

(2015) 05 DEL CK 0267

In the Delhi High Court

Case No : Criminal M.C. 2815/2012, CrI. M.A. No. 14102/2012, CrI. M.C. 2816/2012, CrI. M.A. No. 14104/2012, CrI. M.C. 2817/2012, CrI. M.A. No. 14106/2012, CrI. M.C. 2819/2012, CrI. M.A. No. 14113/2012, CrI. M.C. 4395/2014, CrI. M.A. No. 17954/2014, 15066/2014 and C

Ashesh Devendrabhai Vyas and Others APPELLANT

Vs

State of Delhi and Others RESPONDENT

Date of Decision : 11-05-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 251, 482

Foreign Exchange Management Act, 1999 — Section 3(2)

Negotiable Instruments Act, 1881 (NI) — Section 138, 145 (2)

Citation : (2015) 3 BC 82 : (2015) 220 DLT 101

Hon'ble Judges : Sunil Gaur, J

Bench : Single Bench

Advocate : A.R. Gupta, Aaditya Gupta and Vikrant Arora, for the Appellant

Final Decision : Disposed off

Judgement

Sunil Gaur, J.—In the above captioned six petitions, quashing of criminal complaint under Section 138 of Negotiable Instruments Act, 1881 (hereinafter referred to as "NI Act") and the common order of 2nd June, 2010 (vide which petitioners have been summoned as accused), is sought on merits by M/s. Rachana Global Excavation Limited and its Chairman, Managing Director and a Director.

2. In the above captioned four petitions, petitioner - Nalin, Chairman of M/s. Rachana Global Excavation Limited (hereinafter referred to as M/s. Rachana Global) and petitioner - Ashesh, Director of M/s. Rachana Global seek to challenge summoning order of 2nd June, 2010 on the ground that there are no averments to make them vicariously liable. Whereas, in the above captioned remaining two petitions i.e. CrI. M.C. No. 4395/2010 and CrI. M.C. 4396/2010, petitioner - M/s. Rachana Global and its Managing Director are seeking quashing of two criminal complaints under Section 138 of NI Act wherein the total cheque

amount is Rs. 27,84,52,604/- and Rs. 5,00,00,000/- respectively and quashing of these two complaints is sought on the ground that the aforesaid two post dated cheques were not issued in discharge of any debt or existing liability and receipt of these two cheques is hit by Section 3(2) of Foreign Exchange Management Act, 1999 (hereinafter referred to as "FEMA")

3. With the consent of learned counsel for the parties, the above captioned six petitions were heard together and are being disposed of by this common judgment.

4. The undisputed facts emerging from the two complaints in question are that a 100% foreign subsidiary of M/s. Rachana Global in Mozambique, Africa entered into a commercial relationship with a 100% foreign subsidiary of M/s. Jindal Steel and Power Limited (hereinafter referred to as M/s. JSPL) in Mauritius. The transaction between the parties stands explained in paragraphs No. 1 to 16 of the complaints in question and it needs no reproduction. It would be suffice to note that since M/s. JSPL had to pay US \$ 10 Million to M/s. Rachana Global under 1218 L and M/s. Rachana Global had to return US \$ 17,140,274 on account of cancellation of 929 L, 1242 L. The parties agreed to set off these amounts vide 1220L Amendment No. 3 Agreement dated 31.12.2009. Finally, M/s. Rachana Global became liable to pay to M/s. JSPL US \$ 7,140,274 by 31st January, 2010 along with interest @ 12 % pa w.e.f. 1st October, 2009 till 31st January 2010 which was calculated and agreed to be US \$ 2,85,611/- thereby totaling US \$ 7,425,885. M/s. Rachana Global gave a letter of 18th January, 2010 to M/s. JSPL in which M/s. Rachana Global acknowledged the liability of M/s. Rachana to pay US \$ 7,425,885 to M/s. JSPL and enclosed three post dated cheques of Rs. 20,00,00,000/-, Rs. 7,84,52,604/- and Rs. 5,00,00,000/- respectively, totaling to Rs. 32,84,52,604/- (equivalent to aforesaid US \$ 7,425,885) which were payable at Delhi and were dishonoured. Hence, two complaints in question were lodged.

5. To seek quashing of these two complaints in question and the common summoning order, it was vehemently contended by learned counsel for petitioners that these two complaints are bereft of necessary averments to impute vicarious liability on petitioners - Nalin and Ashesh. It was pointed out by learned counsel for petitioners that in these two complaints, there are no averments to indicate that petitioners - Nalin and Ashesh were Incharge and were responsible for the dishonor of cheques in question and so bald assertions made in these two complaints are not sufficient to hold petitioners - Nalin and Ashesh vicariously liable for the offence in question. It was pointed out that role of petitioners - Nalin and Ashesh is required to be highlighted as there is no deemed liability of a Director or Chairman of the company. To contend so, reliance is placed upon decisions in Central Bank of India Vs. Asian Global Ltd. and Others, AIR 2010 SC 2835 : (2010) 3 BC 597 : (2011) 163 CompCas 398 : (2010) CriLJ 4420 : (2010) 7 JT 88 : (2010) 11 SCC 203 : (2011) 1 SCC(Cri) 167 : (2011) 105 SCL 363 : (2010) AIRSCW 4671 ; Anita Malhotra Vs. Apparel

Export Promotion Council and Another, (2011) 4 RCR(Civil) 930 : (2011) 12 SCALE 471 : (2011) 6 UJ 3765 ; National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another, (2010) 1 BC 674 : (2010) 2 CompLJ 304 : (2010) CriLJ 1907 : (2010) 2 JT 161 : (2010) 2 SCALE 372 : (2010) 3 SCC 330 : (2010) 98 SCL 407 : (2010) 2 SCR 805 .

