(2011) 03 DEL CK 0010

In the Delhi High Court

Case No : Criminal M.A. No. 2039 of 2010 in Criminal M.C. No. 3200 of 2009, Criminal M.A. No. 1965 of 2010 in Criminal M.C. No. 3678 of 2009, Criminal M.A. No. 2037 of 2010 in Criminal M.C. No. 3693 of 2009 and Criminal M.A. No. 1963 of 2010 in Criminal M.C. No. 36

Hardeep Singh Nagra APPELLANT

Vs

State and Another RESPONDENT

Date of Decision : 04-03-2011

Acts Referred:

Companies Act, 1956 — Section 2, 2(24), 291, 5
Criminal Procedure Code, 1973 (CrPC) — Section 2, 200
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 141(1), 141(2)
Penal Code, 1860 (IPC) — Section 420

Citation : (2011) 8 AD 38 : (2011) 3 BC 135

Hon'ble Judges : D.K. Jain, J

Bench : Single Bench

Advocate : Harpreet Singh, Kuldip Singh and Sanjay Bhardwaj, for the Appellant; Janender Kumar Chumbak, for R-2, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Jain, J.—Vide these applications, the applicant is seeking recall of the order dated 21st January, 2010 whereby the criminal complaints filed by it, to the extent they pertained to the Petitioner Hardeep Singh Nagra, were dismissed. Criminal complaints u/s 138 of the Negotiable Instruments Act were filed by the applicant/complainant M/s Kotak Mahindra Prime Ltd. against Routes Car Rental Pvt. Ltd. and 3 others, including the Petitioner Hardeep Singh Nagra, who was impleaded as Accused No. 4 in the complaint. It was alleged in para 3 of the complaint that Accused Nos. 2 and 3 i.e. Sukhdev Dhillon and Syed Akthar Arshad were the directors of Accused No. 1 company and were officers engaged in day to day affairs of the company. As regards, the Petitioner/accused No. 4 Hardeep Singh Nagra, it was alleged in para 4 of the complaint that he had given personal guarantee to the complainant for the repayment of the loan advanced by the complainant company. The case of the complainant before the learned Metropolitan Magistrate was that the cheques, which had been issued to it towards partial discharge of the liability, when presented to the bank were dishonoured for want of sufficient funds and the accused persons had failed to make payment of the amount of the cheques despite notice to them.

2. When the petitions filed by Hardeep Singh Nagra were taken up for consideration on 21st January, 2010, no one appeared for the complainant/ applicant. This Court while allowing the petitions, inter alia, observed as under:

3. The Petitioner committed no offence punishable u/s 138 of Negotiable Instruments Act, merely by giving guarantee for the loans taken by accused No. 1 and 2. It is the drawer of the cheque who is liable to punishment in case the cheque used by him towards discharge in full or in part of a debut or liability, when presented to his bank for encashment, is dishonoured for want of funds and he fails to make payment within 15 days of receipt of notice envisaged in proviso (b) to Section 138 of the Act. There is no allegation in the complaint that the cheques in question were drawn by the Petitioner. Section 138 of Negotiable Instruments Act does not fasten any criminal liability on the guarantor of a loan secured or sought to be paid by way of a cheque, which, when presented to the bank for encashment is dishonoured for want of funds. Of course, the guarantor incurs a civil liability to pay the debt guaranteed by him and his liability may be joint as well as several, but, he is not liable to be punished u/s 138 of Negotiable Instruments Act.

4. Though learned Counsel for the Petitioner fairly conceded that the Petitioner is a Director in M/s Routes Car Rentals (India) Pvt. Ltd which has been arraigned as accused No. 1, there is no averment to this effect in the complaint. If the offence u/s 138 of Negotiable Instruments Act is committed by a company, every person who is in-charge of and responsible to the company for conduct of its business, at the time of commission of offence, is also liable to punishment on account of vicarious liability created by Section 141 of the Act. This is not the case of the complainant that Petitioner No. 4 was also a person in-charge of and responsible to the company M/s Routes Car Rentals (India) Pvt. Ltd. for conduct of its business. In the absence of such an averment in the complaint it also cannot be said that the Petitioner is vicariously liable for the offence committed by the company u/s 138 of the Negotiable Instruments Act on account of dishonor of the cheques issued by it and its failure to make payment even after the receipt of notice from the complainant.

