

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

+ Crl.M.C.Nos. 1406, 3093, 3094, 3095, 3096, 3097, 3098, 3099, 3100, 3101, 3102, 3103, 3104, 3105, 3106, 3107, 3108, 3109, 3110, 3111, 3112, 3113, 3114, 3115, 3116 & 3117 of 2009

% Reserved on : 26th November, 2009
Date of Decision: 10th December, 2009

NITIN KUMAR & OTHERS Petitioners
! Through: Mr. Mohit Mudgil, Adv.

Versus
NCT OF DELHI THROUGH ITS STANDING COUNSEL &
ANR. Respondents

Through: Mr. O.P. Saxena, APP.
Mr. Jayant Sud, Adv. for R-2.

* **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. These are petitions under Section 482 of the Code of Criminal Procedure seeking quashing of the complaint case filed by respondent No.2 against the petitioner under Section 138 of Negotiable Instruments Act. The complaints were filed against a company Tip Info Centre Pvt. Ltd. & Others, including the petitioner. It has been alleged in the petitions that the

petitioner is neither a Signatory to the cheque in question nor had he handed over to the complainant. It has been further alleged that the petitioner had resigned as a Director of this company on 10th August, 2007, much prior to the issue of cheque in question.

2. A perusal of the complaint would show that accused No.1 is a private limited company. Accused No.4 Nitin Kumar was alleged to be a Director and share holder of accused No.1. It has been further alleged in the complaint that the accused, towards payment of legally recoverable debt, issued the cheque in question to the complainant, which, when presented, was dishonored. It has been generally alleged in the complaint that “the accused has been actively involved in the affairs of accused No.1 and is a necessary party to the offence.”

3. It is an admitted case that cheque in question has not been signed by the petitioner. It is also an admitted case that the petitioner is not the Managing Director of accused No.1 Tip Info Centre Pvt. Ltd. Though the petitioner claims that he had resigned as a Director of the company with effect from 10th August, 2007 and his resignation was also accepted by the Board of Director in its meeting held on the very same day, certified copy of form 32 has not been filed by the petitioner. Therefore, for the purpose of the present petition I proceed on the assumption that the petitioner was a Director of accused No.1

Tip Info Centre Pvt. Ltd on the date offence under Section 138 of Negotiable Instruments Act was committed by accused No.1.

4. In the present case, there is no specific averment that the petitioner was in-charge of and responsible to the company for conduct of the business of the company. There is no such factual averment in the complaint as would indicate that the petitioner was in-charge and responsible to the company for conduct of its business. There is no allegation in the complaint that the petitioner was in overall control of the day-to-day business of the company nor are there any such factual averment from which such a control can be inferred. There is no such particular in the complaint, from which it may be inferred that he was involved in day to day affairs of the company. There is no allegation in the complaint that he was party to any decision to issue cheque in question or to get it dishonoured. Thus, the complaint contains no such particulars as would enable the Court to draw an inference that he was a person in-charge of and responsible to the company for conduct of its business. Admittedly, the cheque in question was not signed by the petitioner. Admittedly, he was not the Managing Director or Joint Managing Director of the company at the time when offence under section 138 of the Negotiable Instruments Act was committed by the company. There is no averment in the complaint that the offence has been committed with the consent

or connivance of the petitioner or is attributable to any negligence on his part. Therefore, the case cannot be brought within the purview of sub-section 2 of section 142 of the Negotiable Instruments Act.

5. The learned counsel for respondent No. 2 has referred to 'N. Rangachari v. BSNL'. In the case before the Hon'ble Supreme Court, it was alleged in the complaint that accused No.2 and 3 were Directors of the company and were Incharge of and responsible to the company for conduct of its business. In that case, the Hon'ble Supreme Court, noticing the above referred allegations in the complaint, refused to interfere with the decision of the High Court in declining to exercise its jurisdiction under Section 482 of the Code of Criminal Procedure for quashing the complaint. However, in the present case, there is no specific allegation that the petitioner was present Incharge of and responsible to accused No.1 Tip Info Centre Pvt. Ltd for conduct of its business at the time when the offence under Section 138 of Negotiable Instruments Act was committed by the company. This judgment, therefore, is of no help to the respondent.

6. The learned counsel for respondent No. 2 has next referred to a decision of this court in Sameer Karnani v. State 2009(1) LRC 327(Delhi). In that case, it was alleged in para 5 of the complaint that the petitioner was a Director of accused No.1

company and was responsible for its day to day business and, therefore, liable for the acts committed for and on behalf of the company. The learned Single Judge of this Court noticing that the complaint did not assign any role to the petitioner, indicate that that he was engaged in the day to day affairs and management of the company, allowed the petition filed by him and quashed the proceedings initiated against him. This judgment is of no help to the respondent.

7. The learned counsel for respondent No.2 has also referred to the decision of this court in Crl. M.C. No.2700/2007 decided on 22nd September, 2008. In that case, as regards accused Nos. 2-4, partners of accused No.1, it was specifically alleged that they were responsible to run the business and day-to-day financial and administrative activities of accused No.1. In these circumstances, it was held that prima facie there was substantial compliance with the provisions of section 141 of the Negotiable Instruments Act. However, in the present case, there is no specific averment that the petitioner was running the day-to-day business of accused No.1 and was responsible for its financial and administrative activities. A general allegation that the accused has been actively involved in the affairs of accused No.1, to my mind does not constitute necessary ingredient envisaged under section 141 of the Negotiable Instruments Act.

