

(2013) 12 DEL CK 0109

In the Delhi High Court

Case No : Criminal M.C. 1791 of 2013 and Criminal M.A. 5559 of 2013

Shyam Narayan Mishra and Others

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision : 10-12-2013

Acts Referred:

Companies Act, 1956 — Section 2(24), 5
Criminal Procedure Code, 1973 (CrPC) — Section 207, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 141(1), 141(2), 142
Penal Code, 1860 (IPC) — Section 120

Citation : (2014) 206 DLT 371

Hon'ble Judges : Sunita Gupta, J

Bench : Single Bench

Advocate : R.S. Mishra, for the Appellant; Kusum Dhalla, APP, Mr. R.K. Thakur, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Sunita Gupta, J

1. Vide this common order, I shall dispose of three petitions, bearing Nos. 1791/2013, 1983/2013 and 1986/2013 for quashing of Criminal Complaint No. 40686/2011, titled as "Kamal Singh vs. Research India & Ors." u/s. 138 of N.I. Act, P.S. Dwarka Courts, Delhi. A criminal complaint u/s. 138 read with Section 142 of the Negotiable Instruments Act read with Section 120 IPC was filed by the respondent complainant against M/s. Research India and seven others including the present petitioners, inter alia on the allegations that in the month of October, 2008, Uttam Kumar Tiwari introducing himself as Director of the firm, contacted the complainant for investment/loan of Rs. 8 lakhs for the ongoing projects of the company with assurance to return the same with secured profits/interest and the total amount agreed by the accused persons were Rs. 20,00,000. On persistent request from all accused, complainant agreed for the secured investment/loan of Rs. 8 lakhs and gave two cheques of Rs. 4 lakhs each to accused no. 4 i.e. Uttam Tiwari and the accused got the amount transferred in

his account. On persistent request of the complainant, accused issued a cheque bearing No. 840001 for Rs. 20 lakhs dated 23.10.2010, which on presentation was dishonoured with the remarks "Payment stopped by drawer".

2. It was alleged that accused nos. 2 to 8 are active participants in the day to day business of accused No. 1 and they are under a liability to disburse the legally enforceable debt arising out the loan taken by accused No. 1. Accused Nos. 2 to 8 are the members of the Board of Director/Executive. Legal notice was served upon all the accused persons calling upon them to pay the cheque amount. On their failure to pay the same, the complaint in question was filed.

3. After pre-summoning, evidence was led by the complainant, all the accused were ordered to be summoned. Application was moved by the petitioners for stopping the proceedings qua them which was dismissed on the ground that in view of Adalat Prasad Vs. Rooplal Jindal and Others, , that an aggrieved person cannot invoke the provisions of Section 207 of Cr.P.C. The remedy lies in invoking Section 482 Cr.P.C. before the High Court. The revision preferred against that order was dismissed in view of the aforesaid Supreme Court judgment. Thereafter these petitions have been filed u/s. 482 Cr.P.C. for quashing of the Criminal Complaint, inter alia, on the allegations that respondent No. 1 has been shown as NGO/M/s. Research India and respondent No. 4 Uttam Kumar Tiwari is the sole Director of the NGO. In 2008, the petitioners were not the office bearers of accused No. 1 nor had joined the NGO in any capacity. They joined the NGO in 2010 only. Uttam Kumar Tiwari is the sole Director of the NGO and is authorized signatory and accordingly, he has signed a cheque in question on behalf of the NGO and he is ready and willing to discharge his liability of the cheque amount, if legally recoverable from him or the said NGO by the complainant. In the affidavit also, the complainant has mentioned that when the loan was given to Uttam Kumar Tiwari by Sh. Kamal Singh, the petitioners were not present. There was no deal between Kamal Singh and the petitioners. They have been wrongly impleaded as accused in the complaint by the complainant. As per the byelaws of Research India, i.e. Memorandum of Association, Managing Committee Rules and Regulations of the NGO for the year 2010-2011, it is clear that petitioners were not the office bearers in any capacity in 2008, as such no liability can be fastened on them.

4. Notice of the petitions was served upon the respondent. I have heard Sh. R.S. Mishra, Advocate for the petitioner and Mr. R.K. Thakur, Advocate for respondent no. 2 and have perused the record.

5. It is submitted by learned counsel for the petitioners that petitioners were inducted in the NGO i.e. respondent no. 1 in the year 2010 whereas the transaction took place in the year 2008, as such, they cannot be held liable for any transaction which took place in the year 2008. He also referred to the Memorandum of Association and Rules and Regulations of respondent no. 1 for showing that even otherwise, the petitioners were not in charge nor were concerned with the day to day affairs of respondent No. 1 and in the absence of

any allegations qua them, they cannot be made liable. He also referred to the affidavits filed by all the petitioners for showing that they joined the NGO somewhere in the year 2010 and the affidavit of Uttam Kumar Tiwari who owned the responsibility of making the payment to the complainant, if the cheque amount is legally recoverable from him. Reliance was placed on K.K. Ahuja Vs. V.K. Vora and Another, and Deepika Malhotra and Ors Vs. Kanti Lal Jain, to substantiate his submission.

6. On the other hand, learned counsel for the respondent submitted that the question whether the petitioners had joined the respondent No. 1 in the year 2010 or were already part of respondent No. 1 is a matter which is required to be adjudicated upon by means of evidence. He also referred to the certificate of renewal of registration for showing that it was renewed for a period of five years with effect from 12.04.2005 and as such, it was submitted that it will be a matter of trial as to whether the petitioners formed part of respondent no. 1 at the relevant time or not.

7. I have given my considerable thoughts to the respective submissions of learned counsel for the parties and have perused the record.

