(2008) 01 DEL CK 0242

In the Delhi High Court

Case No : Criminal M.Cs. 1901, 1914 and 1953 of 2004 and Criminal M.A. No''s. 6172, 6229 and 6392 of 2004

R.S. Rathore APPELLANT

Vs

Reserve Bank of India and Others RESPONDENT

Date of Decision : 28-01-2008

Acts Referred:
Companies Act, 1956 — Section 220, 5
Criminal Procedure Code, 1973 (CrPC) — Section 200, 29, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 141(1), 142
Reserve Bank of India Act, 1934 — Section 31, 45, 45E, 45IA, 45IA(1)

Citation : (2008) 4 BC 599

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Vijay Nair, Sumesh Dhawan and Vikas Chandel, for the Appellant; Jayant Bhushan Gajinder Kumar and Kiran Jai, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—These are three petitions u/s 482 of the Code of Criminal Procedure (''Cr.P.C.'') seeking the quashing of a Criminal Complaint titled "Reserve Bank of India v. Kuber Auto General Finance & Leasing Ltd. and Ors." and an Order dated 18th December, 2003 by which the learned Metropolitan Magistrate, New Delhi (''MM'') dismissed the application for recall of the summoning order dated 21st September, 1999. Since the three petitions are directed against a common criminal complaint, summoning order, and the order dismissing the application for recall, they are being disposed of by this common judgment.

2. In 1999, a complaint was filed by the Reserve Bank of India (''RBI'') against Kuber Auto General Finance and Leasing Limited (hereafter the ''Company'') and six others who are described in the complaint as its Directors as indicated in the Annual Report of the Company for the year ending 31st March, 1998. The complaint states that the Company submitted an application on 3rd July, 1997 to

the complainant RBI u/s 45IA of the Reserve Bank of India Act, 1934 (''Act'') for grant of a certificate of registration for carrying on business as a non-banking financial company (NBFC). It is then stated that for the purposes of examining that application, the RBI sought to scrutinize the books of accounts of the Company. It is stated that although the Managing Director of the Company and its Directors did not allow such scrutiny, upon the persistence of the officials of the RBI, a few computer printouts and security documents were made available for scrutiny on 30th January, 1999. It is stated in the complaint that the scrutiny of those documents revealed three specific violations:

(a) That the Company had classified some of the sub-standard loans and advances as standard assets thereby violating Para 7(1) of the NBFC Prudential Norms (Reserve Bank) Directions, 1998, and therefore, there has been a violation punishable under Sections 58(B)(5)(aa) of the Act.

(b) The Company had failed to maintain a consolidated register of branches at its registered office of the receipt and repayment or renewal deposits for at least a period of eight calendar years and thus had violated para 16 of the aforementioned statutory directions attracting the penalty u/s 58B(5)(aa) of the Act.

(c) Cheques had been drawn in favour of depositors despite that" there being insufficient balance in the account of the Company, as a result of which a large number of cheques had been dishonoured. However, on the basis of such cheques, the Company had reduced its deposit liabilities artificially in its books and accounts and therefore had violated the statutory direction contained in para 16(1) of the NBFC Acceptance of Public Deposits (Reserve Bank) Directions, 1998 which is also punishable u/s 58B(5)(aa) of the Act.

3. The complaint proceeds to aver that in terms of Section 58C of the RBI Act where the default is committed by a company "every person who at the time the contravention or default was committed was in charge of or was responsible to the company for the conduct and business of the company, as well as the company, shall be deemed to be guilty for the contravention or default and shall be liable to be proceeded against and punished accordingly". In this regard, the key averment concerning the three petitioners here, who according to the RBI, were Directors of the Company reads as under:

10. In the present case, the offences have been committed by the first accused company. The accused Nos. 2 to 7 are the directors, who at the time the contravention or default was committed or in other words, when the offences were committed, were in-charge of and were responsible to the company for the conduct of business of the company. This position is supported by the responsibility of the directors to the conduct of the business of the company contained in the Article 142 of the Articles of Association of the company and also by the specific provisions of Section 5 of the Companies Act, 1956.

4. Preceding the filing of the complaint, the RBI had an inspection conducted and

had also placed before the Magistrate the report of such inspection. The petitioners have placed on record a copy of the Inspection Report dated 29/30th January, 1999 which is shown to have been filed by RBI in the Court of the learned MM on 18th May, 1999. On 21 st September, 1999, the following summoning order was passed by the Magistrate:

File perused.

