IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of Decision: 01.04.2015

CRM M No.28346 of 2012 (O&M)

T.C. Khetan & others ......Petitioners

Vs

M/s Pragati Associates & others .....Respondents

CRM M No.29165 of 2012 (O&M)

T.C. Khetan & others ......Petitioners

Vs

M/s Pragati Associates & others .....Respondents

CRM M No.29166 of 2012 (O&M)

T.C. Khetan & others ......Petitioners

Vs

M/s Pragati Associates & others .....Respondents

CRM M No.29167 of 2012 (O&M)

T.C. Khetan ......Petitioner

Vs

M/s JSD Enterprises & others .....Respondents

CRM M No.29168 of 2012 (O&M)

T.C. Khetan & others ......Petitioners

Vs

M/s Pragati Associates & others .....Respondents

CRM M No.29169-2012 (O&M)

T.C. Khetan & others ......Petitioners

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2015.04.06 13:47
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Vs

M/s Pragati Associates & others .....Respondents

CRM M No.29170 of 2012 (O&M)

T.C. Khetan ......Petitioner

Vs

M/s JSD Enterprises & others .....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. D.V. Sharma, Senioir Advocate with
Mr. Harit Sharma, Advocate
for the petitioners.

Mr. Kunal Garg, Advocate
Amicus Curiae for respondent No.1.

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1. ***Whether Reporters of local papers may be allowed to see the judgment ?***
2. ***To be referred to the Reporters or not ?***
3. ***Whether the judgment should be reported in the Digest?***

RAJ MOHAN SINGH, J.

Vide this order above mentioned seven petitions are being disposed of.

Learned counsel for the petitioners states that controversy involved in all the cases can be set at naught in the present case. Therefore, facts are being culled out from CRM-M No.28346 of 2012.

This is a petition under Section 482 Cr.P.C., seeking quashing of undated Criminal Complaint No.11603 (Annexure P-4) under Sections 138, 141 and 142 of the Negotiable Instruments Act

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2015.04.06 13:47
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(hereinafter referred as ‘the Act’) and Section 420 of IPC, the summoning order dated 24.01.2011 (Annexure P-5) and entire subsequent proceedings arising therefrom pending the Court of Judicial Magistrate Ist Class, Gurgaon.

2. The petitioners alleged that a post dated cheque No.150530 was issued by the company on 01.03.2010 for a sum of ₹24,79,760/- in favour of respondent No.1/complainant as a security for payment of certain supply transactions which were to be made in the month of November and December 2009. Besides the aforesaid cheque, six more post dated cheques were also given to respondent No.1 as security for the payment of purchases. The company made the payment to complainant in lieu of the aforesaid cheque through RTGS i.e. by means of electronic transfer. Similarly, payment of other cheques were also made and a request was made by the petitioner company to the respondent No.1 on 08.04.2010 for the return of all seven cheques given as security in lieu of payment of purchases made from the complainant.

3. The complainant did not return the cheques rather presented the cheque in question to Syndicate Bank at Gurgaon, which was returned by Corporation Bank, Noida (U.P.) vide memo dated 25.05.2010 on account of stopped payment. The cheque in question was drawn by M/s Polaron Marketing Limited, Kolkata through its corporate office, D-32, Sector 63, Noida which is a legal entity. On 21.06.2010, notice was issued to the Directors of the

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2015.04.06 13:47
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company only. No notice was issued to the drawer. Reply to the said notice was filed by the petitioners and respondents No.3 to 7 on 19.07.2010 highlighting that the cheque in question was given as security and was not in discharge of any debt or legal liability. It was mentioned that the payment of cheques has already been made. It was claimed that the company had already discharged its liability towards the supplies against which the cheque was issued as security. The cheque was legally required to be given back in person, but for the reasons best known to the complainant, the cheque was not returned rather the same was presented for encashment. Despite receipt of reply to the notice, undated complaint No.110603 of 2010 was filed. The basic nomenclature of the number and date of the criminal complaint shows the following characteristics:-

"Criminal Complaint No.11603/27.4.10/16.11.10"

4. It is beyond comprehension that how the date of complaint can be 27.04.2010 i.e. the date before issuance of even notice by the complainant and reply by the petitioners. Perusal of the complaint would reveal that the pleadings whether the same can be made basis for further progress of the case? In Para 8, the recital was made that the accused company its Director being accused No.2 to 8 are responsible for day to day affairs and looking after the financial matters of company and authorized signatures have cheated the complainant.

