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

Date of Decision: May 11, 2015

(i) + **CRL.M.C. 2815/2012 & Crl. M.A.No.14102/2012**

ASHESH DEVENDRABHAI VYAS ..... Petitioner

Through: Mr. A.R. Gupta, Mr. Aaditya Gupta & Mr. Vikrant Arora, Advocates

versus

STATE OF DELHI & ANR. ..... Respondents

Through: Mr. Sudhir Nandrajog, Senior Advocate with Mr. Mohit Mathur, Mr. Amish Dabas, Mr. Ujjwal K. Jha, Mr. Devender Dedha, Mr. Pankaj Verma, Mr. Pramadn N. Mathur & Ms. Vasudha Data, Advocates for respondent No.2

(ii) + **CRL.M.C. 2816/2012 &Crl. M.A.No.14104/2012**

NALIN KUMAR VASUDEVBHAI SOMPURA ..... Petitioner

Through: Mr. A.R. Gupta, Mr. Aaditya Gupta & Mr. Vikrant Arora, Advocates

versus

STATE OF DELHI & ANR. ..... Respondents

Through: Mr. Sudhir Nandrajog, Senior Advocate with Mr. Mohit Mathur, Mr. Amish Dabas, Mr. Ujjwal K. Jha, Mr. Devender Dedha, Mr. Pankaj Verma, Mr. Pramadn N. Mathur & Ms. Vasudha Data, Advocates for respondent No.2

(iii) + **CRL.M.C. 2817/2012 & Crl. M.A.No.14106/2012**

ASHESH DEVENRABHAI VYAS ..... Petitioner

Through: Mr. A.R. Gupta, Mr. Aaditya Gupta & Mr. Vikrant Arora, Advocates

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(iv) + **CRL.M.C. 2819/2012 & Crl. M.A.No.14113/2012**

NALIN KUMAR VASUDEVBHAI SOMPURA ... Petitioner

Through: Mr. A.R. Gupta, Mr. Aaditya Gupta & Mr. Vikrant Arora, Advocates

versus

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(v) + **CRL.M.C. 4395/2014 & Crl. M.A.No.17954/2014 & 15066/2014**

M/S RACHANA GLOBAL EXCAVATION LTD & ANR.
……….Petitioners

Through: Mr. A.R. Gupta, Mr. Aaditya Gupta & Mr. Vikrant Arora, Advocates

versus

THE STATE OF DELHI & ANR. ..... Respondents

Through: Mr. Sudhir Nandrajog, Senior Advocate with Mr. Mohit Mathur, Mr. Amish Dabas, Mr. Ujjwal K. Jha, Mr. Devender Dedha, Mr. Pankaj Verma, Mr. Pramadn N. Mathur & Ms. Vasudha Data, Advocates for respondent No.2

(vi) + **CRL.M.C. 4396/2014**

M/S RACHANA GLOBAL EXCAVATION LTD & ANR….
Petitioners

Through: Mr. A.R. Gupta, Mr. Aaditya Gupta & Mr. Vikrant Arora, Advocates

versus

THE STATE OF DELHI & ANR. ..... Respondents

Through: Mr. Sudhir Nandrajog, Senior Advocate with Mr. Mohit Mathur, Mr. Amish Dabas, Mr. Ujjwal K. Jha, Mr. Devender Dedha, Mr. Pankaj Verma, Mr. Pramadn N. Mathur & Ms. Vasudha Data, Advocates for respondent No.2

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

J U D G M E N T

In the above captioned six petitions, quashing of criminal complaint under Section 138 of *Negotiable Instruments Act*, *1881* (*hereinafter referred to as 'NI Act'*) and the common order of 2nd June, 2010 (vide which petitioners have been summoned as accused), is sought on merits by *M/s Rachana Global Excavation Limited* and its Chairman, Managing Director and a Director.

In the above captioned four petitions, petitioner – *Nalin,* Chairman of *M/s Rachana Global Excavation Limited* (hereinafter referred to as *M/s Rachana Global*) and petitioner – *Ashesh*, Director of *M/s Rachana Global* seek to challenge summoning order of 2nd June, 2010 on the ground that there are no averments to make them vicariously liable. Whereas, in the above captioned remaining two petitions i.e. Crl. M.C. No. 4395/2010 and Crl. M.C. 4396/2010, petitioner – *M/s Rachana Global* and its Managing Director are seeking quashing of two criminal complaints under Section 138 of *NI Act* wherein the total cheque amount is ₹27,84,52,604/- and ₹5,00,00,000/- respectively and quashing of these two complaints is sought on the ground that the aforesaid two post dated cheques were not issued in discharge of any debt or existing liability and receipt of these two cheques is hit by Section 3(2) of *Foreign Exchange Management Act, 1999* (hereinafter referred to as 'FEMA').

With the consent of learned counsel for the parties, the above captioned six petitions were heard together and are being disposed of by this common judgment.

