

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

+ Cr1.M.C. Nos. 923/2009 & 1654/2009

% Reserved on: 18th November, 2009
Date of Decision: 30th November, 2009

V.S. GUPTA Petitioner
! Through: Mr. Sanjay Gupta,
Adv.
Versus

PUNJAB NATIONAL BANK Respondent

Through: Mr. U.C. Mittal & Mr.
Ankur Mittal, Advs.

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

1. Whether the Reporters of local papers
may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be
reported in the Digest? Yes

: V.K. JAIN, J.

1. This is a petition under Section 482 of the Code of Criminal Procedure, 1973 for quashing criminal complaints No.1367/2008 and 1368/2008, filed by the respondent against the petitioner and others under Section 138 of Negotiable Instrument Act. Identical allegations have been made in both the complaints, the only difference being the date and amount of the cheques.

2. Complaints under Section 138 and 141 of Negotiable Instrument Act read with Section 420 of IPC were filed by respondent – Punjab National Bank against Padmini Technologies Ltd. and 30

others including the petitioner – V.S.Gupta. It was alleged in the complaint that accused No.2 to 4 namely Shri Vivek Nagpal, Managing Director, Shri Mahesh Malhotra, Commercial Manager, Shri V.S.Gupta, Director of accused No.1 – Padmini Technologies Ltd., were carrying on the management and day to day affairs of Company and were responsible for everything related to finances of the company. It has been further alleged that accused No.1 which had availed credit facilities from the complainant – Bank issued cheques towards part payment of its liability. The cheques according to the complainant were issued by accused No.3 acting for all other accused. The aforesaid cheques when present to the Bank were returned unpaid with remarks 'funds insufficient'. A notice demanding amount of the cheque in question was sent to the accused persons. They having failed to make payment, these complaints were filed.

3. Vide order dated 12.9.2008, the learned Metropolitan Magistrate summoned all the accused only under Section 138 of Negotiable Instrument Act.

4. The case of the petitioner is that since he had resigned as a director of accused No.1 - Padmini Technologies Ltd., prior to issue of cheques in question, he is not vicariously liable for the offence committed by the Company. A certified copy of Form 32 has been filed by the petitioner which shows that he had resigned as a Director of Padmini Technologies Ltd. w.e.f. 30.4.2003. The petitioner has also filed a certified copy of the order dated 24.2.2009 passed by learned ACMM, North Delhi, whereby the petitioner was discharged in a complaint initiated by Registrar under Section 209A(8) of Companies

Act against four persons including the petitioner V.S.Gupta. The other persons against whom complaint was filed were Mr.Vivek Nagpal, Managing Director and Mr.Praveen Kumar, whole Director and Mr.Rajesh Sodhi, an officer of Padmini Technologies Ltd. During the course of his judgment, the learned ACMM recorded that the accused No.3 had resigned w.e.f. 30.4.2003 and since the offence was committed on 30.5.2003, he was entitled to a discharge.

5. The petition has been opposed by the respondent. It has been alleged in the reply the petitioner is the person who is responsible for day to day affairs of Padmini Technologies Ltd., along with accused No.2 and 3 was carrying on the management and day to day affairs of Company and was responsible for everything related to finances of the company. It has also been alleged that petitioner has been representing the Company in O.A.No.481/1999 filed by the respondent and in R.C.No.349/2009 arising out of the final order passed in O.A.No.481/1999. It has been claimed that the appearance of the petitioner as a representative of the Company has been recorded by Debt Recovery Tribunal in various proceedings including the proceeding dated 18.2.2005. It has been stated in the reply that to attract liability under Section 141(1) of Negotiable Instruments Act, the person concerned need not necessarily be a Director of the Company and any person, who is incharge of and responsible to the Company for conduct of its business will be deemed to be guilty of the offence. It has also been claimed that it is the petitioner who had been approaching the Bank for the compromise which was affected in R.C.No.349/2009 pursuant to which cheque in question was issued by

Company. It has also been pointed out that it was the statement of the petitioner which was recorded on behalf of the Company at the time of compromise.

6. Section 141(1) of Negotiable Instruments Act reads as under:-

*“ 141. **Offences by companies** – (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:*

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

[Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

7. In support of his claim that he had resigned as a Director of Padmini Technologies Ltd. w.e.f. 30.4.2003, the petitioner has placed on record a certified copy of Form 32 issued by Registrar of Companies. This document shows that the petitioner resigned as a Director of Padmini Technologies Ltd.w.e.f. 30.4.2003. There is no reason, not to accept an authentic public document such as certified copy of Form 32. Therefore, for the purpose of this petition, I proceed on the basis that the petitioner had actually resigned as a Director of Padmini Technologies Ltd. w.e.f. 30.4.2003.

