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AFR

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Court No. - 44

Case :- APPLICATION U/S 482 No. - 11672 of 2024

Applicant :- M/S Parthas Textiles And Another

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Nikhil Mishra

Counsel for Opposite Party :- G.A.

Honble Arun Kumar Singh Deshwal,J.

1. Heard learned counsel for the applicants and Sri Rajeev Kumar Singh, learned AGA for the State.
2. Present application under Section 482 Cr.P.C. has been filed for quashing the summoning order dated 27.07.2023 as well as non-bailable warrant dated 08.02.2024, including the entire criminal proceedings of Case No.563 of 2023, under Section 138 Negotiable Instrument Act (hereinafter will be referred to N.I. Act) and Section 420 IPC in Police Station- Luxa, District- Varanasi pending in the Additional Court, Varanasi.
3. Contention of learned counsel for the applicants is that as per the complaint itself, the cheque was issued on behalf of firm M/s Partha Textiles and the applicant No.2 is one of the partners of that firm but only the firm was impleaded as accused in the complaint. He further contended that in the complaint all the allegations were made against applicant no.1 (firm) itself, and no allegation was made against the present applicant, but the learned Magistrate issued a summons to the present applicant personally instead of issuing summons to the accused firm. It is further submitted that once the applicant no.2 was not impleaded as accused to vicariously liable him as a partner of the firm (applicant no.1), then issuance of summons against him in a personal capacity is absolutely erroneous.

4. In support of his contention, learned counsel for the applicants has relied upon the judgement of Patna High Court in **Amarnath Prasad and others vs State of Bihar and another; 1976 Cr.L.J. 1778 (Pat.)**, in which the Single Judge of Patna High Court observed that if the firm is impleaded as a party, then the notice ought to be issued in the name of a firm, not in the name of a partner unless they are specifically made reliable. In another judgement of Patna High Court in **Anil D. Ambani and another vs State of Bihar and another; 2006(4) Pat LJR 571**, Single Judge of Patna High Court observed that when the prosecution is against a corporate body or juristic person, then summons ought to be issued to a juristic person, not in the name of the Director or Partner.

5. Learned counsel for the applicants also submitted that prosecution of a juristic person is not barred. It can be prosecuted, but only a fine can be imposed instead of punishing imprisonment. In support of his contention, he has also relied upon the judgement of Apex Court in the case of **Standard Chartered Bank and others vs Directorate of Enforcement and others (2005) 4 SCC 530**. He relied on paragraphs nos. 29, 30, 31, and 32, which are being quoted hereinbelow;

29. The contention of the appellants is that when an offence is punishable with imprisonment and fine, the Court is not left with any discretion to impose any one of them and consequently the company being a juristic person cannot be prosecuted for the offence for which custodial sentence is the mandatory punishment. If the custodial sentence is the only punishment prescribed for the offence, this plea is acceptable, but when the custodial sentence and fine are the prescribed mode of punishment, the Court can impose the sentence of fine on a company which is found guilty as the sentence of imprisonment is impossible to be carried out. It is an acceptable legal maxim that law does not compel a man to do that which cannot possibly be performed (impotentia excusat legem). This principle can be found in Bennion Statutory Interpretation, 4th Edn. at p. 969. All civilized systems of law import the principle that lex non cogit ad impossibilia; As Patterson, J. said "the law compels no impossibility". Bennion discussing about legal impossibility at states that: If an enactment requires what is legally impossible it will be

presumed that Parliament intended it to be modified so as to remove the impossibility element." This Court applied the doctrine of impossibility of performance (lex non cogit ad impossibilia) in numerous cases (State of Rajasthan v. Shamsheer Singh [1985 Supp SCC 416 : 1985 SCC (Cri) 421] and Special Reference No. 1 of 2002, In re [(2002) 8 SCC 237]).

