

Anurag Modi, Vs. Mstc Ltd.

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Court : Delhi

Decided On : Oct-30-2001

Reported in : 95(2002)DLT203; 2002(61)DRJ220

Judge : K.S. Gupta, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 482; [Companies Act, 1956](#) - Sections 617; [Negotiable Instruments Act, 1881](#) - Sections 138 and 141

Appeal No. : Crl. M.(M) Nos. 1263, 4581, 4582, 4583, 4584, 4585, 4586, 4587, 4634, 4635, 4636, 4637, 4638, 4639,

Appellant : Anurag Modi, ;kusum Modi, ;ashish Modi and ;p.S. Santhanakrishnan

Respondent : Mstc Ltd.

Advocate for Def. : V.K. Shali, Adv.

Advocate for Pet/Ap. : A.S. Chandhiok, Sr. Adv.,; Gaurav Duggal,; Manmeet Arora

Disposition : Crl. M.(M) dismissed

Judgement :

K.S. Gupta, J.

for the offence under Section 138 of [Negotiable Instruments Act, 1881](#) (for short the 'Act').

4. Complaint case Nos. 710/1/97, 711/1/97, 713/1/97, 714/1/97 and 712/1/97 based on aforesaid cheques No. 841008, 841009, 841010, 841011 and 841012 respectively were filed by the complainant against accused No. 1-company and its five directors on dishonouring of cheques and non-payment of amounts thereof by them despite service of legal notices.

5. In aforementioned complaints, the accused were summoned to face trial for the offence under said Section 138. Application (s) jointly filed by accused Nos. 1 to 5 dated 8th July, 1997 and also filed by accused No. 6 separately seeking their discharge/release and dismissal of six complaints were dismissed by the Metropolitan Magistrate by the order dated 2nd September, 1998. Crl. R. Petition No. 75/98 filed by one of the accused against that order was dismissed by the order dated 6th March, 2000 by an Addl. Sessions Judge. Crl. R. Petition Nos. 111, 112, 113, 114 of 1999, 18, 19, 20, 21, 22, 23, 24, 35, 36, 37, 39, 40, 41 & 42 of 2000 filed by four accused against said order dated 2nd September, 1998 were also dismissed by the order dated 29th July, 2000 by the same Addl. Sessions Judge. In this batch of petitions, the petitioners seek setting aside of said orders together with summoning order and quashment of complaints pending against them.

6. Contention advanced by Sh. A.S. Chandhok for petitioners/accused was that post dated cheque Nos. 841007 to 841012 were Bills of Exchange and they became cheques on the dates written on them. Mrs. Kusum Modi, accused resigned as director of accused No. 1-company on 20th May, 1996 while Anurag Modi, accused on 1st October, 1996. Since both of them had ceased to be the directors of company much before 15th November, 1996 on which date first cheque No. 841007 became payable, they cannot be held vicariously liable for the offence arising out of non-payment of any of the said cheques. In support of submission, my attention was invited to the decisions in *Anil Kumar Sawhney v. Gulshan Rai*, : (1993)4SCC424 and *Ashok Muthanna & Ors. v. Wipro Finance Ltd.*, 2001 105 Comp. Cas. 203 as also photostats of certified copies of Form-32

pertaining to both the accused-petitioners. In Anil Kumar Sawhney's case, it was held that when a post dated cheque is written or drawn, it is only a bill of exchange and it becomes cheque under the Act on the date which is written on it and six months' limitation is to be reckoned for the purpose of Section 138(a) from the date written on the cheque. In view of this ratio, liability qua both the said accused for the offence under Section 138 of the Act would not arise if they had ceased to be the directors of accused No. 1-company on 20th May, 1996/1st October, 1996. But the question is as to when this aspect of the matter can be gone into by the Court? It is admitted case of parties that application seeking discharge/release was filed jointly by accused Nos. 1 to 5 on 8th July, 1997. In para No. 2 of this application, it is alleged that accused Nos. 2 to 5 resigned as directors of accused No. 1-company w.e.f. March 1997 which fact is specifically denied in the reply filed by the complainant. Accused Nos. 2 to 5 filed another application on 18th April, 1998 raising additional grounds. In para No. 2 of this application, it is stated that in the absence of proper instructions, the specific dates of resignation of directors were not mentioned in the previous application. Mrs. Kusum Modi resigned as director of company on 20th May, 1996 while Anurag Modi on 1st October, 1996. Bharat Kumar Modi and Ashish Kumar Modi resigned on 31st March, 1997. Date of deposit of Form-32 with the Register of Companies in respect of Mrs. Kusum Modi was disclosed as 14th October, 1996 while in regard to Anurag Modi as 29th November, 1996. 20th May, 1997 had been shown as date of deposit of Form-32 pertaining to Bharat Kumar Modi and Ashish Kumar Modi. Along with application, photostats of certified copies of Form-32 were also filed. In the reply to the application, it is pleaded that Board resolutions accepting resignations of said accused have not been placed on record; alleged submissions of Form-32 with Registrar of Companies is nothing but manufacturing of documents in back date with a view to avoid prosecution. To be noted that latter application was filed after more than 9 months of the filing of former application. Sh. V.K. Shali appearing for complainant relied upon certain authorities on the issue on hand which I propose to refer hereinafter. In *B.C. Sharma v. Shree Bhagwati Enterprises* : 1999VIAD(Delhi)521 , the ground taken by petitioner for dropping proceeding under Sections 138/141 of the Act was that he had resigned from the post of director of company on 19th January, 1991 and he had no concern with the

