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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 13.05.2024

\+ **CRL.M.C. 3686/2022 & CRL.M.A. 15439/2022**

VIKAS GUPTA ..... Petitioner

Through: Mr.Ankur Singh, Ms.Krutika Gaur, Mr.Abhijeet Singh, Advs.

versus

WILEY INDIA PRIVATE LIMITED & ORS. ..... Respondents

Through: Mr.Anil Kumar Mishra, Mr.Mrinal Bharti, Mr.Manish Kumar Shekhari, Ms.Sanjana Srivastava, Mr.Supantha Sinha, Advs. for R-1.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed under Section 482 of the Code of Criminal Procedure, 1973 (in short, 'Cr.P.C.') praying for quashing of the Complaint Case No.2537/2022 titled ***Wiley India Private Limited v. Miles Education Private Limited & Ors.,*** pending before the Court of learned Metropolitan Magistrate (NI Act)-03, Central District, Tis Hazari Courts, Delhi.

Facts in brief

2. The above complaint has been filed by the respondent no.1 against the petitioner and the respondent nos.2 to 5, alleging therein that the respondent no.1 is engaged in the business of developing educational/literary contents and publishing books and journals. The

respondent no.2 is engaged in the business of upskilling students and professionals in new technologies and emerging skill areas.

3. The petitioner has been arrayed as accused no.5 in the said complaint, with the allegations that he alongwith others was in-charge of and responsible for the conduct of day-to-day functioning, management and business affairs of the accused no.1 Company at the time of the commission of the offence by the accused no.1.

4. The complaint further states that the respondent no.1 had entered into a CMA Exam Review Agreement dated 29.09.2021 with the respondent no.2, to market, promote, re-sell and distribute its product viz. '*Wiley CMA Exam Review*' ('CMA Product/CMA Guide Books') on a non-exclusive basis in India. In terms of clause (2) of the said Agreement, the respondent no.2 agreed to purchase 5,000 set of CMA product from the respondent no.1 each year on a fixed price of INR 9,375/- per set. It is further alleged that the respondent no.2 placed an order of 1500 sets of CMA Guide Books *vide* email dated 16.09.2021 for a total sum of Rs.1,39,62,000/-, for which an invoice dated 09.10.2021 was raised. In terms of Clause 1 (d) of Annexure-A to the Agreement, the said invoice was to be paid in advance, that is, before the delivery of goods, however, in spite of non-payment of the said invoice, the respondent no.1 in good faith and considering the past relationship with respondent no.2, delivered 1,500 sets of CMA Guide Books to the respondent no.2 which was duly acknowledged by the respondent no.2 *vide* email dated 21.10.2021. It is further stated that in terms of Clause 11 of the Agreement, the cheques lying with the respondent no. 1 could be encashed for any payment due from

the respondent no.2. In view thereof, the respondent no.1 presented three cheques dated 30.09.2021, 31.10.2021 and 30.11.2021 for payment, however, they were returned unpaid with the remarks "*Stop Payment*" *vide* Returning Memo dated 05.01.2022. The respondent no.1 thereafter issued a Statutory Demand Notice dated 02.02.2022 to the petitioner and the respondent nos.2 to 5. A reply dated 16.02.2022 was given by the petitioner and the respondent nos.2 to 5, however, payment was not made. Rejoinder notice dated 25.02.2022 was, thereafter, issued by the respondent no.1, however, as no payment was still made, the subject complaint was filed.

5. Aggrieved of the same the petitioner/accused no.5 has filed the present petition.

Submissions by the learned counsel for the petitioner

6. The learned counsel for the petitioner submits that in fact, the transactions between the parties started from an invoice dated 20.10.2020, when the petitioner was the Managing Director of the respondent no.1/complainant. He submits that as a security for the liability owed against the said invoice, 12 post dated cheques were handed over by the respondent no.2 to the respondent no.1, including the three cheques in question. He submits that full payment towards the said invoice was made by the respondent no.1 to the respondent no.2 between 05.02.2021 to 22.09.2021. He submits that therefore, these cheques were no longer valid for presentation.

7. He submits that thereafter the respondent no.1 and the respondent no.2 entered into the abovementioned Agreement on 29.09.2021. Though Clause 11 of the said Agreement refers to certain

cheques handed over by the respondent no.2 to the respondent no. 1, no details thereof are mentioned in the Agreement. He further submits that it is only on 01.11.2021, that the petitioner was appointed as a Director of the respondent no.2. He submits that therefore, the petitioner was neither a Director of the respondent no.2 when the cheques in question were issued nor is a signatory to any of those cheques. He submits that therefore, the petitioner cannot be made liable for the dishonour of those cheques.

8. He submits that the complaint is in fact filed with *mala fide* intent only to take vengeance against the petitioner for him having left the services of the respondent no.1 and joined the respondent no.2 as a Director. He submits that there is a misuse of the cheques that were given pursuant to the arrangement that was made between the parties with respect to the invoice dated 20.10.2020.

