

(2020) 09 DEL CK 0138

In the Delhi High Court

Case No : Criminal Miscellaneous Case No. 1602 Of 2020, Criminal
Miscellaneous Application No. 9935 Of 2020

Alibaba Nabibasha

APPELLANT

Vs

Small Farmers Agri-Busines Consortium & Ors

RESPONDENT

Date of Decision : 23-09-2020

Acts Referred:

Negotiable Instrument Act, 1881 — Section 138, 141, 141(1)
Code Of Criminal Procedure, 1973 — Section 397, 482

Citation : (2020) 09 DEL CK 0138

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : V.M. Kannan, Punit Gaur

Final Decision : Disposed Of

Judgement

V. Kameswar Rao, J

1. The present petition has been filed by the petitioner primarily against R1 with the following prayers:

"It is most respectfully prayed that this Hon'ble Court may graciously be pleased to:

1) Allow the Petition and quash complaint case nos. 2863 of 2019, 2851 of 2019, 2856 of 2019, 2869 of 2019 and 2873 of 2019 under section 138 of the Negotiable Instruments Act, 1881 pending before the court of Ms. Alka Singh, Metropolitan Magistrate, South Delhi as against the Petitioner.

2) Pass such other order or further orders as this Hon'ble Court may deem lit and proper.

AND FOR THIS ACT OF KINDNESS THE PETITIONER

AS IN DUTY BOUND SHALL EVER PRAY."

2. It is the case of the petitioner and so contended by his counsel Mr. V.M. Kannan that the proceedings have been initiated by the respondent No.1 against the petitioner before the learned Metropolitan Magistrate (MM for short) Saket Courts, under Section 138 of the Negotiable Instruments Act, 1881 (NI Act hereinafter) purportedly on the ground that the petitioner was a Director of the respondent No.2. According to him, the cheques in question, all dated December 31, 2018 were issued by the respondent No.2 for a total amount of Rs.45 Lakhs and the same were dishonoured due to insufficient funds vide memo dated January 11, 2019. He stated that as per the complaints, the respondent No.1 had disbursed Venture Capital Funding of Rs.45 Lakhs to the respondent No.2 in terms of an agreement dated March 03, 2011. The cheques in question were purportedly issued by the respondent No.2 to discharge its liability towards the respondent No.1.

3. He submitted that the petitioner ceased to be a Director of the respondent No.2 w.e.f. October 27, 2010, at least eight years prior to the issuance of the cheques in question. The petitioner was a Non-Executive Director of the respondent No.2 for a brief period between October 07, 2009 to October 27, 2010. The resignation of the petitioner was also notified to the Registrar of Companies / Ministry of Company Affairs (MCA for short) by the respondent No.2 by filing Form 32 dated January 04, 2011, which is a public document.

4. According to Mr. Kannan, the respondent No.1 has suppressed these publicly available documents along with the complaint against the petitioner. He submitted that the Company's Master Data available on the website of MCA also does not reflect the name of the petitioner as a Director. However, the learned MM in a mechanical manner only by considering Company Master Data of the period when the petitioner was Director has entertained the complaint under Section 138 of the NI Act and without applying any judicial mind and without recording any satisfactory reasons as to whether the offence is made out against the petitioner has issued the summons.

5. He submitted that both the events that resulted in the complaints i.e. the agreement and the issuance of the cheques are events that took place after October 27, 2010 when the petitioner ceased to be a Director of the respondent No.2. The legal notice dated January 28, 2019 allegedly sent by the respondent No.1 was never received by the petitioner. Also the tracking report filed by the respondent No.1 in that regard before the learned MM does not show that the said notice was delivered to the petitioner. Even the averments in the complaints filed by the respondent No.1 are sketchy and in no way demonstrate how the complaints are maintainable against the petitioner. The essential ingredients for maintaining a complaint under Section 138 of the NI Act are absent with respect to the petitioner. The respondent No.1 has failed to show in what manner and how the petitioner was responsible for the affairs of the respondent No.2. The issuance of summons was contrary to the settled position of law in terms of the judgments of the Supreme Court and this Court which are referred as under:

- (i) Harshendra Kumar D. v. Rebatilata Koley and Others, (2011) 3 SCC 351;
- (ii) Anita Malhotra v. Apparel Export Promotion Council and Another, (2012) 1 SCC 520;
- (iii) Pooja Ravinder Devidasani v. State of Maharashtra, (2014) 16 SCC 1;
- (iv) J.N. Bhatia & Ors. v. State & Anr., 2006 SCC Online Del 1598;
- (v) Ashoke Mal Bafna v. Upper India Steel Manufacturing & Engineering Company Limited, (2018) 14 SCC 202;
- (vi) Kamal Goyal v. United Phosphorous Limited, CRL. M.C. 1761/2009, decided on February 04, 2010; and
- (vii) Sudeep Jain v. ECE Industries, CRL. M.C. 1821/2013 decided on May 06, 2013.

