

\$~35

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

Date of decision: 25.02.2020

+ CRL.REV.P. 147/2017

M/S BELLPOLY MOULDERS PVT LTD Petitioner
Through Mr. Madhav Khurana with Mr. Jai
Sahai Endlaw and Ms. Trishal Mittal,
Advs.

versus

M/S SUNLIGHT AEROSOL Respondent
Through Adv. (appearance not given) with
complainant in person

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

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

1. The present revision petition is filed under Section 397 of Cr.P.C. for setting aside the judgment dated 31.01.2017 passed by learned District & Sessions Judge in Crl. Appeal No. 54439/2016 thereby upholding judgment dated 26.11.2015 and order of sentence dated 31.03.2016 passed by learned metropolitan magistrate (N.I. Act), West District, in CC no. 194/1/12 under section 138 of the Negotiable Instruments Act, thereby convicted the petitioner/accused and sentenced him to undergo simple imprisonment for a period of four months along with payment of ₹2,00,000/- as compensation to complainant and in default thereof further simple imprisonment of three

months.

2. Case of complainant/respondent, inter-alia, is that it is a proprietorship firm, engaged in the business of silicon spray etc., filed a criminal complaint bearing No. 194/1/12 before the learned Metropolitan Magistrate against the petitioner/accused alleging that against outstanding liability, the accused/petitioner issued a cheque bearing No. 609424 dated 05.01.2012 for Rs. 1,00,000/- drawn on Allahabad Bank, Vasundhra, Ghaziabad. The said cheque on presentation was dishonoured with the remarks "*Exceeds arrangements*". Thereafter respondent sent a legal notice dated 25.01.2012 to petitioner and same was replied and when no payment was received from petitioner, complainant filed the complaint in question.

3. Case of petitioner is that complaint is not maintainable under section 138 and 141 of NI Act as complainant is neither proprietor of M/s Sunlight Aerosol, New Delhi nor Shri Zile Singh is authorized person to file the complaint, nor complainant filed any document on record in support thereof. Moreover, no legal notice was issued to drawer of the cheque i.e. M/s Bellpoly Moulders Pvt. Ltd. as mandatorily required u/s 138(b) of the Act. In addition to above, no notice u/s 251 Cr.P.C. has been framed by learned trial court against drawer of the cheque i.e. M/s Bellpoly Moulders Pvt. Ltd.

but against Sanjiv Kapoor in his individual capacity. The goods supplied by complainant were of sub-standard quality and contrary to their own quotation and ISI specification which resulted in rejection of the goods of petitioner by their buyers. Hence, there was no criminal liability of petitioner which could be fastened u/s 138 of NI Act. Moreover, complainant itself admitted that it supplied the goods irrespective to its own quotation and against ISI standard. The complainant failed to make any averments against Shri Sanjiv Kapoor as required under section 141 of the NI Act, hence the complaint is not maintainable and is liable to be dismissed summarily.

4. Learned counsel for petitioner submits that in addition to above, accused company, during pendency of the criminal complaint, was wound up vide order dated 23.02.2016 in C.P. No. 463/13.

5. It is further submitted that learned trial court as well as Appellate Court have failed to marshal entire evidence led by the parties in the right and true perspective and have not given any cogent and adequate reasons for discarding defense of petitioner. Judgment of conviction passed by learned trial court and upheld by Appellate Court is not sustainable, keeping in view settled law and also material infirmities in the evidence that is available on judicial record.

6. Learned counsel has drawn attention of this Court to notice under Section 251 Cr.P.C. dated 06.04.2013 framed against petitioner which is reproduced as under:-

“I Satvir Singh Lamba, MM-01 (West) Delhi do hereby serve the present notice upon the accused Sanjiv Kapoor, S/o Shri O.P.Kapoor, Aged about 50years, R/o 58, North Avenue, Punjabi Bagh, New Delhi - 26.

It is the allegation against you that you had issued a cheque bearing no. 609424 dt. 05.01.2012 for Rs.1,00,000/- drawn on Allahabad Bank, Vasundhra, Ghaziabad-201012 in favour of complainant in discharge of your legal debt/liability towards the complainant. On presentation by the complainant with its banker got dishonoured with remarks "Exceeds Arrangement" as reflected vide returning memo dated 11.01.2012 with remarks of accused bank received through Bank. Thereafter legal demand notice dated 25.01.2012 was served upon you calling you to pay the cheque amount. Despite the service of the legal notice you have not paid the cheque amount within stipulated period of 15 days as per NI Act, and thus committed the offence under Section 138 NI Act within cognizance of this court. By this notice it is called upon you that why you should not be tried of the said offence.”

