

Before Sudhir Mittal, J.

ANIL CHANANA—Petitioner

versus

M/S GYANI RAM RULIYA RAM—Respondent

CRM-M No.36869 of 2018 & connected matters (132 cases)

October 30, 2018

A) Negotiable Instruments Act, 1881—Ss.138 and 141—Ex-Director Liability— Petitioner resigned much prior to issue of cheque in dispute Form No.32 and annual return of Company on record and not denied—Magistrate not justified in summoning petitioner—Summoning of accused—Court must be satisfied on basis of material produced before it that prima facie accused has committed offence—Compliant and summoning order quashed.

Held, that for imposing vicarious liability upon the petitioner, as a person responsible for the business of the company, it was necessary to make specific averments in the complaint regarding his role in the conduct of the business of the Company. No such averment having been made in this case, the Magistrate was not justified in summoning the petitioner. At the stage of summoning of an accused person, the trial Court/Magistrate must be satisfied on the basis of material produced before it that prima facie the accused persons have committed an offence. The material being referred to by the complainant by way of its reply cannot be looked into at this stage because the same has not been referred to or relied upon in the complaint.

(Para 21)

B) Fastening of liability on Director—Trial Court shall direct complainant to produce copy of Form 32 and annual return filed by company in order to determine persons, who were Directors on date of commission of offence.

Held, that in cases where the accused–Director is the Chairman or Managing Director or Joint Managing Director or authorized signatory of the cheque, they may be summoned without any averment regarding their role in the conduct of the affairs of the Company. For summoning of any other Director or officer of the Company the necessary averment regarding their role in the conduct of the business of the Company, must be insisted upon. In respect of whole time

Directors, mere reproduction of the words of Section 141 of the Act would be sufficient.

(Para 29)

R.S. Rai, Sr. Advocate with Kunal Dawar, Advocate; Jasdeep Singh Gill, Advocate; Gautam Dutt, Advocate; Abhinav Sood, Advocate; Ashish Gupta, Advocate; Rajeev Anand, Advocate; Amanpreet Kaur Sabherwal, Advocate *for the petitioner(s)*.

Arun Bansal, Advocate with Gaurav Aggarwal, Advocate;

Ashish Yadav, Addl. A.G. Haryana; for the respondent(s).

SUDHIR MITTAL, J.

(1) This judgment shall dispose of aforementioned 132 petitions as common questions of fact and law arise therein. The facts are being extracted from CRM-M-36869-2018 tilted as *Anil Chanana versus M/s Gyani Ram Ruliya Ram*.

(2) A complaint No. 2597/2017 dated 04.10.2017 titled *as M/s Gyani Ram Ruliya Ram versus Amira Pure Food Pvt. Limited*, was filed under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act'). Vide order of even date, the accused persons (respondents) mentioned therein, were summoned to stand trial. The name of the petitioner finds mention at Serial No. 2 in the list of respondents. A perusal of the complaint, reveals that the respondents therein, are 'Amira Pure Food Private Limited' through Chairman and respective Directors. The petitioner has also been impleaded allegedly being a Director. The cheque in dispute is Annexure P-2 on record. The same has been drawn by the authorized signatory on behalf of Amira Pure Food Private Limited.

(3) The present petition under Section 482 Cr.P.C. has been filed for quashing of the complaint and summoning order on the ground that the petitioner ceased to be a Director of the Company w.e.f. 10.02.2006. It has been argued that this fact is contained in Form No. 32 dated 23.02.2006, submitted to the Department of Company Affairs. It further finds corroboration in the Annual Return of the Company (annexed as Annexure P-5), wherein, in the list of Director/Manager /Secretary, it is recorded that the petitioner ceased to be a Director w.e.f. 10.02.2006. The said documents are 'public documents' within the meaning of the term according to section 74(2) of the Indian Evidence Act, 1872. The cheque in dispute is dated 26.04.2017. Thus, it is evident that the petitioner was not a Director in

the Company on the date of issuance of cheque. It has further been argued that the petitioner cannot ever be made liable as a “person in-charge of the affairs of the company or responsible to it for its business” as no specific allegation has been made against him in the complaint regarding the manner in which he was responsible for the conduct of the business of the Company. Thus, the filing of the complaint and issuance of summoning order, is an abuse of the process of law and they deserve to be quashed qua the petitioner.

