

K.Sitaram & Anr vs Cfl Capital Financial Ser.Ltd.& Anr on 21 March, 2017

Equivalent citations: AIR 2017 SC 1560, 2017 (5) SCC 725, AIR 2017 SC(CRI) 651, (2017) 5 MH LJ (CRI) 356, (2017) 2 CRILR(RAJ) 395, 2017 CALCRILR 3 154, (2017) 2 DLT(CRL) 70, 2017 (2) SCC (CRI) 658, (2017) 4 KCCR 434, 2017 CRILR(SC&MP) 395, (2017) 1 UC 664, (2017) 2 RECCRIR 415, (2017) 174 ALLINDCAS 152 (SC), 2017 (2) ABR (CRI) 239, (2017) 2 BOMCR(CRI) 566, (2017) 3 ALLCRILR 651, (2017) 99 ALLCRIC 927, (2017) 3 SCALE 689, (2017) 2 CRIMES 21, (2017) 2 CURCRIR 49, (2017) 3 CAL LJ 77, 2018 (1) AJR 261, AIR 2017 SUPREME COURT 1560, AIR 2017 SC (CRIMINAL) 651 2017 (2) ABR (CRI) 239

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Bench: R.K. Agrawal, Adarsh Kumar Goel

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2285 OF 2011

K. Sitaram & Anr.

.... Appellant(s)

Versus

CFL Capital Financial Service Ltd. & Anr.

.... Respondent(s)

J U D G M E N T

R.K. Agrawal, J.

1) This appeal has been filed against the judgment and order dated 07.01.2011 passed by the High Court of Judicature at Bombay in Criminal Writ Petition No. 1279 of 2010 whereby learned single Judge of the High Court dismissed the writ petition filed by the appellants herein.

2) Brief facts:

(a) The complainant-respondent Company borrowed a sum of Rs. 900 lakhs comprising Rs. 180 lakhs through cash credits from the consortium of Banks (of which the State Bank of Travancore was the lead bank) and a sum of Rs.

720 lakhs being working capital demand Loan. Due to non-payment of the loan amount, the account became Non-Performing Asset. In order to recover the amount against the borrower, the State Bank of Travancore filed OA No. 96 of 2003 before the Debts Recovery Tribunal (DRT), Mumbai. On 22.07.2005, the DRT passed a partial decree awarding a sum of Rs. 812.26 lakhs with 12 per cent interest.

(b) On 29.03.2006, the State Bank of Travancore assigned the debts due from the complainant-Company to the Kotak Mahindra Bank together with all the securities through an Assignment Deed. On 11.01.2007, the borrower-the respondent Company assigned to Kotak Mahindra Bank the debt due towards it from one Ravishankar Industries Pvt. Ltd. of more than Rs. 32 crores with an agreement that any excess recovery over and above Rs. 90 lakhs from Ravishankar Industries Pvt. Ltd. would be shared equally between the Kotak Mahindra Bank and the complainant-Company. It is pertinent to mention here that the fact of the alleged Assignment Deed came to the notice of the complainant-Company only on 17.01.2007 when the Kotak Mahindra Bank handed over a copy of the application for substituting themselves in place of State Bank of Travancore to the respondent-Company.

(c) The Kotak Mahindra Bank initiated process for substituting its name in place of the assignor-State Bank of Travancore in the recovery application and also withdraws two criminal complaints filed by the respondent-Company against Ravishankar Industries Pvt. Ltd. without any information to the respondent-Company. On 28.04.2007, the Kotak Mahindra Bank moved an application before the Recovery Officer-I for appropriating Rs. 67.5 lakhs due towards the complainant-Company, being 50 per cent of the amount of Rs. 135 lakhs received in excess of Rs. 90 lakhs from the Ravishankar Industries Pvt. Ltd., against the claim towards the State Bank of Travancore.

(d) On 16.05.2007, the complainant-respondent Company filed a complaint against the Kotak Mahindra Bank and its officers being No. 18/SW/07 before the Metropolitan Magistrate, Bandra, Mumbai under Sections 409, 418, read with 120-B of the Indian Penal Code, 1860 (in short 'the IPC'). On 25.06.2007, the Additional Chief Metropolitan Magistrate, Bandra, Mumbai issued process against all the accused in the complaint dated 16.05.2007. The accused therein preferred Criminal Revision Applications being Nos. 1024-1026 of 2007 before the Court of Sessions for

Greater Bombay. Learned Additional Sessions Judge, vide order dated 03/05.04.2008, allowed the revision applications while setting aside the order of issue of process dated 25.06.2007.

