

Supreme Court of India

Harshendra Kumar D vs Rebatilata Koley Etc on 8 February, 2011

Author: R Lodha

Bench: Aftab Alam, R.M. Lodha

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.360-377 OF 2011

(Arising out of SLP (Criminal) Nos. 3008-3025 of 2008)

Harshendra Kumar D.

.... Appellant

Versus

Rebatilata Koley Etc.

.... Respondents

JUDGMENT

R.M. Lodha, J.

Leave granted.

2. These 18 appeals, by special leave, are directed against the common judgment and order dated September 6, 2007 passed by Calcutta High Court whereby 18 criminal revision applications filed by the appellant for quashing the proceedings initiated by the complainants in 18 complaint cases under Section 138 read with Section 141 of Negotiable Instruments Act, 1881 (for short, `NI Act') against him have been dismissed.

3. The brief facts are these. The complainants were interested in business relationship with Rifa Healthcare (India) Pvt. Ltd. (for short, 'the Company') for the sale of bio-ceramic products. The complainants, for the orders they had placed, issued demand drafts in favour of the Company. It appears that the Company had not delivered the products ordered by the complainants and accordingly they asked the Company for return of their money. On April 30, 2004, the Company issued 18 cheques bearing Nos. (i) 000843 for Rs. 30,000/-; (ii) 00870 for Rs. 40,000/-; (iii) 000845 for Rs. 30,000/-; (iv) 000852 for Rs. 3,00,000/-; (v) 00842 for Rs. 60,000/-; (vi) 000862 for Rs. 40,000/-; (vii) 000834 for Rs. 60,000/-; (viii) 000572 for Rs. 40,000/-; (ix) 000827 for Rs. 30,350/-; (x) 000854 for Rs. 3,00,000/-;

(xi) 000826 for Rs. 60,000/-; (xii) 000855 for Rs. 3,00,000/-; (xiii) 000857 for Rs. 3,00,000/-; (xiv) 000858 for Rs. 3,00,000/-; (xv) 000841 for Rs. 60,000/-; (xvi) 000871 for Rs. 40,000/-; (xvii) 000568 for Rs. 40,000/- and (xviii) for Rs. 60,130/- drawn on UTI Bank Ltd., Jayanagar, Bangalore in favour of the complainants. These 18 cheques were dishonoured by the Bank/s on presentation.

4. In the month of December, 2004, the complainants filed 18 complaints under Section 138 read with Section 141 of the NI Act. For the sake of brevity and convenience, we shall refer to the complaint no. 14512 of 2004. In the complaint, besides the Company, the appellant was arraigned as accused No. 3. It was alleged in the complaint that the Managing Director and the two Directors (including the appellant) were responsible for day-to-day affairs of the Company and that it was on their assurance that the complainant issued demand draft in favour of the Company and when the products of the Company were not received by the complainant, she contacted the accused persons and told them that she could not continue business with them and asked for return of her money. Accordingly, for and on behalf of the Company, in discharge of the existing liability, an account payee cheque was issued but the cheque was returned by the complainant's banker on presentation with the endorsement 'insufficient fund'. The complainant then sent legal notice asking the accused persons to pay the amount of cheque within 15 days from the date of the receipt of the notice but despite service of notice, no payment has been made.

5. The concerned Metropolitan Magistrate issued summons to all the accused persons including the appellant.

6. The appellant challenged the proceedings initiated by the complainants against him by filing 18 revision applications under Section 397 read with Section 401 of the Criminal Procedure Code, 1973 (for short, 'Code') before the Calcutta High Court. In these revision applications, notices were issued to the complainants. On behalf of the appellant, the principal contention canvassed was that the appellant was appointed as Director of the Company on August 27, 2003. He resigned from the directorship on March 2, 2004 which was accepted by the Board of Directors on that day itself with immediate effect. The factum of his resignation is also recorded in Form No. 32 filed by the Company with the Registrar of Companies on March 4, 2004. The 18 cheques which were issued on behalf of the Company to the complainants were issued after his resignation. The dishonour of these cheques through the complainants' bankers' was also subsequent to his resignation. In other words, it was submitted by the counsel for the appellant before High Court that at the time when the

cheques were issued or when the cheques were dishonoured, the appellant had no concern or connection with the Company.

