(2013) 08 P&H CK 0576

In the Punjab And Haryana At Chandigarh

Case No : C.R.M. Nos. M-3975, 3976, M-15903 and 15904 of 2013 (O and M)

Kailash Chand Jain — APPELLANT

Vs

M/s. Bibby Financial Services India Pvt. Ltd.
 Paresh Jain Vs State of Haryana and Another — RESPONDENT

Date of Decision : 16-08-2013

Acts Referred:

Citation : (2013) 08 P&H CK 0576

Hon'ble Judges : Jitendra Chauhan, J

Bench : Single Bench

Judgement

Jitendra Chauhan, J.—By way of this single judgment, four petitions u/s 482 of the Code of Criminal Procedure, are being disposed of as the dispute is between the same parties and identical questions of law are involved therein. In C.R.M.-M-3975-2013, petitioner Kailash Chand Jain, has sought quashing of the criminal complaint case No. 2057 of 2012 dated 06.07.2012, and the impugned summoning order dated 29.08.2012, passed by Judicial Magistrate 1st Class, Gurgaon, and all consequent proceedings arising therefrom.

2. In C.R.M.-M-3976-2013, the petitioner has sought quashing of the criminal complaint case No. 2237 of 2012, dated 06.08.2012, and the impugned summoning order dated 06.08.2012, passed by the Judicial Magistrate 1st Class, Gurgaon, and all consequent proceedings arising therefrom.

3. In C.R.M.-M-15903-2013, the quashing of the complainant case No. 3846 RM/12 (Old No. 2057/2012) dated 29.08.2012, and summoning order dated 29.08.2012, passed by Judicial Magistrate 1st Class, Gurgaon, and all consequent proceedings arising therefrom has been sought.

4. Whereas, in C.R.M.-M-15904-2013, the petitioners, Paresh Jain and Rakesh Kumar Jain, have sought quashing of complainant case No. 3844 RM/12 (Old No. 2237/2012) dated 06.08.2012, and summoning order dated 06.08.2012, passed by Judicial Magistrate 1st Class, Gurgaon, and all consequent proceedings arising

therefrom.

5. However, for brevity, the facts are being derived from C.R.M.-M-3976-2013.

6. The brief facts emerging from the pleadings of the parties are as under:--

7. On 25.03.2009, the respondent had granted factoring facility to M/s. Vikash Metal & Power Ltd., who is described as ''Borrower'' in the factoring transaction; and M/s. Action distributors Pvt. Ltd. & M/s. Sahaj Distributors Private Ltd. are ''Approved Debtor'' in the said transaction. This implied that M/s. Vikash Metal & Power Ltd. was selling goods to M/s. Action Distributors Pvt. Ltd. & M/s. Sahaj Distributors Private Ltd., and the invoices payable to M/s. Vikash Metal & Power Ltd. were being assigned to the respondent. On 26.02.2010, one of the directors of M/s. Vikash Metal & Power Ltd. namely, Mr. Akash Patni, undertook and confirmed that in case the company failed to make payment of the outstanding amount within a period of seven days under facility, the respondent shall have a right to present the cheque issued by them for realization. M/s. Vikash Metal & Power Ltd. through its directors issued nine cheques in favour of the respondent towards discharge of its liability on 10.05.2012. On 29.02.2012, the petitioner is said to have resigned from the Board of M/s. Vikash Metal & Power Ltd. and has also filed an alleged document showing his resignation. The respondent denied this document. On 07.07.2012, the cheques in question were returned unpaid with the remarks, ''Funds insufficient''. On 18.07.2012, a notice of demand u/s 138 of the Negotiable Instruments Act (for short, ''the Act''), was issued by the respondent to M/s. Vikash Metal & Power Ltd. and its directors including the petitioner herein. On 06.08.2012, the impugned complaint (Annexure P-2) u/s 138 of the Act, was filed by the respondent against M/s. Vikash Metal & Power Ltd. and its directors, including the petitioner herein. Impugned summoning order dated 06.08.2012 (Annexure P-1) was passed by the trial Court. A letter was issued by M/s. Vikash Metal & Power Ltd. addressed to the respondent admitting its liability and a schedule for payment of the outstanding amount.

8. The learned counsel for the petitioners submit that the petitioners have already resigned from the respondent Company, and even during their tenure, none of the petitioners, was either incharge or in control of the day-to-day activities or responsible for the conduct of the business of the Company. They were summoned as their names were mentioned in the past records of the Company not pertaining to the relevant period.

9. On the other hand, the learned counsel for the respondent-complainant submits that the petitioners are not entitled to any relief as disputed questions of facts are involved in these cases.

10. This Court has heard the rival contentions of the counsel for the parties and gone through the record of the case.

11. The only point involved in these petitions is that "whether there are specific averments made in the impugned complaints that the petitioner are incharge of

and responsible for the conduct of the business of the company? If not, its effects."

12. The specific averments in paragraph 3 of the complaint to the extent that accused No. 2 to 7 are the Managing Director/Directors or authorized signatories and responsible persons for day to day act, conduct and affairs of the business as well as the liabilities of the accused No. 1, would prima facie reveal that offence u/s 138 of the Act is made out against each and every person including the petitioners herein. However, it is settled law that even a non-director can be liable u/s 141 of the Act, on the basis of the averments made by the complainant in the complaint.

