

(2013) 07 DEL CK 0408**Delhi High Court****Case No:** Criminal M.C. 696 of 2012

Rajiv Tibrewal and Others

APPELLANT

Vs

Dynamic Continental Pvt. Ltd.

RESPONDENT

Date of Decision: July 11, 2013**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 482
- Negotiable Instruments Act, 1881 (NI) - Section 118, 138, 139, 141

Citation: (2013) 203 DLT 498 : (2013) 3 JCC 153**Hon'ble Judges:** Kailash Gambhir, J**Bench:** Single Bench**Advocate:** Gaurav Malhotra, for the Appellant; Pawan Verma, for the Respondent**Final Decision:** Dismissed

Judgement

Kailash Gambhir, J.

By this petition filed u/s 482 of Code of Criminal Procedure (hereinafter referred to as Cr. P.C.), the petitioners who are accused nos. 2, 3 and 6 in the Criminal Complaint bearing C.C. No. 4455/2009 seek quashing of the said complaint filed by the complainant Company u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the Act"), pending before the Court of the learned Metropolitan Magistrate, Saket Court, New Delhi. Arguing the present petition, the learned counsel for the petitioners, Mr. Gaurav Malhotra, submitted that the accused no. 1 in the complaint, M/s. Taurus Confectionery India (P.) Ltd. entered into a leave and license agreement dated 21.08.2007 with the complainant company for taking a shop at "Flamez" Mall at Ludhiana on license basis. Learned counsel further submitted that the said agreement was signed by Ms. Geeta Jain, accused no. 4 in the complaint who is the Regional Manager (North) of the said company. Learned counsel further submitted that the said shop taken on leave and license basis was run by Ms. Geeta Jain who was the sole proprietor of accused no. 5 in the complaint, M/s. Ishan Enterprises. Learned counsel also submitted that the monthly license fee

of the said premises was being paid by M/s. Ishan Enterprises as it was actually running the said shop and also issued various post-dated cheques in favour of the complainant. Learned counsel also submitted that the said shop was licensed in favour of M/s. Taurus Confectionery India (P.) Ltd. for a period of nine years but it was agreed between the parties that there shall be a lock-in period of three years for which period the licensee would be liable to pay the license fee even if the licensee chooses to vacate the shop before the expiry of the lock-in period of three years. Learned counsel for the petitioners further submitted that the said shop was vacated by M/s. Ishan Enterprises on 17.06.2009, i.e., before the expiry of lock-in period of three years and three postdated cheques issued by the said M/s. Ishan Enterprises were presented in its bank by the complainant which were returned dishonoured by the banker of the said accused no. 5, M/s. Ishan Enterprises with the remarks "Funds Insufficient"/"Payment stopped by Drawer". Learned counsel for the petitioners submitted that all the three dishonoured cheques were signed by Ms. Geeta Jain, the sole proprietor of M/s. Ishan Enterprises and the petitioners were neither the signatory of the said cheques nor they had any concern with M/s. Ishan Enterprises. Learned counsel for the petitioners submitted that petitioner No. 3 is nowhere related with M/s. Taurus Confectionery India (P.) Ltd. or even M/s. Ishan Enterprises as he only happens to be the husband of Ms. Geeta Jain and therefore cannot be made liable or responsible for the acts committed by the said companies. Learned counsel for the petitioners in support of his arguments, placed reliance on the judgment of the Karnataka High Court in the case of Uppinangady Grama Panchayath Vs. P. Narayana Prabhu, and on the judgments of this Court in the case of Arsh Electronics Pvt. Ltd. Vs. Telematica Star Ltd. and Another, and Rushi International Vs. The State (Nct of Delhi) and Others.

2. Opposing the present petition, the learned counsel for the respondent company submitted that petitioner Nos. 1 and 2 were Directors of M/s. Taurus Confectionery India (P.) Ltd. and they were looking after day to day affairs of the said company. Learned counsel for the respondent company submitted that the said company had authorized Ms. Geeta Jain, its Regional Manager (North) to execute the leave and license agreement dated 21.08.2007 on behalf of the said company. Learned counsel for the respondent company submitted that in terms of the Para 4.4 of the leave and license deed, the licensee was prohibited from creating, sub-letting or otherwise parting with the possession of the licensed premises but in violation of the said clause 4.4 of the license deed, the accused no. 1 company allowed Ms. Geeta Jain to operate the business under the name and style of M/s. Ishan Enterprises in the said shop and pay the monthly license fee towards rent for the said shop. Learned counsel for the respondent company submitted that with a view to maintain business relationship, the respondent allowed Ms. Geeta Jain to operate M/s. Ishan Enterprises as franchisee of M/s. Taurus Confectionery India (P.) Ltd. but the principal liability to perform the contractual obligation always remained with M/s. Taurus Confectionery India (Pvt.) Ltd. Learned counsel for the respondent