8. A perusal of complaint filed by the respondent-petitioner goes to show that the allegations qua the petitioners are to the following effect:-

(i) Complainant is known to accused No. 5 Rajneesh who brought accused Nos. 2 to 8 to his house and introduced them as Directors of the company;

(ii) All the accused gave a rosy picture of the accused company and induced him to invest his hard earned money in the company as an investor and earn good returns;

(iii) All the accused, in the month of October 2008, through Uttam Kumar Tiwari, introducing himself as Director of the firm contacted the complainant for the ongoing projects with assurance to return an amount of Rs. 20 lakhs. All the accused assured the complainant that the cheque would be honoured on presentation as there was sufficient funds in the account of the accused;

(iv) Accused Nos. 2 to 8 actively participated in the day to day business of accused No. 1 and are under liability to disburse the legally and enforceable debt who are the members of the Board of Director/Executive.

9. The sole question for consideration is as to whether these averments in the complaint are sufficient to hold them liable for the commission of offence u/s. 138 of the N.I. Act.

10. Section 138 and Section 141 were brought in the N.I. Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (Act 66 of 1988) with effect from April 1, 1989. These provisions as amended from time to time read as under:

138. Dishonour of cheque for insufficiency, etc., of funds in the account.-Where

any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) The drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.-For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

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.

11. The legal position concerning the vicarious liability of a Director in a company which is being prosecuted for the offence u/s 138, NI Act has come up for consideration before Courts on more than one occasion. In the case of S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, , the following questions were referred to a 3-Judge Bench for determination:

(a) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfil the requirements of the said section and it is not necessary to specifically state in the complaint that the person accused was in charge of, or responsible for, the conduct of the business of the company.

(b) Whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

(c) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the managing directors or joint managing director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against.

12. The three-Judge Bench of Hon''ble Supreme Court answered the aforesaid questions thus:

(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 the question posed in sub-para (b) has to be in the negative. Merely being a director of a company is not sufficient to make the person liable u/s 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of

and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to Question (c) has to be in the 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 the 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 the 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.

13. In K.K. Ahuja (*supra*) relied upon by learned counsel for the petitioner, the position u/s. 141 of the Act was summarized thus:-

(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix "Managing" to the word "Director" makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii) In the case of a director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under Sub-section (2) of Section 141.

(iii) In the case of a Director, Secretary or Manager (as defined in Section 2(24) of the Companies Act) or a person referred to in clauses (e) and (f) of Section 5 of Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case u/s 141(1). No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable u/s 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that Sub-section.

(iv) Other Officers of a company cannot be made liable under Subsection (1) of Section 141. Other officers of a company can be made liable only under Sub-section (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque,

disclosing consent, connivance or negligence.

14. Turning to the factual matrix of the case, a bare perusal of the complaint goes to show that the allegations against the accused persons are very vague. No specific role has been assigned to them. The complaint itself makes it clear that as per the case of the complainant, it was accused No. 4 Uttam Kumar Tiwari who had gone to the complainant's house and the complainant gave two cheques of Rs. 4 lakhs each to him which was got transferred in the account of respondent no. 1. Thereafter cheque of Rs. 20 lakhs was also issued by respondent no. 4 (as arrayed in the complaint), which was dishonoured. Except for vague assertions that accused Nos. 2 to 8, excluding accused No. 4, actively participated in the day to day business of accused No. 1 and that they are members of Board of Directors., no specific role has been assigned to them and it is not disclosed as to how they are responsible for the day to day affairs of the company.

15. On the other hand, the petitioners have filed their affidavits according to which, petitioner No. 1 Shyam Narayan Mishra joined respondent no. 1 as Chairman on 20.10.2010, petitioner No. 2 Rekha Sinha was working as Vice Chairman since 12.04.2005. However, according to her, her duties were only to look after the work in the absence of the Chairman. Petitioner no. 3 Rajneesh Kumar Dubey joined respondent No. 1 on 16.08.2010 as Director Finance and remained there till 26.04.2011. Similarly petitioner no. 4, Naveen Kumar Singh joined as President on 16.10.2010 and remained there till 26.04.2011. Petitioner no. 5, Amit Kumar Mishra joined as President on 17.08.2010 and remained there till 26.04.2011. Petitioner no. 6, Neeraj Pratap Singh joined as member on 16.08.2010 and is continuing till date. Although it is true that these averments may be required to be adjudicated during the trial, however, in the legal notice as well as in the complaint itself, the complainant has described them as Chairman, Vice Chairman, President, Director, Director (Finance), Vice-President and Member. As per the amended Rules and Regulations, the duties and responsibilities of Chairman, Vice Chairman, President, Vice-President, Director, Director Finance and Members have been specified and except for the Director who can receive loan, donation, resources from various government/non-government, national/Indian bodies, to sign all the bills, vouchers, cheques, notes and orders, none of the other persons have been authorized to do so. That being so, the Rules and Regulations of the bank does not empower the petitioners to take any loan from any person or to issue any cheque. That being so, coupled with the fact that Uttam Kumar Tiwari has filed his own affidavit owning the responsibility of paying the cheque amount, if legally recoverable, in the absence of specific allegations qua the petitioners, the summoning order qua the petitioners is not sustainable in law as there is neither any specific allegation nor prima facie evidence on record to show that they were in charge and responsible for the conduct of the business and day to day affairs of M/s. Research India. Substantially similar view was taken in Deepika Malhotra (supra) relied upon by learned counsel for the petitioner. Accordingly the petitions are

allowed. The complaint and the proceedings emanating therefrom qua the petitioners are quashed. However, nothing stated herein shall have any repercussion as regards respondent no. 1, M/s. Research India and respondent no. 4 Mr. Uttam Kumar Tiwari in the complaint case concerned.