30. As the company cannot be sentenced to imprisonment, the Court has to resort to punishment of imposition of fine which is also a prescribed punishment. As per the scheme of various enactments and also the Penal Code, 1860, mandatory custodial sentence is prescribed for graver offences. If the appellants plea is accepted, no company or corporate bodies could be prosecuted for the graver offences whereas they could be prosecuted for minor offences as the sentence prescribed therein is custodial sentence or fine. We do not think that the intention of the legislature is to give complete immunity from prosecution to the corporate bodies for these grave offences. The offences mentioned under Section 56(1) of the FERA Act, 1973, namely, those under Section 13; clause (a) of sub-section (1) of Section 18; Section 18-A; clause (a) of sub-section (1) of Section 19; sub-section (2) of Section 44, for which the minimum sentence of six months imprisonment is prescribed, are serious offences and if committed would have serious financial consequences affecting the economy of the country. All those offences could be committed by company or corporate bodies. We do not think that the legislative intent is not to prosecute the companies for these serious offences, if these offences involve the amount or value of more than Rs one lakh, and that they could be prosecuted only when the offences involve an amount or value less than Rs. one lakh.

31. As the company cannot be sentenced to imprisonment, the Court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the Court can impose the punishment of fine which could be enforced against the company. Such a discretion is to be read into the section so far as the juristic person is concerned. Of course, the Court cannot exercise the same discretion as regards a natural person. Then the Court would not be passing the sentence in accordance with law. As regards company, the Court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake a series of activities that affect the life, liberty and property of the citizens. Large-scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy.

32. We hold that there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the

punishment prescribed is mandatory imprisonment (sic and fine). We overrule the views expressed by the majority in Velliappa Textiles [(2003) 11 SCC 405 : 2004 SCC (Cri) 1214] on this point and answer the reference accordingly. Various other contentions have been urged in all appeals, including this appeal, they be posted for hearing before an appropriate Bench.”

6. Learned AGA submitted that as per Section 63 Cr.P.C. when the summons has been served on the Principal or Chief Executive Officer of the company or corporate body then it will be deemed sufficient service. Therefore, there is no illegality in the impugned summoning order.

7. After hearing the submissions of learned counsel for the applicants as well as learned AGA, the sole question arises, if a cheque is issued on behalf of a registered firm, and on bouncing, the same, it failed to pay the cheque amount despite receiving the demand notice, then in the complaint filed under Section 138 N.I. Act against the firm, whether a summons is required to be issued to the firm or its partner.

8. From the perusal of the complaint, it is clear that only the firm namely, M/S Partha Textiles has been arraigned as accused through its partner Praveen Raj Rajendran and demand notice after bouncing the cheque was also sent to firm M/s Partha Textiles (applicant no.1). On bouncing the cheque issued on behalf of a registered firm, primary liability is of the firm, and its partner can also be liable vicarious, but in the present case, the partner (applicant no.2) was not implicated as accused along with the firm.

9. Under Section 142 N.I. Act or in Section 190 (1)(a) Cr.P.C. the Court takes cognizance against any offence, not the offender. But the summons is issued against the offender by the Court to inform him/it about the charges which he or it requires to be replied. The summons format has been given in Form 1 of the second schedule.

10. As per Section 141 of N.I. Act, if the offence under Section 138 N.I. Act is committed by a company/firm; then it shall be prosecuted, but Director/ Partner can also be vicariously liable for punishment along with the company if they are responsible for the conduct of the business of the company or offence has been committed with the consent or connivance of any Director/ Partner or other Officers of the company. Section 141 N.I. Act is being quoted hereinbelow;

“141. Offences by companies.—(1) If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and 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 accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence. [Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company, and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other Officer of the company, such Director, manager, secretary or other Officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section, — (a) means any body corporate and includes a firm or other association of individuals; and (b) director, in relation to a firm, means a partner in the firm.

11. It is clear from Section 138 N.I. Act that if the offence is committed by the company/firm, it shall be prosecuted and punished accordingly. But the company, being a juristic person, cannot be awarded punishment of sentence but can be punished only with a fine, as observed in the case of Standard Chartered Bank and others (supra).