8. In *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and another* (2005) 8 SCC 89 the Hon'ble Supreme Court, inter alia, held as under:-

"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 the question posed in sub-para

(b) has to be in the 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 the 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."

9. In *Sabitha Ramamurthy and Another vs. R.B.S. Channabasavaradhya* (2006) 10 SCC 581, it was alleged in the complaint that the accused being the company and all the Directors are responsible for the clearance of liability under section 141 of the Negotiable Instruments Act. Holding that the statutory requirement contained in section 141 of Negotiable

Instruments Act had not been complied with, the Hon'ble Supreme Court observed that though it may not be necessary for the complaint to specifically reproduce the wording of the section, what is required is a clear statement of fact so as to enable the court to arrive at a prima facie opinion that the accused are vicariously held liable. It was held that before a person can be vicariously liable strict compliance with the statutory requirement would be insisted in a case where the court is required to issue summons which would put the accused to some sort of harassment. It was held that in terms of section 200 of Cr.PC the complainant is bound to make statement on oath as to how the offence has been committed and how the accused persons are responsible therefor. It was observed that in the event ultimately the prosecution is found to be frivolous or otherwise malafide the court may direct registration of the case against the complainant for malafide prosecution of the accused.

10. In *N.K. Wahi vs. Sekhar Singh & others* (2007) 9 SCC 481, the Hon'ble Supreme Court, inter alia, held as under:-

“5. 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 incharge 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.”

In the case before the Hon’ble Supreme Court it was alleged in the complaint that accused Nos. 2 to 12 were the Directors/persons responsible for carrying out the business of the company and the liability of the accused persons was joint and several. The order of the High Court, quashing the complaint on such allegations was upheld by the Hon’ble Supreme Court.

11. In K.K. Ahuja vs. V.K. Vora and Anr., 2009 (3) JCC (NI) 194, 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 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”.

The Hon’ble Supreme Court after considering its earlier decisions on the subject, 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.

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.”

12. 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."

13. 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.

14. It was contended by the learned counsel for the respondent that since M/s Tip Info Centre Pvt. Ltd. Is a private limited company with only two Directors and the meeting of the Board of Directors cannot be held without at least two Directors attending it, this case ought to be treated differently from the case of a Director in a public limited company. In my view, since section 141 of Negotiable Instruments Act does not make any distinction between Director of a private limited company and Director of a public limited company, it would not be permissible

for the court to draw such a distinction. It is not necessary that if there are two Directors in a private limited company both of them would, in every case, necessarily be the persons in-charge and responsible to the company for conduct of its business. It is quite possible that the affairs of a private limited company having only two Directors, is managed only by one of them who acts as its Managing Director and the other person despite attending the meeting of the Board of Directors is not involved in day-to-day affairs and business of the company. To take an example, a private limited company may have only two Directors one of them being the husband and the other being the wife or one of being the father and the other being the daughter. The company may be managed only by the male Director and the female despite being one of the two Directors of the company may not be involved in its day-to-day affairs, she having been made a Director only on account of her relationship with the male Director who controls the affairs of the company. Therefore, it cannot be said, as a general rule, that if there are only two Directors in a private limited company both of them would be persons in-charge of and responsible to the company for conduct of the business of the company. As emphasized by the Hon'ble Supreme Court a penal statute attracting vicarious criminal liability must be construed strictly and there must be strict compliance with the statutory provisions before such a

liability can be fastened. If merely attending Board Meetings attracts criminal liability under Section 141 of Negotiable Instruments Act, a large number of Directors even though not involved in the day to day management of the company, and not having any control on its affairs, may have to face harassment of a criminal trial. This definitely could not have been the intention behind enactment of Section 141 of Negotiable Instruments Act.

15. In *Smt.Bina Sharma vs. H.D.F.C.Bank Ltd.* 2009 (4) JCC(NI) 257, the petitioner was a Director in a private limited Company M/s Vardan Agrotech Pvt. Ltd. The allegation against her was that being Director of the company she was responsible to the company for conduct of its business, and that being in-charge of day-to-day affairs of the company, she along with other Directors was jointly and severally liable for the acts and the liabilities of the company. A learned single Judge of this Court rejected the contention of the respondent that there is a distinction between a public limited company and a private limited company, so far as Directors are concerned. It was noted that in the matters of criminal liability under section 141 of Negotiable Instruments Act, no distinction can be made between the Director of a public limited company and the Director of a private limited company and in case such a

distinction is made that would be reading something in the statute which does not exist.

16. For the reasons given in the preceding paragraphs, I hold that no offence under section 138 of Negotiable Instruments Act is made out against the petitioner from the averments made in the complaint. The petitions are, therefore, allowed to the extent that the order whereby the petitioner was summoned for the commission of the offence under section 138 of the Negotiable Instruments Act read with section 141 thereof, is hereby set aside. The learned Magistrate shall, however, proceed with the complaint, to the extent it relates to other accused persons.

(V.K.JAIN)
JUDGE

DECEMBER 10, 2009
AG/RS