



2024:DHC:8699

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

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Judgment delivered on:11.11.2024

+ **CRL.M.C. 5464/2019 & CRL.M.A. 38989/2019****ANEES UR RAHMAN**

.....Petitioner

versus

**M/S SMAL FARMERS AGRIBUISNESS
CONSORTIUM**

..... Respondent

Advocates who appeared in this case:For the Petitioner : Mr. Vatsalya Vigya, Advocate (Through
V.C.) & Mr. Kanhaiya Kumar, AdvocateFor the Respondent : Mr. Ravindra Kanth & Dr. Puran Chand,
Advocates**CORAM
HON'BLE MR JUSTICE AMIT MAHAJAN****JUDGMENT**

1. By the present petition, the petitioner challenges the proceedings in Complaint Case No. 476576/2016 filed by the respondent under Section 138 of the Negotiable Instruments Act, 1881 ('NI Act').

2. The complaint was filed alleging that the petitioner and other co-accused persons, acting on behalf of the accused company namely M/s Fresco Foods Pvt. Ltd., entered into an agreement dated



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12.03.2009 with the complainant whereby the respondent disbursed a sum of ₹1,60,00,000/- as a venture capital amount to the accused. This venture capital assistance was refundable upon the full repayment of the term loan. It is the case of the respondent that the accused undertook that in the event of the venture capital amount not being refunded on the same date as that of the repayment of the term loan from the bank, the same would attract interest at the same rate as that being charged by the bank for the term loan.

3. It is further the case of the respondent that the accused company had issued a cheque for a sum of ₹1,60,00,000/- being cheque no. 970600 dated 26.09.2016. The said cheque, upon presentation, was dishonoured with remarks "*funds insufficient*" vide Bankers memo dated 04.10.2016. The respondent had earlier written a letter dated 08.07.2016 to the accused company, to either pay the venture capital amount or keep sufficient amount so that the post dated cheque issued by the accused company would not be dishonoured. Thereafter, M/s Fresco Foods Pvt. Ltd, vide letter dated 22.09.2016 informed the respondent that the accused persons had settled the entire liability of the claim of the respondent for a sum of ₹1,60,00,000/- with the bank. It is the respondent's case that such contention is baseless, and the accused company owed a liability for a sum of ₹1,60,00,000/- to the respondent. Upon the failure of the accused persons to make the payment despite the service of notice, the respondent filed the subject complaint.

4. The present petition is filed on the ground that the petitioner had resigned from M/s Fresco Foods Pvt. Ltd. way back on 05.12.2009.



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The petitioner relied upon Form-32 filed with the Registrar of Companies. The learned counsel for the petitioner submitted that the petitioner was not the director of the company at the time of the dishonour of the cheque on 04.10.2016. He submitted that since the petitioner had already resigned on 05.12.2009, and was not in charge of managing the affairs of the company at the time of the alleged dishonour of the cheque, no liability would be attracted under Section 138 read with Section 141 of the NI Act. He further submitted that no specific averment regarding the role of the petitioner in the transaction has been made either in the complaint, or in the demand notice.

5. The learned counsel for the respondent submitted that the petitioner was a director of the company when the agreement was executed on 12.03.2009. He submitted that the petitioner was in charge of the day-to-day business of M/s Fresco Foods Pvt. Ltd. He submitted that the petitioner had also signed as a witness in the agreement dated 12.03.2009. He further submitted that the petitioner, by way of a resolution dated 28.02.2009, had been specifically appointed as the director who had to accompany the managing director as a witness for executing the Agreement at the SFAC office, New Delhi. He submitted that at the time of the execution of the agreement dated 12.03.2009, it was made known that the accused company had 4 directors, including the petitioner, who are responsible for the functioning of the company. He consequently submitted that the petitioner is liable to be proceeded against under Section 138 read with Section 141 of the NI Act, and prayed that the proceedings *qua* the petitioner in Complaint Case No. 476576/2016 not be quashed.