The undisputed facts emerging from the two complaints in question are that a 100% foreign subsidiary of *M/s Rachana Global* in Mozambique, Africa entered into a commercial relationship with a 100% foreign subsidiary of *M/s Jindal Steel and Power Limited* (hereinafter referred to as M/s JSPL) in Mauritius. The transaction between the parties stands explained in paragraphs No. 1 to 16 of the complaints in question and it needs no reproduction. It would be suffice to note that since *M/s JSPL* had to pay US $ 10 Million to *M/s Rachana Global* under 1218 L and M/s Rachana Global had to return US $ 17,140,274 on account of cancellation of 929 L, 1242 L. The parties agreed to set off these amounts vide 1220L Amendment No. 3 Agreement dated 31.12.2009. Finally, *M/s Rachana Global* became liable to pay to M/s JSPL US $ 7,140,274 by 31st January, 2010 along with interest @ 12 % pa w.e.f. 1st October, 2009 till 31st January 2010 which was calculated and agreed to be US $ 2,85,611/- thereby totaling US $ 7,425,885. *M/s Rachana Global* gave a letter of 18th January, 2010 to M/s JSPL in which M/s Rachana Global acknowledged the liability of M/s Rachana to pay US $ 7,425,885 to M/s JSPL and enclosed three post dated cheques of ₹20,00,00,000/-, ₹7,84,52,604/- and ₹5,00,00,000/- respectively, totaling to ₹32,84,52,604/- (equivalent to aforesaid US $ 7,425,885) which were payable at Delhi and were dishonoured. Hence, two complaints in question were lodged.

To seek quashing of these two complaints in question and the common summoning order, it was vehemently contended by learned counsel for petitioners that these two complaints are bereft of necessary averments to impute vicarious liability on petitioners – *Nalin and Ashesh.*

It was pointed out by learned counsel for petitioners that in these two complaints, there are no averments to indicate that petitioners – *Nalin and Ashesh* were Incharge and were responsible for the dishonor of cheques in question and so bald assertions made in these two complaints are not sufficient to hold petitioners – *Nalin and Ashesh* vicariously liable for the offence in question. It was pointed out that role of petitioners – *Nalin and Ashesh* is required to be highlighted as there is no deemed liability of a Director or Chairman of the company. To contend so, reliance is placed upon decisions in *Central Bank of India v. Asian Global Limited and Others (2010) 11 SCC 203 ; Anita Malhotra v. Apparel Export Promotion Council and Another (2012) 1 SCC 520; National Small Industries Corporation Limited v. Harmeet Singh Paintal and Another (2010) 3 SCC 330.*

On behalf of petitioners - *M/s Rachana Global* and its Managing Director – *Manoj Kumar*, it was vehemently submitted that as per the two complaints in question, the liability to pay the debt was of one foreign company - *M/s Rachana Global* in Mozambique to another foreign company - M/s JSPL in Mauritius and none of these companies are party to the complaints in question. Learned counsel for petitioners asserted that post dated cheques in question were enclosed with letter of 18th January, 2010 and in the said letter, it was specifically stated that these cheques were given as security and if M/s Rachana in Mozambique does not clear the cheques towards M/s JSPL in Mauritius on or before 31st January, 2010, then these cheques were encashable. Thus, it was contended that there was no legally enforceable debt when these three cheques were given to the complainant on 18th January, 2010. To submit that the instant case does not come within the ambit of Section 138 of *NI Act*, the reliance was placed on decisions in *M/s Indus Airways Private Limited and others v. M/s Magnum Aviation Private Limited and Another 2014 SCC Online SC 305; Collage Culture and Ors. V. Apparel Export Promotion Council 2007 (99) DRJ 251; Shanku Concretes Private Limited and others v. State of Gujarat and another 1999 SCC Online Guj 366; M/s Balaji Seafoods Exports (India) Limited and another v. Mac Industries Limited 1999 (I) CTC 6 ; Icon Buildcon Private Limited v. Aggarwal Developers Private Limited and others 2014 (I) MWN (Cr.) DCC 177 (Del.).*

Lastly, it was submitted on behalf of petitioners that permission of Reserve Bank of India for recovery of debt of a foreign company has not been taken and so the complaints in question are hit by FEMA. Thus, it is submitted that continuance of proceedings arising out of these two complaints is an abuse of process of law and so these two complaints deserve to be quashed.

Learned Senior counsel for respondent - complainant contended that whether a cheque is a security cheque or towards an outstanding liability, is a question of fact, which requires trial. It was pointed out that mere use of word 'security' in letter of 18th January, 2010 does not change the nature of liability, which was existing and enforceable on the day of issuance of the cheques in question. It was vehemently asserted that even a Guarantor is liable for encashment of a cheque, which is towards discharge of debt of another person.