6. In support of his submissions, he has drawn my attention to various documents like the Form 32, Company Master data, cheque dated December 31, 2018, cheque return memo, the complaint and pre-summoning evidence filed before the learned MM. He states that it is a fit case where the proceedings initiated against the petitioner by the respondent No.1 needs to be set aside.

7. On the other hand, Mr. Punit Gaur, learned counsel appearing for the respondent No.1 contended that the respondent No.1 is a society registered under the Societies Registration Act, 1860 established by the Department of Agriculture & Cooperation, Ministry of Agriculture, Government of India, with the objective to facilitate agribusiness ventures in collaboration with private investment in close association with financial institutions. That as the respondent No.2 and its Directors needed Venture Capital Assistance (VCA for short) for setting up a mango pulp processing unit, they requested the respondent No.1 for VCA and accordingly, the accused respondent No. 2 provided the bio data of all the Directors including that of the petitioner.

8. According to him, the petitioner being a responsible Director of accused respondent No.2 participated in meetings and assisted the officials of the respondent No.1 who had visited the respondent No.2 for verification of its financial and physical status. He has drawn my attention to the photographs annexed at Annexure-F&G of the counter affidavit.

9. He stated that the respondent No.1 duly considered their request for VCA and sanctioned an amount of Rs.45,00,000/-vide order dated February 23, 2011 after which an agreement was executed between the respondent No.2 and the respondent No.1 dated March 03, 2011. Thereafter, the above-mentioned amount was disbursed vide demand draft dated January 04, 2011 bearing No.235630 drawn on State Bank of India.

10. He stated that when cheques became due, the respondent No.1 presented the same in its account in State Bank of India, Asian Games Village Complex,

Hauz Khaz, New Delhi, but all the cheques were returned with remarks 'funds insufficient'.

Thereafter, the respondent No.1 demanded payment through legal notice dated January 28, 2019 to all the accused Directors including the petitioner which were duly received by them according to the postal receipts, and after the receipt of legal notice neither the petitioner nor any of the other Directors considered giving a reply as to why the payment was not made. It is under such circumstances that the respondent No.1 was compelled to proceed under the provisions of the NI Act.

11. According to Mr. Gaur that on the complaints made by the respondent No.1, the learned MM has only issued summons to the petitioner. The petitioner is within his right to appear before the learned MM and put forth his defence that he has not committed any offence. In other words, the invocation of the jurisdiction of this Court is totally uncalled for.

12. That apart, he stated that merely showing the resignation letter of the petitioner from Directorship of the respondent No.2 does not entitle him to an acquittal from the alleged offence committed under section 138 of NI Act because it is a triable issue and would be decided by the trial court after affording full opportunity of being heard to both the parties. He stressed on the fact that it was the respondent No.2 and its Directors including the petitioner, who had sent a proposal for loan to the lending Bank and for VCA to respondent No.1, which was duly considered. In fact, according to him, the petitioner had participated in the deliberations that had taken place between the Officers of the respondent No.1 with the Directors of the respondent No.2.

13. That apart, the respondent No.2 had furnished the detailed project report which included bio data of the petitioner and a sale deed in favour of the respondent No.2 which was executed by the petitioner. In substance, it is his submission that the petitioner played a very important role on behalf of the respondent No.2 resulting in the sanction of the VCA. Moreover, neither the petitioner nor the respondent No.2 ever informed the respondent No.1 about the resignation of the petitioner. He stated that it is not a case where this Court in exercise of its power under Section 482 of the Code of Criminal Procedure, 1973 (CrPC hereinafter) should quash the proceedings initiated by the respondent No.1 under Section 138 of the NI Act and dismiss the present petition.

14. Having heard the learned counsel for the parties and perused the record, it is evident that this petition has been filed seeking quashing of five complaint cases initiated by the respondent No.1 against the petitioner herein. These complaint cases are primarily grounded on the return of five cheques which were issued on behalf of the respondent No.2 for a total amount of Rs. 45 Lakhs.

