

CASE NO.:
Appeal (crl.) 83-85 of 2004

PETITIONER:
N.K. Wahi

RESPONDENT:
Shekhar Singh and Ors.

DATE OF JUDGMENT: 09/03/2007

BENCH:
Dr. Arijit Pasayat & Lokeshwar Singh Panta

JUDGMENT:
JUDGMENT

Dr. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the order passed by a learned Single Judge of the Delhi High Court, allowing the three applications filed by the respondents for quashing the order passed by the learned Metropolitan Magistrate, New Delhi, on 25th November, 2000.

2. Background facts in nutshell are as under:

3. Appellant presented a criminal complaint under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (in short the 'Act') in the Court of Metropolitan Magistrate, New Delhi. It was pleaded that M/s Western India Industries Ltd. is a limited company and the respondents and some others were the Directors/persons responsible for carrying on the business of the company and the liability of these persons is joint and several. It was stated that certain cheques had been issued by the company which were dishonored on being presented. After giving the necessary notice the complaint was filed. The respondents filed an application for dropping the proceedings stating that they were not Directors of the company and further there was no allegation against them in terms of Section 141 of the Act and as such they should not have been made parties. Learned Metropolitan Magistrate dismissed the application holding that whether the applicants in the aforesaid petitions were Directors at the relevant point of time or not is to be decided on evidence.

4. It was further held that the company is a juristic person and works through persons responsible for carrying out its activities and, therefore, they have been rightly impleaded as parties. Respondents filed applications invoking Section 482 of the Code of Criminal Procedure, 1973 (in short the 'Code'). The High Court held that the preliminary evidence does not establish that the respondents were either incharge or were responsible to the companies for the conduct of business. In the absence of any such evidence or assertion, it was held that the learned Metropolitan Magistrate was not justified in issuing summons to the respondents.

5. In support of the appeals, learned counsel for the appellant submitted that there was clear material to show that respondents were either Directors or persons incharge of the business of the company. The High Court found that preliminary evidence had been recorded and subsequent evidence was forthcoming. The appellant who appeared at that time only stated that accused 2 to 12 are Directors and responsible for the company and as such liable by the acts of the company. The High Court held that there was no clear averment or evidence to show that the respondents were incharge or responsible to the company for the conduct of the business as well as the company. Accordingly the proceedings were quashed so far as the respondents are concerned.

6. The respondents on the other hand supported the order of the High Court.

7. Chapter XVII has been incorporated under the Act with effect from 1.4.1989. In certain contingencies referred to under Section 138 of the Act on the cheques being dishonored a new offence as such had been created. But to take care of the offences purported to have been committed provisions of sub-section (1) to Section 141 of the Act come into play. It reads as under:-

"141 - Offence by companies - (1) If the person committing an offence under section 138 is a company, 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, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence."

8. This provision clearly shows that so far as the companies are concerned if any offence is committed by it then every person who is a Director or employee of the company is not liable. Only such person would be held liable if at the time when offence is committed he was in charge and was responsible to the company for the conduct of the business of the company as well as the company. Merely being a Director of the company in the absence of above factors will not make him liable.

9. To launch a prosecution, therefore, against the alleged Directors there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are in charge and responsible for the conduct of the business of the company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and the court can always come to a conclusion in facts of each case. But still in the absence of any averment or specific evidence the net result would be that complaint would not be entertainable.

10. Section 138 of the Act reads as under:-

"138. Dishonour of cheque for insufficiency, etc., of funds in the account-

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another persons from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an arrangement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both."

11. In order to bring application of Section 138 the complaint must show:

1. That Cheque was issued;
2. The same was presented;
3. It was dishonored on presentation;

4. A notice in terms of the provisions was served on the person sought to be made liable;

5. Despite service of notice, neither any payment was made nor other obligations, if any, were complied with within fifteen days from the date of receipt of the notice.

12. Section 141 of the Act in terms postulates constructive liability of the Directors of the company or other persons responsible for its conduct or the business of the company.

13. The only averment made so far as the respondents are concerned, reads as under:

"Preliminary evidence had been recorded and at that time also no specific evidence on assertion was forthcoming. Shri Wahi who appeared at that time only stated that accused 2 to 12 are directors and responsible officers of the company. They are liable for the acts of the company. In other words, there was no averment or evidence that the present petitioners were incharge of or responsible to the company for the conduct of the business of the company as well as the company.

The accused Nos. 2 to 12 are the Directors/persons responsible for carrying out the business of the company and the liability of the accused persons in the present complaint is joint and several".

14. In S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr., [2005] 8 SCC 89, it was, inter-alia, held as follows:-

"18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 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 the respondent falls within the 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 under Section 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 under Section 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) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a director of a company is not sufficient to make the person liable under Section 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.

(c) The answer to Question (c) has to be in the affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 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 under Section 141. So far as the 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".

15. The matter was again considered in *Sabitha Ramamurthy and Anr. v. R.B.S. Channabasavaradhya and Anr.*, [2006] 9 SCALE 212, and *Saroj Kumar Poddar v. State (NCT of Delhi) and Anr.*, JT (2007) 2 SC 233. It was, inter-alia, held as follows:

"....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 therefor. 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. Before a person can be made vicariously liable, strict compliance of the statutory requirements would be insisted....".

16. In view of the legal position set out above, the inevitable result is that the appeals are without merit, deserve dismissal, which we direct.