

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : CODE OF CRIMINAL PROCEDURE

CRL.M.C. 1409/2006

Date of order : 14th February, 2008

RAMASWAMY ATHAPPAN and ANR. Petitioners
Through Mr. S. Gurukrishna Kumar with
Ms. Srikala Kumari, Advocates

versus

BHARTI INFOTEL LTD. Respondent
Through Mr. Sidharth Luthra, Senior Advocate with
Mr. Manu Beri, Advocate.

Dr. S. Muralidhar, J. (open court)

1. This petition under Section 482 of the Code of Criminal Procedure, 1973 (CrPC) seeks the quashing of Criminal Complaint Case No. 3142/2004 pending in the Court of the Metropolitan Magistrate (MM) New Delhi titled Bharti Infotel Ltd. v. Data Access India Ltd. under Section 138 read with Sections 141 and 142 of the Negotiable Instruments Act, 1881 (NI Act) in so far as it concerns the Petitioners here.

2. Petitioner No.1 Mr. Ramaswamy Athappan is a resident of 96 Meyer Road, Singapore and Petitioner No.2 Mr. Gobinath Athappan is a resident of 1450 Washington Boulevard Appt. 709 S Stamford, CT (USA).

3. The aforementioned Complaint Case No. 3142/2004 was filed by Respondent Bharti Infotel Ltd. (BIL) on 16th October 2004 in the Court of the learned MM against Data Access India Ltd. (DAIL) and eight others. Petitioner No.1 was arrayed as Accused No.2 and described as the Vice Chairman of DAIL. His address was shown as the registered and corporate office of the DAIL at Nehru Place, New Delhi. Likewise Petitioner No.2 was shown as Accused No. 6 at the same address.

4. The aforementioned complaint, Section 138 NI Act, stated that cheque No. 769293 dated 31st May 2004 was issued by DAIL for a sum of Rs. 2,43,39,709/- drawn on Canara Bank, Green Park Extension, New Delhi in favour of BIL, the complainant company. This payment was pursuant to a settlement arrived at between the parties. Later BIL complainant was informed by DAIL that there was a change in the operation of its bank accounts and that it required to replace the aforementioned cheque with a new cheque in order to discharge its debt. Accordingly cheque No. 809526 dated 26th August 2004 for a sum of Rs. 2,43,39,709/- drawn on Canara Bank, Green Park Extension, New Delhi in favour of BIL, signed by new signatories was issued by DAIL in replacement of the earlier cheque. The said cheque dated 26th August, 2004, said to have been signed by accused No. 4 Mr. Siddhartha Ray, the Managing Director and accused No. 8 Mr. Avinash Mishra, the Executive Director, when presented to the bank for clearance, was

returned dishonoured with the reason funds insufficient . BIL then demanded payment which was denied by the accused. Consequently the complaint in question was filed.

5. On 16th October 2004 the learned MM passed the following order in Criminal Complaint No. 3142/2004: Fresh complaint received by assignment. It be checked and registered. Present: AR of complainant with counsel. Affidavit in evidence tendered is accepted. Heard. Files perused. In view of the material on record including complaint, evidence and documents, there appears sufficient ground to summoning the accused for offence punishable u/s. 138 NI Act. Accused be summoned on PF/RC/Dasti/Permissible courier for 21-2-2005. Affidavit of proof of service be filed. Sd/- MM ND 16-10-2004

6. Initially Criminal Miscellaneous Case No. 541 of 2005 was filed in this Court by Mr. K.C. Palanisamy, accused No.3, who was also the Managing Director of DAIL and Mr. R. Karunanithi, the Director (Finance Operations) along with the Petitioners, i.e., Mr. Atthappan Ramasamy and Mr. Gobinath Atthapan seeking the quashing of Criminal Complaint No. 3142/2004 However, subsequently the two Petitioners here sought leave to withdraw from the said petition to file a separate fresh petition. This Court granted that permission. DAIL also filed a separate petition Criminal Miscellaneous Case No. 427 of 2005. Criminal Miscellaneous Case No. 541/2005 by Mr.Palanisamy and Mr.Karunanithi and Criminal Miscellaneous Case No. 427/2005 by DAIL were heard together by this Court. By an order dated 27th February 2007, the two petitions were dismissed.

