HIGH COURT FOR THE STATES OF PUNJAB & HARYANA AT CHANDIGARH

CRM-M-4545-2015
Date of decision:10.9.2015

Mr.Rakesh Radheshyam Jhunjhuwala

...Petitioner

Versus

State of Haryana and another

...Respondents

CORAM: HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

1. To be referred to the Reporters or not ?
2. Whether the judgment should be reported in the Digest ?

Present: Mr.Ashok Bhan, Sr. Advocate with
Mr.Ashish Bhan, Advocate and
Mr.Sidakmeet Sandhu, Advocate for the petitioner.

Mr. Manoj Kumar Sangwan, DAG, Haryana.

Mr.Prabhat K.C., Advocate and
Mr.Munish Kumar Garg, Advocate for respondent No.2.

RAMESHWAR SINGH MALIK, J. (Oral)

Petitioner, by way of instant petition under Section 482 of the Code of Criminal Procedure (`Cr.P.C.' for short), seeks quashing of impugned complaint No.927 of 2013 dated 26.7.2013 titld as ('Sicom Limited v. M/s A2Z Maintenance and Engineering Services Ltd. & others), summoning order dated 26.7.2013 (Annexure P-2) passed by the learned Judicial Magistrate 1st Class, Gurgaon (`JMIC' for short) and the revisional order dated 15.1.2015 passed by the learned Additional Sessions Judge, Gurgaon (Annexure P-3), whereby revision of the petitioner was dismissed and the impugned summoning order was upheld.

Notice of motion was issued and pursuant thereto, reply on behalf of respondent No.2 has been filed. A separate reply by way of affidavit dated 21.4.2015 was filed on behalf of respondent No.1-State of

Haryana. Petitioner has filed separate rejoinders to both the replies, filed on behalf of respondents.

Learned senior counsel for the petitioner submits that petitioner was no more the Director of accused No.1 Company on the date of issue of cheque in question, i.e. 11.4.2013. He had already submitted his resignation, which had been duly accepted. Petitioner had nominated Mr.Manish Gupta as nominee Director but complainant-respondent No.2 has not made him an accused. Petitioner has informed the accused No.1 Company about nominating Mr.Manish Gupta as his nominee on the Board of Directors vide communication dated 30.8.2007 (Annexure R-13). Resignation of the petitioner was accepted on 15.10.2012 vide Annexure P-5 and he ceased to be Director of the accused No.1 Company, i.e. A2Z w.e.f. 15.10.2012, whereas cheques in question were issued on 11.4.2013.

He next contended that the accused No.1 Company also informed the Registrar of Companies, about the acceptance of resignation of the petitioner in the prescribed form for the said purpose, i.e. Form 32, vide communication (Annexure P-6). Accused No.1 Company, in its reply dated 28.6.2013 Annexure P-7 (colly) at page 66 of the paper-book, while replying the legal notice of the complainant-company dated 14.6.2013, informed about the petitioner that he has since resigned from the company and was no longer associated with the accused No.1 Company.

He concluded by submitting that in such a situation there was no scope of impleading the petitioner as accused, at the hands of the complainant-respondent/company and the learned courts below also misdirected themselves, while passing the impugned summoning order as well as revisional order. In support of his contentions, learned senior counsel places reliance on the following judgments:-

