
(2013) 01 RAJ CK 0029

In the Rajasthan High Court

Case No : Criminal Miscellaneous Petition No. 504 of 2011

Mahavir Prasad Mansinghka

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 15-01-2013

Acts Referred:

Citation : (2014) 1 BC 248 : (2014) 2 RLW 998

Hon'ble Judges : R.S. Chauhan, J

Bench : Single Bench

Advocate : A.K. Sharma, assisted by Mr. Shailesh Prakash Sharma, for the Appellant; Alka Bhatnagar, Public Prosecutor and Mr. Chetan Kumar Jain, for the Respondent

Final Decision : Allowed

Judgement

R.S. Chauhan, J.—The petitioner, Mahaveer Prasad Mansinghka, is aggrieved by the order dated 7.10.1998 passed by the Additional Chief Judicial Magistrate (CR), Kota, whereby he had taken cognizance for offence u/s 138 of the Negotiable Instruments Act ("the Act" for short) against the petitioner and other co-accused persons. The petitioner is also aggrieved by the order dated 29.11.2010 passed by the Special Judicial Magistrate (N.I. Cases) Kota, whereby the learned Judge has rejected an application filed by the petitioner for quashing the criminal proceeding, qua him, which is pending before the learned Trial Court in the form of Criminal Case No. 1213 of 2005 (Sunil Jain v. Smt. Mamta Virendra Kumar Mansinghka). Before this Court, the petitioner has prayed that the said criminal case, qua him should be quashed and set aside. Brief facts of the case are that one Sunil Jain had filed a complaint against the petitioner and other co-accused persons for offence u/s 138 of the Act. In the complaint, he had alleged that M/s. Kilol Finance and Investment Private Limited (for short "M/s. KFIP Ltd."), arrayed as accused No. 2, and M/s. Mansinghka Oil Products Limited (for short "M/s. MOP Ltd."), arrayed as accused No. 6, are sister concerns. They are registered under the provisions of the Companies Act. It was further alleged

that Smt. Mamta Mansinghka, arrayed as accused No. 1, had issued a cheque, namely, cheque No. 372137 dated 4.7.1998 for an amount of Rs. 7500000/- in favour of the complainant. The said cheque was given on behalf of M/s. KFIP Ltd. However, when the said cheque was submitted for encashment, the same was dishonored inter alia on the ground that there was direction "to stop the payment"" as indicated in the body of the cheque, and that there was "insufficient fund" as indicated in the memo issued by the Bank. Despite the service of notice, as required u/s 138 of the Act, due amount was not paid to the complainant. Therefore, the complaint u/s 138 of the Act.

2. By order dated 7.10.1998, the learned Trial Court had taken cognizance for offence u/s 138 of the Act against all the six accused-persons.

3. Subsequently, on 14.6.2002, the petitioner filed an application, wherein he pleaded that he has no relationship with the management of M/s. KFIP Ltd. Till 20th of January, 1997, he was one of the Directors of M/s. MOP Ltd., but on 20.1.1997 he resigned from the Board of Directors. Therefore, he has no concern with the cheque dated 4.7.1998 issued by M/s. KFIP Ltd. Hence, he prayed that the case against him should be dropped. Since no action was taken on his application dated 14.6.2002, again he filed another application on 18.9.2010, wherein he reiterated the same stand taken by him in his earlier application. By order dated 29.11.2010, learned Magistrate dismissed the application dated 14.6.2002. Hence, the petitioner has filed the present petition before this Court.

4. During the course of hearing, on 3.3.2011, this Court pointed out to the learned Counsel for the petitioner that the cognizance order was not under challenge, the petitioner had merely challenged the order dismissing the petitioners application. Therefore, learned Counsel for the petitioner sought time to amend the present petition for challenging the order dated 7.10.1998. Subsequently an amendment petition has been filed, whereby the petitioner is challenging the cognizance order dated 7.10.1998.

5. By order dated 8.3.2011 the amendments made in the petition were allowed. By order dated 17.3.2011, this Court had stayed the further proceedings qua the petitioner in Criminal Case No. 1646/2010 (Sunil Jain v. Mamta & Ors.) pending before the learned Special Judicial Magistrate (N.I. Cases), Kota.

