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THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.M.C.3060/2011

Date of Decision: 20.04.2012

P.P.MARINA & ANR.

..... Petitioner

Through: Mr.Manoj Kr.Singh, Advocate
with Mr.Arpan Behl, Advocate.

Versus

STATE & ANR.

..... Respondent

Through: Ms.Fizani Husain, APP for
R1/State.
Mr.Sandeep Sethi, Sr.Advocate
with Mr. Amit Khanna, Advocate
for R2.

CORAM:

HON'BLE MR. JUSTICE M.L. MEHTA

M.L. MEHTA, J.

1. The petitioner by way of present petition prays quashing of the criminal complaint bearing CC No. 3864/ 11 under Section 138 of the Negotiable Instruments Act (hereinafter referred to as "Act"), titled "Countrywide Promoters Pvt. Ltd. V. Era Landmarks Ltd. & Ors" and the summoning order dated 01.03.2011 and all proceeding arising there from.
2. The brief facts necessitating the disposal of the present petition are that the accused company in which the petitioners were directors, entered into an MOU with the Complainant Company/ respondent no. 2 for development of certain land in Haryana. Pursuant to the MOU, a Development Rights Agreement dated 13.04.2007 was entered into between the parties and subsequently

a Share Purchase Agreement dated 05.05.2008 for transfer of the agreed land was entered into between the parties. The accused company vide letter dated 14.08.2010 communicated to the complainant company / respondent no. 2, that an amount of Rs. 2458.39 Lacs shall be paid by the complainant company/ respondent no. 2 as External Development Charges to the Government Department on behalf of the accused company, which shall be repaid by the accused company along with 18% interest to the complainant company / respondent no. 2. It is alleged that, in lieu of part payment of the aforesaid liability of 2458.39 Lacs, post dated cheques bearing cheque no. 291473 dated 31.12.2010, cheque no. 291474 dated 31.12.2010, cheque no. 291477 dated 31.12.2010 and cheque no. 291476 dated 31.12.2010 of the amounts Rs. 500 Lacs, Rs. 500 Lacs, Rs. 229.195 Lacs and Rs. 74.196 Lacs respectively totalling to Rs. 13,03,39,100/-, were handed over by the accused company to the complainant company/ respondent no. 2 on 14.08.2010 itself. The cheques were presented for encashment on 07.01.2011. However, they were returned unpaid by the complainant company / respondent no.2's banker vide return memo dated 08.01.2011 stating the reason as "payment stopped by the Drawer". The complainant company / respondent no. 2 sent a demand notice to the accused company vide letter dated 17.01.2011 demanding the payment of the aforesaid amount of Rs. 13,03,39,100. The accused company replied to the demand notice, stating that the aforesaid cheques were handed over to the complainant/ respondent no. 2 merely as security and not for the satisfaction of

any debt or liability. On non-payment of the aforesaid amount, a complaint dated 09.02.2011 was filed in the court of Ld. MM under Section 138 of the Act. After recording the pre-summoning evidence of the complainant, the Ld. MM issued summons to the accused company along with its directors, holding them vicariously liable under section 141 of the Act. The present petitioners were also the Directors of the accused company. The petitioners have invoked the power of this court under section 482 CrPC, seeking quashing of the complaint, summoning order and all proceeding arising therefrom.

3. The learned counsel for the petitioners submitted that at the time of commission of the alleged offence the petitioners had ceased to be directors of the accused company. Form 32 of the petitioners' evidences that the petitioner no. 1 ceased to be a director of the accused company on 12.11.2009, petitioner no. 2 ceased to be a director on 05.01.2011 and petitioner no. 3 also ceased to be a director on 05.01.2011. The dishonoured cheques were presented on 07.01.2011 and the demand notice was sent to the accused company on 17.01.2011. It is submitted that, an offence under section 138 of the Act is completed on non-payment of the cheque amount, after the expiry of the statutory period of 15 days from the date of receiving the demand notice. It is submitted that the present petitioners had ceased to be directors of the accused company at the time of the commission of the alleged offence, hence they cannot be held vicariously liable for an offence committed by the accused company. It is also submitted that none of the petitioners was a signatory to the dishonoured cheques. It is

also contended that the dishonoured cheques were issued as security and not against any existing debt or liability incurred by the petitioners or the accused company.

