

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

Judgment reserved on: September 22, 2011
Judgment delivered on: September 23, 2011

+ **CRL.M.C. NO.4104/2009**

T.R. BHAGAT

....PETITIONER

Through:Mr.Ghanshyam Sharma, Advocate

Versus

**DIRECTOR GENERAL OF CENTRAL EXCISE
& ORS.**

.....RESPONDENTS

Through:Dr.Ashwani Bhardwaj with Mr.Jitender
Choudhary, Advocates.

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. This is a petition under Section 482 Cr.P.C. seeking quashing of the complaint under Section 9 of the Central Excise and Salt Act, 1944 and the proceedings arising out of the same in the complaint case titled 'Shri S.N.Malhotra, Superintendent of Central Excise(Anti-Evasion) Vs. M/s Office Machines Pvt. Ltd and others', qua the petitioner.

2. Briefly stated, facts relevant for the disposal of this petition are that respondent No.1 through Sh.S.N. Malhotra, Superintendent, Central Excise (Anti-Evasion) filed a complaint under Section 9 of the Central Excise and

Salt Act, 1944(now known as Central Excise Act, 1944) alleging that the petitioner has indulged in evading Central Excise Duty amounting to ₹4,20,234,52 by clandestinely removing/selling the office Machinery. As per the allegations in the complaint, petitioner T.R. Bhagat was Director of M/s Office Machines Pvt. Ltd. As such, he is sought to be prosecuted vicariously for the offences punishable under Section 9(1)(a), 9(1)(b) and 9(1)(bb) of the Central Excise Act alleged to have been committed by the company.

3. Learned Magistrate, after taking cognizance of the complaint and recording pre-charge evidence has charged the aforesaid company as well as the petitioner under Section 9(1)(a), 9(1)(b) and 9(1)(bb) of the Central Excise Act.

4. On perusal of the record, it is apparent that the respondent complainant is seeking to hold the petitioner vicariously liable for the offences under Section 9(1)(a), 9(1)(b) and 9(1)(bb) of the Central Excise Act claimed to have been committed by the accused company M/s Office Machines Pvt. Ltd.

5. Learned counsel for the petitioner has taken me through Section 9AA of the Central Excise Act and submitted that under this provision of law, a person can be held vicariously liable for the offence punishable under Section 9 of the Central Excise Act only if at the time of commission of offence, he was in-charge of and was responsible for the conduct of business of the accused company and every Director or person connected with the company shall not fall within the ambit of Section 9AA of the

Central Excise Act. Learned counsel argued that in the instant case, but for a vague allegation that the petitioner was the Director of the accused company M/s Office Machines Pvt. Ltd. and in-charge of day-to-day affairs of the company, there is no specific allegation which could, prima facie, show as to how and in what manner the petitioner was in-charge of and responsible for the day-to-day affairs of the company and what duties and functions were being discharged by him so as to bring him within the ambit of Section 9AA of the Central Excise Act. Learned counsel argued that even in the pre-charge evidence, there is no specific averment to bring the case of the petitioner within the ambit of Section 9AA of the Central Excise Act to hold him vicariously responsible for the alleged offence of excise duty evasion committed by the accused company M/s Office Machines Pvt. Ltd. Thus, learned counsel for the petitioner has strongly urged for quashing of charge as well as complaint qua the petitioner.

6. Learned counsel for the respondent, on the contrary, has submitted that the complainant has made specific allegations in the complaint that the petitioner was the Director of accused company and was also responsible for day-to-day activities of the firm. Thus, the initial onus for making out a prima facie case against the petitioner stands discharged by the respondent. Learned counsel argued that now the onus is on the petitioner to adduce evidence during the course of trial to establish that he was not in-charge of or responsible for the conduct of the day-to-day affairs/business of the accused company.

7. I have perused the rival contentions and material on record.
8. In order to appreciate the rival contentions, it would be useful to have a look on Section 9AA of the Central Excise Act, which was earlier known as Central Excise and Salt Act, 1944. The Section is re-produced thus:-

“Section 9AA - OFFENCES BY COMPANIES.

(1) Where an offence under this Act has been committed by 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 punished accordingly :

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, 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.

