(2011) 08 DEL CK 0474

In the Delhi High Court

Case No : Criminal M.C.1085 of 2007

Vijay Kumar Agarwal APPELLANT

Vs

United Phosphorus Ltd. Ors. RESPONDENT

Date of Decision : 08-08-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 251, 319, 82, 83
Negotiable Instruments Act, 1881 (NI) — Section 138, 141
Penal Code, 1860 (IPC) — Section 420

Citation : (2012) 1 BC 415 : (2011) 184 DLT 247

Hon'ble Judges : Suresh Kait, J

Bench : Single Bench

Advocate : Vagesh Sharma and K.K. Sharma, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Suresh Kait, J.

Crl. M.A. 3603/2011 (Restoration)

For the reasons mentioned in the application the order dated 18.03.2011 is recalled. The petition is restored to its original number and position. The application stands disposed of.

Crl. M.C. 1085/2007

1. By filing the instant petition, the Petitioner has challenged the summoning order dated 07.02.2000 issued by learned Metropolitan Magistrate and order dated 21.02.2007, whereby, the proceedings were initiated against the Petitioner u/s 82/83 Code of Criminal Procedure.

2. The facts of the case in brief are that, Respondent No. 1 had filed a complaint dated 26.09.1997, u/s 138 of the Negotiable Instrument Act, 1881 (as amended) read with Section 420 of the Indian Penal Code, against Vijay Remedies Limited

through its Director Sh. Kamal Goel. vide order dated 25.07.1998, summons were issued after recording pre-summoning evidence of the complainant and notice u/s 251 of Code of Criminal Procedure was framed vide order dated 07.02.2000.

3. On 07.02.2000, an application u/s 319 of Code of Criminal Procedure was moved by the Respondent No. 1 to issue summons against the Petitioner and two other persons namely Satish Garg and Aushotosh Gupta and the matter was fixed for 30.03.2000 for further proceedings.

4. Vide order dated 07.07.2000, notice u/s 251 of Code of Criminal Procedure was framed against the Petitioner M/s. Vijay Remedies Limited through Sh. Kamal Goel, Director.

5. On 21.02.2007, the alleged co-accused Kamal and Aushotosh appeared in person, whereas, the alleged accused Satish was exempted for that date on an application being filed, further, proceedings under Sections 82/83 of Code of Criminal Procedure was issued against the Petitioners.

6. Being aggrieved by the aforesaid orders and proceeding, two petitions were filed, the details of which are as follows:

(I) Filed by Sh. Satish Garg and Sh. Aushotosh Gupta being Criminal M.C. No. 1860/2007 (II) The instant petition filed by the Petitioner being Criminal M.C. No. 1805/2007

7. I make it clear that the aforesaid Criminal M.C. No. 1860/2007 was allowed as the Respondent conceded that he has no objection if order dated 07.02.2000 is set aside qua Sh. Satish Garg and Sh. Aushotosh Gupta, as they were not the active Directors of the Company.

8. Keeping in view the aforesaid statement of the learned Counsel for the Respondent, the order dated 07.02.2000 passed by learned Metropolitan Magistrate was set aside qua Sh. Satish Garg and Sh. Aushotosh Gupta only, accordingly Criminal M.C. No. 1860/2007 was allowed by this Court.

9. In the instant petition, the Petitioner has raised the issues as mentioned in the grounds of the petition that the learned Metropolitan Magistrate gravely erred in passing the impugned orders dated 07.02.2000 and 21.02.2007.

10. Further submits, the learned Metropolitan Magistrate ought to had consider that the offence u/s 138 of the Negotiable Instrument Act is a technical offence and sending a demand notice to the accused is a condition precedent, before launching prosecution u/s 138 of the Negotiable Instrument Act.

11. It is submitted, in the instant case, no demand notice was being sent to the Petitioner. The other ground, which, he has taken is that the learned Metropolitan Magistrate ought to had taken into consideration that Section 319 of Code of Criminal Procedure could be resorted to only during the trial.

12. As submitted, in the instant case, only a notice u/s 251 Code of Criminal Procedure was served upon the accused, whereas, evidence was to be recorded first, and if evidence is on record, only thereafter the Trial Court ought to had issued summoning orders against the Petitioner.

13. Learned Counsel for the Petitioner further submits that since, there was nothing against the Petitioner, even in the pre-summoning evidence, therefore, the impugned orders are faulty .

14. To support his arguments, he has relied upon a case of Rajesh Bagga V. State of Andhra Pradesh [2005 (3) JCC (NI) 226], wherein, it was held that if the necessary ingredients to set the criminal proceeding in motion is missing, the other Directors cannot be made an accused.

