

IN THE HIGH COURT OF DELHI: NEW DELHI

+ Crl. M.C. 122/2010 & Crl. M.A. 489/2010
% Crl. M.C. 123/2010 & Crl. M.A. 491/2010
Crl. M.C. 124/2010 & Crl. M.A. 493/2010
Crl. M.C. 125/2010 & Crl. M.A. 495/2010
Crl. M.C. 126/2010 & Crl. M.A. 497/2010
Crl. M.C. 127/2010 & Crl. M.A. 499/2010
Crl. M.C. 133/2010 & Crl. M.A. 512/2010
Crl. M.C. 434/2010 & Crl. M.A. 1488/2010
Crl. M.C. 435/2010 & Crl. M.A. 1490/2010
Crl. M.C. 436/2010 & Crl. M.A. 1492/2010
Crl. M.C. 437/2010 & Crl. M.A. 1494/2010
Crl. M.C. 438/2010 & Crl. M.A. 1496/2010
Crl. M.C. 439/2010 & Crl. M.A. 1498/2010
Crl. M.C. 440/2010 & Crl. M.A. 1500/2010

SUSHIL KUMAR

..... Petitioner

Through: Mr. Sumit Bansal, Mr.
Rajnish Gaur & Mr. Sanjay
Gupta, Advs.

Versus

IBM INDIA PVT. LTD. & Anr.

..... Respondents

Through: Mr. Dileep Poolakkot, Adv.

Judgment reserved on: 24th September, 2010

Judgment delivered on: 29th September, 2010

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

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

A.K. PATHAK, J.

1. All the above noted petitions are being disposed of together as the facts involved there in are similar inasmuch, the question of law raised is also same.

2. Petitions under Section 482 of the Code of Criminal Procedure, 1973 have been filed by the petitioner praying therein that the complaints filed by respondent No. 1 under Section 138 of the Negotiable Instruments Act, 1881 (for short hereinafter referred to as “the Act”) be quashed.

3. In the compliant, petitioner has been arrayed as accused No. 4 being Chief Operating Officer of respondent No. 2, besides the Managing Director and Chief Financial Officer who have been arrayed as accused Nos. 2 and 3. In paras 2 and 8 of the complaint it has been averred as under:

Para 2

“----- Accused No. 2 is the Managing Director and Chief Executive Officer of accused No. 1 company. Accused No. 3 is the Chief Financial Officer and accused No. 4 is the Chief Operating Officer of the Accused No. 1 company. Accused Nos. 2, 3 and 4 are Incharge of and responsible for the day to day affairs of the accused No. 1 company.

Para 8

“----- That accused Nos. 2, 3 and 4 are persons incharge and responsible for the day to day affairs of the accused No. 1 company and that the aforesaid cheque was issued to the complainant company with the knowledge of accused Nos. 2, 3 and 4 and therefore are responsible and guilty along with accused No. 1 company for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881.”

4. As per the complaint, respondent No.1 was one of the leading information technology companies in the world and was providing hardware, software, consulting and other related services to its customers in India. Respondent No. 2 was also engaged in the business of providing information technology products and services to its customers. Respondent No. 2 had signed a contract with Telecommunications Corporation of India Limited for doing some project at Bharat Sanchar Nigam Limited. To execute the said contract, respondent No. 2 had subcontracted certain part of its work to the complainant. A contract was entered into between respondent Nos. 1 and 2 in this regard. Towards services rendered by respondent No. 1, it raised invoices on respondent No. 2 as per the agreed terms. In discharge of its part liability towards the said invoices, respondent No. 2 had issued the cheques in question all dated 30th June, 2008, favouring the respondent No. 1. It was alleged that on presentation, seven cheques were returned dishonored along with return memo dated 20th December, 2008 by the bankers of respondent No. 2 with the remarks "payment stopped by the drawer". Statutory notice dated 6th January, 2009 was sent to respondent No. 2 and other accused including the petitioner on 7th January, 2009. Remaining seven cheques were also returned dishonored vide return memo dated 1st January, 2009 and statutory

notice in respect thereof was sent on 22nd January, 2009. In spite of receipt of the demand notice, accused failed to pay the cheque amount, thus, had committed offence under Section 138 of the Act. Hence the complaint.

