

62. **IN THE HIGH COURT OF DELHI AT NEW DELHI**  
**CRL.M.C. No. 243/2009 & CRL.M.A.No. 936/2009 (stay)**

DINESH MOHINDRA & ANR. .... Petitioners  
Through: Mr.K.T.S.Tulsi, Senior Advocate  
with Mr. Manish K. Sanyal and Mr. Ravinder  
Singh, Advocates.

versus

DCM FINANCIAL SERVICES LTD. & ORS. .... Respondents  
Through: Mr. Sachin Chopra, Advocate  
for R-1.  
Mr. Vijendra, Advocate for R-2.

**CORAM:**  
**HON'BLE DR. JUSTICE S. MURALIDHAR**

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|-----------------------------------------------------------------------------|-----|
| 1. Whether Reporters of local papers may be<br>allowed to see the judgment? | No  |
| 2. To be referred to the Reporter or not?                                   | Yes |
| 3 . Whether the judgment should be reported in Digest?                      | Yes |

**ORDER**  
**16.02.2009**

1. Through this petition under Section 482 CrPC the Petitioners seek to be discharged in Criminal Complaint No. 5654/1 titled “***D.C.M. Financial Services Ltd. v. M/s. Sai Moh Auto Links Pvt. Ltd.***” pending in the Court of the learned Metropolitan Magistrate (‘MM’), New Delhi under Section 138 of the Negotiable Instruments Act, 1881 (‘NI Act’).

2. The aforementioned complaint was filed in respect of the dishonour of a Cheque No.319925 dated 1<sup>st</sup> November 1998 for a sum of Rs.1,68,441/-drawn in favour of M/s.DCM Financial Services Ltd. by Sai Moh Auto Links Pvt. Ltd.(‘SMALPL’). The cheque when presented to the drawer’s Bank was dishonoured with the remarks “funds insufficient”.

3. The Petitioner No.1 Dinesh Mohindra and Petitioner No.2 Karuna Mohindra have been arrayed in the complaint as accused Nos.3 and 5 respectively. The averments in the Complaint relevant to the petitioners are in paras 13 and 14 which read as under:

“13. That the accused No.1 is a company/firm and the accused Nos. 2 to 5 was in charge and was responsible to the accused No.1 for the conduct business of the accused No.1, at the time when the offence was committed. Hence, accused Nos. 2 to 5 along with the accused No.1, is/are liable to be prosecuted and punished in accordance with law by this Hon’ble Court, as provided by section 138 of the N.I. Act, 1881. Further the offence has been committed by the accused No.1.

14. That the accused person(s) has/have committed an offence punishable under section 138 of N.I. Act and the cause of action has arisen in favour of the complainant and against all the accused persons, on the failure of the payment against the cheques presented for honour in the bank, as demanded by legal notice. It is pertinent to mention here that till filing of this complaint before this Hon’ble Court, no payment has been made either in part or full against these abovementioned cheques to the complainant company.”

4. Mr. K.T.S. Tulsi, learned Senior counsel appearing for the Petitioners submits that both these Petitioners were not Directors of SMALPL on the date of the cheque i.e. 1<sup>st</sup> November 1998. He relies on the certified copy of the Form 32 placed on record which shows that both Dinesh Mohindra and Karuna Mohindra resigned as Directors of SMALPL on 25<sup>th</sup> December 1997. It is stated that therefore on the date of the commission of the offence neither Petitioner was in charge of the affairs of SMALPL or responsible to it for the conduct of its business as stated in the complaint. Referring to the judgments of the Supreme Court in *S.M.S. Pharmaceuticals v. Neeta Bhalla (I) 2005 (8) SCC 89*, *S.M.S. Pharmaceuticals v. Neeta Bhalla (II) 2007 (4) SCC 70* and *DCM Financial Services Ltd. v. J.N. Sareen 2008 (8) SCC 1*, it is submitted that no deemed liability in terms of Section 14 NI Act can attach to a Director who was no longer as such on the date of the commission of the offence. Mr. Tulsi also refers to the observations of the Supreme Court in *Anil Kumar Sawhney v. Gulsan Rai 1993 (4) SCC 424* where it was held that even a postdated cheque which was not payable on demand till a particular date, was not a cheque in the eyes of law till the date it becomes payable on demand.

5. Appearing for Respondent No.1 Mr. Sachin Chopra, learned Advocate, does not deny that the Form 32 submitted to the Registrar of Companies does show that neither of the Petitioners was a Director of

SMALPL as on the date of the cheque or even as of the date of commission of the offence under Section 138 NI Act. He however submits that this is an issue which should be left to be decided by the trial court. He further submitted that cheques were issued pursuant to a Hire Purchase agreement entered into between SMALPL and the complainant and that initially both these Petitioners were holding 20% shares in SMALPL. The cheques were given pursuant to the said agreement, which was also signed by one of the Petitioners. The cheques were post-dated. He however did not deny that the cheque dishonoured was admittedly not signed by either of the Petitioners. Learned counsel for Respondents 2 and 3 also opposed the quashing of the complaint stating that these issues ought to be decided only at the time of trial.