15. It is a conceded case, that summons have been issued to the petitioner on those complaint cases by the learned MM. The primary ground of challenge as contended by the learned counsel for the petitioner is that the petitioner was not

the Director when the underlying contract was executed between the respondent No.1 and respondent No.2, nor when the cheques were issued and when they were presented, inasmuch as the petitioner had resigned from the respondent No.2 much before, on October 27, 2010. In support of his submission, the petitioner and his counsel had relied upon Form 32 submitted to the Registrar of Companies / MCA by the respondent No.2 with regard to the fact that the petitioner ceased to be its Director.

16. There is no dispute that the petitioner has been named as accused No.4 in the complaints. The relevant paragraph in the complaints as well as pre-summoning evidence is as follows:

"4. That as per Company Master Data accused company is registered under the Companies Act and having CIN U15130TZ2009PTC015235 Roc Coimbatore, Registration No.015235 which incorporated on May 26, 2009 at present following persons are working Directors and responsible for day to day working and function of the company.

S. No.

1.

01130952

Naval Pakkam Ettinathan Kumar, Managing Director

26.05.2009

2.

01036883

Ettinathan Vinayagam Director

26.05.2009

3.

02791295

Alipbaba Nabibasha, Director

07.10.2009

17. In support of his submission, the learned counsel for the petitioner has drawn my attention to the Company Master Data at Annexure P6 to contend that the name of the petitioner has not been reflected as the Director of the respondent No.2. According to him, the reliance placed by the respondent No.1 is primarily on the Company Master Data having CIN U15130TZ2009PTC015235, RoC Coimbatore, Registration No.015235 and exhibited as PW1/9 wherein the name of the petitioner is reflected as one of the Directors, but the same is of the period when the petitioner was the Director in the said Company i.e. before

October 27, 2010. According to him, the Company Master Data of February 26, 2019 as relied upon by him does not depict the name of the petitioner.

18. The case of the respondent No.1 is primarily that the petitioner was involved in the discussion before an agreement was executed between the respondent No.1 and the respondent No.2. In support of his submission, he had relied upon the photographs (annexed at Annexure-F&G of the counter affidavit). On a specific query to the learned counsel for respondent No.1, whether he disputes the Form 32 as annexed by the petitioner at page 20 (of the petition), the answer was in the negative. In other words, he does not dispute the Form 32 annexed by the petitioner which depicts that the petitioner ceased to be the Director of respondent No.2. This factum surely suggests that the petitioner having resigned on October 27, 2010 from the respondent No.2 was not the Director when the agreement dated March 03, 2011 was executed. Even the cheque dated December 31, 2018 was also issued much after petitioner's resignation as the Director of the respondent No.2.

19. If that be so, the respondent No.1 ought not to have arrayed the petitioner as an accused in the proceedings. In cases where the accused has resigned from the Company and Form 32 has also been submitted with the Registrar of Companies then in such cases if the cheques are subsequently issued and dishonoured, it cannot be said that such an accused is in-charge of and responsible for the conduct of the day-to-day affairs of the Company, as contemplated in Section 141 of NI Act for being proceeded against.

20. It is also settled law that mere repetition of the phraseology of Section 141 of NI Act that the accused is In-charge and responsible for the conduct of the day-to-day affairs of the Company may not be sufficient and facts stating as to how the accused was so responsible must be averred. It is the case of the respondent No.1 that the petitioner was involved in the discussion and represented the respondent No.2 before the agreement was executed on March 03, 2011 but that does not mean even after his resignation he continues to be responsible for the actions of the Company including the issuance of cheques and dishonour of the same which then attracts proceedings under Section 138 of the NI Act against him.

21. It can be argued that the learned MM had issued the summons on the basis of the documents filed by the respondent No.1 with the complaints which depicts the petitioner as the Director in the respondent No.2; but the fact remains, had the learned MM called for the latest Company Master Data, along with the complaint, the learned MM would not have issued summons as it would have revealed that the name of the petitioner does not find mention and the petitioner was not In-charge of the Company. This I also say on the basis Form 32, which has not been disputed by Mr. Gaur. Accordingly, the summons issued against the petitioner were not justified.

22. This Court is conscious of the settled position of law that the High Court while

entertaining a petition of this nature shall not consider the defence of the accused or conduct a roving inquiry in respect to the merits of the accusation/s but if the documents filed by the accused / petitioner are beyond suspicion or doubt and upon consideration, demolish the very foundation of the the accusation/s levelled against the accused then in such a matter it is incumbent for the Court to look into the said document/s which are germane even at the initial stage and grant relief to the person concerned under Section 482 CrPC in order to prevent injustice or abuse of process of law. In my opinion the present petition would fall within the aforesaid parameters.

