

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.M.C. 999/2005 & CRL.MA 3385/2005

Date of order: 19th February, 2008

K.P.G. NAIR

..... Petitioner

Through Mr. Ravi Kumar Aggarwal, Advocate.

versus

STATE & OTHER

..... Respondents

Through Mr. O.P.Saxena, APP.

Mr. Shridhar Chitale and Ms. Prerna Mehta,
Advocates.

CORAM:

HON'BLE DR. JUSTICE S. MURALIDHAR

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| 1. | Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in Digest? | Yes |

ORDER

Dr. S. Muralidhar, J. (open court)

1. This petition under Section 482 CrPC seeks the quashing of Criminal Complaint No. 2111/1/04 pending in the court of learned Metropolitan Magistrate ('MM'), New Delhi titled *M/s. Officeaids & Others v. M/s. Pertech Computers Ltd. & Others* and all proceedings consequent thereto including the summoning order dated 24th July, 1998 passed by the learned MM.

2. The aforementioned complaint was filed by Respondents 2 and 3 in the Court of the learned MM under Sections 138 read with 141 of the Negotiable Instruments Act, 1881 ('NI Act'). The complainant alleged that pursuant to commercial dealings between the parties, as on 31st August 1997

a sum of Rs. 43.47 lakhs was due and payable to M/s. Officeaids the
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complainant, by M/s. Pertech Computers Ltd. ('PCL') accused No.1. Accused No.2 was the Chairman of PCL. The Petitioner was arrayed as accused No.3 in his capacity as Director, PCL. Accused No.4 to 8 were also shown as Directors of PCL. It was stated in the complaint that three cheques dated 31.12.1997 were issued by PCL in favour of M/s. Officeaids for the sums of Rs.5,96,200/-, Rs.8,94,300/- and Rs.14,90,500/-. When presented for payment these cheques were dishonoured with the remarks "payment stopped by drawer" by a cheque return memo dated 2nd January, 1998. Thereafter notice demanding payment was sent on 13th January, 1998 to all the accused and the complaint was filed on 21st February, 1998. By an order dated 24th July, 1998 the learned MM, after recording the pre-summoning evidence of CWs 1 & 2 i.e. the proprietor of M/s. Officeaids (CW-2) as well as the official from the bank (CW-1) issued summons to the accused including the Petitioner here.

3. It is contended by learned counsel for the Petitioners that the averments made in the complaint do not specify out the role played by the Petitioner in the issuance of the cheques in question. The allegations being vague, the learned MM could not have taken cognizance of the offences vis-a-vis the Petitioner. Secondly, it is submitted that Petitioner resigned as a Director on 29th December, 1997 i.e. even before the date of issuance of the cheques. A photocopy of the Form 32 filed in terms of Section 303(2) of the Companies Act, 1956 by PCL with the Registrar of Companies has been placed on record. It is accordingly submitted that the Petitioner here cannot be held liable for the offence under Section 138 read with 141 NI Act since on the

date of commission of the offence the Petitioner was not in charge of the

affairs of the PCL or responsible for it for the conduct of the affairs. Learned counsel has relied upon *S.M.S. Pharmaceuticals v. Neeta Bhalla(I)* **AIR 2005 SC 3512**, *Everest Advertising (P) Ltd. v. State, Govt. of NCT of Delhi* **(2007) 5 SCC 54**, *S.M.S. Pharmaceuticals Ltd. Neeta Bhalla(II)* **(2007) 4 SCC 70**, *N.K. Wahi v. Shekhar Singh* **2007 (4) SCALE, K. Srikant Singhv. North east Securities Ltd. JT 2007 (9) SCC 449**. Reliance is also placed on the judgment of this Court in *J.N. Bhatia v. State* **139 (2007) DLT 361**.

4. Learned counsel for the Respondents on the other hand states that the scope of interference by this Court under Section 482 CrPC is extremely limited as pointed out in *Raj Lakshmi Mills v. Shakti Bhakoo* **(2002) 8 SCC 236**. Reliance is also placed on the judgment of the Supreme Court in *N. Rangachari v. Bharat Sanchar Nigam Ltd.* **AIR 2007 SC 1682**.

5. As regards the first submission, the averments in para 3 of the complaint read as under:

“The Accused No.2 to 5 and 8 are Directors of the Accused No.1 who at the time when the cheques stated below were dishonoured, were responsible to the Accused No.1 Company for the conduct of the business of the Accused No.1 Company. The Accused No.6 and 7 were the authorized signatories of the Accused No.1 in respect of the said dishonoured cheques issued to the Complainants.”

6. The law in relation to the minimum requirements in a complaint under Section 138 read with 141 NI Act has been explained in *S.M.S.*

Pharmaceuticals v. Neeta Bhalla(I) in the following words:

“19. 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 under Section 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 requirements of Section 141 cannot be said to be satisfied.

(b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for 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 under Section 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 under Section 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.”
(emphasis supplied)

7. The above law has been further explained by the Supreme Court in *N.*

Ranagachari where the averments in the complaint read as follows:

“That accused No. 1 is a company incorporated under the Companies Act. Accused Nos. 2 and 3 are its Directors. They are incharge of and responsible to accused No. 1 for conduct of business of accused No. 1 Company. They are jointly and severally liable for the acts of accused No. 1.”

