Suresh Jindal Vs. State and anr.

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Court : Delhi

Decided On : Nov-03-2008

Reported in : 154(2008)DLT588

Judge : Kailash Gambhir, J.

Acts : Negotiable Instrument Act - Sections 138, 138(2), 141 and 142; State Financial Corporation Act, 1955; Code of Criminal Procedure (CrPC) - Sections 482

Appeal No. : Crl. M.(C) No. 1514/2007

Appellant : Suresh Jindal

Respondent : State and anr.

Advocate for Def. : U.L. Watwani, Adv. and; V. Srivastava, Adv. for Respondent No. 2

Advocate for Pet/Ap. : Ashim Vachher, Adv

Disposition : Petition allowed

Judgement :

Kailash Gambhir, J.

1. By way of this petition filed under Section 482 Cr.P.C., the petitioner seeks quashing of complaint case No. 399/2004 filed by the respondent No. 2 under Section 138 r/w with Section 142 of the N.I. Act. Brief facts relevant for deciding the present petition as stated by the petitioner are that the respondent No. 2 is a body corporate constituted by the Central Government to promote industrialization through the process of giving financial assistance to small and medium industries by way of loan advances as per the provisions of the State Financial Corporation Act 1955. In the complaint filed by the said Corporation i.e., Delhi Financial Corporation under Section 138 r/w Section 142 N.I. Act, the petitioner has been impleaded asaccused No. 2 being Director of M/s. AAR EM Alloys (P) Ltd., Mr. Ramesh Chand Jindal, Director of the said company as accused No. 1 and M/s. AAR EM Alloys (P) Ltd., as accused No. 3. It is alleged in the complaint that accused No. 3 i.e., M/s. AAR EM Alloys (P) Ltd., approached the said Corporation for the advancement of loan amount of Rs. 59 lacs and acceding to their request the said loan amount was advanced by the Corporation in terms of the loan agreement dated 15.3.96 duly executed between the parties. The said loan agreement wassigned by the said two Directors on behalf of the company. It is furtheralleged that in discharge of their outstanding liability pertaining to the saidloan amount a cheque dated 8.12.2003 drawn on Indian Bank, MehrauliInstitutional Area for a sum of Rs. 1 lac was issued by Mr. Ramesh ChandJindal, accused No. 1, although in the complaint filed by respondent No. 2 it is wrongly stated that the cheque was issued by Mr. Suresh Jindal, accused No. 2.The said cheque was returned dishonoured with the remarks 'funds insufficient after the same was presented by respondent No. 2 with their bank. Legal notice of demand dated 15.1.2004 was sent by the complainant through registered A.D. cover and finding no response within the statutory period of 15 days, the said Corporation filed the complaint in question. The learned M.M. taking the cognizance of the complaint had issued summons against the petitioner as well as the other accused persons. During the pendency of the said complaint the other Director Mr. Ramesh Chand Jindal Chand who was the signatory and drawer of the said cheque in question died on 2.7.2006. The petitioner has sought quashing of the said complaint case primarily on the ground that the petitioner is nota drawer of the cheque in question and therefore, has not committed any offence

