
(2012) 08 SHI CK 0004
In the High Court Of Himachal Pradesh
Case No : Criminal M.M.O. No. 6 of 2012

Nexus Health and Beauty Care Private Limited and Another APPELLANT
Vs
M/s. National Electrical Office RESPONDENT

Date of Decision : 24-08-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 133, 138, 139, 140, 141

Citation : (2012) 3 ShimLC 1664

Hon'ble Judges : Kuldip Singh, J

Bench : Single Bench

Advocate : G.C. Gupta, with Mr. Pawan Sharma, for the Appellant; B.C. Negi, for the Respondent

Final Decision : Dismissed

Judgement

Kuldip Singh, J.—This petition u/s 482 Cr.P.C. has been filed for quashing complaint No. RBT 47/3 of 2009/08 and order dated 17.3.2009 passed by Judicial Magistrate, Nalagarh taking cognizance of the offence u/s 138 of the Negotiable Instruments Act, 1881 (for short "Act"). The facts pleaded in the complaint are that the petitioners had issued a cheque dated 10.6.2008 for Rs. 2,00,000/- drawn on State Bank of Patiala, Parwanoo, Barotiwala Branch in favour of respondent for installing electricity fittings. The cheque on presentation to the bank was dishonoured with the remarks "payment stopped by the drawer vide memo dated 14.7.2008".

2. The respondent contacted the petitioners, the petitioners assured the respondent that the cheque will be encashed and asked the respondent to present the cheque again. The respondent again presented the cheque but the cheque was dishonoured with remarks "payment stopped by the drawer vide memo dated 23.8.2008". The respondent again contacted the petitioners, who regretted for the dishonouring of the cheque and said that they could not withdraw the instructions made to the bank. The petitioners asked the

respondent to again present the cheque and assured its clearance. The respondent in these circumstances again presented the cheque for encashment but it was returned unpaid with the remarks "payment stopped by attachment order/court order" vide memo dated 2.9.2008.

3. The respondent issued notice dated 18.9.2008 under registered cover and UPC which were not returned to respondent. The petitioners despite notice failed to make the payment of the dishonoured cheque. It has been pleaded that petitioner No. 2 is the Managing Director and authorized signatory of the cheque. The respondent filed the complaint u/s 138 of the Act. On 17.3.2009 the learned Magistrate found prima-facie case for summoning the petitioners and, therefore, issued process to the petitioners u/s 138 of the Act.

4. The summoning order and the complaint have been assailed by the petitioners on the grounds that the cheque was not dishonoured for want of funds in the account maintained by the petitioners. The cheque was returned on account of Court order for attachment of the bank account and, therefore, no offence has been committed u/s 138 of the Act. The complaint is not maintainable.

5. The notice for dishonouring of the cheque and demand of the payment has also not been issued in accordance with mandatory provisions of law. There is nothing on record to show that notice was served on the petitioners. The Court below has not appreciated that prima-facie no case is made out on the statement of respondent or from the documents placed on record. The complaint as well as order dated 17.3.2009 are liable to be quashed.

6. Heard and perused the record. Mr. G.C. Gupta, Senior Advocate has submitted that the averments made in the complaint are insufficient to summon the petitioners u/s 138 of the Act. It has been submitted that the complaint has been filed by "M/s. National Electrical Office" through its Proprietor Subhash Bharwal, but in the complaint, the complainant has been pleaded as firm. The notice dated 18.9.2008 has been issued on behalf of "National Electrical Office". The cheque was issued in the name of "National Electrical". In the complaint it has been pleaded that cheque has been dishonoured on account of "payment stopped by attachment order/ court order". The notice before filing the complaint has not been issued in accordance with law. There is no evidence of service of notice on the petitioners. The pleadings in the complaint are not as per law for summoning the petitioners u/s 138 of the Act. Therefore, the petitioners have committed no offence.

7. The learned Counsel for the respondent has supported the impugned order dated 17.3.2009. It has been submitted that name of the business concern of the respondent has been pleaded in para 2 of the complaint as "National Electrical". The cheque has also been issued in the name of "National Electrical". The cheque has been signed by petitioner No. 2 as Managing Director of petitioner No. 1. The cheque has been dishonoured on presentation, the cheque has been returned with the memo "payment stopped by attachment order/ court

order". It has been submitted that prima-facie petitioners have committed offence u/s 138 of the Act and, therefore, the learned Magistrate has committed no wrong in summoning the petitioners u/s 138 of the Act.