Submissions by the learned counsel for the respondent

9. On the other hand, the learned counsel for the respondent no.1 submits that the petitioner has not refuted that he was the Director of the respondent no.2 company on the date of the presentation and dishonour of the cheques and had also received a legal notice of demand. In the reply issued to the said legal notice also, the petitioner does not dispute his position of being in-charge of the conduct of the business of the respondent no.2 company, that is the main accused. He submits that therefore, the petitioner cannot escape his liability under Section 141 of the Negotiable Instruments Act, 1881 (in short, 'NI Act') and seek quashing of the complaint filed by the petitioner which, in any case, is towards the final stages of adjudication. He submits that

at least two cheques were issued when the petitioner was the Director.

Analysis & Findings

10. I have considered the submissions of the learned counsels for the parties.

11. From the above, it is evident that the petitioner does not dispute his position as a Director of the respondent no.2, the main accused Company, as on the date of the presentation of the cheques in question, their dishonour, the demand notice having been issued and received, and the reply given to that demand notice, however, no payment being made. Therefore, as on the date when the ingredients of the offence under Section 138 of the NI Act fructify, the petitioner was admittedly the Director of the respondent no.2 Company and in-charge of the affairs of the respondent no. 2. Therefore, *prima facie* he is liable in terms of Section 141 of the NI Act.

12. The submission of the learned counsel for the petitioner that he was not the Director of the respondent no.2 company as on the date of the issuance of the cheques, is not relevant inasmuch as the Supreme Court in ***S.P. Mani & Mohan Dairy v. Dr. Snehalatha Elangovan,*** (2023) 10 SCC 685, has clarified that different persons can be in-charge of the company when each of the series of acts of commission and omission, essential to complete the commission of offence by the company, that is, (i) the drawing of cheque, (ii) presentation of the cheque to the bank for encashment, (iii) returning of the cheque unpaid by the drawee bank, (iv) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, and (v) failure of the drawer to make payment within 15 days of the receipt of

the notice, may have taken place. The purpose of the provisions of Section 138 and Section 141 of the NI Act would advance if any or all of them are permitted to be prosecuted. I may quote from the judgment as under:-

> *"**34.** The seminal issue raised and required to be settled in the present case is one relating to a person liable to be proceeded against under the provisions of sub-section (1) of Section 141 for being in-charge of and responsible to the company "at the time the offence was committed." It would, therefore, be important to find out the "time" when the offence under Section 138 can be said to have been committed by the company. It is commonplace that an offence means an aggregate of facts or omissions which are punishable by law and, therefore, can consist of several parts, each part being committed at different time and place involving different persons. The provisions of Section 138 would require a series of acts of commission and omission to happen before the offence of, what may be loosely called "dishonour of cheque" can be constituted for the purpose of prosecution and punishment. It is held by the Supreme Court in K. Bhaskaran v. Sankaran Vaidhyan Balan, that :*
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> > *"14. The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence : (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice."*

35. *Different persons can be in-charge of the company when each of the series of acts of commission and omission essential to complete the commission of offence by the company were being committed. To take an example, in the case of a company, "A" might be in charge of the company at the time of drawing the cheque, "B" might be in charge of the company at the time of dishonour of cheque and "C" might be in charge of the company at the time of failure to pay within 15 days of the receipt of the demand notice. In such a case, the permissibility of prosecution of A, B and C, respectively, or any of them would advance the purpose of the provision and, if none can be prosecuted or punished, it would frustrate the purpose of the provisions of Section 138 as well as Section 141.*

36. *The key to this interpretation lies in the use of the phrase:"every person shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly" as it occurs in sub-section (1) of Section 141 and the use of the phrase "provided that nothing contained in this sub-section shall render any person liable to punishment if he proves…" that occurs in the first proviso. Every person who was in charge of and was responsible to the company for the conduct of its business at the time any of the components necessary for the commission of the offence occurred may be "proceeded against", but may not be "punished" if he succeeds in proving that the offence was committed without his knowledge and despite his due diligence; the burden of proving that remaining on him.*

37. *Therefore, it also has to be held that the time of commission of the offence of dishonour of cheque cannot be on the stroke of a clock or during 15 days after the demand notice has to be construed as the time when each of the acts of commission and omission essential to constitute the offence was committed. The*

> *word "every" points to the possibility of plurality of responsible persons at the same point of time as also to the possibility of a series of persons being in charge when the sequence of events culminating into the commission of offence by the company were taking place."*

13. As far as the submission of the learned counsel for the petitioner that the respondent no.1 has acted out of *mala fide* in presenting the cheques, without commenting on whether this at all is relevant for finding the accused guilty of the offence under Section 138 of the NI Act or not, in any case, this will be a matter of evidence and cannot be decided in a proceeding under Section 482 of the Cr.P.C., where disputed question on fact cannot be gone into.

14. The Supreme Court has repeatedly cautioned that the power under Section 482 of the Cr.P.C. cannot be used to scuttle a complaint or an FIR at an initial stage, especially where a disputed question of fact is involved. The power is to be exercised sparingly and only in the rarest of the rare cases. Reference in this regard may be had to the judgement of the Supreme Court in ***Rathish Babu Unnikrishnan v. State (Govt. of NCT of Delhi) & Anr.,*** 2022 SCC OnLine SC 513.

Conclusion

15. I, therefore, find no merit in the present petition. The same is dismissed. The pending application is also disposed of.

16. There shall be no order as to costs.

NAVIN CHAWLA, J

MAY 13, 2024/Arya/RP

Click here to check corrigendum, if any