

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

Reserved on: 08.05.2014
Date of Decision: 09.05.2014

+ **CRL. A. No.1432 of 2013**

VIJAY POWER GENERATORS LTD. Appellant

Through: Mr. B.K. Pandey, Adv.

Versus

SUMIT SETH Respondent

Through: Mr. Rakesh Tiku, Sr. Adv. with
Mr. Prakash Gautam & Mr. Vivek Ojha,
Advs.

+ **CRL. A. No.1433 of 2013; CRL. A. No.1434 of 2013;
CRL. A. No.1435 of 2013; & CRL. A. No.1436 of 2013;**

VIJAY POWER GENERATORS LTD. Appellant

Through: Mr. B.K. Pandey, Adv.

Versus

TARUN ENGINEERING SYNDICATE Respondent

Through: Mr. Rakesh Tiku, Sr. Adv. with
Mr. Prakash Gautam & Mr. Vivek Ojha,
Advs.

CORAM:

HON'BLE MR. JUSTICE V.K. JAIN

JUDGEMENT

V.K. JAIN, J.

The appellant before this Court is a Company engaged in the business

of selling power generators and related equipments. The case of the appellant/complainant is that M/s. Tarun Engineering Syndicate, which is a partnership firm, purchased goods from it and issued cheques from time to time towards payment of those goods. The cheques, when presented to the bank were dishonoured with the endorsement “Account Closed/Payment Stopped”. After serving demand notice upon the firm, as many as six complaints were filed by the appellant/complainant, five against the firm through its partner Shri Sumit Seth and one against Shri Sumit Seth, describing him as the proprietor of M/s. Tarun Engineering Syndicate.

2. In the complaint relevant to Crl. A. No.1432/2013, a cheque dated 10.10.1997 was issued by Shri Sumit Seth for a sum of Rs.4,59,704/-; in the complaint relevant to Crl. A. No.1433/2013 a cheque dated 1.8.1997 was issued for Rs.5.00 lakh; in the complaint relevant to Crl. A. No.1434/2013 a cheque dated 25.7.1997 was issued for Rs.8.00 lakh; in the complaint relevant to Crl. A. No.1435/2013 a cheque dated 22.7.1997 was issued for Rs.9,79,151/- and in the complaint relevant to Crl. A. No.1436/2013 a cheque dated 15.7.1997 was issued for Rs.8.00 lakh by Mr. Sumit Seth as partner of M/s. Tarun Engineering Syndicate. Two cheques dated 3.8.1997 – one for Rs.6,56,633/- and the other for Rs.4.00 lakh were subject matter of

the complaint in Crl. A. No.1431/2013 but since the payment against those cheques have already been made to the appellant/complainant Company, Crl. A. No.1431/2013, arising out of the decision of the trial court, was withdrawn by the appellant on 7.5.2014.

3. The complainant Company examined three witnesses in support of its case. CW1 is an official from Syndicate Bank who deposed with respect to dishonour of two (2) cheques – one of Rs.6.56,633/- and the other of Rs.4.00 lakh. His testimony is not relevant for the purpose of deciding the controversy involved in these appeals.

CW2 Shri G.K. Pachauri in his affidavit by way of evidence stated that the accused purchased goods/material from the complainant Company and issued cheques in question which, on being presented to its bank were dishonoured. He also deposed with respect to issue of the demand notice and service of the said notice. He stated that the accused had failed to make payment of the dishonoured cheques.

CW3 Shri Kishore Kumar *inter alia* stated that the accused firm had been purchasing material from the complainant Company and making payment on account basis. He further stated that against the purchases made by it, the accused had also issued Sales Tax Forms and C-Forms and that the cheques

in question were issued as part payment of that material. He proved the Sales Tax Forms and C-Forms Ex.CW3/3 (Colly). He also proved the statement of account Ex.CW3/4(Colly) and stated that the said account was maintained in due course and all the payments made through cheques/cash/by way of adjustments were duly entered in the said account. According to him a sum of Rs.1,09,71,948.02 was due from the accused on 31.3.1999. The certificate under Section 65B of the Indian Evidence Act is also part of Ex.CW3/4 (Colly).