The complaint is made by the Public Servant in discharge of his official duties so the pre-summoning evidence of the complainant is dispensed with u/s 200 of the Cr.P.C.

After perusing the material on record I am of the opinion that there is sufficient ground for proceeding against the accused person under Sections 58B and 58C of the RBI Act. So the accused be summoned on PF and RC on 8.3.2000.

Metropolitan Magistrate

21.9.1999

5. Thereafter each of the petitioners here filed an application for recall of the summoning order, and for discharge from the case. In these applications, it was stated that none of these petitioners, was any longer a Director of the Company. It was stated that Mr. R.S. Rathore had resigned on 5th January 1999, Mr. D.G. Ramaiah had resigned on 4th February, 1999 and Mr. S.S. Karnik had resigned on 29th October, 1998. Form 32 in terms of the Companies Act intimating the change in the Board of Directors of the Company was filed by the Company later but this was not due to the fault of the petitioners. The fact remained that by the time the complaint was filed on 12th May, 1999 each of them had ceased to be a Director. The learned MM dismissed these applications by the following order dated 18th December 2003:

An application seeking exemption of AR of the complainant has been moved. Heard he is exempted from personal appearance for today.

None for accused No. 1.

Accused Nos. 5, 6 and 7 have been exempted till disposal of the application for discharge.

Accused Nos. 2, 3 and 4 are absent. Matter is listed for today for orders on the application of accused Nos. 2 to 7 for discharge. Arguments on the same have already been advanced. Relevant provisions of law and precedents on the point have been perused. All the accused persons have been summoned vide order dated 21.9.2001 of the learned Predecessor of this Court and I find that the reasons for summoning of the accused are mentioned in the order. I do not find any reason to deviate from the opinion expressed by my learned Predecessor. The contentions of the accused persons cannot be considered at this stage and can be decided only after adducing evidence by both the sides. In the circumstances as the application for discharge of accused Nos. 2 to 7 are without merits the same are hereby dismissed matter be listed for precharge evidence.

6. Thereafter the present petitions were filed. While directing notice to issue to the respondents on 28th July, 2004, this Court passed the following order in one of the cases i.e. Crl.M.C. 1901/2004:

Cr. M.C. 1901/2004 and Crl. M. 6172/2004

Learned Counsel for petitioner submits that petitioner specifically pleaded before the learned trial Court that he after his retirement from the Government service was only engaged as a non-Executive Director for consultations and resigned from the Board of Directors way back in January, 1999 and that nothing incriminating against him indicating that he was in-charge or responsible for conduct of day-to-day management of the accused M/s. Kuber Auto General Finance and Leasing Ltd., was placed on record. Learned trial Court dismissed the application without dealing with the issues raised.

Notice for the next date.

At this stage, learned Counsel for petitioner submits that the petitioner is represented by a Counsel, whose power of attorney is on record; who has full instructions in the matter, the case is at the preliminary stage and the presence of the applicant is not required for further progress in the case; that the petitioner will be present as and when ordered by the Court, therefore, he be permitted to be represented through his Counsel.

In view of the above, petitioner may move an application for exemption before the trial Court and if the above conditions are satisfied, learned trial Court will consider the application for exemption favourably.

List on 21st September, 2004.

7. A reply has been filed by the complainant RBI in which it has been contended that the accused Company which was incorporated on 1st November, 1993 filed an application on 3rd July, 1997 with the RBI for grant of certificate of registration as an NBFC. During the processing of the said application, an inspection of the Company was conducted by the RBI on 29th and 30th January, 1999 which revealed the commission of various irregularities. The RBI then issued a show cause notice to the Company on 19th March, 1999. Neither the Company nor its Directors gave a satisfactory explanation and accordingly the application for grant of certificate of registration was rejected. Even though the Company had stopped accepting public deposits from 1st January, 1998 onwards, the total figure of unpaid and matured deposits and non-convertible debentures stood at Rs. 295.06 lakh and Rs. 209.76 lakh respectively as on 31st December, 1998. It is contended that the offences are of a continuing nature, and these offences were detected for the first time only during the inspection.

8. The learned Counsel for the petitioners contends that as on the date of the issuance by the RBI of the show-cause notice, and on the date of filing of the

criminal complaint, each of the three Directors had ceased to function as such. Two of them, i.e., Shri Rathore, and Shri Karnik had resigned even before the date of inspection. Shri Ramaiah had resigned soon after on 4th February, 1999. Further, it was not enough to merely state in the complaint that these persons were in charge of the affairs of the Company. It had to be shown that in fact they were in fact in charge of its affairs on the date of commission of the offence by the Company. The inspection report of the RBI, which is available in the record before the learned MM showed that the factual position was to the contrary. The learned MM did not refer to this report at all, and erroneously proceeded to summon these accused although the requirement of Section 58C(2) of the RBI Act was not satisfied.

