
(2014) 03 MP CK 0042

In the Madhya Pradesh High Court

Case No : M. Cr. C. No's. 8129 of 2012, 3785 and 5350 of 2013

Safal Investment Ltd. and Others

APPELLANT

Vs

M/s. Vibgyor Laminates Pvt. Ltd.

RESPONDENT

Date of Decision : 10-03-2014

Acts Referred:

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

Citation : (2014) 4 MPLJ 466

Hon'ble Judges : P.K. Jaiswal, J

Bench : Single Bench

Advocate : Anand Soni, in all Appeals, for the Appellant; Vinay Saraf, learned counsel in all appeals, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Jaiswal, J.

They are heard.

1. This order will also govern the disposal of M. Cr. C. No. 3785/2013 and M. Cr. C. No. 5350/2013 as the common questions are involved and all the matters were heard together and are being decided by this common order. For the purpose of this order, the facts are taken from M. Cr. C. No. 8129/2012. By this application (M. Cr. C. No. 8129/2012) u/s 482 of Cr. P.C., 1973, the applicants are praying for quashment of impugned order dated 22/08/2012, passed by the learned magistrate and also proceedings initiated in pursuance thereof against applicants in Cri. Case No. 21884/2012.

2. Brief facts of the case are that applicant No. 1 M/s. Safal Investment Ltd. is a Registered Company, engaged in the business of share trading, investment, finance etc. The applicant No. 2 Rakesh Akar, applicant No. 3 Dinesh Parasrampur and applicant No. 9 Anil Agrawal are authorized signatories of applicant No. 1-Company. The applicants no. 4 to 8 are/were Directors of

applicant No. 1 - Company.

3. M/s. MRK Pipes Limited is a company of Parasrampur Group of Jaipur. The management of the said MRK Pipes Limited was under Parasrampur Group. Kalani Group invested in the Company inter-alia by subscribing in the share capital as also by providing interest free loan and supply of plant and machinery on lease etc. The manufacturing units of MRK Pipes Ltd. were situated at faraway places in Gujarat, Rajasthan and Haryana and the company started mis-utilizing the funds invested by the Kalani Group as such Kalani Group proposed to seek an exit option i.e. to withdraw itself from the capacity of an "Investor Group". The aid proposal was accepted by the Parasrampur Group including the present applicant company-whose Directors are interchangeably the members of Parasrampur family or employees of Group Companies. Resultantly, Agreement dated 13.09.2010 (Annexure-R/1) was executed whereby the Parasrampur Group including the present applicant company accepted the liability towards the investment of Kalani Group in equity share of MRK Pipes Limited as also towards share application money, interest free convertible debenture, Interest free loan and lease of machinery etc. The Parasrampur Group including the present applicant company agreed to repay the lump sum amount of Rs. 10 Crores along with interest @ 18% p.a. for the period beyond 31.03.2012. It was also agreed that the after repayment as aforesaid the Kalani Group will transfer its shares to the nominees of Parasrampur Group.

4. Since the Parasrampur Group including the applicant No. 1 --Company and its Directors failed to honour their commitment of repayment as agreed under para 4 of aforesaid agreement, another agreement executed on 23.12.2011 (Annexure-R/2), whereby the Parasrampur Group including the present applicant acknowledged their liability under the agreement dated 13.09.2010, but in view of the financial constraints expressed by the Parasrampur Group including the applicant, the aforesaid repayment of Rs. 10 Crores was reduced to Rs. 8,99,00,000/-(Rupees Eight Crores Ninety Nine Lacs Only) payable by way of Bank transfer into the designated bank account of the companies of Kalani Group.

5. M/s. Parasrampur Group including the applicants herein again failed to honour their commitments as agreed under Clause 7 and 8 of the agreement dated 23.12.2011 which resulted in inception 3rd Agreement on 14.07.2012 (Annexure-A/1) whereby the Parasrampur Group including the present applicants acknowledged their liability under agreement dated 13.09.2010 and 23.12.2011 but on the reasoning given by the Parasrampur Group including the present applicant that the said MRK Pipes (Party of the 7th part in agreement dated 14.07.2012) is continuously suffering losses thus in order to buy the peace of mind to avoid future litigation between the parties the Kalani Group ultimately agreed to-reduce the amount of repayment of Rs. 8,99,00,000/- to Rs. 4,49,49,900/-(Rupees Four Crores Forty Nine Lacs Forty Nine Thousand Nine Hundred only). Against the aforesaid repayment of agreed debt and other liabilities 46 post dated cheques were issued by various companies of

Parasrampur Group.

