



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

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Date of Decision: 06.02.2024

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CRL.M.C. 5269/2023, CRL.M.A. 20025/2023

IN THE MATTER OF:

M/S SQUIRREL DESIGN HOUSE AND ORS Petitioners

Through: Mr. Ashesh Lal, Mr. Apurv Lal, Mr.
Raghav Parwatyar and Mr. Abhinav
Anand, Advocates.

versus

VIVEK KUMAR TRIPATHI Respondent

Through: Mr. Adarsh Kr. Tiwari, Advocate.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. By way of present petition filed under Section 482 Cr.P.C., the petitioners seek to assail the order dated 17.07.2023 passed by learned ASJ-02, South West, Dwarka Courts, New Delhi in Criminal Revision No. 636/2022, whereby order of summoning dated 30.09.2021 passed by the Trial Court has been upheld.

2. Briefly, the facts are that the respondent/complainant had initiated proceedings under Section 138 of the Negotiable Instruments Act, 1881 (hereafter, '*the NI Act*') thereby alleging that a loan of Rs.4.5 lacs was given to the petitioner Nos.2 and 3/accused persons for their project. Towards settlement of the said account, the accused persons issued a cheque of Rs.2.95 lacs, which when presented for encashment, was dishonoured with the remarks '*insufficient funds*'. A legal notice was issued on 03.07.2021 to the accused persons, whereafter when the liability was not discharged, the aforesaid criminal complaint came to be filed.



3. The issue arising in the present petition is that while the cheque in question was issued from the account of the partnership firm and signed by both Nikhil Kumar/petitioner No.2 and Vivekanand Tiwari/petitioner No.3, no legal notice was issued to the partnership firm. Even the criminal complaint was also filed accusing the two partners, without impleading the partnership firm. The complaint was filed under Section 138 NI Act read with Section 420 IPC. A perusal of the proceedings would show that on 17.09.2021, learned M.M. noted that the partnership firm had not been arrayed as an accused and sought clarification from learned counsel for the complainant in this regard, who replied that there was no legal requirement for impleading the partnership firm. It appears that on the next date i.e. 30.09.2021, an amended memo of parties came to be filed wherein the partnership firm was arrayed as accused No. 3 and vide order dated 30.09.2021, summons were issued to the partnership firm besides the two partners. Petitioners assailed the said order before the Revisional Court. The Revisional Court, vide the impugned order, upheld the order passed by learned MM taking into account Section 24 of the Partnership Act, opining that notice to the partners shall operate as notice to the partnership firm. It was further held that since the amended memo of parties was taken on record prior to issuance of summons, there was no material irregularity.

4. Admittedly, the cheque in question was not issued by the partners from their individual accounts. Rather, it was issued from the account of the partnership firm and signed by both the partners. Thus, the liability of the partners is vicarious and flow from Section 141 of the NI Act. Before proceeding further, this Court deems it apposite to reproduce Section 141 of the NI Act, which reads as under :-



“141. Offences by companies. —

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and 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 accordingly:

Provided that nothing contained in this sub-section 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:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation— For the purposes of this section,—

(a) “company” means anybody corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.

(emphasis supplied)”

5. It is apt to observe that sub-section 1 of Section 141 NI Act stipulates



that if an offence is committed by a company, then every person, who at the time of commission of offence, was in charge and was responsible to the company for the conduct of its business, as well as company itself, would be guilty of the offence. The first proviso, which is in the nature of exception, provides that in case such a person is able to prove that offence was committed without his knowledge or that he exercised due diligence to prevent the commission of offence, then such a person would not be liable for punishment. The onus to satisfy the said requirement is on the person alleging/stating the same. However, this does not take away the initial onus cast on the complainant to establish the requirements of sub-section 1 of Section 141. The law in this regard was crystallised in National Small Industries Corporation Limited v. Harmeet Singh Paintal¹ wherein the following conclusions were drawn:-

“(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make accused therein vicariously liable for offence committed by company along with averments in the petition containing that accused were in-

¹ (2010) 3 SCC 330



charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If accused is Managing Director or Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

(vi) If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint.

(vii) The person sought to be made liable should be in- charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases.

6. The issue whether any person under Section 141(1) can be proceeded against in the absence of a company, came up before the Supreme Court in Aneeta Hada v. Godfather Travels & Tours (P.) Ltd.², wherein a three Judges Bench held that for maintaining prosecution under Section 141, arraigning of company as an accused is imperative. The other categories of offenders can only be brought in the drag-net by way of vicarious liability. The position with respect to a partnership firm is no different. Likewise in the case of the partnership firm, the liability of its partners is vicarious and thus impleading of the partnership firm is necessary. In the present case, though the complainant sought to overcome the said issue by way of filing an amended memo of parties however, the same would not come to its rescue. When a cheque issued for discharge of any debt or other liability is



returned unpaid, the drawer or holder of the cheque in due course is required to issue a demand notice for payment of the amount under the cheque within 30 days of the receipt of the information from the bank of its dishonour and if the drawer fails to make such payment within 15 days of the receipt of the said notice, then the offence under Section 138 NI arises. In the present case, no such demand notice was issued to the partnership firm and as such, the filing of the criminal complaint suffered from a material defect. Both the courts below have committed a grave illegality in permitting the complainant to file an amended memo of parties to overcome this material defect. Accordingly, both the impugned orders are set aside. This Court is also fortified in its conclusion by the decision of the Apex Court in Dilip Hariramani v. Bank of Baroda³, wherein while relying on its earlier decision in State of Karnataka v. Pratap Chand⁴, the Court set aside appellant's conviction under Section 138 read with Section 141. As noted above, the criminal complaint under Section 138 of the NI Act was filed only against the partners, without impleading the partnership firm and as such this Court deems it fit to exercise its power under Section 482 Cr.P.C. to quash the complaint.

7. Consequently, the petition is allowed and the order dated 17.07.2023 passed by the learned ASJ as well as the summoning order dated 30.09.2021 are set aside. Pending application is disposed of as infructuous.

MANOJ KUMAR OHRI
(JUDGE)

FEBURARY 06, 2024

² (2012) 5 SCC 661

³ 2022 SCC OnLine SC 579

⁴ (1981) 2 SCC 335



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Signature Not Verified

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