company submitted that as all the postdated cheques issued by Ms. Geeta Jain as an authorized signatory of M/s. Ishan Enterprises were dishonoured therefore, the petitioner nos. 1 & 2 who were directors of the principal company, i.e. M/s. Taurus Confectionery India (P.) Ltd. along with Ms. Geeta Jain, the signatory of the dishonoured cheques and petitioner no. 3, the proprietor of M/s. Taurus Confectionery India (Pvt.) Ltd. are liable for committing criminal offence u/s 138 of the Act and they cannot escape the said criminal liability by raising technical pleas. Learned counsel for the respondent company also submitted that the present petition has been filed by the petitioners with dishonest intentions to escape from their criminal liability u/s 138 of the Act and if the present petition, at the instance of the petitioners is allowed, the same will open flood gates for such unscrupulous tenants to shift their criminal liability on the unauthorized Franchisees/Sub-tenants. Based on the aforesaid submissions, the learned counsel for the respondent company urged that the present petition warrants outright dismissal.

3. I have heard the learned counsel for the parties and given my anxious considerations to the arguments advanced by them.

4. Section 141 of the Negotiable Instruments Act fastens vicarious liability on the directors of the company for an offence u/s 138 committed by the company. It provides that if the person committing an offence is a company, then 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, shall be deemed guilty of the offence and shall be liable to be proceeded against and punished accordingly. The Hon'ble Apex Court in National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another, has laid down the following principles to be kept in mind by the courts for determining such liability of the directors of the accused company u/s 141 r/w 138 of the Act.

(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.

5. The aforesaid being the legal principles to be kept in mind for determining the criminal liability of the company directors u/s. 141 r/w 138 of the Act, it is necessary to peruse the averments that are spelled out in the complaint filed by the complainant in order to decide whether the present criminal complaint filed u/s 138 of the Act deserves quashing or not.

6. The relevant averments made in the complaint are that-

The complainant, M/s. Dynamic Continental (P) Ltd., is a Private Limited Company registered under The Companies Act, 1956. The complainant is the owner and developer of "Flamez Mall" situated at Ludhiana, Punjab. The accused no. 1, M/s. Taurus Confectionery India (P) Ltd. is a Private Limited Co. registered under The Companies Act, 1956 and accused nos. 2 and 3 (petitioner nos. 1 and 2 herein) are the directors of accused no. 1. Accused no. 5, M/s. Ishan Enterprises, is a franchisee of accused no. 1. Accused no. 6 (petitioner no. 3 herein) is the proprietor and responsible for the day to day affairs of accused no. 5. Accused no. 4 is the Regional Manager (North) of accused no. 1, wife of accused no. 6 and also the authorized signatory of the cheques in question. She is also responsible for the day to day conduct of business of accused no. 5. Accused no. 4 has been interacting with the complainant with respect to all the meetings, correspondences and representations and also signing all the documents on behalf of accused no. 1 and accused no. 5.

It has been averred in Para 3 of the complaint that the complainant granted a license to the accused no. 1 to use a shop i.e. shop no. GF-8 situated in its "Flamez Mall" for a period of nine months vide leave and license deed dated 21.8.07. The license fee was agreed to be paid by way of postdated cheques. It was also agreed that there shall be a lock-in period for three years for which period the licensee shall be liable to pay the interest even if the licensee chooses to vacate the shop before the expiry of the said lock-in period of three years. (True copy of the aforesaid deed is annexed with the complaint). Accused no. 4 signed the said deed on the strength of the resolution passed by board of directors of accused no. 1 company. (True copy

of the aforesaid resolution is also annexed with the complaint)

Para no. 4 of the complaint states that accused no. 1 used the shop jointly with its franchisee i.e. Accused no. 5. The overall management of the shop was looked after by Accused nos. 2, 3, 4 and 6. The sales were done by Accused nos. 4 and 6. The benefits of the said license were enjoyed by all the accused jointly.