(e) A fresh complaint being No. 0800009/SW/08 was filed by the complainant-the respondent Company before the Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Mumbai under Sections 409, 418, 423 and 425 read with Section 120-B of the IPC against the State Bank of Travancore, Kotak Mahindra Bank Limited and its officers. The Metropolitan Magistrate, I/C ACMM, 8th Court, Esplanade, Mumbai, vide order dated 25.01.2008, issued process against the officers of the State Bank of Travancore and Kotak Mahindra Bank Limited. On 11.05.2008, learned Magistrate excluded the officers of the Kotak Mahindra Bank Limited in view of an application filed by the respondent-Company to withdraw the complaint against them.

(f) Being aggrieved, the appellants herein preferred a Criminal Writ Petition being No. 1279 of 2010 before the High Court. On 07.01.2011, learned single Judge of the High Court, dismissed the writ petition filed by the appellants herein for setting aside the order of issue of process by learned Magistrate dated 25.01.2008 against the appellants.

(g) Aggrieved by the order dated 07.01.2011, the appellants have preferred this appeal by way of special leave.

3) Heard the arguments advanced by Mr. T.R. Andhyarujina, learned senior counsel for the appellants and Mr. Aniruddha P. Mayee, learned counsel for the State and perused the records.

Point for consideration:

4) The only point for consideration before this Court is whether Criminal Case No. 0800009/SW/08, pending in the Court of Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Mumbai, is liable to be quashed or not?

Rival contentions:

5) Learned senior counsel for the appellants vehemently contended that the appellants were not the employees of the State Bank of Travancore when the alleged Deed of Assignment was entered into between the State Bank of Travancore and the Kotak Mahindra Bank. He further contended that the Deed of Assignment dated 29.03.2006 is a valid and equitable assignment. The decision in respect of execution of the assignment is taken by the Executive Committee of the State Bank of Travancore and the same is not the individual decision of the appellants herein. Learned senior counsel further contended that since the State Bank of Travancore had no knowledge about the transactions between the respondent-Company and the Kotak Mahindra Bank, the State Bank of Travancore cannot be said to have any intention to defraud anyone. There is no wrongful gain to the appellants or the State Bank of Travancore and the accusation that they acted in collusion and connivance with the officers of the Kotak Mahindra Bank to commit the criminal breach of trust,

cheating and dishonest/fraudulent execution of deeds of transfer is baseless. He further submitted that as the complainant-respondent Company had withdrawn the complaint against the co-accused, i.e., the officers of the Kotak Mahindra Bank Ltd., the complaint made against the appellants herein cannot proceed and is liable to be quashed as the allegations against them are also same. The complainant-respondent Company cannot be allowed to blow hot and cold in the same breath. Learned senior counsel for the appellants finally contended that the appellants are in no way related to the said transaction and the complaint also has not specifically set out any offence against them.

6) On the other hand, learned counsel for the State submitted that the appellant No. 1 herein was the Managing Director of the State Bank of Travancore at the relevant time and was responsible for the business and day to day affairs of the Bank. Similarly, appellant No. 2 herein was the Deputy General Manager and Principal Officer, who had signed the alleged Assignment Deed dated 29.03.2006 on behalf of the State Bank of Travancore.

He further submitted that in such a scenario, the appellants herein, being the principal perpetrators, actively connived and colluded with the Kotak Mahindra Bank and its officers with a common intention to deceive the respondent-Company in order to make wrongful gains. Learned counsel further submitted that the active collusion and conspiracy between both the Banks hatched together deliberately with a view to deceive the respondent- Company is also evident from the fact that in the alleged assignment deed dated 29.03.2006, there was a clear undertaking under Clause 2.3 that simultaneously with the execution of the said deed, the State Bank of Travancore must send a notice addressed to the respondent-Company herein informing it of the assignment of the alleged debts and the financial instruments to the Kotak Mahindra Bank.