23. I must state that the learned counsel for the petitioner is justified in relying upon the judgment of a Coordinate bench of this Court in the case of J.N. Bhatia & Ors. (supra), wherein it was held as under:

"16. However, difficulty arises when the complainant states that the concerned accused was Director and also makes averment that he was in charge of and responsible for the conduct of its day-to-day business, but does not make any further elaboration as to how he was in charge of and responsible for the day-today conduct of the business. The question would be as to whether making this averment, namely, reproducing the language of Sub-section (1) of Section 141 would be sufficient or something more is required to be done, i.e. is it necessary to make averment in the complaint elaborating the role of such a Director in respect of his working in the company from which one could come to a prima facie conclusion that he was responsible for the conduct of the business of the company.

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24. Thus, what follows is that more bald allegation that a particular person (or a Director) was responsible for the conduct of the business of the company would not be sufficient. That would be reproduction of the language of Sub-section (1) of Section 141 and would be without any consequence and it is also necessary for the complainant to satisfy how the petitioner was so responsible and on what basis such an allegation is made in the complaint.

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32. It can, therefore, be safely concluded that the view, which is now accepted by the Supreme Court, is that more repetition of the phraseology contained in Section 141 of the NI Act, i.e. "the accused is in charge of and responsible for the conduct of the day-to-day affairs of the company", may not be sufficient and' something more is to be alleged to show as to how he was so responsible.

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48. In this petition specific averment is made by the petitioner that he was neither a Director of the company nor at all incharge of the company nor involved in day-to-day running of the company at the time of commission of the alleged offence in February and March, 1999 when the cheques were

dishonoured. What is stated is that the petitioner had resigned from the company on 4.2.1998 and copy of Form 32 was also submitted with the Registrar of Companies. Certified copy of Form 32 issued by the office of the Registrar of Companies is enclosed as per which, the petitioner resigned with effect from 4.2.1998. Cheques in question are dated 31.12.1998, which were issued much after the resignation of the petitioner as the Director and were dishonoured subsequently and notice of demand is also dated 8.2.1999 on which date the petitioner was not the Director, as certified copy of Form 32 obtained from the Registrar of Companies is filed indicating that the resignation was also intimated on 26.2.1998, which can be acted upon in view of judgment of this Court in *Saria Kumar Dr. (Mrs.) v. Srei International Finance Ltd.* (supra). The summoning order qua the petitioner is liable to be quashed. It is accordingly quashed and the complaint qua him is dismissed.

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76. Summoning orders are issued in all these cases. Sh. Mukhesh Punjwani, who is accused No. 4, has filed these petitions raising similar plea that he had tendered his resignation on 1.3.2002, which was accepted on 10.3.2002 and thereafter. Form 32 was filed with the Registrar of Companies. Cheques were allegedly issued on 20.3.2002, namely, after his resignation and were dishonoured much thereafter when he was not the director. It is further contended that apart from bald allegation that he was in charge of the affairs of the company, nothing is stated as to how he was in charge of and/or responsible for the conduct of the day-to-day business of the accused No. 1 company. The averments qua the petitioner herein contained in all these complaints are as under:

"The accused Nos. 2 to 4 are the Directors and accused No. 5 is the General Manager Finance, who are responsible for the day-to-day affairs of accused No. 1 company and are jointly and severally liable for the acts and liabilities of the accused No. 1 company."

77. On the basis of these bald averments, I am afraid, proceedings could not have been maintained against the petitioner herein, as it is not specifically stated as to how the petitioner was in charge of and responsible for the affairs of the company. The summoning orders qua the petitioner are hereby quashed and the complaints qua him are dismissed."

24. Additionally, in the judgement of Kamal Goyal (supra) on which reliance has been placed, this Court has held as under:

"12. In the case before the Hon'ble Supreme Court, the respondent No.1 had resigned from the Directorship of the Company under intimation to the complainant and, in these circumstances, the Hon'ble Supreme Court was of the view that a person who had resigned with the knowledge of the complainant in the year 1996, could not be a person in charge of the Company in the year 1999 when the cheque was dishonoured as he had no say in the matter that the

cheque is honoured and he could not have asked the Company to pay the amount. In my view even if resignation was not given by the petitioner under intimation to the complainant, that would not make any difference, once the Court relying upon certified copy of Form 32 accepts his plea that he was not a director of the Company, on the date the offence under Section 138 of Negotiable Instruments Act was committed. He having resigned from the directorship much prior to even presentation of the cheque for encashment, he cannot be vicariously liable for the offence committed by the Company, unless it is alleged and shown that even after resigning from directorship, he continued to control the affairs of the company and therefore continued to be person in charge of and responsible to the company for the conduct of its business."

