



GAHC010089492023

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THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

CRIMINAL PETITION NO. 402/2023

Sri Rajpal Walia,
Aged about 52 years,
Son of Late Chuttal Lal Walia,
Resident of 48B, Race Course,
Dehradun, Uttarakhand,
PIN- 248001.

.....Petitioner.

-Versus-

Sri Rajeev Mehrotra,
Son of Sri Kartar Singh Mehrotra,
Borengajuli Tea Estate,
P.O.- Dimakuchi, District- Udalgori,
Assam, PIN - 784526.

.....Respondent.

Advocate for the petitioner : Mr S Dey,

Advocate for the respondent : Mr D Das.

AND



CRIMINAL PETITION NO. 390/2023

Sri Rajpal Walia,
Aged about 52 years,
Son of Late Chuttal Lal Walia,
Resident of 48B, Race Course,
Dehradun, Uttarakhand,
PIN- 248001.

.....Petitioner.

-Versus-

Sri Rajeev Mehrotra,
Son of Sri Kartar Singh Mehrotra,
Borengajuli Tea Estate,
P.O.- Dimakuchi, District- Udalguri,
Assam, PIN - 784526.

Advocate for the petitioner : Mr S Dey,

Advocate for the respondent: Mr D Das.

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of hearing : 18.01.2024

Date of judgment : 27.03.2024.



JUDGEMENT AND ORDER (CAV)

Heard Mr S Dey, learned counsel for the petitioner and Mr D Das, learned counsel for the respondent.

2. Both the petitions, being Criminal Petition No. 402/2023 and Criminal Petition No. 390/2023 are disposed of by this common Judgment and Order.

3. The petitioner, Rajpal Walia has filed applications under Section 482 of the Code of Criminal Procedure, 1973 (CrPC, for short), with prayer to set aside and quash the criminal proceedings of Complaint Case Nos. 4033^C/2019 and 1339^C/2021, respectively. The respondent in both the cases is Sri Rajeev Mehrotra.

4. The petitioner is aggrieved on being arraigned as accused in the aforementioned complaint cases, which are pending in the Court of learned Judicial Magistrate First Class, Kamrup (Metro) (Magistrate, for short). The respondent had filed complaints dated 14.10.2019 and 09.02.2021, respectively, before the learned Chief Judicial Magistrate, Kamrup (Metro) (CJM, for short), under Sections 138, read with 141 of the Negotiable Instruments Act, 1881 (NI Act, for short) and the complaints were registered as CR No. 4033^C/2019 and CR No. 1339^C/2021, respectively.

5. The allegations levelled by the respondent against the petitioner herein, in both the complaint petitions are primarily based on dishonour of the following cheques-

(i) Cheque No. 175585: for Rs. 4,04,054/-

(ii) Cheque No. 175588: for Rs. 7,95,946/-

(iii) Cheque No. 175589: for Rs. 23,81,480/-

Total: Rs. 35,81,480/-

Three cheques in connection with CR Case No. 4033^C/2019

And

(i) Cheque No. 918049: for Rs. 10,00,000/-

(ii) Cheque No. 918050: for Rs. 10,00,000/-

(iii) Cheque No. 918051: for Rs. 10,00,000/-

(iv) Cheque No. 918052: for Rs. 3,00,000/

Total: Rs. 33,00,000/-

Four cheques in connection with CR Case No. 1339^C/2021

6. It is alleged that the petitioner's Company deals in the business of construction, development and maintenance of commercial and residential colonies and the Company had launched a residential housing project by the name of 'Orchid Park' in Dehradun, at Uttarakhand. The respondent, Rajeev Mehrotra had booked an apartment under the said housing project and paid Rs. 37,95,946/- (Rupees Thirty Seven Lakhs Ninety Five Thousand Nine Hundred and Forty Six Only) to the petitioner's Company in this regard, but the Company failed to fulfill its commitment of delivering possession of the apartment within the promised time frame, i.e., 14.04.2018. The respondent, thereafter sought for cancellation of allotment and for return of the consideration paid to the petitioner along with compensation and interest. In response, the Company issued three cheques. However, the cheques bearing