(4) The petition has been resisted by the complainant-respondent. A detailed reply has been filed on its behalf. It has been averred that the Company has purchased rice from a large number of Mandis in the State of Haryana, for export purposes. The same was purchased on credit. The cheques were issued in discharge of the liability to make payment for the product purchased but the cheques were dishonored. Since, the cheques were issued with a dishonest intention various FIRs under Sections 406, 420 Indian Penal Code (45 of 1860) were also got registered. Subsequently, the Company and its Directors (including former Directors) entered into various Memoranda of Understanding with the creditors and made payments of the amounts due. The Memoranda of Understanding entered into with commission agents of Narnaul, Safidon and Gohana Mandis have been placed on record. In Matloda Mandi, a sum of Rs.4.53 crores, is outstanding. A list recording settlements with Commission Agents of various Mandis, has also been annexed with the reply. Thus, the submission is, that the petitioner being party to the Memoranda of Understanding, was responsible to the Company for the conduct of its business. Even though he had ceased to be a Director, he was actively participating in the business of the Company and was, liable in terms of Section 141 of the Act. No specific averment regarding the manner in which the person was responsible for the conduct of the business of the Company is necessary to be made in the complaint. It is also submitted that the present petition is not maintainable as the petitioner could challenge the order of summoning by way of revision petition before the Sessions Court.

(5) I intend to take the last objection raised on behalf of the complainant- respondent, first. This is regarding maintainability of the present petition. The argument is that the summoning order has been issued by the Judicial Magistrate Ist Class. Against such an order, a revision could have been preferred under Section 397 of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.) The

argument does not impress me for the reason that the present petition has been filed for quashing of the complaint as well as the summoning order. In exercise of revisional power, Court of Sessions or the High Court can summon the record of the case for examining the correctness, legality or propriety of any finding, sentence or order and also for the purpose of examining the regularity of proceedings of the inferior Court. It is not vested with the power of quashing a criminal complaint. This power is available to the High Court alone under Section 482 Cr.P.C., where under the High Court, in exercise of its inherent powers, can pass orders to prevent abuse of process of any Court or to secure the ends of justice. Thus, the prayer made in this petition could not have been granted by the revisional Court and, therefore, it cannot be said that the petitioner had an alternative remedy before the Court of Sessions in the first instance. The argument is, thus, rejected.

(6) The allegation against the petitioner, the Chairman and Directors of the Company, is as follows:-

xxx xxx xxx

2. That accused above notices are Chairman and Directors of the Company namely Amira Pure Foods Private Limited vill Harsru Gadi 21 Mile Stone Pattoudi Road Distt. Gurgaon Haryana and deals in the business of purchasing and exporting of the paddy crops and rice. Accused all are in-charge of day to day works of accused company and responsible and liable for all the acts and conducts of the company as accused all are actively participated in all the affairs of the company.

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(7) Section 141 of the Act dealing with 'offences by Companies' is reproduced below:-

“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.]

(8) From a perusal of the aforementioned provision, it is evident that every person who was incharge of the business of the Company and responsible to the Company for the conduct of its business is vicariously liable apart from the Company itself. Such a person may be somebody other than a 'Director' so long as he is an officer of the Company. However, an Ex-officio Director is not liable. Even a Director may prove his innocence during trial. The question regarding innocence of a Director or culpability of an officer of the Company, who is not a Director is a matter of evidence.

(9) The question, therefore, is regarding the liability of a person who admittedly ceased to be a Director w.e.f. 10.02.2006 and against whom no specific averment has been made in the complaint

regarding the manner in which he was in-charge of and responsible to the Company for conduct of its business. In the paragraph of the complaint reproduced hereinabove, it is only mentioned that the petitioner alongwith other Directors was in-charge of and responsible to the Company for the conduct of its business, which is a mere reproduction of the words of Section 141 of the Act.]

(10) Learned Senior counsel for the petitioner submits that it is settled law that before a summoning order is issued by the trial Court, it should feel *prima facie* satisfied that the persons being summoned have committed an offence. In the present case, the petitioner had ceased to be a Director in the Company long before the cheque was issued and being an ex-Director, to make him liable, it was necessary to aver in the complaint regarding the manner in which he was in-charge of the affairs of the Company but no specific averment regarding the involvement of the petitioner, has been made in the complaint. Thus, it cannot be said that there was any material on record to show that *prima facie* the petitioner had committed any offence. Under the aforementioned circumstances, summoning of the petitioner is an abuse of the process of law and the complaint and summoning order deserve to be quashed. Reliance has been placed upon judgment of the Hon'ble Supreme Court in *Harshendra Kumar D. versus Rebatilata Koley and others*¹, *Mrs. Anita Malhotra versus Apparel export Promotion Council and another*², *Pooja Ravinder Devidasani versus State of Maharashtra and another*³, *Ashoke Mal Bafna versus M/s Upper India Steel Mfg. & Engg. Co. Ltd.*⁴ and judgment dated 28.04.2018 passed in Crl. Appeal Nos. 586-594/2018 *Ajay Aggarwal versus M/s Integrated Finance Company Limited*. Reliance has also been placed upon judgment of Delhi High Court in *Sudeep Jain versus M/s ECE Industries Ltd. Crl.M.C. No. 1821/2013* decided on 06.05.2013.

