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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on:- 4th December, 2018

+ CRL.M.C. 3729/2017 & CrI.M.A. 15136/2017

CHANAKYA BHUPEN CHAKRAVARTI & ANR...

Petitioners

Through: Mr. Mohit Mathur, Sr. Adv.
with Ms. Sonam Gupta, Mr.
Anurag Tandon & Mr. Mayank
Sharma, Adv.

versus

MRS RAJESHRI KARWA

..... Respondent

Through: Mr. Divyakant Lahoti, Adv.

+ CRL.M.C. 3730/2017 & CrI.M.A.15138/2017

CHANKYA BHUPEN CHAKRAVARTI & ANR.....Petitioners

Through: Mr. Mohit Mathur, Sr. Adv.
with Ms. Sonam Gupta, Mr.
Anurag Tandon & Mr. Mayank
Sharma, Adv.

versus

NAND KISHORE KARWA HUF

..... Respondent

Through: Mr. Divyakant Lahoti, Adv.

+ CRL.M.C. 3731/2017 & CrI.M.A. 15149/2017

CHANAKYA BHUPEN CHAKRAVARTI & ANR

Petitioners

Through: Mr. Mohit Mathur, Sr. Adv.
with Ms. Sonam Gupta, Mr.
Anurag Tandon & Mr. Mayank
Sharma, Advs.

versus

PRAMOD KARWA Respondent

Through: Mr. Divyakant Lahoti, Adv.

+ CRL.M.C. 3732/2017 & CrI.M.A. 15152/2017

CHANAKYA BHUPEN CHAKRAVARTI & ANR .. Petitioner

Through: Mr. Mohit Mathur, Sr. Adv.
with Ms. Sonam Gupta, Mr.
Anurag Tandon & Mr. Mayank
Sharma, Advs.

versus

NAND KISHORE KARWA Respondent

Through: Mr. Divyakant Lahoti, Adv.

+ CRL.M.C. 3733/2017 & CrI.M.A. 15154/2017

CHANKYA BHUPEN CHAKRAVARTI & ANR..... Petitioner

Through: Mr. Mohit Mathur, Sr. Adv.
with Ms. Sonam Gupta, Mr.
Anurag Tandon & Mr. Mayank
Sharma, Advs.

versus

NILESH KARWA HUF Respondent

Through: Mr. Divyakant Lahoti, Adv.

+ CRL.M.C. 3734/2017 & CrI.M.A. 15156/2017

CHANAKYA BHUPEN CHAKRAVARTI & ANR
Petitioners

Through: Mr. Mohit Mathur, Sr. Adv.
with Ms. Sonam Gupta, Mr.
Anurag Tandon & Mr. Mayank
Sharma, Adv.

versus

SULOCHANA KARWA Respondent

Through: Mr. Divyakant Lahoti, Adv.

+ CRL.M.C. 3735/2017 & CrI.M.A. 15158/2017

CHANKYA BHUPEN CHAKRAVARTI & ANR.....Petitioners

Through: Mr. Mohit Mathur, Sr. Adv.
with Ms. Sonam Gupta, Mr.
Anurag Tandon & Mr. Mayank
Sharma, Adv.

versus

PRAMOD KARWA HUF Respondent

Through: Mr. Divyakant Lahoti, Adv.

+ CRL.M.C. 3736/2017 & CrI.M.A. 15160/2017

CHANAKYA BHUPEN CHAKRAVARTI & ANR....
Petitioners

Through: Mr. Mohit Mathur, Sr. Adv.
with Ms. Sonam Gupta, Mr.
Anurag Tandon & Mr. Mayank
Sharma, Adv.

versus

NILESH KARWA

..... Respondent

Through: Mr. Divyakant Lahoti, Adv.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. On the criminal complaints (CC Nos. 4401, 4402, 4408, 4404, 4407, 4406, 4405, 4403 of 2017) instituted by the respondents in these petitions, each alleging offence under Section 138, Negotiable Instruments Act, 1881 (NI Act) having been committed concerning different set of cheques, the Metropolitan Magistrate by his almost identical orders passed on 26.04.2017, summoned amongst others, the petitioners as accused, invoking the vicarious criminal liability under Section 141 NI Act, 1881 against them, they having been shown in the array as fourth and fifth accused, their description being that of a director of Amrapali Silicon City Pvt. Ltd. which is the company against whose account and on whose behalf the said cheques had been issued, the same having been concededly returned unpaid.

