



shakuntala

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO.8 OF 2024**

1. Cosmos Premises Pvt. Ltd.
a private company registered under the
provisions of the Indian Companies Act,
Having its local office 183/2,
Francisco Pereira Waddo,
Utorda, Salcete, Goa-403 713,
Represented through its authorized
Signatory, Mr. Shiwam Verma,
52 years of age, married, Indian National,
Having his office at the abovementioned
local office.
 2. Sunita Baljee, 69 years of age,
married, Residing at 124, III Main,
Defence Colony, Indira Nagar, Bangalore,
Karnataka, India-560038
-PETITIONERS

Versus

1. Novex Communications Pvt. Ltd.
A company incorporated under
the Companies Act 1956,
Having its registered office at B-301,
Remi Biz Court, Plot No.9, Shah Industrial
Estate, Off. Veera Desai Road, Andheri
(West) Mumbai-400058
 2. State of Goa,
Thro' Public Prosecutor,
High Court of Bombay at Goa,
Porvorim Goa.
- RESPONDENTS

Mr. Shivan Desai with Ms. Maria Veigas, Advocates for the Petitioners.

Mr. Iftikhar Agha with Ms. Valencia Fernandes, Advocates for Respondent No. 1.

Mr. Somnath Karpe, Additional Public Prosecutor for Respondent No.2.

CORAM: **BHARAT P. DESHPANDE, J**

RESERVED ON: 16th October, 2024.

PRONOUNCED ON: 21st October, 2024

JUDGMENT:

1. Rule.
2. Rule is made returnable forthwith.
3. Matter is taken up for final disposal at the admission stage with consent.
4. Heard Mr. Shivan Desai with Ms. Maria Veigas, learned Advocates for the Petitioners, Mr. Iftikhar Agha with Ms. Valencia Fernandes, learned Advocates for Respondent No. 1 and Mr. Somnath Karpe, learned Additional Public Prosecutor for Respondent No.2.

5. The legality or otherwise of the order passed by the Magistrate while issuing process against the Petitioners, is questioned in the present petition.

6. Mr. Desai learned counsel appearing for the Petitioners would submit that Petitioner No. 1 is a Company whereas Petitioner No. 2 is one of the Director of Petitioner No.1. He submits that somewhere in February 2023, Petitioner No. 1 received summons from the Magistrate, directing them to appear in connection with complaint lodged by Respondent No.1 for the offences punishable under Sections 418, 34, 51, 63, 69 of the Indian Penal Code (I.P.C. for short) and Section 200 of the Copyrights Act, 1957.

7. Mr. Desai would submit that first of all there are no specific allegations in the complaint as far as Petitioner No. 2 is concerned and also against Petitioner No. 1 who has been shown as represented by the Director who has already retired. He submits that the complaint also shows Accused No. 2 as a Beach Resort and Spa i.e. a Restaurant owned by Petitioner No.1 Company through its General Manager.

8. Mr. Desai would submit that Accused No. 2 cannot be an entity in the eyes of law as it is only a Hotel. Such an entity cannot be arrayed as an Accused. He submits that issuance of process against such entity which is not recognised in the eyes of law, as a legal person, itself shows non-application of mind.

9. Mr. Desai would submit that Accused No. 1-B is not at all connected with the day-to-day affairs of Accused No. 1 Company and there are no allegations showing any vicarious liability.

10. Mr. Desai would submit that Section 69 of the Copyright Act deals with offences by the Company and since there are no allegations as to who is responsible for day-to-day affairs of the Company, the complaint itself is defective. He submits that the role allegedly played by other Accused persons has not been disclosed in the complaint itself.

11. Mr. Dessai, places reliance on the following decisions:
(a) Dhariwal Tobacco Products Ltd. And Ors. Vs. State of Maharashtra & Anr. (2009) 2 SCC 370; (b) GHCL Employees Stock Option Trust Vs. India Infoline Ltd.

(2013) 4 SCC 505; (c)Sunil Bharti Mittal Vs. Central Bureau of Investigation (2015) 4 SCC 609; (d)Ravindranath Bajpe Vs. Mangalore Special Economic Zone Ltd. and others (2021) SCC OnLine SC 806.

