

Yashaswini Mittal vs M/S Shri Tapodhani Aluminium Trading ... on 26 February, 2024

Author: Anoop Kumar Mendiratta

Bench: Anoop Kumar Mendiratta

* IN THE HIGH COURT OF DELHI AT NEW
Judgment delivered on: Fe
+ CRL.M.C. 1176/2021, CRL.M.A. 6012/2021
+ CRL.M.C. 1187/2021, CRL.M.A. 6074/2021
+ CRL.M.C. 1207/2021, CRL.M.A. 6136/2021
+ CRL.M.C. 1208/2021, CRL.M.A. 6141/2021
+ CRL.M.C. 2289/2021, CRL.M.A. 15258/2021
YASHASWINI MITTAL Peti
Through: Mr. Ashutosh Lohia, Ms. Shradd
Bhargawa, Mr. Gaurav Anand,
Mr. Rohit Saraswat, Mr. Karan
Sharma and Ms. Parul Lohia,
Advocates.
versus
M/S SHRI TAPODHANI ALUMINIUM TRADING CO.
THROUGH SH. NARENDER KUMAR JAIN & ORSRespondents
Through: Mr. Droan Dutt, Mr.
Mr. Aditya Malik, Ad
CORAM:
HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA
JUDGMENT

ANOOP KUMAR MENDIRATTA, J.

CRL.M.C. 1176/2021, CRL.M.C. 1187/2021, CRL.M.C. 1207/2021, CRL.M.C. 1208/2021 and
CRL.M.C. 2289/2021

1. Five separate petitions under Section 482 of the Code of Criminal Procedure, 1973 („Cr.P.C.)
have been preferred on behalf of the petitioner, who was impleaded as accused No.3 in the
complaint cases preferred under Section 138/141 NI Act by the respondent; for quashing of
proceedings emanating from Complaint Case No.9996/2014; 9995/2014; 9994/2014;

9997/2014 and 9993/2014, pending before learned MM (NI Act), North- West, Rohini Courts,
Delhi.

2. In brief, complaints under Sections 138/141 NI Act were filed on behalf of the respondent against
M/s Genesis Industrial Solution Pvt. Ltd. (accused No.1 Company) alongwith accused Nos.2 to 4
being the Directors, before the learned Trial Court. The averments made in para 2 of the complaint
may be reproduced for the purpose of present proceedings:

"2. That the accused No.1 is a private limited company and is engaged in the business of trading of Aluminum at the abovesaid address. The accused No.2 to 4 are the directors of the accused No.1 and accused No.2 is authorised signatory of accused No.1 and has been participating in day to day functioning and activities of the accused No.1 and also responsible for day to day affairs and business of accused No.1. The accused No.3 and 4 are the Directors of the accused No.1 and also responsible for day to day affairs and business of accused No.1. As such, they have been dealing in day to day activities of the accused No.1."

3. As per the case of the petitioner (accused No.3 in the complaint under Section 138 NI Act), she was summoned in aforesaid proceedings by the learned MM vide order dated 05.07.2014 without considering the fact that the petitioner had already resigned on 15.03.2014 as Director of the Company and was neither signatory of the cheques, nor Managing Director of the Company. Further, she was pursuing her studies at relevant time and had completed her Law only in the year 2014 having joined Jindal Global Law School in the year 2009. It is further her case that the transactions as per the complaint pertain to January, 2014 to March, 2014 and during the aforesaid period, she was residing in the hostel without any active role in the aforesaid Company and was not responsible for conduct of day-to-day affairs of the Company.

4. It is further the case of the petitioner that she was a non-working Director on 05.01.2012 but inadvertently in Form-32, she was marked as „Executive Director of the Company. In view of above, a certificate of clarification was issued by the Chartered Accountant vide Certificate No. 15 on 07.08.2018 and the same was submitted in the office of Registrar of Companies. Further, the cheques in question are stated to have been presented subsequent to her resignation on 15.03.2014 and the same were not signed by her. Reliance is further placed upon *Sunita Palita & Ors. v. M/s Panchami Stone Quarry*, MANU/SC/0944/2022, *Anil Khadkiwala v. State (Govt. of NCT of Delhi) & Anr.*, 2019 (17) SCC 294, *M.A. Alagappan v. PVR Limited*, 2024 SCC OnLine Del 698, *Siby Thomas v. Somany Ceramics Ltd.*, MANU/SC/1117/2023 and *Sushil Kumar v. IBM India Pvt. Ltd. And Ors.*, MANU/DE/2540/2010.