1. DCM Financial Services Limited v. J.N.Sareen and another, (2008) 8 SCC 1;

2. Harshendra Kumar D. v. Rebatilata Koley and others, (2011) 3 SCC 351;

3. Anita Malhotra v. Apparel Export Promotion Council and another, (2012) 1 SCC 520;

4. Mahesh Sapra v. Siel Chemicals Complex, 2014 (3) RCR (Crl.) 74;

5. M.S. Narayana Menon alias Mani v. State of Kerala and another, (2006) 6 SCC 39;

6. Kamala S. v. Vidhyadharan M.J.and another, (2007) 5 SCC 264;

7. S.M.S.Pharmaceuticals Ltd. v. Neeta Bhalla and another, (2005) 8 SCC 89;

8. Saroj Kumar Poddar v. State (NCT of Delhi) and another, (2007) 3 SCC 693;

9. K.K.Ahuja v. V.K. Vora and another, (2009) 10 SCC 48;

10. National Small Industries Corporation Limited v. Harmeet Singh Paintal and another, (2010) 3 SCC 330;

11. Central Bank of India v. Asian Global Limited and others, (2010) 11 SCC 203;

12. N.Rangachari v. Bharat Sanchar Nigam Ltd. (2007) 5 SCC 108;

13. O.P.Mehra v. Raj Kumar Bhalla and another, 2006 (2) ILR Punjab and Haryana 607;

14. Pepsi Foods Ltd.and another v. Special Judicial Magistrate and others, (1998) 5 SCC 749;

15. Punjab National Bank and others v. Surendra Prasad Sinha, 1993 Supp (1) SCC 499;

16. Shree Raj Travels & Tours Ltd. & Ors v. Destination of the World (Subcontinent) Private Limited, 2010 (119) DRJ 75;

17. Bharat Poonam Chand Shah v. M/S Dominos Printech

India Pvt. Ltd., 2008 (BC) 618;

18. R.K.Dalmia ETC v. Delhi Administration (In all the three appeals), AIR 1962 SC 1821;

19. State of Haryana and others v. Bhajan Lal and others, 1992 Supp (1) SCC 355;

20. Rajiv Thapar and others v. Madan Lal Kapoor, (2013) 3 SCC 330 and

21. Pooja Ravinder Devidasani v. State of Maharashtra & another, 2014 SCC Online SC 1020.

He prays for quashing the impugned complaint (Annexure P-1), impugned summoning order (Annexure P-2) as well as the impugned revisional order (Annexure P-3), by allowing the present petition.

On the other hand, learned counsel for the State as well as learned counsel for respondent No.2-complainant submit that since the petitioner was actively participating in the business of the accused No.1-Company, through his above-said nominee Mr.Manish Gupta, he was very much responsible for the criminal liability of the company. They further submit that the learned Magistrate as well as the learned Additional Sessions Judge proceeded on factually correct and legally justified approach, while passing their respective impugned orders and the same deserve to be upheld. Learned counsel for the respondent-company also submitted that since the petitioner was having about 20% equity shares in the accused No.1 Company, he was rightly summoned to face trial. To buttress their submissions, learned counsel for the respondents relied on two judgments of the Hon'ble Supreme Court in **National Small Industries Corporation Limited v. Harmeet Singh Paintal and another, (2010) 3 SCC 330** and **Gunmala Sales Private Limited v. Anu Mehta, 2014 (12) Scale 270**. They pray for dismissal of the present petition.

Having heard the learned counsel for the parties at considerable length, after careful perusal of the record of the case and giving thoughtful consideration to the rival contentions raised, this Court is of the considered opinion that instant one has been found to be a fit case, warranting interference at the hands of this Court, while exercising its inherent jurisdiction under Section 482 Cr.P.C. To say so, reasons are more than one, which are being recorded hereinafter.

A combined reading of the impugned complaint (Annexure P-1), impugned summoning order (Annexure P-2) as well as the impugned judgment passed by the revisional court of learned Additional Sessions Judge, Gurgaon, would leave no room for doubt that, initially the complainant-respondent/company and later on the learned Magistrate as well as the learned Additional Sessions Judge, proceeded on a factually incorrect and legally misconceived approach. Petitioner was not liable to be impleaded as party-respondent nor he was liable to be summoned to face the criminal trial, arising out of the impugned complaint, which was totally unwarranted qua the petitioner.

It is so said, because it was a matter of record that petitioner submitted his resignation which was duly accepted by the accused No.1 Company on 15.10.2012 vide Annexure P-5. This material fact was also communicated to the Registrar of Companies by the accused No.1 Company, by way of communication dated 15.10.2012 (Annexure P-6) in the prescribed Form 32, pointing out that petitioner has ceased to be Director w.e.f.15.10.2012. It is matter of record that cheques in question came to be issued on 11.4.2013, i.e. after about 6 months of acceptance of resignation of the petitioner as Director of the accused No.1 Company.

