

CASE NO.:
Appeal (crl.) 520 of 2007

PETITIONER:
Everest Advertising Pvt. Ltd

RESPONDENT:
State, Govt. of NCT of Delhi & Ors

DATE OF JUDGMENT: 10/04/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO. 520 OF 2007
[Arising out of SLP (Crl.) No. 6204-6205 of 2005]

S.B. SINHA, J :

Leave granted.

This appeal is directed against a judgment and order dated 13.07.2005 passed by a learned Single Judge of the Delhi High Court in Criminal M.C. Nos. 3690 and 3691 of 2001.

Respondent Nos. 2 and 3 herein are Chairman and Managing Director of a Company known as 'Dalmia Industries Ltd.', (The Company) which is registered and incorporated under the Companies Act, 1956. It was arrayed as Accused No. 6 in the complaint petition.

The Company is engaged in the business of advertising and publicity. By an agreement dated 17.07.1995, the Company as also Accused No. 6 entered into an agreement in terms whereof the Company was appointed as advertising and publicity agents of Accused No. 6 in respect of their various products on the terms and conditions contained therein. Allegedly, the Company carried out various jobs and releases between the period July, 1997 and December, 1997. It raised bills to the extent of Rs. 2,59,21,053.37 for the work executed by it. On 14.11.1997, Accused No. 6 issued various post dated cheques allegedly towards part payment of the said dues which on presentation to the bank on 6.04.1998 admittedly were dishonoured. Notices were served on the Respondents Nos. 2 and 3 on 18.04.1998.

Appellant \026 Company (Company) filed two complaint petitions against the accused persons including Respondent Nos. 2 and 3 herein alleging:

"4. That accused No. 1 to 5 are the Chairman, Vice Chairman, Director (Technical), Executive Director, and Senior General Manager (Finance) of the accused Company respectively and are Incharge and responsible to the accused company for the conduct of the business of the Company and are thus liable for making the payment.

9. That the complainant company presented these cheques on 26.3.1998 for encashment through their bankers Central Bank of India, Ram Tilak Nagar Branch, New

Delhi, which have been returned back to the complainant company on 28.3.1998 by the Banker with the endorsement dated 27.3.1998 of the State Bank of Bikaner and Jaipur D 72 Connaught Circus, New Delhi to the bank of the accused company "payment stopped by the drawer". One of the cheque bearing No. 588184 dated 6.11.1997 drawn on the State Bank of Bikaner and Jaipur, D-72 Connaught Circus, New Delhi returned with the endorsement of the accused Bank "exceeds arrangement". This Bank Memo along with the cheque was sent by the Banker of the complainant company vide Memo dated 28.3.1998. Subsequently, the accused gave pay order in lieu of the cheque.

11. That these post dated cheques as per Annexure 'B' were given after the accused No. 1 to 5 had various meetings with the complainant company and it is only after persuasion that the complainant company owes money to various Media Concessionaries and unless they are being paid, the releases of the accused company shall not be entertained by the Media Concessionaries.

13. That accused No. 1 to 5 are Incharge and responsible for the conduct of the business and the offence is committed by the accused company with the active connivance of the accused No. 1 to 5."

On the said complaint petitions and upon recording the initial deposition of the complainant and its witnesses under Section 200 of the Code of Criminal Procedure, by an order dated 24.07.1999, processes were directed to be issued by the learned Magistrate against the accused persons in terms of Section 204 of the Code of Criminal Procedure.

An application was filed by them for recalling the processes so issued. By an order dated 11.07.2001, the learned Magistrate recalled the said order dated 24.07.1999 issuing summons against Respondent Nos. 2 and 3. Criminal Miscellaneous applications were filed by the Company thereagainst before the High Court. By reason of the impugned judgment, the said applications have been dismissed by the High Court holding:

"13. Coming back to the facts of the two cases before me, I find that the allegations in the complaint are far from sufficient to summon respondents 2 and 3 for the offence of the company - accused No.6. Apart from making an omnibus allegation that all the accused were responsible for the conduct of the business of the company and that all of them connived in the offence, there is no specific averment as to how any of the accused 1 and 2 (respondents 2 and 3 herein) were actually involved in the conduct of the business of the company relating to the transaction in question or how and on what basis it can be said that it was with the active connivance of these two accused that the offence was committed by the company. In my opinion, the petitioners could not have been summoned on the basis of the allegations made by the complainant. The Metropolitan Magistrate has not committed any mistake in declining to summon the two accused. The petitions have no merit and, therefore, dismissed."

Mr. Alope Kumar Sengupta, learned Senior Counsel appearing on behalf of the Company, would submit that having regard to the allegations made in the complaint petition, the High Court committed a serious illegality in passing the impugned judgment. The learned counsel submitted that the

learned Magistrate had no jurisdiction to recall its order whereby the accused persons were summoned.