4. When Shri Sumit Seth was examined under Section 313 of Cr.P.C., he admitted that the cheques in question were drawn on the bank account of his partnership firm Tarun Engineering Syndicate and bears his signature. He claimed that the aforesaid cheques were issued to the complainant Company as advance payment for supply of material but no material was supplied against the cheques. He also claimed that they had issued reminders to the complainant but that was of no avail. He denied having received any notice from the complainant but admitted that the address appearing on the legal notice and postal articles was the correct address of the firm. No witness was examined by the accused.

5. The learned Metropolitan Magistrate vide impugned common

judgement dated 8.4.2013 accepted the defence taken by the accused and accordingly dismissed the complaints. Being aggrieved from dismissal of the complaints and acquittal of the accused, the appellant/complainant Company is before this Court by way of these appeals.

The primary issue involved in these cases is as to whether the cheques in question were issued as advance for supply of goods which were never supplied or they were issued towards payment of the goods which were purchased by the firm and were duly supplied to it.

6. There is a statutory rebuttable presumption under Section 118 (a) of the Negotiable Instruments Act, 1881, that every negotiable instrument was made or drawn for consideration. Section 139 of the said Act also provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, or any debt or other liability.

In Hiten P. Dalal Vs. Bratindranath Banerjee (2001) 6 SCC 16, the Apex Court *inter alia* observed that the statutory presumption does not preclude the person against whom the presumption is drawn from rebutting it and proving to the contrary, but such evidence must be adduced before the court in support of the defence that the court must either believe the defence

to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man.

In Kumar Exports Vs. Sharma Carpets (2009) 2 SCC 513, the Hon'ble Supreme Court, in this regard held as under:

“The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the

Act.”

In M.S. Narayana Menon Vs. State of Kerala (2006) 6 SCC 39, the Apex Court dealing with the statutory presumption under Section 118(a) and 139 of the N.I. Act *inter alia* held as under:

“30. the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.

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32. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies.

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41...Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'.”

7. Since the accused did not lead any evidence at all, the question which arises for consideration is as to whether it has been able to bring on record such facts & circumstances which would impel the Court to believe that the

consideration did not exist or that its non-existence was so probable that a prudent man would in the facts & circumstances of the case accept the plea that the consideration did not exist. In a case where no evidence is led by him the accused is required to show existence of circumstances which are so compelling as to shift the burden again on the complainant. Of course the accused is not required to prove his defence beyond reasonable doubt and he can discharge the onus placed on him by establishing, the proof required from him, on the standard of being preponderance of probabilities.

8. Ex.CW3/3/A which forms part of Ex.CW3/3 (Colly) is a CST Form purporting to be issued by Tarun Engineering Syndicate to the appellant/complainant Vijay Power Generation Limited. On the backside of this C-Form, Ex.CW3/3/A1, details of various bills making a total sum of Rs.1,74,43,178/- have been given. The genuineness of the C-Form was challenged by the learned counsel for the accused/respondent pointing out that (i) on some of the photocopies filed by the appellant the seal of the Oath Commissioner is on the right top side whereas on some of them it is in the middle of the document; (ii) the amount of bill Nos.1026 and 1040 as per details Ex.CW3/3/A1 is Rs.13,50,934/- and Rs.8,87,210/- respectively whereas the amount of the same bills given in Ex.CW3/3/A2 is

Rs.2,72,078/- (against bill No.1040) and Rs.9,94,438/- (against bill No.1026); (iii) Ex.CW3/3A bears 2.1.1992 as the date of issue whereas the accused firm was registered only on 11.8.1995 as indicated by the registration number given on the document; (iv) the C-Form is issued for one financial year, and the said year is not indicated on Ex.CW3/3A.

