

Anita Malhotra vs Apparel Export Promotion Counl.& Anr on 8 November, 2011

Equivalent citations: 2012 CLC 89 (SC), 2011 AIR SCW 6535, 2012 (1) SCC 520, 2012 (2) AIR JHAR R 458, 2012 (1) AIR KAR R 634, 2012 CLC 89, (2012) 1 MADLW(CRI) 399, (2011) 4 DLT(CRL) 410, 2011 CRILR(SC&MP) 887, 2011 CALCRILR 3 729, (2012) 1 UC 318, (2011) 75 ALLCRIC 956, (2011) 183 DLT 488, (2011) 105 CORLA 405, (2012) 1 ALD(CRL) 645, (2011) 108 ALLINDCAS 83 (SC), (2012) 1 KCCR 1, (2012) 2 ALLCRILR 407, (2011) 50 OCR 1042, (2011) 4 BANKCAS 665, (2011) 4 BOMCR(CRI) 577, (2012) 2 MH LJ (CRI) 53, (2012) 3 CIVLJ 181, (2011) 4 CRIMES 281, (2012) 1 CIVILCOURTC 549, (2011) 4 RECCIVR 930, (2011) 2 CRILR(RAJ) 887, 2011 CRILR(SC MAH GUJ) 887, (2011) 2 NIJ 561, (2012) 2 MAD LJ(CRI) 371, (2011) 4 RAJ LW 3586, (2011) 4 CURCRIR 174, (2011) 12 SCALE 471, 2012 (1) SCC (CRI) 496, (2011) 6 BOM CR 694, AIR 2012 SUPREME COURT 31, 2012 ACD 1 (SC)

Author: P. Sathasivam

Bench: P. Sathasivam, Jasti Chelameswar

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2033 OF 2011

(Arising out of SLP (CrI.) No. 85 of 2011)

Mrs. Anita Malhotra

.... Appellant(s)

Versus

Apparel Export Promotion Council & Anr. Respondent(s)

J U D G M E N T

P. Sathasivam, J.

- 1) Leave granted.
- 2) This appeal is filed against the final judgment and order

dated 16.12.2009 passed by the High Court of Delhi at New Delhi in Crl. Misc. Petition No. 1238 of 2007 wherein the learned single Judge of the High Court dismissed the petition filed by the appellant herein for quashing of Criminal Complaint being No. 993/1 of 2005 filed against her under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the Act") in the Court of ACMM, New Delhi.

- 3) Brief facts:

- (a) The appellant, who was a non-executive Director on the

Board of M/s Lapareil Exports (P) Ltd. (hereinafter referred to as "the Company"), resigned from the Directorship w.e.f.

31.08.1998. On 20.11.1998, recording the resignation of the appellant, the Company filed statutory Form 32 with the Registrar of Companies. A notice dated 10.12.2004 was issued to the appellant regarding dishonour of alleged cheques under Section 138 of the Act by the respondents. The appellant, vide letter dated 15.12.2004, replied to the said notice informing the respondents that she had resigned from the Directorship of the Company long back in 1998. By letter dated 17.12.2004, the respondents sought for certain information/documents from the appellant relating to the Company. On 18.12.2004, the appellant replied to the aforesaid letter reiterating that after her resignation she had nothing to do with the Company and as such she was not in a position to give the information sought for.

(b) The Respondents filed a complaint under Section 138 of the Act being Complaint No. 993/1 of 2005 in the Court of ACMM, New Delhi against the Company arraying the appellant herein as

accused No.3. The appellant herein also filed a petition being Criminal Misc. (Main) Petition No. 1238 of 2007 before the High Court of Delhi for quashing of the complaint pending in the Court of ACMM, New Delhi. The High Court, by impugned judgment dated 16.12.2009, dismissed her petition.

(c) Aggrieved by the said judgment, the appellant has filed this appeal by way of special leave before this Court.

4) Heard Mr. Akhil Sibal, learned counsel for the appellant and Mr. G.L. Rawal, learned senior counsel for the respondent No.1.

5) The only point for consideration in this appeal is whether the appellant has made out a case for quashing the criminal complaint filed by the respondents under Section 138 of the Act.

6) In the complaint filed by the respondents before the ACMM, New Delhi, the appellant herein was shown as A3.