9. Counsel for the petitioners contends that the wording of Section 58C(2), RBI Act concerning liability of Directors where the offence is committed by a Company is in pari materia with Section 141 of the Negotiable Instruments Act, 1881 (''NI Act''). Accordingly it is submitted that the decisions of the Supreme Court rendered in the context of Section 141, NI Act would equally apply to the instant case in order to test the individual liability of the petitioner Directors for the offence u/s 58C(2), RBI Act. A reference is made to the judgments in S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, ; Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, ; K. Srikanth Singh Vs. North East Securities Ltd. and Another, ; and the judgment of the Bombay High Court in Saumir Dilip Mehta v. State of Maharashtra 2003 (113) Com Cas 443.

10. Counsel for the petitioners also refers to the decision of the Rajasthan High Court in Ravindra Narayan v. Registrar of Co.''s 1994 (3) CLJ 416 (Raj) in which, in the context of the failure of a company to file balance sheets as stipulated u/s 220 of the Companies Act, 1956, the Court held that the definition of the expression "officer who is in default" in Section 5 of that Act would be determinative of who could be made liable for the default committed by the Company. The High Court held that only the Managing Director or wholetime Directors, and the Managers could be held liable and not the nonexecutive Directors. Based on the judgment in Ravindra Narayan, the Department of Company Affairs issued a Circular on 24th June, 1994 directing that prosecution should be launched against only such persons who were officers-in-default in terms of Section 5 of the Companies Act. Drawing an analogy, it is submitted by the learned Counsel for the petitioners that even for the purposes of RBI Act, it is only those persons who could be characterised as officers-in-default who may be made liable for the offence committed by a company. It is submitted that in the instant case, there is no such averment in the complaint and in fact none of the petitioners answers that description.

11. Appearing for the complainant RBI, Mr. Jayant Bhushan, the learned Senior Counsel, contends that in order to satisfy himself that the complaint discloses the commission of a cognizable offence in terms of Section 58C(2), RBI Act, the learned MM has only to see if the complaint contains the necessary averments to

the effect that the named individual was a director who, at the time the offence was committed, "was in charge of and was responsible to the company for conduct of the business of the company." If it does, then the learned MM has no option but to issue summons to the accused. He further refers to the guidelines issued by the RBI as regards compliance with the relevant provisions of the RBI Act, and in particular Section 58C which makes it clear that where the default is committed by a company, then every person in-charge of the affairs of such company, would be liable. He reiterates that this is a continuing offence, and therefore, the fact that two of the Board of Directors had resigned at the time of inspection, cannot be determinative of their respective liabilities for violation of the provisions of the RBI Act. He submits that even if one were to draw comparison with Section 141, NI Act, the question whether in fact any of these Directors were in charge of the affairs of the company at the time of the commission of the offence, can be determined only at the trial and not at the pre-summoning stage. Further the complainant RBI seeks to make out a case against the petitioners not only on the basis of Section 58C(2) but Section 58C(2) which says that such of those directors who have connived in or to whom the commission of the offence by the company can be attributed to "shall also be deemed to be guilty of the offence". He submits that it was not incumbent on the MM to look into the inspection report which would be proved in accordance with law at the time of trial. Referring to the judgment in S.M.S. Pharmaceuticals, Mr. Bhushan submits that this Court should exercise the power of quashing extremely sparingly, and this is not a case which can be categorized as one in which, when on the reading of the complaint as a whole, no offence can be said to have been made out.

12. As regards the judgment of the Rajasthan High Court in Ravindra Narayan, Mr. Jayant Bhushan sought to point out that the wording of Section 220 read with Section 5 of the Companies Act was not in pan materia with the relevant provisions of the RBI Act. The question whether the proviso to Section 58C of the RBI Act would apply, could be determined only at the trial.

13. At the outset it requires to be noticed that the present complaint has been filed specifically in relation to the offences by the Company and its Directors under Sections 58B and 58C of the RBI Act. The said two Sections read as under:

58B. Penalties- (1) Whoever in any application, declaration, return, statement, information or particulars made, required or furnished by or under or for the purposes of any provisions of this Act, or any order, regulation or direction made or given thereunder or in any prospectus or advertisement issued for or in connection with the invitation by any person, of deposits of money from the public wilfully makes a statement which is false in any material particular knowing it to be false or wilfully omits to make a material statement shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.

