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

Judgment reserved on: February 17, 2011
Judgment delivered on: February 24, 2011

\+ **CRL.M.C. 3308/2010 & CRL.M.A. NO.16467/2010**

GAURAV KUMAR & ORS ....PETITIONERS

Through: Mr. Vikas Sharma, Advocate

Versus

SURINDER PATWA .....RESPONDENT
Through: Mr. K.S. Pathania, Advocate

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. Gaurav Kumar and Ms. Kiran Vihani, the petitioners herein filed instant petition under Section 482 Cr.P.C. have prayed for the quashing of complaint case No.132/1/2005 pending in the court of Metropolitan Magistrate, New Delhi and consequent summoning order dated 25.07.2005 qua them.

2. Briefly stated, the facts relevant for the disposal of this petition are that the respondent Surinder Patwa, Proprietor of M/s. Madan Lal Surender Kumar filed above referred complaint No.132/1/2005 under Section 138 read with 141 of the Negotiable Instruments Act against

M/s. Fisba Enterprises Pvt. Ltd. (hereinafter referred to as "company") and its four directors including the petitioners.

3. It is alleged in the complaint that the complainant had supplied yarn products to the accused company against two post dated cheques being cheque No.217412 dated 01.06.2004 and cheque No.217413 dated 02.06.2004 for ₹6,40,000/- each, drawn on State Bank of Patiala, Azadpur Sabzi Mandi, Transport Centre, New Delhi which were revalidated on 18.03.2005. Shitij Kumar, director of the company is stated to be the signatory of those cheques. These cheques, when presented for encashment through the bankers of the complainant, were returned unpaid with the remarks "Insufficient Funds". The complainant, therefore, issued a notice of demand under Section 138 N.I. Act to the company and its directors including the petitioners, but they failed to pay the cheque amount within the requisite period despite service of notice. Consequently, the complainant was constrained to file the complaint under Section 138 read with 141 N.I. Act against the company and its directors, including the petitioners.

4. The allegations to fix the vicarious liability of the petitioners with the aid of Section 141 N.I. Act are in para 21 of the complaint, which is reproduced thus:

> "21. That the accused No.1 is a company incorporated under the Companies Act 1956. Accused No.1 company has issued the abovementioned cheques for the discharge of its liability in part. Accused No.2,3,4 & 5 are directors of the accused No.1 company and were/are in charge of the affairs of the company and are responsible to the company for the conduct of the business of the company. The

offence has been committed with the consent and connivance of the accused No.2,3,4 & 5 as well as accused No.1 are guilty of the offence envisaged u/s 138 of the Negotiable Instrument Act and are liable to be proceeded against and punished accordingly."

5. On the basis of the aforesaid allegations in the complaint and the affidavit evidence of the complainant reiterating the allegations, the learned Magistrate passed the impugned order of summoning the petitioners.

6. The petitioners, feeling aggrieved have filed present petition seeking quashing of the summoning order dated 25.07.2005.

7. Main contention on behalf of the petitioners is that apart from a bald allegation in the complaint with regard to the petitioners being directors of the accused company and in-charge of day to day affairs of the company and being 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 petitioners were in-charge and responsible for day to day affairs of the company and what were the acts and functions which were being discharged by them so as to bring them within the ambit of law under Section 141 of the Negotiable Instruments Act. Learned counsel submitted that in absence of any specific allegations in this regard, the order of summoning is not sustainable in law.

8. Learned counsel for the respondent, on the contrary, has submitted that the complainant has made a specific allegation against

the petitioners that they were directors of the accused company and were in-charge of day to day affairs and conduct of the business of the company, which fact is also supported by the affidavit evidence filed by the respondent in the court. Therefore, the initial onus for making a prima facie case against the petitioners has been 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 establish that they were not in-charge and responsible for the conduct of the business of the company.

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

10. 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."

11. 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."

12. 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.

13. On reading of the complaint filed by the respondent, it would be seen that admittedly the petitioners are not the signatories to the cheques in question. In order to rope in the petitioners to be vicariously liable for the offence under Section 138 N.I. Act committed by the company, in the name of allegations, respondent/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 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, in my view, the petitioners 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 25.07.2005 summoning the petitioners 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 in-charge and responsible for the conduct of the business and the day to day affairs of M/s Fisba Enterprises Pvt. Ltd.

15. Result of above discussion is that impugned summoning order dated 25.07.2005 qua the petitioners Gaurav Kumar and Ms. Kiran Vihani is quashed.

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

(AJIT BHARIHOKE)
JUDGE

FEBRUARY 24, 2011
pst