4. It is further submitted by the learned counsel for the petitioners that the complaint contains bald allegations against the petitioners that they had interacted and participated in various negotiations between the parties in regard to the land development project. Relying upon *K. Srikanth Singh v. North East Securities, 2007 (9) SCALE 371*, it is submitted that mere participation in the transaction does not infer that the director was responsible for the day-to-day affairs of the company. Vicarious liability has to be pleaded and proved and cannot be inferred. It is submitted that since there is no specific allegations, qua the petitioners, as to the role played by them in the subject matter, the requirements of section 141 of the Act are not satisfied. He relies upon *N.K. Wahi v. Shekhar Singh & Ors AIR 2007 SC 1454,, J.N Bhatia & ors. v. State & Anr, (2008) UTR 276 (Delhi)* (PG 84) and *Bikash Chakraborty v. Reliance Structures, Crl.MC 4110/2011* to substantiate his arguments.
5. Per Contra, the Ld. Senior Counsel for the complainant company/ respondent no. 2 submitted that the allegations in the complaint, stating that the petitioners were participants in the negotiations to the agreements between the parties, were not vague, so as to discard the petitioners from the ambit of section 141 of the Act. Such allegations directly point towards the active role played by the petitioners in the agreements between the parties which is the subject matter of the present case. Relying upon *S.M.S*

Pharmaceuticals Ltd. V. Neeta bhalla & Anr AIR 2005 SC 3512, it is submitted that liability under Section 141 of the Act can be cast on the persons who may have something to do with the transaction complained of. A person who is incharge of and responsible for conduct of business of the company would naturally know why the cheque in question was issued and why it got dishonoured. It is submitted that, in the present case, the complaint clearly states that the petitioners played an active role in the transaction between the parties and hence, can be held vicariously liable under section 141 of the Act. Relying upon ***N. Rangachari v. Bharat Sanchar Nigam Ltd, Crl Appeal No. 592 of 2007 (SC)*** it is submitted that the complaint should be read as whole while determining vicarious liability under Section 141 of the Act.

6. Learned Senior Counsel further submitted that the demand notice dated 17.01.2011 was addressed to all the accused persons including the petitioners and it expressly stated that the petitioners played an active role in the management and control of the accused company and thus were incharge of and responsible for the day-to-day affairs of the accused company. Further, the reply dated 21.01.2011, to the said demand notice was on behalf of all the accused persons including the present petitioners, however, the said reply does not state that the petitioners herein had ceased to be directors of the accused company or were not incharge of the day-to-day functioning of the accused company. It is contended that this plea cannot be raised afresh before this court.

7. The Ld. Senior Counsel further submitted that petitioner no. 2 and 3 were directors of the accused company in November, 2010, when admittedly, directions were given to the accused company's banker to stop payment qua the aforesaid dishonoured cheques. The petitioner no. 2 and 3 were directors at the date of maturity of the cheques i.e. 31.12.2010. Petitioner no 2 and 3 ceased to be directors on 05.01.2011. Hence, petitioner no. 2 and 3 were directors and had knowledge of the factum of issue and maturity of the dishonoured cheques. Relying upon the judgment of this court in ***Rajesh Agarwal v. State & Anr 171 (2010) DLT 51*** and ***Rallis India Ltd. V. Poduru Vidya Bhushan & Ors Crl. Appeal No. 926 of 2007 (SC)***, it is further contended that the plea of the petitioners that they were not directors or not incharge of the day to day affairs of the company at the time of commission of the offence or the cheques were issued as security, cannot be raised before this court, but, can be raised before the Ld. MM. It is contended that, the powers of the Magistrate cannot be usurped by this court and it ought not to interfere with the trial by the Magistrate of the offence under Section 138 N.I. Act.
8. The learned counsel for the petitioner, in rebuttal, relying upon ***Harman Electronics Pvt. Ltd v. National Panasonic India Ltd. AIR 2009 SC 1168***, submitted that an offence under section 138 of the Act is completed only if the Drawer fails to pay the cheque amount on the expiry of the statutory period in the demand notice and not on the day when the cheques were issued or matured. Since, at the time of commission of the offence, all the petitioners

had ceased to be directors of the accused company, they are not liable.

9. I have heard the learned counsel for the petitioner, the learned senior counsel for the complainant/ respondent no. 2, perused the documents available on record and the case laws cited by both the parties.

10. The facts of every case have to be analysed 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 law laid down by the Full Bench of Hon'ble Supreme Court on Section 141 of the Act in ***S.M.S Pharmaceuticals Ltd. (Supra)*** has been endorsed, accepted and followed in all subsequent decisions namely ***N.K. Wahi (Supra)***, ***J.N Bhatia (Supra)*** and ***Bikash Chakraborty (Supra)***. 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.”

11. In ***S.M.S Pharmaceuticals Ltd. (Supra)***, the Hon'ble Supreme Court stated that liability can be cast on a director of a company, if his involvement in the transaction complained of, can be shown, so as to infer knowledge of the factum of issue and dishonour of the cheques.

