Hdfc Securities Ltd.& Ors vs State Of Maharashtra & Anr on 9 December, 2016

Equivalent citations: AIR 2017 SC 61, 2017 (1) SCC 640, AIR 2017 SC (CRIMINAL) 203, 2017 CRILR(SC MAH GUJ) 89, (2017) 169 ALLINDCAS 24 (SC), (2017) 1 MH LJ (CRI) 693, 2017 CALCRILR 2 604, (2017) 1 CRILR(RAJ) 89, (2017) 1 KER LT 59, (2017) 1 RECCRIR 207, (2016) 12 SCALE 657, (2016) 4 CRIMES 395, (2017) 1 ALLCRILR 910, 2017 (1) SCC (CRI) 485, (2017) 1 KER LJ 44, 2017 (1) ABR (CRI) 563, (2017) 98 ALLCRIC 277, (2017) 1 MADLW(CRI) 790, (2017) 1 ALLCRIR 131, (2017) 1 CURCRIR 26, (2017) 1 DLT(CRL) 8, (2017) 1 KCCR 29, (2017) 1 BANKCAS 212, 2017 CRILR(SC&MP) 89, (2017) 1 UC 1, (2017) 67 OCR 961, AIR 2017 SUPREME COURT 61

Author: Pinaki Chandra Ghose

Bench: Amitava Roy, Pinaki Chandra Ghose

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1213 OF 2016
(Arising out of S.L.P.(Crl.) No.1913 of 2012)

HDFC Securities Ltd. & Ors	...	Appellants
	:Versus:	
State of Maharashtra & Anr.	...	Respondents

J U D G M E N T

Pinaki Chandra Ghose, J.

Leave granted.

This appeal has been filed assailing the judgment and order dated 16th November, 2011, passed by the High Court of Judicature at Bombay in Criminal Writ Petition No.672 of 2011, whereby the writ petitions filed by the appellants were dismissed by the High Court on the ground that the filing of the writ petition was premature and there was no need for exercising the powers either under Article 227 of the Constitution of India or under Section 482 Cr.P.C.

Brief facts of the case are as follows: appellant No.1 - HDFC Securities Ltd., is a public liability company (hereinafter referred to as "the Company" for short), appellant No.2 is the Managing Director of the Company, appellant No.3 is Business Head of the Company, and appellant No.4 is the Regional head of Mumbai Region of the Company, respectively. Respondent No.1 is State of Maharashtra and respondent No.2 is an individual, who held an account with the Company. The Company is engaged in the business of dealing in shares and securities on behalf of its constituents and clients on Brokerage Charge and it is also a member of National Stock Exchange of India Limited (NSE) and Bombay Stock Exchange of India Limited (BSE).

Respondent No.2, had registered herself with the Company as a constituent/client by opening Securities Trading Account vide No.342889 and was an imperial customer of the Company for about eight years. She executed a Member-Client Agreement dated 28th June, 2005. On 3rd August, 2009, respondent No.2, through a legal Notice dated 03.08.2009, requested the appellants to make good the losses caused to her by indulging in unauthorized and fraudulent trading in her account by one Vinod Koper (Relationship Manager of the company-"RM" in short) during the period July, 2008 to June, 2009. This Notice was also sent to RM and one Rohan Raut, Assistant Vice President of the Company, on 20th October, 2009. Thereafter, she filed arbitration proceedings before NSE Panel of Arbitrators against the Company for a sum of Rs.48.99 Lacs and costs of Rs.2.5 Lacs, and chose the Arbitrators of her choice, being two retired High Court Judges and sought to call RM as a witness. The Arbitrators passed an award in favour of the Company on 18th August, 2010, recording a shift in the stand of respondent No.2, authorizing her husband to trade on her behalf. In the meantime, as the Police did not take cognizance of the matter, albeit she filed a complaint on 31st march, 2010, against the appellants, RM and AVP, on 10th June, 2010, she also filed a criminal complaint under Section 156(3) of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.) before 10th Metropolitan Magistrate, Andheri, bearing Case No.143/2010, alleging execution of unauthorized trades in her account without her consent by the appellants and claimed that she had thereby suffered losses amounting to Rs.70 Lacs. Specific allegations were levelled against RM and appellant No.3 as she was introduced to RM by appellant No.3 and was told that RM would handle her investment portfolio honestly and efficiently with her prior instructions. General allegations of involvement of other appellants were made. On 25th September, 2010, she preferred an appeal before NSE Appellate Panel of Arbitrators, being Arbitration REF No.CM/M-213/2009, wherein she disputed the trades which had taken place during the period December 2008 to April 2009. Being completely oblivious of the Arbitration proceedings, the award passed therein and the appeal preferred by respondent No.2, on 04.01.2011, the learned Metropolitan Magistrate directed registration of FIR against the appellants and ordered for a report after investigation.