7) Learned counsel for the State further submitted that the State Bank of Travancore was duty bound to protect the interest of the respondent- Company as the Bank was entrusted with certain properties of the respondent- Company. By entering into such alleged assignment with deliberate suppression and concealment of material facts with dishonest intention, the appellants herein, who were responsible for the day to day affairs of the Bank, have committed the offence of criminal breach of trust and cheating. Learned counsel for the State finally submitted that the order dated 25.01.2008 passed by the Metropolitan Magistrate for issue of process as well as the order dated 07.01.2011, passed by the learned single Judge of the High Court, dismissing the writ petition filed by the appellants herein for setting aside the order of issue of process dated 25.01.2008 against the appellants are justified and do not call for any interference. Discussion:

8) The present appeal has been filed for quashing of Criminal Case No. 0800009/SW/08 pending in the Court of Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Mumbai and for setting aside the order dated 25th January 2008, by which process was issued against all the persons accused in the complaint. Appellant No. 1 herein was working as Managing Director with the State Bank of Travancore during the period 11th May 2006 to 30th June 2007. Appellant No. 2

herein worked with the Bank as the Deputy General Manager during the period from January 2005 to November 2006.

9) The respondent-Company filed a complaint alleging offence punishable under Sections 409, 418, 423 and 425 read with Section 120-B of the IPC against the appellants herein. The Bank had in December 1995 sanctioned loan of Rs. 180 lakhs by way of cash credit facility and Rs. 720 lakhs by way of working capital demand loan, totaling to Rs. 900/- lakhs and the complainant-Company executed various documents in favour of the Bank. As the respondent-Company was unable to pay its dues to the Bank, the Bank had filed recovery proceedings before the Tribunal wherein a partial decree for a sum of Rs.812.26 lakhs had been passed.

10) In the said proceedings, Kotak Mahindra Bank Limited filed an application for substituting its name in place of State Bank of Travancore claiming all the dues and charge on the immovable properties mortgaged in favour of State Bank of Travancore vide an Assignment Deed dated 29.03.2006. The respondent-Company claimed that no notice of the alleged assignment dated 29.03.2006 had been given to it. On 11.01.2007, the respondent-Company entered into a Deed of Assignment with the Kotak Mahindra Bank Limited, wherein all the dues of Ravishankar Industries Pvt.

Ltd. of more than Rs. 32 crores were assigned to the Kotak Mahindra Bank. Under the agreement, it was agreed that any amount received over and above Rs. 90 lakhs from the Company would be shared equally between the respondent-Company and Kotak Mahindra Bank. The Kotak Mahindra Bank withdrew the proceedings filed by the respondent-Company under Section 138 of the Negotiable Instruments Act against the Ravishankar Industries Pvt. Ltd and also settled an amount of Rs. 225 lakhs without giving any information to it as to the terms of settlement and the mode of payment. It is the allegation of the complainant that if the complainant was informed about the alleged Assignment Deed dated 29.03.2006, it would not have entered into the assignment agreement on 11.01.2007 with the Kotak Mahindra Bank. It is alleged that the suppression of facts and surreptitious execution of the deed of assignment dated 29.03.2006 was deliberately done with a dishonest intention to induce the complainant- Company and to make wrongful losses and to deceive it.

11) Learned senior counsel for the appellants contended that the allegations against the appellants in their personal capacity are vague. He further contended that Appellant No. 1 herein joined the State Bank of Travancore on 11.05.2006 i.e. subsequent to the Assignment Deed dated 29.03.2006. He was, however, admittedly working with the Bank on 11.01.2007, when the complainant Company entered into the Deed of Assignment with the Kotak Mahindra Bank. As regards Appellant No. 2 herein, though he was signatory to the Deed of Assignment dated 29.03.2006, he submitted that he was not in service of State Bank of Travancore on the date on which Deed of Assignment dated 11.01.2007, was executed between the complainant-Company and the Kotak Mahindra Bank and hence he claims to have no connection whatsoever with the offence alleged. He further contended that the IPC does not contain any provision for attaching vicarious liability on the part of the Chairman and General Managers of the Company when the accused is the Company. When the

Company is the offender, vicarious liability of the directors cannot be imputed automatically, in the absence of any statutory provisions to this effect.

12) In support of his claim, learned senior counsel for the appellant cited a decision of this Court in *Maksud Saiyed vs. State of Gujarat and Others* (2008) 5 SCC 668 wherein it was held as under:-

“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.”

