

(2009) 12 DEL CK 0180

In the Delhi High Court

Case No : Criminal M.C. No's. 3607-12 of 2006

Rajender Kumar Bansal and Others

APPELLANT

Vs

J.J. Jewellers and Another

RESPONDENT

Date of Decision : 23-12-2009

Acts Referred:

Air (Prevention and Control of Pollution) Act, 1981 — Section 40
Companies Act, 1956 — Section 2, 291, 5
Criminal Procedure Code, 1973 (CrPC) — Section 251, 482
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14A
Employees State Insurance Act, 1948 — Section 86A
Income Tax Act, 1961 — Section 278B
Minimum Wages Act, 1948 — Section 22C
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 141(1), 141(2), 142
Payment of Bonus Act, 1965 — Section 29
Water (Prevention and Control of Pollution) Act, 1974 — Section 47

Citation : (2009) 12 DEL CK 0180

Hon'ble Judges : Kailash Gambhir, J

Bench : Single Bench

Advocate : Sanobar Ali, for the Appellant; Sanjeev Sahay and Abhishek Agarwal, for the Respondent

Judgement

Kailash Gambhir, J.—By this common order, I shall dispose of CrI. M.C. bearing Nos. 3607-12/2006 and 3613-18/2006. By these petitions filed u/s 482 Cr.P.C. the petitioners seek quashing of complaint case No. 122/03 and No. 120/03 respectively u/s 138 read with Section 142 of the Negotiable Instruments Act. The petitioners also seek directions to set aside the notice dated 09.03.2006 framed by the learned Trial Court u/s 251 Cr.P.C.

2. Brief facts relevant for deciding the present petitions are:

Two complaint cases u/s 138 read with Section 142 of Negotiable Instruments Act were filed by respondent No. 1 against the present petitioners and respondent No. 2. Complaint Case No. 122/03 relates to the dishonour of cheque No. 104352 dated 15.8.2002, while complaint case No. 120/03 relates to the

dishonour of cheque No. 104353 dated 15.9.2002 of Rs. 5 lakhs each. It is stated in both the complaints that all these petitioners were involved in the business of jewellery trade and all of them represented as Director/proprietor of the business concern namely M/s Mani Ratnam Jewellers (Pvt.) Ltd. It is further stated that the accused persons were liable to make payment for the jewellery supplied by the complainant. It is also mentioned that accused No. 1 i.e. Mr. Jugal Kishore, Director/Chairman of M/s Kedar Nath Ratan Lal had issued post dated cheque bearing No. 104352 dated 15.8.2002 for a sum of Rs. 5 lakhs and another cheque bearing No. 104353 dated 15.9.2002 for the same amount. The said accused No. 1 as per the complaints kept on assuring accused Nos. 2 to 6 that the above cheques will be duly honoured on their presentation for encashment. The accused No. 2 to 6 in discharge of their liabilities issued another post dated cheque bearing No. 517960 dated 20.9.2002 for a sum of Rs. 5 lakhs drawn on State Bank of India Dilshad Garden, New Delhi and cheque bearing No. 517961 dated 20.9.2002 drawn on State Bank of India, Dilshad Garden, New Delhi. It is further stated that accused Nos. 2 to 6 are directly in charge and responsible for the conduct of the jewellery business and the entire transactions pertaining to the outstanding amount of the aforesaid cheques and hence the complaints were filed u/s 138 of the Negotiable Instruments Act against the present petitioners and respondent No. 6.

3. Counsel for the petitioners submitted that the complainant has not impleaded M/s Mani Ratnam Jewellers Pvt. Ltd. as one of the accused persons. Counsel further submitted that although the petitioner Nos. 3 & 4 are directors of the said company but they could not have been impleaded as accused persons unless the complainant had impleaded the company in which they are the directors. Counsel further submitted that the dishonoured cheques are neither issued by the said company nor signed by any of the petitioners as the same are signed by Jugal Kishore who is the Director of M/s Kedar Nath Rattan Lal and therefore only the said company and Jugal Kishore can be held liable for the dishonoured cheques and not the present petitioners.