7. The High Court, however, relying upon a decision of Single Judge of that Court in *Fateh Chand Bhansali v. M/s. Hindustan Development Corporation Ltd.*¹, held that resignation by the petitioner as Director of the Company is a defence of the accused and the defence is a matter for consideration at the trial on the basis of evidence which cannot be decided by the Court in revisional jurisdiction. The High Court considered the matter thus:

"The question of the learned Advocate for the petitioner is that the petitioner was not director of a company at the material point of time because there is form 32 which shows the date when the petitioner was appointed a director and when there came to be a change of directorship of the company. According to Mr. Trivedi learned Advocate for the petitioner, a Hon'ble Judge of this Court in *Saroj Kumar Jhunjunwala Vs. State of West Bengal and Anr.* (2007) 1 C Cr.LR (Cal) 793 was pleased to hold that if before the issuance of cheques, the accused-petitioner had resigned from the directorship, then he cannot be held liable for the offence. This decision which favours the petitioner has been pitted against the decision in *Fateh Chand Bhansali Vs. M/s. Hindustan Development Corporation Ltd.*, (2005) 1 C Cr. LR (Cal) 581 wherein another Hon'ble Single Judge of this court with reference to a good number of decisions including the decision in *State of M.P. Vs. Awadh Kishore Gupta & Ors.*, 2004 1 (2005) 1 C Cr.LR (Cal) 581 SCC (Cr.) 352 held that the High Court while considering the revisional application cannot look into the papers and documents annexed to such application as those were neither verified nor tested. In that decision also the point was raised with reference to form 32 and His Lordship held that the decision of *State of M.P. Vs. Awadh Kishore Gupta and Ors.* (Supra) is an authority regarding permissibility of the High Court to look into the papers and documents annexed to the revisional application and the story of the petitioner that they resigned from the company by submitting Form 32 and are, in no way, responsible for the alleged offence is a defence of the accused person and the defence is a matter for consideration at the trial on the basis of evidence which cannot be decided by the court. It is worth mentioning that this decision in *Fateh Chand Bhansali* was rendered on 23.3.2005 while the decision in *Saroj Kumar Jhunjunwala* was rendered on 05.04.2007 and in this decision *Fateh Chand Bhansali* was not placed before his Lordship for consideration and judicial discipline demands that I should go by the earlier decision, namely, *Fateh Chand Bhansali* (Supra)."

8. Section 138 and Section 141 were brought in the NI Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (Act 66 of 1988) with effect from April 1, 1989. These provisions as amended from time to time read as under :

"S.138. Dishonour of cheque for insufficiency, etc., of funds in the accounts.--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 person 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 agreement 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 extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless--

(a) The cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) The payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) The drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.--For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

S. 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.]

9. The legal position concerning the vicarious liability of a director in a company which is being prosecuted for the offence under Section 138, NI Act has come up for consideration before this Court on more than one occasion. In the case of *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Another*², the following questions were referred to a 3-Judge Bench for determination :

"(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 fulfil the requirements of the said section and it is not necessary to specifically state in the complaint that the person 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 or 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."

10. The 3-Judge Bench of this Court answered the aforesaid questions thus:

"(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 2 2005 (8) SCC 89 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."

