

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 21st FEBRUARY, 2022

IN THE MATTER OF:

+ **CRL.M.C. 2082/2021 & CRL.M.A. 14016/2021**

GOPALA KRISHNA MOOTHA

..... Petitioner

Through Mr. Neeraj Malhotra, Senior
Advocate with Mr. Shiv Gupta, Ms.
Devahuti Tamuli, Advocates

versus

THE STATE GOVT OF NCT OF DELHI & ANR Respondents

Through Ms. Neelam Sharma, APP for the
State
Ms. Kamlesh Mahajan, Advocate for
R-2

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. The petitioner seeks quashing of Criminal Complaint No.5799/2020 titled as Chetan Sharma v. India Ahead News Pvt. Ltd. & Ors. which is a complaint filed under Section 138 of the Negotiable Instruments Act (in short 'NI Act'). The petitioner also seeks to quash order dated 03.02.2021 passed by the learned Trial Court issuing summons to the petitioner herein.

2. The respondent No.2 herein filed a complaint under Section 138 read with Section 142 of the NI Act before the Court of learned Metropolitan Magistrate, Saket Court with the following averments.

i. The respondent No.2/complainant was appointed as the CFO of

the India Ahead News Private Ltd. which is engaged in the business of running a TV news channel.

- ii. It is alleged in the complaint that the petitioner herein and the accused No.2 - Goutham Mootha, who is the son of the petitioner herein, are the directors of India Ahead News Pvt. Ltd. and they are responsible for the day to day affairs of the company and they are running the TV channel and actively controlling all the operations of the company.
- iii. It is stated in the complaint that the complainant was taken in service by the respondent No.1 at a fixed salary of Rs.10,00,000/- per month plus GST less TDS (to be deposited by the company under the Income Tax Act) along with monthly expenditure and reimbursement of Rs.1,50,000/- per month. It is stated that a stake of 10 per cent was also assured to the complainant herein.
- iv. It is stated that in the year 2019, the salaries of staff including the complainant started getting delayed and even the statutory obligations like the PF, ESI etc. were not being fulfilled by the company. It is stated that since the dues and the arrears of salary were mounting up, at the request of Goutham Mootha (son of the petitioner herein), the complainant herein offered to take a salary cut.
- v. It is stated that it was decided that the company would be paying a sum of Rs.32,00,000/- plus GST from 01.01.2020 to 31.05.2020 and reimbursement of Rs.5,00,000/-.
- vi. It is stated that the complainant herein was given the following

cheques of a total amount of Rs.39,56,000/-:-

- Cheque No.63 dated 25.08.2020 for a sum of Rs.17,28,000/- drawn on Andhra Bank, Sector 18, Noida.
 - Cheques No.64 dated 26.08.2020 for a sum of Rs.17,28,000/- drawn on Andhra Bank, Sector 18, Noida.
 - Cheque No.65 dated 26.08.2020 for a sum of Rs.5,00,000/- drawn on Andhra Bank, Sector 18, Noida.
- vii. It is stated that the cheques were for payment of arrears of salary.
- viii. It is stated that the cheques were presented for encashment through Andhra Bank, Sector B, Pkt 1, DAV Public School Campus, Vasant Kunj, New Delhi, which is the bank of the complainant and the cheques were returned with remark "insufficient fund".
- ix. It is stated that the cheque No.63/2020 dated 25.08.2020, cheque No.65/2020 dated 26.08.2020 drawn on Andhra Bank, Sector-18, G B Nagar, Noida-201301 were returned on 28.8.2020 and cheque No. 64/2020 dated 26.08.2020 drawn on Andhra Bank, Sector-18, G B Nagar, Noida-201301 was returned on 29.08.2020 due to insufficient funds.
- x. It is stated that legal notice dated 02.09.2020 was issued in compliance to the mandate of Section 138 of the NI Act demanding payment. However, instead of making the payment,

a reply dated 17.09.2020 was received by the complainant. Since, the money was not paid, the instant complaint was filed on 03.02.2021.

