

(2011) 05 DEL CK 0393

Delhi High Court

Case No: Criminal M.C. No. 3737 of 2010 and Criminal M.A. 18048 of 2010

V. Mohan

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision: May 19, 2011

Acts Referred:

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

Hon'ble Judges: Ajit Bharihoke, J

Bench: Single Bench

Advocate: Madhukar Pandey and Anirudha Mishra, for the Appellant; Fizani Husain, APP for R1, for the Respondent

Judgement

Ajit Bharihoke, J.

This is a petition u/s 482 of the Code of Criminal Procedure seeking quashing of summoning order dated 22nd May, 2001 passed by learned Metropolitan Magistrate, New Delhi in complaint case No. 908/2002 titled `Duet Trading Co. Pvt. Ltd. v. Reinz Talbros Ltd. & Ors.", whereby the Petitioner was also summoned to stand trial for the offence u/s 138 of the Negotiable Instruments Act (for short "N.I. Act").

2. Briefly stated, allegations in the complaint are that a cheque No. 617453 dated 16th March, 2001 for `4,88,849/- drawn on Bank of Baroda, New Delhi was issued by the accused company M/s Reinz Talbros Ltd. in favor of the complainant in discharge of its existing liability. The cheque, on presentation, was dishonored for the reason "Exceeds arrangements" as per the cheque return memo dated 30th March, 2001. The complainant therefore served a legal notice for demand on the accused company. Accused company failed to pay the cheque amount within stipulated time. This led to filing of the complaint u/s 138/141, N.I. Act against the accused company and Ors. including the Petitioner.

3. Only submission on behalf of the Petitioner is that he was neither In charge nor concerned with the day to day conduct of business of M/s. Reinz Talbros Ltd. Learned Counsel argued that neither the complaint nor the preliminary evidence adduced by Respondent No. 2 disclosed existence of necessary ingredient to hold the Petitioner vicariously liable for the offence u/s 138, Negotiable Instruments Act (for short "N.I. Act"). It is contended that except for general averment in Para 11 of the complaint filed in the court, there is no specific averment against the Petitioner herein that he was either a Director or In charge of the day to day affairs of the company. Thus, it is strongly urged that the complaint case qua the Petitioner be quashed.

4. On 9th February, 2011, the matter was adjourned on the request of learned Counsel for the Respondent No. 2 and he was granted time to file reply to the petition within four weeks. Respondent No. 2 have failed to file any reply and he has also failed to put in appearance either in person or through counsel even on the second call. Thus, I am left with no alternative but to hear the Petitioner in absence of Respondent No. 2 and decide the petition.

5. I have considered the submissions made on behalf of the Petitioner and carefully gone through the record. On perusal of the complaint, it transpires that allegations in the complaint do not satisfy the basic ingredient of Section 141 of the N.I. Act for roping in the Petitioner vicariously for the alleged offence u/s 138, N.I. Act committed by the company i.e. M/s. Reinz Talbros Ltd.

6. In [S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another](#), the Supreme Court had held that a person sought to be made vicariously liable u/s 141 of the N.I. Act must be at the time, when the offence is committed, In charge and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. In every complaint, a necessary averment must be made before vicarious liability is sought to be fastened for offence u/s 138, N.I. Act on a person connected with a company and a clear and unambiguous case should be made out in the complaint against the person sought to be made liable. Relevant portion of the judgment is reproduced hereunder:

10. While analyzing Section 141 of the Act, it will be seen that it operates in cases where an offence u/s 138 is committed by a company. The key words which occur in the Section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words " 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 etc." What is required is that the persons who are sought to be made criminally liable u/s 141 should be at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company.

Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of "every person" the section would have said "every Director, Manager or Secretary in a Company is liable"....etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before persons can be subjected to criminal process. A liability u/s 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That Respondent tails within parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141 he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non director can be liable u/s 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

19. In view of the above discussion, our answers to the questions posed in the Reference are as under:

(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.

....

10. On a bare reading of the complaint, copy of which is annexed on the record, it is seen that complainant/Respondent No. 2 has made general averment in Para 11 that accused No. 1 to 10 arrayed in the complaint are all part of the conspiracy to cheat the complainant. Para 11 of the complaint is reproduced below:

11. That the Accused No. 1 to 10 is all a part of a conspiracy to cheat the complainant. They knowingly issued the post-dated cheque in favor of the complainant Company knowing fully well that they do not have the funds or any intentions to honor the cheque. All the Respondents/Accused(s) were fully aware of the issuance of the dishonored cheque and are fully responsible and accountable to the complainant for the unjust financial loss caused to it. They fully participate in all the affairs of the Accused No. 1 Company and actively looking into the day-to-day affairs of the Accused No. 1 Company.

11. Reading of Para 11 would show that neither the Petitioner has been described as Director of the company nor it has been stated that at the time when the offence was committed, he was In charge of and responsible for conduct of the business of the company. Only in the title, the Petitioner is described as Secretary of the company but nowhere in the complaint, description of his duties have been given, which could throw light on whether or not, the Petitioner was responsible for day to day conduct of the business of the company. Thus, it is apparent that necessary ingredient of Section 141, N.I. Act to rope in the Petitioner vicariously for the offence u/s 138, N.I. Act committed by the company is missing in this case. Accordingly, instant petition is allowed. Complaint No. 908/2002 entitled `Duet Trading Co. Pvt. Ltd. v. Reinz Talbros Ltd. & Ors.". qua the Petitioner stands quashed. The summoning order dated 22nd May, 2001 qua the Petitioner is also set aside.

12. Petition stands disposed of.