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Court : Delhi

Decided On : Nov-20-2006

Reported in : 137(2007)DLT10; (2007)146PLR18

Judge : A.K. Sikri, J.

Acts : Negotiable Instrument Act - Sections 138 and 141

Appeal No. : Crl. M.C. 4821/2003

Appellant : Anil Kumar

Respondent : State and anr.

Advocate for Def. : U.L. Watwani, Adv. and ; Sandeep Sharma, Adv. for Respondent no. 2

Advocate for Pet/Ap. : Arun Sinha, Adv

Disposition : Petition allowed

Judgement :

A.K. Sikri, J.

1. M/s.Prem Nath Autos Pvt.Ltd., (hereinafter referred to as `the complainant') respondent no.2 herein has filed complaint under Section 138 of the Negotiable Instrument Act against two persons, namely, M/s.Om Sons Autos as Accused No.

1 and Shri Anil Kumar, Proprietor of M/s. Om Sons Autos impleading him as Accused No. 2. It is, inter alia, stated that complainant had supplied material to accused persons from time to time and discharged of their liabilities. Accused persons had issued different cheques on different dates for total sum of Rs. 17,76,470/-. These cheques which were 37 in numbers and particulars whereof are given in para-5 of the complaint were dishonoured on presentation. Legal notice dated 17.5.1997 was issued calling upon accused persons to make payment of the amount within 15 days from the date of the receipt of the said notice which was neither replied nor payment was made and, therefore, complaint was filed by the complainant. Vishnu Sharma, authorized representative of the complainant tendered his evidence by way of defense and was examined who exhibited various documents in his examination on the basis of which summoning orders were passed against the accused persons. Shri Anil Kumar, accused no.2 has filed this petition challenging the summoning orders. It may be noted that he had moved an application dated 2.11.2001 for recalling the summoning orders and his discharge, inter alia, alleging that:

(i)the present applicant has no concern or connection with the proprietorship concerned namely Om Sons Auto;

(ii)the Hon'ble Court after recording the evidence issued the summons to the proprietorship firm of Om Sons Auto;

(iii)the present applicant has not received any notice u/s. 138 of the N.I. Act which is mandatory in nature of any point of time.

(iv)the cheques in question, was never signed or issued by the present applicant;

(v)No liability in any manner occurred against the present applicant for discharge of the same by the applicant.

(vi)The issuance of the cheque in question, is not in the knowledge of the present applicant in any manner.

2. This application was dismissed by the learned Trial Court vide order dated 11.8.2003. In this petition, the petitioner prays for setting aside the aforesaid

orders and quashing of summoning orders passed against him. It may be stated at the outset that the Trial Court observed that the petitioner was in fact a partner and not a Proprietor of M/s.Om Sons Autos and he was inadvertently described as Proprietor of the said firm. Learned Magistrate, however, has stated that it would not be a ground to reject the complaint. It further noted that all the cheques issued in favor of the complainant would show that accused is a partnership firm and the cheques are signed by a partner of the firm. Even notice dated 17.5.1997 was given by the complainant through counsel, to accused as a partner of the firm . This aspect of the matter is not challenged by the petitioner in the present petition. thereforee, one has to proceed on the basis that the petitioner is arrayed as an accused in the capacity of a partner of M/s. Om Sons Autos.

3. Cheques in question are admittedly issued by the said firm and are signed by another partner of the firm. In this backdrop the contention which is pressed is that the petitioner is not the person responsible for the affairs of the firm and, thereforee, he could not be made an accused person. Submission of learned Counsel for the petitioner is that there is no averment against the petitioner to the effect that he was responsible for the affairs of the accused no.1 firm. It was submitted that there was not even averment to the effect in the complaint and referring upon the judgment of SMS Pharmaceuticals v. Neeta Bhalla : 2005 CriLJ4140 , learned Counsel contended that such a complaint qua petitioner was liable to be rejected and summoning order quashed. This contention of the petitioner placed before the Trial Court has been dealt with in the following manner in the impugned order dated 11.8.2003:

The plea of the accused Anil Kumar is that he had nothing to do with M/s. Om Sons Autos and that he did not sign any cheques and did not deal with the complainant company. This plea cannot be decided out rightly without the trial of the case. This plea has to be proved. In support of this contention Ld. Counsel for the accused has relied on the cases of Mukesh Aggarwal v. State and Anr. 2002(1) JCC 134 and K. Seetharam Reddy v. K. Radhika Rani and Ors. 2001 (1) CC C 326.

