

\$~13

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

Date of decision: 11.12.2019

+ CRL.M.C. 2028/2017 & Crl.M.A. 8340/2017

AYUSH JAIN

..... Petitioner

Through Mr.Vipul Goel, Adv.

versus

STATE & ORS

..... Respondent

Through Mr. K. K. Ghai, APP for State
Mr.Sanjeev Singh, Adv. with
Mr.Prashant Tripathi & Mr.Dhruv
Malhotra, Advs. For R-2.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (O R A L)

1. Vide the present petition, the petitioner seeks direction thereby to set aside the order dated 10.01.2017 passed by learned MM-01, Patiala House Courts, Delhi for summoning the petitioner in CC No.433/2017 under section 138 of the Negotiable Instruments Act, 1881.

2. The brief facts of the case are that respondent no. 2 -M/s Hero Fincorp Ltd. is a Non-Banking Finance Company, providing loan etc. and has filed a complaint against the petitioner/accused no.4, who is the director of M/s

Vigyan Chemical Pvt. Ltd./accused no.1. The Court below was pleased to summon accused no.4 and one of the directors of M/s Vigyan Chemicals Pvt. Ltd. vide order dated 10.01.2017, whereby the learned Trial Court directed the petitioner to appear on 31.05.2017.

3. Counsel appearing on behalf of the petitioner submits that in the complaint, respondent no.2 has alleged that M/s Vigyan Chemicals Pvt. Ltd. was in need of some finance, accordingly approached the respondent no.2 for loan of Rs.7,30,00,000/- which was sanctioned on 26.05.2015. In pursuance to the sanction letter, the respondent no. 2 entered into Master Facilities Agreement dated 27.05.2015 as well as other supplementary agreements dated 27.05.2015, 20.08.2015, 11.12.2015 and 27.01.2016. However, the petitioner is neither the signatory on the Master Facilities Agreement nor any other Supplementary Agreements. But, M/s Vigyan Chemicals in connivance with each other and in discharge of part of their liabilities issued a post dated installment cheque bearing No.581319 dated 10.11.2016 drawn on Corporation Bank, Delhi for a sum of Rs.3,65,00,000/- for repayment of part of the remaining full liability towards the loan. The said cheque was returned unpaid with remarks '*Funds Insufficient*' with Returning Bank Memo dated 12.11.2016. The respondent no. 2 issued a

statutory notice on 03.12.2016 and 06.12.2016 under Section 138 of the NI Act calling upon the petitioner to make the payment within 15 days. In addition, respondent no. 2 had initiated arbitration proceedings against the petitioner as well as M/s Vigyan Chemicals Pvt. Ltd. The respondent no. 2, thereafter, filed the complaint case mentioned above under Section 138 NI Act against the petitioner.

4. Being aggrieved by the summoning order, the present petition is filed on the ground that the petitioner since beginning had been disputing over the working style of the management of M/s Vigyan Chemicals Pvt. Ltd., therefore, the petitioner was never involved in any affairs of the company. Moreover, he had resigned from the position of Director of M/s Vigyan Chemicals Pvt. Ltd. on 22.02.2016.

5. Learned counsel submits that the petitioner received the copy of proceedings in the arbitration case filed by the respondent no. 2, the petitioner was shocked to see that there were no signatures of the petitioner on the Master Facility Agreement and he had not signed any Personal Guarantee. The signatures on the Personal Guarantee are false and fabricated. The petitioner is neither the signatory on the cheque dated 10.11.2016 nor had signed any loan document such as Master Facility

Agreement, Supplementary Agreements or Personal Guarantee of the respondent no. 2 company.

6. It is further submitted that not having recovered loan from M/s Vigyan Chemicals Pvt. Ltd. and in order to cover lapses of Sh.Mohit Sharma and other officers of the respondent no.2, such as due diligence etc., the respondent no. 2 has falsely implicated the petitioner in the recovery proceedings of the loan.