3. It is alleged in the applications under consideration that though the complainant did not make any averment in the complaint to the effect that Petitioner was incharge of business and responsible for conduct of the day to day affairs of the company at the time of commission of offence, an application for amendment was filed by it in which it was specifically stated that he was one of the directors of the company, who was also in charge of day to day affairs of the company at the time when the cheques were handed over to the complainant,

were presented for payment and were dishonoured and the learned Metropolitan Magistrate had taken cognizance only thereafter.

4. A perusal of the record of the trial Court shows that an application was filed by the complainant alleging therein that the accused No. 4 was also one of the directors of the company, who was also in charge of day to day affairs of the company at the time when cheques in question were handed over to the complainant company, were presented for payment and were dishonoured. A perusal of the order of learned Metropolitan Magistrate dated 19th March, 2009 shows that the application was considered by him while taking cognizance and summoning the accused persons. In his affidavit filed initially by way of evidence, the sole witness produced by the complainant did not claim that Respondent No. 4 was a director of accused No. 1 company and was also in charge of its day to day affairs when the offence u/s 138 of the Negotiable Instruments Act was committed. An additional affidavit dated 19th March, 2009 was filed by the complainant, which also finds mention in the order passed by the learned Metropolitan Magistrate on that date and was thus considered by him before taking cognizance. It was averred in the affidavit that accused No. 4 was involved in day to day affairs of accused No. 1 company, when the cheques were issued and dishonoured.

5. The order passed by the learned Metropolitan Magistrate on 19th March, 2009 does not indicate that amendment of the complaint sought by the applicant was allowed by him, though the averments made therein as also in the additional affidavit filed by the complainant were considered. In any case, there is no provision in the Code of Criminal Procedure for amendment of a written complaint made to the Magistrate. Unlike Code of Civil Procedure, the Code of Criminal Procedure does not confer any inherent power on the Magistrate and he can exercise only those powers, which have been conferred on him under the Code.

6. The question whether amendment of a complaint can be allowed or not, came to be considered by the Supreme Court in Subodh S. Salaskar v. Jayprakash M. Shah and Anr., VII (2008) SLT 127. In that case, the complaint petition was sought to be amended by adding Section 420 of IPC in the complaint. It was held by the Court that the Magistrate had no jurisdiction to allow the amendment of the complaint petition at a later stage.

Similar view was taken by the Kerala High Court in T.J. Joy. s/o Joseph and Ors. V. Food Inspector and Anr. 2008 CrILJ 4643.

In Kunstocom Electronics (I) Ltd. v. Stae of M.P. and Ors. 2002(5) MPLJ 178, Madhya Pradesh High Court, noticing lack of any provision in the Code of Criminal Procedure giving right to the parties to file an application for amendment of pleadings and power to lower Courts to allow such an application, held that the trial Court committed an error in entertaining an application for amendment of the complaint. The Court was of the view that if there was any misstatement of fact in the complaint because of bona fide mistake or intention, the same could be explained in the court statement by the complainant.

7. In Adalat Prasad Vs. Rooplal Jindal and Others, , Supreme Court held that in the absence of specific power given to him by the Code, the Magistrate did not have power to recall the process issued by him against an accused. The Court did not agree with the contention that no specific provision of law was required for recalling an erroneous order and felt that recalling the process issued against the accused runs counter to the scheme of the Code, which had not provided for review of his order by the Magistrate. This view was reiterated by Supreme Court in Subramanium Sethuraman Vs. State of Maharashtra and Another, .

In Bharat Parikh Vs. C.B.I. and Another, , Supreme Court held that the Magistrate had no jurisdiction in law to recall an order framing charge against an accused.

8. In Dharmeshbhai Vasudevbhai and Others Vs. State of Gujarat and Others, , Supreme Court observed that the Magistrate does not possess any inherent power.

9. In Ramrajsingh Vs. State of M.P. and Another, , Supreme Court, inter alia, held 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 be entertain able.