7. As far as the present petition is concerned, the two petitioners filed it on 16th March 2006 and by an order dated 17th March, 2006 while directing notice to issue, this Court stayed the trial court proceedings. Later it was clarified on 19th April 2007 that the stay of trial court proceedings was applicable only to the two petitioners here.

8. The submissions of Mr. S. Gurukrishna Kumar, the learned counsel appearing for the Petitioners were as follows: (i) There is no specific allegation against either of the petitioners in the complaint connecting them with the offence under Section 138 NI Act. Both the petitioners remained as Directors of DAIL for very short period and in fact resigned on 30th August 2004 as is evident from the copy of the Form 32 filed by the company in compliance with the requirement of Section 303(2) of the Companies Act, 1956. (ii) The date of presentation of the cheque for payment i.e. 1st September 2004 was the date on which the offence could be said to have been committed. On that date neither of the petitioners was a Director in the company. Therefore the essential ingredient of Section 141 NI Act in respect of the two petitioners was absent. (iii) The averments in the complaint when read as a whole only show that the language of the Section 141 has been mechanically reproduced. In terms of the law explained by the Supreme Court in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla* (2005) 8 SCC 89 [Neeta Bhalla-I], *N.K. Wahi v. Shekhar Singh* (2007) 4 SCALE 188, *Saroj Kumar Poddar v. State (NCT of Delhi)* (2007) SCC 693, *Everest Advertising Pvt. Ltd. v. State (NCT of Delhi)* (2007) 5 SCC 54 of Delhi, *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla* (2007) 4 SCC 70[Neeta Bhalla-II] and *Sabitha Ramamurthy v. RBS Channabasavaradhya* (2006) 10 SCC 58, the averments were inadequate to fasten liability on the petitioners. (iv) The only allegation against petitioner No.1 was that he was a Vice Chairman which did not mean that he was in charge of the affairs of the company or responsible to it for the conduct of its business. Even against Petitioner No. 2 the allegation only satisfied the language of Section 141 and nothing more. In fact the cheques in question were signed by the Managing Director and the authorized signatory and not by the petitioners. (v) The dismissal by this Court of the two petitions under Section 482 CrPC filed by Shri K.C. Palanisamy and DAIL was on an entirely different ground and that did not affect the

present petition. (vi) Neither of the petitioners was served with a notice before the filing of the complaint. Both of them resided outside India at the relevant time. At the time the notices were purported to have been sent to them at the address of DAIL, neither was a director in the company. (vii) The complaint is nothing but an abuse of the process of law with a view to harassing the petitioners, and extracting money when in fact they had relinquished their directorship of the company and could not be held responsible for the default of the company.

9. Appearing for the Respondent, Mr. Sidharth Luthra, the learned Senior Counsel refers to specific paragraphs of the complaint to show that the averments contained therein satisfy the requirements of the law as explained by the Supreme Court. In particular, he refers to the judgment in *N. Rangachari v. Bharat Sanchar Nigam Ltd.* AIR 2007 SC 1682. It has been pointed out by Mr. Luthra that the averments contained in the complaint are not a mere reproduction of the language of the statute, and any defence that the Petitioners may have to show that either they were no longer associated with the company at the time of the commission of the offence or that they had no knowledge of the issuance of the cheques in question, could be examined at the trial. These are matters for which evidence would have to be led before the trial court and examined by it.