13) In support of his claim that the transactions between the complainant and the State Bank of Travancore were purely civil in nature and criminal court has nothing to do with it, learned senior counsel for the appellants further relied upon a decision of this Court in *Sardar Trilok Singh and Others vs. Satya Deo Tripathi* (1979) 4 SCC 396 wherein it was held as under:-

“5.....The question as to what were the terms of the settlement and whether they were duly incorporated in the printed agreement or not were all questions which could be properly and adequately decided in a civil court. Obtaining signature of a person on blank sheet of papers by itself is not an offence of forgery or the like. It becomes an offence when the paper is fabricated into a document of the kind which attracts the relevant provisions of the Penal Code making it an offence or when such a document is used as a genuine document. Even assuming that the appellants either by themselves or in the Company of some others went and seized the truck on July 30, 1973 from the house of the respondent they could and did claim to have done so in exercise of their bona fide right of seizing the truck on the respondent's failure to pay the third monthly installment in time. It was, therefore, a bona fide civil dispute which led to the seizure of the truck. On the face of the complaint petition itself the highly exaggerated version given by the respondent, the appellants went to his house with a mob armed with deadly weapons and committed the offence of dacoity in taking away the truck was so very unnatural and untrustworthy that it could take the matter out of the realm of civil dispute. Nobody on the side of the respondent was hurt. Even a scratch was not given to anybody.

6. In our opinion on the facts and in the circumstances of this case criminal prosecution deserves to be quashed. On behalf of the respondent it was argued that the appellants' filing a petition in the High Court for quashing the proceeding before issuance of the summons was premature and the High Court could not have quashed it. In our opinion the point is so wholly without substance that it has been stated merely to be rejected. Since the parties during the course of the hearing in this appeal showed their inclination to settle up and end all their disputes and quarrels in relation to the matter in question after we indicated our view that we are going to allow the appeal and quash the proceedings, we have not thought it necessary to elaborately give other reasons in support of our order".

14) Learned senior counsel for the appellants further relied upon *Sunil Bharti Mittal vs. Central Bureau of Investigation* 2015 (1) SCALE 140 wherein it was held that 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 a cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

15) As the appellants herein have challenged the legality of the order of issue of process, it would be worthwhile to recapitulate the law regarding issue of process. The relevant point that arises for consideration at this stage is whether the material available is sufficient enough to constitute a prima facie case against the accused.

16) When a person files a complaint and supports it on oath, rendering himself liable to prosecution and imprisonment if it is false, he is entitled to be believed unless there is some apparent reason for disbelieving him; and he is entitled to have the persons, against whom he complains, brought before the court and tried. The only condition requisite for the issue of process is that the complainant's deposition must show some sufficient ground for proceeding. Unless the Magistrate is satisfied that there is sufficient ground for proceeding with the complaint or sufficient material to justify the issue of process, he should not pass the order of issue of process. Where the complainant, who instituted the prosecution, has no personal knowledge of the allegations made in the complaint, the magistrate should satisfy himself upon proper materials that a case is made out for the issue of process. Though under the law, a wide discretion is given to magistrate with respect to grant or refusal of process, however, this discretion should be exercised with proper care and caution.

17) The respondent-Company came to know about the Assignment Deed dated 29.03.2006 only on 17.01.2007 when the Kotak Mahindra Bank moved an application for substituting themselves in place of State Bank of Travancore on the basis of that alleged document i.e. Assignment Deed dated 29.03.2006. It is also pertinent to mention here that neither the State Bank of Travancore nor the Kotak Mahindra Bank informed the respondent- Company regarding the alleged Assignment Deed either before or after the alleged assignment. It is also on record that vide agreement dated 01.10.1999, the Kotak Mahindra Bank, which was earlier a financial services Company, entered into an agreement with the respondent-Company to act as an advisor and to provide necessary

assistance for the successful restructuring of the respondent-Company and to provide follow up and support services to the complainant-Company in recovery from its various defaulters.

18) Under the above terms and conditions, when the Kotak Mahindra Bank was already in an agreement with the respondent-Company in order to safeguard its interest, the fact of the Assignment Deed between the State Bank of Travancore and the Kotal Mahindra Bank with regard to alleged rights of the State Bank of Travancore pertaining to the immovable properties allegedly mortgaged in its favour, must be communicated by the State Bank of Travancore to the respondent-Company. More so, the fact of such assignment deed must also be brought to the notice by the Kotak Mahindra Bank to the respondent-Company when it was responsible to provide necessary assistance to the respondent-Company.