2. The petitioners have come up to this Court invoking the inherent power and jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.) to bring a challenge to the said summoning orders primarily contending that they were non-executive directors of Amrapali Silicon City Pvt. Ltd. (the company accused) at all relevant points of time, though their additional

submission also is that they had already resigned from even such position prior to the presentation of the cheques for encashment.

3. The submission of the petitioners that on account of being “non-executive directors” nominees of the investor company, they were not responsible for the day-to-day affairs or conduct of the business of the company accused, is founded primarily on copies of Form 32 submitted pursuant to sections 303 (2), 264(2) or 266 (1) (a) and 266 (1)(b) (iii) of the Companies Act, 1956, the said document indicating their appointment as “non-executive directors” in the company accused on 07.08.2012. It has been submitted that this fact was within the knowledge of the respondent (the complainant before the magistrate) inasmuch as replies were sent on 10.02.2017 to the notices of demand served upon these petitioners, the complainant having scrupulously avoided any reference to such reply in the criminal complaints as also the evidence which was led in its support at the stage of pre-summoning inquiry. The petitioners have also placed reliance on articles of agreement dated 09.10.2015 whereunder the company accused had entered into an arrangement with the respondents for purposes of investment in its group housing project by the respondent (the complainant), which was to be repaid by the said company through the cheques in question under “buy back agreement”. Reliance is also placed on the articles of association of the company accused wherein it is clarified – by clause 36 – that the non-executive directors appointed by the investors – shall have no responsibility for the day-to-day management of the company.

4. The petitions are resisted by the respondents primarily on the submissions that in terms of the articles of association of the company accused, the petitioners being the non-executive directors nominated by the investor company would continue to participate in the management by being on the board of directors and consequently being privy to all transactions entered upon including the liabilities undertaken. It is the submission of the respondent that, from this perspective, the petitioners being privy to the liability arising out of the dishonored cheques cannot escape the presumption being raised in terms of Section 141 NI Act, it being a matter of their burden of proof to show facts to the contrary.

5. During the course of hearing, reference was made primarily to three decisions of the Supreme Court reported as *SMS Pharmaceuticals Pvt. Ltd. vs. Neeta Bhalla* (2005) 8 SCC 89; *Gunmala Sales (P) Ltd. vs. Anu Mehta* (2015) 1 SCC 103 and *Standard Chartered Bank vs. State of Maharashtra* (2016) 6 SCC 62. Similar issues had come before this Court in a batch of matters led by *Jwala Devi Enterprises P. Ltd. vs. Fadi EL Jaouni* 2018 SCC Online Del 10030. This Court taking note of the penal clause under Section 138 held thus:-

“6. It is clear from the plain reading of the above quoted provision and is now also well settled that the offence under Section 138 of the Negotiable Instruments Act does not stand constituted merely upon dishonor of a cheque. The dishonor of a cheque which had been issued by the person (who is sought to be prosecuted) in favour of the complainant must be followed by a notice of demand within the stipulated period. It is the non-payment of the

amount of the cheque within the statutory period after service of the notice of demand which constitutes the offence that is punishable under the aforementioned provision of law”.

