

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

+ **Crl.M.C.1317/2009**

Date of Order: 20th January 2010

M.L. GUPTA & ORS. Petitioners
! Through: Mr. R.K. Bharti & Mr. Mahipal
Khangwal, Advs.

versus

\$ M/S DCM FINANCIAL SERVICES LTD. Respondent
^ Through: Mr. Sachin Chopra, Adv.

+ **Crl.M.C.1318/2009**

M.L. GUPTA & ORS. Petitioners
! Through: Mr. R.K. Bharti & Mr. Mahipal
Khangwal, Advs.

versus

\$ M/S DCM FINANCIAL SERVICES LTD. Respondent
^ Through: Mr. Sachin Chopra, Adv.

+ **Crl.M.C.1319/2009**

M.L. GUPTA & ORS. Petitioners
! Through: Mr. R.K. Bharti & Mr. Mahipal
Khangwal, Advs.

versus

\$ M/S DCM FINANCIAL SERVICES LTD. Respondent
^ Through: Mr. Sachin Chopra, Adv.

+ **Crl.M.C.1320/2009**

M.L. GUPTA & ORS. Petitioners

! Through: Mr. R.K. Bharti & Mr. Mahipal
Khangwal, Adv.

versus

\$ M/S DCM FINANCIAL SERVICES LTD. Respondent
^ Through: Mr. Sachin Chopra, Adv.

+ **Crl.M.C.1321/2009**

M.L. GUPTA & ORS. Petitioners
! Through: Mr. R.K. Bharti & Mr. Mahipal
Khangwal, Adv.

versus

\$ M/S DCM FINANCIAL SERVICES LTD. Respondent
^ Through: Mr. Sachin Chopra, Adv.

+ **Crl.M.C.1322/2009**

M.L. GUPTA & ORS. Petitioners
! Through: Mr. R.K. Bharti & Mr. Mahipal
Khangwal, Adv.

versus

\$ M/S DCM FINANCIAL SERVICES LTD. Respondent
^ Through: Mr. Sachin Chopra, Adv.

* **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. (Oral)

1. By this common judgment, I shall dispose of all the six petitions referred above. Criminal complaints under Section 138 of Negotiable Instrument Act were filed by the respondent against M/s.Sakura Seimitsu India Limited and seven others including the petitioners M.L. Gupta, Rajiv Gupta and Sanjeev Gupta. The allegation against the petitioners was that they were the Chairman, Managing Director and Director respectively of the company and were the persons in charge of and responsible to the company for conduct of its business at the time of commission of the offence.

2. The petitioners were summoned by the learned Metropolitan Magistrate under Section 138 of the Negotiable Instrument Act r/w Section 141 thereof. The petitioners are seeking quashing of the complaint on the ground that they had resigned from the Directorship of the company much prior to the date(s) on which cheques in question were presented to the bank for encashment. The petitioners have placed on record certified copies of Form 32 issued by Registrar of Companies, which would show that the petitioner M.L. Gupta had resigned from

Directorship on 4th September, 1997, whereas the petitioner Rajiv Gupta resigned on 5th June, 1998.

3. Sanjeev Gupta, who is petitioner in Criminal M.C. No.1317/2009, Criminal M.C. No.1318/2009, Criminal M.C. No.1320/2009 and Criminal M.C. No.1321/2009, has not filed certified copy of Form 32 though he has placed its photocopy on record. He, however, has placed on record copies of the judgments of this Court in Crl.M.(M).242 of 1999 titled as "***Sanjeev Gupta Vs. The State of Delhi & Another***", decided by Hon'ble Mr. Justice Dalveer Bhandari, on 11th of July, 2000 and Crl.M.C.1056/2003 to 1058/2003, titled as "***Sanjeev Gupta Vs. The State of Delhi & Another***", decided by Hon'ble Mr. Justice A.K. Sikri on 23rd of August, 2006. The case of the petitioner Sanjeev Gupta is that he had resigned as a Director of the Company on 25th of September, 1995. This factual position was accepted by this Court in Crl.M.(M).242/1999, as is evident from paragraph 2 of the order, though the order does not indicate the name of the Company from directorship of which he resigned with effect from 25th of September, 1995. However, a perusal of the order of this Court in Crl.M.C.1056/2003 to 1058/2003 dated 23.8.2006, would show that DCM Financial Services Limited, which is the respondent in the present

Crl.M.C.Nos.1317-1322/09

petition, was respondent No.2 in those cases as well. It further shows that the petitioner Sanjeev Gupta claimed in those petitions that he was a Director of M/s.Sakur Seimitsu India Limited up to 25th September, 1995 when he left India for overseas assignments. He placed on record copy of Form No.32 issued by the Registrar of Companies. Accepting his claim, this Court quashed the complaints filed against him under Sections 138 of the Negotiable Instruments Act. Thus, in another proceedings between Sanjeev Gupta and the respondent DCM Financial Services Limited, this Court accepted his claim of having resigned from the Directorship of M/s.Sakura Seimitsu India Limited with effect from 25th of September, 1995.

