

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

Judgment reserved on: March 03, 2011
Judgment delivered on: March 29, 2011

+ **CRL.M.C. 410/2011 & CRL.M.A.1622/2011**

SATYAPAL TALWAR

....PETITIONER

Through: Mr.Sunil K.Mittal, Advocate with Mr. Mohit Chaudhary, Ms.Rashi Bansal, Ms. Niketa, Advocates.

Versus

STATE (GOVT. OF NCT OF DELHI) & ORS...RESPONDENTS

Through: Ms.Santosh Kohli, APP for R-1.
Mr.R.K.Handoo, Advocate for R-2.
Mr. Vinod Kumar, Advocate for R-3.

WITH

CRL.M.C. 26/2011 & CRL.M.A.118/2011

**WING COMMANDER (RETD.)
OM DUTT SHARMA**

.....PETITIONER

Through: Mr.Sunil K.Mittal, Advocate with Mr. Mohit Chaudhary, Ms.Rashi Bansal, Ms. Niketa, Advocates.

Versus

STATE (GOVT. OF NCT OF DELHI) & ORS...RESPONDENTS

Through: Ms.Santosh Kohli, APP for R-1.
Mr.R.K.Handoo, Advocate for R-2.
Mr. Vinod Kumar, Advocate for R-3.

WITH

CRL.M.C. 3829/2010 & CRL.M.A.18383/2010

VIKRAM MITTAL

....PETITIONER

Through: Mr.Sunil K.Mittal, Advocate with Mr.
Mohit Chaudhary, Ms.Rashi Bansal, Ms.
Niketa, Advocates.

Versus

STATE (GOVT. OF NCT OF DELHI) & ORS...RESPONDENTS

Through: Ms.Santosh Kohli, APP for R-1.
Mr.R.K.Handoo, Advocate for R-2.
Mr. Vinod Kumar, Advocate for R-3.

WITH

CRL.M.C. 55/2011 & CRL.M.A.236/2011

JAGDISH KUMAR GUPTA

....PETITIONER

Through: Mr.Sunil K.Mittal, Advocate with Mr.
Mohit Chaudhary, Ms.Rashi Bansal, Ms.
Niketa, Advocates.

Versus

STATE (GOVT. OF NCT OF DELHI) & ORS...RESPONDENTS

Through: Ms.Santosh Kohli, APP for R-1.
Mr.R.K.Handoo, Advocate for R-2.
Mr. Vinod Kumar, Advocate for R-3.

AND

CRL.M.C. 411/2011 & CRL.M.A.1624/2011

ASHOK MITTAL

....PETITIONER

Through: Mr.Sunil K.Mittal, Advocate with Mr.
Mohit Chaudhary, Ms.Rashi Bansal, Ms.
Niketa, Advocates.

Versus

STATE (GOVT. OF NCT OF DELHI) & ORS...RESPONDENTS

Through: Ms.Santosh Kohli, APP for R-1.
Mr.R.K.Handoo, Advocate for R-2.
Mr. Vinod Kumar, Advocate for R-3.

CORAM:
HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.

1. Ashok Kumar Mittal, Vikram Mittal, Jagdish Kumar Gupta, Om Dutt Sharma and Satyapal Talwar have filed above referred separate petitions under Section 482 Cr.P.C. praying for quashing of order dated 05.05.2010 of the learned Metropolitan Magistrate in complaint case No.16/1/2010 under Section 138 N.I. Act titled "Acme Resources Ltd. Vs. Hotel Indraprastha & Others" whereby the petitioners have been summoned to undergo trial for the offence under Section 138 N.I. Act read with Section 141 N.I. Act.

2. Briefly stated, facts relevant for the disposal of these petitions are that respondent No.2 M/s. Acme Resources filed above referred complaint No.16/1/2010 under Section 138 N.I. Act read with Section 141 Negotiable Instruments Act (N.I. Act) against M/s. Hotel Indraprastha, a unit of Hotel Queen Road Pvt. Ltd., Ram Purshotam Mittal, its earlier Chairman and the petitioners who are the Chairman and Directors of M/s. Hotel Indraprastha.

3. It is alleged in the complaint that in May, 2008, respondent No.3 Ram Purshotam Mittal, the then Chairman of Hotel Indraprastha (a unit of Hotel Queen Road Pvt. Ltd.) approached respondent No.2 M/s. Acme Resources Pvt. Ltd. for a loan of ₹5 crores to be invested in working capital of the hotel. Respondent No.2/complainant acceded to the request and advanced ₹5 crores at an interest @ 33.60% per annum through two cheques for ₹ 2.50 crores each both dated 06.05.2008 and drawn on HDFC Bank Ltd., K.G. Marg, Connaught Place. Those cheques were duly encashed.