(2) If any person fails to produce any book, account or other document or to

furnish any statement, information or particulars which, under this Act or any order, regulation or direction made or given thereunder, it is his duty to produce or furnish or to answer any question put to him in pursuance of the provisions of this Act or of any order, regulation or direction made or given thereunder, he shall be punishable with fine which may extend to two thousand rupees in respect of each offence and if he persists in such failure or refusal, with further fine which may extend to one hundred rupees for every day, after the first during which the offence continues.

(3) If any person contravenes the provisions of Section 31, he shall be punishable with fine which may extend to the amount of the bill of exchange, hundi, promissory note or engagement for payment of money in respect whereof the offence is committed.

(4) If any person discloses any credit information, the disclosure of which is prohibited u/s 45E, he shall be punishable with imprisonment for a term which may extend to six mounts, or with fine which may extend to one thousand rupees, or with both.

[(4A) If any person contravenes the provisions of Sub-section (1) of Section 45IA, he shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to five years and with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

(4AA) If any auditor fails to comply with any direction given or order made by the Bank u/s 45MA, he shall be punishable with fine which may extend to five thousand rupees.

(4AAA) Whoever fails to comply with any order made by the Company Law Board under Sub-section (2) of Section 45QA, shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to a fine of not less than rupees fifty for every day during which such non-compliance continues.]

(5) If any person [other than an auditor]- (a) receives any deposit in contravention of any direction given or order made under Chapter IIIB; or

[(aa) fails to comply with any direction given or order made by the Bank under any of the provisions of Chapter IIIB; or]

(b) issues any prospectus or advertisement otherwise than in accordance with Section 45NA or any order made u/s 45, as the case may be, he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine which may extend-

(i) in the case of a contravention falling under Clause (a), to twice the amount of the deposit received; and

(ii) in the case of a contravention falling under Clause (b), to twice the amount of the deposit called for by the prospectus or advertisement.

[(5A) If any person contravenes any provision of Section 45S, he shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of deposit received by such person in contravention of that section, or two thousand rupees, whichever is more, or with both:

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, the imprisonment shall not be less than one year and the fine shall not be less than one thousand rupees.

(5B) Notwithstanding anything contained in Section 29 of the Code of Criminal Procedure, 1973 (2 of 1974), it shall be lawful for Metropolitan Magistrate or a Judicial Magistrate of the First Class to impose a sentence of the fine in excess of the limit specified in that Section on any person convicted under Sub-section (5A).]

(6) If any other provision of this Act is contravened of if any default is made in complying with any other requirement of this Act or of any order, regulation or direction made or given or condition imposed thereunder, any person guilty of such contravention or default shall be punishable with fine which may extend to two thousand rupees and where a contravention or default is a continuing one, with further fine which may extend to one hundred rupees for every day, after the first, during which the contravention or default continues.

58C. Offences by companies.- (1) Where a person committing a contravention or default referred to in Section 58B is a company, every person who, at the time the contravention or default 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 contravention or default and shall be liable to be proceeded against and punished accordingly:

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

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

Explanation 1- Any offence punishable under this Act shall be deemed to have been committed at the place where the registered office or the principal place of business, as the case may be, in India, of the company is situated.

Explanation 2- For the purpose of this section-

(a) ''a company'' means any body corporate and includes a corporation, a non-banking institution, a firm, a co-operative society or other association of individuals;

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

14. Where the accused is a company, then Section 58C provides that "every person, who at the time of contravention or default 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 contravention or default and shall be liable to be proceeded against and punished accordingly". Mr. Bhushan very fairly states that the deeming provision would be attracted only after it is shown that a certain person was in fact in charge of and responsible to the company for the conduct of its business. In other words, it is not as if every person who is described as a Director, would automatically be deemed to be such Director for the purposes of this section. He nevertheless adds that this itself is a question of fact which has to be determined in every case only at the trial.

15. The contention of the petitioners here can be divided into two broad categories. The first was that the complaint when read as a whole did not disclose the commission of offences by these petitioners. For this purpose a comparison was drawn with Section 141, NI Act and the case law explaining that provision and the requirement of the type of averment that would pass muster before a Director of a company that is accused of an offence u/s 138, NI Act could be summoned to face trial. For this purpose it was sought to be contended that in fact the petitioners were not in charge of the affairs of the company at the time of commission of the offence and a mere reproduction of the words of Section 58C(2), RBI Act in the complaint was not sufficient.

