

Arjun Dev Nagpal Vs. Madhya Pradesh State Industrial Development Corporation Ltd

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Court : Madhya Pradesh

Decided On : Oct-31-2012

Appellant : Arjun Dev Nagpal

Respondent : Madhya Pradesh State Industrial Development Corporation Ltd

Judgement :

HIGH COURT OF MADHYA PRADESH : JABALPUR M.Cr.C. No.12847/2011
Arjun Dev Nagpal Petitioner vs. Madhya Pradesh State Industrial Development Corporation Limited Respondent

M.Cr.C. No.12851/2011 Arjun Dev Nagpal Petitioner vs. Madhya Pradesh State Industrial Development Corporation Limited Respondent

M.Cr.C. No.12854/2011 Arjun Dev Nagpal Petitioner vs. Madhya Pradesh State Industrial Development Corporation Limited Respondent

M.Cr.C. No.12864/2011 Arjun Dev Nagpal Petitioner vs. Madhya Pradesh State Industrial Development Corporation Limited Respondent

M.Cr.C. No.13039/2011 Arjun Dev Nagpal Petitioner vs. Madhya Pradesh State Industrial Development Corporation Limited Respondent

M.Cr.C. No.13041/2011 Arjun Dev Nagpal Petitioner vs. Madhya Pradesh State
Industrial Development Corporation Limited Respondent

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2. :: M.Cr.C. No.12857/2011 Arjun Dev Nagpal Petitioner vs. Madhya Pradesh
State Industrial Development Corporation Limited Respondent

M.Cr.C. No.13336/2011 Arjun Dev Nagpal Petitioner vs. Madhya Pradesh State
Industrial Development Corporation Limited Respondent

M.Cr.C. No.13850/2011 Arjun Dev Nagpal Petitioner vs. Madhya Pradesh State
Industrial Development Corporation Limited Respondent

M.Cr.C. No.13076/2011 Arjun Dev Nagpal Petitioner vs. Madhya Pradesh State
Industrial Development Corporation Limited Respondent

M.Cr.C. No.13080/2011 Arjun Dev Nagpal Petitioner vs. Madhya Pradesh State
Industrial Development Corporation Limited Respondent

M.Cr.C. No.13141/2011 Arjun Dev Nagpal Petitioner vs. Madhya Pradesh State
Industrial Development Corporation Limited Respondent ::

3. :: Shri Ajay Mishra, Senior Advocate with Shri Mukesh Sahu, Advocate for the
petitioner. Shri Sanjay K. Agrawal and Shri Piyush Bhatnagar, Advocates for the
respondent.

ORDER

Date of Hearing :

24. 07.2012 Date of Order :

31. 10.2012 This common order shall govern disposal of all the 12 petitions
preferred, under Section 482 of the Code of Criminal Procedure (hereinafter

referred to as the Code), for quashing of the proceedings pending before ACJM-cum-Special Magistrate (for MPSIDC cases), Bhopal, details of which may be summarized as under - Complaint For an Demand pertaining to MCrC R.T. not amount of notice issued dishonour of Rs. on cheque dated 12847/11 112/04 25.10.2003 3400000 4.2.2004 12851/11 148/05 25.4.2003 3400000 29.5.2003 12854/11 781/03 1.2.2002 6475000 20.2.2002 1.2.2002 2775000 12857/11 128/05 25.4.2002 3400000 14.5.2002 12864/11 503/03 30.6.2001 9250000 16.7.2001 13039/11 502/03 1.11.2001 6475000 20.11.2001 1.11.2001 2775000 13041/11 508/01 1.8.2001 6475000 10.8.2001 1.8.2001 2775000 13076/11 127/05 25.10.2002 3400000 22.11.2002 13080/11 504/03 1.5.2001 6475000 18.5.2001 1.5.2001 2775000 13141/11 1064/04 25.4.2004 3400000 27.5.2004 13336/11 2572/04 25.10.2004 3400000 24.11.2004 25.10.2004 40000000 13850/11 787/03 25.10.2001 3400000 8.11.2001 ::

4. ::

2. In each one of these cases, cognizance of the offence punishable under Sections 138 read with 141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the Act) was taken against a company namely M/s Geekay Exim (India) Limited, Kolkata [formerly named as M/s Majda East Land Leasing Co. Ltd.), a company registered under the Companies Act, 1956 through its Chairman, the petitioner here, Vice Chairman, Managing Director, as well as six Directors and Executive Director-cum-Company Secretary, upon a complaint made on behalf of the respondent viz. Madhya Pradesh State Industrial Development Corporation (for brevity MPSIDC.), a Government Company registered under the Companies Act.