9. Undisputedly the seal of the Oath Commissioner is not required on the C-Form. It appears that since the appellant/complainant had to file original C-Form in one case and their photocopies in other cases, the photocopies were got attested from an Oath Commissioner and at that time, either inadvertently or otherwise he also put his seal on the original C-Form and that is why, on some of the photocopies it appears in the middle of the document and in some of them it appears on the top right side of the document.

As regards discrepancy in the amount of bill Nos.1026 & 1040, according to CW3 Shri Kishore Kumar the discrepancy in the amount of bills mentioned in the C-Forms could be a typographical error, the same having been issued by the purchaser and taken by Excise MODVAT, thereby suggesting that the accused had claimed MODVAT against the purchases and that explains the difference in the amount.

10. Ex.CW3/4 (Colly) is the statement of account maintained by the appellant/complainant Company in respect of the accused Tarun Engineering Syndicate. This account has been maintained in electronic form the year 1996-1997 onwards. A certificate under Section 65B of the Evidence Act is also annexed to the said statement. CW3 Shri Kishore Kumar has vouched the correctness of the said statement on oath. On the other hand the respondent has not produced any witness to rebut the sworn statement of Shri Kishore Kumar nor has it produced its own account books or its account in respect of the transaction with the complainant/appellant. This is not the case of the accused that it had no dealing with the appellant/complainant at any point of time. In these circumstances there would be no reason to reject the statement of accounts filed by the appellant/complainant Company, which is admissible in evidence under Section 34 of the Evidence Act. A perusal of the statement of accounts would show that as on 1.4.1996 a sum of Rs.35,83,390.02 was due to the appellant/complainant Company from the accused firm. Thereafter, there have been several credit entries as well as debit entries. The statement shows sale of goods to the accused firm on a number of dates including 23.5.1996, 5.11.1996, 13.11.1996, 26.11.1996, 27.11.1996, 28.11.1996,

11.12.1996, 12.3.1997, 28.3.1997, 18.4.1997, 25.4.1997, 26.4.1997, 3.5.1997, 7.5.1997, 15.5.1997, 16.5.1997, 21.5.1997, 13.6.1997, 14.6.1997, 16.6.1997, 18.6.1997, 19.6.1997, 14.7.1997, 17.3.1998, 5.8.1998. There are also entries of purchases made by the complainant/appellant Company such as local purchase on 6.8.1997 and 12.9.1997. The statement contains bill numbers in respect of the sales purporting to have been made to the accused firm. The statement also contains entries whenever cheques issued by the accused firm were deposited in the account of the complainant/appellant Company. This is not the case of the accused that the payments entered in the aforesaid statement were not made by it to the complainant/appellant Company. As per this statement two payments – one of Rs.6.00 lakh and the other of Rs.1.40 lakh was received vide MR No.488 and 487 respectively through cheque No.055789 and 055788 respectively on 28.12.1996, amount of Rs.3.24 lakh was received vide MR No.490 through cheque No.160367 on 30.12.1996, amount of Rs.5.40 lakh was received vide MR No.004 through cheque No.055790 on 6.1.1997, amount of Rs.13.05 lakh was received vide cheque No.219156 on 16.1.1997. Two payments of Rs.5.50 lakh each was received on 24.1.1997 and one such payment was received on 30.1.1997. There are several other payments