Para nos. 6 and 7 of the complaint talks about the dishonor of three postdated cheques issued by accused no. 4 on behalf of accused no. 5 and gives details regarding the same.

Para no. 8 talks about the sending of the legal notice dated 25.9.09 by the complainant to the accused persons.

Para nos. 9 and 10 aver about the replies sent to such legal notices and specifically points out to the fact that the accused sent their respective replies through one and the same advocate. (True copies of the replies to the legal notices are annexed with the complaint)

7. After going through the aforesaid averments made in the complaint, all the documents annexed with the complaint, the pre-summoning evidence filed by way of affidavit by the complainant and also the contentions raised by the accused persons in the present application seeking quashing of the complaint, this Court has no doubt in holding that petitioner Nos. 1 and 2 were Directors of accused no. 1 company and vide leave and license agreement dated 21.08.2007, the complainant had licensed the shop at "Flamez" Mall at Ludhiana on leave and license basis in favour of the accused no. 1 company. It is also clear that the leave and license agreement was signed by accused no. 4, Ms. Geeta Jain, as an authorized representative of M/s. Taurus Confectionery India (P.) Ltd. In terms of the Clause 2.1 of the leave and license agreement, the licensee was required to pay monthly license fee by way of postdated cheques. The period of said license was agreed to be for nine years commencing from 9.8.2007 and the period from 9.8.2007 to 8.8.2010 was agreed to be the lock-in period of the license to the effect that the licensee shall pay license fee in the form of postdated cheques for the said lock-in period. It is also not in dispute that accused no. 1 company allowed accused no. 4, Ms. Geeta Jain, to operate business in the name and style of M/s. Ishan Enterprises (accused no. 5) and the payments of the monthly license fee were being made by M/s. Ishan Enterprises. It is also an admitted fact that the licensee had vacated the said shop before the expiry of the lock-in period, i.e. before 8.8.2010. It is also seen that while Ms. Geeta Jain was the authorized signatory of the dishonoured cheques issued on behalf of M/s. Ishan Enterprises i.e. the alleged Franchisee of M/s. Taurus Confectionery India (P.) Ltd. Mr. Ajay Jain, husband of Ms. Geeta Jain (accused no. 6 in the complaint, petitioner no. 3 herein) is alleged to be the proprietor of the said franchisee.

8. From the above it is crystal clear that as far as complaint against petitioner no. 3 is concerned, being the proprietor of the company issuing the dishonoured cheques in

question, he is liable to be proceeded against u/s 138 of the Act. The plea raised by the counsel for the petitioners that Mr. Ajay Jain, by simply being the husband of Ms. Geeta Jain, cannot be held liable either for the deeds and acts of M/s. Taurus Confectionery India (P.) Ltd. or M/s. Ishan Enterprises does not hold any merit. The complainant has clearly averred in its complaint that accused no. 6 is the proprietor of M/s. Ishan Enterprises and a mere denial of this fact by the accused in the present application would not result in quashing the complaint qua accused no. 6.

9. So far as the plea for quashing of complaint qua petitioner Nos. 1 and 2 herein is concerned, the leave and license agreement in respect to the shop in question was executed by the complainant in favour of accused no. 1 company and the role of the directors of accused no. 1 company while entering into such agreement with the complainant has been clearly averred in the complaint. It has been specifically averred in Para no. 3 of the complaint that the board of directors authorized accused no. 4 to enter into the leave and license agreement with the complainant company through the resolution dated 9.8.07. The said resolution bears the signatures of one of the accused, petitioner no. 3 explicitly. It has also been specifically averred in Para no. 4 of the complaint that the overall management of the licensed shop was looked after by accused nos. 2, 3, 4 and 6 and the benefits of the said license was enjoyed by all the accused jointly. No doubt the cheques in question were issued by Ms. Geeta Jain, the authorized signatory of M/s. Ishan Enterprises, but then there was no privity of contract between the Complainant Company and M/s. Ishan Enterprises and the entire liability to pay the monthly license fee was always upon the accused no. 1 company. Also, the presence of petitioner Nos. 1 and 2 would be necessary to prove and establish the existence and enforceability of the monthly license fee arising out of the leave and licensee deed, more particularly, if for any reason, M/s. Ishan Enterprises succeeds in rebutting the initial presumption arising in favour of the complainant in terms of the Sections 118 and 139 of the Act.

10. In the light of the aforesaid discussion, the present petition filed by the petitioners is hereby dismissed. It is ordered accordingly.