7. He further submits that the petitioner has already filed a police complaint against the respondent no.2 for illegally cheating, blackmailing, forging documents, fraud, filing of false and fictitious case at Police Station Economic Offence Wing, Delhi. The petitioner has also filed a complaint for registration of FIR under section 156(3) Cr.P.C against respondent no. 2 u/s 107/108/111/120/403/405/409/415/418/420/463/464/468/ 473/474 IPC r/w section 200 and the other provisions of Cr.P.C.

8. Moreover, the cheque in question is dated 10.11.2016 whereas the petitioner had resigned from M/s. Vigyan Chemicals Pvt. Ltd. on 22.02.2016 and respondent no.2 in its claim petition pending before learned Arbitrator has stated that the cheque in question is a security cheque, thus, it does not fall under the ambit of 138 of the NI Act. However, if the allegations made

in the complaint and the documentary evidence placed on judicial record are taken at their face value, the same does not cover offences under section 138 of the NI Act against the petitioner in any matter whatsoever.

9. To strengthen his argument, learned counsel has relied upon the case of ***S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla and Anr.: 2005(7) SCALE 397***, whereby the Court observed as follows:

“the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141.”

10. Learned counsel further submits that it is established law that the responsibility of an official of a company/ trust under Section 141 NI Act has been explained in a case of ***S.M.S. (supra)*** where it is held that it is necessary to specifically aver in the complaint that at the time of committing of offence, the person accused was in charge of and responsible for the conduct of business of the company. The said averment is an essential requirement of Section 141 and has to be made in a complaint. Accordingly, held in above cited case that without this averment being made in the

complaint, the requirement of Section 141 cannot be said to be satisfied.

11. Learned counsel further submits that the offence u/s 141 NI Act runs a vicarious liability and makes Director or other principal officer of a company responsible only when it is found that they are in charge and are responsible for conducting the business of the company. The proviso to Section 141 makes it further clear that nothing contained in sub-section (1) 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. The effect of reading Section 141 is that in a complaint case of dishonoured cheque when a company is principal offender for the offence u/s 138 NI Act, the person in charge of and responsible to the company for the conduct of its business are made offenders by virtue of legal fiction.

12. In addition to above, he submits that in the complaint filed under section 156(3) Cr.P.C. filed by the petitioner, the Trial Court vide order dated 16.09.2019 directed the SHO concerned to register an FIR based on the allegations against respondent no.2 and directed to investigate the matter and also to investigate the role of Sanjay Jain along with other accused persons in the matter and to file report before the Court. Consequently, the

FIR No.168/2019 dated 02.12.2019 has been lodged at Police Station, Vasant Vihar, Delhi for the offences punishable under sections 420/468 IPC.

13. On the other hand, learned counsel appearing on behalf of the respondent No. 2 submits that a cheque in question was issued when the petitioner was Director of M/S Vigyan Chemicals Pvt. Ltd. and he signed Master Facilities Agreement dated 27.05.2015 as well as four supplementary agreements. During the arbitration proceedings, the signature of the petitioner had been sent to FSL, however, the opinion of the Arbitrator that signatures were forged has no relevance. Therefore, the present petition is liable to be dismissed and the issue raised by the petitioner is subject matter of trial.

14. Learned counsel for the respondent no.2 further submits that accused no.1 is a company registered under the Companies Act, 1956 and accused no.2 is the Managing Director/Authorised Signatory of accused no.1, accused nos.3 & 4 are the Directors of accused no.1. At the time of availing the loan facility from the respondent no.2, accused no.2 signed the Master Facilities Agreement dated 27.05.2015. The cheque in question was issued for repayment of the loan availed under the said agreement. Thus, accused nos.2 to 4 are responsible for all the acts and deeds of accused no.1

including and not limited to its business decisions and deliberations.

