(2011) 03 CAL CK 0055

Calcutta High Court

Case No: C.R.R. 2355 to 2357 and 2359 of 2009 and C.R.A.N. 754 to 756 of 2010

Lav Jhingan — APPELLANT

Vs

State of West Bengal and Another — RESPONDENT

Date of Decision: March 31, 2011

Acts Referred:

- Negotiable Instruments Act, 1881 (NI) - Section 138, 141

Citation: (2012) 5 CHN 140 : (2011) 3 Crimes 641

Hon'ble Judges: Syamal Kanti Chakrabarti, J

Bench: Single Bench

Advocate: Joymalya Bagchi, Sourav Chatterjee, for the Appellant;S.K. Kasem Ali Ahmed in CRR 2355 of 2009, S.K. Mallick in CRR 2356 of 2009, S.S. Roy in CRR 2357 of 2009 and Alok Roy Chowdhury in CRR 2359 of 2009, for the Respondent

Judgement

Syamal Kanti Chakrabarti, J.
Since some common issues are involved in all these revisional applications the same are taken up together for consideration and disposal by a composite order.

2. In all these revisional applications the Petitioner has claimed that he was one of the six Directors of M/s. Caritt Moran and Co. Pvt. Ltd. and retired from the post of Director of the company on 12.03.2009 and was not in charge of day to day affairs of the accused company. Yet he has been falsely implicated in the proceedings being case Nos. C/5687/2009, C/5688/2009, C-5689/2009 and C/5690/2009 respectively under Sections 138/141 of the Negotiable Instruments Act now pending before the learned Metropolitan Magistrate, 13th Court, Calcutta. In all these cases the cheques issued by the company on different dates were dishonored on the grounds of "ACCOUNT CLOSED". In fact as the Petitioner was in no way connected with the day to day affairs and management of the company at the time of issuing those cheques he was not liable in any way for prosecution as alleged in the petition of complaint on the basis of which the learned Chief

Metropolitan Magistrate took cognizance of the offence and transferred the case to the learned Transferee Magistrate for disposal of the same. It is further submitted on behalf of the Petitioner that in the petitions of complaint in respect of the aforesaid four cases there is no specific mention of the individual role of the Petitioner in the alleged dishonor of the cheques and therefore, he is not vicariously liable for the misdeeds of the company. The company being accused No. 1 may be prosecuted for the alleged offence and the proceeding against the Petitioner in respect of all these cases may be quashed. The learned lawyer for the Petitioner has referred to and relied upon the principles laid down in S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, ; Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya, AND Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another, , in support of his contention. Learned lawyer for the State on the contrary has contended that since charge sheet has already been submitted in all those cases the revisional Court cannot look into the merit of the allegations and form opinion of its own pending trial of the cases. In fact, there is no merit in these applications which should be dismissed. He has referred to and relied upon the principles laid down in U. P. Pollution Control Board -Vs.- Dr. Bhupendra Kumar Modi and Anr., reported in 2009(1) Crimes 216. It has been held therein that once the Magistrate takes cognizance, it is not for the superior Courts to substitute its own discretion for that of the Magistrate or to examine their case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. He has also referred to the ratio of the case of Rajesh Bajaj Vs. State NCT of Delhi and Others, in which it has been held, inter alia, by the Hon"ble Apex Court that complaint need not require to reproduce verbatim all ingredients of offence alleged in the body of the complaint. Quashing of FIR is not proper if averments in complaint prima facie makes out case for investigation.