After referring to the earlier judgments in *S.M.S. Pharmaceuticals v. Neeta Bhalla* AIR 2005 SC 3512, *Saroj Kumar Poddar v. State (NCT of Delhi)* AIR 2007 SC 912, *Monaben Ketanbhai Shah v. State of Gujarat* AIR 2004 SC 4274, *Rajesh Bajaj v. State of NCT of Delhi* AIR 1999 SC 1216, *Bilakchand Gyanchand Co. v. A. Chinnaswami* AIR 1999 SC 2182 and *Rajneesh Aggarwal v. Amit J. Bhalla* AIR 2001 SC 518, the Supreme Court concluded in *N. Rangachari* as under (AIR p. 1682):

“18. In the case on hand, reading the complaint as a whole, it is clear that the allegations in the complaint are that at the time at which the two dishonoured cheques were issued by the company, the appellant and another were the Directors of the company and were incharge of the affairs of the company. **It is not proper to split hairs in reading the complaint so as to come to a conclusion that the allegations as a whole are not sufficient to show that at the relevant point of time the appellant and the other are not alleged to be persons incharge of the affairs of the company. Obviously, the complaint refers to the point of time when the two cheques were issued, their presentment, dishonour and failure to pay in spite of notice of dishonour.** We have no hesitation in overruling the argument in that behalf by the learned Senior Counsel for the appellant.

19. We think that, in the circumstances, the High Court has rightly come to the conclusion that it is not a fit case for exercise of jurisdiction under Section 482 of the Code of Criminal Procedure for quashing the complaint. In fact, an advertence to Sections 138 and 141 of the Negotiable Instruments Act shows that on the other elements of an offence under Section 138 being satisfied, the burden is on the Board of Directors or the Officers incharge of the affairs of the company to show that they are not liable to be convicted. Any restriction on their power or existence of any special circumstance that

makes them not liable is something that is peculiarly within their knowledge and it is for them to establish at the trial such a restriction or to show that at the relevant time they were not incharge of the affairs of the company. Reading the complaint as a whole, we are satisfied that it is a case where the contentions sought to be raised by the appellant can only be dealt with after the conclusion of the trial.”

8. It is not possible to agree with the learned counsel for the Petitioner that the judgment in *Saroj Kumar Poddar v. State JT 2007(2) SC 233*, *S.M.S. Pharmaceuticals v. Neeta Bhalla (II)* and *N.K. Wahi* require something more to be stated in the complaint other than merely reproducing the language of the Statute. The judgment in *N.K. Wahi* does not set out the precise averments in the complaint and therefore it is not possible to know in what context the Supreme Court quashed the complaint for lack of inadequate averments.

9. In *Neeta Bhalla (II)*, the Supreme Court had taken pains to explain the decision in *Saroj Kumar Poddar* in the following words:

“26. A faint suggestion was made that this Court in *Saroj Kumar Poddar* 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 therefor.” (emphasis supplied)

10. The law, as it presently stands therefore, is that as long as there is an averment to the effect that the person sought to be made liable, apart from the company, is in charge of the affairs of the company or responsible to it for the conduct of its business. Nothing more is required to averred in the complaint.

11. Turning to the case in hand, the aforementioned extracted paragraph of the complaint does satisfy the requirements of the law as explained by the Supreme Court in *N. Rangachari*. Therefore there is no merit in the first contention and, therefore, it is rejected as such.

12. It is no doubt true that the Petitioner has placed in record a photocopy of the Form 32 filed under the Companies Act, 1956 to show that the Petitioner resigned as Director on 29th December, 2007 i.e. 2 days before the issuance of the cheques. However, in *J.N. Bhatia* the cheques in question were returned dishonoured on 31st October, 2000/8th November, 2000 and the Petitioners had resigned as Directors of the company in question on 20th September, 2000. Form 32 had been filed on 14th November, 2000. This Court then explained the position as under:

“No doubt, the case of the petitioners is that they resigned on 20.9.2000 and if that date is correct, the petitions cannot be held responsible as the cheques were presented and dishonoured later. The cause of action for filing the complaint under Section

138 arises when the cheques are dishonoured and demand notice is sent for making payment against the dishonoured cheques. However, Form 32 was submitted only on 14.11.2000. Had the Form 32 been submitted before the dishonor of the cheques and certified copy of Form 32 been produced, one could have acted on the said certified copy and concluded that the petitioners had resigned on 20.9.2000 and, therefore, they cannot be held legally liable for making payment and, therefore, cannot be impleaded as accused persons. **Since Form 32 is submitted after the commission of the alleged offence, i.e. 14.11.2000, it becomes a disputed question as to whether they actually resigned on 20.9.2000 as alleged by them.** For this they will have to produce necessary evidence and the matter can be thrashed out only during trial of the case on this aspect. I had the occasion to discuss this aspect of the matter in detail in the case of *Sarla Kumar Dr. (Mrs.) v. Srei International Finance Ltd.*, reported as 132 (2006) DLT 363=IV (2006) CCr61=2006 IX AD (Delhi) 511.” (emphasis supplied)

13. In *Sarla Kumar* the cheques were issued on 15th May 2003, 15th June 2003, and 15th August 2003 whereas the Petitioners had resigned with effect from 20th August, 1994. Form 32 was submitted on 20th August, 1994 itself. Accepting the authenticity of such a document, this Court quashed the complaint vis-à-vis the Petitioner.

14. Following the law explained by this Court in *J.N. Bhatia*, it has to be held that in the case in hand that the question whether the Petitioner in fact resigned on 27th December, 1997 would be a disputed question because the Form 32 was filed on 31st March, 1998, that is, after the information about

the dishonor of the cheque was received by the complainants. Therefore, the question whether the Petitioner was, on the date of commission of the offence, in charge of the affairs of the company or responsible to it for the conduct of its business would require to be examined by the trial court. The second contention is also therefore rejected.

15. In that view of the matter, no ground has been made out for the exercise by this Court of its powers under Section 482 CrPC.

16. The petition is dismissed with no order as to costs.

S. MURALIDHAR, J

FEBRUARY 19, 2008
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