6. On behalf of petitioners - M/s. Rachana Global and its Managing Director - Manoj Kumar, it was vehemently submitted that as per the two complaints in question, the liability to pay the debt was of one foreign company - M/s. Rachana Global in Mozambique to another foreign company - M/s. JSPL in Mauritius and none of these companies are party to the complaints in question. Learned counsel for petitioners asserted that post dated cheques in question were enclosed with letter of 18th January, 2010 and in the said letter, it was specifically stated that these cheques were given as security and if M/s. Rachana in Mozambique does not clear the cheques towards M/s. JSPL in Mauritius on or before 31st January, 2010, then these cheques were encashable. Thus, it was contended that there was no legally enforceable debt when these three cheques were given to the complainant on 18th January, 2010. To submit that the instant case does not come within the ambit of Section 138 of NI Act, the reliance was placed on decisions in M/s. Indus Airways Private Limited and others v. M/s. Magnum Aviation Private Limited and Another 2014 SCC Online SC 305 ; Collage Culture and Others Vs. Apparel Export Promotion Council, (2007) 99 DRJ 251 : (2007) 8 ILR Delhi 1 ; Shanku Concretes Pvt. Ltd. Vs. State of Gujarat, (2000) CriLJ 1988 : (2000) 2 GLR 753 ; M/s. Balaji Seafoods Exports (India) Ltd. and another Vs. Mac Industries Ltd., (1999) 1 CTC 6 ; Icon Buildcon Pvt. Ltd. Vs. Aggarwal Developers Pvt. Ltd. and Others, (2014) 143 DRJ 136 .

7. Lastly, it was submitted on behalf of petitioners that permission of Reserve Bank of India for recovery of debt of a foreign company has not been taken and so the complaints in question are hit by FEMA. Thus, it is submitted that continuance of proceedings arising out of these two complaints is an abuse of process of law and so these two complaints deserve to be quashed.

8. Learned Senior counsel for respondent - complainant contended that whether a cheque is a security cheque or towards an outstanding liability, is a question of fact, which requires trial. It was pointed out that mere use of word "security" in letter of 18th January, 2010 does not change the nature of liability, which was existing and enforceable on the day of issuance of the cheques in question. It was vehemently asserted that even a Guarantor is liable for encashment of a cheque, which is towards discharge of debt of another person.

9. It was asserted on behalf of respondent - complainant that proceedings under Section 138 of NI Act pertaining to a cheque issued in discharge of a liability of their sister concern is very much maintainable. To assert so, reliance is placed upon decisions in Collage Culture and Others Vs. Apparel Export Promotion Council, (2007) 99 DRJ 251 : (2007) 8 ILR Delhi 1 ; Jyoti Build Tech Pvt. Ltd. and Others Vs. Mideast Pipeline Products, (2011) 183 DLT 680 ; C.V. Alexander Vs.

Joseph Chacko, (1995) 82 CompCas 368 ; I.C.D.S. Ltd. Vs. Beena Shabeer and Another, AIR 2002 SC 3014 : (2002) 3 BC 310 : (2002) 111 CompCas 742 : (2002) 4 CompLJ 359 : (2002) CriLJ 3935 : (2002) 4 Crimes 75 : (2002) 6 JT 119 : (2002) 5 SCALE 541 : (2002) 6 SCC 426 : (2002) 39 SCL 305 : (2002) 1 SCR 488 Supp : (2002) 2 UJ 1186 : (2002) AIRSCW 3358 : (2002) 6 Supreme 25 ; K.S. Bakshi and Another Vs. State and Another, (2008) 146 DLT 125 : (2007) 9 ILR Delhi 108 ; Krish International P. Ltd. and Others Vs. State and Another, (2013) 2 BC 340 : (2013) 179 CompCas 210 : (2013) 4 CompLJ 104 : (2013) 2 ILR Delhi 945 : (2013) 1 JCC 62 ; Anil Sachar and Another Vs. Shree Nath Spinners P. Ltd. and Others etc., (2011) 3 BC 508 : (2011) 3 CompLJ 654 : (2011) 8 JT 586 : (2011) 3 RCR(Criminal) 698 : (2011) 7 SCALE 730 ; HMT Watches Ltd. Vs. M.A. Abida and Others(2015) 4 AD 238 : (2015) 2 BC 267 : (2015) 125 CLA 333 : (2015) 2 CompLJ 449 : (2015) CriLJ 2408 : (2015) 2 RCR(Civil) 497 : (2015) 2 RCR(Criminal) 366 : (2015) 3 SCALE 832 : (2015) 130 SCL 511 ; N and S and N Consultants S.R.O Vs. SRM Exploration Private Limited, (2011) 3 AD 435 : (2011) 163 CompCas 97 : (2011) 2 CompLJ 306 : (2011) 179 DLT 685 : (2011) 122 DRJ 573 : (2011) 3 ILR Delhi 281 : (2011) 106 SCL 433 ; N. Rangachari Vs. Bharat Sanchar Nigam Ltd., AIR 2007 SC 1682 : (2007) 4 BC 516 : (2008) 1 CompLJ 124 : (2007) CriLJ 2448 : (2007) 3 CTC 495 : (2007) 6 JT 292 : (2007) 5 SCALE 821 : (2007) 5 SCC 108 : (2007) 5 SCR 329 : (2007) AIRSCW 2591 : (2007) 3 Supreme 626 .

