

Sidharth Chauhan vs Sushila Tyagi on 9 August, 2024

Author: Manoj Kumar Ohri

Bench: Manoj Kumar Ohri

\$~76 to 78

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ CRL.M.C. 1713/2023
SIDHARTH CHAUHAN

Through: Mr. Sameer Chan
Tomar, Mr. Hima
Shubham Parasha

versus

SUSHILA TYAGI

Through: Mr. Sarjanand J
Ghose and Mr. R

77

+ CRL.M.C. 1714/2023
SIDHARTH CHAUHAN

Through:

SUSHILA TYAGI

78

+ CRL.M.C. 1715/2023
SIDHARTH CHAUHAN

Through:

versus

ANIL KUMAR TYAGI

Through:

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OH
ORDER

% 09.08.2024 This is a digitally signed order.

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1. By way of the present petitions, the petitioner seeks quashing of three criminal complaints bearing CC numbers 8149/2020, 9954/2020 and 9125/2020 for offences punishable under Section 138 N.I. Act, 1881 read with Section 420 IPC, and consequent proceedings thereof.

2. The present petitions arise out of three complaints initiated by the respondent against the petitioner with respect to three different cheques issued in the same transaction. As the parties are common and common submissions have been addressed by both of them, the three petitions are taken up together for consideration.

3. Before proceeding further, some factual aspects which are different in the three petitions are noted hereunder:

1. CRL.M.C. 1713/2023 Relates to dishonour of cheque for a sum of Rs.15,00,000/- vide return memo dated 07.01.2020.

2. CRL.M.C. 1714/2023 Relates to dishonour of cheque for a sum of Rs.20,00,000/- vide return memo dated 04.03.2020.

3. CRL.M.C. 1715/2023 Relates to dishonour of cheque of Rs.

15,00,000/- vide return memo dated 04.02.2020.

4. All the aforesaid cheques have been dishonoured vide return memos issued separately, each with the remarks, "Funds Insufficient".

5. Indisputably, all the three cheques were issued in the proceedings that were pending before Real Estate Regulatory Authority (hereinafter referred to as 'RERA'), Haryana, in executions filed by the respondent/complainant. In pursuance of a settlement arrived at between the parties, a total of six cheques were given. While three of them were encashed on presentation, the other three cheques, in respect of which present proceedings arise, were This is a digitally signed order.

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6. Mr. Sameer Chandra, learned counsel for the petitioner, contends that the complaints filed before the learned Magistrate were materially defective inasmuch as they were not preceded with a legal notice to the accused company. He further submits that all the three cheques that were dishonoured, were issued on behalf of the company, namely, M/s Sidhartha Buildhome Pvt. Ltd. (hereinafter referred to as 'the company') and the present petitioner has signed the said cheques for and on behalf of the company. Furthermore, he submits that even in the subject complaints, the company was not impleaded as an accused. It is also stated that while in one case, the amended memo of parties was filed after the issuance of summons, in the other two cases, the same were filed prior to issuance of summons. It is submitted that only in Crl.M.C. 1715/2023, the company has been

summoned upon filing of the amended memo.

7. The petitioner's challenge to the filing and continuation of the criminal complaint is solely premised on the contention that in the absence of any statutory demand notice issued to the company, the complaints could not have been filed. Learned Counsel has also cited case law in favour of his submissions.

8. Learned counsel for the respondent contended that the petitioner has not approached the Court with clean hands inasmuch as the initiation of proceedings under IBC against the company have not been disclosed. He further submits that the company was admitted into CIRP on 04.03.2021. The said factum was later brought to the notice of the learned Judicial Magistrate by the Legal Officer of the company on 27.03.2021. While placing reliance on *P. Mohanraj & Others v. Shah Brothers Ispat Private* This is a digitally signed order.

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While refuting the petitioner's contention that the complaint was not preceded by mandatory statutory notice, learned counsel for the respondent contends that reading of the notice as a whole would show that though the same was addressed to the petitioner, it impliedly was also issued to the company. In this regard, learned counsel places reliance on the decision in *Dashrathbhai Trikammbhai Patel v. Hitesh Mahendrabhai Patel and others*, reported as AIR 2022 SC 4961.

Learned counsel further refers to the reply tendered by the petitioner at the stage of framing of notice, wherein he answered that he did not receive any notice, and that the same might have been received at the office address of the company. On the aspect of placing on record an amended memo of parties after the filing of the complaint, it was contended that the same does not prejudice the accused, and in this context, reference is made to the decision in *S. R. Sukumar vs S. Sunaad Raghuram*, reported as 2015 AIR SCW 4066.

9. The controversy in the present case revolves around the legal issue as to whether a complaint under Section 138 of Negotiable Instruments Act, 1881 (hereinafter 'NI Act') ought to be preceded with a statutory demand notice, as envisaged under Section 138 of NI Act, when the cheque is issued on behalf of the company. Fortunately, the issue is no longer re integra. In *Himanshu vs. B. Shivamurthy and Another*, reported as (2019) 3 SCC 797, Supreme Court while expounding on the said issue observed as under:

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Server on 14/08/2024 at 21:53:03 "11. In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. The complaint was lodged only against the appellant without arraigning the company as an accused.

