

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.07.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**Crl.O.P Nos.1593 and 10570 of 2011
and
M.P.Nos.1 and 1 of 2011**

- 1.Chanda Devi Dugar
- 2.Devaraj Dugar
- 3.M.Hireswari Devi Dugar
- 4.P.Anita Devi Dugar

... Petitioners
in Crl.OP.No.1593 of 2011

and

- 1.Bherudan Dugar Housing Finance Limited,
No.73/1-A, Jeremiah Road, Vepery,
Chennai – 600 007.

- 2.B.Mangal Chand Dugar

- 3.B.Prakash Chand Dugar

... Petitioners
in Crl.OP.No.10570 of 2011

vs.

National Housing Bank,
No.5A, India Habitat Center,
Lodhi Road, New Delhi-110033,
Represented by its Regional Manager
Ranjan Kumar Barun.

... Respondent in both
the Crl.O.P.s

Common Prayer: Criminal Original Petitions filed under Section 482 of Criminal Procedure Code, to call for the records in C.C.No.4331 of 2010, on the file of the learned IInd Metropolitan Magistrate, Chennai @ Egmore and to quash the proceedings against the petitioners.

(In both the Crl.OPs)

For Petitioners : Mr.R.John Sathyan

For Respondent : Mr.S.Natarajan

JUDGMENT

The petitioners in the above Criminal Original Petitions are accused in C.C.No.4331 of 2010. The petitioners in Crl.O.P.No.10570 of 2011 are the accused No. 1 to 3 and the petitioners in Crl.O.P.No.1593 of 2011 are accused No. 4 to 7. All of them have filed the aforesaid two quash petitions to quash the proceedings in C.C.No.4331 of 2010, on the file of the 2nd Metropolitan Magistrate, Egmore at Chennai.

2.The crux of the case is that the petitioners are arrayed as accused in the aforesaid C.C.No.4331 of 2010 for the alleged offence under Section 29(A)(i), r/w 50 National Housing Bank Act punishable under Section 41 of the said Act. According to the averments in the petitions that the 1st accused is the company, the 2nd accused is the Managing Director of the company and the 3rd to 7th accused are the Directors of

the company. Further, all the petitioners are family members.

3.The case of the petitioners is that the 1st accused is the Housing Finance Limited Company and the said company is to promote Housing Finance Institutions in providing financial and other support to housing finance institution by regulating the activities and issued directions/guidelines to protect public interest while permitting such company to accepts deposits from them in order to avoid exploitation of the depositors. The allegation of the complaints are that the 1st accused company continued business without obtaining the certificate of registration as per Section 29(A)(i) of the National Housing Bank (Amendment Act 2000) and the 1st accused did not follow the directions as given in Para Nos.4 and 5 of the order dated 11.02.2005 and the 1st accused raised funds by public issues. With these allegations, the complainant instituted the complaint under Section 200 of the Code of Criminal Procedure for the alleged commission of offence as stated above.

4.The learned counsel for the petitioners would submit that the taking of the complaint on his file and the taking of cognizance as against the petitioners are against law and the act of issuance of summons is without any materials against the petitioners. Further, it is contended by the learned counsel for the petitioners is that the complaint is bereft of

ingredients to attract the offence and the complainant has not given sufficient materials to fasten criminal liability. In this connection, he has relied on two judgments of the Hon'ble Supreme Court as reported in **(2009) 10 SCC 48 (K.K.Ahuja v. V.K.Vora)** and another judgment reported in **2010 Cr.L.J 4269 (State of NCT of Delhi through its Prosecuting Officer, Insecticides, Government of NCT, Delhi v. Rajuiv Khurana)**.

5.By relying on these two judgments it is contended by the learned counsel appearing for the petitioners that the mere allegation that the directors are responsible for the management of the day-to-day affairs of the company is not sufficient, but the same has to be prima-facie pleaded and proved by sufficient materials. Further he has pointed out it is not pleaded in the complaint as to how and what manner the petitioners, even as directors, are responsible for the day-to-day affairs of the company and moreover the shares of the company are limited within the members of the family. As the Complainant has failed to discharge his liability in explaining the responsibilities of each of the petitioners, no criminal liability can be fastened upon the petitioners so as to make the petitioners vicariously liable. The further contention of the learned Counsel for the petitioners is that the obligation of the petitioners to prove that at the time of the alleged offence they were not in charge of and were not

arise only when the complainant makes necessary averments in the complaint and establish the fact. As the complainant has not specifically pleaded about the day-to-day responsibilities of the petitioners, no prosecution would be launched as against the petitioners and the complaint is liable to be quashed.

