

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.M.C. 600/2008 & CRL.MA. 2216/2008

O.P.AGGARWAL Petitioner
Through Ms. Parvinder Khatra with
Mr. Manish Gandhi &
Mr.Pramod Kumar, Advocates.

versus

STATE & ORS. Respondents
Through Mr. T.K.Ganju, Senior Advocate
with Mr. A.K. Thakur &
Mr. Bharat Gupta, Advocate for
Respondent No.2./NAFED .

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be
allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

ORDER
06.02.2009

1. This petition under Section 482 of the Code of Criminal Procedure, 1973 (CrPC) seeks the quashing of Complaint Case No. 299/01/2007 titled “*National Agricultural Cooperative Marketing Federation of India Ltd. (NAFED) v. M/s Earthtech Enterprises Ltd. & Others*” pending in the Court of the Metropolitan Magistrate (MM), New Delhi under Section 138/141 of the Negotiable Instruments Act, 1881 (NI Act).

2. The aforementioned complaint was filed against M/s Earthtech Enterprises Ltd., and six others, including the petitioner herein, in

respect of the dishonor of cheque No.220512 dated 31st May 2006 for the sum of Rs. 5,00,00,000/- (Rs. Five Crore only). It is contended by the learned counsel for the petitioner on the strength of the judgments in *S.M.S Pharmaceuticals v. Neeta Bhalla (I) (2005) 8 SCC 89* and *N.K. Wahi v. Shekhar Singh (2007) 9 SCC 481* that the complaint lacks the basic minimum averments to summon the petitioner Shri O.P. Aggarwal for the offence under Section 138 NI Act.

3. Para 3 of the complaint, which is relevant, reads: “the accused No. 2 to 7 are the Directors, Authorised Signatory and responsible for day to day affairs of the accused No.1”. It is stated that barring this one averment, there is no other averment which satisfies the requirement of having to proceed against the person concerned who is in charge of the affairs of the company and responsible to it for the conduct of its business “at the time of the commission of the offence”. It is stated that the cheque in question was issued on 31st May 2006. Shri O.P. Aggarwal ceased to be a Director of the Company as on 20th August 1997. A certified copy of the Form 32 is also placed on record. It is submitted that inasmuch as on the date of the commission of the offence, Mr. O.P. Aggarwal was no longer the Director of the Company, no liability could be attached to him in terms of Section 138 read with 141 NI Act.

4. Appearing for the Respondent No.2, NAFED, Mr. T.K. Ganju, the learned Senior Counsel submits that there is an averment in the complaint that Shri O.P. Aggarwal is in fact the person who was in

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control of the affairs of the company and that the said averment is in consonance with the requirement of Section 141 NI Act. He further submits that once the co-accused Shri Inder Verma has written a letter dated 3rd August 2006 to the bank in question, pointing out that Shri O.P. Aggarwal was in fact the functional head of the Earthtech Enterprises Ltd., and that he issued the cheque in question under the instructions and orders of Shri O.P. Aggarwal. It is submitted that there is a reference to this letter in the complaint itself. Therefore, there was sufficient material before the learned MM to summon the petitioner for the offence under Section 138 NI Act.

5. Having considered the rival submissions, this Court is of the view that the petitioner has not been able to make out a case for interference. While it is true that in para 3 of the complaint the averment is that the petitioner was a Director/Authorised Signatory and responsible for day to day affairs of the company, since the petitioner resigned as Director on 20th August 1997, that by itself may not help the petitioner escaping liability. Section 141 (1) NI Act reads as under:-

“141. Offences by companies.” (1) If the person committing an offence under section 138 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 shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he

proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.”

6. It is plain from a reading of the above provision that it is not necessary for a person to be only a Director in order to answer the description of a person who is in charge of the affairs of the company and responsible to it for the conduct of its business. It could be any working person of the company.

7. Para 9 of the complaint which is relevant for the present purpose reads as under:

“That the legal notice dated 23.12.2006 sent to the accused persons were duly served upon them vides AD cards copies of which are enclosed as **ANNEXURE-J-1 to 8**. The said notice was replied by accused No. 2 & 7 creating false and fabricated defense which is contradictory to the records itself. It is pertinent to mention here that the accused No. 7 has stated in his reply that he signed the letters etc. on the orders and instruction of the accused no. 2 who was the owner/functional head of accused no. 1. The copies of the said replies are enclosed herewith as **ANNEXURE-K** (colly).”

8. It is clear that as far as the petitioner is concerned there was a specific averment that accused No. 7 had stated in his reply that “he signed the letters, etc. on the orders and instructions of the accused No.2 who was the owner/functional head of accused No.1”. It is plain that this cheque in question was in fact signed by accused No. 7. The letter which has been referred to in the above paragraph is a letter dated 3rd August 2006 written by Inder Verma accused No.1 to the Union Bank of India. The relevant portion of the said letter reads as under:-

“This is also not out of place to bring in writing here that even though I acted just as an Authorised Signatory with your bank/branch (duly authorized by the Owner and Board of Directors of Earthtech Enterprises Ltd., through a clear-cut and specified Resolution and other related documents), still, I am duty bound to inform to your kindself that all the documents related to the Merchanting Trade L.C. Business and other banking business documents, if any, from time to time, especially the Exporting Documents, under a tie-up arrangement with National Agricultural Co-operative Marketing Federation of India Ltd (NAFED), Head Office, New Delhi were signed exclusively on the clear instructions, orders and contents of Shri O.P. Aggarwal only (the Owner and the Functional Head of Earthtech Enterprises Ltd.). Please make an important note of this fact in your bank’s future records please.”

9. Although it is too premature for this Court to form any opinion on either the authenticity of the above letter which has to be proved by its

author or its contents contained therein, the reference to this letter and it being produced as a document along with the complaint would constitute sufficient material for the learned MM to form a prima facie opinion that the petitioner should be summoned for the offence under Section 138 NI Act.

10. In the considered view of this Court, therefore the case law as settled by the Supreme Court in *S.M.S. Pharmaceuticals* and other line of cases, would not really apply in the facts of the instant case. The question here of the petitioner either being a Director or not being a Director on the date of commission of the offence and whether in fact he was a person in control of the affairs of the company will only be proved after the case goes to trial. It is not possible on a reading of the complaint as a whole along with other materials enclosed with it that not even a prima facie case is made out for the petitioner being proceeded against under Section 138 NI Act.

11. It was submitted by the learned counsel for the petitioner that very little progress has been made in the complaint case and that more than 11 years have passed. It is added that the petitioner himself is a senior citizen and the pendency of the criminal complaint for a long number of years constitutes a harassment.

12. Considering the fact that the complaint was filed in the year 2007, this Court is of the view that the learned MM should be directed to complete the trial of the complaint and deliver judgment within a period

of six months from today. This would of course be subject to the rider that neither of the parties would seek unnecessary adjournments before the learned MM.

13. Accordingly, with the above directions the petition is dismissed with no orders as to costs. A certified copy of this order will be sent to the learned MM. The interim order dated 21st February 2008 stands vacated and the application is dismissed. Any prayer made by the petitioner seeking exemption from personal appearance before the learned MM will be considered on its merits by the learned MM.

S. MURALIDHAR, J.

FEBRUARY 06, 2009

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