- xi. The complaint came up for hearing on 23.01.2021. Since there was nothing on record to show that the accused No.2 & 3 are the directors of the company, the complainant was directed to place on record the Master Data of the company. The Master Data of the company was filed. The evidence by way of affidavit was filed by the complainant. After the pre-summoning evidence, summons were issued on 03.02.2021. The said order and the complaint has been challenged before this Court.

3. When the matter came up for hearing, this Court felt that an attempt can be made to settle the disputes between the parties and the matter was sent to mediation. Unfortunately, despite several sittings, no settlement could be arrived at.

4. Mr. Neeraj Malhotra, learned Senior Advocate for the petitioner, contends that the petitioner is over 80 years of age having several physical ailments and is no longer looking into day-to-day affairs of the company. He contends that the complainant/respondent No.2 being the ex-CFO of the company was well aware of the affairs of the company and he knew who was responsible for the conduct of the business of the company. He states that the averments in the complaint do not reflect the role of each of the directors in the company and summons could not have been issued to the Petitioner. The learned Senior Counsel for the petitioner relies on the following judgments:-

- i. Ashoke Mal Bafna v. Upper India Steel Mfg. & Engg. Co. Ltd., **(2018) 14 SCC 202.**
- ii. Central bank of India v. Asian Global Ltd. & Ors., **(2010) 11 SCC 203.**
- iii. ECL Finance Ltd. v. Sukhmani Bedi & Ors., **(2018) OnLine Del 11213.**
- iv. N K Wahi v. Shekhar Singh & Ors., **(2007) 9 SCC 481.**
- v. NSIC v. Harmeet Singh Paintal & Anr., **(2010) 3 SCC 330.**
- vi. Gunmala Sales (P) Ltd. v. Anu Mehta, **(2015) 1 SCC 103.**
- vii. Saroj Kumar Poddar v. State, **(2007) 3 SCC 693.**
- viii. Ramraj Singh v. State of Madhya Pradesh & Anr., **(2009) 6 SCC 729.**
- ix. Pooja Ravinder Devidasani v. State of Maharashtra & Anr., **(2014) 16 SCC 1.**
- x. Harshendra Kumar D v. Rebatilata Kole & Ors., **(2011) 3 SCC 351.**

5. Ms. Kamlesh Mahajan, learned counsel for the respondent No.2 states that the petitioner herein and his son i.e. accused No.2 are together running the company. She states that there are only two directors and both the directors are responsible for the conduct of the affairs of the company. She submits that the question as to whether the company was being only run by the Accused No.2 i.e. son of the petitioner herein or whether the Petitioner herein is also involved in the affairs of the company, is a matter of trial and the complaint cannot be quashed at this stage. She further states that offence under Section 138 of the NI Act is made out and no interference is warranted from this Court at this stage.

6. The factors which are necessary to be kept in mind before making a person vicariously liable for the offences committed by the company under Section 138 of the N.I. Act have been succinctly laid down by the Apex Court in a number of judgments, and are as follows:-

- (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 the accused therein vicariously liable for offence committed by the 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 the accused is a Managing Director or a 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 the 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.

(Refer Gunmala Sales Private Limited v. Anu Mehta & Ors., **2015 (1) SCC 103**; National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal, **(2010) 3 SCC 330**; S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, **(2005) 8 SCC 89**; S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, **(2007) 4 SCC 70**; Saroj Kumar Poddar v. State (NCT of Delhi), **(2007) 3 SCC 693**; N.K. Wahi v. Shekhar Singh, **(2007) 9 SCC 481**; N. Rangachari v. BSNL, **(2007) 5 SCC 108**; Paresh P. Rajda v. State of Maharashtra, **(2008) 7 SCC 442**; K.K. Ahuja v. V.K. Vora, **(2009) 10 SCC 48**).

7. The averments made in the complaint read as under:-

"2.2 That the Respondent No.1 is a Company registered under the provisions of Companies Act, 1956 with Registrar of Hyderabad and Addressee Nos. 2 to 3 are the Directors of Respondent No.1 Company and are engaged in the ordinary course of the business of the Company and thus liable for bouncing of cheques issued to the Complainant.