3. Common averments made in the complaints may be summarized as under - The petitioner, being the Chairman, was the in- charge of and responsible for the conduct of the business of the company that has taken various loans cumulating to Rs.11,00,50,000/-. For repayment thereof together with interest as per terms of the agreement, cheques, as detailed above, were issued for or on behalf of the borrower company. However, the cheques were dishonoured by the Bank on ground of Insufficient Funds. Thereafter, despite service of respective demand

notice, the amount covered by the corresponding cheques/cheque was not paid by the company.

4. Learned counsel appearing on behalf of the petitioner have strenuously contended that his prosecution is liable to be quashed as an abuse of the process of the Court on the following grounds - ::

5. :: (i) The order taking cognizance without examining the officer authorized by the complainant was bad in law as the exemption under clause (a) of the proviso to Section 200 of the Code of Criminal Procedure was applicable to the complaint concerning any offence under the General Law and not an offence under a special statute like the N.I. Act. (ii) No notice of demand was served on the accused-company. (iii) The complaint is not maintainable as the cheques in question were presented after expiry of a period of 6 months from the actual date of their drawal and therefore, the complaint has been filed beyond a maximum limit of six months prescribed under Section 138(a) of the Act. (iv) No legally enforceable debt or liability was in existence on the respective dates simply because the cheques in question were issued as replacements against the earlier cheques for payment of the ICDs. (v) Since the Company has already gone into liquidation under the orders of Calcutta High Court, all the Directors and officers stand discharged as the same could not continue its business thereafter. (vi) In absence of specific averments explaining as to how the petitioner, being the Non-Executive Chairman/Director, was in-charge of day-to-day business of the company and responsible for conduct of its business, the requirements of Section 141 of the Act were not satisfied. ::

6. :: (vii) The petitioner had ceased to be Chairman/Director of the Company w.e.f. 20.9.2001, consequent upon his resignation. (viii) The complaint, bearing no.504/03 and called in question in MCrC No.13080/11, is barred by limitation.

5. In response, learned counsel for the complainant/ respondent has submitted that being the Chairman, the petitioner was prima facie in-charge of and responsible for the conduct of the business of the company. According to him, no interference with a legitimate prosecution is called for under the inherent powers on any other grounds raised by the petitioner. He has further pointed out that the

petitioners resignation said to have been tendered on 20.9.2001 was accepted by the Registrar of Companies on 12.10.2001.

6. At the outset, it may be observed that ground no.(i) [supra]. is apparently misconceived in view of the decision of the Apex Court in National Small Industries Corporation Ltd. v. State (NCT of Delhi) AIR 200.SC 1284.holding that every employee of Government Company is 'Public Servant' entitled to exemption under clause (a) of the proviso to Section 200 of the Code with regard to a complaint relating to the offence under Section 138 of the Act also.

7. Ground no.(ii) [above]. also does not have any merit in view of the well settled position of law, as propounded in Bilakchand Gyanchand Co., M/s. v. A. Chinnaswami AIR 199.SC 218.and reaffirmed in Rajneesh Aggarwal v. Amit J.Bhalla AIR 200.SC 51.that demand notice under S.138 sent to the director of the Company, who had signed the cheque on its behalf, amounts to notice to the Company itself. ::

7. ::

8. Admittedly, all the cheques in question bearing different future dates were issued on 20.1.2000 only. As explained by a three-Judge Bench in Ashok Yeshwant Badeve v. Surendra Madhavrao Nighojakar AIR 200.SC 131.and reiterated by a Bench of equal strength in Shri Ishar Alloys Steels Ltd. v. Jayaswals NECO Ltd. AIR 200.SC 116.- A 'post-dated cheque' is not payable till the date which is shown thereon arrives and will become cheque on the said date and prior to that date same remains of bill of exchange.

9. Accordingly, each one of the complaints was maintainable. Thus, ground no.(iii) above is not acceptable.

10. It is needless to say that the offence is a strict liability offence, which excludes the defence other than permissible as the conditions set out in Section 138 of the Act. Moreover, Section 139 of the Act creates a presumption, in favour of the holder of the dishonoured cheque that it was issued in discharge of a legally recoverable debt or liability (Rangappa v. Sri Mohan (2010) 11 SCC 44.referred

to). In this view of the matter, the ground no.(iv) also has no substance.