5. It has also been pointed out by learned counsel for the petitioner that the clarification in terms of certificate dated 07.08.2018 issued by Chartered Accountant was furnished before the Registrar of Companies, since the earlier CRL.M.C. preferred before this Court had been withdrawn and it needed to be clarified as to why the petitioner had been reflected as Executive Director, though she was a Non-Working Director in 2012.

6. The petitions for quashing of summoning order have been vehemently opposed by the learned counsel for respondent No. 1 and it is submitted that petitions are barred, since the earlier CRL.M.C.2382/2017-2386/2017 preferred on behalf of the petitioner had been dismissed with liberty to urge all the pleas before the learned Trial Court. It is further submitted that petitioner has already participated in trial and the proceedings are at the stage of defence evidence wherein the role and status of petitioner in the Company can be duly clarified. It is urged that the petitioner was an „Executive Director in the accused Company at the relevant time and a false certificate of clarification was issued by the Chartered Accountant on 07.08.2018 i.e. on the date the earlier

CRL.M.Cs. preferred on behalf of the petitioner were withdrawn. It is emphasized that the stand of the petitioner is an afterthought.

It is also contended that the relevant transactions relate back to December, 2013 and 13 PDCs were issued, which were dishonoured during the period January, 2014 to March, 2014. The petitioner is stated to be 'Executive Director' and 'Promoter' at the relevant time. It is pointed out that part payment of Rs.51,000/- was also made through NEFT in December, 2013 prior to alleged resignation of the petitioner on 15.03.2014.

7. It may be noticed that CRL.M.C.2382/2017-2386/2017 were earlier preferred on behalf of the petitioner for quashing of summoning orders in the aforesaid complaint cases under Section 138 NI Act but the same were withdrawn with liberty to urge all the pleas before the learned Trial Court at appropriate stage. At the stage of issuing of notice in the present petitions, aforesaid aspect was noticed in order dated 10.09.2021 and submission of learned counsel for the petitioner was recorded whereby reliance was placed upon *Anil Khadkiwala v. State (Govt. of NCT of Delhi) & Anr. (supra)*. It is pertinent to observe that nothing had been commented upon by this Court regarding maintainability of the petitions but only contentions of the learned counsel for the petitioner were noticed for the purpose of issuing notice at initial stage to the respondents.

8. At the outset, it may be observed that *Anil Khadkiwala v. State (Govt. of NCT of Delhi) & Anr (supra)*., (2019) 17 SCC 294 relied on behalf of the petitioner is distinguishable on facts. In the aforesaid case, it was noticed in peculiar facts and circumstances of the case that there was a difference between the earlier application and subsequent one preferred before the High Court inasmuch as the statutory Form DIR 32 did not fall for consideration by the Court earlier and as such, subsequent application could not be said to be a repetitive application squarely on the same facts and circumstances.

9. This Court is of the considered view that present petitions under Section 482 Cr.P.C. are not maintainable since the earlier petitions were withdrawn with liberty to urge all the pleas before the learned Trial Court at an appropriate stage and there has been no change of circumstances thereafter. However, in the interest of justice, present petitions have also been considered on merits since the clarificatory certificate issued by Chartered Accountant dated 07.08.2018 that petitioner was a Non-Executive Director is stated to have been filed with the concerned office on the date of withdrawal of earlier CRL.M.Cs. (i.e. 07.08.2018).

10. The scope of proceedings under Section 141 of NI Act has been considered by the Hon ble Apex Court in *S.M.S. Pharmaceuticals v. Neeta Bhalla and Another*, (2005) 8 SCC 89, wherein, it was observed that persons, who are sought to be made criminally liable under Section 141 of NI Act, should at the time of commission of offence be incharge of and responsible to the Company for the conduct of the business of the Company. Consequently, a Director, merely by holding a designation or office in a Company, would not be liable unless he was in-charge of and responsible for the conduct of the business of the Company. Thus, the liability depends upon role in the conduct of the affairs of the Company and not merely by the designation or status except in the case of Managing Director and Joint Managing Director.

11. The principles of vicarious liability as reflected in para 27 in *K. K. Ahuja v. V. K. Vora & Anr.*, (2009) 10 SCC 48, may also be beneficially noticed :

"27. The position under Section 141 of the Act can be summarised thus:

(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix "Managing" to the word "Director" makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii) In the case of a Director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141.

(iii) In the case of a Director, secretary or manager [as defined in Section 2(24) of the Companies Act] or a person referred to in clauses

(e) and (f) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 141(1) of the Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.

(iv) Other officers of a company cannot be made liable under sub-section (1) of Section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence."