10. However, there is no legal bar on the Magistrate taking the additional affidavit/evidence of the complainant before taking cognizance and proceeding against the accused persons. Section 200 of the Code of Criminal Procedure provides that a Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any. Section 2(d) of the Code of Criminal Procedure, which defines "complaint? makes it clear that the complaint can be made orally or in writing. Therefore, making an oral complaint to the Magistrate is not prohibited in law. While taking cognizance and deciding whether there is sufficient ground for proceeding, the Magistrate needs to take into consideration not only the averments made in the written complaint made to him, but also the statement made by the complainant and his witnesses before him u/s 200 of the Code of Civil Procedure. If the complainant has omitted some facts from the written complaint, nothing in law prevents him from including those facts in his statement to the Magistrate. The Magistrate is duty bound to consider those factual averments even if they are not contained in the

written complaint made to him. Therefore, while passing the order dated 19th March, 2009, the learned Metropolitan Magistrate has rightly taken the additional affidavit filed by the complainant by way of evidence, into consideration.

11. The main issue, which comes up for consideration in this case, is whether the averments made in the additional affidavit filed by the complainant disclose commission of offence u/s 138 read with Section 141 of the Negotiable Instruments Act.

12. In N.K. Wahi Vs. Shekhar Singh and Others, , the Hon?ble Supreme Court, inter alia, held as under:

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 be entertain able.

13. In K.K. Ahuja v. V.K. Vora and Anr. 2009 (3) JCC (NI) 194, the Appellant before the Hon?ble Court had imp leaded 9 persons as accused. They included, the company, its Chairman, four Directors, Vice-President (Finance), General Manager and Deputy General Manager. It was alleged in the complaint that "at the time of the commission of offence, accused 2 to 9 were in-charge of and responsible for the conduct of day to day business of accused No. 1" and therefore they were deemed to be guilty of offence u/s 138 read with Section 141 of the Act and Section 420 of the Indian Penal Code. The Appellant also alleged that "Respondents 2 to 9 were directly and actively involved in the financial dealings of the company" and that the accused had failed to make payment of the cheques which were dishonoured. In the pre- summoning evidence, the Appellant "reiterated that accused 2 to 9 were responsible for the conduct of day to day business of first accused company at the time of commission of offence".

The Supreme Court, after considering its earlier decisions on the subject, inter alia, observed as under:

The prevailing trend appears to require the complainant to state how a Director who is sought to be made an accused, was in charge of the business of the company, as every director need not be and is not in charge of the business of the company. If that is the position in regard to a director, it is needless to emphasise that in the case of non-director officers, there is all the more the need to state what his part is with regard to conduct of business of the company and how and in what manner he is liable.

On the question as to who would be persons responsible to the company for conduct of its business, the Court inter alia held as under:

A company though a legal entity can act only through its Board of Directors. The settled position is that a Managing Director is prima facie in charge of and responsible for the company''s business and affairs and can be prosecuted for offences by the company. But insofar as other directors are concerned, they can be prosecuted only if they were in charge of and responsible for the conduct of the company''s business. A combined reading of Sections 5 and 291 of Companies Act, 1956 with the definitions in Clauses (24), (26), (30), (31), (45) of Section 2 of that Act would show that the following persons are considered to be the persons who are responsible to the company for the conduct of the business of the company:

(a) the managing director/s;

(b) the whole-time director/s;

(c) the manager;

(d) the secretary;

(e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act;

(f) any person charged by the Board with the responsibility of complying with that provision (and who has given his consent in that behalf to the Board); and

(g) where any company does not have any of the officers specified in Clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors.

15. Section 141 uses the words "was in charge of, and was responsible to the company for the conduct of the business of the company". It is evident that a person who can be made vicariously liable under Sub-section (1) of Section 141 is a person who is responsible to the company for the conduct of the business of the company and in addition is also in charge of the business of the company...

