

(2011) 05 RAJ CK 0154

Rajasthan High Court (Jaipur Bench)

Case No: Criminal Revision Petition No.467 of 2011

Lokesh Kumar Singh

APPELLANT

Vs

Pushpendra Kumar Jain and
Another

RESPONDENT

Date of Decision: May 5, 2011

Acts Referred:

- Constitution of India, 1950 - Article 21
- Essential Commodities Act, 1955 - Section 10, 3
- Negotiable Instruments Act, 1881 (NI) - Section 138, 141
- Penal Code, 1860 (IPC) - Section 229A

Citation: (2012) 2 RCR(Civil) 49 : (2012) 1 RCR(Civil) 349 : (2011) 4 RCR(Criminal) 671 : (2012) 1 RCR(Criminal) 645 : (2011) 4 RCR(Criminal) 671 : (2011) 4 RLW 3074

Hon'ble Judges: R.S. Chauhan, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Hon"ble R.S. Chauhan, J.

The petitioner has challenged the judgment dated 7.1.2008, passed by Additional Chief Judicial Magistrate, Sawai Madhopur, whereby the petitioner has been convicted for the offence u/s 138, Negotiable Instruments Act, 1881 ('the Act' for short) and has been sentenced to suffer imprisonment of six months, and has been imposed with a fine of Rs.60,000/-, and has been directed to further suffer one and a half month of simple imprisonment in default thereof. The petitioner is also aggrieved by the judgment dated 23.4.2011, passed by Additional Sessions Judge, Sawai Madhopur, whereby the learned Judge has upheld the judgment dated 7.1.2008.

2. The brief facts of the case are that on 28.2.2000, the complainant respondent No.1, Pushpendra Kumar Jain, filed a complaint only against Lok Vikas Finance

Corporation Limited, through Managing Director, Lokesh Kumar Singh. The complainant did not array the petitioner as an accused. It was alleged in the complaint that the cheque, issued for payment of the deposits, made in recurring deposit account of the company, has bounced. Despite the service of the statutory notice, the payment has not been made. On 15.2.2001, the learned trial court took cognizance of the offence u/s 138 of the Act against the Corporation. No cognizance was taken against the petitioner. The petitioner, on behalf of the company, denied the allegation and prayed for trial. However, vide judgment dated 7.1.2008, the trial court held the petitioner guilty for the offence u/s 138 of the Act, and convicted and sentenced him, as mentioned above. The learned trial court did not convict the Corporation. The petitioner preferred an appeal before the appellate court. Vide judgment dated 23.4.2011, the appellate court partly confirmed the judgment dated 7.1.2008. However, as the petitioner failed to appear before the appellate court due to illness, still the appellate court directed that a case against the petitioner be registered for offence u/s 229-A IPC. Hence, the present revision petition.

3. Mr. S.R. Bajwa, Senior Advocate, and the learned counsel for the petitioner, has raised a single issue before this court, namely whether the petitioner could be convicted for the offence u/s 138 of the Act, especially when he was never arrayed as an accused in the complaint? According to the learned counsel section 141 of the Act deals with "offence by companies". It prescribes that besides the company, those persons who are incharge for the conduct and business of the company shall be liable to be proceeded against and punished. According to him the complainant had arrayed only the company as accused; he had not arrayed the petitioner in his individual capacity as an accused. Therefore, the petitioner was never "proceeded against". Therefore, the petitioner cannot be convicted and sentenced for an offence committed by the company. Secondly, Section 141 of the Act, provides certain defences to those who are incharge of the company, in case they were to be proceeded against along with the company. However, as the petitioner was never arrayed as an accused, the opportunity to invoke those defences were never given to him. Hence, the petitioner has been convicted and sentenced without an opportunity of hearing. Therefore, the conviction and sentence cannot be sustained in the eyes of law. Lastly, the reasonings given by the learned appellate court for sustaining the conviction and sentence is that at the relevant time the petitioner was Managing Director, therefore, he is liable for the acts of the company. However, such a reasoning entirely misses the legal issue raised on behalf of the petitioner. Therefore, the impugned judgment dated 23-4-2011, as well as the judgment dated 7-1-2008 are unsustainable. Learned counsel has placed reliance on [Sheoratan Agarwal and Another Vs. State of Madhya Pradesh](#), in order to buttress his contentions.

4. On the other hand, Mr. Manmohan Khetan, the learned counsel for the complainant, has urged that according to Section 141 of the Act, the Managing Director of the company is responsible for the conduct and business of the

company. Therefore, there is no need to separately array him as an accused in his individual capacity. Secondly, the defences were taken by the petitioner, during the course of trial. Hence, he cannot contend that the opportunity to invoke defences was denied to him. Thirdly, he has supported the reasonings given by the learned appellate court, and has vociferously argued that both the judgments are legally sustainable. In order to buttress his contention, he has relied upon the case of SMS Pharmaceuticals Ltd vs. Neeta Bhalla and Anr., (2005 (2) W.L.C. (SC) 49 : RLW 2005 (4) SC 2386).

