

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

Reserved on: 6th November, 2013
Pronounced on: 22nd November, 2013

+ **CRL.M.C. 2803/2012**

S.T.G. INTERNATIONAL LTD. & ORS Petitioners

Through: Mr. Parmanand Yadav, Advocate with
Mr. Ankur Sharma, Advocate

versus

RAJESH MALHOTRA

..... Respondent

Through: Mr. Rakesh Malhotra, Advocate with
Mr. Ashwani Kumar, Advocate

+ **CRL.M.C. 2804/2012**

S.T.G. INTERNATIONAL LTD. & ORS Petitioners

Through: Mr. Parmanand Yadav, Advocate with
Mr. Ankur Sharma, Advocate

versus

RAJESH MALHOTRA

..... Respondent

Through: Mr. Rakesh Malhotra, Advocate with
Mr. Ashwani Kumar, Advocate

+ **CRL.M.C. 2805/2012**

S.T.G. INTERTIONAL LTD & ORS Petitioners

Through: Mr. Parmanand Yadav, Advocate with
Mr. Ankur Sharma, Advocate

versus

RAJESH MALHOTRA

..... Respondent

Through: Mr. Rakesh Malhotra, Advocate with
Mr. Ashwani Kumar, Advocate

CORAM:

HON'BLE MR. JUSTICE G.P. MITTAL

J U D G M E N T

G.P. MITTAL, J.

1. By virtue of these three petitions under Section 482 of the Code of Criminal Procedure, 1973(the Code), the Petitioners seek quashing of the three criminal complaints preferred under Section 138 of the Negotiable

Instruments Act, 1881(the Act) against the Petitioners. Petitioner No.1 is a company, Petitioner No.2 is its Chairman and Chief Executive Officer and Petitioners No.3 to 7 are its Directors. The dispute which led to the filing of the three criminal complaints is recapitulated hereunder.

2. Petitioner No.1 entered into a lease agreement to let out premises No. A-573, Phase-V, Gurgaon consisting of basement, ground floor, second floor, terrace, *etc. etc.* The tenancy came into existence in the year 2004. Initially, the rate of rent was ₹1.5 lakhs per month. An interest free security of ₹9 lakhs was also deposited by Petitioner No.1 at the time of creation of the initial lease. The rent of the premises was increased from time to time. Ultimately, the new lease in question was entered into on 15.07.2009 and was to be effective for a period of four years w.e.f. 16.12.2008. The rate of rent which was fixed was ₹2,90,000/- per month. The rent was liable to be increased further by 10% after completion of the initial term of one and a half years. Petitioner No.1 was also liable to pay interest @ 15% on delayed payment of rent.
3. The three complaints have been filed in respect of various cheques issued by the Petitioner to the Respondent. For instance, Complaint No.357/1/10(Crl.M.C.2805/2012) relates to following seven cheques:

<u>Cheque No.</u>	<u>Dated</u>	<u>Amount</u>
024605	26.12.2009	240715
061384	31.12.2009	240715
582630	31.01.2010	240715
072335	30.12.2009	240715
024604	26.12.2009	191730
582631	31.01.2010	65047
024603	26.12.2009	<u>22376</u>
		<u>1242013</u>

4. Similarly, Complaint No.492/1/10(Crl.M.C.2804/2012) relates to following three cheques:

<u>Cheque No.</u>	<u>Dated</u>	<u>Amount</u>
071582	15.01.2010	261000
071583	15.02.2010	261000
071584	15.03.2010	<u>261000</u>
		<u>783000</u>

5. Further, Complaint No.324/1/10(Crl.M.C.2803/2012) relates to following two cheques:

<u>Cheque No.</u>	<u>Dated</u>	<u>Amount</u>
059237	15.12.2009	240715
061383	30.11.2009	<u>240715</u>
		<u>481430</u>