Nos. 175585, 175588 and 175889, were dishonoured and the respondent notified the Company (petitioner herein) about the dishonour of cheques, but the pending dues were not cleared. This impelled the respondent to institute CR Case No. 4033^C/2019 against M/s Pushpanjali Realms and Infratech Limited. Thereafter, the Company issued five cheques to the respondent on condition that the respondent would withdraw the CR Case No. 4033^C/2019. The Company then issued the following cheques-

- i) Cheque No. 918048
- ii) Cheque No. 918049
- iii) Cheque No. 918050
- iv) Cheque No. 918051 and
- v) Cheque No. 918052.

6.1 All these cheques were again dishonoured and the respondent instituted the CR Case No. 1211/2020 for dishonour of Cheque No. 918048. The impugned complaint case, i.e., CR Case No. 1339^C/2021 was instituted by the respondent for the dishonour of the following four cheques-

- i) Cheque No. 918049
- ii) Cheque No. 918050
- iii) Cheque No. 918051 and

iv) Cheque No. 918052

7. Regarding CR Case No. 4033^C/2019, the petitioner was not arrayed as an accused in the complaint filed by the respondent as there were no averments that the petitioner was in charge of the business of the Company. Also, there were no specific allegations against the petitioner in the entire complaint. The petitioner was not a signatory to the dishonoured cheques, in connection with CR Case No. 4033^C/2019. The petitioner's Company was arrayed as accused in the said case.

8. In connection with CR Case No. 1339^C/2021 instituted by the respondent, which is also pending in the Court of learned Judicial Magistrate, Kamrup (Metro), the petitioner was arrayed as accused No. 3 in the complaint filed by the respondent. The petitioner was arrayed along with the Company and five other Directors of the Company as accused.

9. It is further averred by the learned counsel for the petitioner that in this case too, i.e., in CR Case No. 1339^C/2021, there were no averments that the petitioner was the in charge of the business and the petitioner was responsible for the conduct of the Company and its business. The petitioner is not a signatory to the dishonoured cheques and no notices were issued to the petitioner upon dishonour of the aforementioned cheques.

10. In connection with CR Case No. 4033^C/2019, the learned Magistrate, vide order dated 11.02.2020, found *prima facie* materials to proceed against the Company and its Directors, viz. Deepak Kumar, Rajpal Walia (petitioner herein), Abhay Kumar, Raman Kumar Jha, Archana Sharma and Arpana Nassa, and summonses were issued. Later on, an order was also passed to issue NBWA to the petitioner. Nevertheless, the petitioner appeared before the



learned trial Court on 03.01.2023 and he was enlarged on bail.

11. In connection with CR Case No. 1339^C/2021, vide order dated 21.09.2021, the learned Magistrate, on finding sufficient materials against the petitioner, issued summonses against him along with his co-accused, after duly taking cognizance against the accused named in the complaint petition. The petitioner appeared before the learned trial Court in connection with CR Case No. 1339^C/2021 and was enlarged on bail. It is contended that the learned trial Court erroneously took cognizance vide order dated 11.02.2020, in connection with CR Case No. 4033^C/2019 and vide order dated 21.09.2021, in connection with CR Case No. 1339^C/2021, under Section 138 of the NI Act.

12. It is also contended that the petitioner is not responsible for issuance of the aforementioned cheques which were dishonoured by the respondent's bank.

13. It is submitted that the petitioner is not in charge of the day-to-day activities of the Company.

14. It is also submitted that it is a settled position of law that whenever any complaint is filed against a Director of a Company, specific averments have to be made against the said Director, who was in charge and was responsible for the conduct and business of the Company.