11. So far as ground no.(v) above is concerned, it is well settled that when a company, which committed the offence under S. 138 eludes from being prosecuted thereof, on account of complaint against it being dropped because of winding up proceedings ordered by Court, the Directors of that company can be prosecuted for that offence (See. Anil Hada v. Indian Acrylic Ltd. AIR 200.SC 145). Further, a company cannot escape from penal liability under Section 138 of the Act on the premise that a petition for winding up of the company was presented prior to the company being called upon by a notice to ::

8. :: pay the amount of the cheque (Pankaj Mehra v. State of Maharashtra AIR 200.SC 195.relied on).

12. Adverting to ground nos.(vi) and (vii), learned Senior Counsel Shri Ajay Mishra has vehemently argued that mere averment that the petitioner had the knowledge about functioning of the company was inadequate in the eyes of law to make him vicariously liable for the offence. To buttress the contention, he has placed primal reliance on decision of a three- Judge Bench in S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla (2005) 8 SCC 8.and the following set of precedents based thereon - (i) Sabitha Ramamurthy v. R. B. S. Channabasavaradhya, (2006) 10 SCC 581.(ii) Saroj Kumar Poddar v. State of NCT (Delhi), (2007) 3 SCC 693.(iii) N.K. Wali v. Shekhar Singh (2007) 3 SCC (Cri) 203. (iv) Ramrajsingh v. State of M.P. (2009) 6 SCC 72.(iv) K.K. Ahuja v. V.K. Vora (2009) 10 SCC 48.(v) National Small Industries Corporation Ltd. v. Harmeet Singh Paintal (2010) 2 SCC (Cri) 1113 (vi) Anita Malhotra v. Apparel Export Promotion Council, (2012) 1 SCC 520.

13. In S.M.S. Pharmaceuticalss case (supra), the nature and extent of the liability under Section 141 of the Act was explained in the following terms - The liability under S. 141 arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in ::

9. :: charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of 'every person' the Section would have said 'every Director, Manager or Secretary in a Company is liable'... etc. The legislature is aware that it is a case of criminal liability, which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

14. On a conspectus of subsequent decisions cited above on the subject, the Supreme Court in National Small Industries Corporation Ltd.s case culled out the following principles - (i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction. (ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company. (iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with. ::

10. :: (iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred. (v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with. (vi) If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.

(vii) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases.

. This decision was followed in Anita Malhotras case wherein the Court had to say that - This Court has repeatedly held that in case of a Director, the complaint should specifically spell out how and in what manner the Director was in charge of and was responsible to the accused company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient..

15. Coming to the facts of the case, it may be observed that the petitioner has been prosecuted in the capacity of the then Chairman of the Company. For a ready reference, relevant articles of association of the accused-company viz. Geekay Exim (India) Limited may be reproduced below - 7. Subject to the provisions of the Act and these Articles, the shares in the capital of the Company for the time being (including any shares forming part of any increased capital of the Company) shall be under the control of the Board who may allot or otherwise dispose of the same or any of them to such persons, in such proportion and on such terms and conditions and either at a premium or at par or (subject to compliance with the provisions of Section 79 of the Act) at a discount and at such times as it may from time to time think fit and ::

11. :: proper and, with the consent of the general meeting give to any person the option to call for or be allotted any class of shares of the Company either at par or at a premium or subject as aforesaid at a discount such option being exercisable at such time and for such consideration as the Board thinks fit.

125. The Board may appoint one of the Directors to be the Chairman and one of the Directors to be the vice- chairman of the Board and the Directors so appointed shall continue as chairman and vice-chairman until otherwise determined by the Board.

126. The Directors shall have power at any time and from time to time appoint any other person as a Director as an addition to the Board but so that the total number

of Directors shall not at any time exceed the maximum number fixed by these Articles. Any Director so appointed shall hold office only until the next Annual General Meeting of the Company but shall be eligible for re- election at such meeting.