6. All the 48 post dated cheques were issued by the following companies of Parasrampur Group after unanimously resolving in the Board Meeting of the respective companies:-

7. That all the 9 post dated cheques as aforesaid issued by the applicants therein have already been dishonoured out of which Criminal Case No. 1984/2012 was filed against the accused persons who are applicants herein towards dishonour of cheque no. 285612 dated 20-08-2012 for the sum of Rs. 12,15,000/- and cheque no. 285613 dated 31-08-2012 for the sum of Rs. 12,15,000/- and after issuance of Bailable Warrants by trial Court most of the accused persons appeared and bail was granted by the trial Court on 26.02.2013.

8. On 20/07/2012 cheque no. 285608 of Rs. 10 Lakhs was returned by Axis Bank to the non-applicant unpaid due to insufficient fund. The respondent gave a notice dated "26/07/2012 (Annexure-A/2) to the applicants demanding the cheque amount. The applicants replied to the same by a reply dated 6/08/2012 Annexure-A/3).

9. On 22/08/2012, a private complaint was lodged by the non-applicant against applicants no. 1 to 9 in the Court of ACJM, Indore (Annexure-A/4). On 22/08/2012, the impugned order (Annexure-A/5) was given taking cognizance against all the applicants and issuing process against them.

10. It is alleged that long before the signing of agreement on 14/07/2012, the applicants no. 4 and 5 had already resigned from the post of director of applicant no. 1 i.e. 2/04/2012 (Annexure- A/6). Therefore, these applicants are not even a party to the agreement, which is said to be the basis of private complaint. As per agreement dated 14/07/2012 (Annexure-A/1) Clause 11 is arbitration clause and as per the aforesaid clause in case of any dispute(s) and difference(s) between the parties, the matter shall be referred to the Arbitration under the provisions of the Arbitration and Conciliation Act, 1996. The present complaint filed u/s 138 of the Negotiable Instruments Act (in short "the Act") is not maintainable. Hence, this petition for quashment of impugned order and proceedings thereto has been preferred by the applicants.

11. It is submitted by the learned counsel for the applicants that the complainant has not specified or elaborated the role of applicants No. 4 to 8, who are directors of applicant No. 1-Company nor there is any specific allegation regarding the role of applicant No. 9 in the day-to-day affairs of applicant No. 1-Company and prays for dismissal of the complaint.

12. It is also submitted by the learned counsel for the applicants that applicants No. 4 and 5 were not the directors of the Company when cheque dated 20th July, 2012 was issued. He submitted that they resigned on 2/04/2012 and their resignation was accepted by the Company and that is duly notified to the Registrar of the Company.

13. The reply of the non-applicant to the application filed by the applicants u/s 482 of the Cr. P.C. has been filed on 1/11/2013 wherein the preliminary submission of the non-applicant was that the applicants in the present case have not come before this Hon"ble Court with clean hands in as much as that the subject matter of the present transaction pertains to as many as 48 post dated cheques issued by present applicants and their associates of Parasrampur Group for the period from 18.07.2012 to 30.09.2013 of non-applicant-Company and its sister concerns towards the legally enforceable debt and other liabilities as enumerated under the terms and condition of a subsisting agreement executed between the parties on 14.07.2012.

14. On account of dishonour of all the post dated cheques presented on their respective due dates, so far, various criminal cases are pending against the applicants before the trial Court. M. Cr. C. No. 3026/2013 filed by the present applicants on the identical grounds has already been dismissed on 06.05.2013 by this Hon"ble Court.

