IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-M No.16269 of 2018(O&M)
Date of Decision: 18.03.2020

Neeru Gupta ......**Petitioner**

Vs

Ajay Dhawan .....**Respondent**

CORAM: ***HON'BLE MR. JUSTICE RAJ MOHAN SINGH***

Present: Mr. P.S. Ahluwalia, Advocate
for the petitioner.

Mr. K.S. Kang, Advocate
for the respondent.

****

RAJ MOHAN SINGH, J.

CRM No.4011 of 2020

This is an application for placing on record accompanying documents viz. cheque dated 01.10.2016 along with bank memo dated 25.10.2016, cheque dated 01.10.2016 along with bank memo dated 13.10.2016, full and final settlement/agreement dated 18.12.2015 and annual filing before ROC.

For the reasons mentioned in the application, the same is allowed.

Accompanying documents are taken on record subject to all just exceptions.

CRM-M No.16269 of 2018

[1]. Petitioner has preferred this petition for setting aside the order dated 31.01.2017 passed by Judicial Magistrate Ist Class, Patiala, summoning the petitioner and others to face trial under Section 138 of the Negotiable Instruments Act and order dated 01.03.2018 passed by Additional Sessions Judge, Patiala, vide which revision petition filed by the petitioner against the order dated 31.01.2017 was dismissed.

[2]. Brief facts of the case are that the respondent filed a criminal complaint under Section 138 of the Negotiable Instruments Act against M/s D.S.G. Papers Pvt. Ltd. through its Director and authorized signatory Manoj Kumar, Manoj Kumar son of Suraj Bhan Gupta, Director M/s DSG Papers Pvt. Ltd and Neeru Gupta (petitioner). Complainant/respondent has pleaded that presently, he is living in U.S.A. Complaint has been filed through his brother Sanjay Dhawan as Special Power of Attorney. Complainant has pleaded that accused No.2 i.e. Manoj Kumar was having family relations with the family of the complainant. The accused were running the firm in the name and style of D.S.G. Papers Pvt. Limited and the accused allured the complainant and his family members to invest money in the business of the aforesaid firm and they assured 20% shares to the complainant

and his family members. The complainant believed the accused and invested an amount of Rs.33,70,000/- in the firm of the accused. The amount was transferred from complainant's ICICI Bank NRI Account to the account of the accused. The accused allotted 3,09,250 shares of the company in favour of the complainant. Some shares were allotted to brother, father and sister-in-law of the complainant as per their investment. After some time, the accused demanded more money from the family of the complainant. Family members of the complainant were not in a position to pay the amount to the accused. For this reason, the accused asked the father of the complainant to mortgage his house and stood as personal guarantee to secure loan for his company. Due to good relations with the accused and allurement given by the accused, the father of the complainant has mortgaged his house No.7L, Green View, Rajbaha Road, Patiala and stood as personal guarantee to raise funds for the company of the accused. In the year 2012, the accused again contacted the brother of the complainant and asked him to bring the company out of financial crunch. The accused asked for money, but the complainant showed his inability. Due to persistence and the assurance given by the accused that the amount will be the loan towards the company and the reasonable interest will be paid thereupon, the complainant transferred an amount of Rs.1,04,50,000/- on 14.09.2012 and 15.09.2012 to the company of the accused. It came to the knowledge of the complainant that the accused have allotted 55,000 shares at the rate of Rs.100/- each in the name of the complainant, whereas complainant never asked for the same, rather the amount was a loan towards the company. Para No.7 of the complaint reads as under:-

> *"7. That later on when complainant asked accused to return the amount then accused demanded that the shares in the name of the complainant and his family members should be transferred in accused No.2 and accused No.3's name and accused paid Rs.83,77,140/- to complainant and in discharge of his legal debt liability accused issue cheque No.861414 dated 01.10.2016 of ICICI Bank Branch Chhoti Baradari, Patiala for sum of Rs.2,43,73,000/- in favour of complainant as part payment of legally enforceable debt outstanding towards accused persons. At the time of issuing the above said cheque, you assured complainant that the cheque will be honoured as and when the same will be presented for encashment."*

[3]. The cheque on presentation was dishonoured with the remarks of 'insufficiency of funds'. Thereafter, the complainant contacted the accused, but the accused refused to pay the loan amount. The complainant filed an application before IG, NRI Wing, SAS Nagar, Mohali. The accused contacted the complainant and requested for some time with a promise that he will deposit the amount for the clearance of the cheque. Complainant believing the accused granted him further time. In the month of December, the accused again contacted the complainant and asked him to present the cheque for encashment

with an assurance that the cheque will be honoured as and when presented for encashment. The complainant again presented the cheque through his brother and power of attorney holder with his bankers i.e. HDFC Bank Patiala, but the cheque was again dishonoured vide memo dated 13.12.2016. The complainant again contacted the accused, but the accused flatly refused to return the amount of cheque. Finding no alternative, the complainant had to initiate legal proceedings.

