

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

Reserved on: July 07, 2011
Delivered on: August 02, 2011

+ **CRL. M.C. No.1345/2008 & CRL.M.A. No.5049/2008**

B.T. GOKHALE

....PETITIONER

Through: Mr. G.S. Narula, Advocate

Versus

STATE & ANR.

.....RESPONDENTS

Through: Mr. Sunil Sharma, APP for the State
Mr. Hrishikesh Baruah, Advocate with Mr.
Arun Deevan, Advocate for respondent
No.2

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. B.T. Gokhale, the petitioner herein vide this petition under Section 482 Cr.P.C. is seeking setting aside of summoning order dated 20th February, 1998 qua him passed by the learned Metropolitan Magistrate in Complaint Case No.1351/1/2004 titled Fertilizers and Inputs Pvt. Ltd. Vs. Western India Industries Ltd. and Ors for the offence under Section 138 read with 141 N.I. Act.

2. Briefly stated, background facts for the disposal of this petition are that the complainant/respondent No.2 had advanced a sum of ₹90 lakhs to M/s. Western India Industries Ltd. vide two cheques dated 24.07.1996 and 26.07.1996 for ₹40 lakhs and ₹50 lakhs respectively. The accused company, in order to repay the loan, issued cheques dated 22.10.1996 and 24.10.1996 for ₹40 lakhs and ₹50 lakhs drawn on Standard Chartered Bank, Parliament Street, New Delhi. The cheques when presented for collection through the complainant's bank, were dishonoured with the remarks "insufficient funds". Complainant/respondent No.2 issued demand notice under Section 138 N.I. Act to the accused company and others including the petitioner. The amount of those cheques, however, was not paid during the requisite period of 15 days. This led to filing of complaint by the respondent No.2.

3. The petitioner is sought to be held vicariously liable for the offence under Section 138 N.I. Act alleged to have been committed by the company M/s. Western India Industries Ltd. The allegations to fix the vicarious liability for the offence under Section 138 N.I. Act committed by the company on the petitioner with the aid of Section 141 N.I. are in Para 2 and 6 of the complaint, which are reproduced thus:

"2. That the accused No.1 is also a company and the other accused persons are working with accused No.1 and they are incharge of and are responsible for carrying on the affairs of the accused No.1.

6. That the accused No.1 by issuing both the cheques mentioned above from its account, which were subsequently dishonoured, and by not paying the amount of the cheques after receiving the above mentioned demand notices have committed an offence defined and punishable U/s. 138 of the Negotiable Instruments Act. The accused Nos.2 to 12 being in-charge of and

responsible for the affairs of the accused No.1 are also liable U/s. 141 of N.I. Act for the offence so committed.”

4. On the basis of aforesaid allegations in the complaint and the evidence provided by the authorised representative of the respondent company, namely, Shri K.C. Khera, who appeared as CW1, the learned Magistrate, vide impugned order, summoned the petitioner for offence under Section 138 N.I. Act allegedly committed by the company with the aid of Section 141 N.I. Act.

5. The petitioner, feeling aggrieved, has filed present petition seeking quashing of the summoning order dated 20.02.1998 qua him. Main contention on behalf of the petitioner is that apart from a bald allegation in the complaint with regard to the petitioner being director of the accused company and in-charge of day to day affairs of the company as also responsible to the company for the conduct of the business, there is no allegation in the complaint which could, prima facie, show as to how the petitioner was in-charge of and responsible for management of day to day affairs of the company and what were the acts and functions which were being discharged by the petitioner so as to bring him within the ambit of law under Section 141 of the Negotiable Instruments Act. Learned counsel submitted that in absence of any specific allegation in this regard in the complaint or the evidence led by the complainant in support of the complaint, the order of summoning qua him is not sustainable in law. Learned counsel for the petitioner in support of his contention has relied upon the judgment of Supreme Court in the matter

of **SMS Pharmaceuticals Ltd. Vs. Neeta Bhalla, (2005) 8 SCC 89** as also in Crl.A. No.320-336 of 2010 arising out of SLP (Crl). No.445-461 of 2008 titled **National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal & Anr.** Learned counsel further submitted that a Coordinate Bench of this Court had accepted a similar plea of the petitioner in Crl. Rev. No.415/2001 titled B.T. Gokhale Vs. State and N.K. Wahi and quashed the order summoning the petitioner B.T. Gokhale in that case with the aid of Section 141 N.I. Act.

