



\$~34 to 36, 50, 52, 54, 55

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.A. 147/2022**
GITANJALI GUPTA Appellant
versus

STATE OF NCT OF DELHI &
ANR. & ORS. Respondents

35.
+ **CRL.A. 148/2022**
GITANJALI GUPTA Appellant
versus

STATE OF NCT OF DELHI & ANR. Respondents

36.
+ **CRL.A. 150/2022**
BINOD MANDAL Appellant
versus

STATE OF NCT OF DELHI & ANR. Respondents

50.
+ **CRL.A. 158/2022**
DEEPAK RAO Appellant
versus

STATE OF NCT OF DELHI & ANR. Respondents

52.
+ **CRL.A. 160/2022**
SUNIL KUNJACHAN Appellant
versus

STATE OF NCT OF DELHI & ANR. Respondents



54.

+

CRL.A. 162/2022

SUNIL KUNJACHAN

..... Appellant

versus

STATE OF NCT OF DELHI & ANR.

..... Respondents

55.

+

CRL.A. 163/2022

SRINIVASA A

..... Appellant

versus

STATE OF NCT OF DELHI & ANR.

..... Respondents

Present:-

Ms. Rebecca M John, Senior Advocate with Mr. Setu Niket, Ms. Adya R Luthra, Ms. Salonee Keshwani and Mr. Rajat Bhatia, Advocates for in CRL.A. 147/2022 & CRL.A. 148/2022.

Mr. Siddharth Luthra, Senior Advocate with Mr. V.P. Singh, Mr. Abhimanyu Chopra & Ms. Aishwarya Modi, Advocates for the Appellant in CRL.A. 150/2022.

Mr. Siddharth Agarwal, Senior Advocate with Mr. V.P. Singh, Mr. Paresh B. Lal, Mr. Divyank Tyagi & Mr. Harsh Yadav, Advocates for the Appellant for CRL.A. 158/2022 & CRL.A. 163/2022.

Mr. Arvind Nayar, Senior Advocate with Ms. Bhargavi Kannan & Mr. Akshay Joshi, Advocates for the Appellant in CRL.A. 160/2022 & CRL.A. 162/2022.

Mr. Amit Chadha, APP for the State with ACP Sanjeev, Crime Branch in Item nos. 34 to 36, 50, 52, 54, 55.

Mr. Satya Prakash Gautam, Mr. Rahul Gautam, Mr. Arvial Anand, Ms. Sarita Gautam, Mr. Ajal B., Mr. Sanjeev Gautam, Advocates for the Complainant in Item nos. CRL.A. 147/2022, CRL.A. 150/2022, CRL.A. 158/2022, CRL.A. 160/2022.



CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER
% 19.04.2022

CM APPLs. 7164-65/2022 (for exemptions) in CRL.A. 158/2022
CM APPLs. 7168-69/2022 (for exemptions) in CRL.A. 160/2022
CM APPLs. 7172-73/2022 (for exemptions) in CRL.A. 162/2022
CM APPLs. 7174-75/2022 (for exemptions) in CRL.A. 163/2022

Exemptions allowed, subject to all just exceptions.

These applications stand disposed of.

CRL.A. 147/2022 & CrI.M.A. 6757/2022 (for interim relief),
CRL.A. 148/2022 & CrI.M.A. 6775/2022 (for interim relief) and
CrI.M.A. 6776/2022 (seeking leave),
CRL.A. 150/2022, CRL.A. 158/2022, CRL.A. 160/2022,
CRL.A. 162/2022, CRL.A. 163/2022

1. Issue notice. Mr. Amit Chadha, learned Additional Public Prosecutor for the State, accepts notice on behalf of the respondent No.1. Mr. Satya Prakash Gautam, the respondent No.2- complainant, appears in person, and accepts notice.
2. These seven appeals arise out of two summoning orders dated 23.03.2022, passed by the learned Additional Sessions Judge-02, E-Court, Shahdara, Karkardooma Courts [“the Sessions Court”], in two different FIRs which were registered at the instance of the complainant. The chargesheets have been filed under Section 3(1)(u) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 [“the Act”]. The appellants have filed these appeals under Section 14A of the Act, challenging the orders by which they have been summoned by the



Sessions Court.

