

CRR 3152 of 2022

Tapesh Bharat Kumar Goenka
Vs.
The State of West Bengal & Anr.

Mr. Sandipan Ganguly, Id. Sr. Adv.
Mr. Satadru Lahiri
Mr. S. D. Chowdhury
... for the petitioner

1. Affidavit-of-service showing due service is filed. In spite of due service there is no representation on behalf of the opposite party no. 2.
2. The present revisional application has been preferred praying for quashing of the proceeding being Complaint Case No. CS/31771/2021 under Sections 138/141 of the N.I. Act, as well as all orders including order dated 17th September, 2021, thereby issuing summons against the petitioner passed in connection with the said proceeding presently pending before the learned Metropolitan Magistrate, 3rd Court, Calcutta.
3. From the materials on record and on hearing the learned counsel for the petitioner it appears that the present petitioner Mr. Tapesh Bharat Kumar Goenka was a director of the accused company and **he resigned from the said directorship w.e.f. 25.03.2020** and the same has been recorded with the Registrar of Companies (Documents at page 37 and 38 of the revisional application).

4. From the petition of complaint, at paragraph 7 it appears that **the cheque in the present case was issued on 31.03.2021** (Paragraph 7 of the written complaint).
5. Though there are agreements dated 01.09.2018, 16.04.2018 and 13.08.2018 between companies/parties in this case, the present proceeding is under Section 138 of the N.I. Act and as such the date of the cheque is relevant in the present case.
6. In **Rajesh Viren Shah vs Redington (India) Limited, in Criminal Appeal No. 2024 (arising out of SLP (Crl.) No. 6905 of 2022), decided on 14th February, 2024**, the Supreme Court observed:-

"4. The position of law as to the liability that can be fastened upon a Director for non-realisation of a cheque is no longer res integra. Before adverting to the judicial position, we must also take note of the statutory provision - Section 141 of the N.I. Act, which states that every person who at the time of the offence was responsible for the affairs/conduct of the business of the company, shall be held liable and proceeded against under Section 138 of the N.I. Act, with exception thereto being that such an act, if done without his knowledge or after him having taken all necessary precautions, would not be held liable. However, if it is proved that any act of a company is proved to have been done with the connivance or consent or may be attributable to (i) a director; (ii) a manager; (iii) a secretary; or (iv) any other officer – they shall be deemed to be guilty of that offence and shall be proceeded against accordingly.

5. Coming to the judicial position, we notice a judgment of this Court in **Monaben Ketanbhai Shah v. State of Gujarat, (2004) 7 SCC 15**, wherein it was observed that:-

"...The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is

no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when the complainant makes necessary averments in the complaint and establishes that fact..."

6. A Bench of three learned Judges in **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr.**,⁶ observed:-

"18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. ...A clear case should be spelled out in the complaint made against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out..."

7. We also notice this Court to have observed, in regards to the exercise of the inherent powers under Section 482, CrPC, in cases involving negotiable instruments that interference would not be called for, in the absence of "some unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of process of Court." This principle as held in **S.M.S Pharmaceuticals** (supra) was followed in **Ashutosh Ashok Parasrampuriya and Anr. v. Gharrkul Industries Pvt. Ltd. and Others**⁷.

8. We find the High Court, in the impugned order to have elaborately discussed the principles of law in regard to the quashing of such proceedings but, however, not dealt with the factual matrix. Ex facie, we find that the complainant has not placed any materials on record indicating complicity of the present appellant(s) in the alleged crime. Particularly, when the appellant(s) had no role in the issuance of the instrument, which is evident from Form 32 (Exh.P.59) issued much prior to the date on which the cheque was drawn and presented for realisation.

9. The veracity of Form-32 has neither been disputed by the Respondent nor has the act of

resignation simpliciter been questioned. As such, the basis on which liability is sought to be fastened upon the instant appellant(s) is rendered questionable.

10. The record reveals the resignations to have taken place on 9th December 2013 and 12th March 2014. Equally, we find the cheques regarding which the dispute has travelled up the courts to have been issued on 22nd March 2014. The latter is clearly, after the appellant(s) have severed their ties with the Respondent- Company and, therefore, can in no way be responsible for the conduct of business at the relevant time. Therefore, we have no hesitation in holding that they ought to be then entitled to be discharged from prosecution.”

7. It is clearly on record in the present case that the petitioner was not a Director of the company when the cheque was issued and thus not responsible for the same.