(11) In *Harshendra Kumar D. (supra)*, the facts were that the accused–Company had issued certain cheques, which were dishonored. The complaints under Section 138 of the Act were filed and it was averred that the Managing Director and two Directors of the accused-Company, including the appellant, were responsible for its day to day

¹ 2011(1) RCR(Crl.) 887

² 2011(4) RCR(Crl.) 835

³ 2015(1) RCR(Crl.) 271

⁴ 2017(3) Crl. CC 848

affairs. Upon summons being issued, the appellant challenged the complaint and the summoning order on the ground that he had resigned from the post of Director more than a month before the date of issuance of cheques and this fact is recorded in Form No. 32 filed by the accused-Company. The High Court rejected the petition filed by the appellant on the ground that resignation by a Director of the accused-Company is a matter for consideration in defence during the course of the trial. The Supreme Court, after referring to the statutory provisions, referred to three Judge Bench decision in *S.M.S. Pharmaceutical Ltd. versus Neeta Bhalla*⁵ and various other cases decided by two Judge Benches and held that documents like Form No. 32, are in the nature of public documents and are beyond suspicion and can be looked into at the *prima facie* stage and the criminal proceedings initiated under Section 138 of the Act can be quashed thereupon. The judgment of the High Court was, thus, set aside.

(12) In *Anita Malhotra (supra)*, the appellant before the High Court had resigned from the Directorship of the accused-Company w.e.f. 31.08.1999 and this information was submitted to the Registrar of the Companies through statutory Form No. 32. Notice under Section 138 of the Act, was dated 10.12.2004, which was replied to by her. She was summoned by the trial Court. The petition filed for quashing of the summoning order and the complaint was rejected by the High Court. The Supreme Court placed reliance upon *Harshendra Kumar D. (supra)* and other cases and held that Form No. 32 and annual returns filed by Companies were public documents in terms of Section 74(2) of the Indian Evidence Act, 1872 and such documents can be looked into for the purposes of quashing of criminal proceedings. Again, the judgment of the High Court was set aside.

(13) In *Pooja Ravinder Devidasani (supra)* the facts were similar to the earlier two cases. The appellant before the Supreme Court had resigned before the date of issuance of cheque and this information had been submitted to the Registrar of the Companies through Form No. 32 and it was also contained in the annual return. Again it was held by the Supreme Court, that a document like Form No. 32 and Annual Return of a Company, can be looked into for ascertaining whether an accused person was a Director in the Company on the date of commission of the offence and that even for making a Director liable for an offence under Section 138 of the Act, there must

⁵ 2005(4) RCR(Cr.) 141

be specific averment against him showing the manner in which he was responsible for the conduct of the business of the Company.

(14) In *Ashoke Mal Bafna* (*supra*) the appellant was a Director in the accused Company, when the cheque was issued. However, the cheque was not presented during the period of its validity. Subsequently, the cheque was replaced and presented. But, by then, the appellant before the Supreme Court had resigned from the post of the Director. It was held that after his resignation, the appellant had ceased to play any role in the activity of the accused-Company and, thus, could not be made liable.

(15) In *Ajay Aggarwal* (*supra*) the judgment in *Anita Malhotra* (*supra*) has been relied upon and followed.

(16) Learned counsel for the complainant has placed strong reliance upon judgments of the Supreme Court in *Gunmala Sales Private Ltd. versus Anu Mehta and others*⁶ and *Standard Chartered Bank versus State of Maharashtra and others etc.*⁷.

(17) In *Gunmala Sales Private Ltd.* (*Supra*) the High Court had quashed the proceedings initiated under Section 138 of the Act on the ground that reproduction of the words of Section 141 of the Act, is not sufficient to make a Director vicariously liable and the manner in which he was conducting the affairs of the Company, must be specifically averred. The complainant challenged this judgment and contended that the role played by an individual Director in conducting the affairs of the Company is an internal issue and it would be unreasonable to expect the complainant to elaborate thereupon. The only requirement of law is that an averment should be made in terms of the language of Section 141(1) of the Act. The Supreme Court held that in a situation as existing in the facts of this case, the High Court should have quashed the complaint only after the concerned Director provided sterling evidence that he was infact not responsible for conduct of business of the Company. Thus, the exposition of law, that details regarding the manner in which a person, being a Director was responsible for the conduct of its affairs, has not been declared bad. Further, in this case, the concerned Director had not resigned.