Apparel Export Promotion Council-Complainant No.1 therein is a Company duly registered under Section 25 of the Companies Act, 1956 and has been sponsored by the Government of India through Ministry of Textiles and has been looking after all the matters relating to export of readymade garments from India to various parts of the world and also administer Garments Export Policy (GEP) issued by the Government of India from time to time. Complainant No.2 is the Joint Director and is otherwise a Principal Officer in the Apparel Export Promotion Council. Accused No.1 is a Company incorporated under the Companies Act, 1956 and in the complaint it was stated that accused Nos. 2 and 3 are its Directors. Insofar as the role of A2 and A3 are concerned, it was stated in the complaint that they are the Directors of the Company and are responsible for the conduct of the business and also responsible for day to day affairs of the Company. It was further stated that all the accused persons, who were in charge of and were responsible to the Company for the conduct of its business at the time the offence was committed shall be deemed to be guilty of the offence. It is further seen from the complaint that on 01.06.2004, the Company had issued certain cheques in favour of the complainant for the purpose of allocation of quota and revalidation and utilization thereof. All the cheques mentioned in para 5 of the complaint were sent for encashment but the same were bounced/dishonoured by the drawee Bank, namely, the Punjab & Sind Bank for the reason "funds insufficient". The complaint further shows that the said fact was informed to the accused. Thereafter, the complainant intended to take action under Section 138 of the Act and the complainant got issued a statutory notice dated 10.12.2004. It was specifically stated in the complaint that the notices were sent by Regd. AD post on 15.12.2004 and through courier on 13.12.2004 which were duly served on the accused.

7) Mr. Akhil Sibal, learned counsel for the appellant, by drawing our attention to the reply sent by the appellant to the aforesaid notice vide her letter dated 15.12.2004 informing the complainant that she had resigned from the Directorship of the Company long back in 1998, submitted that the complainant having received such reply dated 15.12.2004 suppressed the same both in the complaint as well as before the courts below. In the said reply dated 15.12.2004, the appellant has

highlighted that she had resigned from the Directorship of the Company long back in 1998. It is the grievance of the appellant that in spite of specific assertion that she ceased to be a Director from 1998 she was arrayed as accused No.3 purportedly in her capacity as a Director of the Company and her reply to the statutory notice was willfully suppressed. When this aspect was confronted to Mr. G.L. Rawal, learned senior counsel for the respondent, he fairly admitted that the complaint does not refer to the reply dated 15.12.2004. He further stated that the said omission at the instance of an undertaking of the Government of India has to be ignored. We are unable to accept the said contention.

Inasmuch as the reply to the statutory notice contains specific information that she had resigned from the Company in 1998, the complainant was not justified in not referring the same in the complaint and arrayed her as accused No.3 in the complaint filed in the year 2005. No doubt, whether the appellant has furnished the required documents in support of her claim for resignation from the Company in 1998 is a different aspect which we are going to discuss in the subsequent paras. The reading of the complaint proceeds that on the date of issuance of cheques, that is, on 01.06.2004, the appellant was a Director of the Company and in charge of all the acts and deeds of the Company and also responsible for the day to day affairs, funding monies etc. This assertion cannot be sustained in the light of her reply dated 15.12.2004 intimating that she had resigned from the Company in 1998.

8) Mr. Akhil Sibal, learned counsel for the appellant, by drawing our attention to a certified copy of Annual Return of the Company dated 30.09.1999 filed with the Registrar of Companies, which was placed on record before the High Court, contended that it is a public document in terms of Section 74(2) of the Indian Evidence Act, 1872 and the High Court ought to have accepted the same as a valid document and quashed the criminal proceedings insofar as the appellant is concerned. The High Court, in the impugned order, after recording the statement of counsel for the petitioner therein (appellant herein) that Form-32 is not available in the record of the Registrar of Companies and finding that Form-32 is the only authentic document and annual return dated 30.09.1999 filed by the accused-Company is not a public document rejected the claim of the appellant and dismissed the petition filed for quashing the complaint.

