

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**Crl. Misc. No. M-21674 of 2013 (O&M)
Date of decision : 17.11.2015**

Kishan Lal More and another

..... Petitioners

versus

M/s. Bibby Financial Services India Pvt. Ltd. & another

... Respondent

with

Crl. Misc. No. M-22396 of 2013 (O&M)

Mr. Rajendra Man Kumar Aggarwal and others

..... Petitioners

versus

M/s. Bibby Financial Services India Pvt. Ltd. & another

... Respondents

CORAM:- HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. R.S. Athwal, Advocate
for petitioners.

Mr. M.S. Vinaik, Advocate
for respondent no.1.

ANITA CHAUDHRY, J.

1. Two separate petitions have been filed by the petitioners who were Directors of M/s. Sitnem Trading and Investment Pvt. Ltd. Company, who have been summoned in a complaint filed under Section 138 of the Negotiable

Instruments Act. The petitioners are seeking quashing of the summoning order and all the subsequent proceedings taken in the complaint.

2. Vide order dated 06.11.2012, the Judicial Magistrate Ist Class, Gurgaon had summoned the petitioners who were stated to be the Directors of the Company. In CRM-21674-2013, the petitioners have pleaded that they had resigned from the Company and were neither the Executive Directors nor Signatories to the cheques and were not responsible for the day-to-day affairs of the Company. Some other pleas were also raised which are not relevant at the present stage.

3. CRM-22396-2013 was preferred by the Directors who hold the same position even till the filing of the petition.

4. Briefly touching the facts, the complainant Company M/s. Bibby Financial Services India Pvt. Ltd. is into the business of factoring and had granted this facility to M/s. Dujodwala Paper Chemicals Ltd. Accordingly M/s. Dujodwala Paper Chemicals Ltd. had intimated that there was a factoring agreement between the complainant company. M/s. Sitnem Trading & Investment Pvt. Ltd. confirmed and assured the complainant Company that they shall make all payments in respect of sale invoices raised by M/s. Dujodwala Paper Chemicals Ltd. as per the agreement Annexure P-4 attached with the complaint. The complainant company approached the accused for clearance of 11 cheques, all drawn on IDBI Bank, Mumbai which were to the tune of over Rs.2 crores. The

cheques were deposited with the complainant's banker having an account in Standard Chartered Bank Ltd., Gurgaon. All the cheques were returned and the cheques were dishonoured. A legal notice dated 14.09.2012 was sent to the accused who sent their reply. The reply and the e-mails were appended as Annexures with the complaint. The same are not available here. The complainant then instituted a complaint. The trial Magistrate summoned all the accused vide its order dated 06.11.2012.

5. The petitioners have approached this Court pleading that the Gurgaon Court had no jurisdiction, the petitioners were not the Executive Directors, they were not responsible for the day-to-day affairs of the Company and they have not signed the cheques. The petitioners had resigned as Directors on 31.07.2012 and they were in no position to take any decision on behalf of the Company and bald assertions have been made. Lastly that only three offences could be tried together in one trial, in view of the provisions contained in Section 219 Cr.P.C. Plea was also taken that the requirement of Section 202 Cr.P.C. had not been made and it was obligatory upon the Magistrate as the petitioners were residing beyond its jurisdiction.

6. I have heard learned counsels of both the sides.

7. The submission raised on behalf of the petitioners was that the petitioners Krishan Lal and Ketan Mahendra Shah had resigned on 31.07.2012 and Form-32 (Annexure P-3) had been placed on record. The submission also was that the

cheques were not signed by any of the petitioners. It was also urged that the complainant had made a sweeping claim that the petitioners were the Directors and responsible for the day-to-day activities but they had not specifically assigned the duties they were actually doing. The submission also was that the notice had been issued on 14.09.2012 i.e. after two months whereas notice is required to be given after one month. Lastly the submission was that 11 cheques were dishonored but all the cheques were joined in one complaint. Reliance was placed upon ***Shankar Menon Vs. State of West Bengal 2012(3) RCR (Criminal) 413, Rajesh M. Pamanai Vs. State of Maharashtra and others 2012(1) RCR (Civil) 517, Sabitha Ramamurty and another Vs. R.B.S. Channabasavaradhya 2006(4) RCR (Criminal) 296 and S.M.S. Pharmaceuticals Ltd. Neeta Bhalla and another 2005(4) RCR (Criminal) 141.***

8. The submission on behalf of the respondent was that the complaint contains the necessary allegations and the complainant had averred specifically that the accused were responsible for the day-to-day act, conduct and affairs of the business as well as acts and liabilities of M/s. Sitnam Trading Investment Company and what more could be said and the averments *prima facie* reveal that the offence under Section 138 of the Negotiable Instruments Act was made against each and every person. It was urged that even a non-Director can be made liable on the basis of averments made in the complaint. It was urged that the question that some of the Directors had

resigned is a question of fact which they are disputing from the very beginning and in the last two years, the petitioners had not placed the certified copies of Form-32 on record and adjournments were taken to produce the certified copies and the petitioners cannot make the High Court a super trial Court and there are disputed questions of facts which can only be examined by the trial Court. It was urged that a single notice was issued therefore the complainant had only one cause of action. It was urged that some cheques had bounced before the Directors had resigned (if they actually had) and the complainant would be left with no remedy if the resignations are made after the cheques are issued and dishonoured. It was urged that when the facts are disputed and debatable, those will have to be decided at the trial and the complaint cannot be quashed nor the High Court at this stage is to consider the defence of the accused or embark upon any inquiry in respect of the merits of the accusations. Reliance was placed upon ***Kailash Chand Jain Vs. M/s. Bibby Financial Services India Pvt. Ltd. 2014(2) RCR (Civil) 431, M/s. SSS Loha Marketing Pvt. Ltd. and others Vs. State of Haryana and another 2014(3) RCR (Criminal) 782 and a judgment of this Court in Nilesh Shah Vs. Jyoti Rani and others in CRM-M-31175-2011, decided on 22.11.2013.***