[4]. The complainant has further alleged that by way of inducement, the accused had committed the offence of cheating. Due to aforesaid inducement, the complainant has to part with the property i.e. Rs.2,43,73,000/- and the accused have dishonestly misappropriated the same. After receiving the dishonoured cheque from the banker, the complainant got served legal notice dated 30.12.2016 through his counsel upon all the accused. The accused did not pay the amount even after receipt of legal notice. The complainant pleaded in para No.17 of the complaint in the following manner:-

> *"17. That by means of aforesaid act, the accused has rendered themselves liable to be prosecuted under Section 138 of Negotiable Instruments Act, 1881 as amended."*

[5]. Bare perusal of the aforesaid complaint would show that the complainant has not pleaded that the petitioner is incharge and responsible for day to day conduct of the business of the company.

[6]. Judicial Magistrate Ist Class, Patiala vide order dated 31.01.2017, summoned the accused to face trial under Section 138 of the Negotiable Instruments Act.

[7]. Perusal of the aforesaid order dated 31.01.2017 passed by the trial Court would show that the order of summoning is not related to offence under Section 141(2) of the Negotiable Instruments Act. The offence under Section 138 of the Negotiable Instruments Act is relatable to signatory of the cheque only. The cheque in question was signed by Manoj Kumar as authorized signatory.

[8]. Learned counsel for the petitioner contended that the cheque in question was not signed by the petitioner and the complaint is silent about the status of the petitioner. The complainant has not pleaded that the petitioner is incharge and responsible for day to day conduct of the business of the company. The petitioner could not have been summoned under Section 138 of the Negotiable Instruments Act simplicitor as she is not signatory of the cheque. The complaint in question does not disclose any overt-act on behalf of the petitioner. The record would indicate that neither in the complaint, nor in the summoning order, any reference has been made to Section 141 of the Negotiable Instruments Act by virtue of which,vicarious liability has been put in place. Petitioner is a lady and she has been implicated solely because she is wife of Manoj Kumar (signatory

of the cheque). It would be apposite to mention that a person can be arrayed as accused under Section 141 of the Negotiable Instruments Act for advancing vicarious liability of such person. It is incumbent upon the complainant to aver/plead that the accused was incharge and controller of the company at any point of time. No such averments have been made which are mandatory in nature before invoking provisions of Section 141 of the Negotiable Instruments Act. Petitioner being a lady has no role to play with the day to day affairs of the company. Complainant has preferred not to make any such averment in the complaint and therefore, mandatory requirement in terms of Section 141 of the Negotiable Instruments Act has not been complied with.

[9]. Learned counsel for the petitioner relied upon ***S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and another, 2005(4) RCR (Criminal) 141, K.K. Ahuja Vs. V.K. Vora and another, 2009(3) RCR (Criminal) 571, Standard Chartered Bank Vs. State of Maharashtra and others, 2016(2) RCR (Criminal) 778, Manalal Chamaria and another Vs. State of West Bengal and another, 2014(2) RCR (Criminal) 232*** and ***Pooja Ravinder Devidasani Vs. State of Maharashtra and another, 2015(1) RCR (Criminal) 271*** and contended that necessary averments ought to be contained in a complaint before a person can be subjected to a criminal process. A liability under Section 141 of the Negotiable Instruments Act is sought to be fastened vicariously on the petitioner as a Director of the company, the

principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Negotiable Instruments Act contains the requirements for making a person liable under the said provision. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141 of the Negotiable Instruments Act, then he would issue the process. Merely describing a person as Director in the company is not sufficient to satisfy the requirement of Section 141 of the Negotiable Instruments Act. Even a non-director can be liable under Section 141 of the Negotiable Instruments Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him/her. It is necessary to specifically aver in a complaint under Section 141 of the Negotiable Instruments Act that when the offence was committed, the accused person was incharge of, and responsible for the conduct of business of the company. This averment is a necessary requirement of Section 141 of the Negotiable Instruments Act and has to be made in a complaint. In the absence of such averment being made in the complaint, the requirement of Section 141 of the Negotiable Instruments Act cannot be said to be satisfied.

