(2019) 07 JH CK 0244

In the Jharkhand High Court

Case No : Criminal Miscellaneous Petition No. 1413 of 2010

Vijay Choudhary — APPELLANT

Vs

State of Jharkhand And Ors — RESPONDENT

Date of Decision : 16-07-2019

Acts Referred:

Negotiable Instruments Act, 1881 — Section 138, 141
Code Of Criminal Procedure, 1973 — Section 482

Citation : (2019) 07 JH CK 0244

Hon'ble Judges : Anubha Rawat Choudhary, J

Bench : Single Bench

Advocate : Onkar Nath Tiwary, Pandey Neeraj Rai, P.D. Agarwal

Final Decision : Dismissed

Judgement

1. Heard counsel for the parties.

2. This application has been filed for the following reliefs:-

(i) "Order dated 12.10.2009 wherein cognizance has been taken under Section 138 of the Negotiable Act against the petitioner, and

(ii) Order dated 18.06.2010 whereby bailable warrant had been issued against the petitioner (who is chairman of the company), inspite of the fact that the company has appeared through its company secretary and the petitioner prays for quashing/setting aside of orders dated 12.10.2009 & subsequent order dated 18.06.2010 (Annexure-2) including the entire criminal proceedings therein and whereas the said complain case no. 2140 of 2009 is presently pending before the learned court of Sri Ghulam Haidar Judicial Magistrate, 1st Class, Ranchi."

3. Counsel for the petitioner submits that he is confining his argument on the point that necessary ingredients of alleged offence under Section 138 read with section 141 of the Negotiable Instruments Act, 1881 is totally absent and in such circumstances the entire criminal proceedings against the petitioner is fit to be

quashed.

4. He submits that admittedly the cheque was issued by the company who is a co- accused in the criminal case. He further submits that the petitioner is admittedly located at Mumbai and it cannot be said that the petitioner was responsible for the affairs at Ranchi. Counsel submits that a statement has been made in paragraph no. 2 of the complaint petition that the accused no. 2 and 3 are the Chairman and Director-cum-Authorized Signatory of the accused no. 1 who are the persons responsible and act for and on behalf of the accused Company as well as authorised to do business of the said company. He submits that the very fact that the petitioner is stationed at Mumbai indicates that the petitioner was not responsible for day to day affairs of the company. Counsel has relied upon the judgment passed by Hon'ble Gujrat High Court in the case of Mukesh Mohan Gupta vs. State of Gujarat decided on 25.04.2017 in Special Criminal Application (Quashing) No. 7593 of 2015 and further analogous cases and also on the judgment passed by Hon'ble Supreme Court reported in (2005) 8 SCC 89 (S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla and Another) paragraph no. 18 and 19. Counsel further submits that it has been held by the Hon'ble Supreme Court in the said judgment that it is only those persons who are in-charge and responsible for the conduct and business of the company at the time of commission of offence are liable for criminal action and the liability arises on account of conduct, act or omission on the part of the person and not merely on account of only an office or a position in the company. He submits that as per cause title of the complaint petition itself, the petitioner was the chairman of the accused company.

5. Counsel appearing on behalf of the complainant/opposite party no. 2 on the other hand submits that specific statement has been made in the complaint petition that accused no. 2 and 3 are the Chairman and Director-cum-Authorized Signatory of the accused no. 1 who are the persons responsible and act for and on behalf of the accused Company. He submits that this statement is in consonance with the provisions of Section 141 of the Negotiable Instruments Act, 1881. Accordingly, if the petitioner claims that he was not responsible for day to day conduct of the affairs of the company, the same is a matter of defence which cannot be raised and appreciated at this stage. He further submits that a rejoinder to the counter affidavit has been filed in the instant case wherein the petitioner has himself admitted that he has been issuing cheques under his signature.