12. Per contra, Mr. Agha would submit that the complaint contains sufficient details as to how the offence is committed under the Copyright Act by the Accused persons and the learned Magistrate has rightly appreciated such facts while taking cognizance and issuing process.

13. Mr. Agha would further submit that apart from the complaint, a legal notice was issued to the Accused persons before filing of the complaint, asking them to stop playing the music/songs on which the Complainant is having copyright and to pay compensation, however, there was no response.

14. Mr. Agha would submit that Section 69 (2) of the Copyright Act clearly provides that the Director/Manager of the said Company is entitled to be prosecuted. Finally, Mr. Agha would submit that the petition filed under Section 482 of the

Criminal Procedure Code (the Cr.P.C. for short), read with Article 226 and 227 of the Constitution of India, should not be entertained since the order passed by the Magistrate is not affecting the rights of the parties or finally deciding the issue involved therein. He would submit that such an order is neither interlocutory nor final and therefore, such proceedings should not be interfered with, at this stage.

15. Mr. Agha would submit that the Petitioners will be having a chance before the Magistrate to demonstrate that they are not connected with the day-to-day affairs of the Company or that they were not aware about playing such music/songs.

16. Mr. Agha placed reliance on the following decisions:

(a)Girish Kumar Suneja Vs. Central Bureau of Investigation (2017) 14 SCC 809; (b) Vinod Raghuvanshi Vs. Ajay Arora (2013) AIR SCW 6660; (c)ANI Technologies Private Limited, Bengaluru and others Vs. State of Karnataka and Another, 2022(2) AKR 234.

17. Rival contentions fall for determination.

18. A private complaint is filed by Respondent No. 1 which is a Company, through its representative, against M/s Cosmos Premises Private Limited, a Company incorporated under the Companies Act through its Directors, namely 1(a) Muthuswamy Krishnamurthy and 1(b) Sunita Baljee. Accused No. 2 is shown as Royal Orchid Beach Resort and Spa located at Utorda Beach, a restaurant owned by M/s Cosmos Premises Private Ltd through its General Manager, Mr Shivam Verma.

19. The complaint shows that the Complainant Company is in the business of obtaining rights in various kinds of music content and issuing Non-Exclusive NOC/permission of such work for on-ground public performances in commercial establishments, such as hotels, restaurants, bars, pubs, banquets, Discotheque and other establishments. It is then claimed that the Complainant Company has Assignment agreements with M/s Eros International Media Limited, Tips Industries Limited, SPI Music Private Ltd, Red Ribbon Entertainment Private Ltd, Yash Raj Films Private Ltd, Sai Productions, etc, who have exclusively transferred and assigned the on-ground public performance rights in “Sound

Recordings” of the songs contained in the Films which are part of the said Company, in favour of the Complainant Company.

20. It is further claimed that during the intervening night of 31/12/2021 and 01/01/2022, the Deputy Sales Manager of the Complainant received information and accordingly directed its representative to visit the premises of Accused No. 2. Accordingly, the representative by name Suraj Kumar visited Restaurant of Respondent No. 2 on two occasions i.e. on 31/12/2021 and 01/01/2022, and observed that there is infringement of copyright of sound recording in which the Complainant Company holds on-ground performance rights.

21. The representative of Complainant Company also observed that events were organised within the premises of Accused No. 2 and entry fee for the show was Rs.10,000/- (Rupees Ten Thousand only) per person. The representative also found that the songs which are assigned to the Complainant were played in the premises of Accused No. 2 without any permission or NOC.

22. The main contention of Mr. Desai that Accused No. 2 as arrayed in the complaint is only the hotel/restaurant which

cannot be considered as separate entity in the eyes of law, is absolutely correct as Royal Orchid Beach Resort and Spa is shown as a restaurant owned by M/s Cosmos Premises Private Limited. Thus, the inclusion of such resort and spa being restaurant, is itself incorrect. Such resort and spa is neither shown as a Company or a separate entity then the Accused No. 1. Thus, showing Accused No. 2 as a beach resort and spa through its General Manager would clearly go to show non-application of mind on the part of learned Magistrate, while issuing notice/summons.