9) As regards the reference made by the High Court as to the statement said to have been made by the counsel for the petitioner therein that Form-32 is not available in the record of the Registrar of Companies, learned counsel for the appellant submitted that no such statement was ever made by the counsel before the High Court and he placed on record copy of Form-32 as Annexure-P2. A perusal of the document makes it clear that with effect from 31.08.1998, the appellant Smt. Anita Malhotra ceased to be a Director since she resigned from the Directorship of the Company, i.e., Lapareil Exports (P) Ltd.

The High Court proceeded that Form-32 is the only authentic document and in the absence of the same, reliance on Annual Return is not permissible. The High Court has further held that annual return is not a public document. It is the assertion of the appellant that no such statement was ever made or could have been made as the petition itself enclosed copies of Form 32 and the receipt of filing of the same.

Though the appellant (petitioner before the High Court) was unable to produce certified copy of the said Form 32 as it was not available with the ROC, copy of Form 32 was placed before the High Court. In that event, we are of the view that the High Court has ignored the fact that the appellant has placed on record copy of Form 32 filed by the Company reporting the cessation of Directorship of the appellant along with the receipt of filing with the Registrar of Companies.

10) Mr. Akhil Sibal by taking us through the relevant provisions of the Companies Act, 1956, particularly, Sections 159, 163 and 610(3) contended that the Annual Return dated 30.09.1999 is a public document and the same is reliable and legally acceptable insofar as the contents of the same are concerned. The said Sections are reproduced hereunder:

159. Annual return to be made by company having a share capital.-- (1) Every company having a share capital shall within sixty days from the day on which each of the annual general meetings referred to in section 166 is held, prepare and file with the Registrar a return containing the particulars specified in Part I of Schedule V, as they stood on that day, regarding--

- (a) its registered office,
- (b) the register of its members,
- (c) the register of its debenture-holders,
- (d) its shares and debentures,
- (e) its indebtedness,
- (f) its members and debenture-holders, past and present, and
- (g) its directors, managing directors, managers and secretaries, past and present:

Provided that any of the five immediately preceding returns has given as at the date of the annual general meeting with reference to which it was submitted, the full particulars required as to past and present members and the shares held and transferred by them, the return in question may contain only such of the particulars as relate to persons ceasing to be or becoming members since that date and to shares transferred since that date or to changes as compared with that date in the number of shares held by a member.

Xxx xxxx"

163. Place of keeping and inspection of, registers and returns.--

(1) The register of members commencing from the date of the registration of the company, the index of members, the register and index of debenture-holders, and copies of all annual returns prepared under sections 159 and 160, together with the copies of certificates and documents required to be annexed thereto under sections 160 and 161, shall be kept at the registered office of the company:

Xxx xxxx"

610. Inspection, production and evidence of documents kept by Registrar.

Xxxx xxx Xxxx xxx (3) A copy of, or extract from, any document kept and registered at any of the officers for the registration of companies under this Act, certified to be a true copy under the hand of the Registrar (whose official position it shall not be necessary to prove), shall, in all legal proceedings, be admissible in evidence as of equal validity with the original document."

11) A reading of the above provisions make it clear that there is a statutory requirement under Section 159 of the Companies Act that every Company having a share capital shall have to file with the Registrar of Companies an annual return which include details of the existing Directors. The provisions of the Companies Act require annual return to be made available by a company for inspection (S. 163) as well as Section 610 which entitles any person to inspect documents kept by the Registrar of Companies. The High Court committed an error in ignoring Section 74 of the Indian Evidence Act, 1872. Sub-section (1) of Section 74 refers to public documents and sub-section (2) provides that public documents include "public records kept in any State of private documents". A conjoint reading of Sections 159, 163 and 610(3) of the Companies Act, 1956 read with sub-section (2) of Section 74 of the Indian Evidence Act, 1872 make it clear that a certified copy of annual return is a public document and the contrary conclusion arrived at by the High Court cannot be sustained. Annual Return dated 30.09.1999 which provides the details about the existing Directors clearly show that the appellant was not a Director at the relevant time. Had the High Court considered the contents of the certified copy of the annual return dated 30.09.1999 filed by the Company which clearly shows that the appellant herein (A3) has not been shown as Director of the Company, it could have quashed the criminal proceedings insofar as A3 is concerned.

