

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

+ Crl. M.C. 1713/2011

Date of Decision: 20.04.2012

**VIRENDER KUMAR AGGARWAL
AND ANOTHER**

..... Petitioner

**Through: Mr.Rakesh Taneja and Mr. Vishal
Bansal, Advocate**

versus

**M/S VIP POWER PROJECTS PVT.
LTD. REPRESENTED BY ANIL
KUMAR GOYAL**

..... Respondent

Through: Mr. Surender Raizada, Advocate

**CORAM:
HON'BLE MR. JUSTICE M.L. MEHTA**

M.L. MEHTA, J.

1. The petitioners pray quashing of the complaint under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the "Act") bearing CC No. 4588/11 pending in the Court of Ld. MM, Saket Courts, New Delhi.
2. The brief facts necessitating the disposal of the present petition are that the complainant/ respondent company entered into an agreement with the accused company with regard to sale/ purchase of certain land. The accused company has 3 directors including the present two petitioners. One accused Sh. Himanshu Aggarwal, director, was empowered to deal with the complainant/ respondent

company on behalf of the accused company vide board resolution dated 16.07.2009. The accused company issued a cheque of Rs. 87 Lacs vide cheque number 726379 dated 15.02.2011 drawn on Punjab National Bank, to the respondent/ complainant company towards discharge of its liability. The aforesaid cheque was presented by the complainant/ respondent company on 17.02.2011 with its banker, which was returned unpaid by the banker citing “insufficient funds”. A statutory demand notice dated 25.02.2011 was issued to the accused persons including the present petitioners. The accused persons sent a reply to the said legal demand notice vide letter dated 12.03.2011. A complaint under Section 138 of the Act was filed in the Court of Ld. MM on 06.04.2011 as the amount remained unpaid by the accused persons. The Ld. MM issued summons to the accused persons including the present petitioners vide order dated 08.04.2011. Hence the present petition.

3. The learned counsel for the petitioners submitted that to fasten vicarious liability on the director of a company for an offence under Section 138 of the Act, there have to be specific averments/ allegations in the complaint evidencing that the accused named therein was in-charge and responsible for the day-to-day affairs of the accused company. It is submitted that, in the present case, there are mere bald allegations, that the petitioners were directors of the company, however, it has not been averred that the petitioners were in-charge and responsible for the day-to-day affairs of the accused company and also no role has been

attributed to them in the alleged transaction between the complainant/ respondent company and the accused company. Reliance has been placed on *S.M.S Pharmaceuticals Ltd. V. Neeta bhalla & Anr AIR 2005 SC 3512*, *Sabitha Ramamurthy v. R.B.S. Channabasavaradhya (2006) 10 SCC 581*, *Saroj Kumar Poddar v. State (NCT of Delhi) (2007) 3 SCC 693*, *N.K. Wahi v. Shekhar Singh & Ors (2007) 9 SCC 481* in support of the contentions. It is further submitted that Sh. Himanshu Aggarwal, Director, was duly authorized by the accused company vide board resolution dated 16.07.2009 to deal with the complainant/ respondent company. The complaint itself discloses the fact that all correspondence and communication, on behalf of the accused company, with the complainant/ respondent company was done by Sh. Himanshu Aggarwal, who is currently facing trial. Relying upon *SMS Pharmaceuticals v. Neeta Bhalla, (2007) 4 SCC 70*, it is submitted that mere signing of a board resolution by a director does not infer vicarious criminal liability under the Act. It is further submitted that the petitioners herein were not signatories to the dishonored cheques.

4. Per Contra, the counsel for the complainant/ respondent company submitted that the accused company is a tightly held company having the statutory minimum of 3 directors, therefore it can be presumed that the petitioners herein were in-charge of the day-to-day affairs of the accused company. It was further submitted that the complainant/ respondent company had no knowledge of the internal affairs of the company and the burden to prove that the

accused directors herein were not in-charge of or responsible for the conduct of the accused company, is on the accused/petitioners. It was submitted that all these issues ought not to be adjudicated by this Court under its inherent powers and are a matter of trial. Reliance is placed on ***Shree Raj Travels & Tours v. Destination of the World Pvt. Ltd.***, 172 (2010) DLT 390 and ***City Palace Electronics v. State***, 126 (2006) DLT 324 in support of these contentions.

5. I have heard learned counsels for the parties and perused the documents available on record and the cases cited by the parties.
6. The facts of every case have to be analyzed on the touchstone of the various judgments of the Hon'ble Supreme Court on the law on vicarious liability under Section 141 of the Act. The Hon'ble Supreme Court in ***S.M.S Pharmaceuticals Ltd. (Supra)*** held that,

“15. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That respondent fails within parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the

Magistrate is satisfied that there are averments which bring the case within Section 141 he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

16. 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 question posed in sub-para (b) has to be in 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 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.

(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in

charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under Sub-section (2) of Section 141.”

7. Also in the case of ***National Small Industries Corp Ltd. v. Harmeet Singh Paintal*** 2010 {1} JCC {NI} 86, discussing ***SMS Pharmaceuticals (Supra)***, ***Sabitha Ramamurthy (Supra)***, ***N.K. Wahi (Supra)*** and ***Saroj Kumar Poddar (Supra)***, the Hon’ble Supreme Court held that,

“25. From the above discussion, the following principles emerge:

(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.”

