

(2013) 02 DEL CK 0040

In the Delhi High Court

Case No : Criminal M.C. 432, 433, 434, 435, 436 and 437 of 2013

Ved Prakash Gupta and Another

APPELLANT

Vs

M/s. Anchon Chemplast Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 04-02-2013

Acts Referred:

Citation : (2013) 2 JCC 97

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Advocate : Arun Sukhija, with Mr. Rohit Shankar, for the Appellant;

Final Decision : Dismissed

Judgement

G.P. Mittal, J.

CRL M.A. 1365/2013 (Exemption) in CRL. M.C. 432/2013

CRL M.A. 1380/2013 (Exemption) in CRL. M.C. 433/2013

CRL M.A. 1382/2013 (Exemption) in CRL. M.C. 434/2013

CRL M.A. 1386/2013 (Exemption) in CRL. M.C. 435/2013

CRL M.A. 1388/2013 (Exemption) in CRL. M.C. 436/2013

CRL M.A. 1390/2013 (Exemption) in CRL. M.C. 437/2013

Exemption allowed, subject to all just exceptions.

The Applications are allowed

CRL. M.C. 432/2013

CRL. M.C. 433/2013

CRL. M.C. 434/2013

CRL. M.C. 435/2013

CRL. M.C. 436/2013

CRL. M.C. 437/2013

1. By virtue of these six Petitions (being Crl. M.C. Nos. 432/2013, 433/2013, 434/2013, 435/2013, 436/2013 & 437/2013) the Petitioners, invoke inherent powers of the Court u/s 482 of the Code of Criminal Procedure, 1973 (Cr. P.C.) for quashing of the summoning order dated 15.11.2011 passed by the learned Metropolitan Magistrate ("MM"). The common ground of challenge raised by the Petitioners in the instant Petitions is that the Petitioners were prosecuted as Directors and persons in charge and responsible for the conduct of business of M/s. Pragati Hitech Products Pvt. Ltd. (Pragati) as certain cheques issued by Pragati were dishonoured on presentation and the Petitioners were made vicariously liable being Directors of the Company. It is urged that the Petitioners had tendered their resignation by letter dated 19.07.2011. The resignations were accepted by the Company by the Resolution dated 20.07.2011. Form 32 in respect of Petitioner Ved Prakash Gupta was submitted with the Registrar of Company (ROC) immediately thereafter. Since the cheques in question were dated 10.08.2011, 20.08.2011, 30.08.2011, 10.09.2011, 10.10.2011 & 30.10.2011, the Petitioners cannot be fastened with the vicarious liability as it was not within their power and competence to honour the cheques as they had already resigned from the Directorship. Learned counsel for the Petitioners places reliance on report of the Supreme Court in Harshendra Kumar D. Vs. Rebatilata Koley Etc., .

2. It is well settled that for the purpose of quashing of a Complaint or FIR, the High Court cannot look into the defence of the accused. The Court is only required to see whether on the basis of the averments and the evidence produced by the Complainant, there are grounds for proceeding against the accused.

3. In a recent report of the Supreme Court in State of Orissa and Others Vs. Ujjal Kumar Burdhan, , the investigation initiated by the Vigilance Department of the State Govt. of Orissa into allegations of irregularities in receipt of excess quota, recycling of rice and distress sale of paddy by one M/s. Haldipada Rice Mill, Proprietorship concern of the Respondent was quashed by the High Court. The Supreme Court reversed the order passed by the High Court and observed that extraordinary power u/s 482 of the Code has to be exercised sparingly with circumspection and as far as possible for extraordinary cases where allegations in the complaint or the FIR taken on its face value and accepted in their entirety do not constitute the offence alleged. The Supreme Court relying on its earlier decision in State of West Bengal and Others Vs. Swapan Kumar Guha and Others, held that the Court will not normally interfere with the investigation and will permit an inquiry into the alleged offence to be completed. Paras 8 and 9 of the report are extracted hereunder:-

8. It is true that the inherent powers vested in the High Court u/s 482 of the

Code are very wide. Nevertheless, inherent powers do not confer arbitrary jurisdiction on the High Court to act according to whims or caprice. This extraordinary power has to be exercised sparingly with circumspection and as far as possible, for extraordinary cases, where allegations in the complaint or the first information report, taken on its face value and accepted in their entirety do not constitute the offence alleged. It needs little emphasis that unless a case of gross abuse of power is made out against those in charge of investigation, the High Court should be loath to interfere at the early/premature stage of investigation.

