



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

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Date of Decision: 21.03.2024

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CRL.M.C. 2399/2023 and CRL.M.A. 9085/2023

PANKAJ GOEL

..... Petitioner

Through: Mr. Arjun, Advocate

versus

STATE OF DELHI & ANR.

..... Respondents

Through: Mr. Nawal Kishore Jha, APP for State
Mr. Avinash Kumar, Advocate for
respondent No.2

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. The present petition has been filed under Section 482 Cr.P.C., whereby the petitioner seeks quashing of Criminal Complaint No.12298/2017 filed under Section 138 read with Section 142 of the Negotiable Instrument Act, 1881 (for short, 'NI Act') pending before the learned Metropolitan Magistrate, New Delhi as well as the summoning order dated 09.01.2018.

2. Facts, as discernible from the complaint, are that in the month of June 2015, the petitioner/accused approached respondent No.2/complainant seeking a friendly loan of Rs.15 lacs as he was in acute financial crisis. The complainant acceded to the request and gave the said loan for a period of six months. At the same time, in order to assure the complainant of his bonafide, the petitioner executed three promissory notes-cum-receipts of



Rs.5 lacs each. Subsequently, in discharge of his liability, the petitioner furnished three cheques bearing Nos. 539689 dated 10.05.2017; 539690 dated 20.06.2017 and 539691 dated 05.07.2017 of Rs.5 lacs each drawn on Bank of Baroda, Kaushambi, Ghaziabad ('*subject cheques*'). However, the said cheques, when presented for encashment, were dishonoured. While the first cheque was dishonoured with the remarks 'title of account required', the latter two cheques were dishonoured with the remarks 'funds insufficient'. Consequently, the complainant issued demand notice, however, upon petitioner's failure to repay the amount, the present criminal complaint came to be filed with respect to all the three cheques.

3. Petitioner has assailed the continuation of the proceedings on the ground that the cheques were issued from the account of *Kwality Prop Mart Pvt. Ltd.* ('*company*'), of which he is the Director, but the complainant has neither issued any demand notice to the company nor has he impleaded the company in the complaint proceedings. In this regard, he has also referred to the bank account statement of the company which mention about the dishonour and return of the subject cheques.

4. Learned counsel for the respondent No.2/complainant, on the other hand, states that the subject cheques were accompanied by a covering letter, which did not indicate that the subject cheques were issued from the account of the company and that the same were being issued by the petitioner in the capacity of Director of the company. Even otherwise, in its reply, complainant has sought permission from the Court to file an amended memo of parties thereby impleading the company as an accused in the complaint.

5. The first issue whether the company needs to be impleaded as an accused or not has been settled by catena of decisions beginning with



Aneeta Hada v. Godfather Travels & Tours Pvt. Ltd.¹, wherein it has been held:-

“xxx

58. *Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words “as well as the company” appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted.*

59. *In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself...*

xxx”

6. Admittedly, the subject cheques belong to the account maintained by the accused company, which has not been impleaded as a party in the criminal complaint under Section 138. The stamp of the company is also visible on two of the three subject cheques. The law, as noted and extracted above, is well settled that the liability of a Director is only vicarious under Section 141 of the NI Act. The non-issuance of a demand notice and non-arraying of company as a party in the complaint is fatal to the complainant’s

¹ (2012) 5 SCC 661



case.

7. The submission of the complainant thereby seeking permission to file an amended memo of parties, to implead the company as an accused is misconceived inasmuch as the complaint is to be mandatorily proceeded by steps as stipulated in proviso to Section 138, which must be fulfilled before the offence is said to be made out. The first condition is that the cheque ought to be presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. The second condition is that the payee or the holder in due course of the cheque, as the case may be, must make a demand for the said money by giving a notice in writing to the drawer of the cheque within 30 days of receiving the information from the bank regarding the dishonour of the cheque. The third condition states that there should be a failure on the part of the drawer of cheque to make the payment of the amount under the cheque to the payee or the holder in due course, as the case may be, within 15 days of the receipt of the said notice. When all these three conditions are fulfilled, then only an offence under Section 138 of the NI Act can be said to be committed by the person issuing the cheque [Ref: MSR Leathers v. S. Palaniappan & Anr.², Charanjit Pal Jindal v. L.N. Metalics³ and N. Harihara Krishnan v. J. Thomas⁴].

8. Recently, in Himanshu v. B. Shivamurthy & Ors.⁵, the Supreme Court has held as under:-

“xxx

² (2013) 1 SCC 177

³ (2015) 15 SCC 768

⁴ (2018) 13 SCC 663

⁵ (2019) 3 SCC 797



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.

xxx”

9. Admittedly, in the present case, neither has a demand notice been issued to the company nor has it been impleaded as a party in the complaint under Section 138. Although the complainant has feigned ignorance as regards the cheque having been issued on account of the company and have sought to correct the error committed in not impleading the company as an accused, however, as discussed above, even if the request for amending the complaint thereby allowing company to be impleaded as a party comes to be allowed, the same would not correct the fatal error that has crept in the complaint inasmuch as no demand notice came to be issued to the company. Issuance of demand notice and its failure to repay the amount due under the cheque within the stipulated time period are sine qua non for the initiation of proceedings under Section 138 NI. In the present case, it was necessary that a demand notice be issued to the company and only upon its failure to repay, could the company have been impleaded as an accused. However, no such course of action was undertaken. Thus, the company cannot be impleaded as an accused by way of amendment in the memo of parties and therefore, continuation of the proceedings against the petitioner would be nothing but an abuse of process of law. Consequently, the petition is allowed and the criminal complaint filed under Section 138 NI Act against the petitioner is



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quashed. As a necessary sequitur, the summoning order dated 09.01.2018 is also set aside. Pending application is disposed of as infructuous.

10. A copy of this order be also communicated to the learned Trial Court.

MANOJ KUMAR OHRI
(JUDGE)

MARCH 21, 2024

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