Dcm Financial Services Ltd vs J.N.Sareen & Anr on 13 May, 2008

Equivalent citations: AIR 2008 SUPREME COURT 2255, 2008 AIR SCW 4034, 2008 CLC 1225 (SC), 2008 ALL MR(CRI) 2272, 2008 (8) SCALE 54, 2008 (3) SCC(CRI) 401, 2008 (8) SCC 1, (2008) 2 JCC 233 (SC), 2008 (7) SRJ 73, (2008) 2 KER LT 762, (2008) 3 CURCRIR 123, (2008) 3 RECCIVR 270, (2008) 2 BOMCR(CRI) 754, (2008) 144 COMCAS 55, (2008) 3 CIVILCOURTC 266, (2008) 2 MAD LJ(CRI) 1434, (2009) 1 MAH LJ 650, (2009) 1 MPLJ 593, (2008) 40 OCR 906, (2008) 3 RECCRIR 152, (2008) 85 CORLA 26, (2008) 3 ICC 808, (2008) 8 SCALE 54, (2008) 2 NIJ 380, (2009) 65 ALLCRIC 103, (2009) 2 CHANDCRIC 259, (2008) 3 ALLCRILR 500, (2008) 2 BANKCLR 750, (2008) 6 BOM CR 504

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Bench: S.B. Sinha, Mukundakam Sharma

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELALTE JURISDICTION

CRIMINAL APPEAL NO. 875 OF 2008

(Arising out of SLP (Crl.) No. 4801 of 2007)

DCM Financial Services Ltd. .... Appellant

Versus

J.N. Sareen and another .... Respondents

JUDGMENT

S.B. SINHA, J.

1. Leave granted.

2. What would be the effect of a post dated cheque vis-`-vis prosecution in terms of Section 141 of the Negotiable Instruments Act, 1881 (in short the Act) is the question involved in this appeal which arises out of a judgment and order dated 31st January, 2007 passed by the High Court of Delhi at

New Delhi in Criminal Revision No. 777 of 2003 dismissing the Criminal Revision Application preferred from an order dated 5th July, 2003 passed by the learned Additional Sessions Judge, New Delhi, discharging the 1st respondent No.1 herein.

3. The basic fact of the matter is not in dispute.

First Respondent herein was a Director of a Company known as M/s. International Agro Allied Products Ltd. (the Company). It had purchased certain agricultural equipments on hire purchase/lease from on 3rd April, 1995. As a part of the said transaction some post dated cheques were issued in favour of the appellant herein towards the payment of monthly hire/rental.

First Respondent admittedly resigned from the Directorship of the Company on or about 25th May, 1996. It was accepted. One of the said post dated cheques which was issued in April, 1995 was dated 28th January, 1998 amounting to Rs.2,01,298/-, when presented to the bank by the appellant for encashment, was dishonoured. Pursuant thereto a notice for payment was issued. Amount having not been paid despite service of notice, a complaint petition was filed under Section 138 of the Act. It was inter alia averred therein :-

> "8. That on assurance of the accused persons cheque No.0644739 dated 28th January, 1998 for a sum of Rs.2,01,298/- drawn on Bank of Baroda, Lucknow and delivered/issued by the accused towards payment of hire/lease rentals, were presented for encashment again by complainant company through their bankers and the same was returned unpaid by the bankers of the accused vide memo dated 22.6.1998 with the remarks "Insufficient Funds" to the banker's of complainant company. The complainant received the information only on 21.6.1998. (sic) (Copy of memo of cheque returned and above referred cheque are annexed herewith.).
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> 9. That the complainant company sent a legal notice to the accused persons through its advocate on 6th July, 1998, demanding the payment against these cheques within 15 days from the receipt of the notice. This notice was sent to the accused persons both through registered AD & UPC within 15 days from the date of receiving the information regarding dishonouring of the cheques.
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> 10. That the accused persons failed to make the payment of the above said amount despite service of legal notice on him.
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> 13. That the accused No.1 is a ccompany/firm and accused No. 2 to 10 were in charge and were responsible to the accused No.1, at the time when offence was committed. Hence, the accused Nos. 2 to 10 in addition to the accused No.1 are liable to be prosecuted and punished in accordance with law by this Hon'ble Court, as provided by section 141 of the N.I. Act, 1881. Further the offence has been committed by the accused No.1 with the consent and connivance of the accused Nos. 2 to 10."