16. The second contention was, however, independent of the first. The petitioners submit that the report of inspection of the RBI which forms the very basis of the launch of the prosecution against the company and its directors formed part of the record of the case before the learned MM. The learned MM claims to have perused "the material on record" while directing summons to issue. Yet, that inspection report in fact contradicts the glib assertion in the complaint that the petitioners were in charge of the affairs of the company at the time of the commission of the offence. Since this material in favour of the petitioners, produced by the complainant itself, was not looked into by the learned MM, the impugned summoning order stands vitiated in law.

17. Although not identically worded, the wording of Section 58C, RBI Act is on the same lines as Section 141, NI Act and therefore an analogy could indeed be drawn with the latter provision while examining a case arising under the former provision. It is with this in mind that Counsel for both the parties made extensive reference to the judgment of the Supreme Court in S.M.S. Pharmaceuticals. In answering the questions raised in those cases, the Court summed up the settled

position of law thus: (SCC, p. 634)

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 spelt 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 respondent tails within parameters of Section 141 has to be spelt 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.

18. Thereafter in para 20 in S.M.S. Pharmaceuticals, the Court summarized its conclusions, the relevant portion of which reads as under:

(a) It is necessary to specifically aver in a complaint u/s 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This 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 question posed in sub-para (b) has to be in 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 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.

19. Following S.M.S Pharmaceuticals there has been a flood of decisions of the Supreme Court involving the liability of Directors where the offence u/s 138, NI Act is alleged to have been committed by a company. The result in each case has depended on the language of the specific averment in the complaint in the given case. These recent decisions include Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya, Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another, S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, ; Everest Advertising Pvt. Ltd. Vs. State, Govt. of NCT of Delhi and Others, Raghu Lakshminarayanan

Vs. Fine Tubes, and N. Rangachari Vs. Bharat Sanchar Nigam Ltd.,

20. The broad trend of the decisions appears to be this. If the averment is merely to the effect that the person is a Director and nothing more, then, following S.M.S. Pharmaceuticals, the complaint is quashed. An example of this is the decision in Sabitha Ramamurthy. However, the position need not be always free from doubt as can be illustratively seen from two recent decisions.

21. In the second round of S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, the specific averment in the complaint was as follows: (SCC, p. 75)

Accused 3 and 4 arc also the Directors of Accused 1 company and Accused 2 to 4 are actively involved in the management of the affairs of Accused 1 company.

To counter the assertion of the Director Smt. Neeta Bhalla, Accused No. 3 that she had resigned on 15th April, 1994 and since the cheques in question were issued in 1996 she was no longer liable, the complainant placed on record a resolution of the Company dated 15th February, 1995 which showed participation of the said Director in the affairs of the company as of that date too. The Supreme Court was not impressed by the complainant''s argument. Upholding the quashing of the complaint by the High Court it was held: (SCC, p.79)

20. The liability of a Director must be determined on the date on which the offence is committed. Only because respondent 1 herein was a party to a purported resolution dated 15.2.1995 by itself does not lead to an inference that she was actively associated with the management of the affairs of the Company. This Court in this case has categorically held that there may be a large number of Directors but some of them may not associate themselves in the management of the day-to-day affairs of the Company and, thus, are not responsible for the conduct of the business of the company. The averments must state that the person who is vicariously liable for commission of the offence of the Company both was in charge of and was responsible for the conduct of the business of the Company. Requirements laid down therein must be read conjointly and not disjunctively. When a legal fiction is raised, the ingredients therefore must be satisfied.

21. If the complaint petition is read in its entirety, the same would show that the only person who was actively associated in the matter of obtaining loan, signing cheques and other affairs of the company which would lead to commission of the alleged offence was Accused 2. By reason of the purported resolution dated 15.2.1995, whereupon strong reliance has been placed by Mr. Mishra, only Accused 2 was authorised to do certain acts on behalf of the Company. The cheques were issued on 15.8.1996 i.e. after a period of 17 months from the date of the said resolution. As is evident from the averments made in the complaint petition, the cheques represented the amount of interest payable for a total period of 15 days only calculated at the rate of 25% per annum on the amount of deposit viz. rupees two crores.

22. The High Court has gone into the matter at some length. The High Court found that the resolution by itself did not constitute an offence even assuming that the same bore the signature of respondent 1 (although the genuineness thereof was disputed).