4. There are five essential ingredients of offence under Section 138 of the Negotiable Instruments Act, (i) drawing of the cheque, (ii) presentation of the cheque to the bank of the payee, (iii) return of the cheque unpaid by the drawee bank, (iv) giving of notice 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.

5. The learned counsel for the respondent DCM Financial Services Limited fairly concedes that the cheques subject matter of all these complaints were presented to the Bank much after

the petitioners M.L.Gupta, Rajiv Gupta and Sanjeev Gupta claim to have resigned from the directorship of the Company M/s.Sakur Seimitsu India Limited. Since they had already resigned from the directorship of Company before even before these cheques were presented for encashment, there is no way they could have ensured that these cheques were encashed when presented to the Bank of the Company. They were not the Directors of the Company when demand notice under Section 138(b) of the Act was issued by the complainant/respondent. Therefore, they were not in a position to comply with the demand made in the notice by making payment of the amount of the cheques as payment was to be made by the Company and not by them in their personal capacity.

6. The learned counsel for the petitioner has relied to the decision of the Hon'ble Supreme Court in "***DCM Financial Services Limited Vs. J.N.Sareen & Another***", 2008 (3) RCR (Criminal) 152. In the case before the Hon'ble Supreme Court post-dated cheques were issued by the Company known as M/s. International Agro Allied Products Limited. The first respondent before the Hon'ble Supreme Court resigned from the Directorship of the Company on 25th of May, 1996. One of the post-dated cheques, which was issued in April, 1995, i.e., before

he resigned from the Directorship of the Company, was dated 28.1.1998. The cheque when presented in the Bank for encashment was dishonoured. The payment to the complainant was not made despite issue of Notice of Demand by it. The complaint against the first respondent before the Hon'ble Supreme Court was based on the allegation that he was the person in charge and responsible to the Company at the time when the offence was committed. It was also alleged that the offence had been committed by the Company with the consent and connivance of accused Nos.2 to 10, which included respondent No.1 before the Hon'ble Supreme Court. He filed an application seeking discharge, relying upon Form No.32 issued by Registrar of Companies in support of his contention that he had resigned as a Director of the Company much prior to dishonour of the cheque in question. The learned Additional Sessions Judge took note of Form No.32 and also noted that the complainant had not filed any affidavit to the effect that it had verified from the Registrar of Companies and Form No.32 filed by the accused was not genuine. A Criminal Revision Petition filed against the order of the learned Additional Sessions Judge was dismissed by the High Court. Relying upon its earlier decisions in the case of "***K.Srikanth Singh Vs. M/s.North East***

Securities Limited & Another", 2007(3) RCR (Criminal) 934 : 207 (4) RAJ 226 : JT 2007 (9) SC 449, the Hon'ble Supreme Court observed as under:

"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."

7. In the case before the Hon'ble Supreme Court, the respondent No.1 had resigned from the Directorship of the Company under intimation to the complainant and, in these circumstances, the Hon'ble Supreme Court was of the view that a person who had resigned with the knowledge of the complainant in the year 1996, could not be a person in charge of the Company in the year 1999 when the cheque was dishonoured as he had no say in the matter that the cheque is honoured and he could not have asked the Company to pay the amount. In my view even if resignation was not given by the petitioners under intimation to the complainant, that would not make any difference, once the Court relying upon certified copy

of Form 32 accepts their plea that they were not directors of the Company, on the date the offence under Section 138 of Negotiable Instruments Act was committed. They having resigned from the directorship much prior to even presentation of the cheque for encashment, they cannot be vicariously liable for the offence committed by the Company, unless it is alleged and shown that even after resigning from directorship, they continued to control the affairs of the company and therefore continued to be persons in charge of and responsible to the company for the conduct of its business.

8. This issue was considered at length by this Court in “***Shri Raj Chawla Vs. Securities and Exchange Board of India(SEBI) & Another***”, in Crl.M.C.3937/09 decided on 12th of January, 2010. Referring to an earlier decision of this Court in “***Dr.(Mrs.) Sarla Kumar vs. Srei International Finance Ltd.***”, 2007 (2) NIJ 208 (Del) and the recent decision of the Hon’ble Supreme Court in “***K.K. Ahuja vs. V.K. Vora and Anr.***”, 2009 (3) JCC (NI) 194, this court, inter alia held as under:

“Since the petitioner was not a Director of the company on the date Regulations were framed by SEBI, he cannot be held vicariously liable for violation of those Regulations and the directions, issued to SEBI by M/s Fair Deal Forests Limited. This is not the case of the respondent that the petitioner was Manager,

Secretary or a person in accordance with whose directions or instructions, the Board of Directors of the company was accustomed to act. He is not stated to be one of the persons falling in any of the categories (a) to (g) mentioned in Section 5 of Companies Act at the time offence under SEBI Act was committed by the company. Therefore, he could not have been a person in charge of business of the company on the date the offence was committed.

