

Maksud Saiyed vs State Of Gujarat & Ors on 18 September, 2007

Equivalent citations: AIRONLINE 2007 SC 332

Author: S.B. Sinha

Bench: S.B. Sinha, Harjit Singh Bedi

CASE NO. :

Appeal (crl.) 1248 of 2007

PETITIONER:

Maksud Saiyed

RESPONDENT:

State of Gujarat & Ors

DATE OF JUDGMENT: 18/09/2007

BENCH:

S.B. Sinha & Harjit Singh Bedi

JUDGMENT:

J U D G M E N T CRIMINAL APPEAL NO. 1248 OF 2007 [Arising out of SLP (Crl.) No. 923 of 2006] S.B. SINHA, J :

1. Leave granted.

2. Respondent No. 2 is a former Chairman-cum-Managing Director of Dena Bank. He is presently the Chairman and Managing Director of Bank of Baroda, Mumbai. Respondent Nos. 3 to 11 are Directors of Dena Bank.

Appellant is a Director of Nagami Nicotine Pvt. Ltd. (hereinafter referred to as "the Company"). He had transactions with the said Company. He had taken loan from Dena Bank. As loans were not paid, admittedly, an original application was filed against him before the Debts Recovery Tribunal, Ahmedabad for recovery of a sum of Rs. 120.13 lakhs from the Company.

3. The Bank floated a public issue of 8 crores equity shares of Rs. 10/- each for cash at a premium of Rs. 17/- i.e. at a price of Rs. 27/- each. Prospectus was published for the purpose of public issue and therein some false and misleading information had been given with regard to sanction limits, the dues and export bills of the Company. It was alleged that the Company had committed an offence punishable under Sections 120B, 425, 191, 192, 177, 181 as also 500 of the Indian Penal Code. A criminal complaint was filed before the Chief Judicial Magistrate, Vadodara by the appellant on or about 28.02.2005 alleging:

"(A) Following false, fabricated and fraudulent documents illegally and dishonestly misused by Shri G.C. Garg in the absence of the sanction letters of the Bank along with its stipulated sanctioned terms and conditions for the sanctioned so called credit facilities, evidently acceptance of Complainant's Company for the stipulated sanctioned terms and conditions does not exist.

Hence following false, fabricated and fraudulent dishonestly and purposefully misused documents with malafide intention are illegal, invalid and not maintainable. Thus, Shri G.C. Garg solemnly affirmed and signed the verification of the aforesaid Original Application by dishonestly making false claim under Section 209 by giving false and fabricated statements, information and evidences under Sections 177, 181, 191, 192, 196, 199, 200, 470 and 471 of IPC."

4. An order under Sub-section (3) of Section 156 of the Code of Criminal Procedure was passed by the learned Chief Judicial Magistrate relying on or on the basis of allegations made in the said complaint petition. The learned Chief Judicial Magistrate by an order dated 28.02.2005 directed the police authorities to investigate the complaint. Respondent filed an application under Section 482 of the Code of Criminal Procedure for quashing the complaint and the investigation on 10.05.2005. By reason of the impugned judgment dated 9.01.2006, the said application has been allowed.

5. Mr. Bishwajit Bhattacharyya, learned counsel appearing on behalf of the appellant would submit that the High Court committed a serious error in passing the impugned order insofar as it failed to take into consideration that it had no jurisdiction to quash the police investigation at that stage. According to the learned counsel, the acts of omission and commission on the part of the bank in causing loss of reputation of the appellant is evident on its face. Such an action on the part of the officers of the appellant's bank was wholly irresponsible.

6. The jurisdiction of the High Court to quash a FIR in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure is well- known. The court may not enter into determination of a disputed question of fact at that stage. It may, however, take note of the allegations made in the complaint petition vis-`-vis the conduct of the parties. It is not disputed that the bank had filed an original application before the Debts Recovery Tribunal, Ahmedabad. A civil suit was filed at Vadodara in the year 2003. In the prospectus issued, it was stated:

"Sr. No. Suit details, Date of Filing Name of the party Branch Amount claimed (Rs. in lacs) Nature of claim made against the Bank DRT, A'bad 28.3.03 M/s.

Nagami Nicotine Pvt. Ltd.

A.R.B. A'bad 993.74 The case is filed against the Bank for non-

submission of export bills and non-releasing of the sanctioned limits.

We have taken plea that since the borrower is not clearing the dues of the Bank, Bank has not released the export bills as per procedure of UCPDC rules."