23. On a plain reading of the averments made in the complaint petition, we are satisfied that the statutory requirements as contemplated u/s 141 of the Act were not satisfied.

22. In contrast, however, in N. Rangachari, the averment in the complaint was to the following effect: (SCC, p. 111)

Accused 2 and 3 are its Directors. They are in charge of and responsible to Accused 1 for conduct of business of Accused 1 company. They are jointly and severally liable for the acts of Accused 1.

The Supreme Court while declining to quash the complaint at the instance of the Director said: (SCC, p. 118)

In the case on hand, reading the complaint as a whole, it is clear that the allegations in the complaint are that at the time at which the two dishonoured cheques were issued by the company, the appellant and another were the Directors of the company and were in charge of the affairs of the company. It is not proper to split hairs in reading the complaint so as to come to a conclusion that the allegations as a whole are not sufficient to show that at the relevant point of time the appellant and the other are not alleged to be persons in charge of the affairs of the company. Obviously, the complaint refers to the point of time when the two cheques were issued, their presentment, dishonour and failure to pay in spite of notice of dishonour. We have no hesitation in overruling the argument in that behalf by the learned Senior Counsel for the appellant.

23. Even while proceeding to examine the applicability of the law explained by the Supreme Court in the context of Section 141, NI Act to the facts on hand, a distinction between those cases and a case like the present involving an offence u/s 58C(2), RBI Act requires to be noticed. It must be remembered that in a cheque bouncing case, the main document is the bounced cheque itself. Once the signature on the cheque on behalf of the company is not in dispute, and the other statutory requirements as set out in Sections 138 and 142 have been complied with, then the defence available to a person who is shown to be a director at the time of commission of the offence u/s 138, NI Act is extremely narrow. The deemed fiction created by the substantive portion of Section 141(1) which draws a presumption of guilt is no doubt rebuttable. In other words, notwithstanding the presumption of guilt in terms of Section 141(1), NI Act, a Director can still escape liability if he is able to prove, in terms of the proviso to that section, that "the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence". However, such requirement of ''proof can only be discharged at the trial. At the stage of cognizance and issue of summons, therefore, the Director of a company

is hard pressed to show that the company has not even satisfied the basic requirement of the substantive part of Section 141(1) by making the necessary averments relevant for that purpose vis-a-vis the individual Director who is sought to be roped in. This is what has spawned the formidable body of case law u/s 141, NI Act. However, for the offence u/s 58C(2) the case of the complainant, which invariably would be the RBI, cannot be so straightforward. Although the presumption of guilt u/s 58C(2), RBI Act is no different from Section 141(1), NI Act and the proviso to both Sections talks of the presumption being rebuttable by the accused Director, for sustaining the complaint u/s 58C(2), RBI Act there will have to be something more than a mere averment in the complaint. To show non-compliance with various regulations of the RBI and so on, a report of inspection of the affairs of the company in question by the RBI itself would indeed be a valuable piece of evidence.

24. In background of the law concerning Section 141, NI Act as explained by the Supreme Court, this Court proceeds to examine the first of the two contentions of the petitioners.

25. A perusal of the complaint filed by the RBI in the instant case shows that the relevant paragraphs containing the averments implicating the present accused are the following:

5. In the process of examining the application made by the first accused company a scrutiny of the Books of Accounts and the affairs of the company was conducted by the complainant through its officer Shri D.S. Negi, D.G.M. DNBS, Reserve Bank of India, Mumbai who was assisted by Shri Ashok Priyadarshi, Manager, DNBS, RBI, New Delhi from 29th January, 1999 to 30th January 1999. However, the first accused company and its Directors initially refused to allow the scrutiny by the officials of the complainant on one or the other pretext....

10. In the present case, the offences have been committed by the first accused company. The accused Nos. 2 to 7 are the directors, who at the time the contravention or default was committed or in other words, when the offences were committed, were in-charge of and were responsible to the company for the conduct of business of the company. This position is supported by the responsibility of the directors to the conduct of the business of the company contained in the Article 142 of the Articles of Association of the company and also by the specific provisions of Section 5 of the Companies Act, 1956.

26. Taken on the face of it the above averments do satisfy the requirement of Section 58B(2) if one were to consider the complaint alone as Constituting the entire material available to the MM at the pre-summoning stage. If indeed there was no other material available but the complaint then the complaint in the instant case would indeed pass muster in light of the law concerning 141, NI Act as explained by the Supreme Court. In fact the complaint also seems to have accounted for the contingency arising out of the judgment of the Rajasthan High Court in Ravindra Narayan although in the view of this Court it does not appear

to have relevance for the case on hand.

