

Sudeep Jain Vs M/s. ECE Industries Ltd.

Court: Delhi High Court

Date of Decision: May 6, 2013

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 482
Negotiable Instruments Act, 1881 (NI) â€” Section 138, 141, 141(1), 141(2)

Citation: (2013) 1 BC 589 : (2013) 201 DLT 461

Hon'ble Judges: Kailash Gambhir, J

Bench: Single Bench

Advocate: Krishan Kumar and Mr. Sanjay Kumar, for the Appellant;

Judgement

@JUDGMENTTAG-ORDER

Kailash Gambhir, J.

Crl.M.A. No. 5630/2013 (Exemption)

Crl.M.A. No. 5632/2013 (Exemption)

Exemption allowed subject to all just exceptions. The applications stand disposed of.

Crl. M.C. No. 1821/2013 & Crl.M.A. No. 5629/2013(Stay)

Crl. M.C. No. 1822/2013 & Crl.M.A. No. 5631/2013(Stay)

1. By these petitions filed u/s 482 of Cr. P.C., the petitioner - Sudeep Jain is seeking quashing of summoning order dated 29.09.2012 passed by

Shri Arul Verma, Metropolitan Magistrate, Patiala House, New Delhi against him in two complaint cases being CC Nos. 422/1/12 and CC Nos.

423/1/12 titled as M/s. ECE Industries Ltd. vs. GEI Industrial Systems Ltd. and Ors. Grievance raised by Mr. Krishan Kumar, Advocate

appearing for the petitioner, is that the petitioner is a Company Secretary in the accused company M/s. GEI Industrial Systems Ltd., Bhopal and

his duty is restricted to ensure the proper observance and compliances made by the said company in terms of various statutory requirements laid

down under the Companies Act. He further submits that the petitioner is neither obliged nor is actually instrumental in the day to day functioning of

the said company and in fact has no knowledge or any role in the issuance of any cheque on behalf of the said company in favour of the

complainant company. It is further the case of the petitioner that no specific averments, as to how and in what manner the petitioner was

responsible for the day to day conduct of the business of M/s. GEI Industrial Systems Ltd., have been made by the complainant company in the

complaint against the petitioner. Counsel for the petitioner also apprises this court that 12 other persons have been issued summons in the said case

and some of them have already approached this court for quashing of the said summoning order.

2. In support of the above, learned counsel for the petitioner submits that the legal position is now well settled that the liability for an offence

punishable u/s 138 r/w Section 141 of the Negotiable Instruments Act, 1881 will not arise by merely stating that the accused person holds some

designation in the accused company or by merely reproducing the language of Section 141 of the Act in the complaint. The complainant has to

make a specific averment in the complaint as to how and in what manner the person accused of the offence u/s 138 of the Negotiable Instruments

Act, 1881 was responsible or had a role in the conduct of the business of the accused company at the relevant time. A mere fact that the accused

person was a Director or was holding some other office in the company cannot make a person vicariously liable to face the prosecution as per the

mandate of Section 141 of the Negotiable Instruments Act, 1881.

3. I have heard the learned counsel for the petitioner.

4. Chapter XVII was incorporated in the Negotiable Instruments Act, 1881 by the Banking Public Financial Institutions and Negotiable

Instruments Laws (Amendment) Act, 1998 with effect from 1.4.1989 for the purpose of imposing penalties in case of dishonor of cheque due to

insufficiency of funds in the account of drawer of the cheque, in addition to the remedy of filing a recovery suit already available to the aggrieved

under the civil law. Finding the punishment contained in this chapter inadequate and the procedure to deal with such matters cumbersome, this

chapter was further amended by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 for the purpose of early

disposal of the cases related to dishonor of cheques as well as for enhancing punishment for the offenders. It would not be inappropriate to say that

while this chapter's introduction has, on the one hand, reduced the civil litigation to a great extent, but, on the other hand, has led to the filing of

countless complaints before the criminal courts which are mostly against companies, whether Private or Public Ltd., registered under the

Companies Act.

5. Section 141 of the Negotiable Instruments Act, 1881 deals with the offences by the companies and says that if an offence has been committed

by a company u/s 138 Negotiable Instruments Act, 1881 then every person, who at the time the offence was committed was in charge of, and was

responsible to the company in the conduct of the business of the company, as well as to the company is liable to be proceeded against and

punished accordingly. What necessary averments are required to be made in the complaint to hold any Director or other post holder in the

company as vicariously liable for an offence committed u/s 138 of the Negotiable Instruments Act, 1881 by the company has been a subject

matter of discussion in a number of cases. Despite the legal position now being well settled with the catena of pronouncements of the Apex Court

on this subject, the trend set up by the complainants to implead all the Directors, company secretaries, etc., of the accused company, irrespective

of whether they were actually involved in the commission of alleged offence or not, has not yet ended. One of the earliest case, S.M.S.

Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, which threw light on the averments required to be made in the complaint u/s 138 r/w 141 of

Negotiable Instruments Act, observed as follows in paragraph 16:-

(a) It is necessary to specifically aver in a complaint u/s 141 that at the time the offence was committed, the person accused was in charge of, and

responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a

complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b)...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 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.

(c)...the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct

of its business. When that is so, holders of such positions in a company become liable u/s 141 of the Act. By virtue of the office they hold as

Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company.

Therefore, they get covered u/s 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the

incriminating act and will be covered under Sub-section (2) of Section 141.

6. Reiterating the same view, the Apex Court in National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another, further observed

that:-

24. ...if the accused is not one of the persons who falls under the category of "persons who are responsible to the company for the conduct of the

business of the company" then merely by stating that "he was in-charge of the business of the company" or by stating that "he was in-charge of the

day-to-day management of the company" or by stating that "he was in-charge of, and was responsible to the company for the conduct of the

business of the company", he cannot be made vicariously liable u/s 141(1) of the Act. To put it clear that for making a person liable u/s 141(2), the

mechanical repetition of the requirements u/s 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how

and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under Sub-section (2) of Section

141 of the Act.

Summarizing the legal position, The Apex court further laid down the following principles:-

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the

accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the

commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements,

which are required to be averred in the complaint/petition, are made so as to make accused therein vicariously liable for offence committed by

company along with averments in the petition containing that accused were in-charge of and responsible for the business of the company and by

virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If accused is Managing Director or Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of

their position they are liable to be proceeded with.

(vi) If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make

specific averment in complaint.

(vii) 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.

7. The recent judgments of the Apex Court namely, Anita Malhotra Vs. Apparel Export Promotion Council and Another, and Laxmi Dychem Vs.

State of Gujarat and Others, have again reiterated the said legal position.

8. The prime objective of this Court is to remind all the Metropolitan Magistrates in Delhi to carefully scrutinize all the complaint cases being filed

u/s 138 r/w 141 of the Negotiable Instruments Act, 1881 against the accused companies at the pre-summoning stage and make sure that notice be

directed only to those directors or employees of the company who satisfy the principles laid down in the aforesaid judgments. Summons must be

issued only after giving due consideration to the allegations and the materials placed on record by the complainant. Undeniably, as per the aforesaid

legal pronouncements, Managing Director and the Joint Managing Director are deemed to be vicariously liable for the offence committed by the

company because of the position they hold in the company. Problem arises in cases where all the persons holding office in the company are sought

to be prosecuted by the complainant, irrespective of whether they played any specific role in the incriminating act. It is surprising to see that in

plethora of cases, the complaint contains allegations even against those persons who might have been Directors at any point in time in the accused

company, but had resigned from such company much prior to the period when the alleged offence was committed. Issuing summons to all persons

named in the complaint mechanically, without ascertaining whether they played any actual role in the transaction, not only pesters the innocent

directors/employees named in the complaint, but also upsurges the load on the High Courts as the Magistrates once issuing the summoning orders

against the accused, are precluded from reviewing their summoning orders in view of the decision of the Apex Court in Adalat Prasad Vs. Rooplal

Jindal and Others, . One can also not lose sight of the fact that once such innocent persons are summoned, they have no choice but to seek bail

and face the ordeal of trial. Many of such persons also approach the High Court u/s 482 Cr.P.C. to seek quashing of the summoning order and the

complaint filed against them and this further increases the burden on the already overburdened Courts.

9. With a view to ensure that the Metropolitan Magistrates dealing with the complaint cases filed u/s 138 r/w Section 141 of the Negotiable

Instruments Act have a clear and complete picture of the persons arrayed by the complainant so as to hold them vicariously liable for the

commission of the offence by the accused company, I am inclined to direct that the Magistrates must seek copies of Form-32 from the

complainant to prima facie satisfy the Court as to who were the directors of the accused company at the time of commission of the alleged offence

and on the date of filing of the complaint case. In addition to the above, the Magistrates must also seek information as given in the following table

which is to be annexed by the Complainant on a separate sheet accompanying the complaint:-

10. The Registry is directed to send a copy of this order to all the Metropolitan Magistrates posted in various district courts of Delhi for necessary

compliance. Registry is further directed to send a copy of this order to all the Bar Associations of various district courts of Delhi, so that they can

apprise the members of the Bar about the aforesaid directions.

11. The aforesaid directions in terms of Para 10 shall come into effect from 1st July 2013. Issue notice to the respondent, returnable on 21st

August, 2013.