[10]. If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is incharge of, and is responsible to the company, for the conduct of the business of the company. In case of a director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was incharge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence, but in case of non-signatory and Director, Secretary or Manager of the company, an averment has to be made that he/she was incharge of, and was responsible to the company, for the conduct of the business of the company. The view expressed by the Hon'ble Apex Court in ***K.K. Ahuja's case (supra)*** can be relied in this context.

[11]. The persons who are sought to be made criminally liable under Section 141 of the Negotiable Instruments Act should be, at the time the offence was committed, incharge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were incharge of and responsible for the conduct of the business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a Director of a company who was not incharge of and was not responsible for the

conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being incharge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being incharge of and responsible for the conduct of the business of a company at the relevant time. Liability depends on the role, one plays in the affairs of a company and not on designation or status. If being a director or manager or secretary was enough to cast criminal liability, the section would have said so. Instead of "every person" the section would have said "every director, manager or secretary in a company is liable". In this context, the law laid down by the Hon'ble Apex Court in ***Standard Chartered Bank's case (supra)*** can be relied.

[12]. Although, no particular form for making such an allegation is prescribed, but wholesome reading of the complaint would show that the substance of the accusation discloses that the accused person was incharge of and responsible for the conduct of the business of the company at the relevant time. The law laid down by the Hon'ble Apex Court in ***A.K.Singhania Vs. Gujarat State Fertilizer Company Ltd., 2013(4) RCR (Criminal) 777*** and ***Manalal Chamaria and another's case (supra)*** can be relied in this context.

[13]. Learned counsel further submitted that under vicarious liability on dishonouring of cheque issued by a company, a non-executive Director of a company could not be prosecuted. Non-executive Director is no doubt a custodian of the governance of the company, but does not involve in the day-to-day affairs of the running of its business and only monitors the executive activity. Simply because a person is a Director of a company, does not make him liable under the Negotiable Instruments Act. Only those persons who were incharge 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. For making a Director of a company liable for the offences committed by the company under Section 141 of the Negotiable Instruments Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the company. Learned counsel by referring to ***Pooja Ravinder Devidasani's case (supra)***, submitted that the ratio of aforesaid case fully covers the present controversy. Para No.17 of the said judgment is relevant to be quoted hereasunder:-

> *"17. There is no dispute that the appellant, who was wife of the Managing Director, was appointed as a Director of the Company-M/S Elite International Pvt. Ltd. on 1st July, 2004 and had also executed a Letter of Guarantee on 19th January, 2005. The cheques in question were issued during April, 2008 to September, 2008. So far as the dishonor of Cheques is concerned, admittedly the cheques were not*

signed by the appellant. There is also no dispute that the appellant was not the Managing Director but only a non-executive Director of the Company. Non-executive Director is no doubt a custodian of the governance of the Company but does not involve 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 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 N.I. 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 N.I. Act. In National Small Industries Corporation (supra) this Court observed:

> *"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.

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 fulfillment of the requirements under Section 141."

[14]. Learned counsel also submitted that summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The Court has to examine the nature of allegation made in the complaint and the evidence both oral and documentary in support thereof. The Court has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise. Learned counsel referred to ***Pepsi Foods Ltd. and another Vs. Special Judicial Magistrate and others, 1997(4) RCR (Criminal) 761***.

[15]. Per contra, learned counsel for the respondent relied upon ***Sonu Gupta Vs. Deepak Gupta and others, 2015(2) RCR (Criminal) 32, Dev Raj Garg Vs. State of Punjab, 1997(2) RCR***

(Criminal) 26 and ***Smt. Manju Joon Vs. State of Haryana and others, 2009(1) RCR (Criminal) 363*** and contended that the pleadings to the effect that the petitioner was active in business of the firm and satisfies the requirement of Section 141 of the Negotiable Instruments Act. The complaint cannot be quashed on the ground that there was no specific averment in the complaint that the petitioner was incharge and responsible to the firm for conduct of the business. Petitioner would be at liberty to prove before the Court that she was not responsible for conduct of the business of the firm and therefore, not liable.