8. The allegations in the complaint against the petitioners reads as under:

“23. That Accused no.3 and Accused no.4 being Directors of the company are liable for criminal offence committed by the company.”

9. Now applying the dictum of law in the present case, it is noted that the perusal of the complaint evidences that the only allegations against the petitioners were that they were directors of the accused company. From the averments as leveled against the petitioners as noted above in the complaint, it cannot be said that the acts

committed by them would sufficiently make out the petitioners herein to be vicariously liable. In order to fasten the vicarious liability on the petitioners in accordance with the provisions of Section 141 of the Act, the averments as to the role of the concerned employees and directors has to be specific. The description should be clear and there should be some unambiguous allegations as to how the concerned employees and directors were alleged to be incharge and responsible for the conduct of the affairs of the company. It is trite that so far as the company is concerned, if any offence is committed by it, then all other persons who are its directors or employees cannot be made vicariously liable. Only such person would be held liable if at the time when the offence is committed, he was incharge and responsible to the conduct of the business and affairs of the company. Merely being a director or employee of the company in the absence of above factors will not make them liable.

10. In the case of ***SMS Pharmaceuticals (Supra)*** it was also held that,

“16. The liability of a Director must be determined on the date on which the offence is committed. Only because Respondent No. 1 herein was a party to a purported resolution dated 15.02.1995 by itself does not lead to an inference that she was actively associated with the management of the affairs of the Company. This Court in this case has categorically held that there may be a large number of Directors but some of them may not associate themselves in the management of the day to day affairs of the Company and, thus, are not responsible for conduct of the business of the Company. The averments must state

that the person who is vicariously liable for commission of the offence of the Company both was incharge of and was responsible for the conduct of the business of the Company. Requirements laid down therein must be read conjointly and not disjunctively. When a legal fiction is raised, the ingredients therefore must be satisfied.”

11. Therefore, merely being a signatory to the board resolution, in which authority was given to accused Himanshu Aggarwal in relation to the transaction with the complainant/ respondent company, is not sufficient to infer that the petitioners were responsible for the day-to-day affairs of the accused company. If the complaint is read in its entirety, it would evidence that the only person, responsible on behalf of the accused company, towards the complainant company/ respondent, at the date of the offence, was accused Himanshu Aggarwal. Also the board resolution was dated 16.07.2009, however the offence is said to have been committed in February, 2011, nearly 18 months after the purported board resolution. Further, it is apparent from the complaint that no role has been attributed to the petitioners in the alleged transaction between the parties and all the communication and correspondence between the parties was conducted and pursued by accused Himanshu Aggarwal, who is currently facing trial.

12. The sum and substance of the above is that the vicarious liability cannot be inferred, it has to be proved. Bald and cursory allegations in the complaint cannot be allowed to fasten vicarious

criminal liability on a person. Merely being the director of the accused company is not sufficient to confer vicarious criminal liability on the director under Section 141 of the Act. As observed in a catena of Supreme Court Judgments, the provisions conferring vicarious liability on a person have to be construed and interpreted strictly.

13. The cases relied upon by the complainant/ respondent contending the grounds in the present petition to be triable issues are misplaced. The case of ***Shree Raj Travels & Tours (Supra)*** and ***City Palace Electronics (Supra)*** are clearly distinguishable from the present case. In the case of ***City Palace Electronics (Supra)***, the accused therein disputed the very factum of liability against the complainant. In the case of ***Shree Raj Travels (Supra)***, the ground taken up by the petitioner was that he had resigned from the company, and could not be held vicarious liable under Section 141 of the Act.

14. The powers of this court under Section 482 CrPC have a wide amplitude, however this power should be used cautiously and sparingly to prevent any gross irregularity or miscarriage of justice. In the case of **State of A.P. Vs. Gourishetty Mahesh and Others**, 2010 CriLJ 3844, which reads thus:

“12. While exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable

appreciation of it accusation would not be sustained. That is the function of the trial Judge/Court. It is true that Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, otherwise, it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time, Section 482 is not an instrument handed over to an accused to short-circuit a prosecution and brings about its closure without full-fledged enquiry. Though High Court may exercise its power relating to cognizable offences to prevent abuse of process of any Court or otherwise to secure the ends of justice, the power should be exercised sparingly. For example, where the allegations made in the FIR or complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused or allegations in the FIR do not disclose a cognizable offence or do not disclose commission of any offence and make out a case against the accused or where there is express legal bar provided in any of the provisions of the Code or in any other enactment under which a criminal proceeding is initiated or sufficient material to show that the criminal proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused due to private and personal grudge, the High Court may step in. Though the powers possessed by the High Court under Section 482 are wide, however, such power requires care/caution in its exercise. The interference must be on sound principles and the inherent power should not be exercised to stifle a legitimate prosecution. We make it clear that if the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the

same in exercise of inherent powers under Section 482”.

15. In the light of the above pronouncements and consideration of facts and circumstances, I am of the view that absence of specific averments in the complaint or any evidence supporting the contention of the complainant/ respondent, no prima facie case is made out qua the petitioners and requires the indulgence of this Court under Section 482 CrPC. In view of the above observations, the complaint and also the summoning order qua the petitioners are hereby quashed.

16. The observations made in the present petition shall not tantamount to expression of opinion qua accused Himanshu Aggarwal and his trial shall continue as per law.

17. The petition is allowed.

M.L. MEHTA, J.

APRIL 20, 2012

hg/akb