10. As regards the complaints in question being hit by FEMA, it was submitted on behalf of respondent - complainant that no specific permission from Reserve Bank of India under the FEMA is required as the Foreign Exchange Management (Transfer or issue of foreign security) Regulation, 2000 permitted issue of such guarantees by holding companies, to or for the benefit of their overseas joint ventures or subsidiaries promoted or set up by them and in which they have made investments in accordance with the provisions of this Regulation.

11. It was next submitted by learned Senior Counsel for respondent-complainant that giving of such a guarantee is also permitted under Regulation 5 (b) of the Foreign Exchange Management (Guarantee) Regulations, 2000. It was pointed out that the only requirement is of reporting to Reserve Bank of India which too was the obligation of petitioner - M/s. Rachana Global and not of the answering respondent -complainant. In the last, it is submitted that Notice under Section 251 of Cr.P.C. has been already framed and application under Section 145 (2) of NI Act stands already allowed and these two complaints cases are at advanced stage of recording of evidence and thus no case for quashing of these complaints on merits is made out.

12. After having heard both the sides at length and on perusal of the complaints in question, material on record and the decisions cited, this Court finds that quashing of these two complaints in question is sought in the above captioned four petitions on the ground of there being no specific averments against the petitioners - Nalin and Ashesh. On this aspect, it is no longer res integra that

there has to be specific averments against Director or Officer of accused company for prosecution in complaint under Section 138 of NI Act for holding a person vicariously liable.

13. Keeping in view of the dictum of the Apex Court in Central Bank of India (supra), Anita Malhotra (supra) and National Small Scales Industries (supra), the two complaints in question have been perused and thereafter, this Court finds that it cannot be said by any stretch of imagination that the continuance of proceedings arising out of these two complaints is an abuse of process of law. Since the proceedings under Section 138 of NI Act, which are in fact summary proceedings, are at the advanced stage of recording of evidence, therefore, this Court does not deem it appropriate to declare whether petitioners - Nalin and Ashesh are vicariously liable or not. This question is left open to be determined at the final stage of trial.

14. Similarly, the question as to whether the cheques in question were towards existing liability or not, is not required to be pre-judged, when the summary proceedings under Section 138 NI Act are at the fairly advanced stage. To do so, it would be premature. In fact, it is quite debatable as to whether the cheques in question were security cheques or not and it would be most appropriate that this aspect is conclusively determined at the final stage after considering the evidence. Whether the use of word "security" in the letter of 18th January, 2010 would make it a security cheque or the cheques in question were legally enforceable on the day of issue, again falls in the realm of evidence.

15. It is settled legal position that this Court is not required to enter into the arena of disputed facts relating to the nature of transaction of being of assignment or of discharge of guarantee. Whether any specific permission is required from Reserve Bank of India under the FEMA is again a question of fact, which has to be considered in light of nature of transaction between the parties. In any case, this Court is of the considered opinion that no case for dropping of the proceedings against petitioners is made out as prima facie case is made out against petitioners to justify the continuance of proceedings, arising out of these two complaints in question. When the complaints in question are at advanced stage of recording of evidence, then meticulous examination of the averments in these complaints in the exercise of extra ordinary jurisdiction under Section 482 of Cr.P.C. is considered to be inappropriate as it cannot be said that the averments regarding the part played by petitioners in the transaction in question is lacking. Whether the averments against petitioners are clear or unambiguous can be effectively determined by trial court in the light of the available evidence on record. Since, prosecution of petitioners in these two complaints cannot be said to be vexatious or amounting to fishing inquiry against them, therefore, it cannot be said that continuance of instant proceedings against petitioners is an abuse of the process of the law.

16. With aforesaid observations, these petitions and the applications are disposed of while not commenting on the merits and with liberty to petitioners to

urge the pleas taken herein before the trial court at the final stage. As the complaints in question are pending adjudication for the last five years, therefore, the trial court shall make all endeavors to conclude the proceedings in these two complaints within this Calendar Year.