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

Decided on : 18th May, 2017

\+ WP(CRL) 949/2009

COL. (RETD.) H.C. GOSWAMI ..... Petitioner
Through: Mr. Sandeep P. Agarwal, Sr.Advocate with Mr. Rajesh Pathak, Advoate

versus

STATE OF DELHI & ANR ..... Respondent
Through: Ms. Smriti Dutta, proxy counsel for Mr. Rahul Mehra, Standing Counsel for R-1/State
Mr. Vinod Kumar and Mr. Aman Bhardwaj, Advocate for R-2

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. The petitioner concededly was one of the directors of a company named M/s. C.T. Cotton Yarn Ltd. On 25.01.2001 when cheque bearing no.757055 for Rs.57,00,000/- drawn on account no.20896, Canara Bank, 74, Janpath, New Delhi of the said company (accused) was issued, amongst others, under his signatures, he being an authorised signatory. The said cheque was admittedly presented by the drawee Frick India Ltd. (complainant / second respondent herein) in its bank on 22.01.2002 for encashment but was returned on the next day (i.e. 23.01.2002) unpaid with remarks “funds insufficient”. The

drawee of the cheque, Frick India Ltd. through its authorized representative instituted a criminal complaint in the court of the Additional Chief Metropolitan Magistrate (ACMM), Patiala House Courts, New Delhi on 22.03.2002 alleging offence under Section 138 of the Negotiable Instruments Act, 1881 seeking prosecution of the said company and its various directors including the petitioner shown in the array as the third accused. It is stated that the court of the Magistrate took cognizance and eventually issued process on the said complaint against the petitioner.

2. By the present petition invoking Articles 226 and 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 (Cr. PC) the petitioner prays for quashing of the above-said criminal complaint case (registered as no.242/1/02) pending in the court of Mr. Jagdish Kumar, Metropolitan Magistrate, New Delhi.

3. On 28.07.2009, when the petition was heard for the first time, it was submitted on behalf of the petitioner that he had been dragged in the litigation which had been pending for over seven years even though he was a paid employee of the accused company, he choosing to restrict the prayer at that stage for exemption from personal appearance to be granted. The subsequent proceedings, however, show that on 10.10.2012, he pressed the prayer for quashing of the case against him primarily on the ground that no notice under Section 138 of the Negotiable Instruments Act had been issued to him. It is this contention which is pressed at the final hearing.

4. During the course of the proceedings arising out of the writ petition at hand, the second respondent (complainant company) submitted counter affidavit. The petitioner filed some more documents, amongst others, by an additional affidavit. Written synopsis was also submitted.

5. From the pleadings, documents and submissions made in these proceedings, some undisputed facts germane to the prayer made before this court have come to the fore which may be taken note of at this stage. In the face of duly authenticated record (form 32) obtained from the office of Registrar of Companies, as indeed the information obtained under the Right to Information Act, 2005, from the said office, the second respondent through counsel fairly concedes that the petitioner had resigned from the position of the Director of the accused company on 16.10.2001. It is admitted that the cheque in question, issued on 25.01.2001 was not presented for encashment during the initial period of its validity. Presumably with the assistance of the accused company, it was revalidated on 25.07.2001 but presented for encashment only on 22.01.2002. Indisputably, the petitioner was the signatory of the cheque as also the director of the accused company on whose account the cheque was drawn both on the date of initial issue (25.01.2001) as also on the date of its revalidation (25.07.2001). But, he had ceased to be a director by 22.01.2002 when the cheque was presented at the bank for encashment, he having resigned from the position of director on 16.10.2001.

6. The averments in (para 7 of) the criminal complaint submitted before the court of the Magistrate, as indeed the evidence adduced in

its support, clearly show that it is admitted case of the complainant company (second respondent) that after the cheque had been returned unpaid on 23.01.2002, a notice of demand was issued for and on behalf of the complainant company on 06.02.2002, it being addressed only to the accused company and served at its office address. It is the non-payment of the amount of the cheque in the wake of such demand notice which was pleaded as the cause of action for filing the criminal complaint. To leave no scope for doubts, it may be mentioned that the learned counsel for the second respondent (complainant) fairly conceded that no such notice of demand was addressed or endorsed to the petitioner before institution of the criminal case.

7. The offence punishable under Section 138 of the Negotiable Instruments Act, 1881 is provided in law as under :-

> *"138. Dishonour of cheque for insufficiency, etc., of funds in the account.— Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person 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 provision of this Act, be punished with imprisonment for a term which may extend to two year, or with fine which may extend to twice the amount of the cheque, or with both:*
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> *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 amount 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."

8. A bare reading of the above provision shows that mere issuance of a cheque does not constitute an offence. The return of the cheque by the bank without payment for either of the two reasons set out in the above provision also does not complete the offence. It is the non-payment of the amount of money represented by the cheque within the statutory period, after service of a notice of demand on the drawer by the drawee of the cheque which constitutes the offence made punishable by the above provision of law.

9. Section 141 of the Negotiable Instruments Act, 1881 deals with offences by companies. It runs thus :-

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:*
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> *"Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this chapter."*

(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.

> *Explanation.—For the purposes of this section,—*
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> *(a) "company" means any body corporate and includes a firm or other association of individuals; and*
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> *(b) "director", in relation to a firm, means a partner in the firm."*

10. Noticeably, the above provision exposes every person responsible for the conduct of business of the company "at the time the offence was committed" to prosecution, with the company, unless it can be shown by such person that the acts constituting the offence were committed "without his knowledge" or that he had exercised "all due diligence to prevent the commission of such offence". Sub-

section (2) of Section 141 contains a deeming provision of culpability on the part of such directors, managers, secretary or other officers as are proved to have committed acts indicating having given "consent" or been guilty of connivance or neglect leading to the non-payment of the cheque amount constituting the offence under Section 138 of the Negotiable Instruments Act, 1881.

11. The petitioner was not a director in the company on the date the cheque was presented for encashment. No notice in terms of Section 138 of the Negotiable Instruments Act was issued to or served on him. Having resigned from the position of the director, there was no occasion for him to be privy to the service of notice of demand on the company. Since he was no longer responsible for the conduct of the business of the company, and had no occasion to be aware of the dishonor of the cheque or the notice of demand served in its wake, it cannot be said by any stretch of reasoning that he had knowledge or could have exercised due diligence to prevent the commission of the offence or is guilty of connivance or neglect, there being no material shown to impute consent.

12. For the foregoing reasons, the continuance of the criminal proceedings against the petitioner is found to be an abuse of the judicial process. This court is duty bound to secure the ends of justice by taking measures to prevent such abuse of judicial process.

13. Thus, the petition is allowed. The criminal proceedings against the petitioner in Criminal complaint case no.242/1/2002 titled Frick India Ltd. Vs. C.T. Cotton Yard Ltd. and Ors. pending in the court of

the Metropolitan Magistrate on the complaint of the second respondent are hereby quashed.

14. The petition is disposed of in above terms.

R.K.GAUBA, J.

MAY 18, 2017
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