15. In the CR Case No. 4033^C/2019, the learned trial Court *suo moto* implicated the petitioner without recording any reasons with respect to the role of the petitioner. The petitioner has prayed to quash the order dated 11.02.2020, passed by the learned Magistrate

in connection with CR Case No. 4033^C/2019, to the extent that the petitioner was arraigned as the accused person in the said case. The petitioner has also further prayed to quash the proceedings of CR Case No. 1339^C/2021, to the extent concerning the prosecution of the petitioner. The petitioner has fervently prayed to stay the proceedings, if this Court thinks fit to stay the proceedings against the present petitioner.

16. Two affidavits-in-opposition were filed on behalf of the respondent against both the criminal petitions under Section 482 CrPC, contending *inter alia* that the petitioner has falsely stated that he is merely a regular Director of the prime accused/Company, M/s Pushpanjali Realms and Infratech Limited (accused Company). The petitioner has misrepresented and suppressed his actual involvement in the Company. It is evident that the petitioner has suppressed that he is the Promoter Director of the accused Company and has been at the helm of affairs since the very inception of the Company. The petitioner has committed perjury by stating in his application/petition that he is merely a Director, whereas the Annual Report of the Financial Year (FY) 2018-19 (Annexure-R-1) filed by the accused Company before the National Stock Exchange (NSE, for short), clearly records that at the relevant point of time, the petitioner was one of the only two Executive/Whole-Time Directors of the accused Company. This is in sharp contrast to the other seven Directors, who are either Non-Executive or Independent Directors.

17. The petitioner's position as an Executive/Whole Time Director indicates that he is not a regular Director (Single Regular Director as stated by him). Under Section 2 (51), read with Section 2 (60) and Section 2 (94) of the Companies Act, 2013, a whole time Director is in whole time employment of the Company and the whole time Director is also a 'key

managerial personnel', along with the Managing Director and is also presumed to be an Officer, who is in default for any liabilities incurred by the Company during the directorship. Thus, it is clear that the petitioner is not a regular Director as stated by him, but is a Promoter Director/Executive Director/Whole Time Director as well as the key Managerial Personnel.

18. A bare perusal of the Annual Report confirms that the petitioner played a pivotal role in the day-to-day management of the accused Company. The factum of his active role in the accused Company, apart from his designation could be deciphered from the facts that-

- i) the petitioner has signed the said Annual Report along with all the annexures therein;
- ii) he has been a Director in the accused Company since its incorporation;
- iii) he is a Member of the Stake Holders Relationship Committee;
- iv) he has attended all Board meetings during FY 2018-19; and
- v) he received remuneration that was equal to the Managing Director, which is an indication of the active role played by the petitioner in the management of the accused Company.

19. It is further contended that the Enforcement Directorate (ED, for short) had issued a public notice dated 30.03.2022, against the petitioner and his wife and the other Directors of the accused Company, wherein the ED has specifically named the petitioner as having diverted advances received from flat owners, like the respondent, towards purchase of flats. Annexure-R-2 is a copy of the Press Release issued by the ED. The recital of the allotted



agreement marked as 'A', clearly mentions the name of the petitioner as the owner of the said land, which if read along with the public notice issued by the ED leads to the incontrovertible conclusion that the petitioner wielded significant control of the affairs of the Company and even beyond it. It is further submitted that allowing the petitioner's application would lead to a gross abuse of the process of the Court and the application is liable to be dismissed. The respondent will be prejudiced by grave injustice if the amount paid by the respondent is not returned to him. The petitioner has approached the Court with unclean hands, in sync with his earlier subterfuged fraudulent activities. The petitioner has been correctly and properly arraigned as an accused in the complaint cases, CR Case Nos. 4033^C/2019, 1211/2021 and 1339^C/2021.

20. It is stoutly denied that there were no averments that the petitioner was in-charge of the business of the accused Company and was responsible to the Company for the conduct of its business as purported. It is denied that no specific allegation has been made against the petitioner in the entire complaint. It is also denied that the petitioner was not a signatory of the dishonoured cheques or that no notice was issued to the petitioner upon dishonour of cheques, as alleged. It is further submitted that the onus is on the petitioner to prove before the learned trial Court that he was not in day-to-day management of the Company or that he was not responsible to the Company for conduct of its business.

