

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

Reserved on: August 23, 2011

Decided on: August 29, 2011

+ **CRIMINAL M.C. No.3586/2009**

B.K. SHARMA

....PETITIONER

Through: Mr. Shesh Datt Sharma, with Mr. R.K.
Sharma, Advocate

Versus

RAJESH KAPOOR & ANR

.....RESPONDENTS

Through: Mr. Piyush Gupta, Advocate with
Mr. Vineet Jain, Advocate for respondent
No.1.

Ms. Jasbir Kaur, APP for respondent No.2.

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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 Digest ?

AJIT BHARIHOKE, J.

1. B.K. Sharma, the petitioner herein vide this petition under Section 482 Cr.P.C. is seeking quashing of complaint No.27/01 of 2009 titled "Rajesh Kapoor, Director of M/s Multitech Instruments Co. Pvt. Ltd. Vs. B.K. Sharma, Director/authorised signatory of M/s Metito Franchise" under Section 138 N.I. Act pending in the court of Metropolitan Magistrate (East), Karkardooma Courts complex, Delhi.

2. Briefly stated, facts relevant for the disposal of this petition are that respondent No.2 Rajesh Kapoor is the Director of M/s Multitech

Instruments Co. Pvt. Ltd. Petitioner B.K. Sharma is claimed to be Director/authorised representative of the M/s Metito Franchise.

3. Rajesh Kapoor, respondent No.2, in his capacity as Director of M/s Multitech Instruments Co. Pvt. Ltd. filed the impugned complaint under Section 138 N.I. Act claiming that his company had business dealings with M/s Metito Franchise. In furtherance of the order placed by the petitioner, some lab equipment was supplied by M/s Multitech Instruments Co. Pvt. Ltd. at Jain Agro Industries, Plot No.39, DSIDC Manipur, Gujarat, Dahanu Road, District Thane. The representative of the petitioner received the supplies on 07.11.2008 without any complaint about the quality or the quantity of the goods. The petitioner, towards part payment of the bill amount, issued a cheque worth ₹2,12,000/- in favour of M/s. Multitech Instruments Co. Pvt. Ltd. The cheque, on presentation through the bankers of respondent No.2, was received back unpaid vide memo dated 20.11.2008 with the remarks "insufficient funds". Thus, a demand notice under Section 138 N.I. Act dated 17.12.2008 was sent to the petitioner. Despite of service of demand notice, the petitioner failed to pay the cheque amount. This led to filing of the complaint.

4. The petitioner is seeking quashing of the complaint under Section 138 N.I. Act on legal as well factual issues. It is submitted on behalf of the petitioner that the complaint under Section 138 N.I. Act filed by respondent No.2 is not maintainable as it has been filed by the respondent No.2 Rajesh Kapoor in his personal capacity and not in the name of M/s Multitech Instruments Co. Pvt. Ltd in whose favour the

cheque in question was issued. Learned counsel further submitted that even the notice of demand issued under Section 138 N.I. Act is also not in accordance with the scheme of Section 138 N.I. Act as the notice was issued in the name of respondent no.2 and not in the name of the payee company. In support of this contention, learned counsel for the petitioner has relied upon the judgment of Supreme Court in the matter of **National Small Industries Corporation Ltd. Vs. State (NCT) and Ors**, AIR 2009 SC 1284 and the judgment of the Madras High Court in the matter of **Nandagopal Vs. NEPC Agro Foods Ltd., 1995 (83) Company cases 213.**

5. I have considered the submissions made on behalf of the petitioner and perused the record as well as the judgments relied upon by the petitioner.

