

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL WRIT PETITION NO.2049 OF 2010****AND****CRIMINAL WRIT PETITION NO.2050 OF 2010**

Mr.Rajeev Khandelwal
Age: 47 years, Occupation: Business,
C-1/33, Safdarjaung Development Area
New Delhi.

...Petitioner

versus

1.The State of Maharashtra

2.Brescon Corporate Advisors Ltd.
Siddhi Vinayak Chambers, 7th Floor,
Gandhi Nagar, Opp.MIG Club,
Bandra (E), Mumbai 400 051.

...Respondents

Mrs.Pravina Kanani, for Petitioner.

Mr.Yashpal Thakur i/b. M/s.Paras Kuhad & Associates, for Respondent 2.

Mr.Rajesh More, APP for State.

CORAM : K.U.CHANDIWAL, J.

DATED : 17th August, 2012

JUDGMENT :

Both the writ petitions are taken together as common question between both the parties is involved. The petitioner-Mr.Rajeev Khandelwal is original accused no.6 in complaint C.C.no.4870/SS/2009 and Original accused no.4 in Complaint C.C.No.5299/SS/2009, he has been prosecuted for an offence punishable under Section 138 r/w. 141 of Negotiable Instruments Act. The respondent no.2 is the complainant engaged in the business of financial advisory services, advising corporate in debt resolution, project finance, mergers and acquisitions and private equity transactions. M/s.Natural Petrochemicals Private Limited appointed respondent no.2 as exclusive financial advisor vide mandate letter dated 1.10.2008 for representing, structuring and assisting for comprehensive financial restructuring of the outstanding liabilities. The respondent no.2 had completed the transactions and asserted, to be entitled to its professional fees as per the mandate letter and it raised a total bill of Rs.33,21,000/-. In discharge of the said liability towards part payment, Sandip Khandelwal (original accused no.2) issued a cheque on behalf of M/s.Natural Petrochemicals Pvt.Ltd. drawn on Punjab National Bank, Nirman Darshan, Andheri (E), Mumbai.

2. Since the cheque on its presentation was dishonoured, followed by statutory demand notice dated 14th October,2009, complaint in terms of Section 138 r/w. 141 of Negotiable Instruments Act was filed. The learned Judge issued process on 24th November,2009, same is questioned in both the writ petitions.

3. The learned Counsel for petitioner submits that the petitioner has no concern with the company or with the transaction of issuance of cheque as he was not a Director at the relevant time. He has not transacted with respondent-company. The complainant did not verify that the petitioner has nothing to do with the Accused company nor records were checked with the Registrar of Companies. The learned Counsel submits, mere one letter by Petitioner would not bind him as a Director as the very concept of he being a Director has been disputed. If he is other than a Director, to be prosecuted then specific pleadings should have been made to show his role. Notice was wrongly issued at the address of the company with which the petitioner has no concern. Verification statement does not make out a case of involvement of petitioner. The petitioner was neither employee nor on the Board of Directors of M/s.Natural Petrochemicals Pvt.Ltd., nor issued, signed or executed any document in favour of respondent no.2 for appointing respondent no.2 as exclusive financial

advisor of M/s.Natural Petrochemicals Pvt.Ltd., the liabilities could not sought to be fastened against him.

4. The learned Counsel for complainant submits that the complaint as a whole will have to be read with specific active participation and role of petitioner in transacting with respondent no.2 and in discharge of liability of the company cheques in question were issued.

5. In paragraphs 9 and 10 of the complaint (Complaint CC.no.5299/SS/2009) the respondent no.2 has stated as under:-

“9. That the cheques have been signed, issued, executed and handed over by the Accused no.2 to the Complainant in discharge of aforesaid legally enforceable liability. As the Accused have failed to make the payment of the said dishonoured cheque within the stipulated period of 15 days from the date of service of statutory notice upon them, they have committed an offence punishable under Section 138 r/w. 141 of the Negotiable Instruments Act (as amended). Hence, this Complaint is filed before this Hon'ble Court.