3. The proceedings concern two public examinations which were conducted by the Delhi Subordinate Services Selection Board [“the Board”]. The first examination was conducted on 15.10.2018 for the post of *Primary Teacher* [“the 2018 examination”] and the second one was conducted on 18.08.2019 for the post of *Medical Social Worker* [“the 2019 examination”]. The principal allegation in the FIRs is that, in each of the said examinations, one question in the *Hindi Language and Comprehension* section was a caste based question, which attracted the offences as stipulated under Section 3 of the Act.

4. Separate FIRs were registered in respect of both the examinations,, and chargesheets have been filed in both the FIRs:-

- a. As far as the 2018 examination is concerned, FIR No. 146/2021, dated 21.06.2021, was registered at PS- Anand Vihar. In the chargesheet filed pursuant thereto, three persons have been named- Ms. Krithika P. Shenoy [*who is alleged to have set the paper in question*], Ms. Kalpana R. Shet [*who is alleged to have been the moderator of the paper*], and Mr. Binod Mandal, who is described as a Director-cum-Company Secretary of Manipal Technologies Ltd. [“MTL”], which was the agency responsible for setting and printing of the question paper for the said examination.
- b. In respect of the 2019 examination, FIR No. 145/2021, dated 21.06.2021, was registered at Police Station Anand Vihar. In the chargesheet filed pursuant thereto, four persons were sent up for trial namely, Ms. Krithika P. Shenoy [*who is alleged to have set the paper in question*], Ms. Kalpana R. Shet [*who is alleged to have*



been the moderator of the paper], Mr. Deepak Rao and Mr. Srinivasa A, both of whom were Directors of TestPrep Prints Private Ltd. [“TPPPL”], which was the agency entrusted with the setting, and printing of the paper in the said examination.

5. By the impugned orders dated 23.03.2022, the Sessions Court has issued summons to all the aforesaid persons, and additionally to Ms. Gitanjali Gupta, the then Chairperson of the Board, and to Mr. Sunil Kunjachan, who is stated to have been the Manager of MTL and TPPPL at the relevant times. [Although I am informed that there is no connection between MTL and TPPPL, it appears that Mr. Kunjachan left the services of MTL, and joined TPPPL, sometime between the 2018 examination and 2019 examination. The same two persons were also engaged to set and moderate both the papers in question.]

6. The summoning orders have now been assailed by Ms. Gitanjali Gupta and Mr. Sunil Kunjachan [in both cases], and by Mr. Binod Mandal, Mr. Deepak Rao and Mr. Srinivasa A. Both the summoning orders were also assailed by Ms. Krithika P. Shenoy and Ms. Kalpana R. Shet, but the appeals filed by them [CRL.As. 159/2022, 161/2022, 164/2022 & 165/2022] have been dismissed as withdrawn by a separate order passed today.

7. In the impugned orders, the Sessions Court has noted that the Board had filed a writ petition before this Court at the stage of investigation [W.P.(Crl) 667/2021 (*Delhi Subordinate Service Selection Board vs. Dr. Satya Prakash Gautam & Anr.*)], which was dismissed by a judgment dated 14.06.2021. The said writ petition was directed against an order of the Sessions Court dated 17.02.2021, whereby the complainant’s



application under Section 156(3) of the Code of the Criminal Procedure, 1973 [“CrPC”], was allowed. This Court, considering the judgments of the Supreme Court in *Swaran Singh vs. State* (2008) 8 SCC 435, and *Arumugam Servai vs. State of Tamil Nadu* (2011) 6 SCC 405, came to a *prima facie* view that the questions fall within the domain of an intentional insult or intimidation with an intent to insult members of the SC/ST communities within public view. The Court further held as follows:-

“48. As to whether the DSSSB was aware or not of the contents of the question papers set is a matter which can be ascertained only through investigation.

49. The aspect of invocation of Section 197 of the Cr.P.C. 1973 would apparently be considered only after the investigation is completed by the Investigating Agency as to who are the persons involved in the commission of the offences. It is essential to observe that though undoubtedly as recorded in the proceedings dated 23.10.2019 that the sealed covers giving the names of the paper setters have been submitted by the DSSSB, the same per se does not spell out the mode of examination of the setting of papers which would have to be investigated

50. The learned Trial Court vide its impugned order has not specified any offender and has only directed the registration of the FIR against the offenders for offences committed under the provisions of the Scheduled Caste/Scheduled Tribes (Prevention of Atrocities) Act, 1989 though in paragraph 10 it mentions that the alleged words in question papers of 2018 as pointed out by the complainant disclose the commission of various offences committed by the respondent DSSSB and an investigation is required into these.