6. Per contra, the learned counsel appearing for the respondent/complainant would submit that it is imperative on the part of the petitioners/accused to comply with all the legal requirements as contemplated under the National Housing Bank (Amendment Act 2000) Central Act No.15/2000 (herein after referred as 'Act'). In case of any violations, the complainant/respondent is legally entitled and competent to file the complaint. Further it cannot be disputed by the petitioners/accused that they carried on the business of Housing Finance with the main object and the Net Owned Fund of the company for the year 1999-2000 was Rs.142.86 lakhs. The 1st accused company applied for certificate of Registration under Section 29(A) of the NHB Act by its letter dated 30.09.2000. Subsequently the complainant bank vide its letter dated 23.08.2001 sought for certain further informations but that was not complied with. Subsequently, legal action was initiated by issuing show-cause notice dated 20.11.2002 and 11.02.2003. The show cause notices were issued by calling upon the petitioners 2 to 7 to show-cause within 15 days from the date of receipt of the notice as to why the application for

grant of certificate of registration should not be rejected and with specific averments as to why proceedings should not be initiated against the accused company and it is functioned in contravention of the provisions of the National Housing Bank Act, 1987.

7.The counsel appearing for the respondent/complainant has further submitted that though reply was sent by the 1st accused for the show-cause notices, no sufficient and acceptable reason was given for the non-compliance of the legal requirements. So, as per the communication dated 24.04.2003 the application of the 1st accused company was rejected. Thereafter, the 1st accused company preferred an Appeal No.7(3)/2003-CP before the appellate authority that is the Ministry of Finance, Department of Economic Affairs (Banking Division). Therefore, by the order dated 18.03.2004 a direction was given to the accused company to furnish details of information immediately, as required by the complainant/respondent by giving 10 days time. However, as the informations given by the 1st accused company were not satisfactory, the complainant/respondent was constrained to reject the application for grant of certificate of registration and the order of rejection was passed by considering all the factual and legal aspects. Further, the 1st accused company cannot run the business of housing finance as defined under Section 2 (d) of the NHB Act, 1987.

8. Further the learned counsel for the respondent/complainant has also pointed out that the 1st accused company has failed to comply with the requirement as mentioned in the order dated 11.02.2005. So, the complaint filed by the respondent/complainant is having legal sanctity and the same is to be permitted to proceed with further in accordance with law.

9. I heard Mr.S.John Sathyan, learned counsel appearing for the petitioners and Mr.S.Natanarajan, learned counsel appearing for the respondent in both the Criminal Original Petitions and all the material available on records are perused.

10. Since the complaint is projected that the petitioners/accused has violated the requirement of registration, it is useful to refer the particular provision as contemplated under the National Housing Bank (Amended Act, 2000).

29. A. Requirement of registration and net owned fund:

1. Not with standing anything contained in this chapter or in any other law for the time being in force, no housing finance institution, which is a company shall commence or carry on the business of a housing finance institution without-

a) obtaining a certificate of registration issued under this chapter, and

b) having a net owned fund of twenty-five lakh rupees or such other higher amount, as the National Housing Bank may, by notification, specify.

2. Every such housing finance institution shall make an application for registration to the National Housing Bank in such form as may be specified by the National Housing Bank:

Provided that a Housing Finance Institution which is a company in existence on the commencement of the National Housing Bank (Amendment) Act 2000 shall make an application for registration to the National Housing Bank before the expiry of six months from such commencement and notwithstanding anything contained in Sub Section (1) may continue to carry on the business of housing finance institution until a certificate of registration is issued to it or rejection of application for registration is communicated extend to five years to it.

Further section 49 of the said act would read thus:

49. Penalties:

(2A) If any person contravenes the provisions of sub-Section (1) of Section 29, he shall be punishable with

imprisonment for a term which shall not be less than one year but which may extend to five lakh rupees.

11. However, it is to be considered that whether the complaint filed by the complainant has appropriately averred and pleaded the nexus between the affairs of the 1st accused company and the petitioners. At this juncture, I have perused the complaint filed by the complainant before the learned trial Court. Though the complaint has consisted of material factors, the same does not contain any particulars about the nexus between the complainant and the 1st accused company. It is no doubt that the complainant ought to have pleaded the nexus and access between the 1st accused company and the petitioners in respect of the management and day-to-day affairs of the company. Even the scrutiny of the complaint has not shown any materials or pleadings about the connectivity of the petitioners with the 1st accused company. Hence, in the considered opinion of this Court that it is not only a major setback for the further proceedings of the complaint, but the same would certainly affect the root of the case.

