

(2009) 08 DEL CK 0162

In the Delhi High Court

Case No : Criminal M.C. No. 194 of 2008

Smt. Bina Sharma

APPELLANT

Vs

HDFC Bank Ltd.

RESPONDENT

Date of Decision : 10-08-2009

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 141

Citation : (2010) 1 ALD(Cri) 27 : (2010) 6 RCR(Criminal) 1265

Hon'ble Judges : V.K. Shali, J

Bench : Single Bench

Advocate : Amand Anand, for the Appellant; Manish Paliwal, for the Respondent

Judgement

V.K. Shali, J.—This is a petition filed by the petitioner for quashing the summoning order dated 18.10.2006 passed the learned MM, Patiala House Courts in respect of Complaint case No. 615/1 u/s 138 of the Negotiable Instruments Act.

2. Briefly stated the facts of the case are that the respondent filed a complaint u/s 138 r/w Section 141 of the Negotiable Instruments Act alleging therein that the petitioner being the Director of a company known as M/s Vardan Agrotech Pvt. Ltd. Dwarka Vihar, 43 Km Stone, NH1, G T Road, District Sonapat, Haryana had borrowed a sum of Rs. 30 lacs by way of loan. M/s Vardan Agrotech Pvt. Ltd. was made accused No. 2, Dwarka Nath, Chairman- cum-Managing Director stood a corporate guarantor to secure the aforesaid facility on the basis of a Board Resolution dated 11.8.2005. It is alleged that the said company towards the repayment of the said loan had issued a cheque bearing No. 031079 dated 28.7.2006 drawn on Bank of India Branch Sonapat for a sum of Rs. 20,60,000/- in favour of the respondent /bank. However, on presentation, the said cheque was dishonoured on 9th August, 2006 on the ground that the account in question did not have sufficient funds. A legal notice dated 22.8.2006 is purported to have been sent to the Company M/s Vardan Agrotech Pvt. Ltd. its Chairman cum Managing Director Dwarka Nath, Mrs.Indira Sharma and Mrs. Bina Sharma, the

petitioner herein.

3. It is alleged in the complaint that since no payment was made to liquidate the aforesaid liability despite service of notice, accordingly, the complaint in question was filed against all the aforesaid persons including the petitioner.

4. The allegations against the present petitioner in the complaint were contained in para 12 of the complaint which stated that the petitioner was the Director of accused company and responsible to the said company for the conduct of business and also being incharge of the day to day affairs of the said company and was thus jointly and severally liable for all the acts of the accused company. The exact averment made in para 12 is reproduced as under:

That Accused No. 3 and 4 being the Directors of Accused No. 2 Company are responsible to the Accused No. 2 Company for the conduct of business and also being in charge of the day to day affairs of Accused No. 2 Company are thus, jointly and severally liable for the acts and liabilities of the Accused No. 2 Company.

5. On the basis of the aforesaid complaint, the respondent /complainant filed an affidavit by way of evidence of one Sh.S.K.Jha constituted attorney of the bank. In this affidavit also so far as the averment made against the petitioner are concerned, they are nothing but reproduction of the averment made in the complaint itself.

6. A perusal of the complaint and the affidavit by way of evidence shows that the affidavit is nothing but a reproduction of the averment made in the complaint itself.

7. On the basis of the aforesaid facts and prima facie evidence, the learned Magistrate passed an impugned order of summoning the petitioner.

8. The petitioner feeling aggrieved by the order of summoning has chosen to file the present petition against the impugned order of summoning dated 18.10.2006 and has also prayed for quashing of the complaint qua the petitioner.

9. I have heard the learned Counsel for the petitioner as well as the learned Counsel for the respondent/bank.

10. The main contention of the learned Counsel for the petitioner has been that the respondent /bank apart from making a bald averment in the complaint with regard to the petitioner being the Director and incharge of day to day business of the company in question, there is not even an iota of evidence adduced by the complainant at the pre- summoning stage to establish as to how the petitioner was incharge and responsible and what were the different acts and functions which were being discharged by her so as to bring her within the ambit of law u/s 141 of the Act. In the absence of such an evidence, the counsel submitted that the order of summoning could not be sustained. The learned Counsel in order to support his submission placed reliance on the following judgments, which are:

N.K. Wahi Vs. Shekhar Singh and Others,

Ramrajsingh Vs. State of M.P. and Another,

Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another,

11. The learned Counsel has also referred to a judgment of this Court in Harmeet Singh Paintal v. State (NCT of Delhi) and Ors. 2007 (4) JCC 396 wherein the facts were somehow akin to the averments made in the case in hand.

12. The learned Counsel for the respondent contested the submission of the learned Counsel for the petitioner and contended that so far as prima facie proof of showing the petitioner as incharge in respect of day to day affairs of the business is concerned, the initial onus has been discharged by the respondent and therefore, it was essentially for the petitioner to adduce evidence during the course of trial to establish that she was not incharge and responsible for the conduct of the business of the company. The learned Counsel has tried to distinguish the judgment in Saroj Kumar Poddar's case both on facts with regard to the averments made in the complaint in the said case as well as on the question that the petitioner in that case was alleged to be the Director of a Public Limited Company as against the Private Limited Company in the instant case where all the Directors including the petitioner were essentially family members. Thus the learned Counsel for the respondent tried to distinguish the liability of a Director in a Public Ltd. Company by contending that in a Public Limited Company, there is a possibility of somebody being an independent Director who may not be aware of the day to day functioning of the company in question, as against a company which is essentially a closely held family company where each and every member of the family who is the Director will be invariably be aware of the day to day functioning of the company.

