

(2007) 10 DEL CK 0265

In the Delhi High Court

Case No : Criminal M.C. No. 3206 of 2007

Bharat Poonam Chand Shah

APPELLANT

Vs

Dominos Printech India Pvt. Ltd.

RESPONDENT

Date of Decision : 10-10-2007

Acts Referred:

Companies Act, 1956 — Section 291
Criminal Procedure Code, 1973 (CrPC) — Section 482
Evidence Act, 1872 — Section 106
Negotiable Instruments Act, 1881 (NI) — Section 138, 141

Citation : (2008) 1 BC 618

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : Sunil Bainsla, for the Appellant; Nemo, for the Respondent

Final Decision : Dismissed

Judgement

Shiv Narayan Dhingra, J.—This petition u/s 482, Cr. P.C. is preferred by the petitioner challenging the summoning order dated 8th December, 2005 whereby the accused was summoned in a case u/s 138 of Negotiable Instruments Act.

2. The plea of the accused is that the accused was merely a sleeping director of the company and no specific role has been assigned by the complainant as to how the accused was managing the affairs of the company and only vague allegations have been made that the accused being a director, was responsible for management of the company. The other plea taken by the accused is that at the time when instrument was executed, the accused had already resigned from the directorship and he was not liable for dishonour of the cheque and the instrument was not signed by him.

3. When a cheque is issued by a company to a supplier or to any person against liability, the person only knows that the cheque was issued by the company. He may not be knowing the directors of the company. A creditor or supplier need not come in contact with directors of the company. He may be dealing with lower

level management of the company. When a cheque is dishonoured, he makes efforts to find out as to who were the directors. This information he gets from the Articles of Association of the company or from ROC Office. The documents which are prepared by the companies for public consumption, like Annual Reports, Articles of Association and Returns filed with ROC Office do not disclose as to who are the sleeping directors and who are active directors. This information is within the special knowledge of the company i.e. Board of Directors managing the company as per law. Section 106 of the Evidence Act provides that where a fact is in the special knowledge of a person, the burden of proving that fact lies on him. If any director of the company claims that despite being the director and legally responsible for management of the company in terms of the Companies Act, he was not the person looking after the affairs of the company, this fact has to be proved by him by cogent evidence before the trial Court concerned. Management of a company is an internal affair of the company. A creditor or supplier is not supposed to know neither can be presumed to know as to who are the sleeping directors or actively involved directors in the management of the company or who were the directors only lending their names. Only a director can prove all this before the trial Court.

4. The Supreme Court in *N. Rangachari v. B.S.N.L.* IV (2007) B.C. 516 : 11 (2007) C.C.R. 258 : 2007 L.J. 2448, observed as under:

13. A company, though a legal entity, cannot act by itself but can only act through its directors. Normally, the Board of Directors act for and on behalf of the company. This is clear from Section 291 of the Companies Act which provides that subject to the provisions of that Act, the Board of Directors of a Company shall be entitled to exercise all such powers and to do all such acts and things as the Company is authorized to exercise and do. Palmer described the position thus-

A company can only act by agents, and usually the persons by whom it acts and by whom the business of the Company is carried on or superintended are termed directors....

It is further stated in Palmer that:

Directors are, in the eye of law, agents of the company for which they act, and the general principles of the law of principal and agent regulate in most respects the relationship of the company and its directors.

The above two passages were quoted with approval in *R.K. Dalmia and Ors. v. The Delhi Administration* (1983) 1 S.C.R. 253. In *Guide to the Companies Act* by A. Ramaiya (Sixteenth Edition) this position is summed up thus:

All the powers of management of the affairs of the company are vested in the Board of Directors. The Board thus becomes the working organ of the company. In their domain of power, there can be no interference, no even by shareholders. The directors as a board are exclusively empowered to manage and are

exclusively responsible for that management.

Therefore, a person in the commercial world having a transaction with a company is entitled to presume that the directors of the company are in charge of the affairs of the company. If any restrictions on their powers are placed by the memorandum or articles of the company, it is for the directors to establish it at the trial. It is in that context that Section 141 of the Negotiable Instruments Act provides that when the offender is a company, every person, who at the time when the offence was committed was in charge of and was responsible to the company for the conduct of the business of the company, shall also be deemed to be guilty of the offence along with the company. It appears to us that an allegation in the complaint that the named accused are directors of the company itself would usher in the element of their acting for an on behalf of the company and of their being in charge of the company. In Gower and Davies' Principles of Modern Company Law (Seventh Edition), the theory behind the idea of identification is traced as follows-

It is possible to find in the cases varying formulations of the underlying principle, and the most recent definitions suggest that the Courts are prepared today to give the original formulation in the Lennard's Carrying Company case Lord Haldane based identification on a person "who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation". Recently, however, such an approach has been castigated by the Privy Council through Lord Hoffmann in the Meridian Global case as a misleading "general metaphysic of companies". The true question in each case was who as a matter of construction of the statute in question, or presumably other rule of law, is to be regarded as the controller of the company for the purpose of the identification rule.

But as has already been noticed, the decision in S.M.S. Pharmaceuticals Ltd. (supra) binding on us, has postulated that a director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of his business in the contest of Section 141 of the Act. Bound as we are by that decision, no further discussion on this aspect appears to be warranted.

14. A person normally having business or commercial dealings with the company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its Memorandum or Articles of Association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. Therefore, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are in charge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of it. So, all that a payee of that cheque that is dishonoured can be

expected to allege is that the persons names in the complaint are in charge of its affairs. The Directors are prima facie in that position.

15. In fact, in an earlier decision in *Monaben Ketanbhai Shah and Another Vs. State of Gujarat and Others*, , two learned Judges of this Court noticed that-

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.

16. in the light of the ratio in *S.M.S. Pharmaceuticals Ltd. (supra)* what is to be looked into is whether in the complaint, in addition to asserting that the appellant and another are the directors of the company, it is further alleged that they are in charge of and responsible to the company for the conduct of the business of the company. We find that such an allegation is clearly made in the complaint which we have quoted above. Learned Senior Counsel for the appellant argued that in *Saroj Kumar Poddar case (supra)*, this Court had found the complaint unsustainable only for the reason that there was no specific averment that at the time of issuance of the cheque that was dishonoured, the persons named in the complaint were in charge of the affairs of the company. With great respect, we see no warrant for assuming such a position in the context of the binding ratio in *S.M.S. Pharmaceuticals Ltd. (supra)* and in view of the position of the Directors in a company as explained above.

5. This Court under its inherent powers cannot adjudicate the facts as to who was the sleeping director or a non working director. It is undisputed that petitioner was the director of the company and the complainant has alleged him to be in charge of management. The resignation of the petitioner from the company, is a defense of the petitioner, which he can take before the trial Court concerned and this Court cannot quash a judicial order of summoning on the ground that the petitioner had resigned. The petitioner shall be given an opportunity before the Court concerned to prove that he was not a director at the relevant time. If an offence is committed by the company under 138 of NI Act, all those who were directors of the company, except those excepted by law are responsible. The accused/petitioner is not covered by exception laid down by law.

In view of my above discussion, I find no force in this petition. The petition is hereby dismissed.