

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Cr1. M.C. No. 782/2008**

Reserved on : 12.10.2009

Date of Decision : 21.12.2009

Bharat Heavy Electrical Ltd. & Ors.

.....Petitioners

Through: Mr. Dinesh Mathur, Sr.
Adv. with Mr. A. K. Roy,
Adv. for the petitioners.

Versus

D. K. Sardana

..... Respondent

Through: Mr. S. C. Garg, Adv. for
the respondent.

CORAM :

HON'BLE MR. JUSTICE V.K. SHALI

- | | | |
|----|---|-----|
| 1. | Whether Reporters of local papers can 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 the Digest ? | YES |

V.K. SHALI, J.

1. This is a petition filed by the petitioners for quashing of a complaint no. 1073/2007 titled **D. K. Sardana Vs. M/s Bharat Heavy Electrical Ltd.** and the order of summoning dated 30.05.2007.

2. Briefly stated the facts leading to the filing of the present petition are that respondent/complainant D. K. Sardana filed a complaint against the petitioner company, BHEL, its Chairman-cum-Managing Director Mr. Ashok K. Puri, Ms. Ambika Khatua,

Chief Vigilance Officer (since discharged), Sh. S. K. Jain, Director (HR), Sh. Sanjay Verma, Deputy Manager (Finance) and Smt. Anupama Parmar, Senior Accounts Officer under Section 138 of the Negotiable Instrument Act. The complainant alleged that he was employed as senior accounts officer with M/s BHEL having its office at Hindustan Time Building, K. G. Marg, New Delhi. It is alleged that his services were terminated w.e.f. 11.11.2000 illegally. The present petitioners who are the accused in the complaint, called the respondent/complainant for the purpose of settlement of his account and issued him a cheque bearing no. 568832 drawn on ABN Amro Bank, Hansalaya, Building, 15 Barakhamba Road, New Delhi for a sum of Rs.58,536/- towards the full and final settlement of his entire claim. The aforesaid cheque is alleged to have been signed by Sh. Sanjay Verma, Deputy Manager (Finance) and Smt. Anupama Parmar, Sr. Accounts Officer. It is alleged that on presentation, the cheque was not honoured and he received intimation from the banker HDFC that the payment of the aforesaid cheque was stopped by the petitioners. It is further alleged that the respondent/complainant had approached the two signatories of the cheque who demanded an illegal gratification of Rs.5,000/- for getting the cheque honoured. The petitioners no. 1 to 4 are alleged to be accountable for Administration and Vigilance Department for BHEL, and as they had failed to make the payment despite a legal notice dated 17th March, 2007 having been served on them consequently the complainant was

constrained to file the present complaint under Section 138 of the Negotiable Instruments Act. It is alleged that the aforesaid amount of Rs.58,536/- was payable to the respondent/complainant on account of terminal benefits like subsidized medical facilities, leave encashment, house rent allowance without ceiling in revised pay, city compensatory allowance, plant performance, profit sharing bonus/ex-gratia and education assistance, etc.

3. The learned Magistrate after taking the evidence by way of an affidavit of the respondent/complainant summoned the petitioners for an offence under Section 138 of the Negotiable Instruments Act. The exact language of order of summoning is as under:

“C.C. No. 1073/2007

30.05.2007

PRESENT: Complainant in person.

I have already heard arguments on the point of summoning and perused the records carefully.

It is mentioned in the complaint that accused no. 1 to 4 are accountable being the Administrative and Vigilance Head in the Department and are looking after the affairs of M/s Bharat Heavy Electricals Limited. The cheque has been issued by BHEL. Under these circumstances, therefore, the court is convinced that accused no. 1 should be summoned through the accused no.2. As per the reply dated 30.03.2007 of accused no. 1, 2 and 3, it was accused Sanjay Verma and Smt. Anupama Parmar, who were in knowledge and control over the affairs of the company as per delegation of power of the company. Accused no. 4 has been mentioned as Director of accused no.1. However, the Court is not concerned

how the Chief Vigilance Officer Smt. Ambika Khatua is liable for the offence under Section 138 N.I. Act. In the facts and circumstances of the case, there is sufficient material on record to summon the accused no. 1, 2, 3, 5 and 6 under Section 138 N.I. Act.

Issue summons against these accused persons on filing of PF/RC, AD and by duly authorized courier service to be filed within 20 days for 8.8.2007. Dasti be given, if desired. If the accused is resident of a place situated outside Delhi, the summons be served through the concerned Ld. CJM.”

4. The petitioners feeling aggrieved by the aforesaid order of summoning challenged the same by filing the present petition.