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13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque, as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.

10. While following the aforesaid decision, this Court also, in *Nipun Padha vs. S.S. Techno Marketing Pvt. Ltd.*, passed in Crl. M.C. 4817/2023, observed as under:

"4. Firstly, the law as regards to the liability of a Director for an offence under Section 138 NI Act committed by a company is no longer *res integra*. Starting from the decision in *S.M.S Pharmaceuticals Ltd. v. Neeta Bhalla & Anr.*¹ upto the recent decision of Supreme Court in *Susela Padmawathy Amma v. Bharti Airtel Ltd.*² it has been observed that while a Director holds special/unique position in a company, having authority to take decisions, however, the mere nomenclature or mention of an individual as Director cannot itself bring him/her into the fold of Section 138 by assistance of Section 141 NI Act, the latter of which relates to vicarious liability of a Director. As observed in a catena of judgements, it is only those Directors who were in-charge of the day-to-day affairs and responsible for the conduct of the business of the company, can be held liable for the offence under Section 138 NI Act. The word 'in-

(2005) 8 SCC 89 2024 SCC OnLine SC 311 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/08/2024 at 21:53:03 charge of a business' has been interpreted to mean a person having overall control of the day-to-day business of the company.³ As noted above, In the present case, the petitioner has denied liability by contending that he was not even a Director in the company at the time of issuance of the cheque. To support the said contention, the petitioner has placed on record Company Master Data from the site of Ministry of Corporate Affairs ("the MCA"), as per which the petitioner had resigned from the Directorship w.e.f. 18.03.2016 i.e. much before the issuance of the subject cheque dated 20.02.2020, 25.02.2020 and 28.02.2020.

5. Secondly, the issue whether a company needs to be impleaded as an accused or not has been settled by catena of decisions beginning with *Aneeta Hada v. Godfather Travels & Tours Pvt. Ltd.*⁴, wherein it has been held: -

"xxx

58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company"

appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, *Girdhari Lal Gupta vs. B.H. Mehta*, (1971) 3 SCC 189 (2012) 5 SCC 661 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/08/2024 at 21:53:03 arraigining of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself...

xxx"

6. The submission of the complainant thereby seeking permission to file an amended memo of parties, to implead the company as an accused is misconceived inasmuch as the complaint is to be mandatorily proceeded by steps as stipulated in proviso to Section 138, which must be fulfilled before the offence is said to be made out. The first condition is that the cheque ought to be presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. The second condition is that the payee or the holder in due course of the cheque, as the case may be, must make a demand for the said money by giving a notice in writing to the drawer of the cheque within 30 days of receiving the information from the bank regarding the dishonour of the cheque. The third condition states that there should be a failure on the part of the drawer of cheque to make the payment of the amount under the cheque to the payee or the holder in due course, as the case may be, within 15 days of the receipt of the said notice. When all these three conditions are fulfilled, then only an offence under Section 138 of the NI Act can be said to be committed by the person issuing the cheque [Ref: MSR Leathers

v. S. Palaniappan&Anr.⁵ , Charanjit Pal Jindal v. L.N. Metalics⁶ and N. Harihara Krishnan v. J. Thomas.⁷]

7. Recently, in Himanshu v. B. Shivamurthy & Ors.⁸, the Supreme Court has held as under:-

"xxx

13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had (2013) 1 SCC 177 (2015) 15 SCC 768 (2018) 13 SCC 663 (2019) 3 SCC 797 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/08/2024 at 21:53:04 signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.

xxx"

8. In the present case, it was necessary that a demand notice be issued to the company and only upon its failure to repay, could the company have been impleaded as an accused and the Directors could have been impleaded in their vicarious capacity. However, no such course of action was undertaken. Thus, the company cannot be impleaded as an accused by way of amendment in the memo of parties and the law, as noted and extracted above, is well settled that the liability of a Director is only vicarious. Concededly, the present petitioner is not the authorised signatory or someone who had signed the subject cheques. The petitioner's resignation prior to issuance of subject cheque is also duly established by the document from Master Data available on the MCA website. Therefore, the proceedings pending are liable to be quashed against the present petitioner."

11. Though learned counsel for the respondent has tried to differentiate the latter decision by contending that the same does not apply to the facts of the present case as the petitioner in that case was not the authorised signatory and moreover, had resigned prior to the issuance of the cheques, however, the contention is misplaced as the resignation of the petitioner in the said case was only supplemental and the complaint was quashed for not being preceded by a statutory demand notice.

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12. The singular fact of not issuing any demand notice to the company by itself is good enough to reach the same conclusion. I find merit in the petitions and accordingly, the complaint cases bearing numbers 8149/2020, 9954/2020 and 9125/2020 pending before the concerned learned Judicial Magistrates and the consequent proceedings arising thereof, are hereby quashed.

13. The petitions stand disposed of in the above terms.

ANOJ KUMAR OHRI, J AUGUST 9, 2024/ns This is a digitally signed order.

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