8. The learned Counsel for the parties on either side have relied some case law in support of their submissions, therefore, it will be appropriate to refer that case law before coming to the facts of the case. Mr. Gupta, has relied Milind Shripad Chandurkar Vs. Kalim M. Khan and Another, where after noticing Shankar Finance and Investments Vs. State of Andhra Pradesh and Others, it has been held that where the "payee" is a proprietary concern the complaint can be filed:

(i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the "payee": (ii) the proprietary concern, describing itself as the sole proprietary concern, represented by its sole proprietor; and (iii) the proprietor or the proprietary concern represented by the attorney-holder under the power of attorney executed by the sole proprietor.

9. In Vempati Balaji and others Vs. D. Vijaya Gopala Reddi and another, it has been held that cheque should be issued by the drawer in discharging of the full or part of the debt or liability and if the said cheque was dishonoured due to insufficient funds, etc., then only Section 138 of the Act gets attracted, if other conditions are complied with. Mr. Gupta has relied Abdul Samad, Managing Director of Bias Steel Pipe Industries Pvt. Ltd. Vs. Satya Naraiyan Mahawar, wherein it has been held that there is no justification to let the proceedings continue. According to the respondents own showing the cheque had been returned unpaid as the drawer had stopped payment and this is apparently on account of civil litigation pending between the parties.

10. In Bhageerathy Vs. V. Beena and Another, , it has been held that in the complaint it is stated that the cheque was returned with the endorsement "payment stopped by the drawer". It is not possible to hold that Section 138 of the Act is attracted. In Kapil Mehra Vs. Sanjeev Jain the plea of the petitioner had been that the quality of goods supplied was "defective" and there was also "shortage in supply" and that is why, they had specifically instructed the Bankers to stop payments vide their letter dated 24.2.1992. The facts show that there was no insufficiency in the case. The petition was allowed and the impugned order quashed.

11. In Bhagat Ram Vs. State of Punjab and Another, it has been held that Ex. P-13 is the document produced by the petitioner himself which clearly indicates that the cheque when presented was returned with the endorsement "Payment stopped by the drawer". In other words, the cheque was returned and not encashed not because of insufficient funds in the account of the respondent, but because the payment had been stopped. The Court upheld the order of learned Additional Sessions Judge, setting aside summoning order of the learned Chief Judicial Magistrate u/s 138 of the Act.

12. In Balakrishna Pillai Vs. Abdullakutty, the cheque was dishonoured as

payment was stopped by the drawer. The learned Magistrate took the cognizance of the offence and issued notice u/s 138 of the Act to accused, who after entering appearance raised a contention that complaint is liable to be dismissed since no offence was made out in the complaint. The learned Magistrate accepted the contention of the accused that there is no averment in the complaint that cheque was bounced due to insufficiency of amount of the account. The High Court upheld the order of the Magistrate.

13. The learned Counsel for the respondent has relied M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, In that case both the cheques when presented were returned with the endorsement "payment stopped by drawer". A contention was raised as payment of the cheques had been stopped by the drawer. One of the ingredients of Section 138 was not fulfilled and thus the complaints were not maintainable. The Supreme Court has held as follows:--

Just such a contention has been Negatived by this Court in the case of M/S Modi Cements Limited Vs. Shri Kuchil Kumar Nandi, . It has been held that even though the cheque is dishonoured by reason of "stop-payment" instruction an offence u/s 133 could still be made out. It is held that the presumption u/s 139 is attracted in such a case also. The authority shows that even when the cheque is dishonoured by reason of stop-payment instructions by virtue of Section 139 the Court has to presume that the cheque was received by the holder for the discharge, in whole or in part, of any debt or liability. Of course this is a rebuttable presumption. The accused can thus show that the "stop-payment" instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there were sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop-payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence u/s 138 would not be made out. The important thing is that the burden of so proving would be on the accused. Thus a Court cannot quash a complaint on this ground.

14. Mr. Gupta has submitted that the pleadings are insufficient to summon the petitioners u/s 138 of the Act. There are no pleadings that respondent No. 2 was the in-charge of and was responsible to the Company for the conduct of the business of the Company. He has relied D. Chandra Reddy Vs. Gowrisetty Prabhakar and Another, wherein the cheque issued by the Company was signed by D. Chandra Reddy, Managing Director, there was no allegation in the complaint that offence was committed by the Company and that D. Chandra Reddy is sought to be prosecuted by virtue of Section 141 of the Act in his capacity as Officer or the person in-charge of and responsible for the conduct of the business of the Company. The Complaint against D. Chandra Reddy was quashed.

15. In S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, it has been

held that Section 141 of the N.I. Act does not say that a Director of a company shall automatically be vicariously liable for commission of an offence on behalf of the company. What is necessary is that sufficient averments should be made to show that the person who is sought to be proceeded against on the premise of his being vicariously liable for commission of an offence by the company must be in charge of, and shall also be responsible to the company for the conduct of its business. The averments must state that the said person was both in charge of and responsible for the conduct of the business of the company.