Despite the above-said peculiar fact situation, the complainant-respondent/company made the petitioner as an accused No.5 in the impugned complaint (Annexure P-1), proceeding on a factually incorrect premise that he was one of the active Directors of accused No.1 Company, having about 20% equity shares in the accused No.1 Company. Having said that, this Court feels no hesitation to conclude that since the impugned complaint qua the petitioner proceeds on factually incorrect averments, which run counter to the official record, the same cannot be sustained qua the petitioner.

Para 4 of the complaint, containing relevant averments, repeatedly refers that accused Nos. 2 to 7 were running the management of accused No.1 Company and were actively involved in its day to day business and management. In para 4(d) of the impugned complaint, respondent-complainant/company has taken the averment about the appointment of Mr.Manish Gupta as a nominee Director of accused No.1-company, by the petitioner. Once the complainant-company was aware about this fact including the official information in this regard, pointed out in Form 32, the complainant-company should not have impleaded the petitioner as one of the accused.

However, it seems that the complainant-respondent/company despite knowing fully well that the petitioner was no more the Director of the accused No.1 Company, nor was actively participating in running the business and management of accused No.1-Company, the complainant-respondent/company had tried to play smart by impleading the petitioner as accused No.5, only with a view to put unwarranted pressure on accused No.1 Company, through the petitioner. It is crystal clear from the reply of accused No.1 Company to the legal notice of the complainant-company, wherein the complainant-company was specifically informed that addressee No.5 (petitioner herein), has since long resigned from the company and was no longer associated with the accused No.1 company.

This fact is so recorded at page 68 of the paper-book in the communication dated 28.6.2013. However, the complainant-company still impleaded the petitioner as party-accused No.5 in the impugned complaint which does not seem to be a bona fide complainant, at least qua the petitioner. Thus, the impugned complaint cannot be sustained against the petitioner, for this reason also.

It is also a matter of record that petitioner was not signatory to the cheques in question. Mr.Manish Gupta, who was appointed as nominee Director by the petitioner, has not been made one of the accused by the complainant-respondent/company for the reasons best known to it. Further, nothing has been brought to the notice of this Court by the learned counsel for the respondents, referring to any official record, which may even remotely suggest that petitioner, as a matter of fact, has been actively participating in the running of business of the management of the accused No.1-company. In such a situation, it can be safely concluded that the petitioner could not have been made an accused only for the reason that he was holding about 20% of the equity shares in accused No.1-company, particularly when he has since resigned as Director of the Company, about six months before issuing the cheques in question.

Coming to the impugned summoning order passed by the learned Magistrate as well as the impugned judgment passed by the learned Additional Sessions Judge, dismissing the revision petition of the petitioner, it is held that since both the learned courts below miserably failed to apply their judicious mind, while not appreciating the above-said material aspects of the matter as well as relevant principles of law applicable thereto, the impugned orders have resulted in miscarriage of justice and the same cannot be sustained, qua the petitioner.

Summoning of a person as an accused to face criminal trial cannot and should not be treated lightly, it being a serious matter. In the present case, learned counsel for the complainant-respondent/company wanted this Court to draw inferences against the petitioner, treating him as an accused, in the absence of any specific averments taken against the petitioner in the impugned complaint, specifying his role in the commission of offence alleged against him. This Court is afraid, it is not impermissible in law to draw such presumption and inferences, therefore, impugned complaint (Annexure P-1), summoning order (Annexure P-2) as well as revisional order (Annexure P-3) cannot be sustained qua the petitioner, for this reason as well.

Coming to the judgments relied upon by the learned counsel for the respondents, there is no dispute about the law laid down therein. However, on close perusal of both the cited judgments, none of them has been found of any help to the respondents, being distinguishable on facts. It is the settled principle of law that peculiar facts of each case are to be examined, considered and appreciated first, before applying any codified or judgemade law thereto. Sometimes, difference of one circumstance or additional fact can make the world of difference, as held by the Hon'ble Supreme Court in **Padmausundra Rao and another Vs. State of Tamil Nadu and others, 2002 (3) SCC 533**

It is again a matter of record that even when the petitioner was a Director of accused No.1 Company, he was a non-executive Director. He was appointed as such, as per Form 32 dated 10.8.2007, supplied by the learned senior counsel to the Court, during the course of hearing. From Annexure P-4 available at page 57 of the paper-book, it becomes clear that petitioner was only a strategic investor. In such a situation, he would be playing no role in day to day affairs and management of the company.