6. The case of the Petitioners is that above said cheques were issued in pursuance to the registered agreement dated 15.07.2009 and that when the cheques were presented with ICICI Bank, Vasant Kunj Branch, New Delhi on 28.05.2010, 12.07.2010 and 20.04.2010 respectively, the same were returned back to the Complainant by Petitioner's Bank with the remarks "payment stopped by drawer". It is also alleged in the complaint that Accused No.2 to 6 and 8 (the Petitioners) are the Directors of the Company and are in-charge of and responsible for the day to day affairs of the company and for conduct of the business of the company. It was stated that the offence was committed with wilful knowledge and the accused persons (Petitioners herein) did not exercise any effort to prevent the offence from being committed by the company. It is pleaded that as per clause 8 of the lease deed, the Directors of Petitioner No.1 stood as guarantors in their individual and personal capacity to make payment. It is averred that in spite of service of legal notice, the accused persons (Petitioners herein) failed to make the payment in terms of the demand notice. It is stated that Accused No.5 had resigned after the cheques were dishonoured but the resignation was ante-dated. The resignation was,

however, sent to the Registrar of Companies only on 01.06.2010.

7. The quashing of the complaint is sought on two grounds. Firstly, that the cheques in question were not issued towards existing liability and, in fact, as per the understanding between the Petitioner Company and the Respondent, the cheques were to be returned. The learned counsel urges that in the year 2009, the Petitioner No.1 company started suffering heavy losses and, therefore, in the month of September and October, 2009, it decided to vacate the rented property. A communication in this regard was sent to the landlord, that is, the complainant. The complainant, however, expressed his inability to refund the security deposit and offered the Petitioners to continue the tenancy for a further period without payment of any further rent by merely issuing advance cheques. It is stated that a specific assurance was also given by the complainant that no interest shall be charged on the rent already due in terms of the conditions of the lease deed. Elaborating this contention, the learned counsel for the Petitioners submits that there was an understanding between the parties that payment in respect of cheques handed over to the complainant in advance for the rent of February and March, 2010 will be stopped. It is also the case of the Petitioners that certain other cheques also issued were required to be returned to Petitioner No.1 and fresh cheques were to be issued by Petitioner No.1 for clearing the dues after adjusting the security amount. In support of this contention, the learned counsel for the Petitioners placed reliance on *M.S. Narayana Menon @ Mani v. State of Kerala and Anr.*, (2006) 6 SCC 39; *Electronics Trade & Technology Development Corpon. Ltd., Secunderabad v. Indian Technologists & Engineers(Electronics) Pvt. Ltd. and Another*, (1996)2 SCC 739; *Mother Marykutty v. Reni C. Kottaram and Anr.*, (2013) 1 SCC 327; *Vijay v.*

Laxman and Anr., (2013) 3 SCC 86 and Bharat Barrel and Drum Manufacturing Company v. Amin Chand Payrelal, (1999)3 SCC 35.

8. The second ground raised by the Petitioners is that no material was placed by the complainant along with the complaint to show as to how Petitioners No.2 to 7 were responsible and in-charge of the conduct of the business of Petitioner No.1. Although, there was a condition in the lease deed whereby the Directors had taken personal liability to pay the rent, yet they were neither the signatory nor party to the lease deed and thus the condition with regard to the personal guarantee of the Directors was not enforceable against them.
9. Per contra, the learned counsel for the Respondents(complainant) submits that the various cheques were issued for specific amounts which were towards either the rent or the interest or the surcharge. Although, the Respondents denied that the premises were vacated on 10.02.2010, it was stated that the premises were vacated only on 31.03.2010 which was also evident from the Gate Pass through which the Petitioner Company took out its goods much after 10.02.2010. It was urged that the cheques were issued by the Petitioners in respect of their existing liability. Relying on a judgment of this Court in *Deepak Vig v. Avdesh Mittal, (2012) 1 MWN(Cri) DCC 127*, the learned counsel for the Respondents argued that although the security amount was liable to be refunded only at the time of the vacation of the premises by the Petitioners and thus the Petitioners could not claim any adjustment, yet even after adjustment of the security amount, there was an outstanding balance which was duly intimated to the Petitioners.
10. The learned counsel for the Respondent further submitted that powers under Section 482 of the Code are to be exercised sparingly and with

circumspection only and disputed questions of fact cannot be gone into in these proceedings. The liability of the Directors is also claimed on the basis of the averment made in the complaint and the terms of the lease as stated above.