23. Secondly, the complaint does show at some places that Accused Nos. 1(a) and 1(b) are the Directors of Accused No. 1 Company whereas Accused No. 2(a), Mr Shivam Verma is the Manager of the hotel/restaurant, there is absolutely no averment in the entire complaint that Accused Nos. 1(a) and 1(b) or Accused No. 2(a) are responsible for day-to-day affairs of the said Company or the restaurant

24. Section 69 of the Copyright Act, 1957 reads thus:-

69. Offences by companies.- (1) Where any offence under this Act has been committed

by 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 such 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 any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company, and it is proved that the offence was committed with the consent or connivance of, or is attributable to any negligence 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.

25. Mr. Dessai has rightly pointed out that Sub-Section (1) of Section 69 would clearly go to show that the Company could be prosecuted as a separate entity showing represented by a person who at the time of offence committed was in charge of and was responsible to the Company for the conduct of the business. Thus, provisions of the above Section would clearly go to show that the Company could be independently prosecuted along with the person who at the time of the commission of offence was responsible for the day-to-day affairs of the said Company.

26. Sub-Section (2) of Section 69 of the Copyright Act has to be read along with Sub-Section (1), even though, it starts with a non-obstante clause. It says that notwithstanding anything contained in Sub-Section (1), where an offence under this Act has been committed by the Company, and it is proved that the offence was committed with the consent or connivance of, or is attributable to any negligence 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.

27. Thus, Sub-Section (2) of Section 69 imposes a vicarious liability on the so called director, manager, secretary, or other

officer who commits an offence with consent or connivance of, or attributable to any negligence towards such offence. It thus shows that apart from the Company and the officer who is responsible for the conduct of the business of the Company, such other director, manager, secretary, or other officer having consent or connivance or negligence is liable to be prosecuted.

28. It thus shows that while launching prosecution, it is necessary for the Complainant first of all to implead the Company through the responsible officer who conducts the business of such Company at the first place and also could prosecute any other director, manager, secretary, or other officer in case of any connivance or consent or negligence on their part. However, the complaint must disclose relevant averments as to who is the officer responsible for the conduct of the business of the Company at the time of alleged offence as found in Sub-Section (1) of Section 69. Similarly, the complaint must contain the allegations regarding commission of offence by other director, manager, secretary, or other officer, who with consent or connivance of or is attributable to any negligence, towards commission of such offence.

29. Perusal of the complaint would go to show that except mentioning that Accused No. 1(a) and 1(b) and Accused No. 2(a) are the directors/managers, there are no specific allegations against them as required by law to be incorporated, so that they could be prosecuted for vicarious liability.

30. The Company is a separate entity who could be prosecuted. In this matter, the Company is the main Accused as according to the Complainant, the violation of the copyrights is by Accused No. 1 Company. Since it is an artificial person, it has to be operated through a human being who could be responsible for the business of the said Company. Thus, there has to be specific allegations against the particular officer of the said Company who is responsible for conducting the business. It is not necessary that such person conducting business of the Company is always the director or manager, secretary, etc. Under the Companies Act, day-to-day affairs of the Company or the conduct or the business of the Company could be assigned to any officer and only such an officer is liable to be prosecuted alongwith the Company and not each and every director.

31. The learned Magistrate while issuing process has passed following order:

“I have perused the complaint, documents deposition of the witnesses. I have heard Adv. Agha on behalf of the complainant. It is prima facie seen from the document on record that the exclusive right i.e. Copyright was conferred upon the complainant to play the sound music from various assignors. The agreements reflects on the same. However, as per PW2, the music was unauthorisedly played by the proposed Accused. Such acts prima facie constitute an offence and are likely to cause wrongful loss for the complainant. As such, cognizance is taken under Section 418 r/w 34 of IPC and Sections 51, 63 and 69 of Copyright Act, the same being cognisable offences as per ruling of Hon’ble Supreme Court. Issue s/s to the Accused.”