8. In *Dr.(Mrs.) Sarla Kumar vs. Srei International Finance Ltd.*, 2007 (2) NIJ 208 (Del), the petitioner sought quashing of the criminal complaint against her on the ground that she had resigned from the directorship of the concerned Company M/s.Sansar Braktols Pvt. Ltd. on 20.8.1994 whereas cheques in question were issued in the year 2003 and she was not a Director of the Company at that time. In that case, it was alleged in the complaint that the petitioner was a Director of the Company and was incharge and responsible for day-to-day conduct and business of the Company at the time of commission of the offence. The petitioner placed on record the certified copy of Form 32 and claimed that she was not liable for the offence committed by the Company. The petition was opposed by the respondent on the ground that the question as to whether the petitioner had resigned or not was a question of fact which should be gone into only at the stage of trial and should not be dealt with in proceeding under Section 482 of the Code of Criminal Procedure. The learned Single Judge noted that the petitioner had filed certified copy issued by Registrar of Companies, authenticity of which could not be disputed and such a document was conclusive of the fact that the petitioner had resigned w.e.f. the date mentioned in the document. Holding that the petitioner was not incharge or responsible for day-to-day affairs of the Company and could not be so, the petitions were allowed and the complaints were quashed quo the petitioner. I am in full agreement with the view taken in the above referred case as regards authenticity and conclusive nature of certified copy of form 32. When such an authentic and conclusive document is made available to the Court, it

would be an exercise of futility to again go into the same question to find out as to whether the petitioner was a Director in the Company or not at the time mentioned in the document. Such an exercise, if undertaken, would not serve any useful purpose but would unnecessarily drag the person concerned to a long drawn trial without rendering any fruitful result.

9. The learned counsel for the respondent has referred to the decision of this Court in **O.P. Aggarwal vs. State and Anr., 2009** (108) DRJ, 494, where despite the petitioner having produced certified copy of Form-32, the petition filed by him for quashing the proceedings was dismissed. A perusal of the judgment would show that in that case one of the co-accused Inder Verma had written a letter dated 3rd August, 2006 to the complainant-bank stating that petitioner Shri O.P. Aggarwal was, in fact, the Functional Head of the company and that he had issued cheque in question under the instruction and order of the petitioner Shri O.P. Aggarwal. There was a reference to this letter in the complaint itself. Also, in his reply to the legal notice, accused No. 7 has stated that he had signed the letters, etc. on the orders and instructions of accused No. 2 who was the owner/Functional Head of accused No. 1. It was, under these circumstances, that this Court after noticing that to incur criminal liability under Section 141 of Negotiable Instruments Act, one need not necessary be a Director of the company and could be any working person of the company if he was otherwise in charge of affairs of the company and responsible to it for the conduct of its business, held that the question whether or not the petitioner was a person in

control of the affairs of the company, would only be proved after the case had gone to trial

The facts of the present case being altogether different, the above referred decision would not apply to this case.

10. The learned counsel for the petitioner has mainly relied upon recent decision of the Supreme Court in K.K. Ahuja vs. V.K. Vora and Anr., 2009 (3) JCC (NI) 194. In the case before the Hon'ble Supreme Court, the appellant before the Hon'ble Court had impleaded 9 persons as accused. They included, the company, its Chairman, four Directors, Vice-President (Finance), General Manager and Deputy General Manager. It was alleged in the complaint that "at the time of the commission of offence, accused 2 to 9 were in-charge of and responsible for the conduct of day to day business of accused No. 1" and that therefore they were deemed to be guilty of offence under Section 138 read with Section 141 of the Act and Section 420 of the Indian Penal Code. The appellant also alleged that "respondents 2 to 9 were directly and actively involved in the financial dealings of the company" and that the accused had failed to make payment of the cheques which were dishonoured. In the pre- summoning evidence, the appellant "reiterated that accused 2 to 9 were responsible for the conduct of day to day business of first accused company at the time of commission of offence".

11. Accused No.9, who was the first respondent before the Supreme Court, filed two petitions for quashing the proceedings against him on the ground that as Deputy General Manager, he was not in charge of and responsible to the company for the conduct of the business of the

company. He also contended that merely stating that he was directly and actively involved in the financial dealings of the accused or was responsible for the conduct of day to day business would not be sufficient to fasten criminal liability on him. He submitted that neither the complaint nor the sworn statement gave any particulars of the part played by him or part attributed to him in the alleged offence.