company on the date of issue of offending cheque dated 2nd June, 1995. In support of the ground, two Form No. 32 issued by Registrar of Companies - one showing the petitioner as having resigned w.e.f. 19th January, 1991 and other showing him as director up to 9th July, 1997 were filed. Taking note of inconsistency in the entries in two forms, it was held that date of resignation of petitioner as director was a disputed fact which could not be decided in proceeding under Section 482 Cr.P.C. In the decision in *Davinder Kaur and Anr. v. Small Scale Industries Development Bank of India and Anr.*, 1999 (2) All I B L J 97, two directors of accused/respondent No. 1-company claimed that they had ceased to be the directors by the date the offending cheque on behalf of company came to be issued. While dismissing the petition, it was held by Andhra Pradesh High Court that the claim of petitioners to the said effect could be looked into by the trial court and no investigation is supposed to be done by the High Court in proceeding under Section 482 Cr.P.C. Yet another decision in *Bharat Kumar Modi and Ors. v. Pennar Peterson Securities Ltd.*, 2000 (2) All I B L J 542, reveal that on dishonour of cheques issued by Kusum Ingots and Alloys Ltd., accused No. 1, six complaints under Section 138 of the Act were filed before XV Metropolitan Magistrate, Hyderabad. While seeking setting aside of summoning order, the plea taken by Mrs. Kusum Modi, accused No. 3 was that she had resigned as director of company w.e.f. 20th May, 1996. Anurag Modi, accused No. 6 also claimed to have resigned as director w.e.f. 1st October, 1996. In support of plea of resignations, Form-32 and other documents were filed. While dismissing the revision petitions against the order of summoning, it was held by Andhra Pradesh High Court that the fact that accused had resigned from respective dates was not known to the complainant and that exercise could be done only during trial. It may only be noticed that these very Form No. 32 have been made the basis by Mrs. Kusum Modi and Anurag Modi in the present proceedings. Considering the stand taken in the replies to applications dated 8th July, 1997 and 18th April, 1998 as also the ratio in said three decision, assertion about Mrs. Kusum Modi having resigned as director of company w.e.f. 20th May, 1996 and Anurag Modi on 1st October, 1996 being disputed facts, can be examined by the concerned Metropolitan Magistrate during trial and not in these proceedings under Section 482 Cr.P.C. Ashok Muthanna's case (*supra*) is distinguishable as genuineness of Form No. 32 therein

was not disputed by the counsel of respondent-complainant.

7. It was next contended on behalf of accused-petitioners that complainant does not have cause of action in regard to cheque No. 841007 dated 15th November, 1996 as notice as required by Section 138(b) of the Act was not served on the accused. Further, in the notice dated 26th December, 1996, deemed for an amount of Rs. 1,44,60,000/- including that of cheque Nos. 841007 and 841008 dated 18th November, 1996, was made and by the time this notice was issued, intimation from the bank regarding dishonour of these cheques, had already elapsed. Photostat copy of notice dated 5th December, 1996 sent by the complainant-respondent No. 1 through counsel to accused persons demanding payment of Rs. 50 lacs is placed at pages 49 to 52 on the file of Crl. M.(M) No. 4585/2000. Paras 3 & 4 of the notice which are material, are reproduced below:-

'3. That although the goods are sold by my client on Letter of Credit basis but on account of the past business relationship with your company and the fact that you all had represented that your company had financial problem, the goods were released on post dated cheques drawn on 15th February, 1996 the details of which are given below:-

1. Cheque No. 841007 dated 15/11/96 for Rs. 25,00,000/-2. Cheque No. 840008 dated 18/11/96 for Rs. 25,00,000/-3. Cheque No. 841009 dated 28/11/96 for Rs. 25,00,000/-4. Cheque No. 841010 dated 30/11/96 for Rs. 25,00,000/-5. Cheque No. 841011 dated 05/12/96 for Rs. 25,00,000/-6. Cheque No. 841012 dated 10/12/96 for Rs. 19,60,000/------Total: Rs.

1,44,60,000===== 4. The first and second post dated cheques, i.e. cheque Nos. 841008 and 841009 both for a sum of Rs. 25 lacs each were presented by my client to their banker, Indian Overseas Bank, Tolstoy Marg, New Delhi for encashment. However, banker, State Bank of India, Indore on account of insufficiency of funds.'

8. Legal notice dated 11th December, 1996 (copy at pages 48 to 51 on the file of Crl.M.(M) No. 4583/2000) was sent by the complainant on dishonour of cheque Nos. 840009 dated 28th November, 1996 and 84010 dated 30th November, 1996 for Rs. 25 lacs each. In para No. 4 of this notice it is stated that two cheque Nos.

