

(2009) 05 CAL CK 0005
In the Calcutta High Court
Case No : C.R.R. No. 218 of 2007

Sri Chhedi Lal Gupta

APPELLANT

Vs

Shri Suresh Damani and Others

RESPONDENT

Date of Decision : 18-05-2009

Acts Referred:

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

Citation : (2010) 6 RCR(Criminal) 1232

Hon'ble Judges : Patha Sakha Datta, J

Bench : Single Bench

Advocate : Subrata Bose and Ratanlal Joshi, for the Appellant; Amit Bhattacharyya and Ayan Bhattacharyya for the Opposite Party No. 1, for the Respondent

Final Decision : Dismissed

Judgement

Patha Sakha Datta, J.

The Judgment of the Court was as follows:

1. The opposite party No. 1 lodged a complaint with the learned Chief Metropolitan Magistrate, Calcutta against one M/s. Gaya Prasad Chhedi Lal, said to be a partnership firm and three others including the present petitioner Chhedi Lal Gupta who are said to be the partners of the said firm. In terms of the petition of complaint under Sections 138/141 of the N.I. Act a certain cheque which was issued by the firm in favour of the opposite party towards discharge of debt or other liability was got bounced back as a result of which the criminal proceeding followed after service of a notice of payment u/s 138(b) of the N.I. Act. of the four accused persons it is the accused No. 4 Chhedi Lal Gupta who is the petitioner herein being aggrieved with the order dated 8th November, 2006 whereby the learned Magistrate rejected the prayer of the present petitioner praying for dropping of the proceeding. The contention of the petitioner was that he was in no way liable to answer the charge as he was never a partner of the

firm. The learned Magistrate observed that whether the petitioner was partner of the firm or not cannot be considered without recording of evidence and accordingly prayer for discharge was rejected.

2. Mr. Subrata Basu, learned Senior Advocate appearing for the petitioner submitted that the petitioner was never the partner of the firm and no document was produced in support of such averment. A bare statement in the petition of complaint that the petitioner was one of the partners of the firm is not sufficient for the purpose of lodging the prosecution under Sections 138/141 of the N.I. Act. The second submission of Mr. Basu is that u/s 141 of the N.I. Act if the accused 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 accordingly petition of complaint must bear an averment that the persons sought to be prosecuted were in-charge of and was responsible to the company for the conduct of the business of the company, but in the instant case it has not been alleged or averred in the petition of complaint that the petitioner was in-charge of and responsible to the company for the conduct of the business of the company. Reference in this connection has been made to the decision reported in AIR 2007 SCW 1880 (N.K. Wahi vs. Shekhar Singh & Ors.), where it has been observed with reference to S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, that a complaint must contain specific allegations against the Directors as to how they are in-charge of and responsible to conduct of the business of the company. Now in S.M.S. Pharmaceuticals Limited vs. Neeta Bhatta, reported in 2005 SCC (Cri) 1925 it was observed as follows:-

"In view of the above discussion, our answers to the questions posed in the reference are 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 requirement 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."

Reference in N.K. Wahi has been made to the decision in Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya, and Saroj Kumar Poddar vs. State (NCT of Delhi) & Anr., 2007(2) C Cr LR (SC) 187.

3. Mr. Amit Bhattacharyya, learned Counsel appearing for the opposite party No. 2, the complainant, submitted that Section 141 of the N.I. Act deals with vicarious liability by virtue of which a director of a company is held liable who was in-charge and responsible for the conduct of business of the company at the relevant point of time when the alleged offence took place. It is further submitted that what is the requisite averment to attract a director criminally liable was dealt with in a three Judges Bench decision of the Supreme Court in S.M.S. Pharmaceutical Ltd., 2005 SCC (Cr) 1975: 2005(2) C Cr.L.R (SC) 457 (Paras 8/17/18/19) wherein it has been observed that it is necessary to specifically aver in a complaint u/s 141 of the Act that at the time offence was committed the person accused was in-charge of and responsible for the conduct of business of the company and in absence of such averment the requirement of Section 141 cannot be said to be satisfied. It is submitted that the decision in N.K. Wahi (supra) does not lay down at all that an averment is a must as to how and in what manner a certain person was responsible for conduct of business of the company or otherwise responsible to it in regard to its functioning.

4. In the second S.M.S. Pharmaceutical Ltd. decision 2007 (2) Supreme 459, the same principle has been reiterated and it was held that Section 141 of the Act does not say that a director of a company shall automatically be vicariously liable for commission of an offence on behalf of the company and what is necessary is that sufficient averment should be made to show that the person who is sought to be proceeded against on the premise of his being vicariously liable for commission of an alleged offence by the company must be in-charge and shall also be responsible to the company in the conduct of its business. The decision in Saroj Kumar Poddar (supra) which is banked upon by the petitioner has been referred to in second SMS case wherein the same Hon'ble Judge who spoke in Saroj Kumar Poddar case wrote the following lines.