4. Opposing the present petitions, Counsel for the respondent submitted that so far as petitioner Nos. 3 and 4 are concerned it is admitted position that they are directors in M/s Mani Ratnam Jewellers Pvt. Ltd. and in the complaints filed by the respondent, it has been stated clearly that they are responsible for the day-to-day affairs of the said company, M/s Mani Ratnam Jewellers Pvt. Ltd., as they have been dealing with the complainant for the purchase of jewellery articles. The contention of the Counsel for the respondent was that since they have been implicated in their capacity as Directors of the said company therefore the complaints against them would be maintainable even in the absence of impleadment of the company. Counsel for the respondent further submitted that there is an active collusion and connivance amongst these petitioners who have been dealing with the complainant for the purchase of jewellery items on behalf of M/s Mani Ratnam Jewellers Pvt. Ltd. or sometimes on behalf of some other companies. Counsel thus submitted that once in the said two complaints specific

allegations have been leveled against the present petitioners, therefore, the complaints filed by the respondent/complainant are maintainable against all of them. Counsel further submitted that the complainant has already been examined before the trial court and complainant in his evidence has established the case against these petitioners.

5. I have heard learned Counsel for the parties.

6. The complaints u/s 138 read with Section 142 of Negotiable Instruments Act were filed by respondent No. 1 based on dishonoured cheques for a sum of Rs. 5 lakhs each, which were issued by the firm M/s Kedar Nath Ratan Lal proprietor Shri Goverdhan Finance Pvt. Ltd. It is not in dispute between the parties that the payment of the said cheques was stopped by the drawer and these cheques were signed by Mr. Jugal Kishore, respondent No. 6 for and on behalf of the said firm. The present petitioners in the said complaints have been arrayed as respondent Nos. 2 to 6 being the Directors/Proprietor of M/s Mani Ratnam Jewellers Pvt. Ltd. as the accused persons. In the complaints the complainant has alleged that all these accused persons were in charge and responsible for the conduct of the business of the said private limited company and the complainant had been supplying jewellery articles to these accused persons since 1996-97.

7. Section 141 of the Negotiable Instruments Act deals with the offence by the companies, which is reproduced as under:

141.

(1) Offences by companies. 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, Explanation.- For the purposes of this section,-

(a) " company" means any body corporate and includes a firm or other association of individuals; and

(b) " director", in relation to a firm, means a partner in the firm.

8. As would be evident from the above Section 141, the criminal liability for the offence by a company u/s 138 is fastened vicariously on the persons referred to in Sub-section (1) of Section 141 by virtue of a legal fiction. Such vicarious liability can be fastened on the Directors of the company only after impleading the company and also when the complaint clearly discloses the exact role of the directors at the time of the commission of crime so as to hold them vicariously liable for the offence committed by the company.

9. In the facts of the present case the complainant has failed to implead the said company i.e. M/s Mani Ratnam Jewellers Pvt. Ltd. as one of the accused persons and, therefore, in the absence of the said company been made a party, the Counsel for the respondent failed to impress upon this Court as to how the complainant could have impleaded the present petitioners as the accused persons in their capacity as Directors of the said company. The vicarious liability for the offence committed by the company u/s 138 of the Negotiable Instruments Act could be fastened only when the company is impleaded as one of the accused persons and not in the absence of such company unless there is any legal impediment due to which the company has not been impleaded. It is a settled legal position that that Penal Statutes are required to be construed strictly and criminal liability cannot be fastened on any person just in a casual manner. It is not the case of the complainant that the present petitioners were impleaded in their personal capacity but in their capacity as Directors of the said company and as already discussed above in the absence of implement of the company itself no vicarious liability of the Directors would arise. It would be useful to refer to recent decision of the Apex Court reported in K.K. Ahuja Vs. V.K. Vora and Another, , especially the following paragraphs:

The criminal liability for the offence by a company u/s 138, is fastened vicariously on the persons referred to in Sub-section (1) of Section 141 by virtue of a legal fiction. Penal statutes are to be construed strictly. Penal statutes providing constructive vicarious liability should be construed much more strictly. When conditions are prescribed for extending such constructive criminal liability to others, courts will insist upon strict literal compliance. There is no question of inferential or implied compliance. Therefore, a specific averment complying with the requirements of Section 141 is imperative. As pointed out in K. Srikanth Singh Vs. North East Securities Ltd. and Another, , the mere fact that at some point of time, an officer of a company had played some role in the financial affairs of the company, will not be sufficient to attract the constructive liability u/s 141 of the Act.