51. At this stage, the Court merely stays the operations of the observations in para 10 of the impugned order dated 17.2.2021 wherein it observed to the effect



“discloses commission of various cognizable offences committed by the respondent/DSSSB, i.e., the petitioner herein, and an investigation is required into these” as the same can be ascertained only after the investigation is conducted by the Investigating Agency on registration of the FIR on the basis of the complaint that has been made by the complainant in relation to CT Nos. 13/18 and 16/19, till the conclusion of the investigation.

52. However, the staying of the operation of the impugned order to the extent that it observed in paragraph 10 of commission of offences by the respondent/DSSSB **does not amount to an expression on the aspect as to whether or not the DSSSB had committed any offence or not.** The contention that the DSSSB would not be vicariously liable qua the two offences alleged to have been committed as detailed in the complaint CT No.13/18 and 16/19 is also an aspect which cannot be ascertained without completion of investigation.

53. Furthermore, the contention of the DSSSB, the petitioner that it leaves the questions to the wisdom of the paper setters for such important exams as it conducts for selection of persons for public service and leaves the question set wholly to the domain and expertise of the paper setters *prima facie* does not appeal to a prudent person and if a fact, **the same can only be determined on investigation conducted qua which thus the investigation needs to be conducted.**”

[Emphasis supplied.]

8. A Special Leave Petition [SLP(Crl) 7757/2021 (*Delhi Subordinate Services Selection Board vs. Dr. Satya Prakash Gautam & Anr.*)], which was preferred by the Board against the aforesaid judgment dated 14.06.2021, was dismissed by the Supreme Court *vide* an order dated 08.11.2021.

9. By the impugned orders, the Sessions Court has summoned the



accused persons, as well as Ms. Gitanjali Gupta and Mr. Sunil Kunjachan, *inter alia* with the following observations:-

“3. *Prima facie*, contents of charge-sheet alongwith annexures indicate that the Question Paper containing caste based questions was outsourced by Accused DSSSB through Manipal Technologies Ltd. (MTL) situated at Manipal (Karnataka). Accused Binod Mandal was Director of MTL, Accused Kalpana R. Shet (both Hindi Lecturers) was the Question Paper Setter and Accused Krithika Shenoy was the maker/Moderator of Question Paper.

4. Ms. Geetanjali was the then Chairperson, DSSSB at the time the offences took place. The record and statements of witnesses, *prima facie* show the decision to set / print the question papers rested only with the Chairman DSSSB/accused and Chairman never raised any objection to any question in question papers set by Outsourcing Agency nor there was any mechanism also to cross check / vet or oversee them. Mr. Sunil Kunjachan was a Delhi based resource person and the main link between DSSSB and the outsourcing agency in Delhi. Being Manager (marketing), MTL would deal with DSSSB through him only.

5. Contrary to the conditions of the Service Level Agreement (SLA) (which prescribes approval / FTP verification by Chairperson DSSSB), the same was never done on instructions of Chairman DSSSB as decision to dispense with the compliances of conditions of SLA rested with the then Chairperson DSSSB. Despite the caste related question included once in the examination, nothing was done by accused DSSSB and instead it continued services of the same question paper setter and which resulted in repeat of caste based question in Examination held on 18.08.2019 i.e. very next year.

Ms. Geetanjali Gupta, was the Chairperson from



19.12.2017 to 29.07.2020, i.e. the period when both examination with question papers containing castiest remarks were held.

6. Accused Binod Mandal, being Director of MTL was also looking after the Confidential Branch of MTL and as Company Secretary, would take care of all contractual compliances of confidential printing division. The material indicates the questions were not vetted by Confidential Division of MTL or DSSSB to avoid any questions with political, religious or castiest overtones.

7. Prima facie there is sufficient material against accused Binod Mandal, Krithika P. Shenoy and Kalpana R. Shet to summon them for the alleged offences.

8. Considering the law laid down in judgment of Constitution Bench in Dharampal and ors. Vs. State of Haryana; Kishun Singh and ors. Vs. State of Bihar (Decided on 11.01.1993) and Nahar Singh Vs. State of UP (decided on 16.03.2022 by Hon'ble Apex Court), prima facie, I find sufficient material on record to summon Ms. Geetanjali Gupta, the then Chairperson DSSSB, and Sunil Kunjachan as accused persons for the offences as above."