16. The Supreme Court in DCM Financial Services Ltd. Vs. J.N. Sareen and Another, has held that 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.

17. In Ramrajsingh Vs. State of M.P. and Another, the Supreme Court has noticed N.K. Wahi Vs. Shekhar Singh and Others, in which S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, has been considered wherein it has been held:

(a) It is necessary to specifically aver in a complaint u/s 141 that at the time of offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This is averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a Director of a company is not sufficient to make the person liable u/s 141 of the Act. A Director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases.

18. The Supreme Court in Everest Advertising Pvt. Ltd. Vs. State, Govt. of NCT of Delhi and Others, has noticed Section 141 of the Act and held that a Chairman of a large company may or may not be aware of the actual transaction if in a given situation, cheques are issued in ordinary course of business. The Managing Director or a Deputy Managing Director in view of S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, would be deemed to be aware thereof. A Chairman or a Director of a company need not be.

19. In National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another, , it has been held that 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.

20. The learned Counsel for the petitioners has relied Harshendra Kumar D. Vs. Rebatilata Koley Etc., wherein it has been held that appellant was not the Director; he had nothing to do with the affairs of the company. In this view of the matter, if the criminal complaints are allowed to proceed against the appellant, it would result in gross injustice to the appellant and tantamount to an abuse of process of the Court.

21. The learned Counsel for the respondent has again relied M.M.T.C. Ltd. (supra) wherein it has also been held that it is settled law that at this stage Court is not justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint. The inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice. At this stage the Court could not have gone into merits and/or come to a conclusion that there was no existing debt or liability.

22. In S.A. Nanjundeswara Vs. M.S. Varlak Agrotech Pvt. Ltd., it has been held that High Court can be justified in quashing the proceedings only if it comes to the conclusion that even the statement taken on face value do not make out any offence. Obviously, applying that standard, it cannot be said that no offence has been made-out against Veralakshmi Gundu Rao.

23. Now coming to the facts of the case, the complaint has been filed by complainant through its proprietor Subhash Bharwal. In para 2 of the complaint, it has been pleaded that complainant is providing services of Industrial Electrical Fitting under the name and style of "National Electrical". In para 1 of the complaint, it has been pleaded that complainant is a Firm running under the name and style "National Electrical Office". Subhash Bharwal is its sole proprietor. In the complaint, it has been pleaded that accused No. 2 being Managing Director of accused No. 1 issued Account Payee Cheque bearing No. 103540 dated 10.6.2008 for Rs. 2,00,000/- drawn on State Bank of Patiala, Parwanoo, Barotiwala Branch in favour of the complainant. The cheque on presentation was dishonoured with the remarks "payment stopped by attachment order/court order" vide memo dated 2.9.2008. The notice was issued on 18.9.2008 which was posted on 24.9.2008 under registered AD post and under Postal Certificate. The notices have not been returned to the complainant.

24. Ex. C-1 is the cheque No. 103540 dated 10.6.2008 for Rs. 2,00,000/- in favour of "National Electrical" issued by petitioner No. 1 and signed by petitioner No. 2 as Managing Director. Ex. C-3 is the memo dated 2.9.2008 of State Bank of Patiala returning the cheque No. 103540 amounting to Rs. 2,00,000/- on account of "payment stopped by attachment order/court order". Ex. C-4 is the notice dated 18.9.2008 issued by the complainant to the petitioners. Ex. C-5 is the postal receipt, Ex. C-6 is the UPC. Ex. CW-1/A is the evidence by way of affidavit

of Subhash Bharwal.

25. The complaint is not happily worded, no doubt, in the memo of parties the complainant has referred complainant "M/s. National Electrical Office but in para 2 it has been pleaded that complainant is providing services of Industrial Electrical fitting under the name and style of "National Electrical". Again in the memo of parties, Subhash Bharwal has been referred as proprietor but in para 1 of the complaint, the complainant has described itself as a firm. In evidence by way of affidavit Ex. CW-1/A, it has been stated that complainant is providing services of Industrial Electrical fitting under the name and style of "National Electrical". Subhash Pharwal is its sole proprietor. The cheque Ex. C-1 has been issued in the name of "National Electricals". The complaint is loosely drafted. But in the complaint, the complainant has described itself as "National Electrical" in the body of the complaint.