Conclusion

6. The petitioner is sought to be implicated in the present case by virtue of Section 138 read with Section 141 of the NI Act on account of being the director of the accused company at the relevant time when the post dated cheque was issued. 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: 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 any body corporate and includes a firm or other association of individuals; and

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

7. In accordance with Section 141 of the NI Act, in instances where the principal offender under Section 138 of the NI Act is a



company, every person who at such time when the cheque was dishonoured, and no subsequent payment was made, was in charge of the business of the company, and was responsible for the conduct of business, is deemed to be guilty of the offence under Section 138 of the NI Act.

8. It is trite law that a person cannot be arrayed as an accused person merely due to association with the accused company in capacity of a Director. In ***S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla : (2005) 8 SCC 89***, the Hon'ble Apex Court analysed Section 141 of the NI Act and observed as under:

“10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the section are “every person”. These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words:

‘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, etc.’

*What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. **Every person connected with the company shall not fall within the ambit of the provision.** It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. **It follows from this that if a Director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision.** The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed*



*and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a company at the relevant time. **Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a Director or manager or secretary was enough to cast criminal liability, the section would have said so.** Instead of “every person” the section would have said ‘every Director, manager or secretary in a company is liable’..., etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.”*

(emphasis supplied)

9. Similarly, the Hon’ble Apex Court in ***K.K. Ahuja v. V. K. Vora*** : (2009) 10 SCC 48 observed as under:

“20. Section 291 of the Companies Act, 1956 provides that subject to the provisions of that Act, the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do. A company though a legal entity can act only through its Board of Directors. The settled position is that a Managing Director is prima facie in charge of and responsible for the company’s business and affairs and can be prosecuted for offences by the company. But insofar as other Directors are concerned, they can be prosecuted only if they were in charge of and responsible for the conduct of the company’s business.”

(emphasis supplied)

10. Recently, the Hon’ble Apex Court in ***Susela Padmavathy Amma v. M/s. Bharti Airtel Limited*** : 2024 INSC 206 while quashing the proceedings under Section 138 read with Section 142 of the NI Act against the director of the company observed as under:

“10. It was held that merely because a person is a director of a company, it is not necessary that he is aware about the day-to- day



functioning of the company. This Court held that there is no universal rule that a director of a company is in charge of its everyday affairs. It was, therefore, necessary, to aver as to how the director of the company was in charge of day-to-day affairs of the company or responsible to the affairs of the company. This Court, however, clarified that the position of a managing director or a joint managing director in a company may be different. This Court further held that these persons, as the designation of their office suggests, are in charge of a company and are responsible for the conduct of the business of the company. To escape liability, they will have to prove that when the offence was committed, they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence.”

11. It must be borne in mind that Section 141 of the NI Act is a penal provision that aims to create vicarious liability on the accused. For this reason, the provisions ought to be strictly construed. In the case of ***National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal : (2010) 3 SCC 330***, the Hon’ble Apex Court had emphasised the necessity to detail the role of the director accused on account of the penal nature of Section 141 of the NI Act and held as under:

*“13. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. **But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.***

(emphasis supplied)

12. Accordingly, to impute liability on the petitioner under Section 138 read with Section 141 of the NI Act, it must be shown that the petitioner was responsible for the conduct of the accused company



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when the offence was committed. In the present case, liability is sought to be imputed to the petitioner based on the fact that the petitioner signed as a witness to the agreement dated 12.03.2009, and that he had knowledge that the accused company had taken a loan to the tune of ₹1,60,00,000/- from the respondent.

13. Upon a perusal of the agreement dated 12.03.2009, it is apparent that the agreement materialises that the respondent had advanced a venture capital amount for a sum of ₹1,60,00,000/-. In terms of the agreement, the accused company undertook to ensure substantial balance in their account to facilitate the refund of the loan. As an alternative, the accused company also had the option to refund the venture capital amount by means of a demand draft in favour of the respondent. The agreement, however, does not specify the particulars or the date of the issuance of the subject cheque.

14. It is stated that the cheque was handed over way back in the year 2009. However, upon a perusal of the complaint, it is apparent that cheque no. 970600 for a sum of 1,60,00,000/- was dated 26.09.2016. The date of issuance of the cheque was thus 26.09.2016. The same cheque, on presentation, was dishonoured with remarks "*funds insufficient*" on 04.10.2016.