6. This Court finds merit in the submissions made on behalf of the Petitioners. The decision of the Supreme Court in *Neeta Bhalla (I)* explains what should be the minimum averment in a complaint in order to determine if a prima facie case is made out for proceeding against the accused under Section 138 read with Section 141 NI Act. In *Neeta Bhalla (II)* in para 20 it was explained as under:

“20. The liability of a Director must be determined on the date on which the offence is committed. Only because Respondent 1 herein was a party<sup>7</sup> to a purported resolution dated

15.2.1995 by itself does not lead to an inference that she was actively associated with the management of the affairs of the Company. This Court in this case has categorically held that there may be a large number of Directors but some of them may not associate themselves in the management of the day-to-day affairs of the Company and, thus, are not responsible for the conduct of the business of the Company. The averments must state that the person who is vicariously liable for commission of the offence of the Company both was in charge of and was responsible for the conduct of the business of the Company. Requirements laid down therein must be read conjointly and not disjunctively. When a legal fiction is raised, the ingredients therefore must be satisfied.”

7. Further in its recent judgment in *DCM Financial Services* the Supreme Court explained in paras 19, 20 and 21 as under:

“19. Section 141 of the Act provides for a constructive liability. A legal fiction has been created thereby. The statute being a penal one, should receive strict construction. It requires strict compliance of the provision. Specific averments in the complaint petition so as to satisfy the requirements of Section 141 of the Act are imperative. Mere fact that at one point of time some role has been played by the accused may not by itself be sufficient to attract the constructive liability

under Section 141 of the Act. (See *K. Srikanth Singh v. North East Securities Ltd.*)

20. We may also notice that this Court in *N.K. Wahi v. Shekhar Singh and Ors.* (2007) 9 SCC 481 has observed:

8. 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 in-charge 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.*”

(Emphasis supplied)

21. The cheque in question was admittedly a post dated one. It was signed on 3<sup>rd</sup> April, 1995. It was presented only sometimes in June, 1998. In the meantime he had resigned from the directorship of the Company. The complaint petition was filed on or about 20<sup>th</sup> August, 1998. Intimation about his resignation was given to the complainant in writing by the 1<sup>st</sup> respondent on several occasions. Appellant was, therefore, aware thereof. Despite having the knowledge, the 1<sup>st</sup> respondent was impleaded one of the accused in the complaint as a Director Incharge of the affairs of the Company on the date of commission of the offence, which he was not. If he

was proceeded against as a signatory to the cheques, it should have been disclosed before the learned Judge as also the High Court so as to enable him to apply his mind in that behalf. It was not done. Although, therefore, it may be that as an authorized signatory he will be deemed to be person incharge, in the facts and circumstances of the case, we are of the opinion that the said contention should not be permitted to be raised for the first time before us. *A person who had resigned with the knowledge of the complainant in 1996 could not be a person incharge of the Company in 1998 when the cheque was dishonoured. He had no say in the matter of seeing that the cheque is honoured. He could not ask the Company to pay the amount. He as a Director or otherwise could not have been made responsible for payment of the cheque on behalf of the Company or otherwise.* (See also ***Shiv Kumar Poddar v. State (NCT of Delhi)***, ***Everest Adveristing Pvt. Ltd. v. State (NCT of Delhi)*** and ***Raghu Lakshminarayanan v. Fine Tubes (2007) 5 SCC 103.***)” (emphasis supplied)

8. In light of the law explained by the Supreme Court it is plain that unless the Respondent is able to show that on the date of the commission of the offence either of the Petitioners was in charge of the affairs of SMALPL or responsible to it for the conduct of its business, the complaint against either of them would not be maintainable.

9. The Form 32 is a statutory document evidencing the change in the status of directors of a Company. In the instant case, a certified copy of the Form 32 has been filed in support of the submission that both petitioners had ceased to remain directors on the date of the cheque or even at the time of its dishonour. Thus the offence under Section 138 NI Act is not even prima facie made out against either petitioner. Respondent No.1 was unable to show that the Form 32 produced is not genuine.

10. In the circumstances, this Court accepts that such document reflects the correct state of affairs. In *Sarla Kumar v. SREI International Finance Ltd. IV (2006) CCR 61*, this Court has explained the position as regards Form 32 as under:

“10. After seeking adjournment for the said purpose, learned counsel for Respondent No.1 was fair enough to state that Form 32, certified copy of which has been placed on record by the Petitioner, does reflect the correct state of affairs as regards the Petitioners having resigned from the Directorship of SMALPL on 25<sup>th</sup> December 1997. Therefore on the date of issuance of the cheques they clearly were not associated with the Company.”

11. In *Anil Kumar Sawhney* the Supreme Court explained that a post dated cheque will become a negotiable instrument only when it is in fact presented for demand. In para 13 of the said judgment it was explained as under:

“13. It is clear from Section 19 that a “cheque”

is an instrument which is payable on demand. A postdated cheque, which is not payable on demand till a particular date, is not a cheque in the eyes of law till that date it becomes payable on demand.”

12. Likewise, in *DCM Financial Services* the Supreme Court was dealing with a case of a post dated cheque which was signed on 3<sup>rd</sup> April 1995 but was presented only in January 1998 by which time the accused has resigned from the Directorship of the Company. In those circumstances it was held that the complaint would not be maintainable against such persons.

13. For the aforementioned reasons, the petition should succeed. The Petitioners will stand discharged in Criminal Complaint No. 5654/1 titled “*D.C.M. Financial Services Ltd. v. M/s. Sai Moh Auto Links Pvt. Ltd.*” pending in the Court of the learned MM, New Delhi. It is made clear the complaint will continue as far as the other accused are concerned.

14. The petition is accordingly allowed.

15. The petition and application are disposed of.

16. A certified copy of this order be sent to the learned MM concerned forthwith. Dasti to the parties.

**S.MURALIDHAR, J**

**FEBRUARY 16, 2009**  
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