3. From the petition of complaint it will appear that the aforesaid criminal proceedings were initiated on account of dishonour of different cheques in course of commercial transaction between the complainant M/s. G. S. Fertilizer Pvt. Ltd. and accused No. 1 M/s. Caritt Moran and Co. Pvt. Ltd. The common allegation in the petition of complaint is that the Petitioner company manufactures, sells and markets fertilizers. Impressed upon the representation of the accused company they made a corporate deposit with the accused company for a sum of Rs. 3,00,00,000/- (Rupees three crores only) for a period of 91 days and in the discharge of their liabilities the said accused company made payment of Rs. 1,00,00,000/- (Rupees one crore only) and the rest amount of Rs. 2,00,00,000/- (Rupees two crores only) was redeposited by a further period of 91 days with the accused company. It is further alleged that in the discharge of their liabilities the accused persons issued cheques on different dates which were returned with the remarks of the bank as "ACCOUNT CLOSED", the details of which are as under:

Case No.	C/5689/2009
Date of issue of the cheque	07.07.2008
Name of Drawer	Nil

Name of the Drawee Bank : Axis Bank Limited

Cheque No. : 144428

Amount : Rs. 50,00,000/-

Presented before (Bank) : State Bank of Hyderabad Park Street Branch.

Date of presentation : Nil

Date of dishonour : 05.01.2009

Remarks of the Bank : ACCOUNT CLOSED

Case No. : C/5690/2009

Date of issue of the cheque : 07.07.2008

Name of Drawer : Nil

Name of the Drawee Bank : Axis Bank Limited

Cheque No. : 144429

Amount : Rs. 50,00,000/-

Presented before (Bank) : State Bank of Hyderabad Park Street Branch.

Date of presentation : Nil

Date of dishonour : 05.01.2009

Remarks of the Bank : ACCOUNT CLOSED

Case No. : C/5688/2009

Date of issue of the cheque : 07.07.2008

Name of Drawer : Nil

Name of the Drawee Bank : Axis Bank Limited

Cheque No. : 144426

Amount : Rs. 50,00,000/-

Presented before (Bank) : State Bank of Hyderabad Park Street Branch.

Date of presentation : Nil

Date of dishonour : 05.01.2009

Remarks of the Bank : ACCOUNT CLOSED

Case No. : C/5687/2009

Date of issue of the cheque : 07.07.2008

Name of Drawer : Nil

Name of the Drawee Bank : Axis Bank Limited

Cheque No. : 144427

Amount : Rs. 50,00,000/-

Presented before (Bank) : State Bank of Hyderabad Park Street Branch.

Date of presentation : Nil

Date of dishonour : 05.01.2009

Remarks of the Bank ACCOUNT CLOSED

4. It is claimed that the Petitioner in all these cases resigned from the post of Director of the company on 12th March, 2009, but the four cheques in the above cases were issued on 07.07.2008 and dishonored on 05.01.2009, i.e., while he was acting as Director of the company. Therefore, if the petition of complaint discloses any fact constituting offence u/s 138/141 of the Negotiable Instruments Act, trial may proceed against him since cognizance has already been taken. The contents of the complaint disclosing allegations against the present Petitioner Director is almost identical in all the four petitions of complaint. For the purpose of considering merit of such complaint relevant portion of the complaint being C/5688/2009 by way of illustration is quoted below by way of illustration:

3. That the accused No. 1 is the company and accused Nos. 2 to 7 are the Directors of the accused No. 1, having its registered office at "Carritt House", 9, R. N. Mukherjee Road, P.S. Hare Street, Kolkata - 700001.

4. That the complainant company on coming into the representation of the accused company, made a corporate deposit with the accused company for a sum of Rs. 3,00,00,000/- (Rupees Three Crores only) for a period fo 91 days and in discharge of their liabilities the said company refunded a sum of Rs. 1,00,00,000/- (Rupees One Crore only) and rest amount of Rs. 2,00,00,000/- (Rupees Two Crores only) was redeposited for a further period of 91 days with the accused company.

5. That in discharge of the said liabilities the accused persons issued a cheque bearing No. 144426 dated 07-07-2008 for Rs. 50,00,000/- (Rupees Fifty Lacs only) each drawn on Axis Bank Ltd. Shakespeare Sarani, Kolkata - 700071 in favour of the complainant company as part payment.

6. That the complainant having received the said cheque deposited the said cheque to its banker State Bank of Hyderabad, Park Street Branch, Kolkata - 700016 in for encashment but the said cheque was returned unpaid to the complainant company through their banker on 05-01-2009 accompanied by a memon of Axis Bank Ltd., 7, Shakespeare Sarani, Kolkata - 700071 with an endorsement therein "ACCOUNT CLOSED".