punishable under Section 138 of the N.I. Act. It is also contended that the cheque in question was issued by late Shri Ramesh Chand Jindal in his individual capacity from his own saving bank account and therefore, also thepetitioner cannot be made liable for dishonor of a cheque issued by theother accused in his individual capacity. It is also contended that no specific allegations have been leveled in the complaint against the petitioner attributing any role in the issuance of the said cheque or being responsible for day to day affairs and management of the company. It is also contended that even no valid notice as per requirement of Section 138 of Negotiable Instrument Act was served upon the accused. No legal notice was served upon the companyM/s. AAR EM Alloys (P) Ltd., therefore, the petitioner cannot be held vicariously liable for the acts and deeds of the company. Another ground of attack by the petitioner is abatement of the complaint case due to the demise of Mr. Ramesh Chand Jindal who was the signatory and drawer of the cheque. Counsel for the petitioner submitted that respondent No. 2 had failed to release the sanctioned credit facility to the said company due to which the said company became a sick unit. Counsel further submitted that respondent No. 2 had for cibly taken possession of the factory premises of company along with the plant and machinery which was later on auctioned by the respondent No. 2 in a high handed manner. The officials of the said Corporation kept on pressurizing the Directors of the said company as a result of which late Shri Ramesh Chand Jindal had issued a cheque of Rs. 1 lac from his personal account which cheque was returned dishonoured and led the respondent No. 2 to file the complaint case which is under challenge in the present petition, counsel contended. Counsel thus argued that once the cheque was issued by Mr. Ramesh Chand Jindal in his own individual capacity then as per the mandate of Section 138 of the N.I. Act, the petitioner could not have been held liable to face the criminal prosecution. In support of his arguments counsel for the petitioner placed reliance on the following judgments.

SMS Pharmaceuticals Ltd. v. Neeta Bhalla and Anr. : (2007)4SCC70

D.R. Gupta v. State and Anr. : 95(2002)DLT543

K. Seetharam Reddy v. Smt. K. Radhika Ran, Smt. Ch. Kasturi and Ors. 2001 (1) ALT (Crl) 175

G. Hanumantha Rao Bros. and Anr. v. Gaddam Lingalah and Anr. 2005 (1) ALD (Cri) 641.

2. Counsel for the petitioner also submitted that since Mr. RameshChand Jindal had already died and the petitioner who was not a drawer of thesaid cheque and against whom no averments have been made in the complaint disclosing his role qua the company at the relevant time of commission of the offence, therefore, the complaint filed by respondent No. 2 cannot proceed and needs to be quashed.

3. Refuting the said argument of the counsel for the petitioner, counsel for respondent No. 2 submitted that the present petitioner and the other director Mr. Ramesh Chand Jindal both being the signatories to the loan documents are responsible for the affairs of the company and the cheque in question was given in discharge of the liability of the company qua the respondent No. 2. The contention of the counsel for the respondent No. 2 is that even if the same was signed by Mr. Ramesh Chand Jindal the same cannot exonerate the petitioner from his liability who was not only a functional Director of the company but was a signatory to the loan agreement. Counsel for respondent No. 2 further submitted that petitioner had deliberately not filedcopy of the loan agreement along with the present petition and has wrongly placed reliance on the photo copy of the saving account pass book of Mr. Ramesh Chand Jindal which document was not before the trial court before issuance of the summoning order. Counsel for respondent No. 2 thus submitted that the is sues raised by the petitioner can only be decided in trial and therefore, the same are outside the purview of Section 482 of Cr.P.C., which remedy can be invokedonly under exceptional circumstances.

4. I have heard learned Counsel for the parties at consider able length and carefully gone through the documents filed on record. It is not in dispute that the cheque for a sum of Rs. 1 lac which is the basis of the complaint in question was issued by late Shri Ramesh Chand Jindal and photo copy of the same as placed on record clearly shows that the same was not issued by Mr. Ramesh Chand Jindal in his capacity as a Director of the company. There is no seal of the

company on the photo copy of the said cheque and the account number as indicated in the cheque coincides with the account number given on the photo copy of the saving bank pass book of Mr. Ramesh Chand Jindal. Evidently, the said cheque was issued by Mr. Ramesh ChandJindal from his personal saving account and not from the account of the company i.e., M/s. AAR EM Alloys (P) Ltd. It is also not in dispute that legal notice, photo copy of which has been placed on record was not issued by the respondent No. 2 against the said company. The same was sent in the name of the petitioner as well as Mr. Ramesh Chand Jindal without even disclosing their designation or status in the said company. Even in the said complaint case filed by the respondent No. 2, it has wrongly been stated that the cheque was prepared and signed by the accused No. 2 (Mr. Suresh Jindal) as a Director of accused No. 3(Company), whereas, the fact not in dispute is that the cheque was issued by the accused No. 1 (Mr. Ramesh Chand Jindal) and that too in his individual capacity. Nowhere in the complaint any averment has been made by respondent No. 2 as to how that petitioner is liable or responsible for the said dishonor of the cheque. It is no more res integra that for fastening vicariously ability on the Director of the company or against any other person necessary averment has to be made in the complaint to show as to when and how at the time the offence was committed such a person was in charge and was responsible to the company for the conduct or the business of the company as per the mandate of Section 141 of the N.I. Act and in the absence of such an averment the complaint against such a Director cannot be held to be maintainable. In this regard in N.K. Wahi v. Shekhar Singh : AIR 2007 SC1454 , the Hon'ble Apex Court observed as under