So far as present case is concerned, petitioner was holding about 20% shares, thus a minority share holder in the accused No.1 Company, which was admittedly a public limited company. Once petitioner was no more the Director of the company, its Board of Directors would be governing body of the company and the petitioner would be having only limited right to his dividend, he being a share holder. Such a share holder would have no role to play in the management of the company or its day to day affairs. Although the petitioner was not a Director of accused No.1-Company at the relevant time, when the cheques in question were issued, even a Director can be held liable only if he is in charge and had been taking active part in day to day affairs as well as in the management of the company, at the relevant time.

Further, a Director cannot be held liable if a post-dated cheuqe is dishonoured, after his resignation is accepted. Similarly a nominee Director, Mr. Manish Gupta in the present case, would also be only a non-executive Director in the company and he would not be in charge of the day to day affairs of the company. Under these circumstances, the only irresistible conclusion is that no case, whatsoever, is made out against petitioner, who has been unnecessarily dragged in the instant unwarranted litigation, therefore, the impugned complaint, summoning order as well as the revisional order, cannot be sustained qua the petitioner.

The above-said view taken by this Court also finds support from the numerous judgments of the Hon'ble Supreme Court and different High Courts including this Court. Judgment of the Hon'ble Supreme Court in **Pooja Ravinder Devidasani's** case (supra) is the complete answer to the arguments raised by the learned counsel for the respondents, including two judgments relied upon by them.

The relevant observations made by the Hon'ble Supreme Court in para 17 of its judgment in **Pooja Ravinder Devidasani's** case (supra), which aptly apply to the fact situation of the present case, read as under:-

> *"There is no dispute that the appellant, who was wife of the Managing Director, was appointed as a Director of the Company-M/S Elite International Pvt. Ltd. on 1st July, 2004 and had also executed a Letter of Guarantee on 19th January, 2005. The cheques in question were issued during April, 2008 to September, 2008. So far as the dishonor of Cheques is concerned, admittedly the cheques were not signed by the appellant. There is also no dispute that the appellant was not the Managing Director but only a non-executive Director of the Company. Non-executive Director is no doubt a custodian of the governance of the Company but does not involve in the day-to-day affairs of the running of its business and only monitors the executive activity. To fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the Company, one who actively looks after the day-to-day activities of the Company and particularly responsible for the conduct of its business. Simply because a person is a Director of a Company, does not make him liable under the N.I. Act. Every person connected with the Company will not fall into the ambit*

of the provision. Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, 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 for an offence under Section 141 of the N.I. Act. In National Small Industries Corporation (supra) this Court observed:

> *"Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.*
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> *A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfillment of the requirements under Section 141."*

Similarly, the judgment of the Hon'ble Supreme Court in **Anita Malhotra's** case (supra), which was close to the fact situation of the instant case, squarely covers to the case in hand. The relevant observations made by the Hon'ble Supreme Court in paras 18 to 22 and 23, which can be gainfully followed in the present case, read as under:-

"In DCM Financial Services Limited vs. J.N. Sareen, this Court, while considering Sections 138 and 141 of the Act came to the following conclusion which is relevant for our purpose: (SCC pp.10-11, para 21)

"21.The cheque in question was admittedly a post-dated one. It was signed on 3-4-1995. It was presented only sometime in June 1998. In the meantime the first respondent had resigned from the directorship of the Company. The complaint petition was filed on or about 20-8- 1998. Intimation about his resignation was given to the complainant in writing by the first respondent on several occasions. The appellant was, therefore, aware thereof. Despite having the knowledge, the first respondent was impleaded as one of the accused in the complaint as a Director in charge of the affairs of the Company on the date of commission of the offence, which he was not. If he was proceeded against as a signatory to the cheques, it should have been disclosed before the learned Judge as also the High Court so as to enable him to apply his mind in that behalf. It was not done. Although, therefore, it may be that 12 as an authorised signatory he will be deemed to be person in-charge, in the facts and circumstances of the case, we are of the opinion that the said contention should not be permitted to be raised for the first time before us. A person who had resigned with the knowledge of the complainant in 1996 could not be a person in charge of the Company in 1998 when the cheque was dishonoured. He had no say in the matter of seeing that the cheque is honoured. He could not ask the Company to pay the amount. He as a Director or otherwise could not have been made responsible for payment of the cheque on behalf of the Company or otherwise. [See also Saroj Kumar Poddar v. State (NCT of Delhi), Everest