12. At this juncture, the following judgments relied on by the learned counsel for the petitioners are taken up for consideration and in the opinion of this Court the same would be applicable to the legal as well as

factual aspects of this case:

I. ***CDJ 2009 SC 1340 (K.K.Ahuja v. V.K.Vora & Another)*** it is stated as follows:

"...Therefore, the averment in a complaint that an accused is a director and that he is in charge of and is responsible to the company for the conduct of the business of the company, duly affirmed in the sworn statement, may be sufficient for the purpose of issuing summons to him. But if the accused is not one of the persons who falls under the category of 'persons who are responsible to the company for the conduct of the business of the company' (listed above), then merely by stating that 'he was in charge of the business of the company' or by stating that 'he was in charge of the day to day management of the company' or by stating that he was in charge of, and was responsible to the company for the conduct of the business of the company', he cannot be made vicariously liable under section 141(1) of the Act.

15. Section 41 uses the words "was in charge of, and was responsible to the company for the conduct of the business of the company". It is evident that a person who can be made vicariously liable under sub-section (1) of Section 141 is a person who is responsible to the company for the conduct of the business of the company and in

addition is also in charge of the business of the company. There may be many directors and secretaries who are not in charge of the business of the company at all. The meaning of the words "person in charge of the business of the company" was considered by this Court in *Girdhari Lal Gupta v. D.N.Mehta* [1971 (3) SCC 189] followed in *State of Karnataka v. Pratap Chand* [1981 (2) SCC 335] and *Katta Sujatha vs. Fertiliser & Chemicals Travancore Ltd.* [2002 (7) SCC 655]. This Court held that the words refer to a person who is in overall control of the day to day business of the company. This Court pointed out that a person may be a director and thus belongs to the group of persons making the policy followed by the company, but yet may not be in charge of the business of the company; that a person may be a Manager who is in charge of the business but may not be in overall charge of the business; and that a person may be an officer who may be in charge of only some part of the business.

17. Therefore, the averment in a complaint that an accused is a director and that he is in charge of and is responsible to the company for the conduct of the business of the company, duly affirmed in the sworn statement, may be sufficient for the purpose of issuing summons to him. But

if the accused is not one of the persons who fails under the category of 'persons who are responsible to the company for the conduct of the business of the company' (listed in para 14 above), then merely by stating that 'he was in charge of the business of the company' or by stating that 'he was in charge of the day to day management of the company' or by stating that he was in charge of, and was responsible to the company for the conduct of the business of the company', he cannot be made vicariously liable under section 141(1) of the Act."

II. **(2004) 7 Supreme Court Cases 15 (Monaben Ketanbhai Shah and Another v. State of Gujarat and Others)** it is stated as follows:

"6.From the above, it is evident that in the complaint there are no averments against the appellants except stating in the title that they are partners of the firm. Learned counsel for the respondent complainants contended that a copy of the partnership deed was also filed which would show that the appellants were active in the business. No such document was filed with the complaint or made part thereof. The filing of the partnership deed later is of no consequence for determining the point in issue. Section 141 does not make all

partners liable for the offence. The criminal liability has been fastened on those who, at the time of the commission of the offence, were in charge of and were responsible to the firm for the conduct of the business of the firm. These may be sleeping partners who are not required to take any part in the business of the firm; they may be ladies and others who may not know anything about the business of the firm. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and establishes that fact. The present case is of total absence of requisite averments in the complaint."

III. CDJ 2010 SC 650 (State of NCT of Delhi Through Prosecuting Officer, Insecticides, Government of NCT, Delhi v. Rajiv Khurana)

"19.....

(iv) Other officers of a company cannot be made liable under sub-section (1) of Section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence."

13. It is, no doubt, imperative on the part of the complainant to plead in a detailed manner that the petitioners are very well responsible and having nexus with the affairs of the company and the complaint must contain the exact role played by each of the petitioners in order to fasten criminal liability. It is unfortunate to hold here that no complaint shall be entertained in the absence of pleading to connect the petitioners with the affairs of the 1st accused company.

14. For the forgoing discusses, this Court is constrained to hold that the complaint in C.C.No.4331 of 2010, on the file of the learned IInd Metropolitan Magistrate, Egmore, Chennai, is lacking of materials and pleadings to connect the petitioners and the 1st accused company, hence the same is liable to be quashed. Accordingly quashed.

15.In the result, both the Criminal Original Petitions are allowed and the proceedings in C.C.No.4331 of 2010, on the file of the learned IInd Metropolitan Magistrate, Egmore at Chennai, are hereby quashed. Consequently, connected miscellaneous petitions are closed.

12.07.2017

Note:Issue order copy on 21.09.2017

Speaking order

Index : Yes

vs

To

The IInd Metropolitan Magistrate,
Egmore, Chennai.



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M.V.MURALIDARAN,J.

VS



**Pre-Delivery Judgment in
Crl.O.P.Nos.1593 and 10570 of 2011
and
M.P.Nos.1 and 1 of 2011**

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