8. To launch a prosecution, therefore, against the alleged Directors there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are in-charge and responsible for the conduct of the business of the company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and the court can always come to a conclusion in facts of each case. But still, in the absence of any averment or specific evidence the net result would be that complaint would not been tertainable.

5. For better appreciation of the controversy it would be appropriate to reproduce Section 138 and 141 of N.I. Act at this juncture, which is as under Section 138. Dishonour of cheque for insufficiency, etc., of funds in the accounts Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for ``a term which may extend to two year'`, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) The cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) The payee or the holder induce course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer, of the cheque, ``within thirty days'`] of the receipt of information by him from the bank regarding the return of the cheques as unpaid, and

(c) The drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation: For the purpose of this section, debt or other liability'` means a legally enforceable debt or other liability.141. Of fences by companies. Offences by companies.

(1) If the person committing an offence under Section 138 is 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 the offence and shall beliable to be proceeded against and proceeded against and punished accordingly];

Provided that nothing contained in this Sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in Sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attribute to, any neglect on the part of, any director, Manager, secretary, or other office 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. Explanation: For the purpose of this section.

(a) Company' means any body corporate and includes a firm or other association of individuals; and

(b) Director'`, in relating to a firm, means a partner in the firm.

6. A plain reading of Section 138 of the Act makes it manifest that if a cheque is drawn by a person on an account maintained by him and issued for the discharge of an existing debt and the cheque bounces either on account of insufficiency of the funds or on account of a fact that it exceeds the amount arranged to be paid from that account, that person is deemed to have committed an offence. The section leaves no doubt and makes it manifest that the person who has drawn the cheque on his account alone is liable in the event of that cheque drawn by him

having bounced.

7. A complaint petition is maintainable at the instance of the person in whose favour the cheque was drawn to bring home the offence under Section 138 N.I. Act only when:

(i) The cheque was drawn by 'a person' And

(ii) The cheque was drawn on account maintained by 'him' with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, or any debt or other liability, is returned by the bank unpaid either because of insufficient amount in the account or due to the amount to be paid exceeds the amount in the account; and

(iii) In that event such a person shall be deemed to have committed an offence. However, Section 141 of the N.I. Act envisages a situation where the drawer of the cheque is a juristic person like a company or other association of individuals. The language of Section 141 of N.I. Act also makes it explicitly clear that if a person who has drawn the cheque is the company then not only the company alone but also every person who at the time the offence was committed was in charge and was responsible for the conduct of the business of the company is liable for the commission of an offence under Section 138 of N.I. Act. Section 141 of N.I. Act thus postulates three categories of persons who can be held liable and responsible for the penal consequences which are (i) the company in itself who committed the offence;(ii) every person who was in charge and was responsible for the conduct of the business of the company at the relevant time; (iii) any other person who is a Director or Manager or Secretary or an officer of the company with whose connivance or due to whose negligence the company had committed the offence. The Apex Court in SMS Pharmaceuticals Ltd. v. Neeta Bhalla and Anr. : (2007)4SCC70 has clearly held that in order to implicate any person it has to be averred in the complaint that such a person was in charge or responsible for the affairs of the company, in a case where the main offender is the company.