16. A conjoint reading of Sections 5 and 291 of the Companies Act, 1956 with the definitions in clauses (24), (26), (30), (31), (45) of Section 2 of that Act would show that the following persons are considered to be the persons who are responsible to the company for the conduct of the business of the company: (a) the Managing Director(s); (b) the whole-time Director(s); (c) the manager; (d) the secretary; (e) any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act; (f) any person charged by the Board with the responsibility of complying with that provision (and who has given his consent in that behalf to the Board); and (g) where any company does not have any of the officers specified in clauses (a) to (c), any Director or Directors who may be specified by the Board in this behalf or where no Director is so specified, all the Directors. (Emphasis supplied) ::

12. ::

17. By reason of the legal fiction introduced by Section 141 of the Act, a person, though, not personally liable for commission of an offence under Section 138 would be vicariously liable therefor. However, it is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole. If the substance of the allegations made in the complaint fulfills the requirements of Section 141, the complaint has to proceed and is required to be tried with. In construing a complaint a hypertechnical approach should not be adopted so as to quash the same. The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind. These provisions create a statutory presumption of dishonesty, exposing a person to criminal liability if payment is not made within the statutory period even after issue of notice. It is also true that the power of quashing is required to be exercised very sparingly and where, read as a whole, factual foundation for the offence has been

laid in the complaint, it should not be quashed (Monaben Ketanbhai Shah v. State of Gujarat (2004) 7 SCC 1.relied on). Incidentally, these observations were quoted with approval in paragraph 17 of the judgment in S.M.S. Pharmaceuticalss case.

18. Re-affirming the ratio in Monabens case, the Apex Court in N. Rangachari v. Bharat Sanchar Nigam Limited AIR 200.SC 168.has laid down the following guidelines - It is not proper to split hairs in reading the complaint so as to come to a conclusion that the allegations as a whole are not sufficient to show that at the relevant point of time the appellant and the other are not alleged to be persons in-charge of the affairs of the company.. ::

13. ::

19. In Rangacharis case, rejecting the contention that being a nominated Chairman and holding an honorary post in the Company, the appellant was never assigned with any of the Company's financial or other business activities, the Court observed as under - A person normally having business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its memorandum or articles of association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. Therefore, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are in charge of the affairs of the company. It is not reasonable to expect him to knot whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of it. So, all that a payee of a cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in charge of its affairs..

20. A bare perusal of the complaints would reveal that it was specifically pleaded that being the Chairman of the Company, the petitioner was aware of every act as well as of the transaction of the company. Further, in the demand notices, he was referred to as the Chairman of the Company and, admittedly, no reply denying the aforesaid fact was sent on his behalf. Moreover, in the application under Section

245(2) of the Code, he did not prefer to raise the plea that he was not the Chairman. As pointed out already, cheques, as mentioned above, were issued in favour of the Government Company for and on behalf of Geekay Exim (India) Limited, for repayment of the outstanding amounts against the Inter Company Loan termed as ICDs and therefore, the petitioner as the Chairman of the borrowing Company could ::

14. :: not plead ignorance of the entire transaction (Everest Advertising (P) Ltd. v. State, Govt. of NCT of Delhi, (2007) 5 SCC 5.referred to).

21. Learned Senior Counsel, still making reference to a decision of the Division Bench in Dolly Devendrakumar Shah Versus State of M.P. 1984 MPLJ 331 has argued that the documents submitted by the petitioner to establish that his resignation was accepted on 12.10.2001 must be treated as undisputed. In that case, it was observed - A question of fact cannot be called to be a disputed question of fact merely because a fact, which cannot be disputed, has been denied by a party. To demonstrate, it is well recognized that 2 + 2 make four and if a party chooses to say that 2 + 2 do not make four, it would not be a disputed question of fact. Similarly, if there is a certified copy of a judgment showing a particular holding and if the other side were to dispute the judgment, or that the particular fact alleged was not decided by the judgment, which is very clear from the reading of the judgment that it was decided, such a denial would not make a question a disputed question of fact, because under Section 76 of the Evidence Act a judgment stands proved by production of the certified copy thereof.

22. The documents are in the form of copy of - (i) letter of resignation dated 29.8.2001. (ii) extract of minutes of the Board Meeting of the Company held on 20.9.2001 at Mumbai. (iii) Form 32 submitted in the office of Registrar of Companies dated 29.11.2001. (iv) Annual Return for the year 1999-2000 dated 3.1.2002.