27. There are two distinct parts to the averment in para 10 of the complaint. The first part is that the petitioners were directors who were in charge of and were responsible to the company for the conduct of its business. The second part is that they were such directors "at the time the contravention or default was committed or in other words, when the offences were committed". The learned Senior Counsel for the respondent complainant RBI is right in contending that the question whether the offences were of a continuing nature or not and whether on the date the offence was first committed, each of the petitioners was in fact a Director can be left to be determined at the trial. The crucial date for determining liability in terms of Section 58C(2), RBI Act is undoubtedly the date of commission of the offence, and in the event of a continuing one, the date when it was first committed and/or the dates on which it continued to be committed. However strong the defence of each of these petitioners that they were not directors at the time of commission of such offence may be, that would be a matter to be determined at the trial. This is as far as the second part of the averment is concerned. But it is the first part of the averment to the effect that these petitioners were "were in charge of the affairs of and were responsible to the company for the conduct of its business" that appears to be crucial. If the material produced by the complainant itself does not show the petitioners to be answering this description, then a crucial element of Section 58C(2), RBI Act would be missing.

28. If the learned MM was to go merely by the complaint and nothing more, then the respondent would be right in its contention that on the basis of the above averments, the learned MM would have no option but to direct issuance of summons. But in the case on hand the material before the learned MM was not merely the complaint. And that is what brings us to the second contention of the petitioners, on which in the view of this Court they are bound to succeed for the reasons explained hereafter.

29. The argument of the respondent that even though the inspection report of the RBI was placed on record, the learned MM was not bound to look into it before issuing summons does not appear to be correct. For a Criminal Court faced with a complaint of the present nature there are certain cardinal requirements of criminal law that have to be followed. One is that since Sections 58B and 58C, RBI Act are penal provisions, the Court has to be cautious in examining the material presented to it and should not proceed to direct issuance of summons in a mechanical manner as was reminded by the Supreme Court in Pepsi Foods Ltd. in the following words: (SCC p.760)

Summoning of an accused in a criminal cases is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.

30. The above law has to be understood in light of the task before a Criminal Court where a complaint is presented. That Court will have to be satisfied that the complaint discloses the commission of an offence in the manner contemplated by law and of which cognizance can therefore be taken. For this, the Court will doubtless have to examine if the complaint is within the statutorily stipulated time, it is not barred by jurisdiction and if it contains the basic averments to make out a case against the accused for the offences complained of. Also, it is trite that the Court is not at this stage expected to examine the material presented to it at great length and arrive at a definite conclusion of the guilt or otherwise of the accused. But the extent of the scrutiny will vary from case to case depending on the material presented to the Court at the pre-summoning stage. If this material is only the complaint followed by the sworn statements of the complainant''s witnesses, then that entire material at the pre-summoning stage will have to be examined to determine if it makes out prima facie the commission of the offence complained of. The other factors that the learned MM will have to look into might include examining if the complaint is within time, it is not otherwise barred by law or on account of jurisdiction. If all these stand satisfied, the Court will proceed to issue summons. In yet another case the pre-summoning evidence might include the complaint, the statements of the complainant''s witnesses and any other document that the complainant may itself choose to present as part of the pre-summoning evidence. In such event, the Court will be bound to, in terms of the law laid down in Pepsi Foods Ltd., to examine such additional material as well. Having placed such material on the record of the Court, it would not be open to the complainant in such case to contend that the Court should not look into such material but should confine itself to just the complaint itself in order to determine whether a prima facie case of commission of the offence complained of by the accused has been made out. After all, the Court is not expected to act in a mechanical manner but is required to look at the entire pre-summoning evidence presented to it before proceeding to issue summons.

31. Turning to the facts on hand, a perusal of the summoning order as extracted, would show that the learned MM in fact dispensed with the pre-summoning evidence of the complainant, and then proceeded to peruse "the material on record", and not merely the complaint. Since the report of the inspection of 29th and 30th January, 1999 had already been filed on the record of the learned MM

on 18th May, 1999 by the RBI, it is possible that the learned MM meant to include this document when he referred to "the material on record". In other words, the material that was available with the learned MM was not merely the complaint of the RBI but also the report of inspection prepared by the complainant itself.