(18) In *Standard Chartered Bank* (*supra*) the accused-Company issued cheques for repayment of loan extended by a Bank,

⁶ 2015(1) RCR (CrI.) 54

⁷ 2016(2) RCR (CrI.) 778

which were dishonored. The trial Court summoned the accused persons which was challenged by way of revision but was dismissed. Consequently the said orders was challenged before the High Court. The petition filed by two of the accused Directors, was allowed on the ground that no specific assertion regarding the role of the said Directors, had been made in the complaint. In this backdrop, the Supreme Court held that -

- (a) the complaint must contain material to enable the Magistrate to make up his mind for issuing process as the Magistrate can not issue process in each and every case;
- (b) vicarious liability under Section 141 of the Act arises only when it is shown that an accused person was in-charge of and responsible for the conduct of business of the Company at the relevant time;
- (c) Since the liability is on account of the nature of work being done by the accused person, it is necessary to disclose the appropriate facts for making him liable;
- (d) in the case of a Managing Director or Joint Managing Director or authorized signatory of the cheque there is no requirement of making an averment that he was in-charge of and responsible to the Company for the conduct of its business; and
- (e) for making any other officer of the Company liable specific averment regarding his role and duty in the Company is necessary.

(19) Thus, it was held that the Chairman, Managing Director and authorized signatories of the cheques were liable for the offence even in the absence of any averment regarding their involvement in the conduct of the business of the Company. The whole time Directors were also liable as in their capacity as such Directors they would be involved in the conduct of the business of the Company even on daily basis and, thus, the averment in terms of language of Section 141 of the Act, was sufficient. The judgment of the High Court was, thus, set aside. This judgment is not on the point in issue in the present case. In fact, even in this judgment, it has been reiterated that for making any other person liable it is necessary to plead the necessary facts.

(20) Thus, there is no ambiguity in the law on the subject.

(21) Reverting to the facts of this case, it is clear that the

petitioner had resigned w.e.f. 10.02.2006. The cheque in dispute had been issued much later. Form No. 32 and the annual return of the Company have been placed on record and the same have not been denied. For imposing vicarious liability upon the petitioner, as a person responsible for the business of the company, it was necessary to make specific averments in the complaint regarding his role in the conduct of the business of the Company. No such averment having been made in this case, the Magistrate was not justified in summoning the petitioner. At the stage of summoning of an accused person, the trial Court/Magistrate must be satisfied on the basis of material produced before it that *prima facie* the accused persons have committed an offence. The material being referred to by the complainant by way of its reply cannot be looked into at this stage because the same has not been referred to or relied upon in the complaint.

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(22) This case is being taken up separately as learned counsel representing the complainant has submitted that specific averments regarding the manner in which the petitioner was responsible for conducting the business of the Company have been made in the complaint.

(23) The complaint is on record as Annexure P-1. The petitioner has been arrayed as accused No. 3. A perusal thereof does not support the contention of the learned counsel.

(24) Faced with this situation, learned counsel for the complainant has drawn my attention to the notice issued under Section 138 of the Act, which is Annexure P-6 on the record. He submits that the said notice is a part of the complaint and necessary averments have been made therein. Thus, there is no error in the order of summoning.

(25) The petitioner is notice No. 3. The averment made regarding him is as follows:-

“You address No. 3 being Chairman/Director of addressee No. 1 are also being incharge and being responsible person of address No. 1 company for conduct to the business of the Company are also liable for the punishment prescribed under the Act *ibid.*”

(26) Contention of learned counsel for the petitioner cannot be accepted because the averments made in the legal notice under Section 138 of the Act cannot be construed to be averments made in the

complaint. That apart, even the averments made in the legal notice, do not fulfill the requirement of law. Thus, the contention of learned counsel for the complainant, is misplaced and is rejected.

(27) The petitions are, accordingly, allowed; summoning orders as well as Complaints, which are subject matter of the respective petitions alongwith consequential proceedings having arisen therefrom, are quashed qua the petitioner.

(28) At this stage, it would be appropriate to refer to the judgment of the Delhi High Court in *Sudip Jain (supra)*. Delhi High Court has held that in order to reduce litigation it would be appropriate for the concerned Magistrates to seek copies of Form No. 32 and the latest Annual Return filed by the Company so that only those persons who are Directors on the date of commission of the offence are summoned.

(29) I respectfully agree with the observations made by the Delhi High Court. It is, thus, directed that in all cases where the accused is a 'Company', before issuing summons to the accused persons the trial Court/Magistrate shall direct the complainant to produce a copy of Form No. 32 and the annual Return filed by the Company in order to determine the persons, who were Directors on the date of commission of the offence. In cases where the accused—Director is the Chairman or Managing Director or Joint Managing Director or authorized signatory of the cheque, they may be summoned without any averment regarding their role in the conduct of the affairs of the Company. For summoning of any other Director or officer of the Company the necessary averment regarding their role in the conduct of the business of the Company, must be insisted upon. In respect of whole time Directors, mere reproduction of the words of Section 141 of the Act would be sufficient.

(30) A copy of this judgment be sent to all District Judges in the States of Punjab and Haryana and to the District Judge of U.T. Chandigarh for compliance.

Shubreet Kaur