9. In *State of West Bengal and Others Vs. Swapan Kumar Guha and Others*, , emphasising that the Court will not normally interfere with an investigation and will permit the inquiry into the alleged offence, to be completed, this Court highlighted the necessity of a proper investigation observing thus: (Paras 65-66)

65. ... An investigation is carried on for the purpose of gathering necessary materials for establishing and proving an offence which is disclosed. When an offence is disclosed, a proper investigation in the interests of justice becomes necessary to collect materials for establishing the offence, and for bringing the offender to book. In the absence of a proper investigation in a case where an offence is disclosed, the offender may succeed in escaping from the consequences and the offender may go unpunished to the detriment of the cause of justice and the society at large. Justice requires that a person who commits an offence has to be brought to book and must be punished for the same. If the court interferes with the proper investigation in a case where an offence has been disclosed, the offence will go unpunished to the serious detriment of the welfare of the society and the cause of the justice suffers. It is on the basis of this principle that the court normally does not interfere with the investigation of a case where an offence has been disclosed. ...

66. Whether an offence has been disclosed or not must necessarily depend on the facts and circumstances of each particular case. ... If on a consideration of the relevant materials, the court is satisfied that an offence is disclosed, the court will normally not interfere with the investigation into the offence and will generally allow the investigation into the offence to be completed for collecting materials for proving the offence.

4. In *State of Haryana and others Vs. Ch. Bhajan Lal and others*, the Supreme Court considered its earlier decision on quashing of the FIR and observed that it would not be possible to lay down any precise, clearly defined, sufficiently channelized and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised. Some of the cases where the powers to quash FIR could be exercised were enumerated as under:-

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not

prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers u/s 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated u/s 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

5. At this juncture, I will turn to the copy of the complaints which have been placed in the paper book. In para 3 of the complaint it was stated that accused No. 2 is the Director and authorized signatory of accused No. 1 (Pragati) whereas accused No. 3 to 5 were also the Directors and were responsible for the day to day affairs and conduct of the business of the accused No. 1. It was stated that accused Nos. 2 to 5 (Petitioners herein) on behalf of accused No. 1 negotiated with the Complainant for supply of goods as mentioned in the complaint.

6. In para 5 of the complaint, it was stated that the Complainant (Respondent No. 1 herein) supplied goods worth Rs. 1,68,51,152/- since April, 2010 till November, 2010. It was further stated that discount of Rs. 1,51,279/- was credited to the account of accused No. 1 and it issued 21 cheques for various amounts since 05.04.2010 upto 01.03.2011. After giving credit of the said amount, there was a balance of Rs. 92,66,140/- recoverable from Pragati (accused No. 1). It is further the case of Respondent No. 1 (the complainant) that in the last week of May, 2011 accused No. 4 informed Respondent No. 1 that he would be sending some post dated cheques for the payment towards outstanding amount and in pursuance of the assurance, the accused sent six post dated cheques, which are the subject matter of the instant Petitions. Para

11 of the complaint (which is common in all the complaints) is extracted hereunder:-

11. That it was only after several requests for clearing the dues coupled with several visits to the Yamuna Nagar office of the Accused No. 1. For seeking payment towards the outstanding amount of Rs. 92,66,140.00 in the month of January, February and March, the complainant received as part payment on 22.4.2011 of an amount Rs. 3,50,000/- vide cheque No. 955758. Thereafter the Complainant was still entitled to an amount of Rs. 89,16,140/- as on that day. However, thereafter once again the accused person stopped making any payment to the Complainant reiterating earlier false assurances and promise. It is pertinent to note that in the last week of May, 2011 that on repeated perusals, the accused No. 4 informed the complainant that the latter would be sending some post dated cheques for the payment towards the outstanding amount. Thereafter, in the first week of June, 2011, the accused through their employee sent six post dated cheques towards the part payment of the outstanding amount and the same were received by the Complainant at its office in Delhi. The details of the cheques sent by the accused are as follows:-

