

35.

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

+ CRL.M.C. 1286/2010

Date of decision: 23rd April, 2010

ANU AHLUWALIA & ORS Petitioners
Through Mr. Sanjoy Ghose, Advocate.

versus

BENNETT COLEMAN & CO LTD & ANR Respondents
Through Ms. Fizani Husain, APP for the State.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

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 ?

ORDER

1. The petitioners herein have challenged summoning order dated 25th March, 2010 passed by the learned Metropolitan Magistrate, inter alia, relying upon in view of Section 141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the Act, for short). Learned counsel for the petitioners submits that averments made in the complaint do not satisfy the requirements of Section 141 of the Act and relies upon decision of the Supreme Court in *National Small Industries Corporation Limited versus Harmeet Singh Paintal and Another*, (2010) 3 SCC 330.

2. The question of vicarious liability and scope of enquiry of when cognizance is taken and summons are issued and in which cases, a revisionary court can interfere to strike down a summoning order has been a subject matter of several decisions of the Supreme Court. In ***Municipal Corporation of Delhi versus Ram Kishan Rohtagi and Others***, AIR 1983 SC 67, it was observed that proceedings at the initial stage can be quashed only when on the face of the complaint no offence is constituted. In other words, the test is whether taking the allegations and the complaint as they are, without adding or subtracting anything, if no offence is made out, then the High Court can interfere and quash the proceedings and the summoning order. In the said case in the complaint filed before the learned Magistrate, the allegation made was that the accused in question were “directors and as such” were in charge of and responsible for the conduct of business. The Supreme Court emphasized that directors may or may not be in charge of and responsible for the conduct of business of a company and they cannot be vicariously prosecuted and liability is not fastened because they were directors. Reference in this regard can be made to paragraph 14 of the said judgment, which reads as under:-

“14. Reliance has been placed on the words ‘as such’ in order to argue that because the complaint does not attribute any criminal responsibility to accused Nos. 4 to 7 except that they were in charge of and responsible for the conduct of the business of the company. It is true that there is no clear averment of the fact that the Directors were really in charge of the manufacture and responsible for the conduct of business but the words ‘as such’ indicate that the complainant has merely presumed that the Directors of the company must be guilty because they are holding a particular office. This argument found favour with the High Court which quashed the proceedings against the Directors as also against the Manager, respondent No. 1.”

3. In the same volume of the AIR, there is another decision of the same Bench of the Supreme Court in the case of *Municipal Corporation of Delhi versus Purshotam Dass Jhunjunwala and Others*, AIR 1983 SC 158. In this case, allegations made in the complaint were that the accused were Directors and were in charge of and responsible for conduct of the Company's business at the time of commission of the offence. The words "as such" were missing in the complaint. The Supreme Court observed that vicarious liability was being fastened on the Directors not because they were Directors but because they were in charge of and responsible for conduct of the business at the time of commission of offence. The said averments in the complaint were found to be sufficient for the purpose of summoning of the accused. It may be relevant to reproduce here paragraphs 4 to 7 of the said decision.

"4. Unlike the other case, para 5 of the complaint of this case gives complete details of the role played by the respondents and the extent of their liability. It is clearly mentioned that Ram Krishan Bajaj is the Chairman and R.P. Neyatia is the Managing Director and respondents 7 to 11 are the Directors of the Mill and were incharge of and responsible for the conduct of its business at the time of the commission of the offence whereas in the other case the complaint has merely drawn a presumption without any averment.

5. In the instant case, a clear averment has been made regarding the active role played by the respondents and the extent of their liability. In this view of the matter, it cannot be said that para 5 of the complaint is vague and does not implicate respondents 1 to 11. As to what would be the evidence against the respondents is not a matter to be considered at this stage and would have to

be proved at the trial, We have already held that for the purpose of quashing the proceedings only the allegations set forth in the complaint have to be seen and nothing further.

6. From a perusal of the various clauses of the complaint, including para 5, it is quite clear that a prima facie case for summoning the accused has been made out and the High Court was absolutely wrong in holding that the allegations made in para 5 are vague. The High Court failed to consider that the allegations were quite clear and explicit so as to be sufficient for taking cognizance of the offence against the accused.

7. Further details would have to be given in the shape of evidence when the trial proceeds and in view of the clear allegations made in para 5 of the complaint, we are not in a position to agree with the High Court that it is a fit case in which it should have exercised its discretion under Section 482 of the Code of Criminal Procedure, 1973 in order to quash the proceedings against the accused-respondents.”

4. Reference can be made to the decision of the Supreme Court in *SMS Pharmaceuticals Limited versus Neeta Bhalla and Another*, (2005) 8 SCC 89. In this decision, the Supreme Court reiterated the law and clarified the ratio. In paragraph 5 of *SMS Pharmaceuticals Limited* (supra), the Supreme Court observed as under:-

“5. Section 203 of the Code empowers a Magistrate to dismiss a complaint without even issuing a process. It uses the words “after considering” and “the Magistrate is of opinion that there is no sufficient ground for proceeding”. These words suggest that the Magistrate

has to apply his mind to a complaint at the initial stage itself and see whether a case is made out against the accused persons before issuing process to them on the basis of the complaint. For applying his mind and forming an opinion as to whether there is sufficient ground for proceeding, a complaint must make out a prima facie case to proceed. This, in other words, means that a complaint must contain material to enable the Magistrate to make up his mind for issuing process. If this were not the requirement, consequences could be far-reaching. If a Magistrate had to issue process in every case, the burden of work before the Magistrate as well as the harassment caused to the respondents to whom process is issued would be tremendous. Even Section 204 of the Code starts with the words “if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding”. The words “sufficient ground for proceeding” again suggest that ground should be made out in the complaint for proceeding against the respondent. It is settled law that at the time of issuing of the process the Magistrate is required to see only the allegations in the complaint and where allegations in the complaint or the charge-sheet do not constitute an offence against a person, the complaint is liable to be dismissed.”