12. It may be observed that once the complainant has discharged the primary responsibility to make specific averments to make the accused vicariously liable, it is for accused to furnish an incontrovertible material or evidence to substantiate that accused was not in-charge and responsible for conduct of business of the Company at the relevant time, and make out a case that trial would be an abuse of process of the Court. In terms of first proviso to Section 141 of NI Act, the accused would not be liable for punishment, if he is able to prove to the satisfaction of the Court that offence was committed without his/her knowledge or had exercised due diligence to prevent the commission of

such offence. The existence of special circumstances or change of circumstances which is specific to the knowledge of accused needs to be established during the course of trial, if the same is not apparent from the record. Since the object of enactment of Section 138 and 141 of NI Act is to prevent bouncing of cheques and sustain credibility of commercial transactions, the proceedings can be quashed only if the ingredients of the offence are altogether lacking despite the foundational facts laid by the complainant.

13. Observations made by Hon ble Apex Court in paras 56 to 59 in SP Mani & Mohan Dairy v. Snehalatha Elangovan, (2023) 10 SCC 685 in this regard may also be beneficially reproduced:

"56. Once the necessary averments are made in the statutory notice issued by the complainant in regard to the vicarious liability of the partners and upon receipt of such notice, if the partner keeps quiet and does not say anything in reply to the same, then the complainant has all the reasons to believe that what he has stated in the notice has been accepted by the noticee. In such circumstances what more is expected of the complainant to say in the complaint.

57. When in view of the basic averment process is issued the complaint must proceed against the Directors or partners as the case may be. But, if any Director or Partner wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he is really not concerned with the issuance of the cheque, he must in order to persuade the High Court to quash the process either furnish some sterling incontrovertible material or acceptable circumstances to substantiate his contention. He must make out a case that making him stand the trial would be an abuse of process of Court. He cannot get the complaint quashed merely on the ground that apart from the basic averment no particulars are given in the complaint about his role, because ordinarily the basic averment would be sufficient to send him to trial and it could be argued that his further role could be brought out in the trial. Quashing of a complaint is a serious matter. Complaint cannot be quashed for the asking. For quashing of a complaint, it must be shown that no offence is made out at all against the Director or partner.

58. Our final conclusions may be summarised as under:

58.1. The primary responsibility of the complainant is to make specific averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no legal requirement for the complainant to show that the accused partner of the firm was aware about each and every transaction. On the other hand, the first proviso to sub-section (1) of Section 141 of the Act clearly lays down that if the accused is able to prove to the satisfaction of the Court that the offence was committed without his/her knowledge or he/she had exercised due diligence to prevent the commission of such offence, he/she will not be liable of punishment.

58.2. The complainant is supposed to know only generally as to who were in charge of the affairs of the company or firm, as the case may be. The other administrative matters would be within the special knowledge of the company or the firm and those who are in charge of it. In such circumstances, the complainant is expected to allege that the persons named in the complaint are in charge of the affairs of the company/firm. It is only the Directors of the company or the partners of the firm, as the case may be, who have the special knowledge about the role they had played in the company or the partners in a firm to show before the Court that at the relevant point of time they were not in charge of the affairs of the company. Advertence to Sections 138 and Section 141, respectively, of the NI 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/partners of a firm to show that they were not liable to be convicted. The 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 to show that at the relevant time they were not in charge of the affairs of the company or the firm.

58.3. Needless to say, the final judgment and order would depend on the evidence adduced. Criminal liability is attracted only on those, who at the time of commission of the offence, were in charge of and were responsible for the conduct of the business of the firm. But vicarious criminal liability can be inferred against the partners of a firm when it is specifically averred in the complaint about the status of the partners "qua" the firm. This would make them liable to face the prosecution but it does not lead to automatic conviction. Hence, they are not adversely prejudiced if they are eventually found to be not guilty, as a necessary consequence thereof would be acquittal.

58.4. If any Director wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he/she is really not concerned with the issuance of the cheque, he/she must in order to persuade the High Court to quash the process either furnish some sterling incontrovertible material or acceptable circumstances to substantiate his/her contention. He/she must make out a case that making him/her stand the trial would be an abuse of process of Court.

59. We reiterate the observations made by this Court almost a decade back in *Rallis India Ltd. v. Poduru Vidya Bhushan* [*Rallis India Ltd. v. Poduru Vidya Bhushan*, (2011) 13 SCC 88 : (2012) 3 SCC (Civ) 269 : (2012) 1 SCC (Cri) 778], as to how the High Court should exercise its power to quash the criminal proceeding when such proceeding is related to offences committed by the companies : (SCC p. 93, para 13) "13. ... The world of commercial transactions contains numerous unique intricacies, many of which are yet to be statutorily regulated. More particularly, the principle laid down in Section 141 of the NI Act (which is in pari materia with identical sections in other Acts like the Food Safety and Standards Act, 2006; the erstwhile Prevention of

Food Adulteration Act, 1954, etc.) is susceptible to abuse by unscrupulous companies to the detriment of unsuspecting third parties."