12. Chapter VI of the Cr.P.C. provides the process for compelling the appearance of the accused. As per Section 63 Cr.P.C, if the summons is issued to a corporate body or a registered society, then its service may be effected by serving the summons on its Secretary, Local Manager or other Principal Officer of the Corporation or by a letter through a registered post addressed to the Chief Officer of the Corporation. Section 63 of Cr.P.C. is being quoted hereinbelow;

“63. Service of summons on corporate bodies and societies- Service of a summons on a corporation may be effected by serving it on the secretary, local manager or other principal Officer of the corporation, or by letter sent by registered post, addressed to the Chief Officer of the corporation in India, in which case the service shall be deemed to have been effected when the letter would arrive in the ordinary course of post. Explanation.—In this section, means an incorporated company or other body corporate and includes a society registered under the Societies Registration Act, 1860.”

13. From the perusal of Section 63 of Cr.P.C., it is clear that if the offence was committed by a company/firm, then a summons can be issued to the company or firm, but service of summons may be effected through its Local Manager or other Principal Officer of the company. Therefore, the service of summons on corporate bodies may be made at its registered office or by serving its Local Manager or other Principal Officer. Therefore, the issuance of summons to the body corporate is necessary, though service may be effected by any mode as mentioned in Section 63 of Cr.P.C.

14. When the summons is served on the corporate body, then Section 305 Cr.P.C. provides further procedure. Section 305 (2) of Cr.P.C. provides that the accused corporation may appoint a representative for inquiry or trial in a criminal proceeding against the body corporate. When the corporate body/society appoints a representative, then all the proceedings will be done in the presence of representative and representative will also be

examined on behalf of the accused company. For ready reference, Section 305 Cr.P.C. is quoted hereinunder;

305. Procedure when corporation or registered society is an accused.—(1) In this section, corporation means an incorporated company or other body corporate, and includes a society registered under the Societies registration Act, 1860 (21 of 1860).

(2) Where a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial, and such appointment need not be under the seal of the corporation.

(3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a requirement that the representative shall be examined.

(4) Where a representative of a corporation does not appear, any such requirement as is referred to in sub-section (3) shall not apply.

(5) Where a statement in writing purporting to be signed by the Managing Director of the corporation or by any person (by whatever name called) having, or being one of the persons having the management of the affairs of the corporation to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section, is filed, the Court shall, unless the contrary is proved, presume that such person has been so appointed.

(6) If a question arises as to whether any person, appearing as the representative of a corporation in an inquiry or trial before a Court is or is not such representative, the question shall be determined by the Court.

15. Therefore, from the conjoint reading of Section 141 N.I. Act, Section 63 of Cr.P.C. and Section 305 Cr.P.C., it is explicit that whenever a company is accused under Section 138 N.I. Act then summons has to be issued in the name of the company and service of the same can be effected by serving it on the Principal Officer or Local Manager of the Company.

16. Hon'ble Apex Court in the case of Iridium India Telecom vs Motorola Incorporated and others; 2011 (1) SCC 74 observed that the corporation is virtually in the same position as any

individual, and criminal liability of the corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affair. Paragraph nos. 61, 63 and 66 of the **Iridium India Telecom (supra)** case are being quoted hereinbelow;

“61. A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane’s speech in Lennard Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. [1915 AC 705 : (1914-15) All ER Rep 280 (HL)] (AC at pp. 713, 714). So also, in criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company themselves guilty.

63. From the above, it becomes evident that a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. The position of law on this issue in Canada is almost the same. Mens rea is attributed to corporations on the principle of the company.

66. These observations leave no manner of doubt that a company/corporation cannot escape liability for a criminal offence merely because the punishment prescribed is that of imprisonment and fine. We are of the considered opinion that in view of the aforesaid judgment of this Court, the conclusion reached by the High Court that the respondent could not have the necessary mens rea is clearly erroneous.”

17. Guwahati High Court in the case of **Ram Narayan Sharma vs State of Assam; 2017 SCC Online Gau 1004** has also considered the issue of process against the corporate body and observed that in a criminal case, the Court can issue process against corporate

body in the manner as provided under Section 63 Cr.P.C. Paragraph 13 of the **Ram Naresh Sharma (supra)** case is quoted as under;

“13. It is a settled law, as on date, that a corporation can be prosecuted also for crimes requiring mens rea. In the case of Iridium India Telecom Ltd. v. Motorola Inc., (2011) 1 SCC 74, the Hon’ble Supreme Court has held that a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences, including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. The Hon’ble Supreme Court further held that mens rea is attributed to corporations on the principle of the alter ego company.”