Pursuant to the order of the learned Metropolitan Magistrate dated 4.01.2011, Juhu Police Station registered the FIR, being MECR No.7 of 2011 dated 30th January, 2011, under Sections 409, 420, 465, 467 read with Sections 34 and 120-B of the IPC. Meanwhile, the Appellate Tribunal had decided the appeal against respondent No.2, vide its Award dated 24th January, 2011. The Appellate tribunal found that respondent No.2 had not denied the fact of having received all the necessary documents, including Contract notes, etc. with regard to the transactions undertaken by the appellants on her behalf, which were required to be issued by the trading member to the investor

immediately after the trade is undertaken. Thereafter, the appellants filed a writ petition before the Bombay High Court, being Criminal Writ Petition No.672 of 2011, inter alia praying for quashing of the said FIR and the same prayer was also made in Criminal Writ Petition No.767 of 2011, filed by RM before the High Court. The High Court by its judgment dated 16.11.2011, dismissed both the writ petitions as according to it, the filing of the writ petitions was premature and there was no need for exercising the powers either under Article 227 of the Constitution of India or under Section 482 Cr.P.C. Aggrieved by the aforesaid judgment of the High Court, the appellants have approached this Court by filing this appeal by special leave.

The only question that arises for decision in this appeal is whether the order dated 04.01.2011 passed by the Court of 10th Metropolitan Magistrate, Andheri, in Private Complaint, C.C. No.143/Misc/2010, filed by respondent No.2 for the offences punishable under Sections 409, 420, 465, 467 read with Sections 34, 120(B) IPC, as well as FIR bearing MECR No.7 of 2011 dated 30th January, 2011, registered at Police Station, Juhu, District Mumbai, are liable to be quashed.

In order to answer this question, it is necessary to first set out the relevant provisions i.e. Sections 156 and 482 of the Code of Criminal Procedure, 1973:

> "156. Police officer's power to investigate cognizable case.
>
> (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII. (2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate. (3) Any Magistrate empowered under Section 190 may order such an investigation as above-mentioned." "482. Saving of inherent power of High Court.-

Nothing in this code shall be deemed to limit or effect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of process of any Court or otherwise to secure the ends of justice." The High Court dismissed the application filed by the appellants for quashing and setting aside the order of the Metropolitan Magistrate dated 4th January, 2011, on the ground that the appellants had applied before the stage of issuance of process so to be issued by the Metropolitan Magistrate under Section 156(3) of the Criminal Procedure Code. According to the appellants, the fundamental rights of the appellants would be compromised if the order so passed by the Magistrate is allowed to be given effect to. The contention before the High Court on this question is that the order so passed by the Metropolitan Magistrate is illegal and amounts to abuse of the process of law. On the contrary, before the High Court it was submitted on behalf of respondent No.2 that an order under Section 156(3) of Criminal Procedure Code requiring investigation by the police does not cause any injury of irreparable nature which requires quashing of the investigation. It is further stated that the stage of cognizance would arise after the investigation report is filed. Therefore, the application filed by the appellants before the High Court is nothing but premature and thus there is no need for exercising the powers of the

High Court either under Article 227 of the Constitution of India or under Section 482 of the Code. Further contention of the respondent before the High Court was that the inherent powers under Section 482 of the Code should be sparingly used.

The High Court held that the direction given to the police by the Magistrate under Section 156(3) of the Code for carrying out the investigation into the complaint and to submit a report, cannot give a right to the appellants for quashing the same since such an order would be based absolutely on speculations upon the report not filed. Further, it would result in prejudging the complaint. In these circumstances, the High Court dismissed the said application.