11. In *N. Rangachari v. Bharat Sanchar Nigam Ltd.*³, a 2- Judge Bench of this Court discussed and considered *S.M.S. Pharmaceuticals Ltd.*² and observed as follows :

".....The scope of Section 141 has been authoritatively discussed in the decision in *S.M.S. 3 2007 (5) SCC 108 Pharmaceuticals Ltd.* [2005 (8) SCC 89] binding on us and there is no scope for redefining it in this case. Suffice it to say, that a prosecution could be launched not only against the company on behalf of which the cheque issued has been dishonoured, but it could also be initiated against every person who at the time the offence was committed, was in charge of and was responsible for the conduct of the business of the company. In fact, Section 141 deems such persons to be guilty of such offence, liable to be proceeded against and punished for the offence, leaving it to the person concerned, to prove that the offence was committed by the company without his knowledge or that he has exercised due diligence to prevent the commission of the offence. Sub-section (2) of Section 141 also roped in Directors, Managers, Secretaries or other officers of the company, if it was proved that the offence was committed with their consent or connivance. But as has already been noticed, the decision in *S.M.S. Pharmaceuticals Ltd.* [2005 (8) SCC 89] binding on us, has postulated that a Director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of his business in the context of Section 141 of the Act. Bound as we are by that decision no further discussion on this aspect appears to be warranted."

12. In the case of *K.K. Ahuja v. V.K. Vora & Another.*⁴, a 2- Judge Bench of this Court had an occasion to consider the earlier decisions of this Court including the decision in the case of *S.M.S. Pharmaceuticals Ltd.*² It was held that mere fact that at some point of time an officer of a company had played some role in the financial 4 (2009) 10 SCC 48 affairs of the company, that will not be sufficient to attract the constructive liability under Section 141 of the NI Act. The Court summarized the legal position as follows:

"(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is

sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix "Managing" to the word "Director" makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii) In the case of a Director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141.

(iii) In the case of a Director, secretary or manager as defined in Section 2(24) of the Companies Act or a person referred to in clauses (e) and (f) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 141(1) of the Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.

(iv) Other officers of a company cannot be made liable under sub-section (1) of Section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence."

13. In *K.K. Ahuja*⁴, this Court observed that if a mere reproduction of the wording of Section 141(1) in the complaint was sufficient to make a person liable to face prosecution, virtually every officer/employee of a company without exception could be implicated as accused by merely making an averment that at the time when the offence was committed they were in charge of and were responsible to the company for the conduct and business of the company.

14. In a recent decision in the case of *National Small Industries Corporation Limited v. Harmeet Singh Paintal and Another*⁵, after survey of earlier decisions wherein legal position concerning Section 138 and Section 141 of the NI Act was considered, this Court culled out the following principles:

"(i) The primary responsibility is on the complainant to make specific averments as are required under the law 5 2010 (3) SCC 330 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 the 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 the 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."

15. Every company is required to keep at its registered office a register of its directors, managing director, manager and secretary containing the particulars with respect to each of them as set out in clauses (a) to (e) of sub-section (1) of Section 303 of the Companies Act, 1956. Sub-section (2) of Section 303 mandates every company to send to the Registrar a return in duplicate containing the particulars specified in the register. Any change among its directors, managing directors, managers or secretaries specifying the date of change is also required to be furnished to the Registrar of Companies in the prescribed form within 30 days of such change. There is, thus, statutory requirement of informing the Registrar of Companies about change among directors of the company. In this view of the matter, in our opinion, it must be held that a director - whose resignation has been accepted by the company and that has been duly notified to the Registrar of Companies - cannot be made accountable and fastened with liability for anything done by the company after the acceptance of his resignation. The words 'every person who, at the time the offence was committed', occurring in Section 141 (1) of the NI Act are not without significance and these words indicate that criminal liability of a director must be determined on the date the offence is alleged to have been committed.

16. On March 2, 2004, the appellant sent a letter of resignation to the Managing Director of the Company, the relevant part of that reads as follows:

"Subject : Resignation to the Post of Director With reference to the above subject I hereby resign to the post of Director in your company (sic.) immediate effect as I am pre-occupied with my other business activities and unable to concentrate, participate in the affairs of the company.

Therefore it is kind request with you to accept my resignation and intimate the R.O.C. by filing necessary applications to comply the legal formality."