10. The complaint when read as a whole reveals that it contains the following averments relevant to the case on hand: 3. The Accused/respondent no.1 DATA ACCESS INDIA LIMITED is a company registered as per the provisions of the Companies Act 1956. The accused/respondent no.1 is having its registered office at Block E, 2nd Floor, International Trade Tower, Nehru Place New Delhi. The Accused No. 1 is licensed under Section 4 (1) of the Indian Telegraph Act to establish, install, operate, maintain and provide International Long Distance Services under the License No. 10-05/2002-BS-1 (ILD-03) dated 27th March 2002 granted by the Government of India Through the Department of Telecommunication. The Accused No.2 is the Vice Chairman; Accused no.3 is the Managing Director of the Accused No.1. The Accused no.4 is the Managing Director and was one of the signatory of the Cheque in question. The Accused No.6, 7, 8 and 9 are to Directors of the Accused No.1 and are in-charge and responsible for the affairs as well as negotiation for the Settlement Agreement of the Accused Company being on the board. The accused No.8 was one of the signatory for the issuance of the old cheque mentioned in the Settlement Agreement as well as new replaced Cheque i.e. the Cheque in question. The Accused NO.5 is the Director Finance of the Accused/Respondent No.1 and all the above mentioned Accused/Respondent were responsible and in charge of the day to day affairs of the Accused no.1 at the time of the negotiations and issuance of the cheque in question and commission of the offence under Negotiable Instruments Act 1881. The Accused no.2 is the Vice Chairman. AccusedNo.3 and 4 are the Managing Director, Accused No.6,7,8 and 9 are the Directors and the Accused no. 5 is Director Finance of the Accused/Respondent no.1 and all the above mentioned Accused/Respondent were responsible and in charge of the day to day affairs of the Accused no.1 at the time of negotiations and the issuance of the cheque in question and commission of the offence under Negotiable Instrument Act, 1881. Accused No.2 being the vice chairman are always involved and responsible for the conduct of the business of the Accused No.1 and they are always responsible and instrumental in the negotiations and transactions with the Complainant. The Accused no.3 and 4 being the Managing Director have been in-charge of the conduct of every business transaction including the transactions with the Complainant till the issuance and dishonor of cheque in question. The Accused No.4 Mr. Siddhartha Ray, Managing Director was one of the Directors who had signed the new cheque bearing no. 809526 dated 26th August 2004 for a sum of Rs.2,43,39,709 (Rupees Two Crores Forty Three Lakhs Thirty Nine Thousand Seven Hundred and Nine only) drawn on Canara Bank Green Park Extension, New Delhi- 110049. The Accused no.5 being the Director finance is directly responsible for the

issuance of cheque in question and its dishonor. Accused No.6,7,8 9 being the directors of the Accused No.1 holding its board and all the transactions. Negotiations and decisions were taken by them. Accused No.7 specifically sent an Email dated 29th August 2004 and called upon the Complainant to present the cheque in question for clearance. It is evident that the Settlement Agreement dt. 24th March 2004 was well attributable to the Accused No.2 to 9 and the issuance of cheque bearing no. 809525 dated 26th August 2004 for a sum of Rs.2,43,39,709 (Rupees Two Crores Forty Three Lakhs Thirty Nine Thousand Seven Hundred and Nine Only) drawn on Canara Bank Green Park Extension, New Delhi- 110049, in favour of the Complainant company towards the discharge of payment of legally recoverable debt and its dishonor is a directly related and attributable to the consent and connivance of Accused No.2 to 9. The said cheque was signed by the accused no.4, Mr. Siddhartha Ray, the Managing Director and the Accused no.8, Mr. Avinash Mishra, the Director who were authorized by the accused No.1 to do so and were responsible for the entire transaction. The Accused No.8, Mr. Avinash Mishra, Director was the person responsible for the issuance of the old cheque as mentioned in the Settlement, bearing no. 769293 dated 31.05.2004 for a sum of Rs.2,43,39,709 (Rupees Two Crores Forty Three Lakhs Thirty Nine Thousand Seven Hundred and Nine Only) drawn on Canara Bank Green Park Extension, New Delhi-110049 as well as for the issuance of the new cheque bearing no. 809526 dated 26th August 2004 for a sum of Rs.2,43,39,709 (Rupees Two Crores Forty Three Lakhs Thirty Nine Thousand Seven Hundred and Nine Only) drawn on Canara Bank Green Park Extension, New Delhi-110049, the Cheque in question. The Accused No.2 to 9 being the incharge and responsible to the Accused No.1 for the conduct of the business of the Accused No.1, Thus they are jointly and severally liable to be prosecuted under the relevant provisions of laws including Negotiable Act. The Accused were the persons responsible for the conduct of the business and affairs of the Company at the time when the offence under Sec. 138 and Sec. 141 was committed. (emphasis supplied)

11. On a reading of the above passages, it cannot be said that averments concerning the Petitioners are a mere reproduction of the language of the statute. As regards the petitioner no. 1 it is specifically stated that he being the Vice Chairman are always involved and responsible for the conduct of the business of the Accused No.1 and they are always responsible and instrumental in the negotiations and transactions with the Complainant . . . As regards the petitioner No.2 who is arraigned as accused No.6, there are sufficient averments concerning his being in charge of and responsible to the company for the conduct of its business at the time of commission of the offence. A further averment is that the Accused were the persons responsible for the conduct of the business and affairs of the Company at the time when the offence under Sec. 138 and Sec. 141 was committed. The complaint also alleges that the failure by the company to discharge its liability was directly related and attributable to the consent and connivance of Accused No. 2 to 9 which is a separate offence in terms of Section 138 read with Section 141 (2) of NI Act.