19) In view of the above, it is pertinent to mention here Clause 2.3 of the Assignment Deed dated 29.03.2006, which reads as under:

“Simultaneously with the execution of this Deed, the Assignor shall send a notice addressed by the Assignor to the clients and other related persons at their last known addresses informing them of the assignments of Debts and the Financial Instruments to the Assignee and instructing them to pay all amounts constituting the Debts to the Assignee and a copy of the said notice shall be delivered to the Assignee.” It is very much clear from the above that the Assignment Deed dated 29.03.2006 specifically contains one clause which requires that the clients and other related persons shall be informed about the alleged Assignment.

But this fact was not brought to the notice of the respondent-Company. Primarily, it was the duty of the State Bank of Travancore to inform the respondent-Company about the said assignment and secondly, Kotak Mahindra Bank was to inform the same to the respondent-Company. If the intention of the Assignor and the assignee to the Assignment Deed dated 29.03.2006 was clear, then why the facts of the same were not brought to the notice of respondent-Company that too when Clause 2.3 of the Assignment Deed very clearly states so.

20) The position becomes more clear from the fact that even after the alleged assignment, in a proceeding before the appellate tribunal, none of the representative of the State Bank of Travancore mentioned about the factum of such assignment. The respondent-Company came to know about the alleged Assignment after a lapse of 9 months i.e. on 17.01.2007, when an application was moved by the Kotak Mahindra Bank for substituting its name in place of State Bank of Travancore. In the absence of such knowledge, on 11.01.2007, the respondent-Company entered into a deed of Assignment with the Kotak Mahindra Bank wherein all the dues of a defaulter, viz., Ravishankar Industries Pvt. Ltd., of more than Rs. 32 crores were assigned to the Kotak Mahindra Bank. The Kotak Mahindra Bank was under an obligation to inform the respondent-Company about the earlier Assignment Deed which was not done. More so, the Kotak Mahindra Bank received a sum of Rs. 225 lakhs in March 2007 from Ravishankar Industries Pvt. Ltd. but without giving any information as to the terms of settlement and the mode of payment to the complainant-Company, approached the Recovery Officer-I for appropriating the same.

21) With regard to the contention of learned senior counsel for the appellants herein that there can be no vicarious liability attributed to the Director, Deputy Director of a Company unless the Statute specifically creates so, 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 that too when the criminal act is that of conspiracy. Thus, an individual who has perpetrated the commission of an offence on behalf of the company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which an individual can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically invoking such a provision.

22) In view of the above, we are of the considered opinion that there was suppression of facts by both the Banks and the State Bank of Travancore was duty bound to inform the respondent-Company about the Assignment dated 29.03.2006. As regards the appellants herein, appellant No.1 herein has claimed to have joined the State Bank of Travancore on 11.05.2006 i.e. subsequent to the assignment deed dated 29.03.2006 whereas appellant No.2 was the signatory to the said deed.

23) There is no denying the fact that both the appellants were responsible for day to day functioning of the State Bank of Travancore. Furthermore, admittedly, appellant No.1 was in employment of the State Bank of Travancore at the time of the execution of the deed of assignment and the appellant No.2 was the signatory to it. On a bare perusal of the complaint, it creates an iota of doubt as to why the respondent-Company was kept in dark by the State Bank of Travancore at the time of alleged Assignment Deed dated 29.03.2006

24) However, from the admitted position, it is evident that the complainant-respondent Company in its wisdom had withdrawn the complaint against the two persons, who were the officers of the Kotak Mahindra Bank Ltd. from a common complaint made against four persons. However, we do not find any reason as to why the remaining two persons, being the present appellants, who were the officers of the State Bank of Travancore at the relevant time, are being prosecuted. Hence, the complaint against the present appellants does not survive and in the interest of justice the same is liable to quashed and is accordingly quashed.

25) In view of the above discussion, the appeal succeeds and is allowed. However, there shall be no order as to costs.

.....J. (R.K. AGRAWAL)J. (ADARSH KUMAR
GOEL) NEW DELHI;

MARCH 21, 2017.