6. Mr. A.K. Sharma, the learned Senior Counsel for the petitioner, has raised the following contentions before this Court: firstly, Section 141(1) of the Act deals with vicarious liability of a company. According to the said section every person who, at the time the offence was committed, was incharge 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 and shall be liable to be proceeded against and punished accordingly. Therefore, vicarious liability is limited to only those persons, who are "incharge of and/or responsible for conducting the business of the company".

7. Secondly, the cheque was issued by Smt. Mamta Mansinghka; the cheque

belonged to M/s. KFIP Ltd. However, the petitioner was not a Director of the said company, instead according to Para 2 of the complaint, he is said to be the Chairman/personal guarantor on behalf of M/s. MOP Ltd. (arrayed as accused No. 6). Hence, as far as M/s. KFIP Ltd.. is concerned, the petitioner is neither incharge of, nor responsible for the conduct of the business of M/s. KFIP Ltd.

8. Thirdly, relying on the cases of *Monaben Ketanbhai Shah and Another Vs. State of Gujarat and Others*, , *N.K. Wahi Vs. Shekhar Singh and Others*, , *State of NCT of Delhi through Prosecuting Officer, Insecticides, Government of NCT, Delhi Vs. Rajiv Khurana*, and *Aneeta Hada Vs. Godfather Travels and Tours Pvt. Ltd.*, , the learned Senior Counsel has contended that it is imperative that in the body of the complaint, the complainant should make out a specific case against an accused-person. He must show in what manner the accused is incharge of, or responsible for conduct of the business of the concerned company. However, in the present case the complainant has merely stated that the present petitioner happens to be the "Chairman/personal guarantor of M/s. MOP Ltd." Since, the concerned company is not M/s. MOP Ltd., but is M/s. KFIP Ltd., the complainant has failed to show as to how the petitioner is in-charge of, or responsible for the company whose cheque was issued to him. Hence, even prima-facie the complainant has failed to establish a case against the present petitioner.

9. Fourthly, in order to make out vicarious liability against the petitioner, the complainant has merely alleged that M/s. KFIP Ltd. and M/s. MOP Ltd., are sister concerns. However, this is, too, thin a relationship to make out a case of vicarious liability against the petitioner.

10. Fifthly, even if M/s. MOP Ltd. were taken to be a sister concern of M/s. KFIP Ltd., even then, the fact remains that the petitioner had already resigned prior to the issuance of the cheque on 4.7.1998. For, he had already resigned from the Board of Director of M/s. MOP Ltd. on 21.1.1997. Hence, he is a total stranger to the commission of the alleged offence.

11. Lastly, the learned Judge has failed to take note of the facts mentioned above. Mechanically, he has passed the cognizance order dated 7.10.1998. Even when the facts mentioned above were pointed out by the petitioner, by filing an application before the learned Judge, the learned Judge has ignored these facts. He has dismissed the petitioner's application. Hence, the prayer of the petitioner that the cognizance order, qua him should be set aside and the order dated 29.11.2010 should be interfered with.

12. On the other hand, Mr. Chetan Kumar Jain, the learned Counsel for the complainant, has strenuously raised the following contentions before this Court: firstly, in Para 2 of his complaint, the complainant has clearly mentioned that M/s. KFIP Ltd., and M/s. MOP Ltd., are sister concerns. According to him, the product was sold by the complainant to M/s. MOP Ltd. The cheque was issued by Smt. Mamta Mansinghka in order to discharge and to pay the amount due to the complainant. According to the complainant, the petitioner was Chairman/

personal guarantor of M/s. MOP Ltd. Thus, according to the learned Counsel, a relationship does exist, which prima facie establishes that the petitioner was in-charge of, and responsible for the conduct and business of M/s. KFIP Ltd.

13. Secondly, the petitioner has not produced any evidence to show that he was not a Director of M/s. KFIP Ltd.

14. Thirdly, it is for the Trial Court to see whether the petitioner was a Director or not at the relevant time. In case, it were discovered that he was not a Director, he can be acquitted by the Court.