841007 and 841008 for a sum of Rs. 25 lacs each were also dishonoured and notice dated 5th December, 1996 concerning those cheques had already been sent to accused persons. As noticed above, discharge/release was sought by accused Nos. 1 to 5 by filing application dated 8th July, 1997. In Para No. 4 of this application receipt of notice dated 5th December, 1996 in respect of two cheques No. 841007 and 841008 is admitted by the accused. Along with application, copy of notice dated 5th December, 1996 had been filed as annexure 'B'. It was pointed out on behalf of complainant that said notice after rectifying the typing mistake as regards number of cheque as 841007 in place of 841009 was sent under Certificate of posting to accused persons and said annexure 'B' is the copy of that notice sent through UPC. Contents of aforesaid para No. 4 of the notice dated 11th December, 1996, again para No. 4 of the application dated 8th July, 1997 and annexure 'B' read with notice dated 5th December, 1996 (copy at pages 49 to 52) leave no room for doubt that the notice dated 5th December, 1996 pertained to cheque No. 841007 instead of No. 841009 in addition to cheque No. 841008. Further, as cheque No. 841009 was payable on 28th November, 1996, it could not have been dishonoured before the date of presentation on 27th November, 1996. Thus, the contention about complainants' having no cause of action with respect to said cheque No. 841007 is repelled being without merit.

9. Coming to later limb of argument referred to above, it may be noticed that complainant has filed six complaints based on six cheques in question. Demand notice dated 5th December, 1996 pertains to cheque Nos. 841007 and 841008 while notice dated 11th December, 1996 to cheque No. 841009 and 841010. Demand notice dated 26th December, 1996 (copy at pages 57A to 57D on the file of Crl.M.(M) No. 4583/2000) relates to cheque No. 841011 and 841012. That being so, mere demand of consolidated amount of six cheques in the notice dated 26th December, 1996, would not supersede the said notice dated 5th December, 1996. Decision in *Suman Sethi v. Ajay K. Churiwal and Anr.*, : 2000 CriLJ1391 has no applicability to the facts of this case.

10. It was further urged on behalf of accused that the allegations made in complaints do not explain how the accused were responsible for the day to day functioning of the company and in the absence of such an Explanationn, the

accused cannot be held liable for the offence under Section 138 of the Act. Reliance was placed on the decisions in K.P.G. Nair v. Jindal Menthol India Ltd., JT 2000 (Supp) SC 519, Mahendra Pratap Singh Ratra and Anr. v. N.K. Metals and Anr., : 75(1998)DLT155 , K.K. Chug v. State and Ors., : 84(2000)DLT563 and Jord Engineers India Limited and Ors. v. Nagarjuna Finance Limited and Anr., 2000 (100) Comp Cas 691. Submission is, however, without any merit. Copy of the complaint in respect of cheque No. 841007 is placed at pages 30 to 39 on the file of Crl.M.(M) No. 4583/2000. Para No. 4 thereof which is material, reads as under:-

'4. That the respondent No. 2 is the Chairman-cum-Managing Director of the respondent No. 1 company and the respondent No. 3 Shri Ashish Modi, respondent No. 4 Shri Anurag Modi respondent No. 5 Mrs. Kusum Modi, respondent No. 6 Shri K.S. Santhankrishan are the Directors of the respondent No. 1. All of them were and are in-charge and responsible for the day to day business of the respondent No. 1 company at the time of issuance of the cheque in question in respect of which the offence under Section 138 of the Negotiable Instruments Act, besides other offences under IPC have been committed.'

11. Identical allegations seem to have been made in the complaints of remaining five cheques. The question whether accused 2 to 6 who, prima facie, were the directors of accused No. 1-company at the relevant time, were actually in-charge of and responsible for the day to day business of the company as alleged in above para No. 4, can be determined only after evidence is lead by the parties, by the concerned Metropolitan Magistrate. In this view of mine, I am supported by a decision of the Punjab & Haryana High Court in Manju Podar and Anr., v. Ashwani Kumar and Ors., 1996 (86) Comp Cas 631. In K.P.G. Nair, Mahendra Pratap Singh Ratra and K.K. Chug's cases (supra), no allegations were made in the complaints that the appellant/petitioner(s) were in-charge of and responsible to the company for the conduct of its business at the time of commission of the offence complained of. In Jord Engineers India Limited's case (supra), accused No. 4 was discharged because no qualification was attached to him as to what role he had played in the commission of offence under Section 138 of the Act. In view of what is stated in aforesaid para No. 4, none of these decisions have any applicability to

the facts of present case.

12. Yet another submission advanced on behalf of accused regarding improper mode of service of three demand notices dated 5th December, 1996, 11th December, 1996 and 26th December, 1996 is to be stated to be rejected in view of decision in SIL Import, USA v. Exim Aides Silk Exporters, Bangalore, : 1999 CriLJ2276 .

13. Consequently, aforementioned petitions are dismissed.

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