6. In the matter of **National Small Industries Corporation Limited Vs. State**, the National Small Industries Corporation Limited, a Govt. company within the meaning of Section 617 Companies Act 1956 filed a complaint under Section 138 N.I. Act against the respondent company alleging that the respondent company had issued a cheque drawn in favour of NSIC Ltd. towards discharge of its liability. The cheque was dishonoured when presented for payment and that the respondent company failed to pay the cheque amount despite of service of demand notice. Learned Magistrate, on 4th February, 2010, took cognizance of the complaint and summoned the accused. He did not examine the complainant and its witnesses under Section 200 of the Code of Criminal

Procedure for the reason that the complaint had been filed by a public servant in discharge of his public duties. The respondents in that case filed a petition under Section 482 Cr.P.C. challenging the summoning order, contending that the complainant in that case was a company and not a public servant, therefore the exemption under Clause (a) of Proviso to Section 200 of the Code was not available and that the learned Magistrate could not have dispensed with the mandatory requirement of examination of complainant under Section 200 of the Code. The High Court accepted the said contention and quashed the summoning order passed by the learned Magistrate. The High Court, however, made it clear that the learned Magistrate would be at liberty to record the statement of the complainant and the witnesses and thereafter take appropriate decision in accordance with Section 200 of the Code.

7. Aforesaid order of High Court was challenged in appeal and the Supreme Court, after considering the various provisions of the Code and the N.I. Act, inter alia, observed thus:-

10. The term 'complainant' is not defined under the Code. Section 142 NI Act requires a complaint under Section 138 of that Act, to be made by the payee (or by the holder in due course). It is thus evident that in a complaint relating to dishonour of a cheque (which has not been endorsed by the payee in favour of anyone), it is the payee alone who can be the complainant. The NI Act only provides that dishonour of a cheque would be an offence and the manner of taking cognizance of offences punishable under Section 138 of that Act. However, the procedure relating to initiation of proceedings, trial and disposal of such complaints, is governed by the Code. Section 200 of the Code requires that the Magistrate, on taking cognizance of an offence on complaint, shall examine upon oath the complainant and the witnesses present and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses. The requirement of Section

142 of NI Act that payee should be the complainant, is met if the complaint is in the name of the payee. If the payee is a company, necessarily the complaint should be filed in the name of the company. Section 142 of NI Act does not specify who should represent the company, if a company is the complainant. A company can be represented by an employee or even by a non-employee authorized and empowered to represent the company either by a resolution or by a power of attorney.

11. Section 138 NI Act mandates that payee alone, whether a corporeal person or incorporeal person, shall be the complainant. Section 200 of the Code contemplates only a corporeal person being a complainant. It mandatorily requires the examination of the complainant and the sworn statement being signed by the complainant. If Section 142 of NI Act and Section 200 of the Code are read literally, the result will be : (a) the complainant should be the payee of the cheque; and (b) the complainant should be examined before issuing process and the complainant's signature should be obtained on the deposition. Therefore, if the payee is a company, an incorporeal body, the said incorporeal body can alone be the complainant. The mandatory requirement of Section 200 of the Code is that a Magistrate taking cognizance of an offence on complaint, shall examine upon oath the complainant, and that the substance of such examination reduced to writing shall be signed by the complainant. An incorporeal body can obviously neither give evidence nor sign the deposition. If literal interpretation is applied, it would lead to an impossibility as an incorporeal body is incapable of being examined. In the circumstances, a harmonious and purposive interpretation of Section 142 of NI Act and Section 200 of the Code becomes necessary. Section 142 only requires that the complaint should be in the name of the payee. Where the complainant is a company, who will represent the company and how the company will be represented in such proceedings, is not governed by the Code but by the relevant law relating to companies. Section 200 of the Code mandatorily requires an examination of the complainant; and where the complainant is an incorporeal body, evidently only an employee or representative can be examined on its behalf. As a result, the company becomes a de jure complainant and its employee or other representative, representing it in the criminal proceedings, becomes the de facto complainant. Thus in every complaint, where the complainant is an incorporeal body, there is a complainant -- de jure, and a complainant -- de facto. Clause (a) of the proviso to Section 200 provides that where the complainant is a public servant, it will not be necessary to examine the complainant and his witnesses. Where the complainant is an incorporeal body represented by one of its employees, the employee who is a public servant is the de facto complainant and in signing and presenting the complaint, he acts in the discharge of his official duties.

Therefore, it follows that in such cases, the exemption under Clause (a) of the first proviso to Section 200 of the Code will be available.