13. The petitioners are relying upon a documents i.e. their resignations from the board of M/s. Vikash Metal & Power Ltd., on 26/29.02.2012, which fact is to be decided by leading evidence in the trial Court. Even if it is presumed that the said alleged documents are true, even then proceedings against the petitioners herein are not liable to be quashed on the ground that the petitioners were also incharge of and responsible for financial day to day affairs of the company, i.e. M/s. Vikash Metal & Power Ltd., at the relevant time when the cheques were issued as well as when the offence was committed. Therefore, by no stretch of imagination, the petitioners can take advantage of their alleged resignations. When the respondent issued a notice of demand to the accused-company and its directors including the petitioners herein, there was no reply to refute the demand, or to raise the plea of their resignations. Moreover, the stand of the respondent herein is that M/s. Vikash Metal & Power Ltd. itself wrote to the respondent on 27.09.2012, that their independent directors had submitted their resignations after receiving a notice of demand u/s 138 of the Act.

14. In S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, , it has been held as under:--

12. The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable.

Referring to this Court''s earlier decisions in K.P.G. Nair Vs. Jindal Menthol India Ltd., and Monaben Ketanbhai Shah and Another Vs. State of Gujarat and Others, , it was stated:

18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability u/s 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the

requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable u/s 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

15. In K.K. Ahuja Vs. V.K. Vora and Another, , it has been held as under:

20. The position u/s 141 of the Act can be summarized thus: (i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix ''Managing'' to the word ''Director'' makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company. (ii) In the case of a director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under Sub-section (2) of Section 141. (iii) In the case of a Director, Secretary or Manager (as defined in Sec. 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. (iv)Other Officers of a company can not be made liable under sub-section (1) of section 141. Other officers of a company can be made liable only under Sub-section (2) of Section 141, be averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence.

21. If a mere reproduction of the wording of section 141(1) in the complaint is sufficient to make a person liable to face prosecution, virtually every officer/ employee of a company without exception could be impleaded as accused by merely making an averment that at the time when the offence was committed they were in charge of and were responsible to the company for the conduct and

business of the company. This would mean that if a company had 100 branches and the cheque issued from one branch was dishonoured, the officers of all the 100 branches could be made accused by simply making an allegation that they were in charge of and were responsible to the company for the conduct of the business of the company. That would be absurd and not intended under the Act. As the trauma, harassment and hardship of a criminal proceedings in such cases, may be more serious than the ultimate punishment, it is not proper to subject all and sundry to be impleaded as accused in a complaint against a company, even when the requirements of section 138 read and section 141 of the Act are not fulfilled.

16. An Harshendra Kumar D. Vs. Rebatilata Koley Etc., , it has been held as under:--

18. On March 4, 2004, the Company informed the Registrar of Companies in the prescribed form (Form No. 32) about the resignation of the appellant from the post of Director of the Company and, thus, change among directors.

19. 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 March 2, 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 Single Judge of that Court in the case of Fateh Chand Bhansalil. The counsel for the present appellant (revision petitioner therein) on the other hand referred to a later decision of a Single Judge of the Calcutta High Court in the case of Saroj Kumar Jhunjhunwala v. State of West Bengal and Anr. wherein it was held that if before the issuance of cheques, the accused had resigned from the directorship, then he cannot be held liable for the offence. Confronted with two Single Bench decisions of that Court in Fateh Chand Bhansalil and Saroj Kumar Jhunjhunwala, the Single Judge held that the judicial discipline demanded that he should go by the earlier decision, namely, Fateh Chand Bhansali and, accordingly, refused to take into consideration the documents relating to the appellant''s resignation as Director from the Company with effect from March 2, 2004. While relying upon Fateh Chand Bhansali, the Single Judge referred to a decision of this Court in State of Madhya Pradesh v. Awadh Kishore Gupta and Others which was referred in Fateh Chand Bhansali.

20. In Awadh Kishore Gupta, this Court while dealing with the scope of power u/s 482 of the Code observed: "It is to be noted that the investigation was not complete and at that stage it was impermissible for the High Court to look into materials, the acceptability of which is essentially a matter for trial. While

exercising jurisdiction u/s 482 of the Code, it is not permissible for the Court to act as if it was a trial Judge...."

21. 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 u/s 482 or for that matter in exercise of revisional jurisdiction u/s 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction u/s 482 or revisional jurisdiction u/s 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 accused, the accusations against him cannot stand, it would be travesty of justice if 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.

17. The genuineness, admissibility, validity, legality and bona fide, of the resignations of the petitioners-Kailash Chand Jain, Paresh Jain and Rakesh Kumar Jain, or its effect, will be seen by the trial Court after the evidence is led by the parties. It requires full trial. The petitioner did not reply to the notice of demand. There are prima facie allegations against the petitioners in the impugned complaints and thus, there is no illegality or infirmity in the impugned summoning orders.

18. Because there are disputed questions of facts involved in the present matter, this Court does not deem it proper to exercise its jurisdiction u/s 482 of the Code, at this initial stage.

19. Therefore, under such circumstances, this Court finds no merit in these petitions, which are liable to be dismissed. Accordingly, C.R.M.-M-3975-2013; C.R.M.-M-3976-2013; C.R.M.-M-15903-2013; and C.R.M.-M-15904-2013; are hereby, dismissed. However, the petitioners are at liberty to take up all the pleas during trial, at an appropriate stage.