17. The Board of Directors held the meeting on March 2, 2004 and accepted the appellant's resignation on that day itself. The extract of resolution to that effect reads as follows :

"Mr. Harshendra Kumar D S/o Rathnavarma Hegde residing at No. -55, Vittal Mallya Road, Bangalore. Due to his personal inconveniences (sic.) he requested to accept his resignation for the Director, and the Board accepted the resignation and it will be effected immediately on the date of resignation."

18. On March 4, 2004, the Company informed the Registrar of Companies in the prescribed form (Form no. 32) about the resignation of the appellant from the post of Director of the Company and, thus, change among directors.

19. The above documents placed on record by the appellant have not been disputed nor controverted by the complainants. As a matter of fact, it was not even the case of the complainants before the High Court that the change among Directors of the Company, on resignation of the appellant with effect from March 2, 2004, has not taken place. The argument on behalf of the complainants before the High Court was that it was not permissible for the High Court to look into the papers and documents relating to the appellant's resignation since these are the matters of defence of the accused person and defence is a matter for consideration at the trial on the basis of evidence which cannot be decided by the High Court. The complainants in this regard relied upon a decision of Single Judge of that Court in the case of Fateh Chand Bhansali¹. The counsel for the present appellant (revision petitioner therein) on the other hand referred to a later decision of a Single Judge of the Calcutta High Court in the case of Saroj Kumar Jhunjhunwala v. State of West Bengal and Anr.⁶ wherein it was held that if before the issuance of cheques, the accused had resigned from the directorship, then he 6 (2007) 1 C Cr. LR (Cal) 793 cannot be held liable for the offence. Confronted with two Single Bench decisions of that Court in Fateh Chand Bhansali¹ and Saroj Kumar Jhunjhunwala⁶, the Single Judge held that the judicial discipline demanded that he should go by the earlier decision, namely, Fateh Chand Bhansali¹ and, accordingly, refused to take into consideration the documents relating to the appellant's resignation as Director from the Company with effect from March 2, 2004. While relying upon Fateh Chand Bhansali¹, the Single Judge referred to a decision of this Court in State of Madhya Pradesh v. Awadh Kishore Gupta and Others⁷ which was referred in Fateh Chand Bhansali¹.

20. In Awadh Kishore Gupta⁷, this Court while dealing with the scope of power under Section 482 of the Code observed :

"13. It is to be noted that the investigation was not complete and at that stage it was impermissible for the High Court to look into materials, the acceptability of which is essentially a matter for trial. While exercising jurisdiction under Section 482 of the Code, it is not permissible for the Court to act as if it was a trial Judge....."

21. In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, 7 (2004) 1 SCC 691 materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents - which are beyond suspicion or doubt - placed by accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

22. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In our opinion, the High Court fell into grave error in not taking into consideration the uncontroverted documents relating to appellant's resignation from the post of Director of the Company. Had these documents been considered by the High Court, it would have been apparent that the appellant has resigned much before the cheques were issued by the Company. As noticed above, the appellant resigned from the post of Director on March 2, 2004. The dishonoured cheques were issued by the Company on April 30, 2004, i.e., much after the appellant had resigned from the post of Director of the Company. The acceptance of appellant's resignation is duly reflected in the resolution dated March 2, 2004. Then in the prescribed form (Form No. 32), the Company informed to the Registrar of Companies on March 4, 2004 about appellant's resignation. It is not even the case of the complainants that the dishonoured cheques were issued by the appellant. These facts leave no manner of doubt that on the date the offence was committed by the Company, the appellant was not the Director; he had nothing to do with the affairs of the Company. In this view of the matter, if the criminal complaints are allowed to proceed against the appellant, it would result in gross injustice to the appellant and tantamount to an abuse of process of the court.

23. These appeals are, accordingly, allowed. The judgment of the Calcutta High Court dated September 6, 2007 and the summons issued by the Metropolitan Magistrate, Calcutta to the appellant are set aside. The complaints as against the appellant stand quashed.

.....J.

(Aftab Alam) J.

(R.M. Lodha) NEW DELHI, FEBRUARY 8, 2011.