11. It is very well settled that inherent powers under Section 482 of the Code though very wide have to be invoked sparingly and with circumspection only (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of the Court, and (iii) otherwise to secure the ends of justice. In *Satish Mehra v. State(NCT of Delhi) & Anr.*, AIR 2013 SC 506, the Supreme Court held that inherent powers of the High Court to quash an FIR or a criminal complaint can be invoked where the allegations made in the complaint even if admitted do not disclose any offence. The relevant part of the report in *Satish Mehra* is extracted hereunder:

“15. The power to interdict a proceeding either at the threshold or at an intermediate stage of the trial is inherent in a High Court on the broad principle that in case the allegations made in the FIR or the criminal complaint, as may be, prima facie do not disclose a triable offence there can be reason as to why the accused should be made to suffer the agony of a legal proceeding that more often than not gets protracted. A prosecution which is bound to become lame or a sham ought to be interdicted in the interest of justice as continuance thereof will amount to an abuse of the process of the law. This is the core basis on which the power to interfere with a pending criminal proceeding has been recognized to be inherent in every High Court. The power, though available, being extraordinary in nature has to be exercised sparingly and only if the attending facts and circumstances satisfies the narrow test indicated above, namely, that even accepting all the allegations levelled by the prosecution, no offence is disclosed....”

12. The criminal proceedings are quashed by the High Court in exercise of its inherent powers under Section 482 of the Code on the premise that the

criminal prosecution should not be and ought not to be permitted to denigrate into a weapon of harassment or persecution.

13. In *Janta Dal v. H.S. Chowdhary & Ors.*, (1992) 4 SCC 305, the Supreme Court, while referring to the inherent powers to make orders as may be necessary for the ends of justice, clarified that such power has to be exercised in appropriate cases *ex debito justitiae*, that is, to do real and substantial justice, for the administration of which alone the Courts exist. The powers possessed by the High Court under Section 482 of the Code are of very wide plentitude and the powers require great caution in their exercise. The High Court being the highest Court exercising criminal jurisdiction in a State, has inherent powers to make any order for the purposes of securing the ends of justice. Being an extraordinary power, it will, however, not be pressed in aid except for remedying a flagrant abuse by a subordinate Court of its powers.
14. On the strength of *Deepak Vig* and *Magnum Aviation v. State*, 2010(172) DLT 91, Petitioners are held not entitled to claim adjustment of the security amount by urging that there was no existing liability. As held in *Deepak Vig*, the security amount was liable to be refunded only on vacation. The Respondents have placed on record the statement of accounts to say that there was still an outstanding balance against the Petitioners even after giving adjustment of the security amount. The same however cannot be looked into in these proceedings being disputed question of fact. Suffice it to say that the security was to be refunded later on after the vacation of the premises and the Petitioners cannot claim adjustment thereof in the rent which was payable at the time of the vacation. Thus, on the basis of the averments made in the complaint, it was

sufficiently shown that the cheques presented were towards existing liability.