23. As opined by the Supreme Court in a recent decision in Anita Malhotras case, certified copy of annual return coupled with simple copy of Form 32 may be accepted as proof of any ::

15. :: directors resignation. Thus, on one hand, the question as to whether the petitioner, at the time when the offence was committed, was in charge of, or was responsible to the company for the conduct of the business of the company as its Chairman or otherwise is matter of evidence, to be considered at stage of trial and on the other, even if the corresponding documents are taken at their face value, the fact that petitioners resignation from the post of Chairman was accepted on 12.10.2001 would not assume any significance as the complainant-Company may still prove that change in the management of the accused- Company was effected only to avoid constructive liability, as contemplated in Section 141 of the Act. For this, the following observations made by the Apex Court in DCM Financial Services Limited v. J.N. Sareen (2008) 8 SCC 1 may usefully be quoted - When post-dated cheques are issued and the same are accepted, although it may be presumed that the money will be made available in the bank when the same is presented for encashment, but for that purpose, the harsh provision of constructive liability may not be available except when an appropriate case in that behalf is made out. (Emphasis added) 24. While pointing out that proviso to Section 141 of the Act clearly provides that if the accused is able to prove to the satisfaction of the court that the offence was committed without his knowledge or he had exercised due diligence to prevent the commission of such offence, he will not be liable to punishment, the Supreme Court in a recent decision rendered in Rallis India Limited v. Poduru Vidya Bhushan, (2011) 13 SCC 88.has proceeded to struck a note of caution: , we also take this opportunity to strike a cautionary note with regard to the manner in which the High Courts ought to exercise their power to quash criminal proceedings when such proceeding is related to offences ::

16. :: committed by companies. The world of commercial transactions contains numerous unique intricacies, many of which are yet to be statutorily regulated. More particularly, the principle laid down in Section 141 of the Act (which is in pari materia with identical sections in other Acts like the Food Safety and Standards Act, the erstwhile Prevention of Food Adulteration Act, etc. etc.) is susceptible to abuse by unscrupulous companies to the detriment of unsuspecting third parties..

25. Under these circumstances, as opined in Paresh P. Rajda v. State of Maharashtra AIR 200.SC 2357.it would be inappropriate to quash proceedings

against the petitioner, who has been prosecuted as the Chairman of the accused-Company. In other words, the petitions do not deserve acceptance on ground nos.(vi) and (vii) [above]..

26. The objection as to limitation in relation to complaint corresponding to MCrC No.13080/11 is also misconceived in view of the following facts - (i) Information as to dishonour of cheques was received on 11.5.2001. (ii) The demand notice-dated 18.5.2001 was served on the petitioner on 4.6.2001. (iii) The complaint was filed on 9.7.2001 i.e. well within the period of 30 days from the date of cause of action, under clause (c) of the proviso to Section 138 of the Act, that had accrued on 20.6.2001, the day immediately following the day on which period of 15 days from date of receipt of notice by drawer, expired.

27. The inherent powers, under Section 482 of the Code, are to be exercised *ex debito justitiae* to prevent abuse of the process of Court but not to stifle a legitimate prosecution, when the issue involved, whether factual or legal, can not be decided without sufficient material. ::

17. ::

28. For these reasons, no interference, under the inherent powers, with the prosecution of the petitioner in anyone of the cases is called for.

29. There is yet another aspect of the matter. The complaints, relating to dishonour of cheques covering a huge amount of public money, were filed in the year 2001 and Section 143(3) of the Act contains legislative mandate to expedite the trial and to conclude the same within 6 months from the date of filing of complaint. Most of the preliminary objections as to maintainability of the complaints as against the petitioner were raised in an application under Section 245(2) of the Code for his discharge while ignoring the well settled position of law as laid down in *Adalat Prasad v. Rooplal Jindal* (2004) 7 SCC 338.that the offence, under Section 138 of the Act, is triable by summon procedure that does not contemplate any stage of discharge after taking the cognizance thereof. Accordingly, learned Magistrate instead of considering the objections on merits ought to have rejected the application as not maintainable. Considering the

petitioners strategy to cause unnecessary delay, it is also necessary to impose exemplary costs in the light of guidelines laid down in Mary Angel v. State of T.N. AIR 199.SC 2245.

30. Consequently, each one of the petitions is dismissed with costs quantified at Rs.2,000/-. As an obvious consequence, all the interim stay orders stand vacated. Copy of this order be retained in each one of the connected petitions. (R.C. MISHRA) JUDGE 31 10.2012

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