10. The Accused no.2 to 4 are the Directors of Accused no.1. The cheque in question has been signed by the Accused no.2 on behalf of Accused no.1. At the relevant time when the offence was committed, the

Accused no.2 to 4 were incharge of and were responsible for the day-to-day affairs of Accused No.1 and for the conduct of the business of Accused no.1. The Accused Nos.2 to 4 personally approached the Complainant Company for appointment of the Complainant Company as exclusive financial advisors of Accused no.1 and gave assurance of payment against the services to be rendered by the Complainant. The Accused nos.2 to 4 were personally interacting with the Complainant Company from time to time. The Accused nos.2 to 4 were looking after the functioning of Accused No.1 when the Accused approached Complainant for advisory services, when the cheque in question was issued, and when the statutory notice was issued to the Accused. Hence, the Accused No.2 to 4 were duty bound to honour the cheque in question which was issued by them, on behalf of Accused no.1, to the Complainant against the aforesaid liability.”

The letter dated 17.9.2008 by Respondent no.2 to the Petitioner informing extension by itself will not be branding petitioner as a Director of the Company or a person involved in actively dealing with respondent no.2.

6. Certified copy of Form 20B alongwith annual returns of the Company for the years 2007, 2008 and 2009 illustrate that the petitioner was not a Director of the Company from 13th January,2005. It is pertinent to note, the learned Counsel for respondent no.2 when addressed statutory

notice dated 2nd September, 2009 was in advance informed by the Advocate on behalf of M/s.Renaissance Corporation Ltd. (company-Accused) that petitioner Rajeev Khandelwal is not a Director of its Board of Directors as a Director, in past and present. In the light of this clarification, it was expected of the complainant-respondent no.2 to have verified Form 20B or other details. However, it is not so done. In the list of Board of Directors of M/s.Renaissance Corporation Ltd, annexed to the petition, Rajeev Khandelwal is not shown as Director.

7. The legal position in respect of liability of a Director or a person in terms of Section 141 of the Negotiable Instruments Act, is demonstrated in catena of judgments. In the case “State of NCT of Delhi Vs. Rajiv Khurana (Criminal Appeal no.1380 of 2010)” dated 30th July,2010, the Apex Court has observed that mere naming a person in the title of a complaint as a Director will not attract the test of deeming provision contained in Section 141(1) of the Negotiable Instruments Act. A person without being a Director can be incharge or responsible for a company for the conduct of his business, however, this should be demonstrated in the complaint, fixing such liability against such person (petitioner herein).

8. In the matter of “N.K.Wahi Vs. Shekhar Singh & Ors. (AIR 2007 Supreme Court 1454)”, the Hon'ble Apex Court has observed in paragraph 8 as under:-

“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 incharge 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.”

In paragraphs 11 and 12, the Hon'ble Apex Court has observed as under:-

“11. 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.

12. 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 also 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.”

9. It is thus clear, the complainant in a prosecution under Section 138 read with 141 of the Negotiable Instruments Act has to spell out a clear case against the person sought to be made liable by aid of Section 141 of the Negotiable Instruments Act as it is imperative for the complainant to indicate, such person falls within the parameters of Section 141 of the Negotiable Instruments Act. Even if, it is stated in the complaint that the petitioner was a Director, however, that will not suffice as the record illustrates the petitioner was not a Director of the company nor incharge for the day-to-day affairs of accused-company. In paragraph 11 of the complaint it was stated, “accused nos.2 to 6 personally approached the complainant company for appointment of the complainant company as exclusive financial advisor of accused no.1 and gave assurance of payment against the services to be rendered by the Complainant. The Accused nos.2

to 6 were personally interacting with the complainant company from time to time. The accused nos. 2 to 6 were looking after the functioning of Accused no.1 when the Accused approached Complainant for advisory services, when the cheques in question were issued.” These averments should have been supported with linkage of corresponding documents chaining personal involvement of petitioner in interacting with the complainant or making the complainant to believe that the transaction is to be shouldered by the petitioner.

10. In the matter of “S.M.S.Pharmaceuticals Ltd. Vs. Neeta Bhalla and Anr. (AIR 2005 SC 3512)” the Hon'ble Supreme Court has observed “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.” To repeat, to bring the case within the bracket of such designation or role played by the petitioner, the requisite material was expected in the complaint and annexures thereto which is not surfacing.

11. The verification is also too short to fix primary liability of the petitioner either as a Director or otherwise.

12. In the circumstances, both the petitions allowed. The process issued against the petitioner in the afore referred complaints under Section 138 r/w. 141 of The Negotiable Instruments Act is quashed and set aside.

(K.U.CHANDIWAL, J.)