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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 27.05.2024

+ CRL.M.C. 4342/2024

GEORGE NINAN

..... Petitioner

Through: Mr. Manoj V George,
Mr. K.M. Vignesh Ram,
Ms. Akshita Agarwal, Advs.

versus

STATE NCT OF DELHI & ANR.

..... Respondents

Through: Mr. Shoaib Haider, APP

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)CRL.M.A. 16486/2024 (Exemption)

1. Allowed, subject to all just exceptions.

CRL.M.C. 4342/2024 and CRL.M.A. 16485/2024

2. This petition has been filed under Section 482 of the Code of Criminal Procedure, 1973 (in short, 'Cr.P.C.'), praying for quashing of the Complaint, being CT Case No. 16005/2019, titled *Shubham Chemicals and Solvents v. Uniply Decor Ltd. & Ors.*, filed by the respondent no.2 *inter alia* against the petitioner herein under Section 138 of the Negotiable Instruments Act, 1881 (in short, 'NI Act').

3. The above complaint has been filed by the respondent no.2 alleging therein that it is a leading importer, trader, supplier and distributor of Industrial Chemicals viz, phenol, styrene monomer,



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malic anhydride melamine, solvent c-ix, methanol, toluene, glycols, etc. In the complaint, it is stated that the Accused No.1, that is, Uniply Decor Ltd., had approached the respondent no.2 for the purchase of industrial chemicals, namely Phenol, having represented their company to be in business of printing and service activities related to printing.

4. Based on such representation, the respondent no.2 claims to have made supplies of the required goods to the company. The respondent no.2 states that in discharge of the liability towards the amount outstanding in the books of account, a cheque bearing No. 001063 dated 10.07.2019 for a sum of Rs.11,50,000/- drawn on HDFC Bank was issued by the Accused No.1. However, on presentation, the same was returned as dishonoured with the remark “*funds insufficient*”. As the payment was not made in spite of the legal notice, the respondent no.2 filed the said complaint.

5. As far as the petitioner is concerned, the petitioner has been arrayed as Accused No.6 in the complaint, with the following averments:

“.....Accused no. 6 (is the Chief Financial Officer of the Accused no.1- Company, is the Authorised Signatory who has issued the cheque to the complainant who is and was in charge of and responsible to the company at the relevant time for the conduct of the business of the company)...”

6. The learned counsel for the petitioner submits that the petitioner cannot be arrayed as an accused merely on the basis that he is the signatory to the cheque. Placing reliance on Section 28 of the NI Act,



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he submits that it is only where the agent signs the cheque without indicating thereon that he signs it as an agent, that he can be personally made liable for dishonour of the cheque. In support, he also placed reliance on a judgment of the Full Bench of the Madras High Court in ***Sivagurunatha Pillai v. Padmavathi Ammal and Anr.***, 1940 SCC OnLine Mad 464.

7. I am unable to find any merit in the submission made by the learned counsel for the petitioner.

8. The petitioner is the Chief Financial Officer of the Accused No.1 company and is, therefore, its ‘Key Managerial Personnel’, as defined under Section 2(51)(iv) of The Companies Act, 2013. Section 2(51) of the Companies Act reads as under:

*“2(51) “key managerial personnel”, in relation to a company, means—
(i) the Chief Executive Officer or the managing director or the manager;
(ii) the company secretary;
(iii) the whole-time director;
(iv) the Chief Financial Officer; and
(v) such other officer as may be prescribed.”*

9. The ‘Key Managerial Personnel’ is also made an “officer who is in default” for the purpose of any provision of the Companies Act, 2013, and is liable for any penalty or punishment. Section 2(60) of the Companies Act reads as under:

“2(60) “officer who is in default”, for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means any of the following officers of a company, namely:—



- (i) whole-time director;
- (ii) key managerial personnel;
- (iii) where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;
- (iv) any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default;
- (v) any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity;
- (vi) every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance;
- (vii) in respect of the issue or transfer of any shares of a company, the share transfer agents, registrars and merchant bankers to the issue or transfer."

10. Section 141 of the NI Act 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:



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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.”

11. Section 141 of the NI Act has two parts; the first states that “every person”, who at the time the offence was committed, was in charge of and was responsible for the day-to-day affairs and conduct of the business of the Company, shall be “deemed to be guilty of the offence”, under Section 138 of the NI Act and liable to be proceeded



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against and punished accordingly, unless he can prove that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence; while the second part, under Sub-Section (2) of Section 141 of the NI Act, states that any director, manager, secretary or other officer of the Company, with whose consent or connivance, or due to whose neglect, the Company commits the offence under Section 138 of the NI Act, shall also be deemed to be guilty of that offence and liable to be proceeded against and punished accordingly.

12. In *S.P. Mani and Mohan Dairy v. Dr. Snehalatha Elangovan*, (2023) 10 SCC 685, the Supreme Court, while highlighting the pre-requisites under the two parts of Section 141 of the NI Act for making persons liable to face prosecution under Section 138 of the NI Act, also held that a person who signs the cheque or who has the authority to sign the cheque for an on behalf of the company, regardless of his office or capacity, can, *prima facie*, be assumed to be in charge of and responsible to the company in the conduct of its business. I may quote from the judgment as under:-

“26. By virtue of the provisions of subsection (1) of Section 141, the guilt for the offence and the liability to be prosecuted and punished shall be extended to every person who, at the time the offence was committed, was in charge of and was responsible to the company for the conduct of its business; irrespective of whether such person is a director, manager, secretary or other officer of the company. It would be for such responsible person, in order to be exonerated in terms of the first proviso, to prove that the offence was committed without his knowledge or despite his due diligence.