4. No allegation was made in the complaint petition that the 1st respondent was a signatory to the cheque or he was authorized therefor.

5. An application was filed by the 1st respondent for his discharge. By reason of the order dated 5th July, 2003 the same was allowed by the learned Additional Sessions Judge, New Delhi, stating :-

> "....It is a well-known fact that the Constitution of the Board of Directors of a company keeps on changing and a fixed ration of the directors of the company keep on retiring by rotation every year and new directors are inducted. The complainant cannot make directors of the year 1995 or 1996 as the accused person for a cheque dishonoured in the year 1998. He can make accused only those directors who were the directors of the company in the year 1998. The Companies Act has made specific provisions for all companies registered with the Registrar of Companies to file a return about the directors in the company. These provisions have been made for the benefit to the public so that the people can get information from Registrar of Companies about the change in the constitution of directors. Change of the constitution of the Board of Directors is not a private affair of the company. A complainant cannot take the plea that he had made those directors as accused which were known to him. If this plea of complainant is allowed then he would be at liberty to make all the person who at any point of time, had been the director of company as accused.
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> 5. I consider in view of the documents placed by the applicant on record showing that applicant had resigned way back in 1996 and his resignation was informed to the Registrar of Companies in October 1996 by filing the statutory Form 32, the plea of complainant that applicant was a director cannot be considered without any affidavit of the Authorized Representative of the complainant that he has verified from the Registrar of Companies and Form No.32 filed by the accused was not genuine. It is not a trivial matter that a person has to face trial as an accused in the court. No person can be asked to face trial in the court without there being a basis of proceedings against him merely at the wishes of a complainant. The court must be satisfied that the persons who has been called as an accused against him there was sufficient grounds to proceed. In this case I consider that complainant has taken vague plea in reply to the application of accused regarding genuineness and non-admission of Form No.32 or about his being responsible for the function of the company. In view of specific documents by the accused applicant the vague pleas of the company do not and anywhere."

The Criminal Revision Application filed thereagainst, as indicated hereinbefore, has been dismissed.

6. Mr. P.S. Patwalia, learned Senior Counsel appearing on behalf of the appellant, would submit that although before the High Court no material was placed to show that the 1st respondent was a signatory to the cheque in question, in view of the fact that the entire records were available to the High Court, it should have been held that the First Respondent was primarily liable for payment of

the amount thereunder.

7. Mr. J.N. Sareen, learned counsel appearing on behalf of the 1st respondent, supported the impugned judgment.

8. In support of the said complaint petition one Peter N. Ballam was examined on behalf of the appellant. In relation to the 1st respondent he did not make any statement as is required in terms of Section 141 of the Act. He merely stated :-

> "8. I state that the above named accused no.1 is a Company and accused No. 2 to 8 are Directors/key executives of the accused No.1 Company and are responsible for the affairs of accused No.1 is/are guilty of offence u/s 138 of Negotiable Instruments Act & 420 of IPC and is/are liable to be prosecuted and punished in accordance with law."

He, thus, even was not aware of the post held by the First Respondent herein at the relevant time.

The learned Sessions Judge in his order dated 5th July, 2003 has noticed that no contention had been raised that the 1st respondent in his capacity as an authorized signatory signed the cheque. Such a contention appears to have been raised before us for the first time. It has not been disputed that the 1st respondent resigned as a Director of the Company on or about 25th May, 1996.

9. The question which arises for consideration is as to whether an authorized signatory, in a situation of this nature, would be liable for prosecution.

