under Section 409, 420 RPC, alleging therein that her husband had availed CC facility of Rs.12.00 Lakhs from J&K Bank Branch Pampore in the year 2007. Rs.2.00 Crores are alleged to have been sanctioned in favour of husband of respondent, but, despite fulfillment of all formalities and lien-mark of land, the sanctioned amount was not granted, and even the

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title deeds and revenue extracts were not returned. According to respondent, petitioners committed breach of trust and committed fraud.

4. Upon presentation of complaint by respondent, the Trial Court vide order dated 19th January 2019, said that commission of offences punishable under Sections 409, 420 RPC were made out against accused no.2 and that accused no.1 was also liable to be prosecuted under vicarious liability and directed to issue summons to accused for their appearance before the Trial Court.
5. Learned senior counsel appearing for petitioner-Bank has stated that complainant/respondent has admitted that her husband has availed TOD of Rs.7.00 Lakhs and the said amount along with interest has not been returned by husband of complainant. It is stated that husband of complainant failed to repay, so petitioner no.1, in order to secure interests of bank, asked revenue authorities to put a lien on property of complainant. He has averred that complainant in her complaint has not named the accused at all and this fact is evident from complaint itself. It is contended that petitioner no.2 has been sued as Chairman of the Bank. According to him Chairman of the Bank cannot be sued as he has no role and it lies within jurisdiction and powers of the Branch Managers and even in the matter of sanction of Rs.2.00 Crores, the story is that her husband had already applied through another branch (J&K Bank Branch Office B. B. Cantt.) for providing loan of Rs.2.00 Crores. It is stated that at no stage petitioner no.2 had anything to do with complainant or her husband. He also contends that no criminal case is made out taking into account all the circumstances that have been set out by Trial Court in the order or in the statement of complainant

inasmuch as putting lien in the revenue extract to secure interests of the bank is not an act which is prohibited by law nor does it constitute any criminal offence and that Trial Court has assumed jurisdiction, which is not vested in it.

6. On the other hand, the learned senior counsel appearing for the respondent has stated that the cognizance has been taken by the Trial Court after making a detailed order dated 19th January 2019 and after applying its mind to the whole contents of complaint and statement of respondent. It is contended that petitioners have other remedy available under Section 253 (2) of Cr.P.C. by filing an application before Trial Court and putting their honest effort to satisfy the Trial Court that charge is groundless. It is stated that small liability of husband of respondent towards the bank as alleged by petitioners, cannot be a justification for a criminal wrong committed by them against complainant and that respondent and her husband are two different juristic persons, having and owning some properties individually and independently, thus, act of petitioners is unwarranted criminal act and needs proper trial to give a check to the illegal acts carried on by employers and employees of corporate sector who are equally answerable for their criminal acts against the public.
7. In the present case, when complaint was moved by respondent, the Trial Court issued summons against petitioners by holding that commission of offences punishable under Section 409, 420 RPC was made out under vicarious liability.
8. The issue whether a Chairman/Director of a company, or say a bank, can be vicariously liable for a criminal offence attributed to the

company/bank, came up for consideration before the Supreme Court in

Sunil Bharti Mittal vs. CBI, 2014 40 SCC 609:

“(iii) Circumstances when Director/Person in charge of the affairs of the company can also be prosecuted, when the company is an accused person: 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. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made 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.

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* (supra), 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. This very principle is elaborated in various other judgments. We have already taken note of *Maharashtra State Electricity Distribution Co. Ltd.* (supra) and *S.K. Alagh* (supra). Few other judgments reiterating this principle are the following:

1. *Jethsur Surangbhai v. State of Gujarat 1984 Supp SCC 207:*

“9. With due respect what the High Court seems to have missed is that in a case like this where there was serious defalcation of the properties of the Sangh, unless the prosecution proved that there was a close cohesion and collusion between all the accused which formed the subject matter of a conspiracy, it would be difficult to prove the dual charges particularly against the appellant (A-1).

The charge of conspiracy having failed, the most material and integral part of the prosecution story against the appellant disappears. The only ground on the basis of which the High Court has convicted him is that as he was the Chairman of the Managing Committee, he must be held to be vicariously liable for any order given or misappropriation committed by the other accused. The High Court, however, has not referred to the concept of vicarious liability but the findings of the High Court seem to indicate that this was the central idea in the mind of the High Court for convicting the appellant. In a criminal case of such a serious nature *mens rea* cannot be excluded and once the charge of conspiracy failed the onus lay on the prosecution to prove affirmatively that the appellant was directly and personally connected with acts or omissions pertaining to Items 2, 3 and 4.

It is conceded by Mr Phadke that no such direct evidence is forthcoming and he tried to argue that as the appellant was Chairman of the Sangh and used to sign papers and approve various tenders, even as a matter of routine he should have acted with care and caution and his negligence would be a positive proof of his intention to commit the offence. We are however unable to agree with this somewhat broad statement of the law. In the absence of a charge of conspiracy the mere fact that [pic]the appellant happened to be the Chairman of the Committee would not make him criminally liable in a vicarious sense for items 2 to 4.

There is no evidence either direct or circumstantial to show that apart from approving the purchase of fertilisers he knew that the firms from which the fertilisers were purchased did not exist. Similar is the case with the other two items. Indeed, if the Chairman was to be made liable then all members of the Committee viz. Tehsildar and other nominated members, would be equally liable because all of them participated in the deliberations of the meetings of the Committee, a conclusion which has not even been suggested by the prosecution. As Chairman of the Sangh the appellant had to deal with a large variety of matters and it would not be humanly possible for him to analyse and go into the details of every small matter in order to find out whether there has been any criminal breach of trust.