7. It is not in dispute that in the year 2003, the matter was pending before the City Civil Court, Ahmedabad. Other relevant facts stated in the said prospectus were not incorrect. The stand taken by the respondents therein as contained in Column under the Head "Nature of claim made against the Bank" is also not incorrect as the same was subject matter of a civil suit. Appellant in its notice addressed to Respondent No. 2 herein through his advocate dated 25.01.2005 stated:

"My client says and submits that the litigation you are mentioning does not exist at DRT, Ahmedabad. On the contrary my client has filed Special Civil Suit No. 178/2003 on 28.3.2003 and the same is pending for adjudication in the Civil Court Vadodara before the Hon'ble Civil Judge (SD) Vadodara. Besides my client does not know ARB, Ahmedabad and also not aware of its place of existence and its whereabouts in Ahmedabad and ARB, Ahmedabad has nothing to do with the suit."

8. A case of defamation was found only on that basis. It is not in dispute that Respondent No. 2 in reply to the said notice dated 5.02.2005 through his advocate stated:

"5. The averments made in para 3 of your legal notice are not true and correct and are not admitted. The export bills were sent to Bank of Fujirah and the same were returned unpaid due to discrepancy in the documents, and again, the said export bills were sent to HSBC Bank but, the same were returned unpaid by HSBC bank without payment on account of discrepancy in the Export bills L/C. There is no negligence on the part of Bank in respect of Export bills under L/C. Thus, to pressurize the Bank, your client has filed the Special Civil Suit No. 178/2003 in the Civil Court at Vadodara. In fact, in para 51 of your client's plaint, it is claimed that the branch did not release the CC hypothecation limit.

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7. The contents of para 5 of your notice are not true and correct and the same are denied by my client and there is no question of concealing any facts in the prospectus as alleged by you.

There is no question of any concealment or suppression of facts in the prospectus. Had the notice been given in time the bank could have taken corrective steps in time to include the fact which was omitted unintentionally. The public issue was closed on 29.01.2005 (Saturday) as mentioned in the prospectus.

Draft prospectus of public issue was filed by the Bank with SEBI on 3.12.2004 and was kept on the Website of the bank, SEBI and Lead Manager M/s. SBI Caps and a press note was released. Final prospectus of the issue was filed with SEBI on 10.1.2005 and was kept on Website of the Bank, SEBI and lead Manager M/s. SBI Caps, and a press note was released. Statutory advertisement was published in the newspaper on 12.1.2005. The public issue opened on 24.1.2005 and closed on 29.1.2005.

My client received your notice on 27.1.2005, but it was not readable and hence my client informed on fax to send the same again. However, the notice was not refaxed and instead my client received the notice on 28.1.2005 by post. The fact that the notice was served belatedly, suggests that the intention of your client is to pressurize and put the bank into uncomfortable position. Thus, there is no bonafide intention on the part of your client except to harass my client and to avoid your client's liability towards the repayment of the Bank's dues.

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9. In view of the above, my client has not acted with malafide intention and has not concealed or suppressed any material facts against the interest of the public at large and investors in particulars. The error is by inadvertence and was not intentional.

We hope that wiser counsel shall prevail upon your client and advise your client to withdraw the notice forthwith. We request you that you will desist from taking unwarranted actions against the bank.

In spite of the above if your client takes any action against my client, my client will defend the same at the cost of your client and your client will be held liable and responsible for the costs and consequences thereof."

9. An inadvertent mistake committed by the bank in referring to the case being pending before DRT instead of City Civil Court cannot, in our opinion, give rise to a cause of action for filing a complaint petition far less under Section 500 of the Indian Penal Code particularly when the other particulars contained therein were not found to be incorrect.

10. It is pertinent to notice that the learned Chief Judicial Magistrate in its order dated 28.02.2005 proceeded on the basis that the respondents are Managers and Branch Managers of Dena Bank. There has, thus, been a total non-application of mind on the part of the learned Chief Judicial Magistrate. The learned Chief Judicial Magistrate noticed:

" As per the say of the Complainant, Dena Bank has come out with public issue and on page no. 87 of its Prospectus, the published false information damages the Complainant's Company and endangers credit of the Company. This apart, the Bank fabricated false documents in spite of Complainant has not taken amount under loan and in violation of the rules and regulations of banking law and practice, the Bank deceived the company by filing false suit before DRT, by false submissions and producing false affidavit are the allegations of the Complainant. This apart, the Bank withheld export bills of the Complainant's Company under its custody under the pretext of the false excuses by cheating and committed criminal offence, despite no amount of demand loan taken by the Complainant, the Bank fabricated false reasons and committed offence against the Complainant's Company are the subject matter of the Complaint and looking to this, if the Police investigates the present complaint,

more and better investigation is possible. Hence the present complaint is necessitated for the investigation by the Police, therefore following order is given."