5. Heard learned counsel for the parties, perused the impugned judgments, and considered the case law cited at the Bar.

6. The following issues are before the court: When an offence is committed by a Company, whether a person, incharge of the business and conduct of the company, can be convicted and sentenced without being arrayed separately as an accused in his individual capacity or not? Secondly, what is the meaning of the words "to be proceeded against" in Section 141 of the Act?

7. Section 141 of the Act is as under:-

141. Offences by companies.--(1) If the person committing an offence u/s 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 subsection 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 purpose 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.

A bare perusal of the Section clearly reveals that it is both a deeming and enabling provision. Firstly, it enables the complainant to proceed against those persons, who at the time of commission of the offence were incharge, and were responsible to the company for the conduct and business of the company. The complainant is permitted to proceed against the persons, while proceeding against the company itself. The provision further deems that such person shall be guilty of the offence, and shall be liable to be proceeded against and punished accordingly. But, in order to protect the liberty of such alleged offenders, the first proviso provides certain legal defences to them. Such defences are available not to the Company, but only to those persons who are incharge of the conduct of the business of the Company.

8. In the case of Sheoratan Agarwal (supra), while dealing with Section 10 of the Essential Commodities Act, a provision which is in para-materia with Section 141 of the Act, the Hon'ble Apex Court was faced with the situation wherein the Inspector Food and Civil Supply had filed a complaint against the Managing Director and Production Manager, but had not arrayed the company as an accused. The issue raised before the Supreme Court was whether these two alleged offenders can be proceeded against without arraying the company as an accused? While answering the issue, the Supreme Court observed as under:-

The section appears to our mind to be plain enough. If the contravention of the order made under S.3 is by a Company, the persons who may be held guilty and punished are (1) the Company itself (2) every person who, at the time the contravention was committed, was in charge of, and was responsible to, the Company for the conduct of the business of the Company whom for short we shall describe as the person-in-charge of the Company, and (3) any director, manager, secretary or other officer of the Company with whose consent or connivance or because of neglect attributable to whom the offence has been committed, whom for short we shall describe as an officer of the Company. Any one or more or all of them may be prosecuted and punished. The Company alone may be prosecuted. The person-in-charge only may be prosecuted. The conniving officer may individually be prosecuted. One, some or all may be prosecuted, There is no statutory compulsion that the person-in-charge or an officer of the Company may not be prosecuted unless he be ranged alongside the Company itself. S.10 indicates the persons who may be prosecuted where the contravention is made by the Company. It does not lay down any condition that the person-incharge or an officer of the Company may not be separately prosecuted if the Company itself is not prosecuted. Each or any of them may be separately prosecuted or along with the company. S.10 lists the person who may be held guilty and punished when it is a Company that contravenes an order made under S.3 of the Essential Commodities Act. Naturally, before the person-in-charge or an officer of the Company is held guilty in that capacity it must be established that there has been a contravention of the Order by the Company.

Thus, according to Hon"ble Apex Court, the complainant may proceed against either one, or some, or against all natural persons and juristic persons i.e. the individuals and the company respectively.

9. However, the issue before this court is slightly different from the one faced by the Hon"ble Apex Court; The issue before this court is whether the person can be convicted and sentenced without being arrayed as an accused? Obviously, the answer is in the negative. It is, indeed, trite to state that it is fundamental principle of law that no person can be condemned without being heard. It is not only a part of principle of Audi Alteram Partem, but is also a part of the concept of fair trial enshrined under Article 21 of the Constitution of India.

10. A bare perusal of Section 141 of the Act also reveals that certain statutory defences have been provided to the individual person, namely those who are in-charge and responsible for the conduct and business of the company. Obviously, these defences can be invoked, if and only if, the person is arrayed in his individual capacity as an accused. In case, only the company is arrayed as an accused, through Managing Director, obviously, the Managing Director can not invoke the defences provided by the first proviso. At best, the Managing Director can take the defences, which would be open only to the company itself. Therefore, the contentions raised by learned counsel for the complainant that the petitioner had raised the defences, which are available to him as an individual, is highly misplaced. The petitioner was appearing on behalf of the Company. Therefore, he could not raise the defences provided by the first proviso. Thus, he has raised defences which were available only to the company, and not to himself.

11. The case of SMS Pharmaceuticals Ltd. (supra) does not come to the rescue of the complainant. For, in the said case, the Hon"ble Apex Court has merely observed that the Managing Director is deemed to be responsible for the business of the company, therefore, he is liable under the Act. The said observation cannot be extended to argue that the Managing Director is deemed to be liable without being arrayed as an accused. Thus, the petitioner cannot be convicted and sentenced for the action of the company, without arraying the petitioner as an accused in his individual capacity.

12. Therefore, the revision petition stands allowed. This court quashes and sets aside the judgment dated 23-4-2011, and the judgment dated 7-1-2008, and remands the case back to the learned trial court for re-deciding the case with regard to guilt of the company, and with regard to its conviction and sentence in the form of fine, if any.