10. The underlying purpose for which the Parliament enacted Section 138 of the Act is not in doubt or dispute. What, however, is necessary to be borne in mind is the distinction between a civil proceeding and a criminal proceeding. What is also necessary to be borne in mind is the standard of proof in a civil suit and a criminal case.

11. Averments made in the complaint petition supported by the statements of the complainant form the basis for taking cognizance of an offence by the Magistrate. Application of mind on the averments made in the complaint petition vis-`-vis the order which is required to be passed for summoning the witnesses is imperative.

12. The complaint petition did not disclose as to who had signed the cheque on behalf of the Company. Involvement of the 1st respondent in commission of the offence as signatory was neither averred nor stated by the authorized representative of the complainant. Even the complaint petition proceeded on the basis that the averments contained in the complaint petition were sufficient to enable the learned Magistrate to summon the accused. Even before the High Court such a contention has not been raised, as noticed hereinbefore.

We may notice the concession made by Mr. Patwalia in this behalf that such a contention has been raised before us for the first time. This itself indicates the manner in which the complaint

proceeded. Fairness on the part of the complainant is also expected in such a matter.

It is now not in dispute that the 1st respondent had intimated the complainant as regards his resignation from the Company.

13. Section 138 of the Act reads as under :-

> "138. Dishonour of cheque for insufficiency, etc., of funds in the account.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to two year, or with fine which may extend to twice the amount of the cheque, or with both..."

14. For constituting an offence in terms of the said provision, the following ingredients are to be satisfied:-

a) A cheque must be drawn;

b) It must be presented and returned unpaid inter alia with the remarks "insufficient funds";

c) A Notice for payment should be served on the accused;

d) The accused has failed to make the payment of the said

amount to the payee within 15 days from the date of receipt of notice.

15. First Respondent indisputably was a Director of the Company. The liability attached to him was not a personal liability. It was a constructive liability. The cheque was drawn on behalf of the Company. He might have been liable as a person incharge of the company within the meaning of Section 141 of the Act as has been held by this Court in S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla and another : (2005) 8 SCC 89 whereupon strong reliance has been placed by Mr. Patwalia. One of the questions which indisputably arose for consideration therein was as to whether a signatory of the cheque would come within the purview of Section 141 of the Act, as would appear from paragraph 1 thereof, which reads :-

> "This matter arises from a reference made by a two-Judge Bench of this Court for determination of the following questions by a larger Bench:

> "(a) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfil the requirements of the said section and it is not necessary to specifically state in the complaint that the person accused was in charge of, or responsible for, the conduct of the business of the company.
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> (b) Whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.
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> (c) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the managing directors or joint managing director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against."

It was opined :-

> "9. The position of a managing director or a joint managing director in a company may be different. 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. In order to escape liability such persons may have to bring their case within the proviso to Section 141(1), that is, 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."

It was concluded :-

> "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.
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> Therefore, these words have been rightly qualified by use of the words:
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> "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."

16. We may also notice a decision of this Court in N. Rangachari vs. Bharat Sanchar Nigam Ltd. : (2007) 5 SCC 108 wherein it was held :-

> "21. A person normally having business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its memorandum or articles of association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. Therefore, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are in charge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of it. So, all that a payee of a cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in charge of its affairs. The Directors are prima facie in that position."

It was further held :-

> 27. We think that, in the circumstances, the High Court has rightly come to the conclusion that it is not a fit case for exercise of jurisdiction under Section 482 of the Code of Criminal Procedure for quashing the complaint.

In fact, an advertence to Sections 138 and 141 of the Negotiable Instruments Act shows that on the other elements of an offence under Section 138 being satisfied, the burden is on the Board of Directors or the officers in charge of the affairs of the company to show that they are not liable to be convicted. Any restriction on their power or existence of any special circumstance that makes them not liable is something that is peculiarly within their knowledge and it is for them to establish at the trial such a restriction or to show that at the relevant time they were not in charge of the affairs of

the Company. Reading the complaint as a whole, we are satisfied that it is a case where the contentions sought to be raised by the appellant can only be dealt with after the conclusion (sic commencement) of the trial."