6. After hearing counsel for the parties and after considering the averments made in the complaint petition this court finds that specific averment has been made in paragraph no. 2 of the complaint petition that the accused no. 2 and 3 are the Chairman and Director-cum-Authorized Signatory of the accused no. 1 who are the persons responsible and act for and on behalf of the accused Company as well as authorized to do business of the accused company. This court finds that averments for the purposes of prosecution under Section 138

read with Section 141 of the of the Negotiable Instruments Act appears to be prima-facie there in the averments made in the complaint petition. In the judgment reported in (2009) 10 SCC 48 (K.K. Ahuja vs. V.K. Vora and Another) at paragraph no. 9 it has been held as follows :-

9. A three-Judge Bench of this Court considered the scope of Section 141 of the Act in SMS Pharma (I) and held that it is necessary to specifically aver in a complaint under Sections 138 and 141 of the Act, that at the time when the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company and that in the absence of such averment, Section 141 cannot be invoked. This Court held: (SCC pp. 98-99 & 102-03, paras 10 & 18)

"10. ... What is required is that the persons who are sought to be made criminally liable under Section 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 person 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 the 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 provision. The liability arises from being in charge of and responsible for the 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 the 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 person' 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.

18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the

respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a Director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-Director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial."

7. So far as judgement passed by the Hon'ble Gujrat High Court(supra) is concerned, the conclusions has been summarised in paragraph no. 90 which is as follows:-

"90. In Gunmala Sales Private Limited (supra), the Supreme Court, after an exhaustive review of all its earlier decisions on Section 141 of the N.I. Act, summarized its conclusion as under.

(a) Once in a complaint filed under Section 138 read with Section 141 of the NI Act the basic averment is made that the Director was in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, the Magistrate can issue process against such Director;

(b) If a petition is filed under Section 482 of the Code for quashing of such a complaint by the Director, the High Court may, in the facts of a particular case, on an overall reading of the complaint, refused to quash the complaint because the complaint contains the basic averment which is sufficient to make out a case against the Director;

(c) In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about role of the Director in the complaint. It may do so having come across some unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicates that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of the process of the court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time of or a Director who had resigned long before issuance of cheques. In such cases, if arm twisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases HC-NIC Page 25 of 28 created on Wed Aug

16 06:05:04 IST 2017 R/SCRA/7593/2015 ORDER may be few and far between but the possibility of such a case being there cannot be ruled out. In the absence of such evidence or circumstances, complaint cannot be quashed.

(d) No restriction can be placed on the High Court's powers under Section 482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of the Court. There are no fixed formulae to be followed by the High Court in this regard and the exercise of this power depends upon the facts and circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but, nothing prevents it from taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director."

8. This Court finds that in view of the averments made in the complaint petition and there being no unimpeachable material on record, which could clearly indicate that the petitioner was not concerned with the issuance of cheque, the judgments relied upon by the petitioner does not help the petitioner in any manner whatsoever. Moreover, even the solemn affirmation of the complainant has not been filed by the petitioner for consideration by this Court and in the rejoinder to the counter-affidavit giving the list of dates, the petitioner has stated that cheque was issued by the petitioner (chairman of the company) and the complaint petition indicates that the signatory of the cheque was accused no.3 (i.e., Director-cum-Authorised Signatory of the Company). This court is of the considered view that merely because the petitioner claims to be stationed at a place outside the state, the same by itself cannot be said to be a ground to quash the entire criminal proceedings against the petitioner if it is alleged that the petitioner along with accused no. 3 was responsible for conduct of the business of the company. In the aforesaid facts and circumstances, this court is of the considered view that the entire criminal proceeding including order taking cognizance does not call for any interference by this court. Accordingly, this petition is hereby dismissed.

9. Interim order, if any, stands vacated.

10. Pending I.A., if any, stands dismissed as not pressed.

11. Any observation made in this order will not prejudice the case of the either parties before the learned court below and the case is to be decided by the learned court below as per law and it will be open to the petitioner to take all points which may be available to the petitioner as per law.

12. Let this order be communicated to the court concerned through FAX.