15. To strengthen his argument, learned counsel for respondent no.2 has relied upon the case of **A.R. Radha Krishna vs. Dasari Deepthi and Ors.:** **2019 SCC OnLine SC 357** whereby the Hon'ble Supreme Court has observed as under:

“9. Having heard learned counsel for the parties and carefully scrutinizing the record, we are of the considered opinion that the High Court was not justified in allowing the quashing petitions by invoking its power under S.482, Cr.P.C. In a case pertaining to an offence under S. 138 and S. 141 of the Act, the law requires that the complaint must contain a specific averment that the Director was in charge of, and responsible for, the conduct of the company's business at the time when the offence was committed. The High Court, in deciding a quashing petition under S. 482, Cr.P.C., must consider whether the averment made in the complaint is sufficient or if some unimpeachable evidence has been brought on record which leads to the conclusion that the Director could never have been in charge of and responsible for the conduct of the business of the company at the relevant time. While the role of a Director in a company is ultimately a question of fact, and no fixed formula can be fixed for the same, the High Court must exercise its power under S. 482, Cr.P.C. when it is convinced, from the material on record, that allowing the proceedings to continue would be an abuse of process of the Court. [See Gunamala Sales Private Limited v. Anu Mehta and Ors., (2015) 1 SCC 103]

10. A perusal of the record in the present case indicates that the appellant has specifically averred in

his complaint that the respondent nos. 1 and 2 were actively participating in the day-to-day affairs of the accused no.1 – company. Further, the accused nos. 2 to 4 (including the respondent nos. 1 and 2 herein) are alleged to be from the same family and running the accused no.1 – company together. The complaint also specifies that all the accused, in active connivance, mischievously and intentionally issued the cheques in favour of the appellant and later issued instructions to the Bank to “Stop Payment”. No evidence of unimpeachable quality has been brought on record by the respondent nos. 1 and 2 to indicate that allowing the proceedings to continue would be an abuse of process of the court.”

16. Counsel for respondent no.2 submits that there are specific averment that the petitioner being Director was incharge of and responsible for the conduct of the company's business at the time when the offence was committed. The cheque in question though is dated 10.11.2016, however, was issued at the time of signing Master Facilities Agreement and supplementary agreements.

17. Heard learned counsel for the parties. The fact remains that as for the signing of Master Facilities Agreement and supplementary agreements, the FSL has opined that the signatures are not of the petitioner. Further, the petitioner filed police complaint as well as complaint under section 156(3) Cr.P.C. to lodge FIR against respondent no.2 and same has been lodged vide FIR No.168/2019 dated 02.12.2019. On perusal of the order dated

16.09.2019, whereby the Trial Court directed to register FIR, it is revealed that as per the FSL report, the disputed signatures on the loan documents are different from the specimen signatures of the respondent no.2. Since as per the ATR, respondent no.2 had not signed the loan documents before proposed accused no.2 Mohit Sharma and he had only received the loan documents purportedly signed by the respondent no.2 from another director of the said company i.e. Sanjay Jain and since the loan amount was disbursed to the said company on the basis of those loan documents, the court below is of the view that prima facie, it appears that an offence of forgery for the purpose of cheating has been committed, which is a cognizable offence. In the case cited by respondent no.2 of **A.R. Radha Krishna (Supra)**, it is specifically observed by the Hon'ble Supreme Court that the High Court must exercise its powers under Section 482 Cr.P.C. when it is convinced from the material on record that allowing the proceedings to continue would be an abuse of process of the Court.

18. However, the signature on the resolution passed by the company are forged, therefore, there was no occasion for the petitioner to appoint Mr.Sanjay Jain to issue cheque in question. Since the document itself is forged, therefore, under no stretch of imagination, it can be held that the

petitioner has been looking after day-to-day affairs of the company and is responsible for the offence under section 138 of the NI Act.

19. In the present case, the signatures were not of the petitioner and because he had complaints regarding day-to-day business of the company, he resigned from the company on 22.02.2016, which is not in dispute, much prior to cheque issued on 10.11.2016.

20. Thus it will be futile exercise and irreparable loss to the petitioner if this Court directs the petitioner to face the trial.

21. Accordingly, I hereby set aside the complaint and further proceedings pending before the Trial Court before the petitioner.

22. In view of above, the petition is allowed and disposed of.

23. The pending application also stands disposed of.

(SURESH KUMAR KAIT)
JUDGE

DECEMBER 11, 2019

ab