12. The High Court having quashed the summoning order of the first respondent on the ground that he was not a signatory to the cheque nor was the party to the decision to allow the cheques to be dishonoured, the appellant approached the Hon'ble Supreme Court and contended that having regard to the specific averment in the complaint that the accused 2 to 9 were in charge of and responsible for the conduct of day to day business of the company, the order summoning the first respondent could not have been quashed under Section 482 Cr.P.C. It is also submitted that at the stage of summoning the accused, when evidence was yet to be led by the parties, the High Court committed an error in quashing the order summoning the first respondent, on the basis of an unwarranted assumption that the first respondent was not responsible for or involved in the conduct of the business of the company. Reliance was placed on the decision of this Court in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr.* 2005 (3) JCC (NI) 203: [2005 (8) SCC 89].

13. The Hon'ble Supreme Court, after considering its earlier judgment in the case of *S.M.S. Pharmaceuticals Ltd.* (supra) and noticing that in that case, the Court had observed that only the persons who can be said to be connected with the commission of a

crime at the relevant time have been subjected to action under Section 141 of the Act, also noticed the following observations made in *Saroj Kumar Poddar v. State* (NCT of Delhi), 2007 (1) JCC (NI), 60: 2007 (3) SCC 693,

“there is no averment in the complaint petitions 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. He had not issued any cheque. How he is responsible for dishonour of the cheque has not been stated.”

The Hon’ble Court noted that in the later decisions, *N.K. Wahi vs. Shekhar Singh* – 2007 (1) JCC (NI) 112:2007 (9) SCC 481, *DCM Financial Services Ltd. vs. J.N. Sareen*-2008 (2) JCC (NI) 233: 20008 (8) SCC 1 and *Ramraj Singh vs. State of M.P.* 2009 (2) JCC (NI), 156: 2009 (5) SCALE 670, the Court had reiterated the principle laid down in *Saroj Kumar Poddar* (supra).

14. After considering the above noted decisions, the Hon’ble Court inter alia observed as under:

“The prevailing trend appears to require the complainant to state how a Director who is sought to be made an accused, was in charge of the business of the company, as every director need not be and is not in charge of the business of the company. If that is the position in regard to a director, it is needless to emphasise that in the case of non-director officers, there is all the more the need to state what his part is with regard to conduct of business of the company and how and in what manner he is liable.

15. The Hon’ble Court further observed as under:

“The scheme of the Act, therefore is, that a person who is responsible to the company for the conduct of the business of the company and who is in charge of business of the

company is vicariously liable by reason only of his fulfilling the requirements of Sub-section (1). But if the person responsible to the company for the conduct of business of the company, was not in charge of the conduct of the business of the company, then he can be made liable only if the offence was committed with his consent or connivance or as a result of his negligence.

11. The criminal liability for the offence by a company under Section 138, is fastened vicariously on the persons referred to in Sub-section (1) of Section 141 by virtue of a legal fiction. Penal statutes are to be construed strictly. Penal statutes providing constructive vicarious liability should be construed much more strictly. When conditions are prescribed for extending such constructive criminal liability to others, courts will insist upon strict literal compliance. There is no question of inferential or implied compliance. Therefore, a specific averment complying with the requirements of Section 141 is imperative. As pointed out in *K. Srikanth Singh v. North East Securities Ltd.* 2007 (12) SCC 788, the mere fact that at some point of time, an officer of a company had played some role in the financial affairs of the company, will not be sufficient to attract the constructive liability under Section 141 of the Act."

16. On the question as to who would be persons responsible to the company for conduct of its business, the Hon'ble Court inter alia held as under:

"A company though a legal entity can act only through its Board of Directors. The settled position is that a Managing Director is prima facie in charge of and responsible for the company's business and affairs and can be prosecuted for offences by the company. But insofar as other directors are concerned, they can be prosecuted only if they were in charge of and responsible for the conduct of the company's business. A combined reading of Sections 5 and 291 of Companies Act, 1956 with the definitions in clauses (24), (26), (30), (31), (45) of Section 2 of that Act would show

that the following persons are considered to be the persons who are responsible to the company for the conduct of the business of the company :

- (a) the managing director/s;
- (b) the whole-time director/s;
- (c) the manager;
- (d) the secretary;
- (e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act;
- (f) any person charged by the Board with the responsibility of complying with that provision (and who has given his consent in that behalf to the Board); and
- (g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors.

It follows that other employees of the company, cannot be said to be persons who are responsible to the company, for the conduct of the business of the company.