18. Delhi High Court in the case of **Puneet Gupta vs State; 2013 SCC OnLine Del 208** again considered the issue of process against the corporate body and observed that the summons to the company can be issued through its Principal Officer, and if there is nobody to represent the company, then the Director could not be summoned to appear on behalf of the company itself. Paragraph 10 of the **Puneet Gupta (supra)** case is quoted as under;

“10. Thus, it would be seen that a company can be represented through a representative appointed for this purpose. Sub-section (3) says that where a representative of a company appears, any requirement of this Code that anything shall be done in the presence of the accused, shall be construed as a requirement that, that thing shall be done in presence of the representative. Sub-section(4) says that if the representative of the corporation does not appear, the requirement as referred in sub-section (3) shall not apply. Thus, simply because there was nobody to represent the company, the directors could not have been summoned to appear as accused. The right course to be adopted was to issue summons to the company through its principal Officer and it is for the company to decide as to through whom it is to be represented. Thus, simply on the ground that the company was not being represented, its 10 of 14 directors who are the Petitioners herein could not have been summoned to face prosecution. Moreover, Section 20A of the Act could not have been used by the learned MM to issue the summons to the two directors for the reason that it is only a manufacturer, distributor or a dealer of the sampled food article who has not been prosecuted earlier and where it transpires during the trial that the said manufacturer, distributor or dealer has

not been prosecuted that the Court may take cognizance against him as if the prosecution had been instituted against him.

19. The Andhra Pradesh High Court in the case of **Mannam Venkata Krishna Rao vs State of A.P. represented by Public Prosecutor and others; 2022 SCC OnLine AP 3027** again considered the issue and observed that Section 63 permits the issuance of summons to a company through its Principal Officer, then, after receiving a summons, it is for the company to appoint any representative to appear on behalf of the company. Para no. 7 and 8 of the **Mannam Venkata Krishna Rao (supra)** case are being quoted hereinunder;

“7. The above provision permits service of summons on a company by serving the said summons on any of the principal officers of the company mentioned in the Section 63. However, the manner in which the company is to be represented before a court, after service of summons, is contained in section 305 of the criminal procedure code, which reads as follows:

305. Procedure when corporation or registered society is an accused. (1) In this section, corporation means an incorporated company or other body corporate, and includes a society registered under the Societies Registration Act, 1860 (21 of 1860).

(2) Where a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial and such appointment need not be under the seal of the corporation.

(3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a requirement that the representative shall be examined.

(4) Where a representative of a corporation does not appear, any such requirement as is referred to in sub-section (3) shall not apply.

(5) Where a statement in writing purporting to be signed by the managing director of the corporation or by any person (by whatever name called) having, or being one of the persons having the management of the affairs of the corporation to the effect that the person named in the statement has been appointed as the representative of the corporation for this section is filed, the Court shall, unless the contrary is proved, presume that such person has been so appointed.

(6) If a question arises as to whether any person appearing as the representative of a corporation in an inquiry or trial before a Court is or is not such representative, the question shall be determined by the Court.

8. A reading of the above provision would make it clear that, after receipt of the notice, it would be open to the company to decide whether the person named in the notice would continue to represent the company or not. It would also be open to the person named as the company's representative to decline to represent the company. In both situations, applications may be made before the trial Court under Section 305 Cr. P.C., to remove the name of the person who is arrayed as the accused company's representative. This view is fortified by the judgment of the Hon'ble High Court at Bombay, dated 14.01.2020, in Criminal Writ Petition No. 4942 of 2019, in the case of Sanjeev S. Malhotra v. the State of Maharashtra."