(emphasis supplied)

5. In the said decision, sections 138 and 141 of the Act were examined in the light of the powers of the Magistrate under Sections 200-204 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code, for short). It was held that merely because a person is Director of the company, he cannot be made vicariously liable and summoned under Section 141 of the Act. In the conclusion, the Supreme Court has observed as under:-

“18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

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 the question posed in sub-para (b) has to be in the 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 the 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)

6. Learned counsel has referred several portions of the decision in *National Small Industries Corporation Limited (supra.)* Learned counsel for the petitioners submitted that in the said judgment, it has been held that complaint must state in detail the role of the Director, who is sought to be prosecuted under Section 141 of the Act. I have examined the said contention. The averments made against the Directors in *National Small Industries Corporation Limited (supra)* have been referred to in paragraph 5. The said paragraph reads as under:-

5. It is the claim of the appellant that so as to make the Managing Director and the Director of the Company liable to be prosecuted under the provisions of the Act, they had specifically averred in the complaint that all the accused persons approached it for financing of bill integrated market support programme. It was also stated that the accused

persons had issued cheques which were dishonoured on presentation against which the appellant had filed criminal complaints under the provisions of the Act against all the respondents herein. It is their further case that all the accused persons accepted their liability and delivered various cheques, which are the subject-matter of the present appeals.”

7. The averments made in the said paragraph clearly show that the respondent before the Supreme Court was being prosecuted because he was a Director of the company and as such vicariously liable. It was further averred that all accused persons had approached for finance and had issued cheques, which were dishonoured. It was stated that all accused persons accepted their liability and delivered the cheques. Thus the relevant and material averments which satisfy and meet requirements of Section 141 of the Act were missing. In the concluding paragraph in *National Small Industries Corporation (supra)* the Supreme Court has culled out the principles which emerge after examining the decisions and has observed as under:-

“39. From the above discussion, the following principles emerge:

- (i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.
- (ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.
- (iii) Vicarious liability can be inferred against a company

registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

- (iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.
- (v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.
- (vi) If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.
- (vii) 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.”

8. Applying the aforesaid ratio, let us examine the statements and the averments made in the complaint. In paragraphs 3, 6, 7 and 11 of the complaint, it is stated as under:-

“3. The Accused no. 1 is a private limited company and is engaged in business of providing Broadband service and Internet telephony service to corporate, BPOs and retail customers. The accused no. 2 is the chairman of the accuse no. 1 company. The accused no. 3 to 7 are the directors of the accused no. 1 company and are in charge of and responsible for conduct of the day to day business and affairs of the

company.

4. XXXXX

5. XXXXX

6. There were consistent defaults committed by the accused persons in meeting their financial obligations under the said advertising agreement. In order to resolve these defaults and the issues arising therefrom meetings were held between the complainant and the accused nos. 2 to 7 from time to time. Accused no. 2 is the Chairman of the accused no. 1 and accused no. 3 to 7 are all directors of the accused no. 1 and are in-charge of and responsible to the accused no. 1 for the conduct of its day to day business and affairs.

7. Finally, the issue was resolved and the accused no. 1 company agreed to issue nine cheques towards the part payment of the total agreed amount as per agreement dated 18.7.2007. Thereupon, the accused no. 1, vide letter dated 16.03.2009, had issued the said 9 cheques executed/signed by the accuse no. 2 acknowledging that the same were issued in respect of outstanding payment to the complainant. At the time of delivering the said cheques the accused no. 2 to 7 had all assured the complainant that the cheques would be duly honored/encashed on presentation. All the aforesaid nine cheques were signed by accused no. 2.

8. XXXXX

9. XXXXX

10. XXXXX

11. The complainant thereafter issued a notice date

28.08.2009 calling upon all the accused persons to pay the cheque amount i.e. Rs.24,71,675/- within 15 days of the receipt of the notice. The notice was duly served upon all the accused. The said notice was replied by the accused inter alia refusing to pay. Till date they have not paid the cheque amount to the complainant.”

9. The averments made in the aforesaid paragraphs 3, 6, 7 and 11 clearly make out a case for summoning of the accused under Section 141 of the Act. In paragraph 11 of the complaint it is also stated that a notice was issued to the petitioners herein and was served. The petitioners along with this petition have not filed any reply or stated that they had denied their liability vicariously or otherwise. In these circumstances, I do not think the order of the learned trial court summoning the petitioners requires interference.

10. Learned counsel for the petitioners has made some reference to the advertising agreement and the liability of the accused No. 1. These are disputed questions of fact, which can be only determined and decided once evidence and material is on record and not at this stage.

11. The petition is dismissed. It is clarified that observations made in this order are for the purpose of deciding the present petition and the trial court will not be influenced by the said findings. It is also clarified that whether or not the averments made in the complaint against the petitioners are correct or false, has to be decided by the trial court.

SANJIV KHANNA, J.

**APRIL 23, 2010
VKR**