21. It is denied that the orders dated 11.02.2020 and 21.09.2021, passed by the learned Magistrate, who decided to proceed and take cognizance against the petitioner, are devoid of any specific reasoning with regard to the role of the petitioner in commission of offence under Section 138 of the NI Act. A bare perusal of the orders makes it clear that the orders were



passed after considering the complainant's initial deposition on affidavit, along with the relevant documents, which were exhibited and proved in original. It is vehemently and fervently denied that the petitioner was not responsible for the cheques that were dishonoured and that those were issued without his consent and connivance.

22. It is further contended that the petitioner has passed the buck to one Mr Deepak Kumar, the Managing Director, but it is *ex facie* evident from the public documents that the petitioner was drawing equal remuneration as Mr Deepak Kumar and had also signed the Annual Report for FY 2018-2019. The culpability of the petitioner, at par with Mr Deepak Kumar, cannot be ignored.

23. The decision rendered by Hon'ble the Supreme Court in ***Sunita Palita & Ors. Panchami Stone Quarry;*** reported in **(2022) 10 SCC 152**, is not applicable to this case as the Director in question was a regular Director, whereas the present petitioner is not a regular Director. The learned counsel for the respondent has prayed to dismiss the petition.

24. I have considered the submissions at the Bar with circumspection.

25. I have also scrutinized the scanned copies of the record of CR Case No. 4033^C/2019 and documents annexed along with the petitions being Criminal Petition No. 402/2023 and Criminal Petition No. 390/2023.

26. Cognizance was taken in connection with CR Case No. 4033^C/2019, on 11.02.2020 and cognizance was taken in connection with CR Case No. 1339^C/2021, on 21.09.2021 (Annexure-2 of the petition in Criminal Petition No. 390/2023). Vide order dated 02.05.2023, passed in Criminal Petition No. 390/2023 and order dated 08.05.2023, passed in Criminal Petition No.



402/2023, the proceedings of CR Case No. 4033^c/2019 and CR Case No. 1339^c/2021, were stayed. The proceedings of both the complaint cases were stayed at the initial stage. Both the cases are pending at its nascent stage.

27. It is true that in the CR Case No. 4033^c/2019, the petitioner herein was not arrayed as an accused, but the petitioner's Company, M/s Pushpanjali Realms and Infratech Limited, was arrayed as the accused. It is also true that the learned trial Court *suo moto* arrayed the petitioner as the accused, as he was one of the Directors of the Company. The annual return of the Company marked as Annexure-1, reveals that the petitioner was the Whole-Time Director of the Company and Mr Deepak Kumar was the Managing Director of the Company, which belies the submission that the petitioner was not in charge of the day-to-day affairs of the Company. However, suffice it to mention that this document is not sufficient to prove the liability of the petitioner. At the same time, the petitioner cannot shirk his responsibilities as he was holding the office of the Whole-Time Director of the Company. It has been held by Hon'ble the Supreme Court in ***Sunita Palita (supra)*** that-

“39. The High Court further held that the power of quashing is required to be exercised sparingly. The High Court, in effect, found that even though, on perusal of the complaint, it appeared that the exact words used in Section 141 of the NI Act had not been used in the complaint, the essential pleadings were there in the complaint.

40. There can be no doubt that in deciding a Criminal Revisional Application under Section 482 of the Cr.P.C. for quashing a proceeding under Section 138/141 of the NI Act, the laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of the said Sections has to be borne in mind. The provisions of Section 138/141 of the NI Act create a statutory presumption of dishonesty on the part of the signatory of the cheque, and when the cheque is issued on behalf of a company, also those persons in charge of or responsible for the company or the business of

the company. Every person connected with the company does not fall within the ambit of Section 141 of the NI Act.