Dr. Abhishek Singhvi, learned senior counsel appearing on behalf of the appellants submitted that the initiation of proceedings in the instant case is an abuse of process of law and is liable to be quashed. He argued that it is a settled principle that summoning of an accused in a criminal case is a serious matter and the criminal law cannot be set in motion as a matter of course. Therefore, the order of the magistrate must reflect application of mind to the facts of the case and the law applicable thereto. In support of this submission, the learned counsel has relied upon Anil Kumar Vs. M. K. Aiyappa, (2013) 10 SCC 705, paragraph 11, of which is quoted below:

> "11. The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in Maksud Saiyed case examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation." Learned Magistrate had passed an order on 04.01.2011 holding that:
>
> "The bare reading of the complaint and the accompanying documents disclose the cognizable offence. Therefore in view of the judgement of Hon'ble Supreme Court in case of Srinivas Gunduri & Ors. vs. M. S. SEPCO Electric Power Construction & Anr. In the matter of criminal appeal No.1377/2010 and 1378/2010 decided on 30.07.2010 when the complaint discloses a cognizable offence, then the Magistrate instead of applying his mind to the complaint for deciding whether or not there is sufficient ground for proceedings may direct the police for investigation.

Therefore, considering all these aspects, the complaint discloses the commission of cognizable offence. Therefore, considering the nature of offence it needs to be sent to police for investigation under section 156(3) of CrPC." Dr. Abhishek Singhvi, learned senior counsel appearing on behalf of the appellants has relied upon the following decisions of this Court to assail the aforesaid order passed by the Magistrate: Devarapall Lakshminarayana Vs. V. Narayana Reddy & Ors., (1976) 3 SCC 252, and Ram Dev Food Products Pvt. Ltd. Vs. State of Gujrat, reported in (2015) 6 SCC 439.

Further, it was submitted by the learned counsel for the appellants that there is no merit in the complainant's (respondent No.2) contention that the transactions from her trading account were unauthorized. Trading from the complainant's trading account were being carried out by her husband as admitted by the complainant in the complaint made before the learned Magistrate, and at the time of opening the trading account with appellant No.1, she was made aware of all the risks involved and the complainant had agreed to the same and understood that she would be responsible for all the risks and consequences of entering into trades. The relevant clause of the Agreement entered into by complainant is reproduced hereinbelow:

"2.11 The Client agrees and declares as follows: (i) The Client shall be wholly responsible for all the investment decisions and trades of the Client; (ii) The Client will pay receive applicable daily margins; (iii) Payment of margins by the Client does not necessarily imply complete satisfaction of all dues; (iv) In spite of consistent having paid margins, the Client may, on the closing of his trade, be obliged to pay (or entitled to receive) such further sums as the market price or an instrument of contract may dictate; and (v) The failure of a Client to understand the risk involved or the failure of the member to explain the risk to the Client shall not render a contract as void or voidable and the Client shall be and shall continue to be responsible for all the risks and consequences for entering into trades in Derivatives." In the light of the Agreement entered into between complainant-respondent No.2 and the appellants, the learned counsel for the appellants further averred that criminal prosecution of the appellants could not be allowed to continue because the criminal prosecution requires a much higher standard of proof beyond reasonable doubt, whereas civil matters require lower standard of proof - preponderance of probabilities. He drew our attention towards a very recent pronouncement in the case of Lalitha Kumari Vs. Govt. of Uttar Pradesh, reported in (2014) 2 SCC 1, wherein this Court held: "Therefore, in view of various counter claims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not

relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR." We are of the considered opinion that in the present case a fact finding investigation was directed by the impugned order. Consequently, FIR was registered against appellants No.2 to 4 and against RM (Vinod Kopar). The accused under Indian Criminal Legal System, unless proved guilty shall always be given a reasonable space and liberty to defend himself in accordance with the law. Further, it is always expected from a person accused of an offence pleading not guilty that he shall co-operate and participate in criminal proceedings or proceedings of that nature before a court of law, or other Tribunal before whom he may be accused of an 'offence' as defined in Section 3(38) of the General Clauses Act, i.e., an act punishable under the Penal Code or any special or local law. At the same time, courts, taking cognizance of the offence or conducting a trial while issuing any order, are expected to apply their mind and the order must be a well reasoned one.