11. Allegations contained in the complaint petition, as noticed by the learned Magistrate, may give rise to tortuous liability on the part of Dena Bank. Principal allegations were made against the bank. Who had acted on behalf of the bank was not disclosed. The acts of omission and commission on the part of the bank, if any, by withholding export bills of the bank may give rise to a statutory violation on its part but the respondents were not personally liable therefor.

12. In *Saroj Kumar Poddar v. State (NCT of Delhi) and Anr.* [2007 (2) SCALE 36], this Court held :

"Apart from the Company and the appellant, as noticed hereinbefore, the Managing Director and all other Directors were also made accused. The appellant did not issue any cheque. He, as noticed hereinbefore, had resigned from the Directorship of the Company. It may be true that as to exactly on what date the said resignation was accepted by the Company is not known, but, even otherwise, there is no averment in the complaint petitions as to how and in what manner the appellant was responsible for the conduct of the business of the Company or otherwise responsible to it in regard to its functioning. He had not issued any cheque. How he is responsible for dishonour of the cheque has not been stated. The allegations made in paragraph 3, thus, in our opinion do not satisfy the requirements of Section 141 of the Act."

[See also *Everest Advertising Pvt. Ltd. v. State, Govt. of NCT of Delhi and Ors.* JT 2007 (5) SC 529 and *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr.* 2007 (3) SCALE 245]

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. Indian 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.

14. It will bear repetition to state that throughout the complaint petition, no allegation had been made as against any of the respondents herein that they had any thing to deal with personally either in discharge of their statutory or official duty. As indicated hereinbefore, in the prospectus, a bona fide mistake had been committed. The fact that such a mistake had been committed stands accepted. In any event, the statement that the matter was pending before the DRT in stead and place of the City Civil Court, Ahmedabad, per se, cannot be said to be defamatory as the fact that a suit was pending for recovery of the huge amount is neither denied nor disputed. Whether such a suit

was maintainable and/ or is ultimately to be decreed or disposed of is a question which has to be gone into in the suit itself. A criminal court cannot even take that factor into consideration. The High Court considered the matter at some great details. Having analysed the materials placed before it, it was held:

" It was, therefore, stated that there was no suppression or concealment of any facts and it did not amount to criminal breach of trust and cheating on the part of the Bank as alleged by the complainant. The said export bills under L/C were negotiated by the Bank under the provisions of UCPDC 500 1995 Revision. The Bank has also informed vide its letter dated 8.2.2005 to M/s. SBI Capital Markets Ltd. It was stated therein that the Bank has not concealed or suppressed any material fact against the interest of the public at large and investors in particular. The bonafide mis- description in setting out the nature of claim was unintentional. It was further stated that the material particulars like the amount of claim, date of filing and name of the company was correctly mentioned. The mis-description did not materially influence/affect the decision of the investors/public "

It was furthermore opined:

"It appears to the Court that the learned Chief Judicial Magistrate has not applied his mind while passing the order under Section 156(3) of the Criminal Procedure Code directing the police to investigate in the matter. The impugned order, on the face of it, reveals that he has not gone through the complaint. He has stated in the order that the accused Nos. 1 to 10 are Manager and Branch Manager of Dena Bank. As a matter of fact, the accused No. 1 was the Ex-Chairman and Managing Director of Dena Bank, and the accused No. 2 was the Executive Director. The accused Nos. 3 to 10 are Directors of Dena Bank. None of these persons are Managers or Branch Manager. Despite this, the learned Chief Judicial Magistrate has mentioned in his order that they are Managers or Branch Managers. With regard to the prospectus he has simply stated that the Bank has issued prospectus for its public issue and at page No. 87 false informations were given so as to cause damage to the Company and to jeopardize the reputation of the Company. Despite the fact that the litigations are pending before the Civil Court he has mentioned about non-returning of export bills etc. On these facts he has passed order under Section 156 (3) of the Criminal Procedure Code, directing the PSI, Sayajiganj Police Station to make inquiry in the matter."

The approach of the High Court, with respect, is entirely correct.

15. This Court in *Pepsi Foods Ltd. and Another v. Special Judicial Magistrate and Others* [(1998) 5 SCC 749], 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."

The learned Magistrate, in our opinion, shall have kept the said principle in mind.

16. For the reasons aforementioned, there is no merit in this appeal which is dismissed accordingly with costs. Counsel's fee assessed at Rs. 25,000/-.