15. Section 141 uses the words "was in charge of, and was responsible to the company for the conduct of the business of the company". It is evident that a person who can be made vicariously liable under Sub-section (1) of Section 141 is a person who is responsible to the company for the conduct of the business of the company and in addition is also in charge of the business of the company. There may be many directors and secretaries who are not in charge of the business of the company at all. The meaning of the words "person in charge of the business of the company" was considered by this Court in *Girdhari Lal Gupta v. D.N. Mehta* [1971 (3) SCC 189] followed in *State of Karnataka v. Pratap Chand* [1981 (2) SCC 335] and *Katta Sujatha v. Fertiliser & Chemicals Travancore Ltd.* [2002 (7) SCC 655]. This Court held that the words refer to a person who is in

overall control of the day to day business of the company. This Court pointed out that a person may be a director and thus belongs to the group of persons making the policy followed by the company, but yet may not be in charge of the business of the company; that a person may be a Manager who is in charge of the business but may not be in overall charge of the business; and that a person may be an officer who may be in charge of only some part of the business.

16. Therefore, if a person does not meet the first requirement, that is being a person who is responsible to the company for the conduct of the business of the company, neither the question of his meeting the second requirement (being a person in charge of the business of the company), nor the question of such person being liable under Sub-section (1) of Section 141 does not arise. To put it differently, to be vicariously liable under Sub-section (1) of Section 141, a person should fulfill the 'legal requirement' of being a person in law (under the statute governing companies) responsible to the company for the conduct of the business of the company and also fulfill the 'factual requirement' of being a person in charge of the business of the company.

17. Therefore, the averment in a complaint that an accused is a director and that he is in charge of and is responsible to the company for the conduct of the business of the company, duly affirmed in the sworn statement, may be sufficient for the purpose of issuing summons to him. But if the accused is not one of the persons who falls under the category of 'persons who are responsible to the company for the conduct of the business of the company' (listed in para 14 above), then merely by stating that 'he was in charge of the business of the company' or by stating that 'he was in charge of the day to day management of the company' or by stating that he was in charge of, and was responsible to the company for the conduct of the business of the company', he cannot be made vicariously liable under Section 141(1) of the Act."

17. As regards officers of the company, the Hon'ble Court inter alia held as under:

"It should, however, be kept in view that even an officer who was not in charge of and was responsible to the company for the conduct of the business of the company can be made liable under Sub-section (2) of Section 141. For making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under Sub-section (2) of Section 141 of the Act."

18. The legal position under Section 141 of Negotiable Instruments Act was summarized as under:

"(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix 'Managing' to the word 'Director' makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii) In the case of a director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under Sub-section (2) of Section 141.

(iii) In the case of a Director, Secretary or Manager (as defined in Section 2(24) of the Companies Act) or a person referred to in clauses (e) and (f) of Section 5 of Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 141(1). No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that Sub-section.

(iv) Other Officers of a company can not be made liable under Sub-section (1) of Section 141. Other officers of a company can be made liable only under Sub-section (2) of Section 141, be averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence.”

19. In respect of employees of the company, the Hon’ble Court further noted as under:

“If a mere reproduction of the wording of Section 141(1) in the complaint is sufficient to make a person liable to face prosecution, virtually every officer/employee of a company without exception could be impleaded as accused by merely making an averment that at the time when the offence was committed they were in charge of and were responsible to the company for the conduct and business of the company. This would mean that if a company had 100 branches and the cheque issued from one branch was dishonoured, the officers of all the 100 branches could be made accused by simply making an allegation that they were in charge of and were responsible to the company for the conduct of the business of the company. That would be absurd and not intended under the Act. As the trauma, harassment and hardship of a criminal proceedings in such cases, may be more serious than the ultimate punishment, it is not

proper to subject all and sundry to be impleaded as accused in a complaint against a company, even when the requirements of Section 138 read and Section 141 of the Act are not fulfilled.”

20. Holding that a Deputy General Manager is not a person who is responsible to the company for the conduct of the business of the company, the Hon’ble Court held that since he does not fall under any of the categories (a) to (g) listed in Section 5 of the Companies Act, the question whether he was in charge of the business of the company or not is irrelevant and he can be made liable only under Section 141(2) for which necessary averments relating to consent/connivance/negligence should have been made. Finding no such averment, the appeal filed by the complainant was dismissed.

21. Coming to the present case, as noted earlier, certified copy of Form-32 shows that petitioner was not a Director of the company on the date cheques in question were issued. Though it was alleged in the complaint, accused No.4, V.S. Gupta was a Director of the company, that averment is obviously incorrect as he had already resigned from Directorship on 30th April, 2003.