Mr. K.T.S. Tulsi, learned senior counsel appearing on behalf of Respondents Nos. 2 and 3, on the other hand, would submit that complaint petition contained mechanical reproduction of the wordings of a section and, thus, without making any allegation that Respondent Nos. 2 and 3 had any role to play in the matter of issuance of cheque or the dishonour thereof, no order issuing summons as against the said Respondents could have been passed. A distinction, according to the learned counsel, must be made between a Chairman of a Company and a Managing Director or a Deputy Managing Director thereof inasmuch whereas a Managing Director or a Deputy Managing Director is presumed to be involved in the day to day affairs of the Company, the Chairman of a Company may not even have any knowledge in relation thereto. Provisions of the Negotiable Instruments Act, it was submitted, are being misused and this Court, therefore, should strike a balance between the interest of a complainant and interest of an accused who is alleged to be vicariously liable for the offences committed by the Company.

Summons were issued by the learned Magistrate by reason of an order dated 24.07.1999. He recalled the said order. He did not have any jurisdiction in that behalf. A Magistrate does not have and, thus, cannot exercise any inherent jurisdiction.

In *Adalat Prasad v. Rooplal Jindal and Others* [(2004) 7 SCC 338], a 3-Judge Bench of this Court while overruling an earlier decision of this Court in *K.K. Mathew v. State of Kerala and Anr.* [(1992) 1 SCC 217] stated the law thus :

"14. But after taking cognizance of the complaint and examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint he can issue process by way of summons under Section 204 of the Code. Therefore, what is necessary or a condition precedent for issuing process under Section 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under Section 202 that there is sufficient ground for proceeding with the complaint hence issue the process under Section 204 of the Code. In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons because this is only a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in the Code. It is true as held by this Court in *Mathew case*¹ that before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under Sections 200 and 202, and the only stage of dismissal of the complaint arises under Section 203 of the Code at which stage the accused has no role to play, therefore, the question of the accused on receipt of summons approaching the court and making an application for dismissal of the complaint under Section 203 of the Code on a reconsideration of the material available on record is impermissible because by then Section 203 is already over and the Magistrate has proceeded further to Section 204 stage.

16. Therefore, in our opinion the observation of this Court in the case of *Mathew*¹ that for recalling an erroneous order of issuance of process, no specific provision of law is required, would run counter to the

scheme of the Code which has not provided for review and prohibits interference at interlocutory stages. Therefore, we are of the opinion, that the view of this Court in Mathew case¹ that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law."

The said ratio has been reiterated by another 3-Judge Bench of this Court in Subramaniam Sethuraman v. State of Maharashtra and Anr. [JT 2004 (8) SC 220 and N.K. Sharma v. Abhimanyu (2005)13 SCC 213].

Unfortunately, this aspect of the matter was not considered by the High Court despite the aforementioned binding precedents. The High Court, however, for all intent and purport upheld the order passed by the learned Magistrate on the premise that allegations made in the complaint petition do not satisfy the requirements of Section 141 of the Negotiable Instruments Act.

The said provision reads thus :

"141. Offences 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:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.- For the purposes of this section,-

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

As the contentions of the parties are covered by a few decisions of this Court, we may at the outset notice the law operating in the field.

The applicability and/or extent of Section 141 of the Act was referred to and considered by a 3-Judge Bench of this Court in S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr. [(2005) 8 SCC 89 : 2005 (7) SCALE 397].

The questions so referred read as under :

"(a) whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfill the requirements of the said section and it is not necessary to specifically state in the complaint that the persons accused was in charge of, or responsible for, the conduct of the business of the company.

(b) whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

(c) even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the Managing Directors of Joint Managing Director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against."

They were answered in the following terms :

"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."

In *Saroj Kumar Poddar v. State (NCT of Delhi) and Anr.* [2007 (2) SCALE 36], this Court held :

"Apart from the Company and the appellant, as noticed hereinbefore, the Managing Director and all other Directors were also made accused. The appellant did not issue any cheque. He, as noticed hereinbefore, had resigned from the Directorship of the Company. It may

be true that as to exactly on what date the said resignation was accepted by the Company is not known, but, even otherwise, there is no averment in the complaint petitions as to how and in what manner the appellant was responsible for the conduct of the business of the Company or otherwise responsible to it in regard to its functioning. He had not issued any cheque. How he is responsible for dishonour of the cheque has not been stated. The allegations made in paragraph 3, thus, in our opinion do not satisfy the requirements of Section 141 of the Act."

Yet again in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr.* [2007 (3) SCALE 245], it was held:

"In terms of Section 138 of the Act, a complaint petition alleging an offence thereto must demonstrate that the following ingredients exist that:

- (i) a cheque was issued;
 - (ii) the same was presented;
 - (iii) but, it was dishonoured;
 - (iv) a notice in terms of the said provision was served on the person sought to be made liable;
- and
- (v) 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.