17. We are, however, concerned with a different situation hereat.

18. Section 141 of the Act provides for a constructive liability. A legal fiction has been created thereby. The statute being a penal one, should receive strict construction. It requires strict compliance of the provision. Specific averments in the complaint petition so as to satisfy the requirements of Section 141 of the Act are imperative. Mere fact that at one point of time some role has been played by the accused may not by itself be sufficient to attract the constructive liability under Section 141 of the Act. (See K. Srikanth Singh vs. M/s. North East Securities Ltd. and another : JT 2007 (9) SC 449).

19. We may also notice that this Court in N.K. Wahi vs. Shekhar Singh and others : (2007) 9 SCC 481 has observed :-

> "8. To launch a prosecution, therefore, against the alleged Directors there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are in-charge and responsible for the conduct of the business of the company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and the court can always come to a conclusion in facts of each case. But still, in the absence of any averment or specific evidence the net result would be that complaint would not be entertainable."

[Emphasis supplied]

20. The cheque in question was admittedly a post dated one. It was signed on 3rd April, 1995. It was presented only sometimes in June, 1998. In the meantime he had resigned from the directorship of the Company. The complaint petition was filed on or about 20th August, 1998. Intimation about his resignation was given to the complainant in writing by the 1st respondent on several occasions. Appellant was, therefore, aware thereof. Despite having the knowledge, the 1st respondent was impleaded one of the accused in the complaint as a Director Incharge 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 authorized signatory he will be deemed to be person incharge, 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 incharge 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 Shiv Kumar

Poddar vs. State (NCT of Delhi) :

(2007) 3 SCC 693: Everest Adveristing Pvt. Ltd. vs. State (NCT of Delhi) : (2007) 5 SCC 54 and Raghu Lakshminarayanan vs. Fine Tubes :

(2007) 5 SCC 103.

21. Mr. Patwalia, however, submitted that a situation may arise where change in the management is effected only to avoid such constructive liability.

Firstly we are not concerned with such a hypothetical case. Secondly, as noticed by this Court in Rangachari's case (supra) that a person normally having business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its memorandum or articles of association.

22. When post dated cheques are issued and the same are accepted, although it may be presumed that the money will be made available in the bank when the same is presented for encashment, but for that purpose, the harsh provision of constructive liability may not be available except when an appropriate case in that behalf is made out.

23. Section 140 of the Act cannot be said to have any application whatsoever. Reason to believe on the part of a drawer that the cheque would not be dishonoured cannot be a defence. But, then one must issue the cheque with full knowledge as to when the same would be presented. It appears to be a case where the appellant has taken undue advantage of the post dated cheques given on behalf of the company. The statute does not envisage misuse of a privilege conferred upon a party to the contract. Submission of Mr. Patwalia made in view of the decision of this Court in Adalat Prasad v. Rooplal Jindal and Others [(2004) 7 SCC 338] is misplaced. Had such a contention been raised even in terms of Adalat Prasad (supra), the respondents could have filed an application for quashing in terms of Section 482 of the Code of Criminal Procedure at that stage. Again such a contention had not been raised before the High Court. No such ground appears to have been taken even in the Special Leave Petition. While examining the issue, we have considered the case from a broader angle. Having found that the prosecution of the respondents being mala fide despite the fact that on technical grounds it may be lawful to set aside the order of the High Court, it, in our opinion, should not be done. Jurisdiction of this Court in terms of Article 136 of the Constitution of India need not be exercised only because it would be lawful to do so. Various factors including the conduct of the appellant will be relevant therefor. Having regard to the facts and circumstances of this case, it is not a fit case where we should allow the appellants to raise additional contentions which have not been raised before the courts below.

24. For the reasons abovementioned we are of the opinion that no case has been made out for interference with the impugned judgment.

25. The appeal fails and is dismissed.

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.....J. (S.B. Sinha) .....

.....J. (Dr. Mukundakam Sharma) New Delhi May 13, 2008