13. On the basis of these facts, it was urged that the order of summoning was perfectly justified and there is no merit in the prayer of the petitioner for quashing of the complaint.

14. I have carefully considered the respective submissions and gone through the record. There is no dispute about the fact that by virtue of Section 141 of the Act a Director of a company who is incharge and responsible for the day to day functioning of the company is made liable for the offence u/s 138 of the Negotiable Instruments Act but before a person is brought within the ambit of vicarious liability as envisaged u/s 141 of the Act, two things must be clearly established. Firstly, there must be an averment in the petition to the effect that the person sought to be enroled in the capacity of a Director is incharge and responsible for the day to day functioning of the company and secondly, that the averment should be made good by the complainant by adducing pre- summoning evidence or from the documents proved during the course of pre summoning evidence that a person should be actually incharge and responsible for the day to day functioning of the company.

15. It has been seen that in complaint, the complainant simply reproduced the language of Section 141 of the Act so as to enrope a Director. The Supreme Court in both Saroj Kumar Poddar's case as well as in N.K.Wahi's case has specifically observed that it is not necessary that the exact language of Section 141 of the Act must be reproduced in the complaint but there is no harm in case a person reproduces the exact language of Section 141 of the Act so as to bring a Director within the ambit of vicarious liability, but then he is expected either to mention in the complaint itself as to how a person is incharge and responsible or if that is omitted at least by adducing pre summoning evidence which may be either by way of an affidavit or otherwise as to how a Director is incharge and responsible for the conduct of the business of a company. Thereby meaning that merely because an averment is made by a complainant or that there is reproduction of the ingredients mentioned of Section 141 of the Act would not be sufficient to bring a Director within the ambit of Section 141 of the Act unless and until the complainant shows either by way of documents or by way of a evidence prima facie that the Director is incharge and responsible for the day to day of business it is only when such initial onus is discharged by the petitioner that the said Director can be enrope under vicarious liability u/s of 141 of the Act and the onus will shift on to the said Director to show that either he was not incharge and responsible for the conduct of the business of the firm or the said cheque was issued without his knowledge or he had exercised all due diligence to prevent the commission of such an offence.

16. In the instant case, the order of summoning which has been passed by the learned Magistrate in my view is not sustainable on account of the fact that the petitioner although he has made an averment that the petitioner was incharge and responsible for the day to day conduct of the business of the company but the respondent/complainant failed to show by any evidence either in the shape of his own affidavit or even from the documents which have been proved during the course of recording of pre-summoning evidence that she was incharge and responsible and therefore, the order is not legal and sustainable in the eyes of law.

17. The contention of the learned Counsel for the respondent /bank is that there is a distinction between a Public Limited company and a Private Limited Company so far as the Directors are concerned, does not impress this Court for the simple reason that in matters of a criminal liability u/s 141 of the Act and vicarious liability as envisaged under the said Section, no distinction can be made between the Director of a Public Imitated Company and the Director of a Private Ltd. Company. In case we make such a distinction between two sets of Directors that is no permissible in law and would be reading something in the statute which is not in existence.

18. The learned Counsel for the respondent is right in observing that the facts in Saroj Kumar Poddar's case were distinguishable from the facts of the case in hand so far as the averments qua the Director of that case in comparison to the

averments made in the present complaint qua the petitioner are concerned. Merely because the averments made in two different cases do not match, does not in any manner detract from the ratio which has been laid down in the said case which is contained in para 16 of the said judgment, which reads as under:

16. The question came up for consideration before a 3-Judge Bench of this Court in *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another*, wherein upon consideration of a large number of decisions this Court opined:

While analyzing Section 141 of the Act, it will be seen that it operates in cases where an offence u/s 138 is committed by a company. The key words which occur in the Section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words "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 etc. "What is required is that the persons who are sought to be made criminally liable u/s 141 should be at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every persons connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence who will be liable for criminal action. It follows from this that if a Director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provisions. The liability arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of "every persons" the section would have said "every Director, Manager or Secretary in a Company is liable"...etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

19. Similar is the view expressed by the Supreme Court in *Ramraj Singh's* case (supra) as well as the learned Single Judge of this Court in *Harmeet Singh's* case (supra).

20. For the reasons mentioned above, I am of the considered opinion that the order of summoning which has been passed in the instant case is not sustainable

in the eyes of law inasmuch as the petitioner has not established by any iota of evidence that the petitioner was incharge and responsible of the conduct of the business of the firm nor any document has been placed on record to show that as to how she was the incharge except that the affidavit of the respondent/complainant reproduce the averments made in the complaint which is grossly insufficient to fasten the vicarious liability on the petitioner. Accordingly, the prayer of the petitioner to this extent is allowed. However, so far as the prayer of the petitioner for quashing the complaint qua her is concerned that cannot be entertained for the simple reason that the parameters for quashing the complaint are laid down in case titled State of Haryana and others Vs. Ch. Bhajan Lal and others, , wherein the petitioner has not been able to establish any one of the ground which have been stated in the said case as to why the complaint should be quashed. The prayer of the petitioner for quashing the complaint is totally mis- conceived. Accordingly, the petition of the petitioner is partly allowed.

21. So far as Harmeet Singh's case (supra) is concerned, although in the said case the complaint is stated to have been quashed however, in view of this Court keeping in view the law laid down by the Supreme Court in Ch.Bhajan Lal's case (supra) that cannot be permitted.