Advertising (P) Ltd. v. State (Govt. of NCT of Delhi) and Raghu Lakshminarayanan v. Fine Tubes.

In Harshendra Kumar D. vs. Rebatilata Koley, while considering the very same provisions coupled with the power of the High Court under Section 482 of the Code of Criminal Procedure, 1973 (in short 'the Code') for quashing of the criminal proceedings, this Court held: (SCC pp.361-62, para 25)

> *25.In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents-which are beyond suspicion or doubt-placed by the accused, the accusations against him cannot stand, it would be travesty of justice if the accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for 13 promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage."*

As rightly stated so, though it is not proper for the High Court to consider the defence of the accused or conduct a *roving enquiry in respect of merit of the accusation, but if on the face of the document which is beyond suspicion or doubt placed by the accused and if it is considered the accusation against her cannot stand, in such a matter, in order to prevent injustice or abuse of process, it is incumbent on the High Court to look into those document/documents which have a bearing on the matter even at the initial stage and grant relief to the person concerned by exercising jurisdiction under Section 482 of the Code.*

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This Court has repeatedly held that in case of a Director, complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the accused Company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient. (Vide National Small Industries Corporation Limited vs. Harmeet Singh Paintal.) In the case on hand, particularly, in para 4 of the complaint, except the mere bald and cursory statement with regard to the appellant, the complainant has not specified her role in the day to day affairs of the Company. We have verified the averments as regard to the same and we agree with the contention of Mr. Akhil Sibal that except reproduction of the statutory requirements the complainant has not specified or elaborated the role of the appellant in the day to day affairs of the Company. On this ground also, the appellant is entitled to succeed.

In the light of the above discussion and of the fact that the appellant has established that she had resigned from the Company as a Director in 1998, well before the relevant date, namely, in the year 2004, when the cheques were issued, the High Court, in the light of the acceptable materials such as certified copy of annual return dated 30.09.1999 and Form 32 ought to have exercised its jurisdiction under Section 482 and *quashed the criminal proceedings. We are unable to accept the reasoning of the High Court and we are satisfied that the appellant has made out a case for quashing the criminal proceedings. Consequently, the criminal complaint No. 993/1 of 2005 on the file of ACMM, New Delhi, insofar as the appellant herein (A-3) is concerned, is quashed and the appeal is allowed."*

It is the settled proposition of law that in the matters of quashing of criminal proceedings, while invoking the inherent jurisdiction under Section 482 Cr.P.C., if the allegations levelled in the impugned FIR or criminal complaint are taken to be true on their face value, without adding anything thereto or without subtracting anything therefrom, no offence is made out against an accused, the Court would be justified in quashing the criminal proceedings. Exactly similar is the fact situation obtaining in the present case. In this view of the matter, it is unhesitatingly held that continuation of the impugned complaint (Annexure P-1) and the criminal proceedings arising therefrom would certainly amount to further abuse of process of Court because of which the impugned complaint as well as the impugned summoning orders, cannot be sustained, qua the petitioner.

No other argument was raised.

Considering the peculiar facts and circumstances of the case noticed above, coupled with the reasons aforementioned, this Court is of the considered view that the instant petition deserves to be accepted so as to prevent any further abuse of process of court and also to secure the ends of justice.

Consequently, the impugned complaint (Annexure P-1), summoning order (Annexure P-2), as well as the judgment (Annexure P-3) are hereby quashed, however, only qua the petitioner.

Resultantly, with the above-said observations made, the present petition stands allowed, however, with no order as to costs.

10.9.2015 **(RAMESHWAR SINGH MALIK)**
mks **JUDGE**