8. In *Dayle De’Souza vs Government of India Through Deputy Chief Labour Commissioner (C) and Anr., in Criminal Appeal No. of 2021 (arising out of SLP (Crl.) No. 3913 of 2020), decided on October 29, 2021,*

the Supreme Court held:-

“30. At the same time, initiation of prosecution has adverse and harsh consequences for the persons named as accused. In *Directorate of Revenue and Another v. Mohammed Nisar Holia, 2008 (2) SCC 370*, this Court explicitly recognises the right to not to be disturbed without sufficient grounds as one of the underlying mandates of Article 21 of the Constitution. Thus, the requirement and need to balance the law enforcement power and protection of citizens from injustice and harassment must be maintained. Earlier in *M/s. Hindustan Steel Ltd. v. State of Orissa, 1969 (2) SCC 627*, this Court threw light on the aspect of invocation of penalty provisions in a mechanical manner by authorities to observe:-

“8. Under the Act penalty may be imposed for failure to register as a dealer — Section 9(1) read with Section

25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasicriminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out.”

Almost every statute confer operational power to enforce and penalise, which power is to be exercised consistently from case to case, but adapted to facts of an individual case. The passage from **Hindustan Steel Ltd.** (supra) highlights the rule that the discretion that vests with the prosecuting agencies is paired with the duty to be thoughtful in cases of technical, venial breaches and genuine and honest belief, and be firmly unforgiving in cases of deceitful and mendacious conduct. Sometimes legal provisions are worded in great detail to give an expansive reach given the variables and complexities involved, and also to avoid omission and check subterfuges. However, legal meaning of the provision is not determined in abstract, but only when applied to the relevant facts of the case. Therefore, it is necessary that the discretion conferred on the authorities is applied fairly and judiciously avoiding specious, unanticipated or unreasonable results. The intent, objective and purpose of the enactment should guide the exercise of discretion, as the presumption is that the makers did not anticipate anomalous or unworkable consequences. The intention should not be to target and penalise an unintentional defaulter who is in essence law-abiding.

31. There are a number of decisions of this Court in which, with reference to the importance of the summoning order, it has been emphasised that the initiation of prosecution and summoning of an accused

to stand trial has serious consequences. They extend from monetary loss to humiliation and disrepute in society, sacrifice of time and effort to prepare defence and anxiety of uncertain times. Criminal law should not be set into motion as a matter of course or without adequate and necessary investigation of facts on mere suspicion, or when the violation of law is doubtful. It is the duty and responsibility of the public officer to proceed responsibly and ascertain the true and correct facts. Execution of law without appropriate acquaintance with legal provisions and comprehensive sense of their application may result in an innocent being prosecuted.

32. Equally, it is the court's duty not to issue summons in a mechanical and routine manner. If done so, the entire purpose of laying down a detailed procedure under Chapter XV of the 1973 Code gets frustrated. Under the proviso (a) to Section 200 of the 1973 Code, there may lie an exemption from recording pre-summoning evidence when a private complaint is filed by a public servant in discharge of his official duties; however, it is the duty of the Magistrate to apply his mind to see whether on the basis of the allegations made and the evidence, a prima facie case for taking cognizance and summoning the accused is made out or not. This Court explained the reasoning behind this exemption in **National Small Industries Corporation Limited v. State (NCT of Delhi) and Others, (2009) 1 SCC 407:-**

“12. The object of Section 200 of the Code requiring the complainant and the witnesses to be examined, is to find out whether there are sufficient grounds for proceeding against the accused and to prevent issue of process on complaints which are false or vexatious or intended to harass the persons arrayed as accused. (See *Nirmaljit Singh Hoon v. State of W.B.*) Where the complainant is a public servant or court, clause (a) of the proviso to Section 200 of the Code raises an implied statutory presumption that the complaint has been made responsibly and bona fide and not falsely or vexatiously. On account of such implied presumption, where the complainant is a public servant, the statute exempts examination of the complainant and the witnesses, before issuing process.”

The issue of process resulting in summons is a judicial process that carries with it a sanctity and a promise of legal propriety.

33. Resultantly, and for the reasons stated above, we would allow the present appeal and quash the summoning order and the proceedings against the present appellant.”

9. It is thus seen that the Magistrate issued summons in the proceedings in this case without any application of mind and the said order is clearly not in accordance with law and the present case also being not maintainable against the petitioner is thus liable to be quashed.
10. There also being no prima facie case against the petitioner, for the offences alleged, the proceedings in the present case is also liable to be quashed.
11. **CRR 3152 of 2022 is allowed.**
12. The proceeding being Complaint Case No. CS/31771/2021 under Sections 138/141 of the N.I. Act, as well as all orders including order dated 17th September, 2021, thereby issuing summons against the petitioner passed in connection with the said proceeding presently pending before the learned Metropolitan Magistrate, 3rd Court, Calcutta, **is hereby quashed in respect of the petitioner.**
13. All connected Applications, if any, stands disposed of.
14. Interim order, if any, stands vacated.
15. Copy of this order be sent to the learned Trial Court for necessary compliance.
16. Urgent certified website copy of this order, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)