4. It is also claimed in the complaint that respondent No.2 Ram Purshotam Mittal assured that the loan amount would be repaid within one year along with interest, and he handed over post-dated cheque towards the interest amount of ₹32,48,280/- as also a post-dated cheque for ₹5 crores against the principal amount. All these cheques were drawn on American Express Bank Ltd., Hemilton House, A-Block, New Delhi.

5. It was further claimed that the complainant deposited those cheques for encashment, but the same were returned unpaid. The complainant/respondent No.2 immediately brought this fact to the notice of accused persons and they assured the complainant that cheques on representation would be honoured. On this assurance, the complainant/respondent No.2 re-deposited the cheques for encashment with its banker, but the cheques were returned

dishonoured vide memos dated 21.10.2009 for the reasons “Funds insufficient” and “Stopped payment” respectively. Respondent No.2/complainant then served the petitioners and others with notice of demand under Section 138 N.I. Act, but they failed to make the payment of cheque amounts within requisite period of 15 days from the date of receipt of notice. This led to filing of complaint under Section 138 N.I. Act against the company, the petitioners and others.

6. The allegations to fix the vicarious liability of the petitioners with the aid of Section 141 N.I. Act are in para 7 and 8 of the complaint which are reproduced thus:

“7. That the Complainant immediately informed accused persons but, no heed was given towards the same. The accused No. 3 is the Chairman and the accused No. 4 to 7 are the Directors of the accused No. 1.

8. That the accused No. 2 to 7 are vicariously liable for the commission of the offence on behalf of the company as such the accused No. 2 issued the said cheques and the accused No. 3 to 7 are incharge and responsible to the accused No. 1 for the conduct of its business. The accused persons are also associated with the management of day to day affairs of the company. “

7. On consideration of the allegations in the complaint and the affidavit evidence of the complainant reiterating the allegations, learned Metropolitan Magistrate passed the impugned summoning order dated 05.05.2010.

8. Learned counsel for the petitioners submitted that as per the allegation in the complaint, the offence under Section 138 N.I. Act is

claimed to have been committed by the company i.e. Hotel Indraprastha, a unit of Hotel Queen Road Pvt. Ltd. and the petitioners are roped in on the allegation that they were the directors of the company at the time of commission of offence. Learned counsel contended that under Section 141 N.I. Act, a person can be held vicariously liable for the offence under Section 138 N.I. Act committed by the company provided at the time of commission of offence, he was incharge of and was responsible to the company for the conduct of business of the company and every person connected with the company shall not file within the ambit of Section 141 N.I. Act. Learned counsel argued that in the instant case, but for a vague allegation that the petitioners were the directors of the accused company and incharge of day to day affairs of the company, there is no specific allegation which could, prima facie, show as to how and in what manner the petitioners were incharge and responsible for the day to day affairs of the company and what were their acts and functions which were being discharged by them so as to bring them within the ambit of Section 141 N.I. Act. Learned counsel further submitted that there is no specific averment in this regard even in the affidavit evidence furnished by the petitioner during inquiry by the learned M.M. Thus, he has vehemently contended that in absence of any specific allegation in this regard, the order of summoning is not sustainable under law.

9. Learned counsel for the respondent, on the contrary, has submitted that the complainant has made specific allegation that the petitioner Ashok Kumar Mittal at the relevant time was Chairman of accused company and the other petitioners were directors of the accused company and they all were Incharge of day-to-day affairs and conduct of the business of the company, which fact is also supported by the affidavit evidence submitted by the respondent in the court. Thus, the initial onus for making a prima facie case against the petitioners stand discharged by the respondent. Learned counsel contended that now the onus is on the petitioners to adduce the evidence during the course of trial to show that they were not Incharge and responsible for the conduct of business of the company.

10. I have considered the rival contentions and gone through the material on record.

11. The law relating to vicarious liability of a director under Section 141 of N.I. Act for the offence under Section 138 N.I. Act committed by a company is well settled. The question came up for consideration before a three Judge Bench of Supreme Court in **SMS Pharmaceuticals Ltd. Vs. Neeta Bhalla, (2005) 8 SCC 89** wherein upon consideration of a number of decisions of the Apex Court, Supreme Court opined thus:

“10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the section are “every person”. These are general words and take every

person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words:

“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, etc.”

What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a director or manager or secretary was enough to cast criminal liability, the section would have said so. Instead of “every person” the section would have said “every director, manager or secretary in a company is liable”..., etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.”