12. Learned counsel for the petitioner submitted that the law concerning the minimum averments necessary to be made in a complaint under Section 138 NI Act as explained by the Bench of three Hon ble Judges of the Supreme Court in Neeta Bhalla I has been further explained in N.K. Wahi, Saroj Kumar Poddar, Everest Advertising Pvt. Ltd. and Neeta Bhalla II. According to him, the latter decisions hold that where a company is an accused in a complaint under Section 138 NI Act, then apart from stating that the person sought to be arraigned as an accused in addition to the company was in charge of the affairs of the company and responsible to it for the conduct of its business, a more specific averment as to the exact role and the manner in which the such Director or person was responsible for the commission of the offence has to be indicated.

13. This Court finds that in *Neeta Bhalla I*, the Supreme Court based its decision on the fact that a mere averment that a person is a Director of the accused company is not sufficient to fasten liability on such person. It was in this context that the following observations in paras 18 and 19 of the said judgment in *Neeta Bhalla I* have to be understood (SCC pp. 102-03): 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 respondent falls within 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 question posed in sub-para (b) has to be in 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 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. (emphasis supplied) 14. The subsequent judgment in *Saroj Kumar Poddar* was dealing with a case where the averment in the complaint read as under (SCC p. 697): That Accused 1 is a public limited company incorporated and registered under the Companies Act, 1956, and Accused 2 to 8 are/were its Directors at the relevant time and the said Company is managed by the Board of Directors and they are responsible for and in charge of the conduct and business of the Company, Accused 1. However, cheques referred to in the complaint have been signed by Accused 3 and 8 i.e. Shri K.K. Pilania and Shri N.K. Munjal for and on behalf of Accused 1 Company. The above averment was held not to satisfy the requirement of Section 141 of the Act since it was not shown 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 . It was pointed out that the appellant there had not issued any cheque and it had not been stated how he was responsible for the dishonor of the cheque.

15. However, the above observations in the Saroj Kumar Poddar have been further explained by the Supreme Court in para 26 of the judgment in Neeta Bhalla II as under (SCC p. 80): 26. A faint suggestion was made that this Court in Saroj Kumar Poddar 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. (emphasis supplied) Therefore, it cannot be said that the above observations in Saroj Kumar Poddar constitute the current law on the topic.

16. In N.K. Wahi, the precise averments in the complaint in question were not reproduced in the judgment and, therefore, it is not possible to ascertain what the Supreme Court found to be insufficient as regards the description of the role of the Director in question. Everest Advertising Pvt. Ltd. was a judgment in a case where the person sought to be arraigned as an accused was the Managing Director. Therefore it was held that there was no need for the complainant to specifically aver that such person was in charge of the day-to-day affairs of the company or responsible to it for the conduct of its business. However, the following observations made in para 23 of the judgment show that the question whether a Chairman would automatically be fastened with liability was not gone into (SCC p. 63): 23. 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. 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 the 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 representatives of the Company and Accused 1 to 5 which would include Respondents 2 and 3. Thus the Supreme Court did not form a definitive opinion on whether a Chairman could or could not be arraigned as an accused by stating in the complaint that such person was in charge of the affairs of the company and responsible to it for the conduct of its business or whether something more had to be stated.

17. The judgment in Sabitha Ramamurthy was in a case where the accused was a company and there was no specific averment in regard to its directors. This is clear from the averments in the complaint which read as under (SCC pp. 583-84): The complainant submits that the accused persons have failed to clear the liability. The accused, being the Company and all the Directors, are responsible for the clearance of liability under Section 141 of the NI Act and the acts and deeds of the accused persons are punishable under Section 138 of the NI Act... Accused 2 is the MD and others are Chairman and partners. The accused Company towards repayment of the loan, issued a cheque in favour of the complainant. The MD signed and issued the cheque dated 23-6-2001 for Rs. 1,24,406 on the account maintained by the Company. On presentation of the said cheque to the bank for collection, the same was returned on 30-6-2001 as insufficient funds. Notice dated 12-7-2001 was issued through advocate to the accused and was served on 13- 7-2001. The case was filed on 27-8-2001 .