[16]. I have considered the controversy.

[17]. After the decision of ***Smt. Manju Joon's case (supra)***, the Hon'ble Apex Court after relying upon ***S.M.S. Pharmaceuticals Ltd. case (supra)*** in ***K.K. Ahuja's case (supra), Standard Chartered Bank's case (supra)*** and ***Pooja Ravinder Devidasani's case (supra)*** has categorically reiterated the view expressed by the Hon'ble Apex Court in ***S.M.S. Pharmaceuticals Ltd. case (supra).*** The facts of ***Pooja Ravinder Devidasani's case (supra)*** are more or less as that of the present case. The arguments of learned counsel for the respondent that the signatory of the cheque signed the same being authorized signatory, would not advance the case of the respondent in any manner, nor signatures of the petitioner on other documents of the company, would advance the case of the

respondent in the absence of any averment to that effect made in the complaint in addition to the averment in respect of the petitioner being incharge and responsible to the company.

[18]. Perusal of the order dated 31.01.2017 passed by the trial Court, summoning the petitioner would also show that the summoning order is only under Section 138 of the Negotiable Instruments Act. The order does not show that the petitioner has been summoned under Section 141(2) of the Negotiable Instruments Act. The offence under Section 138 of the Negotiable Instruments Act is relatable to the signatory of the cheque. ***Sonu Gupta's case (supra)*** and ***Dev Raj Garg's case (supra)*** relates to order of summoning under Section 204 of Cr.P.C. Those cases are related to penal offences, where no such averments are required to be made in the context of Section 141 of the Negotiable Instruments Act. The requirement of Section 141 of the Negotiable Instruments Act is somewhat different being of vicarious liability, therefore, requirement of summoning in penal offences is not just at par with that of summoning under Section 141 of the Negotiable Instruments Act. The view expressed in ***S.M.S. Pharmaceuticals Ltd. case (supra)*** was further relied by the Hon'ble Apex Court in subsequent judgments i.e. ***Central Bank of India Vs. Asian Global Limited and others, 2010(11) SCC 203, Harshanda Kumar "D" Vs. Rehati Lata Killey and others, 2011(3) SCC 351, Anita Handa Vs. M/s Godfather Tour and Travels Pvt. Ltd., 2012(2) RCR (Criminal) 854*** and ***Golwal***

<u>Sales Private Limited Vs. Anu Mehta and others, 2015(1) SCC 103</u>.

[19]. In view of aforesaid settled position of law, it can be seen that the complaint in question is wanting on material particulars. The requirement of law in respect of creating vicarious liability must be strictly construed. Since it is a penal provision, creating vicarious liability, therefore, it is not sufficient to make bald and cursory statement in the complaint that Director is incharge and responsible to the company for the conduct of the business of the company without anything more. Rather in the instant case, no such averments have been made in respect of the petitioner being Director is also incharge and responsible to the company for the conduct of the business. The complaint must contain as to how and in what manner, the Director was incharge or was responsible to the company in conduct of its business. This should be in consonance with strict interpretation of penal statutes, especially, where such statute creates vicarious liability.

[20]. In ***<u>National Small Industries Corporation Vs. Harmeet Singh Paintal and another, 2010(3) SCC 330</u>***, the Hon'ble Apex Court has interpreted on the aforesaid lines that requirement in terms of pleading has to be construed not only to the extent of mentioning the Director to be incharge of and responsible to the company for doing its business, but strictly spell

out as to how and in what manner, he was incharge and responsible for the conduct of its business.

[21]. The provisions of Section 141 of the Negotiable Instruments Act are *pari materia* with the provisions of Insecticide Act. In the absence of specific averments in the complaint, no Director can be proceeded against. No Director is required to prove his innocence by leading evidence in the trial, once the averments to this effect are not incorporated in the complaint. The averments made in the present complaint are fell short of statutory requirement. The prosecution against Director cannot be held sustainable in the absence of mandatory requirement in the pleadings.

[22]. For the reasons recorded hereinabove, this petition is allowed. Consequently, the complaint, order dated 31.01.2017 passed by Judicial Magistrate Ist Class, Patiala and order dated 01.03.2018 passed by Additional Sessions Judge, Patiala are quashed.

18.03.2020 **(RAJ MOHAN SINGH)**

Prince **JUDGE**

Whether speaking/reasoned Yes/No

Whether reportable Yes/No