15. Shri Vinay Saraf, learned counsel for the non-applicant also submits that the subject-matter of the present transaction pertains to as many as 48 post dated cheques issued by the present applicants and their associates of parasrampur Group for the period from 18.07.2012 to 30.09.2013 in favour of non-applicant-Company and its concerns towards the legally enforceable debt and other liabilities as enumerated under the terms and condition of a subsisting agreement executed between the parties on 14.07.2012. The list of aforesaid 48 post dated cheques is Annexure-P/5 of the agreement at page 21 and 22 of the present application filed by the applicants before this Court. On account of dishonour of all the post dated cheques presented on their respective due dates, various criminal cases are pending against the applicants before the trial Court. He further submits that one of the criminal complaint which has been registered against the present applicants u/s 138/141 of the Negotiable Instruments Act vide Cri. Case No. 1984/2013, a similar petition was filed vide M. Cr. C. No. 3026/2013. The Co-ordinate Bench of this Court by order dated 6/05/2013 dismissed the aforesaid M. Cr. C. He submits that in view of dismissal of the aforesaid, all the three present M. Cr. Cs are liable to be dismissed.

16. Order dated 6/05/2013. passed in M. Cr. C. No. 3026/2013 is relevant which reads as under:-

06.05.2013

Shri Anand Soni, learned counsel for the applicants.

Heard

Respondent No. 1 has filed a private complaint u/s 138 of the Negotiable instruments Act alleging that two cheques duly signed by applicant No. 9 were dishonored when they were presented by the respondent No. 1.

It is submitted that applicant No. 1 is a private limited company and as per the

agreement between applicant No. 1 and respondent No. 1 some shares were to be transferred. It was submitted that there is an arbitration clause in the agreement. It was also submitted that cheques were not issued towards the discharge of any legal debt. It was also submitted that applicants No. 4 and 5 are the Ex-Directors. It is further submitted that the other applicants are not in charge of the day to day affairs of the company and in absence of any specific allegation the complaint is not tenable. Reliance has been placed on a decision of the Supreme Court reported in AIR 2010 Supreme Court 2835 Central Bank of India V/s. Asian Global Ltd. and others.

It is undisputed that the court below (JMFC, Indore) has issued the process against the applicant and after this no further steps have been taken on the complaint filed by the respondent No. 1.

It would be open for the applicant to raise defences at the proper stage of the trial, which shall be dealt with by the Trial Court in accordance with law. In this view of the matter, the revision is dismissed.

17. His next submission is that first legal notice was issued on 26/07/2012. The aforesaid statutory notice dated 26/07/2012 was received by the applicants. The aforesaid notice was replied by the applicants on 6/08/2012. As per para 2 of the said reply the applicants admitted that applicants no. 4 to 8 are the directors of applicant No. 1 --Company.

From perusal of the aforesaid, it is clear that the applicants in their reply to the legal notice admitted that applicants no. 4 to 8 were the Directors of the applicant no. 1 -Company upto 6/08/2012.

18. In respect of Form-32, he submits that the service request is dated 22/08/2012 and late fees of Rs. 4,500/- was paid along with the Form-32 which was submitted on 22/08/2012 as is evident from the receipt of Ministry of Corporate Affairs, which is at page 44 of the application (Annexure-A/6). He also drew my attention to para 2 and 3 of the criminal complaint (Annexure-A/4). As per para 2 and 3 of the criminal complaint there are specific allegations against the applicants no. 4 to 9, who are directors of the applicant No. 1 - Company. All the cheques were signed by the applicant no. 9. At the time of issuance of cheque, they were in charge of day-to-day affairs of the company. With the aforesaid, learned counsel for the non-applicant submitted that the cheques in question were issued towards repayment of legally enforceable debt and other liabilities under the terms and condition of a subsisting agreement executed between the parties on 14.07.2012 and prays for dismissal of the complaint.

19. In respect of arbitration clause in the agreement (Annexure A/1), the matter has been decided by the Apex Court in the matter of Central Bank of India Vs. Asian Global Ltd. and Others, , wherein the Hon"ble Apex Court held that if there is an arbitration clause, criminal complaint filed under the Act is maintainable and dismissed the aforesaid objection. This question was also considered by the Co-ordinate bench of this Court in M. Cr. C. No. 3026/2013, passed on

6/05/2013 which has been quoted herein the preceding para.