9. The controversy has arisen in the context of prosecutions launched against officers of Companies under Sections 138 and 141 of the Negotiable Instruments Act of

1881 (hereinafter referred to as the "Act"). The relevant part of the provisions are quoted as under :

"Section 138 :

Dishonour of cheque for insufficiency, etc., of funds in the account Where any cheque drawn by a persons on an account maintained by him with a banker for payment of any amount of money to another persons from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless -

- (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.
- (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said account of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;
- and (c)the drawer of such cheque fails to make the payment of the said amount of money to the payee or,

as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation: - For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

Section 141 : Offences by companies -

[1] If the person committing an offence under section 138 is 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 person liable to punishment 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.

Provided [2] Notwithstanding anything contained in sub-section (1), where any 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."

10. It will be seen from the above provisions that Section 138 casts criminal liability punishable with imprisonment or fine or with both on a person who issues a cheque towards discharge of a debt or liability as a whole or in part and the cheque is dishonoured by the Bank on presentation. Section 141 extends such criminal liability in case

of a Company to every person who at the time of the offence, was incharge of, and was responsible for the conduct of the business of the Company. By a deeming provision contained in Section 141 of the Act, such a person is vicariously liable to be held guilty for the offence under Section 138 and punished accordingly. Section 138 is the charging section creating criminal liability in case of dishonour of a cheque and its main ingredients are :

- (i) Issuance of a cheque.
- (ii) Presentation of the cheque
- (iii) Dishonour of the cheque
- (iv) Service of statutory notice on the person sought to be made liable, and
- (v) Non-compliance or non-payment in pursuance of the notice within 15 days of the receipt of the notice.

11. It primarily falls on the drawer company and is extended to officers of the Company. The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in statutes extending liability to others. Section 141 of the Act is an instance of specific provision which in case an offence under Section 138 is committed by a Company, extends criminal liability for dishonour of cheque to officers of the Company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company. Since the

provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the Company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. In other words, persons who had nothing to do with the matter need not be roped in. A company being a juristic person, all its deeds and functions are result of acts of others. Therefore, officers of a Company who are responsible for acts done in the name of the Company are sought to be made personally liable for acts which result in criminal action being taken against the Company. It makes every person who, at the time the offence was committed, was incharge of, and was responsible to the Company for the conduct of business of the Company, as well as the Company, liable for the offence. The proviso to the sub-section contains an escape route for persons who are able to 'prove' that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence.

12. The position of a Managing Director or a Joint Managing Director in a company may be different. These persons, as the designation of their office suggests, are in charge of a company and are responsible for the conduct of the business of the company. In order to escape liability such persons may have to bring their case within the proviso to

Section 141(1), that is, they will have to prove that when the offence was committed they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence.

13. A reference to sub-section (2) of Section 141 fortifies the above reasoning because sub-section (2) envisages direct involvement of any Director, Manager, Secretary or other officer of a company in commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these offices in a company. In such a case, such persons are to be held liable. Provision has been made for Directors, Managers, Secretaries and other officers of a company to cover them in cases of their proved involvement.

14. The conclusion is inevitable that the liability arises on account of conduct , act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable.

15. The petitioners had approached the Court primarily on the ground that the directors had resigned from the company. The fact is disputed by the other side. The case had been adjourned a number of times to enable the petitioners to place on record the certified copies of Form -32 which they

have failed to do so. Therefore, the fact is disputed and it can only be adjudicated by the trial Court.

16. The primary responsibility is on the complainant to make specific averments as required under law in the complaint. The petitioners are said to be the Directors and involved in the day-to-day activities of the Company. The complaint spells out a clear case against the accused who have been named. The Magistrate in the first instance on the basis of the averments and the evidence before it has issued process. The petitioners have not placed on record the memorandum or articles of association to show who were the working Directors. The directors are aware of the affairs of the company and it would be a matter of evidence which would be led at the trial. At the present stage, the specific allegations in the complaint are enough.

17. In ***N. Rangachari Vs. BSNL, 2007(2) Law Herald (SC) 1379***, the Hon'ble Apex Court has held as under:-

“A person normally having a business or commercial dealing with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its Memorandum or Articles of Association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. Therefore, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are incharge of the affairs of the company. It is not reasonable to expect him to know whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of its. So, all that a payee of cheque that is dishonoured can

be expected to allege to allege is that the persons named in the complaint are in charge of its affairs. The Directors are prima facie in that position.”

18. The Magistrate while summoning the petitioners have categorically recorded that there is prima facie material to issue process and the petitioners were the Directors on the relevant date or not is a question of fact and this Court is not inclined to go into that matter in the proceedings under Section 482 Cr.P.C.

19. So far as the question of application of Section 202 Cr.P.C. is concerned, that question has already been settled by this Court. The provisions are not applicable to the complaints filed under Section 138 of the Negotiable Instruments Act.

20. So far as the question of jurisdiction of the Court is concerned, the Negotiable Instruments Ordinance 2015 has amended the Negotiable Instruments Act and it also deals with the pending cases and it is perhaps for this reason this issue was not raised during the course of arguments.

21. Lastly whether one complaint could be filed against number of cheques is an issue to be raised before the trial Court.

22. For the aforesaid reasons both the petitions are dismissed. The parties are directed to appear before the trial Court on 07.12.2015.

**(ANITA CHAUDHRY)
JUDGE**

17.11.2015
Sunil