41. A Director of a company who was not in charge or responsible for the conduct of the business of the company at the relevant time, will not be liable under those provisions. As held by this Court inter alia, S.M.S. Pharmaceuticals Ltd. (supra), the liability under Section 138/141 of the NI Act arises from being in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, and not on the basis of merely holding a designation or office in a company. It would be a travesty of justice to drag Directors, who may not even be connected with the issuance of a cheque or dishonour thereof, such as Director (Personnel), Director (Human Resources Development) etc. into criminal proceedings under the NI Act, only because of their designation.

42. Liability depends on the role one plays in the affairs of a company and not on designation or status alone as held by this Court in S.M.S. Pharmaceuticals Ltd. (supra). The materials on record clearly show that these Appellants were independent, non-executive Directors of the company. As held by this Court in Pooja Ravinder Devidasani v. State of Maharashtra and Anr. (supra) a non-Executive Director is not involved in the day-to-day affairs of the company or in the running of its business. Such Director is in no way responsible for the day-to-day running of the Accused Company. Moreover, when a complaint is filed against a Director of the company, who is not the signatory of the dishonoured cheque, specific averments have to be made in the pleadings to substantiate the contention in the complaint, that such Director was in charge of and responsible for conduct of the business of the Company or the Company, unless such Director is the designated Managing Director or Joint Managing Director who would obviously be responsible for the company and/or its business and affairs.”

28. In the instant case, the cheques were issued on:-

- (i) Cheque No. 175585, dated 30.06.2019,
- (ii) Cheque No. 175588, dated 30.06.2019,
- (iii) Cheque No. 175589, dated 31.07.2019,



- (iv) Cheque No. 918048, dated 21.09.2019,
- (v) Cheque No. 918049, dated 30.01.2020,
- (vi) Cheque No. 918050, dated 30.01.2020,
- (vii) Cheque No. 918051, dated 20.02.2020, and
- (viii) Cheque No. 918052, dated 20.02.2020.

29. Annexure-1 of the petition reveals that the Annual Report of 2018-2019, was signed by the petitioner as a Whole-Time Director of M/s Pushpanjali Realms and Infratech Limited.

30. At this juncture, the petitioner cannot shy away from the responsibility of being the Whole-Time Director. His submission that he was a regular Director cannot be accepted at this stage. This case is pending at the initial stage and I do not find it to be a fit case to be truncated at this juncture, without proper supporting evidence that the petitioner was not responsible for the cheques issued by the Company.

31. The merits of the case and the submissions of the petitioner can also be considered at the stage of consideration of charge or also at a later stage or even at the stage of trial.

32. At this juncture, it cannot be conclusively decided that the petitioner was not responsible for the issuance of the aforementioned cheques which have been dishonoured. The Annual Report reveals that the petitioner was the Whole Time Director. Section 2 (51) (54) (60) (94), reads as under:-

“(51) "key managerial personnel", in relation to a company, means--

(i) the Chief Executive Officer or the managing director or the manager;

(ii) the company secretary;

(iii) the whole-time director;

(iv) the Chief Financial Officer;

[(v) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and

(vi) such other officer as may be prescribed.

(54) "managing director" means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called.

(60) "officer who is in default", for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means any of the following officers of a company, namely:-

(i) whole-time director;

**** **** **** **** ****

(94) "whole-time director" includes a director in the whole-time employment of the company;

33. Indeed, the petitioner appears to be the key managerial personnel as he was the Whole Time and not a regular Director. The documents submitted along with the petitions, reveal that petitioner was the Whole-Time Director. At this juncture, I refrain from conclusively deciding this case to the prejudice of the respondent. This Court is hesitant to invoke the inherent jurisdiction under Section 482 CrPC, in this instant case. The power of quashing has



to be exercised sparingly.

34. It is true that although on the perusal of the complaint, it appears that the exact words used in Section 141 of the NI Act has not been used in the complaint, the essential pleadings were indeed present in the complaint. Thus, the decision rendered by Hon'ble the Supreme Court in ***Sunita Palita's case (supra)***, is also relevant to this case.

35. Petition is dismissed at this stage.

36. No order as to cost(s).

JUDGE

Comparing Assistant