15. The learned Counsel for the Petitioner has also relied upon another case of SMS Pharamaceuticals Limited V. Neeta Bhalla and Anr. [2005(3) JCC(NI) 2003], wherein, it was held that grounds should be made out in the complaint for proceedings against the accused.

16. Further, he has relied upon a case of Bala Krishanan United Durgs Centre and Anr. v. Jaison P.V. and Another [2005 (1) JCC(NI) 2] decided by Kerala High Court, that if there is not sufficient averments as to how the Petitioners were stated to be the Directors of the company are made liable for the offence committed by the Company, the proceeding initiated against them liable to be quashed.

17. The learned Counsel for the Petitioner fairly conceded that the Petitioner was the Managing Director of the Company at that time, however there is no iota of the allegations against the Petitioner, therefore, the impugned order passed are bad in law.

18. On the other hand, learned Counsel for the Respondent submits that in the complaint sufficient allegations are against the company, and he being the Managing Director of the Company is responsible of all the affairs or misdemeanour being committed by the company

19. It is further submitted by the learned Counsel for the Petitioner that the Petitioner was not even made the alleged accused in the complaint u/s 138 of the Negotiable Instrument Act and he was summoned only on the application moved by the Respondent u/s 319 of the Code of Criminal Procedure.

20. Further submits that the Respondent company, while instructing for the issuance of the statutory notice u/s 138 of the Negotiable Instruments Act had instructed its lawyer to issue the same to the accused company being a juristic company acting though its Managing Director and other Directors. The notice was sent to the accused company through one of its Director Sh. Kamal Goel, who also was the signatory of the impugned cheque and the notice was sent to the registered office of the company.

21. It is stated, the malafide intention of the Petitioner in the instant petition on the face of the record in as much as, the Petitioner has very cleverly chosen not to disclose in the entire petition the designation or position which he enjoys in the accused company. To the knowledge of the Respondent company, Petitioner Sh. Vijay Kumar Agarwal was and is the Managing Director of the accused company. This fact was disclosed by the accused Kamal Kumar Goel only, who is the signatory of the impugned cheque and the same prompted the Respondent company to move an application u/s 319 of the Code of Criminal Procedure. Accordingly, Petitioner, being a person responsible for the day to day functioning of the accused company, was summoned by the learned Trial court.

22. Further submits that the Managing Director of the accused company is legally responsible for the conduct of its business and when that is so, by holding such a position in the accused company, the Petitioner automatically becomes liable u/s 141 of the Negotiable Instruments Act.

23. As submitted by the learned Counsel, there is no infirmity in the impugned order, as challenged by the Petitioner in the instant petition and as such the petition deserves to be dismissed with exemplary costs. To support his above submitted arguments, he has relied upon a judgment of Supreme Court in the case of S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, , wherein, there were three issues before the full Bench of the Supreme Court for determination of the following questions as under:

10. A....

B....

C Therefore, mere use of a particular designation of an officer without more may not be enough by way of an averment in a complaint. When the requirement in Section 141 which extends the liability to officers of a company, is that such a person should be in charge of an responsible to the company for conduct of business of the company how can a person be subjected to liability of criminal prosecution without it being averred in the complaint that he satisfied those requirements? Not every person connected with a Company is made liable u/s 141. Liability is cast on persons who may have something to do with the transaction complained of. A person who is in charge of and responsible for conduct of business of a Company would naturally know why the cheque in question was issued and why it got dishonoured. (Para 10).

24. The answer to the above question was given in para 20 of judgment which is reproduced as under:

...(c) The answer to question (c) has to be in 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 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 an responsible for the conduct of business of the company. Therefore, they get covered u/s 141. So far as 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

25. In my opinion, power u/s 319 of the Code can be exercised by the Court suo motto or on an application by someone including accused already before it. If the Court is satisfied that any person other than the accused has committed an offence, he is to be tried together with the accused. The power is discretionary and such discretion must be exercised judiciously having regards to the facts and circumstances of the case. Indisputably, it is an extra ordinary power, which is conferred on the Court, and should be used very sparingly and only if compelling reasons exists for taking actions against the persons, against whom the action has not been taken earlier.

26. Though, the Petitioner was not made party specifically in the complaint filed u/s 138 of the Negotiable Instruments Act, but keeping the aforesaid Full Bench judgment of Supreme Court, the Managing Director is responsible for the day to day affairs of the company.

27. Therefore, as discussed above, I am of the opinion that there is no infirmity in the impugned order passed by the learned Trial court, therefore, I am not inclined to interfere with the same.

28. Criminal M.C. 1085/2007 is dismissed on the above terms.

29. No order as to costs.