5. The learned senior counsel for the petitioners have made the following submissions for the purpose of praying for quashing of complaint and the summoning order.

a) The first submission of the learned Senior Counsel for the petitioners is that the notice dated 17th March, 2007 which is purported to have been sent by the respondent/complainant is not actually issued to the petitioner no.1/BHEL and consequently the requirement of Section 138 of the Negotiable Instruments Act could not deemed to have been satisfied. The learned senior counsel for the petitioners has drawn the Court’s attention to the notice dated 17th March, 2007 which is issued by the respondent/complainant only to Sh. Ashok K. Puri, Smt. Ambika Khatua, Sh. S. K. Jain, Sh. Sanjay Verma, and Smt. Anupama Parmar. The contention of the learned senior counsel for the petitioners is that essentially the grievance of the respondent/complainant is against the petitioner/company

which is a juristic person, therefore, the notice under Section 138 of the Negotiable Instruments Act ought to have been sent to the company and only then the offence under Section 138 of the Negotiable Instruments Act qua the authorized signatories or the Director by virtue of invocation of Section 141 of the Negotiable Instruments Act could be made out.

b) The second submission made by the learned senior counsel for the petitioners is that the petitioners Sh. S. K. Jain and Sh. Ashok K. Puri or for that matter the other petitioners who are impleaded as parties to the complaint are working in their official capacities. There is not even a single averment in the complaint that anyone of them was in-charge and responsible for the conduct of day to day business of the company, therefore, the essential requirement of Section 141 of the Negotiable Instruments Act is not satisfied and consequently the complaint against Sh. Ashok K Puri, Managing Director-cum-Chairman, and Sh. S. K. Jain, Director (HR) is unsustainable. So far as Mr. Sanjay Verma and Smt. Anupama Parmar are concerned, it is not stated that in what capacity they have been made a party in the complaint although averment made in the complaint is that they have signed the cheque.

c) The third submission made by the learned senior counsel for the petitioners is that the dishonour of the cheque under Section 138 of the Negotiable Instruments Act in order to become an offence must be either on account of insufficiency of funds or

exceed the arrangement given in the account on which the cheque is issued and not for any other reason. Supplementing this argument further it is contended that the cheque for a sum of Rs. 58,536/- was issued in favour of the respondent/complainant, the Accounts Branch had erroneously calculated the amount of terminal benefits due and payable to the respondent/complainant and the moment the notice dated 17th March, 2007 was received by the respondent/complainant they had issued a reply to the petitioner to the said notice and enclosed therewith a cheque for an amount of Rs.5,951/- which was actually due and payable on account of terminal benefits to the respondent/complainant. The respondent/complainant in his complaint has nowhere stated the factum of an amount of Rs.5,951/- having been received by him in response to the notice. On the contrary, it is alleged that the respondent/complainant has concealed not only the factum of having received the aforesaid amount but has also not placed on record before the learned Trial Court the reply sent by petitioners no. 4 and 5 in response to the notice, where it was clearly denied by them that any amount is due and payable to the respondent/complainant other than the one which was paid to him along with the reply to the said notice.

d) The fourth contention of the learned senior counsel for the petitioners and which is supplementary to the third contention, was that the respondent/complainant has been guilty of

concealment of facts in as much as the reply to the notice sent by the petitioners no. 4 and 5 and the factum of having received the amount of Rs.5,951/- has not been disclosed by the respondent/complainant in the complaint. The learned senior counsel for the petitioners have placed reliance in this regard on ***MCD Vs. State of Delhi*** 2005 SCC (Cri.) 1322.

6. The respondent/complainant has refuted the arguments of the petitioners and taken the plea that there is a presumption that the cheque having been issued for a valid discharge of liability and the plea which has been set up by the petitioners now is only an afterthought which needs adjudication during the course of trial and the complaint or the summoning order cannot be quashed. So far as the question of notice having not been issued on the company is concerned, it was contended that even though no notice has been issued to the company since the notice has been issued to the Chairman-cum-Managing Director Sh. Ashok K. Puri of the company, therefore, it is deemed to be a notice issued to the petitioner/company which will satisfy the requirement of Section 138 of the Negotiable Instruments Act. Alternatively, it has been contended by the learned counsel for the respondent/complainant that the Apex Court in case titled ***Bimal Kumar Nopani Vs. State of U.P.*** 2006 (3) JCC NI 257 has held that it is not necessary even to implead the company in a case under Section 138 of the Negotiable Instrument Act where

the prosecution of the Managing Director or the Director of the said company is sought by a complainant.

7. I have carefully considered the respective submission of the learned counsel for the parties and have also perused the record.

8. At the outset, it must be submitted that a person who is invoking the jurisdiction of the Court whether civil or criminal must come to the temple of justice with clean hands. In the civil cases, the Hon'ble Supreme Court on case titled ***Chengalvaraya Naidu (dead) by LR's Vs. Jagannath (dead) by LR's & Ors.*** AIR 1994 SC 853 has categorically laid that fraud or concealment of facts by a party at whatever stage it is detected will vitiate the entire proceedings. Similarly, on the criminal side also in case titled ***MCD Vs. State of Delhi & Anr.*** 2005 SCC (Cr.) 1322 while dealing with the question of release of an accused under Section 4 of the Probation of Offender's Act, 1960 the Apex Court has held that a litigant who comes to the Court and withholds a vital document or suppresses the material facts in order to get an advantage in the case can be summarily thrown out at any stage. It was in this background that the Apex Court observed that anybody who plays fraud on the Court can be summarily thrown out and would not be granted any relief.