There is no allegation that the regulations, framed by SEBI, were violated or the direction, issued by it, was ignored by the company with the consent or connivance of the petitioner or it was otherwise attributable to any act on the part of the petitioner. Therefore, he has not covered even by sub Section (2) of Section 27 of SEBI Act."

9. The plea taken by the complainant that the information contained in Form No.32 was a defence available to the accused which could not be considered at the initial stage was dealt with by this Court as under:

"Though as a general proposition of law, the defence available to the accused is not to be examined at this stage, there can be no valid objection to considering an authentic Public Document such as certified copy of Form-32, issued by Registrar of Companies, in a petition under Section 482 of the Code of Criminal Procedure, when the genuineness of the documents is not disputed and the matter can be finally disposed of on the basis of such a documents.

A criminal trial is a serious matter, having grave implications for an accused, who not

only has to engage a lawyer and incur substantial expenditure on defending him, but, has also to undergo the ordeal of appearing in the Court on every date of hearing, sacrificing all his engagements fixed for that day. If he is in business or profession, he has to do it at the cost of affecting his business or profession, as the case may be. If he is in service, he has to take leave on every date of hearing. Besides inconvenience and expenditure involved, a person facing criminal trial undergoes constant anxiety and mental agony, as the sword of possible conviction keeps hanging on his head throughout the trial. Therefore, when there is a reasonably certainty that the trial is not going to result in conviction, it would be neither fair nor reasonable to allow it to proceed against a person such as the petitioner in this case.”

10. In taking a view that certified copy of Form 32 being a public document, authenticity of which had not been disputed, it could be considered in proceedings under Section 482 of the Code of Criminal Procedure, this Court also relied upon the decision of the Hon’ble Supreme Court in “**All Carogo Movers (I) Pvt. Ltd. Vs. Dhanesh Badarmal Jain & Anr.**” (2007) 12 SCALE 39, “**V.Y. Jose & Anr. Vs. State of Gujarat & Anr.**” 2009 I AD (Cr.) (S.C.) 567, and “**Minakshi Bala v. Sudhir Kumar**”, (1994) 4 SCC 142. I must note here that the authenticity of the certified copies of Form 32 filed by the petitioners has not been disputed by the respondent. This is not the case of the respondent that it had got the record of the

Registrar of Companies verified and that these Forms were not issued by his office.

11. In the present cases, the petitioners had resigned from the Directorship of the Company much before cheques in question were presented for encashment. Therefore, they were not in a position to compel the Company to ensure that the cheques when presented to its Bank were honoured. Similarly, they were not in a position to compel the Company to comply with the Notice of Demand by making payment of the amount of the cheques. This is not the case of the respondent that even after resigning as Directors of the Company, any of these petitioners occupied any such position on account of which they continued to be person in charge of and responsible to the Company for conduct of its business. Vicarious liability to the petitioners has been imputed solely on account of their being Directors of the Company. This is also not the case of the complainant that the cheques were dishonoured and/or the Notice of Demand was not complied with the consent or connivance of the petitioner or dishonour of cheques or non-compliance of notice was otherwise attributable to any negligence on the part of any of them. This is also not the case of the complainant that even after reassigning as Directors of the Company these petitioners continue to

control the affairs of the Company and were the persons who could have given instructions to the Board of Directors of the Company to ensure that the cheques when presented for encashment were honoured or that Notice of Demand sent to the Company was duly complied with by making payments of the amount of the cheques. Therefore, the petitioners are not covered even under sub-Section 2 of Section 141 of Negotiable Instruments Act.

12. For the reasons given in the preceding paragraphs, the criminal complaints No.4140/1, 4141/1, 2338/1, 4139/1, 4145/1 and 4138/1 filed against the petitioners and pending in the Court of Shri Naveen Kumar Kashyap, MM, Dwarka Court, Delhi, cannot be allowed to continue and are hereby quashed to the extent they pertain to the petitioners. The trial will, however, continue to proceed against the other accused persons. The quashing against petitioner Sanjeev Kumar Gupta however is subject to the condition that a certified copy of the Form No.32 will be filed by him before the Trial Court within six weeks, failing which the trial would continue against him.

**V.K. JAIN
(JUDGE)**

**JANUARY 20, 2010
RS/**