20. In view of the aforesaid, I am of the view that the private complaint filed by the applicants is maintainable.

21. In respect of liability of each directors, the Apex Court in the case of Anita Malhotra Vs. Apparel Export Promotion Council and Another, has held that in a case of a Director, complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the accused Company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the Company for conduct of its business is not sufficient.

22. In the case in hand, there are specific plea against the Directors of the applicant No. 1- Company, in para 2 and 3 of the complaint. Para 2 and 3 of the complaint reads as under:-

23. The three Judges Bench in the case of S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, , answers the reference and held that:-

(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.

(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable u/s 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered u/s 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141.

24. The Scope of Section 141 of the Act has been authoritatively discussed in the decision of S.M.S. Pharmaceuticals Ltd. (supra). A presumption can be drawn

against such company on behalf of which the cheque issued has been dishonoured but it should also be noted that every person who, at the time when the offence was committed, were in charge of and were responsible to the company for the conduct of its business at the time the offence was committed shall be deemed to be guilty of the offence.

25. Recently, the Apex court in Cri. A No. 1692-1718 of 2013 in the case of A.K. Singhania vs. Gujarat State Fertilizer Co, Ltd. & Anr., decided on 17/10/2013, has held that mere assertion that accused persons were the Directors of the Company is not sufficient to make them liable u/s 141 of the Act. The Court has to see whether they were incharge and responsible for the conduct of business of the Company. The Apex Court in the case of A.K. Singhania (supra) has held the following:-

In case of offence by company for dishonour of cheque, the culpability of the Directors has to be decided with reference to Section 141 of the Act, same reads as follows:

141. Offences by companies.-(1) If the person committing an offence u/s 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty)" of the offence and shall be liable to be proceeded against and punished accordingly:

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

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(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."

From a plain reading of the aforesaid provision it is evident that every person who at the time the offence was committed is in charge of and responsible to the Company shall be deemed to be guilty of the offence u/s 138 of the Act. In the face of it, will it be necessary to specifically state in the complaint that the person accused was in charge of and responsible for the conduct of the business of the Company? In our opinion, in the case of offence by Company to bring its Directors within the mischief of Section 138 of the Act, it shall be necessary to allege that they were in charge of and responsible to the conduct of the business of the Company. It is a necessary ingredient which would be sufficient to proceed against such Directors. However, we may add that as no particular form is prescribed, it may not be necessary to reproduce the words of the section. If reading of the complaint shows and substance of accusation discloses necessary averments, that would be sufficient to proceed against such of the Directors and no particular form is necessary. However, it may not be necessary to allege and prove that, in fact, such of the Directors have any specific role in respect of the transaction leading to issuance of cheque. Section 141 of the Act makes the Directors in charge and responsible to Company "for the conduct of the business of the Company" within the mischief of Section 138 of the Act and not particular business for which the cheque was issued. We cannot read more than what has been mandated in Section 141 of the Act.

26. The question involved in this application has been answered eloquently by the three Judges Bench decision of the Apex Court in the case of S.M.S. Pharmaceuticals Ltd. (supra). Thereafter, the Apex Court in the case of National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another, , after reviewing all its earlier judgments summarized the legal position as follows:-

39. From the above discussion, the following principles emerge:

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite-statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and-proved and

not inferred.

(v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

(vi) If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.

(vii) 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.

27. I have perused the complaint and, in fact, the relevant portions of the allegations have reproduced in the forgoing paras of the judgment. From that it is very clear that the applicants No. 4 to 9 are the directors of the applicant no. 1 company and were incharge and responsible for the conduct of the business of the company at the time when offence was committed. This question was also considered by the Co-ordinate Bench of the learned Single Judge on 6/05/2013, passed in M. Cr. C. NO. 3026/2013. I found on fact that there is averment that the accused persons herein were incharge of and are responsible for the conduct of the business of the applicant No. 1 - Company at the time when the offence was committed.

28. For the above mentioned reasons, I am of the considered view that no case for quashment of impugned order dated 22/08/2012, as prayed by the learned counsel for the petitioner is made out.

29. In the result, I dismiss the M. Cr. C. No. 8129/2012 preferred by the applicants. A copy of this order be retained in the record of M. Cr. C. No. 3785/2013 and M. Cr. C. No. 5350/2013.