6. With reference to vicarious liability under Section 141 NI Act, taking note of the rulings in *SMS Pharmaceuticals Pvt. Ltd* (supra), *Gunmala Sales (P) Ltd.*(supra) and *Standard Chartered Bank* (supra) and the guiding principles were culled out in *Jwala Devi Enterprises P. Ltd.* (supra) thus:-

“14. The guiding principles with reference to Section 141 of the Negotiable Instruments Act, 1881, which are now well settled by judicial pronouncements, some of which have been noted above, may be summarised thus :-

(i) It is only those persons who are in charge of or responsible for the conduct of the business of the company at the time of commission of the offence under Section 138 of the Negotiable Instruments Act, 1881 who can be subjected to criminal action with reference to Section 141;

(ii). If the person committing an offence under Section 138 of the Negotiable Instruments Act, 1881 is a company, the person who was signatory to the cheque which is dishonoured is clearly responsible for the incriminating act and would be liable to be proceeded against under Section 141 (2);

(iii). By virtue of the office they hold, the persons working in the capacity of the Managing Director or Joint Managing Director are deemed to be in charge of, and responsible for the conduct of the business of, the company and, therefore, can be proceeded against in terms of Section 141;

(iv). Merely because a person is a director of the company is not sufficient to make him liable under Section 141, there being no deeming that by holding such position

he is in charge of, or responsible for the conduct of the business of, the company within the meaning of Section 141;

(v). It is necessary for the complainant to specifically aver in the complaint that at the time the offence was committed, the person sought to be prosecuted was in charge of, or responsible for the conduct of the business of, the company in terms of Section 141, there being no need for further particulars to be given in the complaint about his role, this being subject to proof at the trial;

(vi). The person who has been summoned as an accused for offence under Section 138 of the Negotiable Instruments Act, 1881 on the basis of averment that he was director of the company accused, he being in charge of or responsible for the conduct of its business cannot get the complaint quashed by the High Court by filing a petition under Section 482 of the Code of Criminal Procedure, 1973 merely on the ground that no particulars as to his role have been set out in the complaint; and

(vii). The person who has been summoned as an accused for offence under Section 138 of the Negotiable Instruments Act, 1881 by invoking the provision contained in Section 141 may persuade the High Court to quash the process in exercise of its inherent power under Section 482 of the Code of Criminal Procedure, 1973 by furnishing “some sterling incontrovertible material or acceptable circumstances” substantiating his contention that he was not in charge of nor responsible for the conduct of the business of the company “at the time the offence was committed” and thereby showing a case that making him stand the trial would be an abuse of the process of court, but not otherwise”.

7. It may be that under the articles of association of the company accused, the petitioners being the non-executive directors nominated by the investor company have some role to play on the board of

directors. It may also be that no meeting of board of directors could be convened without at least one of them being present. But then, there is some distinction between being privy to what were the affairs of the company and being responsible for its day-to-day affairs or conduct of its business.

8. Dealing with the issue relating to the status of “non-executive directors”, the Supreme Court in *Pooja Ravinder Devidasani vs. State of Maharashtra & Anr.*(2014) 16 SCC 1, ruled thus:-

“17. ...Non-executive Director is no doubt a custodian of the governance of the company but is not involved 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 is 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 NI 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 NI Act. In National Small Industries Corpn. [National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal, (2010) 3 SCC 330 : (2010) 1 SCC (Civ) 677 : (2010) 2 SCC (Cri) 1113] this Court observed: (SCC p. 336, paras 13-14)

“13. 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.

14. 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 fulfilment of the requirements under Section 141.”

9. The respondent (complainant) concededly had received the replies on behalf of the petitioners to the demand notices issued in the wake of the dishonor of the cheques which are the subject matter of these eight petitions. By the said replies, they had specifically informed the complainant that they had no role to play in the day-to-day affairs of the accused company or conduct of its business. It was the responsibility against this backdrop, to set out as to why they wanted to proceed against the petitioners as well. The complaints are conspicuously silent on this score. Rather the complaints would not even acknowledge receipt of the said replies. Same is the position with the affidavits which were filed during the pre-summoning inquiry. The complaints, insofar as they are directed against the petitioners, would, thus, fail even on the averment test.

10. Having regard to the above facts and circumstances, the petitioners concededly being non-executive directors, in absence of any further averments as to their role in the company at the time of

commission of the offences, the presumption under Section 141 NI Act cannot be raised against them.

11. Consequently, the petitions and the applications filed therewith are allowed. The proceedings in the afore-mentioned eight criminal complaint cases against the two petitioners are quashed.

R.K.GAUBA, J.

DECEMBER 04, 2018

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