
(2011) 09 DEL CK 0564
In the Delhi High Court
Case No : Criminal M.C. 1892 of 2010

Kamal Kumar and Another	Vs	APPELLANT
K. G. Dutta and Another		RESPONDENT

Date of Decision : 13-09-2011

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 141
Penal Code, 1860 (IPC) — Section 406, 420

Citation : (2011) 8 AD 576 : (2011) 184 DLT 744 : (2011) 4 JCC 254 : (2012) 1 RCR(Criminal) 286

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Sunil K. Kalra, for the Appellant; Dushyant Chaudhary, for R 1, for the Respondent

Final Decision : Disposed Off

Judgement

Mukta Gupta, J.—By these petitions, the Petitioners seek quashing of criminal Complaint Nos. 7311A/04, 7310/04 and 7311/04 u/s 138 Negotiable Instrument Act (in short Negotiable Instruments Act) and the proceedings pursuant thereto pending before the Learned Metropolitan Magistrate.

2. Learned Counsel for the Petitioner contends that admittedly the cheque in question has been issued by one Anil Kumar as the sole proprietor of M/s. Triveni Transport Company. The Petitioners are neither the signatory of the cheque nor they have anything to do with either Anil Kumar or M/s. Triveni Transport Company since it is a proprietorship concern. Though vicarious liability can be fastened u/s 141 Negotiable Instruments Act but it is only a strict liability and can be fastened only if the Petitioners fall within the ambit of the said provision. According to him a perusal of the entire complaint do not contain allegations which fulfill the requirement of Section 138 Negotiable Instruments Act against the Petitioners and thus the proceedings qua the Petitioners in the abovementioned Complaint Cases is liable to be quashed.

3. Learned Counsel for the Respondent No. 1 on the other hand relying upon *Vijay Chandela v. Cable Sales and Services (India) Pvt. Ltd.* 2005 (1) Crimes 437 contends that the question whether the Petitioners are liable or not is a question to be decided during trial on reception of evidence. Hence No. case for quashing of proceedings is made out and the petitions be dismissed.

4. I have heard learned Counsel for the parties. Admittedly, the cheques in issue have been signed by one Anil Kumar as the sole proprietor of M/s. Triveni Transport Company. In the complaint the allegations against the Petitioner No. 1 are that he negotiated with the complainant on behalf of Anil Kumar proprietor M/s. Triveni Transport Company and himself for providing Tata trucks for carrying goods and material on monthly basis at a flat rate of Rs. 40,000/- per month which terms and conditions were agreed and accepted orally between all the accused and the complainant in a meeting in the office. It is further alleged that the complainant approached the accused persons and informed about the fate of the cheques and demanded the payment of the aforesaid cheques as they were returned with remarks "funds insufficient". All the accused requested the complainant to re-present and promised that the cheques would be honoured, however they were again returned with the remarks "insufficient funds". Again when he approached all the accused they asked him to represent the same but again the cheques met the same fate of being dishonoured with the remarks "insufficient funds". The accused thus deliberately, malafidely and with dishonest intention to cheat the complainant defrauded him knowing fully well that the accused did not have the sufficient funds in their accounts.

5. It may be noted that the Petitioners have been summoned for offences u/s 138 Negotiable Instruments Act and not for offences u/s 420/406 Indian Penal Code. Section 138 Negotiable Instruments Act provides as under:

138. Dishonour of cheque for insufficiency, etc., of funds in the account.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for (a term which may be extended to two years) or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this Section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be,

makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, (within thirty days) of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation.-For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

6. A perusal of Section 138 Negotiable Instruments Act shows that the liability is only of the person who issues the cheque drawn on an account maintained by him, in discharge of a legally enforceable debt or other liability. The vicarious liability in the case of a company or a firm u/s 141 Negotiable Instruments Act would arise if a person is in charge and responsible for the conduct of the business of the company or the firm. Hon'ble Supreme Court in S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, held as under:

10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence u/s 138 is committed by a company. The key words which occur in the section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words:

Who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence, etc.

What is required is that the persons who are sought to be made criminally liable u/s 141 should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a director or manager or secretary was enough to cast criminal liability, the section would have said so. Instead of "every person"

the section would have said "every director, manager or secretary in a company is liable"..., etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

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.

7. Also in DCM Financial Services Ltd. Vs. J.N. Sareen and Another, their Lordships held:

19. Section 141 of the Act provides for a constructive liability. A legal fiction has been created thereby. The statute being a penal one, should receive strict construction. It requires strict compliance with the provision. Specific averments in the complaint petition so as to satisfy the requirements of Section 141 of the Act are imperative. Mere fact that at one point of time some role has been played by the accused may not by itself be sufficient to attract the constructive liability u/s 141 of the Act. (See K. Srikanth Singh Vs. North East Securities Ltd. and Another,

20. We may also notice that this Court in N.K. Wahi Vs. Shekhar Singh and Others, has observed: (SCC p. 483, para 8)

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

entertainable.

(Emphasis supplied)

8. In *Raghu Lakshminarayanan Vs. Fine Tubes*, while dealing with the proprietary concern held:

8. The concept of vicarious liability was introduced in penal statutes like the Negotiable Instruments Act to make the Directors, partners or other persons, in charge of and control of the business of the company or otherwise responsible for its affairs; the company itself being a juristic person.

9. The description of the accused in the complaint petition is absolutely vague. A juristic person can be a company within the meaning of the provisions of the Companies Act, 1956 or a partnership within the meaning of the provisions of the Partnership Act, 1932 or an association of persons which ordinarily would mean a body of persons which is not incorporated under any statute. A proprietary concern, however, stands absolutely on a different footing. A person may carry on business in the name of a business concern, but he being proprietor thereof, would be solely responsible for conduct of its affairs.

9. In the present case, in the entire complaint it has not been alleged that how the Petitioners were associated with the firm which was a proprietorship firm with Anil Kumar being the sole proprietor. No averment has been made as to how the Petitioners were responsible and incharge of the functioning of the firm. The cheques have been issued by Anil Kumar as proprietor of "Triveni Transport Company". Thus even as per the complaint the Petitioners are neither the drawer of the cheques from their accounts nor concerned with the affairs of the proprietorship firm "Triveni Transport Company". The Petitioners are thus not liable for offence u/s 138 read with Section 141 Negotiable Instruments Act.

10. The reliance of the Respondent on *Vijay Chandela (supra)* is mis-conceived. In the said case the Petitioner therein accepted that he was a manager of the company and the cheque was issued on behalf of the company. Thus this Hon'ble Court held that whether the Petitioner was responsible for the affairs of the company or not was a question which was to be decided at the time of trial on examination of the witnesses.

11. In view of the allegations as set out in the complaints against the Petitioners, the proceedings qua the Petitioners in complaint Case Nos. 7311A/04, 7310/04 and 7311/04 u/s 138 Negotiable Instrument Act are hereby quashed.

12. Petitions are disposed of. Order dasti.