received from the accused by cheque including Rs.3.24 lakh received on 6.11.1996, Rs.7.00 lakh received on 12.11.1996, Rs.5.60 lakh received on 27.11.1996. When cheque No.083439 dated 28.3.1997 was deposited in the account a credit entry was made on 29.3.1997 but when the said cheque returned unpaid from the Bank a debit entry was made on 2.4.1997. When the cheque was again present to the bank a credit entry was made on 3.4.1997. Similarly payment of Rs.25.00 lakh received on 23.4.1997; Rs.15.00 on 29.4.1997 and Rs.9.93 lakh on 17.5.1997 were duly credited in the account. When cheque Nos.092108, 092109, 192110 and 092111 of Rs.1.64 lakh each and four cheques of Rs.1.68 lakh each were deposited in the bank on 24.5.1997 credit entry was made in the account and when the aforesaid cheques were returned unpaid on account of payment having been stopped debit entries were made on 24.5.1997. When a cheque of Rs.13.78 lakh was received on 26.5.1997 a credit entry was made. The same was the position with respect to two cheques of Rs.5.00 lakh each received on 30.5.1997 and 4.6.1997 and one cheque of Rs.5.00 lakh on 14.6.1997, one cheque of Rs.5.00 lakh on 19.6.1997, two cheques of Rs.5.00 lakh each on 19.6.1997 and the other on 20.6.1997. There are several other entries made in the statement of account. This was not the case of the accused either in

the statement under Section 313 of Cr.P.C. or during cross-examination of the witnesses of the complainant that the aforesaid cheques were not issued by it to the complainant/appellant Company. In these circumstances and also considering that neither any oral evidence has been produced by the accused nor has it produced its account books, I see no reason to reject the statement of accounts filed by the appellant/complainant Company or to doubt its authenticity. Considering that at the time cheques in question were issued, the amount due from the accused firm was much more than the amount of the cheques issued by it, it would be difficult to accept the contention that the aforesaid cheques were issued as advance payment for purchase of goods and not towards payments of the price of the goods which the accused firm had purchased from the appellant/complainant Company.

11. The C-Forms filed by the complainant/appellant purport to be signed by Smt. Mukta Seth, Partner of the accused firm. Neither Mrs. Mukta Seth was produced in the witness box to prove that the aforesaid C-Forms did not bear her signature nor did Shri Sumit Seth made such a specific claim in his statement under Section 313 of Cr.P.C. Therefore, it would be difficult to say that C-Forms filed by the appellant/complainant Company are forged documents. Considering that C-Forms were issued by the accused firm it is

for them to explain the discrepancy in the amount of bill Nos.1026 & 1040 in Ex.CW3/3/A1 and CW3/3/A2 and it would not be appropriate to hold the aforesaid C-Forms to be forged documents only on account of the said discrepancy, in the documents which they supplied to the appellant/complainant Company.

12. For the reasons stated hereinabove, I am of the considered view that the accused has not been able to rebut the statutory presumption raised under Sections 138(a) and 139 of the Negotiable Instruments Act and the cheques in question were issued for consideration, i.e. towards price of the goods purchased by the accused firm from the appellant/complainant Company.

13. The learned counsel for the accused relied upon M.S. Narayana Menon (supra); K. Prakashan Vs. P.K. Surendran (2008) 1 SCC 258; Krishna Janardhan Bhat Vs. Dattatraya G. Hegde (2008) 4 SCC 54 and Criminal Appeal No.830/2014 titled Indus Airways Pvt. Ltd. & Ors. Vs. Magnum Aviation Pvt. Ltd. & Anr. decided on 7.4.2014.

I have carefully perused the above-referred decisions and have not been able to find any such legal proposition in them as would persuade me to take a contrary view. In M.S. Narayana Menon (supra) the Apex Court *inter alia* held that an accused need not enter into witness box and examine

other witnesses in support of his defence and that the standard of proof required from an accused is preponderance of probability, which can be drawn not only from the material on record but also by reference to the circumstances upon which the accused relies. However, in the facts & circumstances of the case the accused before this Court has not been able to discharge the onus placed on him from the material brought on record by the complainant nor has he been able to show existence of circumstances from which it may be inferred that the cheques in question were without consideration.

In K. Prakashan (supra), the Apex Court *inter alia* held that if two views are possible, the appellate court shall not reverse a judgement of acquittal only because another view is possible. There is no quarrel with the aforesaid proposition of law but the facts & circumstances of the case leave no scope for two view being possible in the matter and, therefore, the aforesaid legal proposition would not apply to the case before this Court.