It may be pointed out that the complainant has not mentioned in so many words in the complaint that accused Anil Kumar is in charge of and responsible to the accused firm (sic.) for the conduct of its business. Merely because this is not mentioned in so many words in the complaint, is no reason to hold that accused No. 2 Anil Kumar is not liable. The language of Section 141 of the Act is not required to be reproduced. These are not any magic words. It is in fact the status and the role of the accused persons that determines whether they are in charge of the company and responsible to it for the conduct of its business.

In the case of *A.K. Goenka v. State and Anr.* 87 (2000) DLT, our own High Court has held that once the offence under Section 138 of the Act is complete, the law makes them responsible for the conduct of the business of the company and liable under a deeming provision. therefore, notice also is deemed to have been served on the accused company under Section 138 of the Act. Once an offence is complete under Section 138 of the Act by the company, its official as mentioned under Section 141 of the Act, become personally liable to be prosecuted. It is not for the complainant to research the working of the company before he exercises his right of moving the court under the Act. If the legislative intent was otherwise, the provision would state so. It is not for the courts to introduce their philosophy to change legislative intent. The complaint otherwise shows that the accused No. 2 has dealt with the complainant firm on behalf of the accused firm as its in charge and responsible to the accused firm for the conduct of its business. The complaint cannot be thrown out at this stage qua the accused No. 2. The contents of the complaint show that the accused No. 2 dealt with the complainant on behalf of the accused firm and that cheques were given by him. Whether the cheques were actually signed or not or signed by some other partners as contended by the applicant accused and the effect thereof can only be known at the time of conclusion of the case and not at this stage. In the case of *Pankaj Jain v. Gyanendra Pal Singh II* (1995) CCR 433 (All), the plea taken by the accused was that the cheques were issued by the other partner. It was held that it could not be pleaded that the cheques was issued by other partner. In para 3 of the complaint it is mentioned that the accused placed orders for goods and the accused agreed to make the payment at the agreed rate within stipulated period. In para 4 of the complaint it is mentioned that bills were issued by the complainant to the accused

and the accused issued different cheques on different dates for different amounts of money. The plea of the accused can be determined on the basis of evidence during trial.

Consequently, I find no merit in the application of the accused for his discharge. The application is dismissed.

Nothing stated therein before shall be construed as an expression on the merits of the case.

4. A perusal of the impugned order would thus show that admittedly the complainant has not stated categorically to the effect that petitioner is in charge of and responsible for the conduct of the business of accused no.1 firm. He has held that it is a matter of evidence. However, what persuaded the Trial Court to reject the application of the petitioner was that the complaint otherwise shows that he has dealt with the complainant firm on behalf of accused firm as its in charge and responsible to the accused firm of the conduct of the business. No such thing can be found out from the reading of the complaint. Moreover, holding the petitioner responsible on this basis may not be proper in view of the law laid down by the Supreme Court in the case of SMS Pharmaceuticals v. Neeta Bhalla (supra). In this judgment the Supreme Court has categorically held that there has to be specific averment in the complaint to the effect that such a person was not only in charge of and responsible to the company (or the firm as the case may be) for the conduct of its business but it was also required to be stated as to how and in what manner he was so responsible. In this case the entire complaint is silent about the role of the petitioner arrayed as accused no.2. The reason is obvious. Even if wrongly, in the complaint the petitioner is shown as Proprietor of OM Sons Autos and, therefore, in that capacity he was responsible for the affairs of Om Sons Autos. However, it turned out to be that he was a partner. The learned Trial Court rightly held that the complaint is not to be rejected because of this mis- description. But at the same time, specific averment had to be there as to how he was responsible for the affairs of the firm. In the absence of specific averment to this effect in the complaint as well as in the evidence of Vishnu Sharma, complaint against the petitioner shall not be maintainable in view of the ratio laid down in the

judgment of Supreme Court in the case of SMS Pharmaceuticals v. Neeta Bhalla (supra). The Trial Court is clearly in error in holding that 'the complaint otherwise shows that the accused who has dealt with the complainant firm on behalf of accused firm as its in charge and responsible to the accused firm of the conduct of the business'. The complaint does not show any such thing. The summoning order against the petitioner is, therefore, bad in law.

5. The petition is accordingly allowed and the summoning order is set-aside and the complaint against the petitioner is dismissed.

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