15. It is settled that different persons may be responsible for the conduct of the company at the relevant time when each series of omission, necessary to constitute the offence under Section 138 read with Section 141 of the NI Act, is committed. It is also settled that every person, regardless of whether they are in charge of the company during each series of act necessary to constitute the offence under



Section 138 read with Section 141 of the NI Act or not, could be proceeded against if they are in charge of the affairs of the company even during one of the omissions' that is necessary to constitute an offence under Section 138 read with Section 141 of the NI Act. This would include being in charge of the company at the time of drawing of the cheque, or the dishonour of cheque, or at the time of failure to pay after the receipt of notice. [Ref: ***S P Mani and Mohan Dairy v. Dr. Snehalatha Elangovan : (2023) 10 SCC 685***]

16. Recently, the Hon'ble Apex Court in ***Ashok Shewakramani and Others v. State of Andhra Pradesh and Another : (2023) 8 SCC 473*** while interpreting the words "was in charge of" and "was responsible to the company for the conduct of the business of the company" as appearing in Section 141(1) of the NI Act observed as under:

"22. In the light of sub-section (1) of Section 141, we have perused the averments made in the complaints subject-matter of these three appeals. The allegation in Para 1 of the complaints is that the appellants are managing the Company and are busy with day-to-day affairs of the Company. It is further averred that they are also in charge of the Company and are jointly and severally liable for the acts of Accused 1 Company. The requirement of sub-section (1) of Section 141 of the NI Act is something different and higher. Every person who is sought to be roped in by virtue of sub-section (1) of Section 141 of the NI Act must be a 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. Merely because somebody is managing the affairs of the Company, per se, he does not become in charge of the conduct of the business of the Company or the person responsible for the Company for the conduct of the business of the Company. For example, in a given case, a manager of a Company may be managing the business of the Company. Only on the ground that he is managing the business of the Company, he cannot be roped in based on sub-section (1) of Section 141 of the NI Act.



23. *The second allegation in the complaint is that the appellants are busy with the day-to-day affairs of the Company. This is hardly relevant in the context of sub-section (1) of Section 141 of the NI Act. The allegation that they are in charge of the Company is neither here nor there and by no stretch of the imagination, on the basis of such averment, one cannot conclude that the allegation of the second respondent is that the appellants were also responsible to the Company for the conduct of the business. Only by saying that a person was in charge of the Company at the time when the offence was committed is not sufficient to attract sub-section (1) of Section 141 of the NI Act.*

24. Sub-section 1 of Section 141 reads thus: “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.]” (emphasis supplied)

On a plain reading, it is apparent that the words “was in charge of” and “was responsible to the Company for the conduct of the business of the Company” cannot be read disjunctively and the same ought be read conjunctively in view of use of the word “and” in between.”

(emphasis supplied)

17. In the present case, the petitioner is sought to be roped in the case only because he was a witness to the agreement dated 12.03.2009. However, the petitioner undisputedly resigned from M/s Fresco Foods Pvt. Ltd. way back on 05.12.2009. In line with the dictum of the Hon’ble Apex Court in *Ashok Shewakramani and Others v. State of Andhra Pradesh and Another* (*supra*) and Section



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141(1) of the NI Act, to fasten liability, the petitioner ought to be in charge of and responsible for the conduct of the company at the time of commission of the offence.

18. From a perusal of the record, it is apparent that during each series of omission necessary to constitute an offence under Section 138 read with Section 141 of the NI Act, the petitioner had ceased to be a director of M/s Fresco Foods Pvt. Ltd. It is evident that at the date of issuance of the cheque on 26.09.2016, the date of the dishonour of the subject cheque on 04.10.2016 or at the date of the demand notice on 28.10.2016, the petitioner was not in charge of and responsible for the conduct of the accused company. Merely stating that the cheque was handed over way back in the year 2009 or that the petitioner signed as a witness to the agreement dated 12.03.2009 is not sufficient to attract liability when the petitioner was not a director of the accused company at any of the relevant stages necessary for the commission of the offence under Section 138 read with Section 141 of the NI Act.

19. In the light of the aforesaid, the present petition is allowed, and the proceedings emanating from Complaint Case No. 476576/2016 for the offence under Section 138 read with Section 141 of the NI Act *qua* the petitioner is quashed. Pending application(s), if any, also stands disposed of.

AMIT MAHAJAN, J

NOVEMBER 11, 2024