20. It is also relevant to mention here that the corresponding provision to Section 63 of Cr.P.C. in Bhartiya Nagarik Suraksha Sanhita, 2023 (in short ' the BNSS') is Section 65. Section 65 of the BNSS also prescribes that summons of a company or corporation may be served through the Director apart from the Manager, Secretary and other Officers of the company. In Section 63 Cr.P.C. word "Director" was missing. Similarly, Section 65 of the BNSS also provides if the letter containing the summons for the company is sent through the registered post addressed to the Director, Manager or other Officer of the company or corporation in India that will also be deemed to be served but in Section 63 of Cr.P.C. summons sent through a letter by registered post addressed to Chief Officer of the Corporation in India was deemed to be served. Therefore, in place of the Officer of the Corporation in India as mentioned in Section 63 Cr.P.C., Director, Manager, Secretary or other Officer of the company or corporation in India has been replaced by Section 65 of the BNSS. Apart from this, in Section 63 of Cr.P.C. only company or other corporate body, including registered society, was mentioned, but in the corresponding Section of the BNSS, the firm or other associations of individuals are also mentioned. Section 65 of the BNSS is being quoted as under;

“65(1) Service of summons on corporate bodies, firms, and socialise.- (1) Service of a summons on a company or corporation may be effected by serving it on the Director, Manager, Secretary or other Officer of the company or corporation, or by letter sent by registered post addressed to the Director, Manager, Secretary or other Officer of the company or corporation in India, in which case the service shall be deemed to have been effected when the letter would arrive in the ordinary course of post. Explanation.—In this section, “company” means a body corporate and “corporation” means an incorporated company or other body corporate registered under the Companies Act, 2013 or a society registered under the Societies Registration Act, 1860.

(2) Service of a summons on a firm or other association of individuals may be effected by serving it on any partner of such firm or association, or by letter sent by registered post addressed to such partner, in which case the service shall be deemed to have been effected when the letter would arrive in the ordinary course of post.”

21. From the perusal of above Section 65 of the BNSS, it is clear that service of summons upon a company, corporation registered society, firm or other association of other individuals may be effected by serving on Director, Manager, Secretary or other Officer of the company or corporation in India or partner of the firm or association.

22. From the above analysis, it is clear that if a company is arraigned as accused in a complaint, then summons ought to be issued to the company through its Principal Officer or Local Manager as mentioned in Section 63 Cr.P.C and after service of summons upon the company, as per Section 63 Cr.P.C., the company can appoint any of his representatives as per Section 305 Cr.P.C. and when the representative of the company appears before the court, the proceeding before him would be deemed to be the proceeding in the presence of the accused and representative will be examined on behalf of the company. Representative of the company is not required to seek bail on behalf of the company as the company can change its representative at any stage of proceeding with the permission of the Court concerned.

23. Service of summons upon the company can be made as per the mode provided under Section 144 N.I. Act, which provides that service of summons can be made on accused by speed post or courier service approved by the Court, where he carries on business or personally works for gain. Therefore, there is no requirement to send a summons to the registered office of the company or firm. It can be served to its local manager, who carries on with the business of the corporate body.

24. In the present case, though the Firm (M/S Partha Textiles) was arrayed as an accused, but a summons was issued to its partner (applicant no.2) personally, which is not a proper service for the firm because the partner was not impleaded as accused in the impugned complaint. As the issue is purely technical, therefore, this petition is being finally disposed of without hearing the opposite party no.2.

25. In view of the above, the summoning order dated 27.07.2023 as well as non-bailable warrant dated 08.02.2024 issued against applicant no.2 is hereby quashed, and the Court below is directed to pass fresh summoning order in the light of the observation made hereinabove within one month from the date of receiving a copy of this order.

26. It is also apposite to mention that though on commencement of the BNSS, the provision of Cr.P.C. has been repealed and Section 65 of the BNSS has come into force in place of Section 63 of Cr.P.C. regarding service of summons upon a company, corporation and firm, but Section 529 of the BNSS provides, proceeding, trial or application pending before the date of commencement of the BNSS will continue as per the provision of Cr.P.C. Therefore, in the present case despite the repeal of Cr.P.C. by the BNSS, the court below will proceed in accordance with the

procedure of Cr.P.C. as mentioned under Sections 63 and 305 Cr.P.C.

27. With the aforesaid observation, the present application is partly **allowed**.

28. Let a copy of this order be communicated to the Additional Court Varanasi.

Order Date: 09.07.2024

A.Kr.