5. Arguments advanced by the counsel for the petitioner are twofold; first contention of the counsel for the petitioner is that the petitioner cannot be held vicariously liable for the offence under Section 138 of the Act allegedly committed by respondent No. 2 as he was not working with respondent No.2 at the relevant time. Initially, petitioner was appointed as Vice President of the ORG Telecom Ltd. with effect from 1st May, 2006. Subsequently, he was promoted as Chief Operating Officer in the ORG Telecom Ltd. with effect from 5th January, 2007 on the basis of his excellent performance at work. Only on 14th January, 2009 he was appointed as Chief Executive Officer (CEO) of the respondent No. 2. Reliance has been placed on the copies of the appointment letters dated 28th April, 2006, 5th January, 2007 issued by the ORG Telecom Ltd. and appointment letter dated 12th January, 2009 issued by the respondent No. 2. Counsel has vehemently contended that as on the date when cheques were issued, were dishonored and statutory notices were served on the respondent No 2, petitioner was not holding any post in respondent No. 2, as such, he cannot be held

vicariously liable for the offence committed by the company, by taking aid of Section 141 of the Act.

6. The second contention of the counsel for the petitioner is that mere re-production of the language employed in the Section 141(1) of the Act was not sufficient to make the petitioner liable to face prosecution for the offence committed by the company. No averment had been made in the complaint as to how petitioner was in-charge of the business of respondent No. 2 at the relevant time when the offence was allegedly committed. Each and every officer and/or Director cannot be held responsible under Section 141 of the Act for the offence committed by a company under Section 138 of the Act. Specific averments have to be made against such officer or Director by disclosing the responsibility assigned to such officer/Director so as to make him responsible for day to day conduct of the business of the company at the time when offence had been committed by the company. Reliance has been placed on **K.K. Ahuja vs. V.K. Vora and Another**, reported in (2009) 10 SCC 48 and **National Small Industries Corporation Limited vs. Harmeet Singh Paintal & Another**, reported in JT 2010 (2) SC 161.

7. To rebut these arguments, counsel for respondent No. 1 has contended that specific averments have been made in the complaint to the effect that the petitioner was Chief

Operating Officer of respondent No. 2, thus, was responsible for the conduct of the business of the company and further that the cheques in question had been issued within the knowledge of the petitioner. In case, petitioner claims to have joined respondent No. 2 at a much later date, at best this is his defense, and he is required to prove the same during the trial. Letters issued by ORG Telecom Ltd. and respondent No. 2 cannot be accepted on its face value, more so when ORG Telecom Ltd. and respondent No. 2 are sister concerns. It is further contended that Chief Operating Officer cannot be equated with any other officer of the company, inasmuch as, Chief Operating Officer being in high position, remains in the helm of affairs of business of a company.

8. Indubitably, law is well settled that mere re-production of wording of Section 141(1) of the said Act would not be sufficient to make a person liable to face prosecution. Something more is required to be averred to show that such officer is responsible for day to day business affairs of the company. In case of Managing Director of a company it is not necessary to make an averment that he was in-charge and responsible to the company for the conduct of business of the company. In case of Director or an officer of the company, who has signed the cheque on behalf of the company, also, there is no need to make a specific averment in this regard. So far as Director, Secretary or Manager as

defined in 2 (24) of the Companies Act or a person referred to in Clauses (e) and (f) of Section 5 of the Companies Act is concerned, averment in the complaint that he was in-charge and was responsible to the company for the conduct of business of the company, was sufficient to bring the case under Section 141(1) of the Act and no further averment in this regard was necessary. However, as far as other officers and Directors of a company are concerned, it was necessary to disclose in the complaint their role in respect of issuance and dishonor of the cheque by disclosing consent, connivance or negligence. However, in my view, the facts of this case are different in nature. Specific averments have been made in the complaint that petitioner was Chief Operating Officer of respondent No. 2 company and was in-charge and responsible for the day to day affairs of the company, inasmuch as cheques had been issued within his knowledge. Petitioner was not working as an ordinary officer in the company. As per his own admission, initially he was appointed as Vice President, later on promoted to Chief Operating Officer though he claims to have been appointed by ORG Telecom Ltd. He was holding high position and prima facie was in the helm of day to day affairs of the business of the company. Not only this, admittedly, in due course of time he was promoted and transferred to respondent No. 2 as Chief Executive Officer with effect from