"A faint suggestion was made that this Court in Saroj Kumar Poddar (supra) has laid down the law that the complaint petition not only must contain averments satisfying the requirements of Section 141 of the Act but must also show as to how and in what manner the appellant was responsible for the conduct of the business of the company or otherwise responsible to it in regard to its

functioning. A plain reading of the said judgment would show that no such general law was laid down therein. The observations were made in the context of the said case as it was dealing with a contention that although no direct averment was made as against the appellant of the said case fulfilling the requirements of Section 141 of the Act but there were other averments which would show that the appellant therein was liable there for."

5. In *Monaben Ketanbhai Shah and Another Vs. State of Gujarat and Others*, it has been held as follows:-

"It is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole. If the substance of the allegations made in the complaint fulfill the requirements of the Section 141, the complaint has to be proceeded and is required to be tried with. It is also true that in construing a complaint a hyper technical approach should not be adopted so as to quash the same. The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind. These provisions create a statutory presumption of dishonesty, exposing a person to criminal liability if payment is not made within the statutory period even after issue of notice. It is also true that the power of quashing is required to be exercised very sparingly and where, read as a whole factual foundation for the offence has been laid in the complaint it should not be quashed. All the same, it is also to be remembered that it is the duty of the Court to discharge the accused if taking everything stated in the complaint as correct and construing the allegations made therein liberally in favour of the complainant the ingredients of the offence are altogether lacking. The present case falls in this category as would be evident from the facts noticed hereinafter."

6. In *N. Rangachari vs. Bharat Sanchar Nigam Limited*, 2007(2) Law Herald (SC) 1379 there Lordships while relying on the decision in first SMS case made certain observations which are pertinent.

"A person normally having a business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its Memorandum or Articles of Association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. Therefore, when a cheque issued to him by the company is dishonored, he is expected only to be aware generally of who are in-charge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheques was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in-charge of its. So, all that a payee of cheque that is dishonored can be expected to allege is that the persons named in the complaint are in-charge of its affairs. The Directors are prima facie in that position."

7. In the instant case, it has been alleged in the petition of complaint that "accused No. 1 is a firm situated at 13 Camac Street, Kolkata-700 017 and accused Nos. 2 to 4 are the partners of the said firm and look after the day to day affairs of the said firm and they reside at 10/2A Alipore Park Place, Kolkata-700 027". Though the exact wordings in Section 141 of the Act have not been reproduced verbatim, which it is not necessary so to do, it has been sufficiently made clear that it is the accused Nos.2 to 4 who were responsible to the partnership firm as partners and they look after the day to day affairs of the said firm. This satisfies, to my mind, the ingredients of the law. In terms of Monaben Ketanbhai Shah, it is the substance of the allegations that have to fulfill the requirements of Section 141 and in the instant case reading the complaint as a whole the requirements of Section 141 have been averred in the petition of complaint. This being so it cannot be said that the petition of complaint is defective.

8. As to the second point that the petitioner was not a partner of the firm, I am unable to agree with the submission of Mr. Bose that since the petitioner was not a partner the complaint should be dropped as against him. At this stage when trial has not yet commenced the papers or documents of the petitioner which in fact are the document of the defence cannot be considered by this Court while considering an application for quashing of a proceeding u/s 482 of the Cr.PC. The onus is on the person who raised a particular fact in issue to prove the same in the trial and this Court cannot assess evidence at this stage. This is a question of fact which has to be decided by the learned Magistrate upon recording of the evidence without which the criminal proceeding at the instance of the accused cannot be quashed simply on his assertion that he was not a partner. In the petition of complaint it has been averred that towards discharge of liability the accused persons who were partners of the firm and they look after day to day affairs of the firm handed over 8 post dated cheques totaling Rs. 9 lacs in the name of the complainant. It is submitted by Mr. Bhattacharya, learned Advocate appearing for the opposite party/complainant that this petitioner earlier filed an identical revisional application in a separate but identical case and there also the same plea was raised which was rejected in C.R.R. No. 3890 of 2006 by an Hon"ble Judge of this Court (Chhedi Lal Gupta Vs. Suresh Damani and Another, .

9. In the circumstances, I find no merit in the application. The application is dismissed. The order of the learned Magistrate is confirmed.

Urgent xerox certified copy, if applied for, be given to the parties as expeditiously as possible.