26. On the face of the complaint and affidavit Ex. CW-1/A, prima facie it cannot be said that complainant is a firm namely M/s. National Electrical Office. The complainant in the body of the complaint has described the complainant as "National Electrical" a sole proprietorship concern of Subhash Bharwal. It will be too technical to throw out the complaint due to loose drafting. At this stage, if the pleadings of the petition are seen the petition is also not less loosely drafted. It starts with the sentence "complainant issued a cheque for Rs. 2.00 lacs". The complainant did not issue cheque of Rs. 2,00,000/-. The cheque was allegedly issued by the accused-petitioners. Not only in the opening para of the petition but at other places also the petitioners have used loose expressions. In para 3 of the petition before grounds it has been pleaded that the "complainant aggrieved and dissatisfied with the order summoning the accused and taking cognizance of the case by Judicial Magistrate, files this petition". The substance of the complaint or petition is to be seen and it should not be thrown out merely on technicalities of loose drafting. It emerges from the complaint that complainant is "National Electrical" sole proprietorship concern of Subhash Bharwal. In view of Milind Shripad Chandurkar (supra) it cannot be said that complaint is not maintainable.

27. It has been contended that there is no averment in the complaint that petitioner No. 2 who allegedly issued the cheque was in charge of and was responsible to the company for the conduct of the business of the company and, therefore, complaint filed against the petitioners is not legally tenable. In para 8 of the complaint, it has been pleaded that accused No. 2 is acting as Managing Director and authorized signatory of the cheque and accused No. 2 is managing day to, day affairs of accused No. 1 and as such, both the accused are liable for dishonour of the cheque.

28. The cheque Ex. C-1 is allegedly signed by petitioner No. 2 as Managing Director for Nexus Health and Beauty Care Pvt. Ltd. In Everest Advertising (P) Ltd. (supra) it has been held that the Managing Director or a Deputy Managing Director would be deemed to be aware of the actual transaction. Similarly in

National Small Industries Corporation Ltd. (supra) it has been held that 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. Once petitioner No. 2 is the Managing Director of petitioner No. 1 and has allegedly signed cheque Ex. C-1, then prima facie implement of petitioner No. 1 through petitioner No. 2 and petitioner No. 2 in his capacity as Managing Director in view of Section 141 of the Act is not wrong and illegal. The petitioner No. 2, being the Managing Director of petitioner No. 1 Company will be presumed to be aware of day to day functioning and business of the affairs of the company.

29. It has been contended that the cheque has been returned on account of "payment stopped by attachment order/court order" and not due to insufficient funds, therefore, according to petitioners they cannot be prosecuted u/s 138 of the Act for bouncing of the cheque. In M.M.T.C. Ltd. and another (supra) it has been held that even though the cheque is dishonoured by reason of stop payment, instruction, an offence u/s 138 could still be made out. The presumption u/s 139 is attracted in such a case also. This is a rebuttable presumption, the accused can show that the stop payment, instructions were not issued because of insufficiency or paucity of funds, if accused shows that in his account there were sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment, at the drawer bank and that stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment then offence u/s 138 would not be made out. The burden of prove would be on the accused. The Court cannot quash the complaint on this ground. The same principle will apply when payment stopped by attachment order/court order.

30. The presumption u/s 139 of the Act is still available in such case also. The Section 140 of the Act excludes defence that drawer had no reasons to believe that cheque would be dishonoured for reasons stated in Section 138 of the Act. The accused will have to show that there were sufficient funds in the account to encash the cheque despite the attachment order/court order. The burden is on the petitioners and complaint cannot be quashed on this ground. The petitioners have filed statement of accounts of Nexus Health and Beauty Care Pvt. Ltd. from 1.6.2008 to 30.9.2008 of account No. 65022958589 with the petition from the bank. This document is not on the lower Court file. It is not clear from this document what was the attachment/court order and for what amount. The petitioners have not placed on record Court attachment order.

31. It has been contended that there is nothing on record to show that notice dated 18.9.2008 Ex. C-4 was served on the petitioners. In affidavit Ex. CW-1/A in paragraph 9 the respondent has stated that the notice dated 18.9.2008 was issued to petitioners under registered cover as well as under Postal Certificate and both were not returned to the respondent. Ex. C-5 is the postal receipt and Ex. C-6 is the UPC. It is not the case of the petitioners that addresses of

petitioners in notice Ex. C-4 are not correct addresses, nor it is the case that notice Ex. C-4 was not posted to petitioners. There is presumption of delivery of notice within reasonable time after posting on correct address. The respondent prima facie has fulfilled requirements of Sections 138, 141 of the Act. There is prima facie material for summoning the petitioners u/s 138 of the Act. Therefore, it cannot be said that the learned Judicial Magistrate has erred in summoning the petitioners u/s 138 of the Act. The complaint, therefore, at this stage cannot be quashed. In view of above, the petition fails and is accordingly dismissed. Cr. M.P. No. 36 of 2012 is also disposed of in view of disposal of the main petition. The interim order dated 10.1.2012 is vacated. The parties through their Counsel are directed to appear before the trial Court on 10.9.2012. The record be sent back immediately so as to reach before the date fixed.