Learned counsel for the appellants has further invited our attention to the order of the High Court dismissing the writ petitions. According to the learned counsel for the appellants, the High Court, relying upon the decision of this Court in Iqbal Singh Marwah & Anr. Vs. Meenakshi Marwah & Anr., (2005) 4 SCC 370 and Rukhmni Narvekar Vs. Vijya Statardekar and Ors., (2008) 14 SCC 1, found that there was no substance in the argument that respondent No.2 ought to have disclosed the arbitration proceedings and the outcome thereof in her complaint and that non-disclosure of the same amounts to suppression of material facts. Learned counsel for the appellants further submitted that the High Court failed to appreciate that it was within its inherent jurisdiction under Section 482 Cr.P.C. to consider the correspondence exchanged as well as the admitted documents under the arbitration proceedings. In the case of All Cargo Movers (India) (P.) Limited Vs. Dhanesh Badarwal Jain, (2007) 14 SCC 776, relied upon in paragraph 17 thereof, it was held by this Court:

"We are of the opinion that the allegations made in the complaint petition, even if given face value and taken to be correct in its entirety, do not disclose an offence. For the said purpose, This Court may not only take into consideration the admitted facts but it is also permissible to look into the pleadings of the plaintiff-respondent No.1 in the suit. No allegation whatsoever was made against the appellants herein in the notice. What was contended was negligence and/or breach of contract on the part of the carriers and their agent. Breach of contract simplicitor does not constitute an offence. For the said purpose, allegations in the complaint petition must disclose the necessary ingredients therefor. Where a civil suit is pending and the complaint

petition has been filed one year after filing of the civil suit, we may for the purpose of finding out as to whether the said allegations are prima facie cannot notice the correspondences exchanged by the parties and other admitted documents. It is one thing to say that the Court at this juncture would not consider the defence of the accused but it is another thing to say that for exercising the inherent jurisdiction of this Court, it is impermissible also to look to the admitted documents. Criminal proceedings should not be encouraged, when it is found to be mala fide or otherwise an abuse of the process of the Court. Superior Courts while exercising this power should also strive to serve the ends of justice.

Learned counsel for the appellants further relied upon few more judgments wherein it was well settled that the test to be applied for quashing is, whether uncontroverted allegations made, prima facie establish the offence. This is because the Court cannot be utilized for any oblique purpose and where, in the opinion of the Court, the chances of an ultimate conviction are bleak, no useful purpose will be served by allowing the criminal prosecution to continue. He relied upon the decisions of this Court in Madhavrao Jiwanrao Scindia & Ors. Vs. Sambhajirao Chandrajirao Angre & Ors., (1998) 1 SCC 692 (para 7-8); State of Haryana Vs. Bhajanlal, 1992 Supp (1) SCC 335 (para 102); Rajiv Thapar & Ors Vs. Madan Lal Kapoor, (2013) 3 SCC 330 at para 30; Rishi Pal Singh Vs. State of Uttar Pradesh & Anr. (2014) 7 SCC 215, at para 12-13.

Learned counsel for the respondents have not rebutted this issue in any of his arguments. With the meticulous understanding of the orders of the Courts below in the instant case, we can see that general and bald allegations are made in the context of appellant No.1 who is a juristic person and not a natural person. The Indian Penal Code, 1860, does not provide for vicarious liability for any offence alleged to be committed by a company. If and when a statue contemplates creation of such a legal fiction, it provides specifically therefor, e.g. Negotiable Instruments Act, 1881. Further, reliance was made on S.K. Alagh Vs. State of Uttar Pradesh & Ors., reported in (2008) 5 SCC 662, where at paragraph 16, this Court observed that “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.” Further in Maksud Saiyed Vs. State of Gujrat & Ors., reported in (2008) 5 SCC 668, at paragraph 13, this Court observed 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. 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 liability. 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. In Thermax Limited & Ors. Vs. K. M. Johny & Ors., (2011) 13 SCC 412, and in Sunil Bharti Mittal Vs. Central Bureau of Investigation, (2015) 4 SCC 609, at para

39, this Court held:

> "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".