18. Clearly the said judgment cannot apply to the facts of the present case where the complaint does not stop with merely stating that the petitioners 1 and 2 were the Vice-Chairman and Director respectively of DAIL at the time of commission of the offence. Therefore, none of the above judgments is in fact helpful to the Petitioners in support of their submission that the averments in the present complaint are insufficient for the MM to have taken cognizance of the offence complained of and to have issued summons.

19. On the other hand, in N. Rangachari, the complaint in question contained the following averments (AIR SC p. 1684, para 4): That accused No. 1 is a company incorporated under the Companies Act. Accused Nos. 2 and 3 are its Directors. They are incharge of and responsible to accused No. 1 for conduct of business of accused No. 1 Company. They are jointly and severally liable for the acts of accused No. 1.

20. After discussing the entire case law up to that date in N. Rangachari, the Supreme Court in para 18 held as under (AIR SC p. 1688): 18. In the case on hand, reading the complaint as a whole, it is clear that the allegations in the complaint are that at the time at which the two dishonoured cheques were issued by the company, the appellant and another were the Directors of the company and were incharge of the affairs of the company. It is not proper to split hairs in reading the complaint so as to come to a conclusion that the allegations as a whole are not sufficient to show that at the relevant point of time the appellant and the other are not alleged to be persons incharge of the affairs of the company. Obviously, the complaint refers to the point of time when the two cheques were issued, their presentment, dishonour and failure to pay in spite of notice of dishonour. We have no hesitation in overruling the argument in that behalf by the learned Senior Counsel for the appellant. (emphasis supplied)

21. As far as the present case is concerned, the complaint in question does contain necessary averments to enable the MM to have taken cognizance of the offence against the Petitioners as well. The basic facts relevant for the learned MM to have taken cognizance of the offence are not in dispute. The cheque in question i.e. cheque No. 809526 dated 26th August 2004 for a sum of Rs. 2,43,39,709/- issued by DAIL when presented for payment was dishonoured. On the date of the issuance of the cheque, both the petitioners were indeed Directors of the company. One was the Vice Chairman and the other was the Director. It is not possible to agree with the submission of the counsel for the petitioners that the offence was committed only on 1st September 2004, i.e., the date of the presentation of the cheque. The presumption in terms of Section 138 read with Section 140 NI Act is that the drawer of the cheque is presumed to have known that the cheque drawn when presented would be dishonoured. The cheque was drawn on 26th August 2004 Under Section 140 it would be no defence for a person to urge that he was not aware on the date the cheque was drawn that when presented for payment such cheque would be dishonoured. In the circumstances, the date of the commission of the offence, cannot be said to be the date of the dishonour of the cheque but the date on which it was drawn. By their own showing, as seen from a copy of the Form 32 enclosed with the present petition, the two petitioners had not resigned on the date the cheque in question was drawn and issued.

22. Any defence that the Petitioners may have to show that they were in fact not in charge of the affairs of the company or responsible to it for the conduct of its business, and in any event not on the date of the commission of the offence, can be proved at the trial by adducing evidence. The failure to serve a prior notice on the petitioners may not material for the purposes of the deemed offence under Section 138 read with Section 141 NI Act. However this and the contention that the complaint itself has been instituted malafide are matters that raise triable issues for which evidence is required to be led.

23. For all of the aforementioned reasons, this Court is not inclined in exercise of its powers under Section 482 CrPC to interfere with the criminal proceedings initiated against the petitioners under Section 138 NI Act.

24. The learned counsel for the petitioners relied upon the judgment of the Supreme Court in *M/s Bhaskar Industries Ltd. v. M/s Bhiwani Denim and Apparels Ltd.* 2001 [2] JCC [SC] 127 to contend that the petitioners should be exempted from personal appearance before the trial court. On the other hand, it has been pointed out by the learned counsel for the respondent that the petitioners have not appeared even once before the trial court till date and, therefore, they should not be granted this indulgence. In any event this should be left to the discretion of the trial court.

25. It is directed that if a request is made by the Petitioners here by an appropriate application before the learned MM for exemption from appearance, the same should be considered on its merits and upon such conditions as may be deemed necessary by the learned MM having regard to the need to secure the presence of the petitioners at subsequent stages of the trial. It is also made clear that the petitioners should appear as and when directed by the learned MM to ensure the fair progress of the trial.

26. The petition is dismissed. The interim order dated 17th March, 2006 stands vacated and the stay application is also dismissed. There will be no order as to costs.

S. MURALIDHAR, J.

FEBRUARY 14, 2008