8. From the above enunciation of law by the Supreme Court, it is apparent that when the complainant before the court is an incorporeal body, only an employee or representative of such company can maintain the complaint on behalf of the company. As a result, the company becomes *de jure* complainant and its employee/representative representing it in the criminal proceedings becomes the *de facto* complainant. In the light of the aforesaid enunciation of law, now it is to be seen whether the instant complaint has been maintained by the payee company or it's Director Rajesh Kapoor in his independent capacity.

9. On perusal of the copy of the complaint annexed to the petition, it transpires that in the title of the complaint, the complainant is described as Rajesh Kapoor, Director of M/s Multitech Instruments Co. Pvt. Ltd., Laxmi Nagar, Delhi. In the main body of the complaint, Rajesh Kapoor has been described as Director of M/s Multitech Instruments Co. Pvt. Ltd. The cheque in question was issued in favour of the company and it was forwarded for encashment in the account of the company. On overall consideration of aforesaid facts, it can be safely inferred that Rajesh Kapoor has filed the complaint on behalf of the company in his capacity as Director of the company and not in his personal capacity. Had the complaint been filed by Rajesh Kapoor in his personal capacity, there was no occasion for him to mention his status in M/s Multitech Instruments Co. Pvt. Ltd. The petitioner is trying to take advantage of the fact that instead

of describing the complainant as M/s Multitech Instruments Co. Pvt. Ltd. through the Director Rajesh Kapoor, in the title, name of the complainant is mentioned the other way round i.e. Rajesh Kapoor, Director of M/s Multitech Instruments Co. Pvt. Ltd. Aforesaid plea, in my view, is hyper technical and on overall consideration of the complaint, it is apparent that for all practical purposes, the complaint has been filed in the name of the company through the Director Rajesh Kapoor and not by Rajesh Kapoor in his personal capacity.

10. Next contention of the petitioner is that in order to maintain prosecution under Section 138 N.I. Act, the respondent No.2/complainant is required to make a specific averment regarding the liability of the petitioner under Section 138 N.I. Act in his capacity as a Director. Learned counsel for the petitioner submits that in the entire complaint, there is no specific allegation as to how the petitioner is sought to be vicariously roped in for the offence under Section 138 N.I. Act committed by M/s Metito Franchise by invoking Section 141 N.I. Act.

11. I do not find any merit in the aforesaid contention. In the matter of **SMS Pharmaceuticals Vs. Neeta Bhalla and Another**, 2005 SCC (Cri) 1975, a three Judges Bench of the Supreme Court, while deciding a reference made by a two Judges Bench of the Court analysed the law of vicarious liability under Section 141 N.I. Act in respect of an offence under Section 138 N.I. Act committed by a company and answered the reference as under:

“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 question posed in sub-para (b) has to be in 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 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 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 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 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.”

12. From the above, it is apparent that in a case where a company is accused of an offence under Section 138 N.I. Act, it's Managing Director or Joint Director and the signatory of cheque would clearly be responsible for the incriminating act committed the company and would be covered under Section 141(2) of the Negotiable Instruments Act. In the instant case, petitioner B.K. Sharma has been described in the title of the complaint as Director/authorised signatory of the company. The cheque in question is purported to have been sent by the authorised signatory.

Therefore, in view of the provisions under Section 141(2) N.I. Act and the law enunciated by the Supreme Court, the petitioner is, prima facie, vicariously liable for the offence under Section 138 N.I. Act alleged to have been committed by the company M/s Metito Franchise.

13. Lastly, it is contended that the complainant company did not supply the goods as per DIS specifications to enable the respondent company to get an ISI licence. It is contended that inspecting authority, on inspection, found the material supplied by the complainant short in quantity and not upto the prescribed quality standard. This resulted in rejection of the application of the respondent for grant of licence and has caused huge losses to the petitioner. It is further contended that respondent company, when served with a notice in this regard, accepted the short supply and assured to make good the shortage subject to final payment, but the shortage was never made good. Thus, the cheque in question cannot be said to have been issued against a legally recoverable debt.

14. The above plea raised by the petitioner is a question of fact which can be determined in trial on the basis of evidence and cannot be decided in exercise of jurisdiction under Section 482 CrPC.

15. In view of the circumstances discussed above, I find no merit in this petition. It is accordingly dismissed.

(AJIT BHARIHOKE)
JUDGE

AUGUST 29, 2011
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