14th January, 2009 and then as Additional Director (Professional) with effect from 18th August, 2009. On the face of specific allegations made in the complaint, plea taken by the petitioner that he had been working with ORG Telecom Ltd. as Chief Operating Officer prior to 14th January, 2009 is a matter which requires evidence and can be resolved only after the trial. Copies of the letters issued by ORG Telecom Ltd. cannot be accepted on its face value, without a formal proof being led during the trial, inasmuch as, it is apparent that ORG Telecom Ltd. and respondent No. 2 were managed by the same group, and are sister concerns. In the letter dated 12th January, 2009 issued by respondent No. 2 itself, it has been mentioned that the petitioner was being appointed as Chief Executive Officer by way of promotion keeping in mind his exemplary performance and contribution in making the company to achieve its objective. In this appointment letter, it has nowhere been mentioned that petitioner had been working with the ORG Telecom Ltd. and keeping in mind his performance in the said company he was being appointed with respondent No. 2. Be that as it may, the plea taken by the petitioner in this regard at best can be termed as his defense and requires to be proved during the trial. In my view, on the face of clear averments in the complaint that petitioner was responsible for the day to day affairs of the company, the complaint cannot be

quashed at this premature stage, merely because petitioner has alleged that role of the petitioner has not been elaborated to indicate that he was responsible for the day to day operation and decision making of the company.

9. Chief Executive Officer (CEO) of a company, as its nomenclature suggests, would be responsible for the day to day affairs of the company. As per Webster's Law dictionary CEO means "the highest executive officer of a company, organization etc." In business parlance, CEO means the highest ranking executive in a company whose main responsibilities include developing and implementing high-level strategies, making major corporate decisions, managing the overall operations and resources of a company, and acting as the main point of communication between the Board of Directors and the corporate operations. Thus, CEO cannot be equated with any other officer of the company necessitating the elaborate averment in the complaint regarding his duties to indicate that he was responsible for the day to day affairs of the company.

10. Section 138 of the Act reads as under:

“138. Dishonour of cheque for insufficiency, etc., of funds in the accounts

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or

other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for 2["a term which may extend to two year"], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) The cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) The payee or the holder induce course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer, of the cheque, 3["within thirty days"] of the receipt of information by him from the bank regarding the return of the cheques as unpaid, and

(c) The drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

11. Bare perusal of Section 138 of the Act makes it clear that following ingredients are required to be fulfilled before offence is said to have completed:

1. Drawing of the cheque by a person on an account maintained by him with a banker, for payment to another person from out of that account for discharge in whole/in part of any debt or liability.

2. Presentation of the cheque by the payee or the holder in due course to the bank;

3. Returning the cheque unpaid by the drawee bank for want of sufficient funds to the credit of the drawer or any arrangement with the banker to pay the sum covered by the cheque.

4. Giving notice in writing to the drawer of the cheque within 15 days of the receipt of information by the payee from the bank regarding the return of the cheque as unpaid demanding payment of the cheque amount; and

5. Failure of the drawer to make payment to the payee or the holder in due course of the cheque of the amount covered by the cheque within 15 days of the receipt of the notice.

12. The last ingredient, namely, failure of the drawer to make payment to the payee or the holder in due course of the cheque, of the amount covered by the cheque within 15 days of the receipt of the notice completes the offence. If payment is made within 15 days of the receipt of notice, then no offence gets committed. Reliance is placed on K. Bhaskaran vs. Sankaran Vaidhyan Balan (1999) 7 SCC 510.

13. As per the complaint, notices were sent on 7th January, 2009 and 22nd January, 2009. These might have been received by the addressees after about two days i.e. on 9th January, 2009 and 24th January, 2009. Fifteen days period would, thus expire on 24th January, 2009 and 6th February, 2009. As the amount has not been paid pursuant to the notice, it can be said that the offence was completed only in the last week of January and 1st week of February, 2009 as

the case may be. Admittedly, on that date the petitioner was occupying the post of CEO of the respondent No. 2. For this reason also it cannot be said that complaint qua the petitioner is not maintainable.

14. For the foregoing reasons, petitions are dismissed being devoid of merits. However, it is made clear that the observations made in this judgment are for the purpose of deciding the present petition and the Trial Court will not be influenced by the same. It is further clarified that whether or not the averments made in the complaint against the petitioner are correct or false, has to be decided by the Trial Court after the trial.

A.K. PATHAK, J.

September 29, 2010

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