32. Perusal of above order would clearly go to show that there is clear non-application of mind as far as Accused No. 2 is concerned, which is clearly a Restaurant and not a legal entity in the eyes of law. Secondly, Accused No. 2(a) is shown as General Manager of the Restaurant. It is not known as to whether Accused No. 2(a) is an employee of Accused No. 1 Company and

whether he was responsible for the management of the business of the said restaurant, as on the date of alleged offence, there is no averment to that effect in the complaint.

33. As far as Accused No. 1(a) and 1(b) are concerned, there is also non-application of mind while issuing process as complaint is completely silent about their role in the business of the said Company and how they were liable and prosecuted in the matter.

34. In the case of ***Dhariwal Tobacco (Supra)***, the Apex Court has observed in paragraph 14 that summoning of accused in a criminal case is a serious matter. The Criminal law cannot be set into motion as a matter of course. The order of Magistrate summoning the Accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The Magistrate has to record his satisfaction with regard to the existence of a prima facie case on the basis of specific allegations made in the complaint, supported by satisfactory evidence and other material on record.

35. The Apex Court further observed in paragraph 19 that the role played by the accused persons in the capacity of Managing

Director, Secretary, or a Director is *sine qua non* for initiating criminal action against them. Such role must be disclosed in the complaint.

36. In the case of ***Sunil Mittal (Supra)***, the Apex Court observed in paragraph 20 while relying on the observations in *S.K. Alag Vs. State of UP* that the short question which arises for consideration is as to whether a complaint petition, even if given face value and taken to be correct in its entirety, disclosed an offence against the Appellant/Director for the offence alleged therein. While answering it, it is observed that even if Appellant was the Managing Director, he cannot be said to have committed an offence only under his capacity as Managing Director as such Director or an employee cannot be held to be vicariously liable for any offence committed by the company itself.

37. The matter in hand as well as the order of the Magistrate, would go to show that though there are allegations of violations of copyright, there is clearly an absence of specific allegations against Accused No. 1-A, 1-B and 2-A in the entire complaint,

about their specific role in the said company and how they are vicariously liable.

38. In the case of ***Ravindranath Bajpe (supra)*** the Apex Court observed in paragraph 27 that the Magistrate is duty bound to record his satisfaction about a prima facie case against the Accused, who are Managing Directors, Secretary or Directors of the company, and the role played by them in their respective capacities, which is *sine qua non* for initiating criminal proceedings against them.

39. Above observation is clearly applicable to the matter in hand as the order itself is clearly silent as to how there is a connection of the alleged offence with that of Accused No.1-A, 1-B and 2-A. Thus, it is clear that the impugned order suffers from non-application of mind.

40. Mr Agha while placing reliance on the case of ***Girish Kumar(supra)*** would submit that the order which is challenged in the present petition need not be interfered with as it is only issuance of summons and the Accused will get an opportunity to defend themselves and to show that they were

not liable to conduct the day-to-day business of the said Company. He submits that the order is an intermediate order as it could be considered as an interlocutory order, but when reversed has the effect of terminating the proceedings. He submits that the present order is not, terminating the proceedings and therefore, it needs no interference.

41. However, it is now well settled that once this Court observes that the order passed by the Court below is clearly demonstrating non-application of mind and it affects the rights of the parties as well as it would be a futile exercise to continue such proceedings as an abuse of process of law, this Court must step in by exercising its inherent powers under Section 482 of the Cr.P.C.

42. Accordingly, the impugned order suffers from non-application of mind and therefore, needs to be quashed and set aside.

43. The impugned order is, therefore, quashed and set aside as per prayer clause (a) which reads thus:-

(a) Pass a writ of certiorari or a writ in the nature of certiorari or any other appropriate order or direction, setting aside the Impugned Order dated 07.10.2022, thereby setting aside the Order taking Cognizance of the Complaint dated 02.03.2022 filed by Respondent against Petitioner.

44. Mr. Agha learned counsel appearing for Respondent No.1 seeks stay of the present order in order to approach the Higher Court. Accordingly, the order is stayed for a period of 6 weeks. However, during the said six weeks, Magistrate shall not insist of personal present of the Petitioner/Accused before the Court.

45. Rule is made absolute in above terms.

BHARAT P. DESHPANDE, J.