12. In the matter of **N.K. Wahi Vs. Shekhar Singh, AIR 2007 SC 1454**, Hon’ble Supreme Court while dealing with the vicarious liability under Section 141 N.I. Act observed thus:

“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.”

13. From the above judgments, it is apparent that in order to rope in a director of a company for the offence under Section 138 N.I. Act with the aid of Section 141 of N.I. Act, the complainant is not only required to make a clear allegation that the person concerned was the director of the company, but he is also required to make specific allegation of the facts indicating as to how and in what manner the said director was in-charge and responsible for conduct of the business of the company.

14. As regards the petitioners Om Dutt Sharma, Jagdish Kumar Gupta, Vikram Mittal and Satyapal Talwar, on reading of the complaint filed by the respondent No. 2, it would be seen that they are not alleged to be signatories of the cheques in question. In order to rope in the above four petitioners vicariously for the offence under Section 138 N.I. Act committed by the company, in the name of allegations respondent has simply reproduced the language of Section 141 N.I. Act in the complaint. There is no allegation in the complaint to show as to how and in what manner the petitioner directors were in-charge and responsible for the day to day affairs and business of the company. In absence of specific allegation in this regard, in my considered view, the requirement of Section 141 N.I. Act to hold the petitioners vicariously

liable for the offence committed by the company is not fulfilled. Even in the affidavit evidence given by the respondent before the Magistrate, there is no mention as to how and in what manner the petitioner directors were in-charge of or were responsible to the company for its day to day affairs and conduct of business. Thus, I am of the considered view that the impugned order of learned M.M. dated 05.05.2010 summoning the petitioners Vikram Mittal, Jagdish Kumar Gupta, Om Dutt Sharma and Satyapal Talwar for the offence under Section 138 N.I.Act committed by the company with the aid of Section 141 N.I.Act is not sustainable in law as there is neither a specific allegation nor prima facie evidence on record to show that the petitioners were Incharge and responsible for the conduct of the business and the day-to-day affairs of Hotel Indraprastha.

15. The case of the petitioner Ashok Kumar Mittal, however, stands on a different footing. On perusal of the complaint under Section 138 N.I.Act filed by respondent No.2, it transpires that as regards the petitioner Ashok Mittal, the complainant has specifically alleged that he is the Chairman of the accused company. This imply that petitioner Ashok Mittal was the Executive Head of the accused company M/s. Hotel Indraprastha and in that capacity, he was prima facie Incharge of running the business of the company and was responsible for day-to-day affairs of the company. Thus, his case squarely falls within the ambit of Section 141 N.I.Act to make him vicariously liable for the offence under Section 138 N.I.Act committed by the company.

16. Learned counsel for the petitioners further submitted that even if it is assumed for the sake of arguments that petitioner Ashok Mittal was Chairman of the accused company when the demand notice under Section 138 N.I. Act was served by the complainant, then also he cannot be held vicariously liable for the offence under Section 138 N.I. Act committed by the company for the reason that he was not the incharge of the business of the company or the management of its day to day affairs at the time when the loan was taken by the company and post-dated cheques bearing the date 06.05.2009 were issued on behalf of the company under the signatures of respondent No.3 Ram Purshotam Mittal for the discharge of the aforesaid loan. In support of this contention, he has referred to Section 138 N.I. Act and submitted that Section 138 defines the offence as under:

“Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for [“a term which may extend to two year”], or with fine which may extend to twice the amount of the cheque, or with both:”

Learned counsel contended that from the reading of above provision, it is obvious that the offence under Section 138 N.I. Act is committed only when three basic ingredients of the offence exist viz. (a) the cheque is

drawn by a person (b) the said cheque is given as payment to the complainant in discharge of any debt or other liability (c) the said cheque is returned unpaid/dishonoured. It is contended that it is not alleged in the complaint that petitioner Ashok Mittal was responsible for the conduct of business of the company or the management of its day to day affairs when the cheques were issued by respondent No.3, the then Chairman of the company and the cheque was dishonoured. Therefore, the petitioner Ashok Mittal who subsequently became the Chairman of the company cannot be held vicariously liable for the offence committed by the company at the time when he was not concerned with the business/affairs of the company.

17. Above contention of learned counsel for the petitioners is based upon incorrect reading of Section 138 N.I. Act. In order to correctly appreciate the import of Section 138 N.I. Act, it is necessary to have a look on the proviso to Section 138 N.I. Act, which reads thus:

“Provided that nothing contained in this section shall apply unless-

(a) The cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) The payee or the holder induce course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer, of the cheque, ["within thirty days"] of the receipt of information by him from the bank regarding the return of the cheques as unpaid, and

(c) The drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to

the holder in due course of the cheque, within fifteen days of the receipt of the said notice.”