7. Learned counsel submits that aforesaid notice was issued only against the petitioner in individual capacity. However, notice under section 251 Cr.P.C. has not been framed against drawer of the cheque i.e. M/s Bellpoly Moulders Pvt. Ltd. Moreover, in the complaint, there is no averment that petitioner is responsible for day to day affairs of the company. As per Section 141 of the NI Act, company must be arrayed as accused and in

absence of the company being arrayed as an accused, complaint against the director or proprietor is not maintainable.

8. To strengthen his arguments, learned counsel has relied upon the case of ***Vijay Power Generators Limited Vs. Tarun Engineer Syndicate: 2014 SCC OnLine Del 2957***

“14. In the complaint relevant to Crl. A. Nos.1433/2013; 1434/2013; 1435/2013; 1436/2013 only M/s. Tarun Engineering Syndicate was prosecuted. Though the firm was prosecuted through Mr. Tarun Seth, he was not made an accused as a partner of the firm. Thus, he had no opportunity to defend himself as an accused. He only defended the firm as its partner. Therefore, it is only the partnership firm which is liable to be convicted in the aforesaid four complaints.”

9. Further relied upon the case of ***Himanshu vs. B. Shivamurthy And Anr.: (2019) 3 SCC 797*** wherein the judgment of the High Court was questioned on two grounds before the Supreme Court. Firstly, the appellant could not be prosecuted without the company being named as an accused. The cheque was issued by the company and was signed by the appellant as its Director. Secondly, it was urged that the observation of the High Court that the company can now be proceeded against in the complaint was misconceived. Learned counsel for appellant had submitted that the offence under Section 138 is complete only upon the issuance of a notice of demand

and the failure of payment within the prescribed period. In absence of compliance with the requirements of Section 138, it was asserted, direction of the High Court that the company could be impleaded/arraigned at this stage is erroneous.

Accordingly, the Hon'ble Supreme Court held as under:-

“11. In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. The complaint was lodged only against the appellant without arraigning the company as an accused.

12. The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or 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.

13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.

14. We, accordingly, are of the view that the High Court was in error in rejecting the petition under Section 482 CrPC. We hence allow the appeal and set aside the judgment of the High Court. In consequence, the

complaint, being CRP No. 27 of 2004 shall stand quashed.”

10. Learned counsel appearing on behalf of respondent/complainant argued that the complaint is filed against M/S BELLPOLY MOULDERS PVT LTD, through proprietor Sanjeev Kapoor (the petitioner herein). He submits that though charges have not been properly framed by the Trial Court, the petitioner did not challenge the charge framed against him and pleaded not guilty and faced trial. After considering the evidence on record, petitioner has been convicted as mentioned above. Thus, there is no merit in the present case and the same is, accordingly, liable to be dismissed.

11. At this stage, learned counsel for petitioner on instructions submits that he has deposited compensation amount of ₹2 lacs against cheque amounting to ₹1 lac and this fact has not been disputed by the complainant, who is present in Court.

12. Though the complaint is filed against company through petitioner being proprietor of the accused company, but fact remains that in a private limited company or limited company, there is no proprietorship. However, on this ground, the complaint cannot be rejected.

13. With regard to notice under Section 251 Cr.P.C. which has not been framed against accused company and only against the petitioner who is an

individual, I find force in the submission of learned counsel for petitioner that cheque in question is issued by him in the capacity of signatory of the company and not as an individual, however, without commenting much on the merits of the case, since compensation amount has already been paid and the fact that petitioner has already undergone 23 days in judicial custody, I hereby while maintaining the conviction, release the petitioner on sentence already undergone.

14. Since the sentence awarded to the petitioner is less than two years and it is a first conviction against the petitioner, therefore, I hereby give him benefit of Section 12 of Probation of offenders Act. Thus, the petitioner shall not suffer disqualification, if any, attaching to the conviction for the above stated offence.

15. As the conviction order is dated 26.11.2015, there is no purpose to ask the petitioner to file bond under the aforesaid provision.

16. In view of above, the petition is disposed of.

17. Order *dasti*.

(SURESH KUMAR KAIT)
JUDGE

FEBRUARY 25, 2020/ms