8. It would be relevant to reproduce the following paras from the said judgment:

16. In State of Haryana v. Brij Lal Mittal it was held that vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in charge of and was a lsores ponsible to the company for the conduct of its business 10. Simply because aperson is a director of a company, it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without beinga director a person can be in charge of and responsible to the company for the conduct of its business.

17. K.P.G. Nair v. Jindal Menthol India Ltd. was a case under the Negotiable Instruments Act. It was found that the allegations in the complaint did not in express words or with reference to the allegations contained therein make out a case that at the time of commission of the offence, the appellant was in charge of and was responsible to the company for the conduct of its business. It was held that the requirement of Section 141 was not met and the complaint against the accused was quashed. Similar was the position in Katta Sujatha v. Fertilizers and Chemicals Travancore Ltd. This was a case of a partnership' It was found that no allegations were contained in the complaint regarding the fact that the accused was a partner in charge of and was responsible to the firm for the conduct of business of the firm nor was there any allegation that the offence was made with the consent and connivance or that it was attributable to any neglect on the part of the accused. It was held that no case was made out against the accused who was a partner and the complaint was quashed. The latest in the line is the judgment of this Court in Monaben Ketanbhai Shah v. State of Gujarat It was observed as under:

4. 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 fulfil the requirements of Section 141, the complaint has to proceed and is required to be tried with. It is also true that in construing a complaint a hyper technical 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. All the same, it is also to be remembered that it is the duty of the court to discharge the accused if taking everything stated in the complaint as correct and construing the allegations made therein liberally in favour of the complainant, the ingredients of the offence are altogether lacking. The present case falls in this category as would be evident from the facts noticed here in after.It was further observed: (SCC pp.' 18-19, para 6)6. ...The criminal liability has been fastened on those who, at the time of the commission of the offence, were in charge of and were responsible to the firm for the conduct of the business of the firm. These may be sleeping partners who are not required to take any part in the business of the firm; they may be ladies and others who may not know anything about the business of the firm. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and establishes that fact. The present case is of total absence of requisite averments in the complaint.

9. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments

contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

10. The said legal position stands crystallized in the above case and also in the other judgments cited by the counsel for the petitioner, there fore, the same need not be dealt with separately. Adverting back to the complaint case filed by respondent No. 2, it is clearly borne out that the cheque in question was signed by late Mr. Ramesh Chand Jindal in his individual and personal capacity from his saving bank account and there fore, the cheque not being drawn by Mr. Ramesh Chand Jindal either in his capacityas a Director of the company or in any other capacity to represent the interest of the company, the present petitioner who although might have been a Director of the company in whose favour the loan was advanced, cannot be made liable to face the criminal prosecution. Indisputably, the company is the principal offender and the Director becomes automatically liable due to the legal fiction created under Section 141 N.I. Act. For holding a person vicariously liable for an offence of which the principal accused is the company, it is essential that the incriminating act was done by him. When the petitioner was neither signatory to the cheques nor there is any averment to the effect that he was in charge of the day-to-day affairs of the firm, I do not find any reason for sustenance of the complainant against him. It is a trite law that criminal prosecution puts a person to a great harassment besides causing damage to ones esteem, therefore, the same cannot be resorted to unless the allegations made in the complaint disclose the commission of offence on the part of a person being impleaded in the case. Even in the legal notice sent by respondent No. 2, the company was not put to notice nor anywhere in the complaint it has been disclosed that the present petitioner was in charge and responsible for the conduct of the business of the company and therefore in the absence of such an averment the complaint case filed by the respondent No. 2 cannot be held to be maintainable against the petitioner. The other irony of the case is that the person

who is a drawer and signatory of the cheque in question has already died during the pendency of the case and due to that the complaint filed by the respondent No. 2 even cannot sustain against the deceased personas the liability of the criminal prosecution cannot be transferred upon the legal heirs of the deceased.

11. In the light of the above discussion the present petition is allowed. The complaint No. 399/2004 filed by the respondent No. 2 is accordingly hereby quashed.