15. Fourthly, relying on the judgment dated 25.7.2012 passed by Judicial Magistrate, 1st Class, Bundi--a case between the State and the petitioner and the other co-accused persons, learned Counsel had contended that even in that criminal case, the petitioner had taken the defence that at the relevant time he was not a Director of M/s. MOP. Ltd. However, said contention was repelled by the learned Trial Court by its judgment dated 25.7.2012. The petitioner was convicted for offences under Sections 420 and 406, I.P.C. Therefore, according to the learned Counsel, the same contention ought to be rejected by this Court.

16. Fifthly, according to the complainant when he had supplied his goods to M/s. MOP Ltd., an assurance was given by the petitioner, and other co-accused persons that the cheque given by Smt. Mamta Mansinghka would be honoured by the Bank. But despite their assurance, the cheque was dishonoured by the Bank.

17. Lastly, according to Form No. 32 submitted before the Registrar of Companies, the resignation has to be accepted by the Registrar of Companies. It is only after the said form is accepted that the person is justified in claiming that he had resigned from the Board of Directors. However, in the present case, so far as the petitioner has not submitted any documents to show that Form No. 32 was duly accepted by the Registrar of Companies, or even that his resignation had been accepted by the Board of Directors. Therefore, the petitioner cannot escape his liability by claiming that he was no longer on the Board of Directors of M/s. MOP Ltd. Hence, he has vehemently prayed that the impugned orders ought not to be disturbed by this Court.

18. Heard learned Counsel for the parties, perused the impugned order, and considered the case law cited at the Bar.

19. Section 138 of the Act defines the criminal liability of an individual, whereas Section 141 of the Act defines the vicarious liability of a company. Section 138 and Section 141 of the Act are 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 of 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 extend to one 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 fifteen 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.

141. Offences by companies--(1) If the person committing an offence u/s 138 is a company, every person 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 and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in Sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

20. Section 141 deals with a case where the offence u/s 138 has been committed by a company. Besides the company, the said section makes other person who, at the time of 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.

21. it is pertinent to note here that in the first part of the provision, the Legislature has used the article "a" and subsequently in the provision, it has

used article "the". Therefore, the word "the" relates to the company, which has committed an offence u/s 138 of the Act. Per-force, Section 141 of the Act, does not cover a sister concern. Therefore, vicarious liability is limited only to the company by which an offence u/s 138 of the Act has been committed.

22. Section 141 of the Act cannot be interpreted to cover a sister concern, or other companies co-related to the company. Moreover, only those persons, who are In-charge of or responsible for the company, only these persons can be held vicariously liable for offence u/s 138 of the Act. Therefore, Directors of a sister concern cannot be roped in for vicarious liability, unless it is first pleaded in the complaint that such Directors are common to both the sister concerns. Since, the criminal law is always limited one, and exists over an individual or vicariously over others, the provision of Section 141 of the Act would have to be given a narrow interpretation. In case, it was given too liberal an interpretation, it would create a havoc in the law.

23. A bare perusal of the complaint clearly reveals that six persons were arrayed as accused, namely Smt. Mamta Mansinghka (accused No. 1), M/s. KFIP Limited (accused No. 2), Virendra Kumar (accused No. 3), Mahaveer Prasad Mansinghka, accused No. 4, (the petitioner before this Court), R.N. Nimodiya (accused No. 5) and M/s. MOP Limited (accused No. 6).

Para 2 of the complaint reveals the interrelationship between the accused No. 1 to accused No. 6.

For ready reference, it is produced as under:

(Matter in regional language omitted)

24. A bare perusal of the said Para reveals that according to the complaint, accused No. 4, the present petitioner, is said to be Chairman/personal guarantor of accused No. 6 i.e. M/s. MOP Limited. It is nowhere alleged that he was either a Chairman, or a personal guarantor for accused No. 2, M/s. KFIP Limited. Merely because, M/s. KFIP happens to be a sister concern, de facto, it would not make the present petitioner liable for an offence committed by M/s. KFIP Limited.