7. I have already observed above that for the purpose of quashing of a complaint the averments made in the complaint have to be accepted on its face value. In Harshendra Kumar D., the Supreme Court quoted with approval the observations of its earlier decision in National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another, ; and Saroj Kumar Jhunjhunwala Vs. The State of West Bengal and Another, and held that if the Director is made liable on the ground of being in-charge and responsible for the company, there have to be specific averments with regard to the same. It was further held that if before issuance of the cheque, the accused resigned from the Directorship, then he cannot be held liable for the offence. Paras 15 and 21-23 of the report in Harshendra Kumar D. are extracted hereunder:-

15. In a recent decision in National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another, after survey of earlier decisions wherein legal position concerning Section 138 and Section 141 of the NI Act was considered, this Court culled out the following principles:

(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.

x x x x x x x x x

21. The above documents placed on record by the appellant have not been disputed nor controverted by the complainants. As a matter of fact, it was not even the case of the complainants before the High Court that the change among Directors of the Company, on resignation of the appellant with effect from 2-3-2004, has not taken place. The argument on behalf of the complainants before the High Court was that it was not permissible for the High Court to look into the papers and documents relating to the appellant's resignation since these are the matters of defence of the accused person and defence is a matter for consideration at the trial on the basis of evidence which cannot be decided by the High Court. The complainants in this regard relied upon a decision of the Single Judge of that Court in Fateh Chand Bhansali Vs. Hindusthan Development Corporation Limited, .

22. The counsel for the present appellant (the revision petitioner therein) on the other hand referred to a later decision of a Single Judge of the Calcutta High Court in Saroj Kumar Jhunjunwala v. State of W.B. (2007) 1 C Cri LR 793 (Cal) wherein it was held that if before the issuance of cheques, the accused had resigned from the directorship, then he cannot be held liable for the offence.

23. Confronted with two Single Bench decisions of that Court in Fateh Chand Bhansali (2005) 4 ICC 117 (Cal) and Saroj Kumar Jhunjunwala (2007) 1 C Cri LR 793 (Cal) the Single Judge held that the judicial discipline demanded that he should go by the earlier decision, namely, Fateh Chand Bhansali and, accordingly, refused to take into consideration the documents relating to the appellant's resignation as Director from the Company with effect from 2-3-2004. While relying upon Fateh Chand Bhansali the Single Judge referred to a decision of this

Court in State of Madhya Pradesh Vs. Awadh Kishore Gupta and Others, which was referred to in Fateh Chand Bhansali.

8. Turning to the facts of the instant case, there are specific averments that the Petitioners negotiated for the purchase of goods by Pragati and they were responsible for the day to day affairs and conduct of the business of the company. It was specifically stated that the goods were supplied from April, 2010 to November, 2010. It was further stated that certain payments were made in the year 2010 and 2011. It was the complainant case that the post dated cheques in question were sent in the first week of June, 2011 and that the same were dishonoured on presentation. Thus, as per the averments made in the complaint, the cheques were delivered much before the Petitioners' resignation. All the transactions are related to the period when the Petitioners were Directors, and as stated above, according to Respondent No. 1 (the complainant) they had negotiated with regard to supply of goods. Of course, copy of Form No. 32 in case of Petitioner Ved Prakash Gupta reveals that the resignation was sent to the ROC on w.e.f. 20.7.2011. Assuming that it was received immediately after 20.07.2011, the question for consideration is, even if the resignation is presumed to have been received in the office of Registrar of Company immediately after 20.07.2011, can the Petitioner be absolved of his liability? If this is allowed, perhaps no Director nor any officer of the accused company can ever be made liable, because they can enter into any transaction at their will, issue some post dated cheques and then tender their resignation before the date of its encashment.

9. In the circumstances, in my view the Petitioners have not been able to make out a case for quashing of the summoning orders dated 15.11.2011, 15.11.2011, 06.03.2012, 07.12.2011, 31.05.2012 and 30.11.2011 respectively.

10. This order, however, shall be without prejudice to the rights of the Petitioners to rebut Respondent No. 1's averments that they were in-charge and responsible for the conduct of the business of the company or that they negotiated with Respondent No. 1 for sale of goods or that the post dated cheques were sent in the first weeks of June, 2011.

11. The Petitions are devoid of any merit; the same are accordingly dismissed. Pending applications also stand disposed of.