... The meaning of the words "person in charge of the business of the company" was considered by this Court in Girdhari Lal Gupta Vs. D.H. Mehta and Another, followed in State of Karnataka Vs. Pratap Chand and Others, and Smt. Katta Sujatha Vs. Fertilizers and Chem. Travancore Ltd. and Another, . This Court held that the words refer to a person who is in overall control of the day to day business of the company. This Court pointed out that a person may be a director and thus belongs to the group of persons making the policy followed by the company, but yet may not be in charge of the business of the company; that a person may be a Manager who is in charge of the business but may not be in overall charge of the business; and that a person may be an officer who may be in charge of only some part of the business.

16. Therefore, if a person does not meet the first requirement, that is being a person who is responsible to the company for the conduct of the business of the company, neither the question of his meeting the second requirement (being a person in charge of the business of the company), nor the question of such person being liable under Sub-section (1) of Section 141 does not arise. To put it differently, to be vicariously liable under Sub-section (1) of Section 141, a person should fulfill the ''legal requirement'' of being a person in law (under the statute governing companies) responsible to the company for the conduct of the business of the company and also fulfill the ''factual requirement'' of being a person in charge of the business of the company.

(iii) In the case of a Director, Secretary or Manager (as defined in Section 2(24) of the Companies Act) or a person referred to in Clauses (e) and (f) of Section 5 of Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case u/s 141(1). No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable u/s 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that Sub-section

14. In the cases before this Court, this is not the case of the complainant in the additional affidavit filed by it that the Petitioner Hardeep Singh Nagra was the Managing Director, Joint Managing Director or a whole time director of the accused company. Therefore, the Petitioner is not one of the persons who falls under the category of "persons who are responsible to the company for the conduct of the business of the company", listed in the above quoted para of the judgment. Therefore, even if it is stated that he was in charge of the business of the company or that he was in charge of day to day management of the company or that he was in charge and responsible to the company for conduct of the business of the company that by itself would not make him vicariously liable under Sub-section (1) of Section 141 of the Negotiable Instruments Act. In the additional affidavit filed by the complainant on 19th March, 2009, there is no averment that the Petitioner Hardee Singh Nagra was in charge of the business of Routes Car Rental Pvt. Ltd. There is no averment in this affidavit that he was in charge of day to day management of the company. There is no averment that he was in charge of and responsible to the company for conduct of the business of the company. The only averment made against him is that he was also one of the directors of accused No. 1 company, who was engaged in day to day affairs of the company. Being engaged in day-today affairs of the company is altogether different from being in charge of the business of the company or being responsible to the company for the conduct of its business or even being in charge of day to day management of the company. The applicant/complainant was required to meet the twin requirement of Section 141 of the Act firstly by alleging that the Petitioner was a person responsible for business of the company and secondly by alleging that he was in charge of the business of the company.

Neither of these two ingredients is made out from the bald averment that he was engaged in day to day affairs of the company. Being engaged in day-today affairs of the company does not make a person in charge of those affairs since more than one person can be involved in conducting day to day affairs of the company and everyone of them cannot be said to be in charge of the business of the company or of its day to day affairs.

15. In Nitin Kumar and Ors. v. NCT of Delhi through its Standing Counsel and Anr. 2010(1) JCC (NI) 9, it was found that the complainant had generally alleged in the plaint that the accused had been actively involved in the affairs of accused No. 1. Noticing that there was no allegation in the complaint that the Petitioner was in overall control of the day to day business of the company nor are there any such factual averment from which such a control could be inferred nor there was any allegation in the complaint that the Petitioner was party to any decision to issue cheque in question or to get it dishonoured, it was held by this Court that the case could not be brought within the purview of Sub-Section 2 of Section 141 of the Negotiable Instruments Act.

In the cases before this Court, there is no allegation either in the complaint or in the affidavit filed by the complainant that the Petitioner Hardeep Singh Nagra was party to a decision to issue the cheques which, when presented to the bank, were dishonoured or to get those cheques dishonoured. Admittedly, none of the cheques was signed by him. There is no averment in the complaint that the cheques were issued and then dishonoured with the consent or connivance of the Petitioner or that the same was attributable to any negligence on his part. Therefore, the case against the Petitioner cannot be brought within the purview of Sub-section (2) of Section 141 of the Negotiable Instruments Act.

For the reasons given in the preceding paragraphs, I see no good reason to recall the order dated 21st January, 2010. The applications are devoid of any merit and are hereby dismissed.