Learned counsel for the appellants has lastly argued in favour of the partial quashment of the FIR against the appellants on the contention that there was no criminality on their behalf. It has been further submitted that the allegations made against them do not amount to disclosure of an offence and were made with the purpose of harassing the appellants. Additionally, learned counsel contends that vicarious liability cannot be attributed to appellant Nos.2 to 4, while relying upon R. Kalyani Vs. Janak C. Mehta & Ors., (2009) 1 SCC 516, wherein it was held:

> "Whereas, thus, no allegation whatsoever has been made against the respondent No.1, the only allegation against the respondent No.2 was that he had forwarded the said letter dated 10.1.2002 to National Stock Exchange. The act of forgery on/or fabrication of the said letter had been attributed to Respondent No.3.
>
> Respondent Nos.1 and 2 herein were sought to be proceeded against on the premise that they are vicariously liable for the affairs of the company. As Mr. Mani had time and again referred to the allegations relating to forgery of the said document dated 10.1.2002, we may also notice a disturbing fact. Before lodging the said First Information, a notice was issued by the appellant against the respondents herein on 15.10.2002, whereas the address of respondent Nos.1 and 2 were shown as 404, Embassy Centre, Nariman Point, Mumbai - 400 021 and 302, Veena Chambers, 21, Dalal Street, Fort, Mumbai - 400 001 respectively. However, in the complaint petition, they were shown to be residents of Chennai".

In Sharad Kumar Sanghi Vs. Sangta Rane, reported in (2015) 12 SCC 781 (para 9-11) it is noted by this Court:

> "The allegations which find place against the Managing Director in his personal capacity seem to be absolutely vague. When a complainant intends to rope in a Managing Director or any officer of a company, it is essential to make requisite allegation to constitute the vicarious liability." Per contra, learned counsel for respondent No.2 submitted that the complaint has disclosed the commission of an offence which is cognizable in nature and in the light of Lalitha Kumari's Case, (supra), registration of FIR becomes mandatory. We observe that it is clear from the use of the words "may take cognizance" in the context in which they occur, that the same cannot be equated with "must take cognizance". The word "may" gives

discretion to the Magistrate in the matter. If on a reading of the complaint he finds that the allegations therein disclose a cognizable offence and that the forwarding of the complaint to the police for investigation under Section 156(3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter, which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence, himself. It is settled that when a Magistrate receives a complaint, he is not bound to take cognizance if the facts alleged in the complaint, do not disclose the commission of an offence.

Learned counsel for the respondents further submitted that there is a marked difference between the civil nature of the arbitration proceedings and the Criminal nature of the current proceedings and relieving the RM on the same day when he had tendered his resignation reflects the conduct whereby conspiracy could be proved. It was further argued that respondent No.2 has also sent the legal notice requesting for making good the losses caused to her by the appellants of which Criminal Court and the Arbitration Tribunal took notice of. Thus, allegations were already made against all the appellants. We find no substance in the said submission being completely opposed to the settled legal principles. Nevertheless, we find patent illegalities which would result in vitiating the entire investigation which would result in miscarriage of justice.

Mr. Basava Prabhu Patil, learned senior counsel appearing on behalf of respondent No.2 submitted that respondent No.2 in her complaint had set out the conduct of the appellants and alleged that their conduct had caused wrongful loss to her and wrongful gain to the appellants and other accused. It is a fact that at the time of summoning of the accused, the Courts must be careful to scrutinize the evidence brought on record and in elicitation of answers to find out the truthfulness of the allegations.

It appears to us that the appellants approached the High Court even before the stage of issuance of process. In particular, the appellants challenged the order dated 04.01.2011 passed by the learned Magistrate under Section 156(3) of Cr.P.C. The learned counsel appearing on behalf of the appellants after summarizing their arguments in the matter have emphasized also in the context of the fundamental rights of the appellants under the Constitution, that the order impugned has caused grave inequities to the appellants. In the circumstances, it was submitted that the order is illegal and is an abuse of the process of law. However, it appears to us that this order under Section 156(3) of Cr.P.C. requiring investigation by the police, cannot be said to have caused an injury of irreparable nature which, at this stage, requires quashing of the investigation. We must keep in our mind that the stage of cognizance would arise only after the investigation report is filed before the Magistrate. Therefore, in our opinion, at this stage the High Court has correctly assessed the facts and the law in this situation and held that filing of the petitions

under Article 227 of the Constitution of India or under Section 482 of Cr.P.C., at this stage are nothing but premature. Further, in our opinion, the High Court correctly came to the conclusion that the inherent powers of the Court under Section 482 of Cr.P.C. should be sparingly used. In these circumstances, we do not find that there is any flaw in the impugned order or any illegality has been committed by the High Court in dismissing the petitions filed by the appellants before the High Court. Accordingly, we affirm the order so passed by the High Court dismissing the writ petitions. The appeal is dismissed.

.....J (Pinaki Chandra Ghose) .....J (Amitava Roy) New Delhi;

December 9, 2016.