9. The principle of law which has been laid down by Apex Court in case titled ***MCD Vs. State of Delhi & Anr.*** is aptly applicable to the facts of the present case because the complaint

deserves to be quashed on this short ground itself. The respondent/complainant was admittedly employed as a senior accounts officer with the petitioner no.1/company and had been dismissed from the service on account of abandonment of his employment. The respondent/complainant was issued a cheque for a sum of Rs.58,536/- towards his settlement of terminal benefits but later on it was found that the amount was actually Rs.5,951/-. The employees of the petitioner/company accordingly issued instructions to the banker to stop the payment and the moment the respondent/complainant issued a notice under Section 138 of the Negotiable Instruments Act on 17th March, 2007 intimating the drawer of the cheque that the same has been dishonoured, they issued him a fresh cheque for a sum of Rs.5,951/- and the signatories to the cheque i.e. petitioners no. 4 and 5 who had signed cheque of Rs.58,536/- on behalf of the company also sent an individual reply to the respondent/complainant intimating him that the earlier cheque was issued to him erroneously under a mistaken belief that such a huge amount was due and payable, but the moment it came to their notice that the amount actually admissible to the respondent/complainant was only a sum of Rs.5,951/-, the cheque for the said amount was dispatched to him. Therefore, the actual amount which was due and payable to the respondent/complainant was actually paid. The respondent/complainant after having received the aforesaid amount has chosen to file the complaint under Section 138 of

the Negotiable Instruments Act by concealing these facts only to gain unfair advantage of getting the petitioners summoned on account of the official discharge of their duties, therefore, on this short ground itself not only the complaint but the summoning order dated 30.05.2007 deserves to be quashed.

10. The second point which arises for consideration is to the effect the non dispatch of notice to the petitioner no. 1/company. There is no dispute about the fact that the company is a juristic person and a notice under Section 138 of the Negotiable Instruments Act ought to have been issued to the company as the cheque was issued for on behalf of the said company by petitioners no. 4 and 5. The notice has not been issued to the company, therefore, the company could not have been made a party because the very basic ingredient of Section 138 of the Negotiable Instruments Act was not complied with.

11. As regards the Chairman-cum-Managing Director Sh. Ashok K. Puri and Director (HR) who are sought to be impleaded in the capacity of their being in-charge and vicariously responsible under Section 141 of the Negotiable Instruments Act, a perusal of the Trial Court record clearly shows that this was not the case which was set up for the respondent/complainant in the complaint that these two officials were in-charge and responsible for the day to day conduct of the business of the company. In the absence of such an averment in the complaint itself it could not be assumed that both of them were in-charge

and responsible so as to answer to the complaint of the respondent/complainant for prosecution of a case under Section 138 of the Negotiable Instruments Act.

12. The contention of the learned counsel for the respondent is that notice under Section 138 of the Negotiable Instruments Act is not required to be sent to the company is not a correct. The judgment which has been relied upon by the learned counsel for the respondent that a Director of a Company can be impleaded under Section 138 of the Negotiable Instrument Act without being a party cannot be found fault with but that does not say that no notice should be issued to the company itself. The judgment which has been relied by the respondent/complainant only lays down that the company may not be necessary party under Section 138 of the Negotiable Instruments Act. This argument cannot be accepted in the instant case in as much as the entire liability of claim of Rs.5,951/- arises qua the company itself, the company is not made a party and in the absence of notice having not been sent by the respondent/complainant to the company itself the prosecution must fail and it could not be justified that he could proceed against the Managing Director and Director and that too without there being any averment against them.

13. The next point which arises for consideration is that there is no averment in the entire complaint that the cheque was dishonoured on account of insufficiency of funds or on account

of exceeding the arrangements in the account on which the cheque was drawn which is an essential requirement of Section 138 of the Negotiable Instruments Act. In the absence of such an averment it could be safely said even the basic ingredients of Section 138 of the Negotiable Instruments Act were not satisfied.

14. For the reasons mentioned above, I am of the considered opinion that the complaint which is filed by the respondent/complainant against the present petitioners is liable to be quashed as it does not meet the requirement of initial ingredients of Section 138 of the Negotiable Instruments Act, and accordingly, the summoning order is also unsustainable. The complaint no. 1073/2007 titled **D. K. Sardana Vs. M/s Bharat Heavy Electrical Ltd.** and the order of summoning dated 30.05.2007 passed therein are quashed. A copy of this order be sent to the learned Trial Court for information.

V.K. SHALI, J.

December 21, 2009
KP