32. The relevant paragraphs of the inspection report read as under:

2.3 The Group Office at E-20, Greater Kailash, Part-V, New Delhi houses the corporate office of the Group and offices of some Group companies. The Corporate Office, however, bore a partially deserted look, with only a few of the executives attending and some of the computer terminals, telephone lines having been dismantled. It also transpired that salaries of the staff had not been paid for the past 2/3 months. Some of the Executives had quit also. The reasons were stated to be pressure of public for repayment of deposits and in turn presence of field functionaries.

2.4 The entire group moves at the instruction of one man i.e., Shri P.K. Sharma as is indicated by the fact that only when Shri P.K. Sharma met the undersigned information started flowing in.

4.2 Management-

Though Shri Ajit Edwin was stated to be the CEO of the company the day-to-day affairs are managed by Shri S.K. Soni, General Manager who is a qualified Company Secretary. Shri Edwin did not meet us during the course of the scrutiny as he was reported to be working somewhere else. The company reportedly has a staff complement of 18 members. The company has no subsidiary.

4.5 Bouncing of cheques in the Account of Kuber Auto General Finance and Leasing Ltd.-

The company was maintaining two Current Accounts with Oriental Bank of Commerce, One account was meant for deposits of cash in-flows and the other account was meant for January 30,1999,15 cheques aggregating Rs. 2.40 lakh issued by the company on its current account No. 24513 had been returned by the bank for want of funds.

Inquiries were made with the company Executives to ascertain why cheques were issued beyond arrangements. The officials of the company stated that cheques were issued by the Directors prior to passing of vouchers and making entries in the books of accounts of the company. Subsequently, from the counterfoils of the cheques issued vouchers were passed. This gives rise to a suspicion that the books of the Company do not reflect the true position.

33. The inspection report referred to above, prepared by the RBI itself, does not name the petitioners or even remotely advert to the role of any of them in managing the affairs of the company. It in fact probabilises their defence that they were merely Executive Directors not entrusted with any function of day-to-

day management of the affairs of the company. They were Directors who were invited to attend Board Meetings for which they were given sitting fees, and did not draw any remuneration. Such directors were not intended to be roped in for prosecution in terms of Section 58C(1) or 58C(2), RBI Act. The RBI itself having prepared and placed the above report on record and having based the entire prosecution on it, cannot avoid the legal consequence of its contents. The inspection report contra indicates that the petitioners were directors who were in charge of the affairs of the company and responsible to it for the conduct of its business. The report, in fact it specifically names the persons who according to RBI''s inspection team were in charge of the affairs of the company and its day-to-day management. None of the three petitioners is named anywhere in the Report. Despite this, it is inexplicable that in para 10 of the complaint filed thereafter before the learned MM, the RBI made a sweeping assertion concerning the role of the petitioners. This is really not a matter for complicated trial and proof, because it is the complainant''s own document which obviously it cannot and does not disown.

34. As already noticed, the law as declared by the Supreme Court in Pepsi Foods Ltd. requires that once the above inspection report was placed on the record of the case before the learned MM by the complainant itself, and it is a document prepared by the complainant itself and forms the basis of the prosecution, the learned MM was obliged to examine it before proceeding to issue summons. The said document formed part of the material made available at the pre-summoning stage to the learned MM by the complainant and he could not have chosen to ignore it. In other words, the learned MM could not have proceeded to issue the summoning order despite the fact that the inspection report did throw light on whether the petitioners here could be said to be Directors in charge of the affairs of the company and responsible to it for the conduct of its business in terms of Sections 58B read with Section 58C, RBI Act. By not even adverting to the report even while stating that he had perused the "material on record" and particularly when he had dispensed with the complainant''s pre-summoning evidence, the learned MM was put on caution not to mechanically direct issuance of summons. The impugned order dated 21st September, 1999 of the learned MM issuing summons to the petitioners contrary to the above requirement must, therefore, suffer invalidation. This is notwithstanding the position that the order dated 18th December, 2003 passed by the learned MM declining to recall the summoning order cannot be faulted in view of the law in Adalat Prasad Vs. Rooplal Jindal and Others, .

35. For the aforementioned reasons, this Court holds that the complaint case titled Reserve Bank of India v. Kuber Auto General Finance & Leasing Ltd. and Ors. as regards the three petitioners (who are arraigned as Accused 7, 6 and 5 respectively), and the impugned summoning order dated 21st September, 1999 of the learned MM as far as the three petitioners are concerned are unsustainable in law, and they are accordingly quashed.

36. These three petitions are allowed but in the circumstances with no order as to costs.