27. Under the separate provision of sub-section (2), if it is proved that the offence was committed with the consent or connivance of or was attributable to the neglect on the part of any Director, manager, secretary or other officer of the company, such person would also be deemed to be guilty for that offence. Obviously, the burden of alleging and proving consent, connivance or neglect on the part of any Director, etc. would rest upon the complainant. The non obstante clause with which sub-section (2) opens indicates that the deeming provision is distinct and different from the deeming provision in sub-section (1) in which the office or designation of the person in charge of and responsible to the company for the conduct of its business is immaterial.

28. While the essential element for implicating a person under sub-section (1) is his or her being in charge of and responsible to the company in the conduct of its business at the time of commission of the offence, the emphasis in sub-section (2) is upon the holding of an office and consent, connivance or negligence of such officer irrespective of his or her being or not being actually in charge of and responsible to the company in the conduct of its business. Thus, the important and distinguishing feature in sub-section (1) is the control of a responsible person over the affairs of the company rather than his holding of an office or his designation, while the liability under sub-section (2) arises out of holding an office and consent, connivance or neglect.

29. While all the persons covered by sub-section (1) and sub-section (2) are liable to be proceeded against and also punished upon the proof of their being either in charge of and responsible to the company in the conduct of its business or of their holding of the office and having been guilty of consent, connivance or neglect in the matter of commission of the



offence by the company, the person covered by sub-section (1) may, by virtue of the first proviso, escape only punishment if he proves that the offence was committed without his knowledge or despite his due diligence.

30. *As for the requisite evidence, the burden upon the prosecution would be discharged under sub-section (1) when a person is proved to be in charge of and responsible to the company in the conduct of its business and would shift upon the accused to prove that he was ignorant or diligent, if that be his defence; whereas under sub-section (2) the prosecution would be required to allege and prove the consent, connivance or neglect and holding of the office by the accused. There is nothing to suggest that the same person cannot be made to face the prosecution either under sub-section (1) or sub-section (2) or both.*

31. *A Director or manager can be arraigned and proved to be guilty as the person in charge of and responsible to the company as well as the Director of the company who, as such, might have consented to, connived at or been negligent in respect of the offence of dishonour of cheque, be logically deduced that a person can be arraigned in a complaint as the accused along with the company if it prima facie appears that he was in charge of and responsible to the company for the conduct of its business, although he may or may not be or may not have continued to be a Director or other officer of the company, as mentioned in sub-section (2). It would be sufficient if the complaint indicates that such person has been arraigned on the basis of averments which disclose him or her to be the person in charge of and responsible to the company in the conduct of its business at the time the offence was committed.*

32. *Evidently, a person who signs the cheque or who has the authority to sign the cheque for*



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and on behalf of the company, regardless of his office or capacity, can, prima facie, be assumed to be in charge of and responsible to the company in the conduct of its business. And, where such person is prosecuted, then, if it be his defence that the offence was committed without his or her knowledge or that he or she has exercised all due diligence to prevent the commission of such offence, the burden to prove that would be on him or her and can only be discharged at the stage of evidence.”

13. In **K.K. Ahuja v. V.K. Vora and Anr.** (2009) 10 SCC 48, the Supreme Court highlighted the difference between the position of a Managing Director or Joint Managing Director *vis a vis* a Director and held that it is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director of the Company. It was clarified that for Director or an officer of the company who signed the cheque on behalf of the Company, there is no need to make specific averment that he was in charge of and was responsible to the Company; the very fact of his signing the cheque gives rise to his responsibility under sub-section (2) of Section 141 of the NI Act.

14. The same reasoning shall also apply in case of the Chief Financial Officer, especially where such Chief Financial Officer has also signed the cheque on behalf of the Company.

15. In the present case, the petitioner is the Chief Financial Officer, who, in terms of Section 2(51)(iv) of the Companies Act, is a ‘Key Managerial Personnel’ of the Accused No.1 company. The petitioner is also the signatory to the cheque in question. In the complaint, it is also stated that the petitioner was in charge and responsible for the



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conduct of the business of the company at the relevant time. In my view, therefore, the complaint satisfies the test of Section 141 of the NI Act for arraying the petitioner as an accused.

16. The complaint does not lay its foundation under Section 28 of the NI Act to make the petitioner liable, but instead makes him liable under Section 141 of the NI Act. The petitioner is not to be impleaded as an Accused in the Complaint only in his position as an agent or signatory of the cheque. Therefore, the provision of Section 28 of the NI Act would not have any application to the facts of the present case.

17. In light of the present set of facts, since the complaint satisfies the test of Section 141 of the NI Act and does not lay its foundation under Section 28 of the NI Act, the judgement of ***Sivagurunatha Pillai*** (Supra), as referred to by the counsel for the petitioner, does not apply to the present case.

18. Accordingly, I do not find any merit in the present petition. The same is dismissed. The application is also dismissed as infructuous. There shall be no order as to costs.

19. It is made clear that this order shall not, in any manner, affect any defence that the petitioner may lead before the learned Trial Court.

NAVIN CHAWLA, J

MAY 27, 2024/Arya/SJ

Click here to check corrigendum, if any