

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRL.M.C. 1375/2010

SANJU KAPOOR Petitioner
Through Mr. Mohit Chaudhary and Mr. A.
Dass, Advocates.

versus

STATE & ANR Respondent
Through Mr. Arvind Kumar Gupta, APP.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

ORDER

% **29.04.2010**

1. Counsel for the petitioner relies upon Section 141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the Act.) and has made reference to ***J.N. Bhatia & Others Vs. State and Another*** 139 (2007) DELHI LAW TIMES 361 in which the decision of the Supreme Court in ***S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another*** (2005) 8 SCC 89 has been referred and was held as follows:-

“12. It may be stated at the outset that initial burden is on the complainant to show that “accused person” was in charge of and responsible for the affairs of the company and in case accused is a Director, then either he was in charge of and responsible to the company for the conduct of its business or the offence had

been committed with his consent or connivance or is attributable to any neglect on his part. Therefore, the first requirement is that there have to be necessary averments in this behalf in the complaint. If, there is no such averment at all in the complaint and a person is arraigned as accused only on the ground that he was a Director, such a complaint qua him has to be necessarily dismissed and no summoning orders would be called for. There are number of judgments to support this view. One may usefully refer to the judgment of this Court in Smt. Saraswathy Amma and Anr. V. Swil Limited and Anr., II (2000) BC 322=83 (2000) DLT 75=(2000) 2 Comp. LJ 240 (Delhi), where this Court recalled the summoning order against the petitioner therein as nothing had been alleged against the petitioner in the working of the company or partnership firm. The relevant part of the said judgment reads as under;

“4.....There must be specific accusation against each of the persons arraigned as accused that such person was in charge of and responsible for the conduct of the business of the company or the firm at the relevant time when the alleged offence was committed by the company or the firm. The said requirement cannot be left the wild imagination of the complainant. Municipal Corporation of Delhi v. Ram Kishan Rohtagi, AIR 1983 SC 67.

5..... In the instant case, there is not even a whisper nor a shred of evidence nor anything to show apart from the presumption drawn by the respondent that there is any act committed by the petitioners from which a reasonable inference can be drawn that they could also be vicariously liable. Consequently, the impugned order cannot be sustained in law

as it has resulted in miscarriage of justice. It appears that while examining the matter for issuing process, the learned Magistrate did not consider the said aspect.”

2. The aforesaid paragraph refers to the judgment of the Supreme Court in ***Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi*** AIR 1983 SC 67 in which 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. In the same volume of the AIR, there is another decision by the same Bench of the Supreme Court in the case of ***Municipal Corporation of Delhi versus Purshotam Dass Jhunjhunwala and Others***, AIR 1983 SC 158. In this case, the allegations made in the complaint were that the accused in question were Directors of the accused company and were in charge of and responsible for conduct of its

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.”

3. In the case of **S.M.S. Pharmaceuticals Ltd.**(supra), the Supreme Court had culled out the following requirements before a person can be summoned under Section 141 of the Act:-

“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.”

4. Counsel for the petitioner has also made reference to the judgment of

the Supreme Court in ***K. Srikanth Singh Vs. North East Securities Ltd. and Another*** (2007) 12 Supreme Court Cases 788 in which reference was to the decisions in ***S.M.S. Pharmaceuticals Ltd. (supra)*** and paragraph 7 of ***Sabitha Ramamurthy Vs. R.B.S. Channabasavaradhya*** (2006) 10 SCC 581 was reproduced. The said paragraph reads as follows:-

“7. A bare perusal of the complaint petitions demonstrates that the statutory requirements contained in Section 141 of the Negotiable Instruments had not been complied with. It may be true that it is not necessary for the complainant to specifically reproduce the wordings of the section but what is required is a clear statement of fact so as to enable the court to arrive at a prima facie opinion that the accused are vicariously liable. Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor(sic). Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned 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 the offence committed by the company. Before a person can be made vicariously liable, strict compliance with the statutory requirements would be insisted. Not only the averments made in Para 7 of the complaint petitions do not meet the said statutory requirements, the sworn statement of the witness made by the son of the respondent

herein, does not contain any statement that the appellants were in charge of the business of the Company. In a case where the court is required to issue summons which would put the accused to some sort of harassment, the court should insist strict compliance with the statutory requirements. In terms of Section 200 of the Code of Criminal Procedure, the complainant is bound to make statements on oath as to how the offence has been committed and how the accused persons are responsible therefor(sic). In the event, ultimately, the prosecution is found to be frivolous or otherwise mala fide, the court may direct registration of case against the complainant for mala fide prosecution of the accused. The accused would also be entitled to file a suit for damages. The relevant provisions of the Code of Criminal Procedure are required to be construed from the aforementioned point of view.”

5. In the present case, the following allegations have been made in the complaint:-

“2. Accused No.1 is a private limited company incorporated under the Companies Act, 1956, having its office at B-158, Shivalik, Malviya Nagar, New Delhi. The Accused Nos.2 to 4, are the executive/Whole time directors of the Accused No.1 Company and are in charge of and responsible for the day to day affairs of the Accused No.1 Company. The Accused Nos. 2 to 4, have also been directly involved on behalf of the Accused No.1 Company in the aforesaid transaction and the representations made thereunder. The cheque, which is the subject

matter of the present complaint is also signed by the Accused No.4.

14. That the Accused Nos. 1 to 4, while entering into the said Agreement and while issuing the said cheque were aware that the said cheque would not be honoured and with the dishonest intention of cheating the Complainant issued the said cheque, therefore, the Accused persons, are also liable to be prosecuted and punished for the offence of Section 420 of IPC.

15. That in these circumstances, the Complainant caused a legal notice dated 16th July, 2009, to be issued to all the accused under section 138 of Negotiable Instruments Act through registered post and courier calling upon them to make the payment of Rs. 14,25,00,000/- (Rupees fourteen crores and twenty five lakhs only) being the amount of the said cheque within 15 days of the receipt of the notice.

16. That however, despite the service of the legal notice the accused have failed to make the aforesaid payments within the statutory period of 15 days and have thereafter caused a reply dated 12th August, 2009 to be issued through their counsel dishonestly attempting to evade liability on false pretexts. The complainant for the purpose of record has sent their response to the said reply dated 12th August, 2009 through their counsels letter dated 27th August, 2009.

17. That as the Accused Nos. 1 to 4 have failed to make the payment within the statutory period of 15 days from the date of the legal notice dated 16th July, 2009 they are liable to be prosecuted under Section 138 of the Negotiable Instruments Act. Further, the Accused Nos.2 to

4, being in charge of and responsible to Accused No.1 for conduct of its business and day to day affairs are also liable to be prosecuted under Section 138 of the Negotiable Instruments Act and for the offence of Section 420 of IPC.

6. Along with petition, the reply by the petitioner to the notice dated 16th July, 2009 under Section 138 of the Act has been filed. In the reply given by the petitioner it is not alleged or stated that the petitioner was not incharge or responsible for conduct of the company-Zenga Entertainment Pvt. Ltd.

7. In view of the averments made in the complaint and the reasoning given above, this is not a fit case to interfere under Section 482 of the Code of the Criminal Procedure, 1973. with the impugned summoning order dated 16th September, 2009. The petition is dismissed. It is clarified that the observations made in this order are for the purpose of the disposal of the present petition and will not be binding on the trial Court at any subsequent stage of the proceedings. It is further clarified that this Court has not expressed any opinion whether or not allegations made in the complaint are true or correct.

SANJIV KHANNA, J.

APRIL 29, 2010
NA