It was asserted on behalf of respondent – complainant that proceedings under Section 138 of *NI Act* pertaining to a cheque issued in discharge of a liability of their sister concern is very much maintainable. To assert so, reliance is placed upon decisions in *Collage Culture v. Apparel Export Promotion Council 2007 (99) DRJ 251; Jyoti Build Tech Private Limited v. Mideast Pipeline Products 2011 (183) DLT 680; C.V. Alexander v. Joseph Chacko 1995 82 copcas 368 Ker; ICDS Limited v. Beena Shabeer 2002 (6) SCC 426; K.S. Bakshi v. State 2008 (146) DLT 125; Krish International Private Limited v. State 2013 (179) CompCas 210; Anil Sanchar v. Shree Nath Spinners Private Limited 2011 (13) SCC 148; HMT Watches Limited v. M.A. Abida and another 2015 SCC Online SC 233; N & S & N Consultants S.R.O v. SRM Exploration Private Limited 2011 (170) DLT 685; N. Rangachari v. Bharat Sanchar Nigam Limited 2007 (5) SCC 108.*

As regards the complaints in question being hit by FEMA, it was submitted on behalf of respondent – complainant that no specific permission from Reserve Bank of India under the FEMA is required as the *Foreign Exchange Management (Transfer or issue of foreign security) Regulation, 2000* permitted issue of such guarantees by holding companies, to or for the benefit of their overseas joint ventures or subsidiaries promoted or set up by them and in which they have made investments in accordance with the provisions of this Regulation.

It was next submitted by learned Senior Counsel for respondent-complainant that giving of such a guarantee is also permitted under Regulation 5 (b) of the *Foreign Exchange Management (Guarantee) Regulations, 2000*. It was pointed out that the only requirement is of reporting to Reserve Bank of India which too was the obligation of petitioner – *M/s Rachana Global* and not of the answering respondent –

complainant. In the last, it is submitted that Notice under Section 251 of Cr.P.C. has been already framed and application under Section 145 (2) of *NI Act* stands already allowed and these two complaints cases are at advanced stage of recording of evidence and thus no case for quashing of these complaints on merits is made out.

After having heard both the sides at length and on perusal of the complaints in question, material on record and the decisions cited, this Court finds that quashing of these two complaints in question is sought in the above captioned four petitions on the ground of there being no specific averments against the petitioners - *Nalin and Ashesh.* On this aspect, it is no longer *res integra* that there has to be specific averments against Director or Officer of accused company for prosecution in complaint under Section 138 of *NI Act* for holding a person vicariously liable.

Keeping in view of the dictum of the Apex Court in *Central Bank of India* (supra), *Anita Malhotra* (supra) and *National Small Scales Industries* (supra), the two complaints in question have been perused and thereafter, this Court finds that it cannot be said by any stretch of imagination that the continuance of proceedings arising out of these two complaints is an abuse of process of law. Since the proceedings under Section 138 of *NI Act*, which are in fact summary proceedings, are at the advanced stage of recording of evidence, therefore, this Court does not deem it appropriate to declare whether petitioners - *Nalin and Ashesh* are vicariously liable or not. This question is left open to be determined at the final stage of trial.

Similarly, the question as to whether the cheques in question were towards existing liability or not, is not required to be pre-judged, when the summary proceedings under Section 138 *NI Act* are at the fairly advanced stage. To do so, it would be premature. In fact, it is quite debatable as to whether the cheques in question were security cheques or not and it would be most appropriate that this aspect is conclusively determined at the final stage after considering the evidence. Whether the use of word 'security' in the letter of 18^{th} January, 2010 would make it a security cheque or the cheques in question were legally enforceable on the day of issue, again falls in the realm of evidence.

It is settled legal position that this Court is not required to enter into the arena of disputed facts relating to the nature of transaction of being of assignment or of discharge of guarantee. Whether any specific permission is required from Reserve Bank of India under the FEMA is again a question of fact, which has to be considered in light of nature of transaction between the parties. In any case, this Court is of the considered opinion that no case for dropping of the proceedings against petitioners is made out as prima facie case is made out against petitioners to justify the continuance of proceedings, arising out of these two complaints in question. When the complaints in question are at advanced stage of recording of evidence, then meticulous examination of the averments in these complaints in the exercise of extra ordinary jurisdiction under Section 482 of Cr.P.C. is considered to be inappropriate as it cannot be said that the averments regarding the part played by petitioners in the transaction in question is lacking. Whether the averments against petitioners are clear or unambiguous can be effectively determined by trial court in the light of the available evidence on record. Since, prosecution of petitioners in these two complaints cannot be said to be vexatious or amounting to fishing inquiry against them, therefore, it cannot be said that continuance of instant proceedings against petitioners is an abuse of the process of the law.

With aforesaid observations, these petitions and the applications are disposed of while not commenting on the merits and with liberty to petitioners to urge the pleas taken herein before the trial court at the final stage. As the complaints in question are pending adjudication for the last five years, therefore, the trial court shall make all endeavors to conclude the proceedings in these two complaints within this Calendar Year.

(SUNIL GAUR)
Judge

MAY 11, 2015
J