22. Though it has been alleged in para 3 of the complaint that accused Nos. 2 to 4, which includes the petitioner, he being accused No.4 in the complaint, were carrying on the management & day to day affairs of the company and were responsible for everything related to finances of the company and it is further alleged that they had every knowledge of transaction in question and were also aware of the final order/subsequent compromise pursuant to which cheques in question were given to the complainant-bank, nowhere does the complaint

disclose as to, if the petitioner was not a Director of the company, what was the status he enjoyed in the company at the time of issue of cheques in question. In fact, the whole case of the complainant against the petitioner is based on the averment that he was a Director of the company, and therefore, he was carrying on management and day to day affairs of the company and was also responsible for its finances. This is not the case of the complainant anywhere in the complaint that the petitioner, by virtue of a position other than a Director in the company, was instrumental behind issue of cheques in question to the complainant-bank. During the arguments, it was submitted by the learned counsel for the respondent that petitioner was a consultant with the company. Though there is no such allegation in the complaint, assuming the statement made by the learned counsel for the respondent to be correct, a consultant cannot be said to be a person in charge of and responsible to the company for conduct of the business of the company. There is no averment in the complaint that decision to issue cheques or to get them dishonoured was taken on the directions or at the behest of the petitioner.

There is no averment in the complaint that cheques in question were issued and dishonoured with the consent/connivance or negligence of the petitioner.

23. In the case of **K.K. Ahuja**, the petitioner was Deputy General Manager of the bank and there was a specific allegation in the complaint that he was person in charge of and responsible for day to day business of the company and was directly and actively involved in its financial dealings. In the present case, the petition does not

disclose true status of the petitioner in the company and makes a false averment that he was its Director on the date of commission of offence. I fail to understand how a consultant could be a person in charge of day to day affairs of the company and how he could be said to be responsible for conduct of business of the company. It has been alleged by the respondent that the petitioner has been appearing as authorized representative of the company before the Recovery Tribunal and that his presence has been recorded on a number of hearings. Even if that be so, that does not make the petitioner a person in charge of and responsible to the company for conduct of the business of the company. Any employee can represent the company before a judicial forum, as its Authorized Representative. To appoint someone as Authorized Representative of a company only a Power of Attorney/Authorization needs to be given to him. Merely from appearing on behalf of the company, as its Authorized Representative, one does not become a person in-charge of and responsible to the company for conduct of the business of the company. The position would be much weaker in the case of a person who is not even an employee of the company. It has also been alleged in the complaint that the petitioner as well as accused Nos. 2 and 3 had submitted a compromise proposal to the bank pursuant to which settlement was arrived at and the cheques were issued. Para 8 of the complaint shows that compromise proposal was approved on 28th August, 2007. The proposal must have been given earlier than that date. The cheques in question were issued in July, 2008. Since the petitioner had ceased to be a Director of the company more than four years before that, it is

obvious that he was acting only as a consultant and not as a Director of the company at that time. Merely from submitting the compromise on behalf of the company alongwith the Managing Director and Commercial Manager of the company, the petitioner did not become person in-charge of and responsible to the company for conduct and its business.

24. Since the petitioner was not a Director, Secretary, Manager or any other person falling under any of the categories a to g listed in Section 5 of Companies Act, at the time of commission of the offence, he could not have been a person incharge of the business of the company, within the meaning of Section 141(1) of Negotiable Instruments Act.

25. Since there is no allegation that cheques were issued and dishonoured with the consent or connivance of the petitioner or that issue and dishonour of the cheques was otherwise attributable to any neglect on his part, the case of the complainant as regards the petitioner is not covered even under sub-section (2) of Section 141 of Negotiable Instruments Act. Since a Consultant is not even an officer of the company, he having been engaged only on contractual basis, it is doubtful whether he would be covered even under sub-section 2 of Section 141 of Negotiable Instruments Act. I, however, need not go into this aspect as there is no allegation in the complaint imputing the requisite consent, connivance or neglect to the petitioner.

26. For the reasons given above, I am of the considered view that, no offence under Section 141 of Negotiable Instruments Act read with Section 138 thereof is made out against the petitioner on the basis of

the complaints filed by the respondent. The proceedings initiated against the petitioner, therefore, cannot be allowed to continue. The complaints, subject matters of these petitions, to the extent they pertain to the petitioner are hereby quashed. It is made clear that quashing of complaint against the petitioner would not affect prosecution of other accused persons.

(V.K.JAIN)
JUDGE

NOVEMBER 30, 2009
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