10. I have heard Ms. Rebecca M. John, learned Senior Counsel for Ms. Gitanjali Gupta in CRL.As. 147/2022 & 148/2022, Mr. Siddharth Luthra, learned Senior Counsel for Mr. Binod Mandal in CRL.A. 150/2022, Mr. Siddharth Agarwal, learned Senior Counsel for Mr. Deepak Rao and Mr. Srinivasa A. in CRL.As. 158/2022 and 163/2022 respectively, and Mr. Arvind Nayar, learned Senior Counsel for Mr. Sunil Kunjachan, in CRL.As. 160/2022 and 162/2022, as well as Mr. Chadha.

11. Learned Senior Counsel for the appellants have principally advanced the following submissions:-



- a. Learned Senior Counsel contend that in the absence of prosecution being launched against the Board, MTL and TPPPL, the prosecutions against the officers/officials of the aforesaid corporate entities cannot be sustained. In order to make good their submission, they rely upon the judgments of the Supreme Court in *Aneeta Hada vs. Godfather Travels & Tours (P) Ltd.* (2012) 5 SCC 661, *Sharad Kumar Sanghi vs. Sangita Rane* (2015) 12 SCC 781 and *Dayle De'souza vs. Government of India* 2021 SCC Online SC 1012.
- b. Learned Senior Counsel for Binod Mandal, Srinivasa A, Deepak Rao and Sunil Kunjachan further submit that, neither the chargesheet, nor the summoning orders, disclose any specific role of the accused persons in connection with the alleged offences. Their contention is that there is no allegation with regard to participation in setting/finalising of the question papers by those persons, and merely holding the office of director/manager, is insufficient to foist criminal liability upon the aforesaid persons under Section 3(1)(u) of the Act.
- c. Learned Senior Counsel rely upon the judgment of the Supreme Court in *Sunil Bharati Mittal vs. CBI* (2015) 4 SCC 609 to contend that, in the absence of any provision for vicarious liability engrafted in the statute under which the offence is alleged to have taken place, the accused persons can be summoned only if some material is available with regard to their factual role in commission of the alleged offence(s).
- d. Learned Senior Counsel further submit that the interference of this



Court at the stage of summoning is justified in the facts and circumstances of the present appeals, as the summoning orders constitute considerable prejudice to the summoned persons, one of whom is a serving public official i.e., Ms. Gitanjali Gupta, and against whom no material whatsoever has been placed on record. In this regard, they rely upon the judgment of the Supreme Court in *Pepsi Foods Ltd & Anr vs. Special Judicial Magistrate & Ors.* (1998) 5 SCC 749.

12. As far as Ms. Gitanjali Gupta is concerned, Ms. John argues additionally that the documents enclosed with the chargesheet themselves show that the question papers, which had the alleged caste based offensive questions, were, in fact, not sent to the Board, and no official of the Board, including the Chairperson, had any role in setting or approval of the questions. In this connection, she refers to a document titled **“Procedure followed for preparation of Question Paper”** submitted by the Board, which also forms a part of the chargesheet.

13. Ms. John lastly submits that the sanction for prosecution of Ms. Gitanjali Gupta has not been obtained under Section 197 of the CrPC, and the summoning order is also vitiated on this ground, as she is a public official.

14. Mr. Chadha on the other hand argues that the role of Ms. Gitanjali Gupta, and the Directors of MTL/TPPPL is borne out by reference to the Service Level Agreements [“SLAs”] between the Board and the companies. He relies upon Clauses II (5) and (6) of the SLA to demonstrate that the approval of the Board was required under the SLAs for the examinations in question, and that the Chairperson was to



nominate the persons authorised to receive the question papers. As far as the role of each specific appellant is concerned, Mr. Chadha seeks some time to place on record a written submission with the relevant documents from the chargesheet against each of the appellant individually.