18. On reading of the above proviso to Section 138 N.I. Act, it is apparent that the prosecution for an offence under Section 138 N.I. Act cannot be initiated by the payee or holder in due course of the cheque unless after the dishonour of the cheque, he serves the drawer of the cheque with a notice of demand of the cheque amount within 30 days of the receipt of information regarding dishonour of the cheque and the drawer of the cheque fails to make arrangement for payment of the cheque amount within 15 days of the receipt of demand notice. From this, it is obvious that to constitute a triable offence under Section 138 N.I. Act, following five ingredients must exist:

“(a) drawing of the cheque, (b) presentation of the cheque to the bank, (c) returning the cheque unpaid by the drawee bank, (d) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount (e) failure of the drawer to make payment within 15 days of the receipt of the notice.”

19. In my considered view, anyone who was incharge of the business of the company or management of day to day affairs of the business at the time of commission of an act constituting any of the five ingredients of the offence under Section 138 N.I. Act, shall be liable to prosecution and punishment under Section 138 N.I. Act unless he falls within the purview of the proviso to Section 141 N.I. Act, which reads thus:

“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.”

20. If the interpretation of Section 138 N.I. Act as propounded by learned counsel for the petitioners is accepted, it would open the possibility of unscrupulous persons associated with the business affairs of the company to commit fraud by ensuring that the person who was responsible for the management of business and day to day affairs of the company from the date of issue of the cheque till its dishonour is replaced by some other person before the service of notice of demand. In such a situation, both the initial manager of the company and subsequent manager of the company would escape liability under Section 138 N.I. Act, the initial manager claiming the benefit of proviso to Section 141 N.I. Act by taking a plea that since at the time of issue of demand notice, he was not concerned with the management and business of the company he, by no means, was in position to ensure the release of the payment of demanded amount, and the subsequent manager replaced the initial one, would take a plea that he was not concerned with the management of the company at the time when the cheque in question was issued and dishonoured. This can never be the intention of the legislature. Thus, I do not find any merit in the contention of learned counsel for the petitioners.

21. In view of the above, I am of the considered view that most important ingredient of Section 138 N.I. Act is proviso (c) to Section 138 N.I. Act, which makes it obligatory on the drawer of the cheque to make payment of the demanded cheque amount within 15 days of the date of the receipt of demand notice. To my mind, any person who is concerned with management of business and day to day affairs of the company at the time of receipt of demand notice is under obligation to honour the demand notice and if he fails to make arrangement for payment of the cheque amount within 15 days of the receipt of demand notice, he shall be liable for prosecution for the offence under Section 138 N.I. Act. It cannot be ignored that in cases of offence under Section 138 N.I. Act committed by the company (a non-juristic person), the company is always a constant and its directors and managers are variables who can be removed or replaced any time. Therefore, there is a possibility that a person who was responsible to the company for its business and management of day to day affairs at the time of taking loan or issue of cheque in discharge of said loan may not be responsible for the business and day to day affairs of the company at the time of dishonour of cheque or the service of demand notice under Section 138 N.I. Act. In such a situation, the person who was actually responsible for the management of the business of the company at the time of service of demand notice cannot escape liability of prosecution under Section 138 N.I. Act unless he is able to bring his case within the purview of proviso to Section 141 N.I. Act.

22. In the instant case, it is alleged that at the relevant time, Ashok Mittal was Chairman of the company. Therefore, he obviously was incharge of business affairs of the company and, as such he was under obligation to ensure payment of the cheque amounts on the receipt of notice of payments. Since he has allegedly failed to do so, he is vicariously liable for the offence under Section 138 N.I. Act and in view of Section 141 of N.I. Act.

23. In view of the discussion above, the impugned order of summoning of learned M.M. dated 05.05.2010 qua the petitioners Vikram Mittal, Jagdish Kumar Gupta, Om Dutt Sharma and Satyapal Talwar is not sustainable under law. As such summoning order qua them is quashed and they petitions being Crl.M.C. Nos. CRL.M.C. 3829/2010, CRL.M.C. 55/2011, CRL.M.C. 26/2011 and CRL.M.C. 410/2011 respectively are allowed accordingly. However, I find no merit in Crl.M.C. No.411/2011 titled Ashok Mittal Vs. State of NCT of Delhi & Ors. It is accordingly dismissed.

24. Petitions are disposed of accordingly.

(AJIT BHARIHOKE)
JUDGE

MARCH 29, 2011

pst