

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CRL.M.C. 996/2010**

Decided on 06.10.2010

IN THE MATTER OF :

SHIV KUMAR VERMA AND ANR. Petitioners
Through: Mr. Raj Kumar Sherawat, Advocate

versus

MANOJ PANDEY Respondent
Through: Nemo

CORAM

*** HON'BLE MS.JUSTICE HIMA KOHLI**

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

HIMA KOHLI, J. (Oral)

1. The present petition is filed by the petitioners under Section 482 of the Cr.PC, praying *inter alia* for quashing of complaint case No.2057/01 and the summoning order dated 16.01.2006 passed by the learned Metropolitan Magistrate, Patiala House Courts, New Delhi, on a complaint filed by the respondent under Sections 138 and 142 of the Negotiable Instruments Act, 1988 (hereinafter referred to as '**the Act**').

2. In a nutshell, the facts of the case are that on 17.11.2005, the respondent filed a complaint under Sections 138 and 142 of the Act against one, Mr.Dalip Kumar Verma and the petitioners, who are his brothers. The case of the respondent as set out in the complaint is that the accused

persons had certain business transactions with him, for which they owed him a sum of ₹ 30 lacs. Out of the aforesaid amount, the accused persons had paid a sum of ₹ 11 lacs, leaving the balance sum of ₹ 19 lacs. Subsequently, the first accused, Mr. Dalip Kumar Verma had issued a cheque for ₹ 15 lacs for part discharge of his debt/liability which, when presented through the bankers of the respondent/complainant, was returned with the remarks "Payment Stopped By Drawer". On receiving the dishonoured cheque, the complainant/respondent issued a legal notice dated 30.09.2005 to the accused but the amount, subject matter of the cheque, was not paid within the stipulated period under the Act, thus compelling him to file a complaint against the accused under the Act.

3. It is argued by the learned counsel for the petitioners that the complaint filed by the respondent against his clients is not maintainable and the summons issued to the petitioners vide order dated 16.01.2006 are liable to be quashed as the learned Metropolitan Magistrate failed to appreciate the fact that the cheque in question was not issued by the petitioners, but by accused No.1, Mr. Dalip Kumar Verma in his personal capacity. In support of the said submission, he hands over a photocopy of the said cheque, which is taken on the record. It is submitted that a perusal of the complaint and the cheque shows that no case whatsoever is made out against the petitioners as they were not the drawers of the cheque. It is contended that the respondent/complainant has deliberately roped in the petitioners, who are senior police officers and have nothing to do with the transaction between him and the accused No.1. In support of the aforesaid submission, counsel for the petitioners relies on the judgments in the case of Suresh Jindal vs. State & Anr. reported as **2008(154)DLT 588** and Lalit

Jain vs. State reported as **2010(4)AD(Delhi)429**.

4. This Court has heard the counsel for the petitioners and also examined the complaint and the dishonoured cheque in question. The limited issue in the present case is as to whether the petitioners could be impleaded as co-accused in a complaint filed by the respondent/complainant under Section 138 read with Section 142 of the Act, when the cheque in question was not issued by them. The provisions of Sections 7, 138 and 141 of the Act are reproduced herein below for ready reference:-

"7. "Drawer", "drawee" – The maker of a bill of exchange or cheque is called the "drawer"; the person thereby directed to pay is called the "drawee".

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 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 in due 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, within thirty days of the receipt of information by

him from the bank regarding the return of the cheque 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.

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 proceeded against and punished accordingly;

Provided that nothing contained in this subsection 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.

(2) Notwithstanding anything contained in subsection (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attribute to, any neglect on the part of, any director, Manager, secretary, or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
Explanation: For the purpose of this section. -

(a) "Company" means any body corporate and includes a firm or other association of individuals; and

(b) "Director", in relating to a firm, means a partner in the firm."

5. The aforesaid provisions make it clear that it is only the drawer of the cheque, who can be held responsible for an offence under Section 138 of the Act. Section 141 provides for constructive liability. It postulates that a person, in charge of and responsible to the company for the conduct of the business of the company, shall also be deemed to be guilty of the offence. The drawer can be a company, a firm or an association of individuals. But only those Directors, partners, or officers can be held responsible for the offence under Section 138 of the Act, who were responsible to the company/firm for the conduct of its business.

6. A complaint under Section 138 of the Act is maintainable at the instance of the person in whose favour, a cheque was drawn, only in the following circumstances:-

- (i) The cheque is drawn by "a person"
- (ii) The cheque, drawn on an account maintained by such a person 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 the debt or other liability, is returned back 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.
- (iii) If the person committing an offence under Section 138 of the Act is a company, or an association of individuals, not only the company but every person, who was incharge of and responsible to the company for the conduct of the business of the company, shall be deemed guilty of the offence and liable to be proceeded against.

7. However, for the purposes of invoking Section 141 of the Act, it is necessary that the cheque should have been issued by the company, a firm or an association of persons and whether any liability can be fastened to persons who are not the signatory of the cheque is a matter which has to be examined carefully. A plain reading of Section 141 of the Act therefore indicates that the person/s sought to be made vicariously liable for a criminal offence under Section 141 should be in charge of and responsible for the conduct of business of the company. But, in the present case, neither is there any averment in the complaint to the effect that the petitioners are signatories to the cheque, nor is there any company or firm in existence, on whose behalf the cheque was issued. The complaint clearly states that the accused No.1 issued the cheque. Said fact is also borne out from a perusal of the cheque which was dishonoured.

8. Before a person is subjected to the criminal process, specific averments in the complaint petition are imperative so as to satisfy the requirements of Sections 138 and 141 of the Act. The Magistrate is required to examine the averments contained in the complaint in the first instance and satisfy himself that the accused falls within the ambit of Section 138/141 of the Act and only then, should the summons be issued. The law on this point is well settled. In the case of M/s Gujarat Oleo Chem. Vs. State & Anr. reported as **2010(1) JCC (NI) 84**, it was held by the Supreme Court that only the signatory of the cheque, i.e., drawer of the cheque, who had drawn the cheque in his individual capacity and from his individual account, would be liable for prosecution under Section 138 of the Act and not the directors of the company. On the same lines was the judgment in the case of Srikant Somani & Ors. vs. Sharad Gupta & Anr. reported as **2005(2)JCC**

(NI)138. The aforesaid judgments were followed by the Single Benches of this Court in the cases of Lalit Jain (supra) and Suresh Jindal (supra).

9. In the present case, a perusal of the complaint filed by the respondent/complainant makes it evident that the cheque in question was issued by accused No.1 in his personal capacity and not as representing an association of persons, firm or a company. The petitioners are not the signatories to the cheque. A bald averment to the effect that the cheque was issued without their concurrence and consent cannot fasten any liability on them under the Act. For fastening a criminal liability, such a presumption cannot be drawn against the petitioners. In such circumstances, on the cheque being dishonoured, the liability, if any, can be said to be of the accused No.1 alone and not the petitioners. In the light of the aforesaid facts and circumstances, the complaint filed by the respondent against the petitioners herein, as also the summoning order dated 16.01.2006, are quashed *qua* them.

10. The petition is disposed of. A copy of this order be forwarded by the Registry to the concerned court for information.

OCTOBER 06, 2010
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(HIMA KOHLI)
JUDGE