Sub-section (2) of Section 141 provides that a Director, Manager, Secretary or other officer, though not in charge of the conduct of the business of the company will be liable if the offence had been committed with his consent or connivance or if the offence was a result of any negligence on his part. The liability of persons mentioned in Sub-section (2) is not on account of any legal fiction but on account of the specific part played - consent and connivance or negligence. If a person is

to be made liable under Sub-section (2) of Section 141, then it is necessary to aver consent and connivance, or negligence on his part.

This takes us to the next question under Sub-section (1) of Section 141, as to (i) who are the persons who are responsible to the company for the conduct of the business of the company, and (ii) who could be said to be in charge and was responsible to the company for the conduct of the business of the company.

The words "every person who, at the time of the offence was committed, was in charge of, and was responsible for the conduct of the business of the company" occurs not only in Section 141(1) of the Act but in several enactments dealing with offences by companies, to mention a few -Section 278B of the Income Tax Act, 1961, Section 22C of Minimum Wages Act, 1948, Section 86A of the Employees State Insurance Act, 1948, Section 14A of Employees Provident Fund and Miscellaneous Provisions Act, 1952, Section 29 of Payment of Bonus Act, 1965, Section 40 of The Air (Prevention and Control of Pollution) Act, 1981 and Section 47 of Water (Prevention and Control of Pollution) Act, 1974. But neither Section 141(1) of the Act, nor the *pari materia* provisions in other enactments give any indication as to who are the persons responsible to the company, for the conduct of the business of the company. Therefore, we will have to fall back upon the provisions of Companies Act, 1956 which is the law relating to and regulating companies. Section 291 of the said Act provides that subject to the provisions of that Act, the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do. 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.

It follows that other employees of the company, cannot be said to be persons who are responsible to the company, for the conduct of the business of the company.

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. There may be many directors and secretaries who are not in charge of the business of the company at all. 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.

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.

10. The learned Counsel for the respondent placed reliance on the judgment of the Apex Court in *Aneeta Hada Vs. Godfather Travels and Tours Pvt. Ltd.*, .

11. In the above case admittedly, there was a difference of opinion amongst the two Hon?ble Judges and therefore, the matter was directed to be placed before the Three Judge Bench and the decision of Three Judge Bench is yet to be given. In any event of the matter, the facts in *Aneeta Hada*'s case are totally dissimilar to the facts of the present case as there the appellant was admittedly a signatory of the dishonoured cheques and the complainant had impleaded the appellant, without impleading the company and therefore, the question arose whether the

impleadment of the company u/s 138 r/w Section 141 of N.I. Act for the prosecution of the Director would be necessary or not. However, in the facts of the present case it is not in dispute that none of the petitioners are signatories to the dishonoured cheques and it is only Jugal Kishore who had signed the dishonoured cheques that too on behalf of a different company and not that company where the accused are stated to be directors. Another indisputable distinction in the facts of the present case is that in the entire gamut of the two complaints, the complainant has leveled allegations against these petitioners who were allegedly dealing with the complainant in the purchase of jewellery items from time to time and it is not the case of the complainant that they were dealing with M/s. Mani Ratnam Jewellers Pvt. Ltd. and the petitioners being directors of the said company were engaged in carrying out the transactions in the purchase of the jewellery items with the complainant. The petitioners have not disputed so far as petitioners No. 3 and 4 are concerned that they are the Directors of M/s Mani Ratnam Jewellers Pvt. Ltd. but as discussed above they could have been held liable only when the offence u/s 138 of the Negotiable Instruments Act is alleged to have been committed by the said company and the said Directors were impleaded for their definite and assigned role in their capacity as Directors of the said company. It is further not in dispute that none of these petitioners are holding any position in the company i.e. M/s Kedar Nath Ratan Lal on whose behalf the dishonoured cheques were signed by Mr. Jugal Kishore and, therefore, the present petitioners could not have been made liable for the offence u/s 138 of the Negotiable Instruments Act when they had no connection with the company on whose behalf the dishonoured cheques were issued. It would be thus apparent that in the absence of any allegation against M/s. Mani Ratnam Jewellers Pvt. Ltd., it would be difficult to hold the present petitioners vicariously liable for the offence u/s 138 r/w Section 141 of Negotiable Instruments Act.

12. In view of the above discussion, the complaint cases bearing No. No. 122/03 and No. 120/03 are directed to be quashed so far as the present petitioners are concerned. However, the complainant/respondent No. 1 will be at liberty to prosecute the said complaint against Mr. Jugal Kishore and the said company M/s Kedar Nath Ratan Lal.