2.3 That the Respondent No.1 is engaged in the

business of running a TV News Channel i.e. "India Ahead" at the above-mentioned address. The Respondent No.2 & 3 are the Directors of Respondent No.1 The Respondent Nos.2-3 are responsible for day to day affairs and acts of the Company and had been conducting the same by being present and actively controlling all operations on site at the office on a daily basis from the start of the operations of the Channel."

8. Admittedly, there are only two directors of the company. As laid down by the Apex Court, specific averments have been made that accused, who are the Directors of the company and are responsible for the day-to-day affairs and acts of the company and had been conducting the same by being present and actively controlling all the operations on site at the office on a day-to-day basis from the start of the operation of the channel. The Apex Court in Ashutosh Ashok Parasrampuriya & Anr. v. Gharrkul Industries Pvt. Ltd. & Ors., (2021) SCC OnLine SC 915 has observed as under:-

" 23. In the light of the ratio in S.M.S. Pharmaceuticals Ltd. (supra) and later judgments of which a reference has been made what is to be looked into is whether in the complaint, in addition to asserting that the appellants are the Directors of the Company and they are incharge of and responsible to the Company for the conduct of the business of the Company and if statutory compliance of Section 141 of the NI Act has been made, it may not open for the High Court to interfere under Section 482 CrPC unless it comes across some unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of process of Court. Despite the

presence of basic averment, it may come to a conclusion that no case is made out against the particular Director for which there could be various reasons.

24. The issue for determination before us is whether the role of the appellants in the capacity of the Director of the defaulter company makes them vicariously liable for the activities of the defaulter Company as defined under Section 141 of the NI Act? In that perception, whether the appellant had committed the offence chargeable under Section 138 of the NI Act?

25. We are concerned in this case with Directors who are not signatories to the cheques. So far as Directors who are not the signatories to the cheques or who are not Managing Directors or Joint Managing Directors are concerned, it is clear from the conclusions drawn in the afore-stated judgment that it is necessary to aver in the complaint filed under Section 138 read with Section 141 of the NI Act that at the relevant time when the offence was committed, the Directors were in charge of and were responsible for the conduct of the business of the company.

26. This averment assumes importance because it is the basic and essential averment which persuades the Magistrate to issue process against the Director. That is why this Court in S.M.S. Pharmaceuticals Ltd. (supra) observed that the question of requirement of averments in a complaint has to be considered on the basis of provisions contained in Sections 138 and 141 of the NI Act read in the light of the powers of a Magistrate referred to in Sections 200 to 204 CrPC which recognise the Magistrate's discretion to take action in accordance with law. Thus, it is imperative that if this basic averment is missing, the Magistrate is

legally justified in not issuing process."

(emphasis supplied)

9. It is not the case of the petitioner herein that he is a non-executive director. The petitioner is a full-time director. The complaint read as a whole indicates that at the time of cheques being issued by the company and returned by the bank, the son of the petitioner and the petitioner were the only directors of the company and were responsible for the conduct of the business of the company. This Court is, therefore, not inclined to interfere with the order dated 03.02.2021 issuing summons to the petitioner herein.

10. The latest judgments of the Supreme Court in Ashutosh Ashok Parasrampuriya & Anr. v. Gharrkul Industries Pvt. Ltd. & Ors., (2021) SCC OnLine SC 915, squarely covers the present case. It is for the petitioner to establish in trial that he was not responsible for the conduct of the business of the company owing to his age and the mere *ipse dixit* of the petitioner that he is 80 years of age and is unable to manage the affairs of the company cannot be accepted at this stage and the complaint cannot be quashed on that basis.

11. The observations made by this Court is limited to the issue as to whether the complaint should be quashed or not because of the fact that the complaint does not state the exact role of the petitioner in the conduct of the business of the company. Needless to state, it is always open for the petitioner to substantiate his assertion that he was not responsible for the conduct of the business of the company by leading evidence which should be considered on its own merits without being influenced by the observations made in this order.

12. The petition is dismissed with the above observations. Pending

application(s), if any, stand disposed of.

SUBRAMONIUM PRASAD, J

FEBRUARY 21, 2022

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