25. Similarly, the Hon'ble Supreme Court in Harshendra Kumar D. (supra) has held as under:

"17. In this view of the matter, in our opinion, it must be held that a Director, whose resignation has been accepted by the company and that has been duly notified to the Registrar of Companies, cannot be made accountable and fastened with liability for anything done by the company after the acceptance of his resignation. The words "every person who, at the time the offence was committed", occurring in Section 141(1) of the NI Act are not without significance and these words indicate that criminal liability of a Director must be determined on the date the offence is alleged to have been committed.

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20. On 4-3-2004, the Company informed the Registrar of Companies in the prescribed form (Form 32) about the resignation of the appellant from the post of Director of the Company and, thus, the change among Directors.

21. The above documents placed on record by the appellant have not been disputed nor controverted by the complainants. As a matter of fact, it was not even the case of the complainants before the High Court that the change among Directors of the Company, on resignation of the appellant with effect from 2-3-2004, has not taken place. The argument on behalf of the complainants before the High Court was that it was not permissible for the High Court to look into the papers and documents relating to the appellant's resignation since these are the matters of defence of the accused person and defence is a matter for consideration at the trial on the basis of evidence which cannot be decided by the High Court. The complainants in this regard relied upon a decision of the Single Judge of that Court in Fateh Chand Bhansali.

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25. In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond

suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is a fairly settled now that while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents - which are beyond suspicion or doubt - placed by the accused, the accusations against him cannot stand, it would be travesty of justice if the accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

26. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In our opinion, the High Court fell into grave error in not taking into consideration the uncontroverted documents relating to the appellant's resignation from the post of Director of the Company. Had these documents been considered by the High Court, it would have been apparent that the appellant has resigned much before the cheques were issued by the Company.

27. As noticed above, the appellant resigned from the post of Director on 2-3-2004. The dishonoured cheques were issued by the Company on 30-4-2004 i.e. much after the appellant had resigned from the post of Director of the Company. The acceptance of the appellant's resignation is duly reflected in the Resolution dated 2-3-2004. Then in the prescribed form (Form 32), the Company informed to the Registrar of Companies on 4-3-2004 about the appellant's resignation. It is not even the case of the complainants that the dishonoured cheques were issued by the appellant. These facts leave no manner of doubt that on the date the offence was committed by the Company, the appellant was not the Director; he had nothing to do with the affairs of the Company. In this view of the matter, if the criminal complaints are allowed to proceed against the appellant, it would result in gross injustice to the appellant and tantamount to an abuse of process of the court."

26. Similarly, in Pooja Ravinder Devidasani (supra) the Hon'ble Supreme Court in para 22 has held as under:

"22. As held by this Court in Pepsi Foods Ltd. v. Judicial Magistrate, summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home

to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

27. Even in the recent judgment in the case of Ashoke Mal Bafna (supra,) the Hon'ble Supreme Court has held as under:

"9. To fasten vicarious liability under Section 141 of the Act on a person, the law is well settled by this Court in a catena of cases that the complainant should specifically show as to how and in what manner, the accused was responsible. Simply because a person is a Director of a defaulter Company, does not make him liable under the Act. Time and again, it has been asserted by this Court that only the person who was at the helm of affairs of the Company and in charge of and responsible for the conduct of the business at the time of commission of an offence will be liable for criminal action. (See Pooja Ravinder Devidasani v. State of Maharashtra)

10. In other words, the law laid down by this Court is that for making a Director of a Company liable for the offences committed by the Company under Section 141 of the Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company.

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12. Before summoning an accused under Section 138 of the Act, the Magistrate is expected to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and then to proceed further with proper application of mind to the legal principles on the issue. Impliedly, it is necessary for the courts to ensure strict compliance with the statutory requirements as well as settled principles of law before making a person vicariously liable.

13. The superior courts should maintain purity in the administration of justice and should not allow abuse of the process of court. Looking at the facts of the present case in the light of settled principles of law, we are of the view that this is a fit case for quashing the complaint. The High Court ought to have allowed the criminal miscellaneous application of the appellant because of the absence of clear particulars about the role of the appellant at the relevant time in the day-to-day affairs of the Company.

28. In view of my above discussion, the present petition needs to be allowed and the proceedings initiated by the respondent No.1 against the petitioner through complaint cases Nos. 2863 of 2019, 2851 of 2019, 2856 of 2019, 2869 of 2019 and 2873 of 2019 under Section 138 of the NI Act, pending before the learned

Metropolitan Magistrate, Saket Courts, and the resultant proceedings including summons issued thereon are quashed.

29. The petition is disposed of.

CRL. M.A. 9935/2020

Dismissed as infructuous.