25. The allegation contained in Para No. 3 of the complaint are that accused No. 1, Smt. Mamta Mansinghka, issued a cheque, namely cheque No. 372137 dated 4.7.1998 for an amount of Rs. 75,00,000/- on an assurance of accused No. 2 M/s. KFIP Ltd. When the said cheque was submitted for encashment, the said cheque was dishonoured. Therefore, the cheque belonged to M/s. KFIP Limited. The said cheque was signed by Smt. Mamta, accused No. 1.

26. Neither in the said Para 2, nor in Para 3 of the complaint, the complainant has stated a single word with regard to fact that as to how the petitioner is "In-charge of, or is responsible for the conduct of the business" of M/s. KFIP Ltd. The only relationship shown with regard to the petitioner is that he happens to be a Chairman of M/s. MOP Limited and that M/s. KFIP Limited happens to be the sister concern. The factum that the petitioner was in duly in-charge or was

responsible for the conduct of business of M/s. KFIP Limited and is conspicuously missing from the entire complaint. Therefore, the contention raised by the learned Counsel for the complainant that the inter-relationship between the petitioner and M/s. KFIP Limited has been clearly stated in Para 2 is without any merit.

27. In the case of *Monaben Ketanbhai Shah and Another* (supra), the Hon''ble Supreme Court observed as under:

The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in-charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes averments in the complaint and establishes that fact. The present case is of total absence of requisite averments in the complaint.

28. Therefore, the contention raised by the learned Counsel for the complainant that it is for the petitioner to show that he was not responsible or was not incharge of the business of the company lies upon him is a misplaced contention. For, it is for the complainant to first establish the fact by making certain averments in the complaint that the petitioner was incharge of or was responsible for the conduct of the business. Since, the said averments are conspicuously missing in the complaint, according to the Hon''ble Supreme Court, the complaint deserves to be quashed, qua the petitioner.

29. Learned Counsel for the respondents has relied upon the judgment passed by the learned Trial Court dated 25.7.2012 in order to contend that the plea taken by the petitioner was rejected by the learned Trial Court, therefore, this Court, too, should reject the said plea that he was not a Director at the relevant time.

30. However, a bare perusal of the judgment clearly reveals that the facts of that case are totally different. In that case the allegation was against M/s. MOP Ltd. However, in the present case, the allegation is with regard to offence committed by M/s. KFIP Ltd. After all, the cheque in dispute belongs to M/s. KFIP Ltd. and does not belong to M/s. MOP Ltd. Therefore, even if the said plea was rejected by the learned Trial Court, it does not form part of issue estoppel in the present case. Hence, the contention raised by the learned Counsel is without any merit.

31. Even if, the petitioner has not produced any evidence to show that he was not responsible for and in fact had already resigned from the Board of Directors of M/s. MOP Ltd., it would not dilute the position taken by him.

32. A bare perusal of the applications filed by him clearly reveals that in Para No. 8 of his application, he has clearly indicated to the Trial Court that he is absolutely unconnected with the functioning of M/s. KFIP Ltd. Most importantly, in the absence of cogent and specific averments made in the complaint, and

considering the principle laid down by the Apex Court in the aforementioned cases, it is absolutely clear that no case is made out against the petitioner, even on a prima facie basis.

33. Although, while taking cognizance, the Trial Court is not expected to shift through the evidence, but simultaneously the Trial Court is expected to examine the complaint, to see whether a vicarious liability is made out against the accused-persons, or not. If no specific averment is made showing the relationship between the accused-company and the accused-person(s), then no cognizance should be taken of the offence against the accused-person(s). Thus, the learned Judge was required to see whether evidence existed for making the petitioner vicariously liable for offences u/s 138 read with Section 141 of the N.I. Act, or not. The learned Judge has failed to discharge this limited duty, as he has not considered the inter-relationship between the accused-company, M/s. KFIP Ltd. and the petitioner. As discussed above, as far as the present petitioner is concerned, no offence u/s 138 read with Section 141 of the Act is made out. Thus, the cognizance of offence against him is not sustainable. Similarly, the dismissal of his application is equally unsustainable.

34. For the reasons stated hereinabove, this petition is hereby allowed. The impugned order dated 7.10.1998, qua the petitioner, is hereby quashed and set aside. Upon disposal of the main petition, the stay application, filed therewith, does not survive; the same is also disposed of.