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2015.04.06 13:47
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5. Preliminary evidence was led by the complainant in the form of Ex.EW1/A. Judicial Magistrate Ist Class, Gurgaon, vide order dated 24.11.2011, passed the order of summoning. The title of the case besides showing the aforesaid characteristics as pleaded in preceding para also shows the following recital:-

“C. No.4770/24.7.10/17.4.12”

6. The aforesaid recital speaks volume about nature of proceedings undertaken by the Court. Judicial Magistrate Ist Class, Gurgaon, in its order dated 24.01.2011, observed that *“complainant served a legal notice for demanding the cheque amount, the receipt of which is placed on file, but despite statutory period of 30 days, notice issued to accused was not received back either served or unserved. Hence, it would be deemed that the notice was served upon the accused. Despite that he has failed to make the payment. Hence, present complaint is filed against the accused under Sections 138 of the Negotiable Instruments Act.”*

7. It is submitted that the factum of reply dated 19.07.2010 submitted by the petitioner stood admitted in the list of documents attached with the complaint along with the summoning order dated 24.01.2011. The order of summoning of the even date reveals that the same was passed in case titled ‘India Bulls versus Polaron Marketing (apparently this is not title of the complaint). The aforesaid facts are apparent on the record that the order of summoning has been passed in complaint titled India Bulls versus Polaron Marketing and not in the complaint titled ‘M/s Pragati

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2015.04.06 13:47
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Associates versus M/s Polaron Marketing Limited etc.' though the first page carries the memorandum of present complaint. Learned counsel for the petitioner has vehemently argued that the Judicial Magistrate Ist Class, Gurgaon has acted arbitrarily to note down the criminal complaint on the date of its filing as well as with reference to the title of the case in which order of summoning has been passed. Learned counsel further argues that no notice was issued to the drawer of the cheque and the issuance of notice to the Directors does not suffice the legal requirement of law.

8. Learned counsel makes reliance upon Annexure P-13 i.e. a certificate dated 06.08.2012 issued in the context of Tara Chand Khetan not being a Director of Polaron Marketing Limited since its incorporation on 29.01.2009 till 04.08.2012.

9. In order to make the company liable under Section 138 of the Act vicariously, the Director can be prosecuted if there is specific recital that the Directors thereof were at the time when offence the offence committed, were responsible for the conduct and day to day business of the complaint. Director, who had resigned long back before the cheque was presented cannot be prosecuted. One of the Director in the array of accused i.e. Tara Chand Khetan (accused No.5) was never Director of the company since its incorporation on 29.01.2009 and still he has been arrayed as accused in the capacity of Director. The certification to this effect Annexure P-13 is computerized information, which is *perse* admissible under Section 65-B of the Evidence Act, rather this

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2015.04.06 13:47
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document has not been denied with reference to any evidence to the contrary.

10. The averments even if made in the complaint that the Director was in-charge, the same can be negated if the High Court comes across some unimpeachable/acceptable circumstance, which may lead to the conclusion that the Director could never have been in-charge of and responsible for the conduct of business of the company at the relevant time and therefore, making such Director as an accused to stand trial would be an abuse of process of law.

11. It is mandatory in terms of Section 138 and 141 of the Act to specifically aver in the complaint that Director was in-charge of and responsible for the conduct of the business of the company at the relevant time, when the offence was committed and he was responsible for day to day functioning of the company. Simply by being a Director in a company, one is supposed to discharge functions of the company is a question which has answer in the precedents of the Courts. The role of the Director in a company is a question of fact depending upon the nomenclature of the company and other circumstances prevailing therein. It depends upon the facts of the each case and there cannot be any universal application of the rule that a Director of company is in-charge of its day to day affairs. In this context reference can easily be made to ***2005 (4) RCR (Criminal) 141*** titled as '***S.M.S. Pharmaceuticals Limited versus Neeta Bhalla & others'***.

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2015.04.06 13:47
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12. This Court in ***2014 (4) R.C.R. (Criminal) 2521*** titled as ***'Sameer Bharati versus State of Haryana and another'*** quashed the order of summoning as the same did not comply with the statutory requirement of law in terms of Section 141 of the Act. In ***2011 (5) R.C.R. (Criminal) 36*** titled as ***'Sukarsh Azar versus Lafarge Aggregates and Concrete India Private Limited'***, this Court quashed the proceedings where the cheque issued by the company was dis-honoured and the Directors who were arrayed the accused were not signatory of the cheque and the summoning order did not specify the capacity of the Directors whether they were in-charge of the company or were responsible for conduct of the business. The criminal complaint itself was quashed by relying upon ***2007 (2) R.C.R. (Criminal) 266 'N.V. Wahi versus Shekhar Singh and others'***.

13. Section 141 of the Act is a penal provision creating criminal liability. As per nature of the offence it has to be strictly construed. It is not sufficient to make bald cursory statement in a complaint that Director/Directors is/are in-cahrge of and are responsible for the conduct of the business of the company without specifying anything more as to the role of the Director/Directors. It is requirement of law that the complainant must spell out as to how and in what manner the accused are in-charge of the affairs of the company in the conduct of its business and thus responsible for the same. This is in consonance with strict interpretation of penal statutes, especially where such statute create vicarious liability. In

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this context ***2010 (3) SCC 330 'Small Industries Corporation's*** case can be relied upon.

14. In the aforesaid context, the observations made by the Hon'ble Supreme Court in ***(SC) 2015 (1) R.C.R. (Criminal) 54*** titled as ***'Gunmala Sales Private Limited versus Anu Mehta***, can also be relied.