(2) Notwithstanding anything contained in sub-section (1), where an 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 attributable 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 purposes of this section, -

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

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

9. The wording of Section 9AA(1) of the Central Excise Act is exactly similar to Section 141 of the Negotiable Instruments Act, which deals with the vicarious liability of a Director or other person associated with the company for the offence under Section 138 N.I. Act committed by the

company. The question of interpretation of Section 141 N.I. Act came up for consideration before a three-Judge Bench of the Supreme Court in **SMS Pharmaceuticals Ltd. Vs. Neeta Bhalla, (2005) 8 SCC 89** wherein upon consideration of a number of decisions of the Apex Court, Supreme Court opined thus:

“10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the section are “every person”. These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words:

“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, etc.”

What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a director or manager or secretary was enough to cast criminal liability, the section would have said so. Instead of “every person” the section would have said “every director, manager or secretary in a company is liable”..., etc. The legislature is aware that it is a case of

criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.”

10. In the matter of **N.K. Wahi Vs. Shekhar Singh, AIR 2007 SC 1454**, Hon’ble Supreme Court while dealing with the vicarious liability under Section 141 N.I. Act observed thus:

“8. To launch a prosecution, therefore, against the alleged Directors there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are in-charge and responsible for the conduct of the business of the company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and the court can always come to a conclusion in facts of each case. But still, in the absence of any averment or specific evidence the net result would be that complaint would not be entertainable.”

11. Legal position which emerges from the aforesaid is that in order to rope in a Director of a company as accused of an offence under Section 138 N.I. Act vicariously with the aid of Section 141 N.I. Act, the complainant is not only required to make a specific allegation that the person concerned was the Director of the company but he is also required to make specific allegation of fact indicating as to how and in what manner the said Director was in-charge of and responsible for the conduct of business of the company. Since the language of Section 9AA(1) of Central Excise Act is exactly similar to Section 141 N.I. Act, the same principle of law would apply to the Director of the company in order to hold him vicariously responsible for an offence committed by the company under Section 9 of the Central Excise Act.

12. Having discussed the law, now it is to be seen whether the allegations in the complaint make out a case under Section 9AA of the Central Excise Act to hold the petitioner vicariously liable for the offences punishable under Section 9(1)(a), 9(1)(b) and 9(1)(bb) of the Central Excise Act allegedly committed by the accused company M/s Office Machines Pvt. Ltd. On reading of the copy of the complaint annexed to the petition, which is not disputed, it transpires that the complainant is seeking to rope in the petitioner, who has been arrayed as respondent No.3 in the complaint, on the basis of allegations made in para 8 of the complaint, which is reproduced thus:-

“That the accused no. 2 and 3, being the Directors of the accused firm No. 1 and also being responsible in the day to day activity of the firm shall also be liable to be punished Under Section 9 of the Act in the same manner as the accused No. 1”.

13. Bare reading of aforesaid judgments makes it clear that the complainant, in order to rope in the petitioner as an accused, has simply re-produced the language of Section 9 AA(1) of the Central Excise Act in the complaint. There is no allegation in the complaint to show as to how and in what manner the petitioner was in-charge of and responsible for day-to-day affairs of the business of the company. Even in the pre-charge evidence, the complainant has not led any evidence to explain as to what is the basis of the averment that the petitioner was responsible for the running of day-to-day business affairs of the company in his capacity as a Director. In absence of any specific allegation or evidence in this regard, I am of the considered view that requirement of Section 9AA(1) of the

Central Excise Act to hold the petitioner vicariously liable for the offence committed by the company is not satisfied. Thus, I find it difficult to sustain the charge framed against the petitioner.

14. Section 9AA(2) of the Central Excise Act provides that notwithstanding Section 9AA(1) of the Central Excise Act where an offence under the Act has been committed by a company and it is proved that the offence has been committed with the consent of or in connivance with or is attributable to any neglect on the part of any Director, Manager, Secretary or other officer etc., such Director, Manager, Secretary or other officer shall be deemed to be guilty of the offence. There is no allegation in this regard either in the complaint or in the pre-charge evidence, therefore the case of the petitioner also does not fall within the ambit of Section 9AA(2) of the Central Excise Act to make him responsible for the offence of evasion of excise duty committed by the company.

15. In view of the discussion above, I am of the opinion that the allegations in the complaint as also the pre-charge evidence do not make out a case to hold the petitioner responsible for the offence of duty evasion committed by the petitioner company M/s Office Machines Pvt. Ltd. As such, the charge framed against the petitioner under Sections 9(1)(a), 9(1)(b) and 9(1)(bb) of the Central Excise Act is not sustainable under law. Accordingly, the charge framed against the petitioner as also the complaint qua him is quashed.

16. Petition is disposed of.

(AJIT BHARIHOKE)
JUDGE

SEPTEMBER 23, 2011

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