In Krishna Janardhan Bhat (supra) the Apex Court again noted that to discharge the burden placed on him the accused need not examine himself and he can discharge the same on the notice being issued to him. Since there is no material on record which would show, even applying the standard

of preponderance of probabilities, that the cheques in questions were without consideration, the aforesaid judgement is of no help to the accused.

In Indus Airways Pvt. Ltd. & Ors. (supra), it was an admitted position that the cheques in question were issued while placing purchase orders for supply of certain aircraft parts and were meant to be advance payment. It was held by the Apex Court that for the purpose of Section 138 of the Act, the drawl of the cheque should be in respect of the existing or past adjudicated liability, if the cheque is issued as advance payment for purchase of goods and for any reason purchase order is not carried to its logical conclusion and the material or goods are not supplied the cheque cannot be said to have been drawn for an existing debt or liability. However, in the present case evidence on record does not indicate that the cheques in question were issued towards advance payment. The evidence rather clearly shows that they were issued towards payment of the price of the goods which the accused firm had already purchased from the appellant/complainant Company.

14. In the complaint relevant to Crl. A. Nos.1433/2013. 1434/2013; 1435/2013; 1436/2013 only M/s. Tarun Engineering Syndicate was prosecuted. Though the firm was prosecuted through Mr. Tarun Seth, he

was not made an accused as a partner of the firm. Thus, he had no opportunity to defend himself as an accused. He only defended the firm as its partner. Therefore, it is only the partnership firm which is liable to be convicted in the aforesaid four complaints.

In the complaint relevant to Crl.A. No.1432/2013, the firm was not arrayed as an accused and only Mr. Sumit Seth was the sole person prosecuted by the complainant/appellant Company. In fact the averment made in the complaint is that Mr. Sumit Seth was the Proprietor of M/s. Tarun Engineering Syndicate. Admittedly M/s. Tarun Engineering Syndicate is a partnership firm and Mr. Sumit Seth is its partner and not its proprietor. Despite his being a partner of the firm Mr. Sumit Seth cannot be convicted in the aforesaid complaint because the firm was not made an accused along with Mr. Sumit Seth. A firm is a Company within the meaning of Section 141 of the Negotiable Instruments Act and, therefore, the partner of a firm is only vicariously liable where an offence under Section 138 of the Act is committed by the firm, provided he was the person in charge of and responsible to the firm for conduct of its business at the relevant time. Unless the firm is prosecuted and convicted, a partner cannot be convicted with the aid of Section 141 of the Act. This legal proposition

was made more than clear by the Hon'ble Supreme Court in Aneeta Hada Vs. Godfather Travels & Tours Pvt. Ltd. and connected matters (2012) 5 SCC 661. Settling the controversy in this regard, the three Judges Bench of the Apex Court *inter alia* held as under:

“43. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh (supra) which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal (supra) does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada (supra) is overruled with the qualifier as stated in paragraph 37. The decision in Modi Distilleries (supra) has to be treated to be restricted to its own facts as has been explained by us hereinabove.”

15. For the reasons stated hereinabove, Crl. A. No.1432/2013, against Shri Sumit Sethi is dismissed. Crl. A. Nos.1433/2013, 1434/2013, 1435/2013 & 1436/2013 are allowed and M/s. Tarun Engineering Syndicate is convicted under Section 138 of the Negotiable Instruments Act. The accused firm is fined of Rs.16.00 lakh Rs.16.00 lakh, Rs.19.00 lakh and Rs.16.00 lakh respectively in the complaints relevant to Crl. A. Nos.1433/2013, 1434/2013, 1435/2013 & 1436/2013. The accused firm is granted four (4) weeks from today to deposit the amount of fine, failing

which it shall be open to the complainant/appellant Company to realize the same in accordance with law.

The appeals stand disposed of accordingly.

The LCR be sent back along with a copy of this order.

MAY 09, 2014
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V.K. JAIN, J.