5. From paragraph 3 of the complaint it appears that the accused company had six Directors. In paragraph 4 it is alleged that on the basis of representation of the accused company, i.e., accused No. 1 they made a corporate deposit with the accused company. In paragraph 5 of the complaint it is alleged that in the discharge of their liabilities the accused persons issued a cheque bearing No. 144426 dated 07.07.2008 for Rs. 50,000/- each drawn on Axis Bank Ltd., Shakespeare Branch as part payment. It is not clear from such statement as to who is the drawer or signatory of such dishonoured cheuqe out of six Directors of the company. In all the aforesaid four petitions of complaint there is no

specific averment that the Petitioner Director Lav Jhingan issued any of the four cheques on behalf of the company. On the basis of such vague and indefinite allegation it has to be considered how far prosecution of each and every Director is justified in addition to the prosecution of the company, accused No. 1. It goes without saying that all the six Directors cannot sign the cheques jointly. Name of the person/ persons who signed the cheques for the accused company has not been disclosed in the petition of complaint.

6. In the case of S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, it has been held by the Hon''ble Apex Court that merely being a Director of a company is not sufficient to make the person liable u/s 141 of the Act. A Director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases. The same principle has been echoed in the case of Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya, It is observed therein that it is not necessary for the complainant to specifically reproduce the wordings of the Section but what is required is a clear statement of fact so as to enable the Court to arrive at a prima facie opinion that the accused are vicariously liable. Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. In the case of Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another, also it has been held by the Hon''ble Apex Court that if there is no averment in the complainant petition as to how and in what manner the Appellant was responsible for the conduct of the business of the company or otherwise responsible to it in regard to its functioning, the allegation made in the complaint will not satisfy the requirement of Section 141 of the Act.

7. In the instant case the petition of complaint does not disclose any such fact constituting the offence either u/s 138 or u/s 141 of the Negotiable Instruments Act. In absence of any averment in the complaint as to how and in what manner the Petitioner was responsible for the conduct of the business of the company or otherwise responsible to it in regard to its functioning; he cannot be prosecuted for the vicarious liability of the company. Therefore, a bare perusal of the petitions of complaint demonstrates that the statutory requirements contained either in Section 138 or in Section 141 of the Negotiable Instruments Act have not been complied with. Relying upon the said principles I hold that in absence of any such statement of fact so as to enable the Court to arrive at a prima facie opinion that the accused is vicariously liable, prosecution of the Petitioner is not sustainable in law and leads to abuse of the process of law. Since the company has been impeded as an accused in this case, learned lawyer for the Petitioner has rightly

contended that the company will face the liability on account of the aforesaid dishonored cheques but its each and every Director, like the present Petitioner, cannot be prosecuted and harassed without any specific allegation in the petition of complaint regarding his role in the day to day affairs of the company.

8. Learned lawyer for the State has relied upon the principles laid down in 2009(1) Crimes 216. In the said case company was shown as first accused in the complaint apart from including other functionaries detailing their role in the day to day affairs and decision making process. Similarly in the case reported in Rajesh Bajaj Vs. State NCT of Delhi and Others, referred to by him the specific role of 5th Respondent who happens to be the Managing Director of the company was specifically mentioned in the complaint. But the present case stands on a different footing and so the ratio in both these cases, in my opining, will not be applicable in this case.

9. Considering all these aspects I hold that further prosecution of the present Petitioner in all these cases will be mere abuse of the process of law and to prevent it all the four proceedings are hereby quashed as against the Petitioner accused who is discharged and released from his bail bond. The interim stay order granted earlier stands vacated. The cases, however, shall proceed against rest accused as per law.

10. All the revisional applications are thus disposed of. In view of above findings all the connected applications being registered as CRAN for extension of interim order will also be treated as disposed of.

11. Urgent certified photocopies of this order, if applied for, be supplied to the parties, on compliance of all requisite formalities.