15. Some times a Director is not the active Director and he may be none executive Director, who was no doubt a custodian of governance of the company, but at the same time was not involved in day to day affairs running of its business. For making such a Director liable there must have been specific averment in the complaint as to how and in what manner such a Director was responsible for conduct of business of the company. In the absence of such plea the Court can definitely come to rescue of such Director against whom the proceedings are nothing but a pure abuse of process of law. In this regard, ***AIR 2015 (SC) 675 '***titled ***Pooja Ravinder Devidasani versus State of Maharashtra'*** is relevant to be quoted.

16. The law laid down in '***S.M.S. Pharmaceuticals Limited versus Neeta Bhalla & others' (supra)*** has been consistently followed and reiterated in ***'N.V. Wahi versus Shekhar Singh and others' 2007 (2) S.C.C. (Criminal) 481*** that simply being a Director would not make a person responsible for an offence that may have been committed by the company. For launching a prosecution against the Director of the company, there had to be

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2015.04.06 13:47
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specific allegation in the complaint in regard to the part played by such Director in the transaction in question. The allegations must be clear, unambiguous in relation to the charge and his responsibility for day to day functioning of the company. Obviously, the mechanism/decisions so made are directed to prevent abuse of process of Court and to discourage frivolous litigation. The ratio as emerge from the aforesaid is that "no criminal proceedings shall be initiated against the Director/accused unless specific allegations should comeforth in complaint, earmarking unambiguous role in the context of charge and responsibility in discharge of day to functioning of the company so as to prevent embarking on a fishing expedition to try and unearth material against the Director. A Special Leave Petition filed by Central Bank of India was dismissed by the Hon'ble Supreme Court with the aforesaid ratio *discendi* in ***A.I.R. 2010 (SC) 2835*** titled ***'Central Bank of India versus Asian Global Limited and others'***.

17. The second point for consideration is the jurisdiction of the Court as emerging from ***2014 A.I.R. (SC) 3519*** titled ***'Dashrath Rupsingh Rathod versus State of Maharashtra and another'***. Para 20 of the aforesaid judgment is relevant in the helm of affairs. Para 20 of the aforesaid judgment is reproduced as under:-

> " We are quite alive to the magnitude of the impact that the present decision shall have to possibly lakhs of cases pending in various Courts spanning across the country. One approach could be to declare that this judgment will have only prospective pertinence, i.e. applicability to Complaints that may be filed after this

SACHIN SHARMA
2015.04.06 13:47
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pronouncement. However, keeping in perspective the hardship that this will continue to bear on alleged accused/respondents who may have to travel long distances in conducting their defence, and also mindful of the legal implications of proceedings being permitted to continue in a Court devoid of jurisdiction, this recourse in entirety does not commend itself to us. Consequent on considerable consideration we think it expedient to direct that only those cases where, post the summoning and appearance of the alleged Accused, the recording of evidence has commenced as envisaged in Section 145(2) of the Negotiable Instruments Act, 1881, will proceeding continue at that place. To clarify, regardless of whether evidence has been led before the Magistrate at the pre-summoning stage, either by affidavit or by oral statement, the Complaint will be maintainable only at the place where the cheque stands dishonoured. To obviate and eradicate any legal complications, the category of Complaint cases where proceedings have gone to the stage of Section 145(2) or beyond shall be deemed to have been transferred by us from the Court ordinarily possessing territorial jurisdiction, as now clarified, to the Court where it is presently pending. All other Complaints (obviously including those where the accused/respondent has not been properly served) shall be returned to the Complainant for filing in the proper Court, in consonance with our exposition of the law. If such Complaints are filed/refiled within thirty days of their return, they shall be deemed to have been filed within the time prescribed by law, unless the initial or prior filing was itself time barred."

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2015.04.06 13:47
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18. The Apex Court, in view of aforesaid held that only those cases where post the summoning in appearance of the alleged accused, the recording of evidence has commenced as envisaged in Section 145 (2) of the Act will continue at that place. In other words all complaints should be transferred to a place where cheque is dishonoured in the cases where preliminary evidence has been led and no evidence has commenced as envisaged under Section 145 (2). If the aforesaid proposition of law is applied to the present case, the proceedings of the case are liable to be transferred to the Court where the cheque was presented i.e. Noida (U.P.). From this point of view also the continuation of proceedings at Gurgaon is not maintainable.

19. Since this Court has deliberated upon the nomenclature of this case in terms of its case number, date and the nature of summoning order passed not in case titled 'M/s Pragati Associates versus M/s Polaron Marketing Limited and others' but in case titled 'India Bulls versus Polaron Marketing' and the nature of pleadings made in terms of requirement of Section 141 of the Act in the complaint, I am of the view that the complaint and subsequent proceedings lack legal criteria for its logical culmination. Therefore, despite the fact that the complaint is required to be transferred to a place where cheque was presented, it is found that the complaint itself is liable to quashed being abuse of process of law and is deficient in formulising vicarious liability of the petitioners in terms of Section 141 of the Act.

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Consequently, the complaint, order of summoning and entire subsequent proceedings arising therefrom are hereby quashed.

01.04.2015 **[RAJ MOHAN SINGH]**
sachin **JUDGE**

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