12) In DCM Financial Services Limited vs. J.N. Sareen and Another, (2008) 8 SCC 1, this Court, while considering Sections 138 and 141 of the Act came to the following conclusion which is relevant for our purpose:

"21. The cheque in question was admittedly a post-dated one. It was signed on 3-4-1995. It was presented only sometime in June 1998. In the meantime the first respondent had resigned from the directorship of the Company. The complaint petition was filed on or about 20-8- 1998. Intimation about his resignation was given to the complainant in writing by the first respondent on several occasions. The appellant was, therefore, aware thereof. Despite having the knowledge, the first respondent was impleaded as one of the accused in the complaint as a Director in

charge of the affairs of the Company on the date of commission of the offence, which he was not. If he was proceeded against as a signatory to the cheques, it should have been disclosed before the learned Judge as also the High Court so as to enable him to apply his mind in that behalf. It was not done. Although, therefore, it may be that as an authorised signatory he will be deemed to be person in-charge, in the facts and circumstances of the case, we are of the opinion that the said contention should not be permitted to be raised for the first time before us. A person who had resigned with the knowledge of the complainant in 1996 could not be a person in charge of the Company in 1998 when the cheque was dishonoured. He had no say in the matter of seeing that the cheque is honoured. He could not ask the Company to pay the amount. He as a Director or otherwise could not have been made responsible for payment of the cheque on behalf of the Company or otherwise. [See also *Saroj Kumar Poddar v. State (NCT of Delhi)*, *Everest Advertising (P) Ltd. v. State, Govt. of NCT of Delhi* and *Raghu Lakshminarayanan v. Fine Tubes*."

13) In *Harshendra Kumar D. vs. Rebatilata Koley and Others*, (2011) 3 SCC 351, while considering the very same provisions coupled with the power of the High Court under Section 482 of the Code of Criminal Procedure, 1973 (in short 'the Code') for quashing of the criminal proceedings, this Court held:

"25. In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents -- which are beyond suspicion or doubt -- placed by the accused, the accusations against him cannot stand, it would be travesty of justice if the accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage."

As rightly stated so, though it is not proper for the High Court to consider the defence of the accused or conduct a roving enquiry in respect of merit of the accusation, but if on the face of the document which is beyond suspicion or doubt placed by the accused and if it is considered the accusation against her cannot stand, in such a matter, in order to prevent injustice or abuse of process, it is incumbent on the High Court to look into those document/documents which have a bearing on the matter even at the initial stage and grant relief to the person concerned by exercising jurisdiction

under Section 482 of the Code.

14) Inasmuch as the certified copy of the annual return dated 30.09.1999 is a public document, more particularly, in view of the provisions of the Companies Act, 1956 read with Section 74(2) of the Indian Evidence Act, 1872, we hold that the appellant has validly resigned from the Directorship of the Company even in the year 1998 and she cannot be held responsible for the dishonour of the cheques issued in the year 2004.

15) This Court has repeatedly held that in case of a Director, complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the accused Company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient.

[Vide National Small Industries Corporation Limited vs. Harmeet Singh Paintal and Another, (2010) 3 SCC 330]. In the case on hand, particularly, in para 4 of the complaint, except the mere bald and cursory statement with regard to the appellant, the complainant has not specified her role in the day to day affairs of the Company. We have verified the averments as regard to the same and we agree with the contention of Mr. Akhil Sibal that except reproduction of the statutory requirements the complainant has not specified or elaborated the role of the appellant in the day to day affairs of the Company. On this ground also, the appellant is entitled to succeed.

16) In the light of the above discussion and of the fact that the appellant has established that she had resigned from the Company as a Director in 1998, well before the relevant date, namely, in the year 2004, when the cheques were issued, the High Court, in the light of the acceptable materials such as certified copy of annual return dated 30.09.1999 and Form 32 ought to have exercised its jurisdiction under Section 482 and quashed the criminal proceedings. We are unable to accept the reasoning of the High Court and we are satisfied that the appellant has made out a case for quashing the criminal proceedings. Consequently, the criminal complaint No. 993/1 of 2005 on the file of ACMM, New Delhi, insofar as the appellant herein (A3) is quashed and the appeal is allowed.

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.....J. (P. SATHASIVAM)J. (JASTI CHELAMESWAR) NEW DELHI;

NOVEMBER 8, 2011.