(emphasis supplied)

14. Reverting back to the facts of the present petitions, Form DIR 12 for the relevant period, as relied by the petitioner, reflects that petitioner was inducted as 'Executive Director' in the category of 'Promoter'. In view of above, the petitioner was having a direct or indirect role in the affairs of the Company but in any case was not holding the position of an „Independent Director . Petitioner only resigned from the position of Director in the accused Company on 15.03.2014 for which digital information was furnished as per prescribed form only on 27.03.2014. It cannot be ignored that cheques issued pertain to the period January, 2014 to March, 2014, though the same were dishonoured subsequent to 15.03.2014. It is imperative to notice that the clarification that petitioner was a „Non-Executive Director and not an „Executive Director was furnished on behalf of the petitioner in terms of certificate issued by the Chartered Accountant only on 07.08.2018, after the earlier petitions preferred on behalf of the petitioner for quashing of summoning order, were withdrawn on 07.08.2018. Apparently, the same is belated after initiation of complaint proceedings in 2014.

15. It is also pertinent to observe that in the complaint cases under Section 138 NI Act, the statement of the accused/petitioner under Section 313 Cr.P.C. already stands recorded and the cases are at the stage of defence evidence. In the complaint initiated under Section 138 of NI Act, respondent No. 1 (complainant) duly pleaded that accused Nos. 2 to 4 (including petitioner) are the Directors of accused No. 1 (Company) and accused Nos. 3 (petitioner) and 4 are also responsible for day-to-day affairs and conduct of business of accused No. 1 Company. The accused, in discharge of legal liabilities are also stated to have partly paid a sum of Rs.51,000/- through NEFT. During the relevant period, the petitioner was shown as an Executive Director and Promoter in the Company and the cheques were issued towards the outstanding amount of Rs.95 lacs prior to resignation of petitioner as Director on 15.03.2014. It has also not been brought to the notice of this Court if any such stand clarifying the status of the petitioner in the Company was taken in the reply to notice issued after dishonour of cheques. In the facts and circumstances, it cannot be inferred at this stage that the petitioner was not responsible for day-to-day affairs of the Company in the position of 'Executive Director' and 'Promoter'. This Court is of the considered opinion that the issue can be only resolved in the light of evidence led on record by the parties before the learned Trial Court.

16. The judgments relied upon by learned counsel for the petitioner are distinguishable. In *Sunita Palita & Ors. v. M/s Panchami Stone Quarry (supra)*, the appellants claimed to be 'Independent Non-Executive Director' of the accused company and were in no way responsible for day- to-day affairs of the accused Company. Directors were also stated to have been inducted for their expertise or special knowledge in any particular discipline and were not in-charge of the management of the Company. Also, relevant form DIR 12 and DIR 32 showed the status of the appellants therein as non-Executive Director.

17. In *M.A. Alagappan v. PVR Limited* (supra), petitioner therein was a 'Non-Executive Director' of the accused Company and submitted resignation on 13.05.2015 to be effective from 11.08.2015. Further, the cheques therein were issued in between 22.05.2015 to 22.06.2015, after the resignation was submitted on 13.05.2015, and as such, the factual position in the aforesaid case is distinguishable. In the present case, cheques were issued while the petitioner was an Executive Director in the category of Promoters in the Company and cheques were issued prior to her resignation.

18. The principle of law, as referred in *Siby Thomas v. Somany Ceramics Ltd.*, MANU/SC/1117/2023, is not disputed, but it may be noticed that in the aforesaid case, the appellant submitted that he had retired from the partnership firm on 28.05.2013, while the cheque in question was issued on 21.08.2015. It was further noticed that the complaint was devoid of mandatory averments required to be made in terms of sub-Section 1 of Section 141 of NI Act.

19. Reference made by learned counsel for the petitioner to *Sushil Kumar v. IBM India Pvt. Ltd. And Ors.*, MANU/DE/2540/2010, a Single Bench judgment of this Court does not further the case of the petitioner in any manner, since the principles referred therein have been considered and the case is factually distinguishable.

20. For the foregoing reasons, all the petitions are dismissed with composite cost of Rs.25,000/- (Rupees Twenty Five Thousand Only) to be paid to respondent No.1. Pending applications in respective petitions, if any, also stand dismissed.

A copy of this judgment be kept in the connected petitions and also forwarded to the learned Trial Court for information.

(ANOOP KUMAR MENDIRATTA) JUDGE FEBRUARY 26, 2024/v/R/sd