In fact, the hero of the entire show seems to be A-3 who had so stage-managed the drama as to shield his guilt and bring the appellant in the forefront. But that by itself would not be conclusive evidence against the appellant. There is nothing to show that A-3 had either directly or indirectly informed the appellant regarding the illegal purchase of fertilisers or the missing of the five oil engines which came to light much later during the course of the audit. Far from proving the intention the prosecution has failed to prove that the appellant had any knowledge of defalcation of Items 2 to 4. In fact, so far as item 3 is concerned, even Mr Phadke conceded that there is no direct evidence to connect the appellant."

2. *Sham Sunder v. State of Haryana (1989) 4 SCC 630:*

"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."

3. *Hira Lal Hari Lal Bhagwati v. CBI (2003) 5 SCC 257:*

"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 thereunder wholly discharged and the GCS granted immunity from prosecution."

4. *Maksud Saiyed v. State of Gujarat (2008) 5 SCC 668:*

"13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. 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.”

5. *R. Kalyani v. Janak C. Mehta* (2009) 1 SCC 516:

“32. Allegations contained in the FIR are for commission of offences under a general statute. A vicarious liability can be fastened only by reason of a provision of a statute and not otherwise. For the said purpose, a legal fiction has to be created. Even under a special statute when the vicarious criminal liability is fastened on a person on the premise that he was in charge of the affairs of the company and responsible to it, all the ingredients laid down under the statute must be fulfilled. A legal fiction must be confined to the object and purport for which it has been created.”

6. *Sharon Michael v. State of T.N.* (2009) 3 SCC 373:

"16. The first information report contains details of the terms of contract entered into by and between the parties as also the mode and manner in which they were implemented. Allegations have been made against the appellants in relation to execution of the contract. No case of criminal misconduct on their part has been made out before the formation of the contract. There is nothing to show that the appellants herein who hold different positions in the appellant Company made any representation in their personal capacities and, thus, they cannot be made vicariously liable only because they are employees of the Company."

7. *Keki Hormusji Gharda v. Mehervan Rustom Irani* (2009) 6 SCC 475:

"16. We have noticed hereinbefore that despite of the said road being under construction, the first respondent went to the police station thrice. He, therefore, was not obstructed from going to the police station. In fact, a firm action had been taken by the authorities. The workers were asked not to do any work on the road. We, therefore, fail to appreciate that how, in a situation of this nature, the Managing Director and the Directors of the Company as also the Architect can be said to have committed an offence under Section 341 IPC. The Penal Code, 1860 save and except in some matters does not contemplate any vicarious liability on the part of a person. Commission of an offence by raising a legal fiction or by creating a vicarious liability in terms of the provisions of a statute must be expressly stated. The Managing Director or the Directors of the Company, thus, cannot be said to have committed an offence only because they are holders of offices. The learned Additional Chief Metropolitan Magistrate, therefore, in our opinion, was not correct in issuing summons without taking into consideration this aspect of the matter. The Managing Director and the Directors of the Company should not have been summoned only because some allegations were made against the Company.

18. In *Pepsi Foods Ltd. v. Special Judicial Magistrate* (1998) 5 SCC 749 this Court held as under:

“28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.”

9. As can be seen in *Pepsi Foods Ltd. v. Special Judicial Magistrate (1998) 5 SCC 749*, summoning of an accused in a criminal case is a serious matter as criminal law cannot be set into motion as a matter of course. It is not that complainant has to bring only two witnesses to support his allegations in a complaint to have criminal law set into motion. The order of the Magistrate summoning accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The Magistrate has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.
10. In the case of *Maksud Saiyed v. State of Gujarat (2008) 5 SCC 668*, the Supreme Court has said that where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind as the Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company.

11. In the present case, the Trial Court has failed to pose to himself the correct question viz. as to whether the complaint, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Chairman/Managing Director and Branch Manager would arise provided any provision exists in that behalf in the statute. The 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.

12. In *Mahendra Singh Dhoni vs. Yerraguntla Shyamsundar 2017 (7)*

SCC 760, the Supreme Court held:

“13. Before parting with the case, we would like to sound a word of caution that the Magistrates who have been conferred with the power of taking cognizance and issuing summons are required to carefully scrutinise whether the allegations made in the complaint proceeding meet the basic ingredients of the offence; whether the concept of territorial jurisdiction is satisfied; and further whether the accused is really required to be summoned. This has to be treated as the primary judicial responsibility of the court issuing process.”

13. The Supreme Court has cautioned that Magistrate should carefully scrutinize as to whether allegations made in the complaint meet basic ingredients of the offence alleged and whether the accused is really required to be summoned. In the present case, these important aspects have not been followed by the Trial Court while entertaining the complaint and issuing summons to petitioners. The complaint filed by respondents does not withstand the touchstone of law laid down by the Supreme Court as discussed above and is, at the most, a civil dispute.

Thus, in order to secure the ends of justice, instant petition requires to be allowed.

14. For the reasons discussed above, this petition is **allowed** and complaint bearing File no.23/A titled *Arjumand Shafi vs. Chairman, J&K Bank and another*, is **dismissed** and order dated 19th January 2019, issuing the process as also summons against petitioners, or for that matter any other order(s) passed by the court of Forest Magistrate, Srinagar, are **set-aside**.

15. Copy be sent down.

(Vinod Chatterji Koul)
Judge

Srinagar

08.10.2021

'Qazi Amjad, Secy'

Whether the order is reportable: Yes/No.