15. In *Modern Denium Ltd. v. Lucas TVS Ltd.*, 1999(4) RCR(Criminal)109 relied on by the learned counsel for the Respondent, it was held that second accused who had personally guaranteed the due payment and had assured to provide sufficient funds in the account to honour the cheques issued was held to be liable under Section 138 of the Act. The facts of the instant case are, however, different. The liability of Petitioners No.2 to 7 is being fastened on the ground, firstly, that they were in-charge of and responsible for the conduct of the business of the Petitioner No.1 company and, therefore, they were vicariously liable and secondly, they stood guarantors in terms of clause 8 of the lease deed. The plea of the Respondent is that the lease deed was entered into by the CEO and Director Yogesh Chandra Vaidya (Petitioner No.2) on the basis of the Board Resolution dated 30.04.2009. Thus, Petitioners No.3 to 7 also cannot escape the liability.
16. In *National Small Industries Corporation Ltd. v. Harmeet Singh Paintal & Anr.*, (2010) 3 SCC 330, the Supreme Court analysed the provisions of Section 141 of the Act and observed that mere repetition of the words as given in Section 141(2) of the Act will not be enough to make a Director or an officer vicariously liable for the acts of the company. Para 38 of the report is extracted hereunder:

“38. But if the accused is not one of the persons who falls under the category of “persons who are responsible to the company for the conduct of the business of the company” then merely by stating that “he was in charge of the business of the company” or by stating that “he was in charge of the day-to-day management of the company” or by stating that “he was in

charge of, and was responsible to the company for the conduct of the business of the company”, he cannot be made vicariously liable under Section 141(1) of the Act. To put it clear that for making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act.”

17. To the same effect are the observations of the Supreme Court in *Central Bank of India v. Asian Global Limited & Ors.*, (2010) 11 SCC 203. The Supreme Court held that although the managing director or the joint managing director of the company would be admittedly in charge of the company and responsible for the conduct of its business, the same yardstick would not apply to any Director. It was stated that for making a director vicariously liable for the act of the company, there has to be clear and unambiguous averments as to the part played by that Director in the transaction in question and how he was in charge of and responsible to the company for the conduct of its business. Para 17 of the report is extracted hereunder:

“17. The law as laid down in S.M.S. Pharmaceuticals Ltd. case [(2005) 8 SCC 89 : 2005 SCC (Cri) 1975] has been consistently followed and as late as in 2007, this Court in N.K. Wahi case [(2007) 9 SCC 481 : (2007) 3 SCC (Cri) 203] , while considering the question of vicarious liability of a Director of a company, reiterated the sentiments expressed in S.M.S. Pharmaceuticals Ltd. case [(2005) 8 SCC 89 : 2005 SCC (Cri) 1975] that merely being a Director would not make a person liable for an offence that may have been committed by the company. For launching a prosecution against the Directors of a company under Section 138 read with Section 141 of the 1881 Act, there had to be a specific allegation in the complaint in regard to the part played by them in the transaction in question.

It was also laid down that the allegations had to be clear and unambiguous showing that the Directors were in charge of and responsible for the business of the company. This was done to discourage frivolous litigation and to prevent abuse of the process of court and from embarking on a fishing expedition to try and unearth material against the Director concerned.

18. The Respondents have not demonstrated in the complaint as to how Petitioners No.3 to 7 are in-charge of and responsible for the conduct of the business of Petitioner No.1. Petitioner No.2, of course, is the CEO and, therefore, his liability is not disputed. Although, in clause 8 of the lease deed which was signed by Petitioner No.2, the Directors stood guarantors and were made personally liable, however, they were neither the signatory to the lease deed nor any material has been placed on record to show that they stood guarantors or undertook to make the payment individually. It has to be kept in mind that the company is a separate legal entity and the acts of the company will not personally bind its Directors unless there is an agreement by the particular Director to bind himself for the acts of the company. Since Petitioners No.3 to 7 cannot be made liable on the basis of clause 8 in the absence of any material, they cannot be made vicariously liable in view of my earlier observation.
19. In view of above discussion, the Petitions are partly allowed to the extent that the complaint is quashed with regard to Petitioners No.3 to 7 only.
20. The Petitions with regard to the Petitioners No.1 and 2 stand dismissed.

(G.P. MITTAL)
JUDGE

NOVEMBER 22, 2013

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