The liability of a Director must be determined on the date on which the offence is committed. Only because Respondent No. 1 herein was a party to a purported resolution dated 15.02.1995 by itself does not lead to an inference that she was actively associated with the management of the affairs of the Company. This Court in this case has categorically held that there may be a large number of Directors but some of them may not associate themselves in the management of the day to day affairs of the Company and, thus, are not responsible for conduct of the business of the Company. The averments must state that the person who is vicariously liable for commission of the offence of the Company both was incharge of and was responsible for the conduct of the business of the Company. Requirements laid down therein must be read conjointly and not disjunctively. When a legal fiction is raised, the ingredients therefor must be satisfied.

If the complaint petition is read in its entirety, the same would show that the only person who was actively associated in the matter of obtaining loan, signing cheques and other affairs of the company which would lead to commission of the alleged offence was the accused No. 2. By reason of the purported resolution dated 15.02.1995, whereupon strong reliance has been placed by Mr. Mishra, only the accused No. 2 was authorized to do certain acts on behalf of the Company. The cheques were issued on 15.08.1996, i.e., after a period of 17 months from the date of the said resolution. As is evident from the averments made in the complaint petition, the cheques represented the amount of interest payable for a total period of 15 days only calculated at the rate of 25% per annum on the amount of deposit, viz., rupees two crores."

The observations made in Saroj Kumar Poddar (supra) were, however, explained therein, stating:

"A faint suggestion was made that this Court in Saroj Kumar Poddar (supra) has laid down the law that the complaint petition not only must contain averments satisfying the requirements of Section 141 of the Act but must also show as to how and in what manner the appellant was responsible for the conduct of the business of the company or otherwise responsible to it in regard to its functioning. A plain reading of the said judgment would show that no such general law was laid down therein. The observations were made in the context of the said case as it was dealing with a contention that although no direct averment was made as against the appellant of the said case fulfilling the requirements of Section 141 of the Act but there were other averments which would show that the appellant therein was liable therefor."

[See also N.K. Wahi v. Shekhar Singh & Others \026 2007 (4) SCALE 188]

The law operating in this behalf is, therefore, no longer res integra. What is, therefore, necessary is the application of law. Necessary ingredients of Section 141 have been stated in the complaint petition at more than one place. Whether the same satisfies the requirements of law or not is the question.

A Chairman of a large Company may or may not be aware of the actual transaction. If in a given situation, cheques are issued in ordinary course of business. The Managing Director or a Deputy Managing Director, in view of S.M.S. Pharmaceuticals Ltd (supra) would be deemed to be aware thereof. A Chairman or a Director of a Company need not be. But, without going into the finer question raised by Mr. Tulsi, we may notice that allegations have not only been made in terms of the wordings of section but also at more than one place, it has categorically been averred that the payments were made after the meetings held by and between the representative of the Company and Accused Nos. 1 to 5 which would include Respondent Nos. 2 and 3.

It is, therefore, not a case where having regard to the position held by the said respondents in the Company, they could plead ignorance of the entire transaction.

Not only cheques were issued having regard to the huge amount payable by Accused No. 6 to the Company but also as a result of fall out of non-payment thereof, negotiations were held between the parties wherein Respondent Nos. 2 and 3 took part, and, thus, in our opinion, there cannot be any doubt that the ingredients of the provisions of Section 141 of the Act stand satisfied.

Reliance placed by Mr. Tulsi on a decision of a Division Bench of this Court in Pepsi Foods Ltd. and Another v. Special Judicial Magistrate and Others [(1998) 5 SCC 749], in our opinion, is not apposite.

One of the questions which fell for consideration therein was as to whether the order of the Magistrate summoning the accused reflected that he had applied the mind to the fact of the case and the law applicable thereto. In that case, the Company was proceeded against under Section 7/16 of the Prevention of Food Adulteration Act, 1954. The Managing Director was also made an accused along with the Company. This Court examined the allegations made in the complaint petition and noticed there were as many as 12 accused named in the complaint. The Court pointed out the duties of the public authorities specified therein including the public analyst. This Court also took into consideration the nature of the complaint as also the circumstances in which the complaint petition came to be filed. In that case,

bottle containing the soft drink was said to have been purchased from a shop known as "The Flavours Fast Food and Cool Corner" and not directly from the manufacturer. In the complaint petition, it was alleged that only upon inquiry, the complainant came to learn that the manufacturer of the bottle of sample was Appellant No. 1 therein and the other accused were their Managing Directors, Directors and Executive Director and Others Officers.

It was, in the aforementioned situation, observed:

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

The said decision, therefore, does not lay down any general proposition in regard to the allegations required to be made in a complaint petition so as to fasten vicarious liability upon the holders of the office of the Company. On the other hand, the three-Judge bench decision of this Court in S.M.S. Pharmaceuticals Ltd. (supra) is binding on us.

For the reasons aforementioned, the impugned judgment cannot be sustained and is set aside accordingly. The appeal is allowed.