6. Learned counsel for the respondent on the contrary has submitted that the submissions of the petitioner are misconceived and are based upon incorrect reading of the judgment of Supreme Court in **SMS Pharmaceuticals Ltd.**(supra). Learned counsel submitted that the complainant has made a specific allegation against the petitioner that he was in-charge of and responsible for carrying on the affairs of the accused No.1 company, which fact is also supported by the evidence produced during inquiry. Thus, the initial onus for making a prima facie case against the petitioner has been discharged by the respondent. Learned counsel for the respondent contended that now the onus is on the petitioner to adduce evidence during the course of trial to establish that he was not in-charge of and responsible for the conduct of the business of the company.

7. I have considered the rival contentions and perused the record.

8. 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.”

9. 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.”

10. In **Saroj Kumar Poddar Vs. State (NCT of Delhi)**, (2007) 3 SCC 693, the Supreme Court following **SMS Pharmaceuticals** case (supra) reiterated the same principle and, inter alia, observed thus:

"12. A person would be vicariously liable for commission of an offence on the part of a company only in the event the conditions precedent laid down therefor in Section 141 of the Act stand satisfied. For the aforementioned purpose, a strict construction would be necessary.

13. The purported averments which have been made in the complaint petitions so as to make the appellant vicariously liable for the offence committed by the Company read as under:

"That Accused 1 is a public limited company incorporated and registered under the Companies Act, 1956, and Accused 2 to 8 are/were its Directors at the relevant time and the said Company is managed by the Board of Directors and they are responsible for and in

charge of the conduct and business of the Company, Accused 1. However, cheques referred to in the complaint have been signed by Accused 3 and 8 i.e. Shri K.K. Pilania and Shri N.K. Munjal for and on behalf of Accused 1 Company."

14. Apart from the Company and the appellant, as noticed hereinbefore, the Managing Director and all other Directors were also made accused. The appellant did not issue any cheque. He, as noticed hereinbefore, had resigned from the directorship of the Company. It may be true that as to exactly on what date the said resignation was accepted by the Company is not known, but, even otherwise, 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 allegations made in para 3, thus, in our opinion do not satisfy the requirements of Section 141 of the Act."

11. In yet another judgment in Crl. A. No.320-336 of 2010 arising out of SLP (Crl). No.445-461 of 2008 titled National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal & Anr, the Supreme Court, after analysing various pronouncements of the Apex Court on enunciation of Section 141 Negotiable Instruments Act, has culled out the following legal principles by observing thus:

- (i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.
- (ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.
- (iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make accused therein vicariously liable for offence committed by company along with averments in the petition containing that accused were in-charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

- (iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.
- (v) If accused is Managing Director or Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.
- (vi) If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint.
- (vii) 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."

12. From the above judgments, settled legal position which emerges is 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 clear allegations that the person concerned was the director of the company, but he is also required to make specific allegations of the facts indicating as to how and in what manner the director was in-charge of and responsible for conduct of the business of the company.

13. On reading of the complaint filed by the respondent as also the statement of authorised representative of the company as CW1, it would be seen that the petitioner is not the signatory to the cheque in question. In order to rope in the petitioner as vicariously liable for the offence under Section 138 N.I. Act committed by the company, in the form of allegations, respondent No.2/complainant 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 director was in-charge of and responsible for the day to day affairs and

business of the company. In absence of specific allegations in this regard, in my considered view, the requirement of Section 141 N.I. Act to hold the petitioner 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 director was in-charge of or was responsible to the company for its day to day affairs and conduct of business. Thus, in my view, the petitioner cannot be held vicariously liable for the purported offence under Section 138 N.I. Act committed by the company.

14. In view of the above, I am of the considered view that the impugned order of learned Magistrate dated 20.02.1998 summoning the petitioner 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 petitioner was in-charge of and responsible for the conduct of the business and the day to day affairs of M/s Western India Industries Ltd.

15. Result of above discussion is that impugned summoning order dated 20.02.1998 qua the petitioner is set aside.

16. Petition as well as the application stand disposed of accordingly.

(AJIT BHARIHOKE)
JUDGE

AUGUST 02, 2011
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