15. Having regard to the aforesaid arguments, I am of view that the matters require consideration. The Act contains no specific provision with regard to vicarious liability. In any event, none of the principal entities involved [viz., the Board, MTL or TPPPL] have been proceeded against in the chargesheet. The judgment of the Supreme Court in *Aneeta Hada* (supra) has been considered in *Sharad Kumar Sanghi* (supra) in the following terms:-

“11. In the case at hand as the complainant's initial statement would reflect, the allegations are against the Company, the Company has not been made a party and, therefore, the allegations are restricted to the Managing Director. As we have noted earlier, allegations are vague and in fact, principally the allegations are against the Company. There is no specific allegation against the Managing Director. When a company has not been arrayed as a party, no proceeding can be initiated against it even where vicarious liability is fastened under certain statutes. It has been so held by a three-Judge Bench in Aneeta Hada v. Godfather Travels and Tours (P) Ltd. [Aneeta Hada v. Godfather Travels and Tours (P) Ltd., (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241] in the context of the Negotiable Instruments Act, 1881.”

16. The principles have been laid down by the Supreme Court in *Sunil Bharti Mittal* (supra) as follows:-

“(iii) Circumstances when Director/person in charge of the affairs can also be prosecuted, when the company is



an accused

42. 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. It would be more so, when the criminal act is that of conspiracy. **However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.**

43. Thus, **an individual who has perpetrated the commission of an offence on behalf of a 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 he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.**

44. **When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect.** One such example is Section 141 of the Negotiable Instruments Act, 1881. In *Aneeta Hada [Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241]*, the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of “alter ego”, was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. **Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to**



the effect that such a person was responsible for the acts committed by or on behalf of the company.”

[Emphasis supplied.]

17. As far as Ms. Gitanjali Gupta is concerned, the “**Procedure followed for preparation of Question Paper**”, *inter alia* states:-

“In case of offline exams, the process is so designed that question papers prepared by subject experts are printed in a secret manner without any officer of the Board being privy to the contents. The printed question papers are received back from the printer in sealed boxes in which the question papers are kept in sealed packets. This sealed packet is sealed in the plastic envelope which can be used only once. Each question paper in the sealed packet is also sealed individually.

These Boxes are received in the Office of DSSSB one day before the examination in a truck sealed with one time lock facility i.e. the lock can be opened only by cutting the lock and not by any key etc. Thereafter, the seal of the container / truck is opened by cutting the one time lock through an electric cutter and is kept in the strong room specially prepared for the purpose. The entire process of receiving the truck, opening the lock and keeping the boxes in the strong room is duly video-graphed in presence of a team of officers of the Board. Thereafter, after tallying the figure of the boxes and also ensuring that seal of each box is intact the boxes are kept in the strong room which is duly locked and sealed by the team of officers. The entire process is duly video-graphed.

xxxx xxxx xxxx

In other words, the contents of the question papers are not shared with the Board Officials. The objective is to ensure utmost secrecy, fairness and integrity in the conduct of examination. DSSSB engages various expert agencies for deploying mobile jammers, paper setting, printing of papers, etc. to support it in conduct such examinations in a



professional and impartial manner. Thus, it is evident that the contents of the question paper are out of the bound of the officers of the Board and the individual paper is opened by the candidate in the examination hall himself.”

[Emphasis supplied.]

18. Having regard to the aforesaid position of law, in the absence of any provision for vicarious liability in the Act, I am *prima facie* of the view that the direct role of each of these appellants was required to be examined prior to summoning them. While the examination at the stage of summoning is of a *prima facie* standard, the existence of some *prima facie* material must be demonstrated. As far as Ms. Gitanjali Gupta is concerned, the document relied upon by Ms. John, *prima facie* demonstrates that, notwithstanding the contents of the SLAs, the question papers were, in fact, not submitted for approval to the Board, or any officers of the Board. Similarly, as far as the other appellants are concerned, they have been summoned only on account of their office as Directors/Managers of MTL/TPPPL. Even in the case of Mr. Sunil Kunjachan, the summoning order records that he was the main link between the Board and MTL/TPPPL. There, however, does not appear to be any specific material as to whether any of the said persons were aware of the contents of the question papers.

19. For the reasons aforesaid, the summoning orders against the aforesaid appellants are stayed until the next date of hearing.

20. Mr. Chadha is directed to place on record a consolidated written submission as to the role of each of the appellants, alongwith the supporting material in CRL.A. 147/2022, which is to be treated as the lead matter. He seeks, and is granted, four weeks' time for this purpose.



21. List on 11.07.2022.
22. A copy of the order be given *dasti* under the signatures of the Court Master.

PRATEEK JALAN, J

APRIL 19, 2022/ 'pv'

Click here to check corrigendum, if any