12. A person alien to a company, cannot be expected to know as to what is the responsibility and role of each director / manager/ secretary/ employee of the company toward the company and towards the third party. However, while dealing with the company, he comes in contact with persons who have the authority to take decisions on behalf of the company and deal with this third person on a particular subject matter, although it may be in different spheres of the same transaction. Such persons with authority to take decisions over the transaction and having knowledge of the transaction are deemed to be incharge of and responsible to the company for the day to day affairs and conduct of the company. Such persons may or may not be directors of the company. In other words, the persons who are incharge of and responsible for the day to day affairs of the company are targeted

to be held vicariously liable and covered within the ambit of Section 141 of the Act. The proviso to Section 141 of the Act specifies that a person not having the knowledge about the offence or a person exercising all due diligence to prevent the commission of the offence is excluded from the scope of Section 141 of the Act. Section 141 of the Act creates a legal fiction against the defaulting company, so as to cover within its ambit all persons who have consented, connived or anyway attributed to the commission of the offence. The offence is the result, whereas the transaction is the cause. **The liability arises on account of conduct, act or omission on the part of the person and not merely on account of holding an office or position in a company. Therefore, in order to bring a case within Section 141 of the Act, the complaint must disclose the necessary “facts” which make the person liable.**

13. In the case of **N. Rangachari (Supra)** the Hon’ble Supreme Court held that,

“A person in the commercial world having a transaction with a Company is entitled to presume that the Directors of the Company are in charge of affairs of the Company. If any restrictions on their powers are placed by the memorandum or Articles of the Company, it is for the Directors to establish it at the trial. It is in that context that Section 141 of the Negotiable Instruments Act provides that when the offender is a Company, every person, who at the time when the offence was committed was in charge of and was responsible to the company for the conduct of the business of the Company, shall also be deemed to be guilty of the offence along with the

Company. It appears to us that an allegation in the complaint that the named accused are Directors of the Company itself would usher in the element of their acting for and on behalf of the company and of their being in charge of the Company. A person normally having business or commercial dealings with a Company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its memorandum or articles of association. Other than that, he may not be aware of the arrangements within the Company in regard to its management, daily routine, etc. Therefore, when a cheque issued to him by the Company is dishonoured, he is expected only to be aware generally of who are in charge of affairs of the Company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the Company and those in charge of it. So, all that a payee of a cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in charge of its affairs. The Directors are prima facie in that position. In fact, an advertence to Sections 138 and 141 of the Negotiable Instruments Act shows that on the other elements of an offence under Section 138 being satisfied, the burden is on the Board of Directors or Officers in charge of affairs of the Company to show that they are not liable to be convicted. Any restriction on their power or existence of any special circumstance that makes them not liable is something that is peculiarly within their knowledge and it is for them to establish at the trial such a restriction or to show that at the relevant time they were not in charge of the affairs of the Company.”

14. The contention of the counsel for the petitioners that the petitioners had ceased to be directors of the company on the date of commission of the offence is unfounded. It is an admitted fact that petitioner no. 2 and 3 were directors in November, 2010 when the cheques were ordered to be stopped from encashment, implying knowledge of the fact of stop payment qua petitioner no. 2 and 3, which remains undisputed. Further, the reliance of the counsel for the petitioner on *Harman Electronics (Supra)* contending that the petitioner no. 2 and 3 ceased to be directors in the accused company at the time of commission of the alleged offence under section 138 of the Act and cannot be made vicariously liable, is based on a mistaken belief and clearly distinguishable from the present case. Therefore at the stage of summoning, as in the present case, **the relevant date to fasten “vicarious liability” on the directors would be the date of issue of the cheques.** The ingredients for bringing a person within the ambit of section 141 of the Act are different from that of an offence under section 138 of the Act. Vicarious liability is created in special statutes like the present Act, by way of a legal fiction so as to make all persons responsible for the conduct of the company and responsible to the company to be held liable for an offence under section 138 of the Act. As observed above vicarious liability is inferred from the cause of the resultant offence. Therefore at this stage of summoning, it cannot be inferred that the petitioner no. 2 and 3 had no knowledge of the offence so as to give them immunity under the proviso to section 141 of the Act.

15. However, the case of petitioner no. 1 stands on a different footing as he had ceased to be a director in the accused company way back on 12.11.2009. Therefore, although petitioner no. 1 can be assumed to be privy to the transaction, he cannot be assumed to be privy to the issue or dishonour of the cheques as the cheques were issued in August, 2010 and dishonoured in January, 2011 which is after more than a year of his ceasing to be a director. The petitioner no. 1 is clearly covered under the proviso of section 141 of the Act which gives immunity to a person not having knowledge of the offence.

16. In the present case, the complaint as well as the demand notice were sent to the accused company as well as the petitioners and it was specifically averred that the petitioners herein played an active role in the transaction, which is the subject matter of the present case. The case of K.Srikanth (Supra) is clearly distinguishable from the present case. In that case, there were no averments in the complaint that the accused persons were responsible for the day to day affairs of the company. However, in the present case there are specific and clear averments in the complaint and legal demand notice that the petitioners were responsible and incharge for the conduct and affairs of the accused company. Further, the petitioners in the reply to the demand notice as well as in the present petition have not contended that they were unaware of the transaction or that they did not consent to the transaction or they were diligent in preventing the commission of the offence. Petitioner no.2 and 3 are not covered under the proviso to section 141 of the Act and

hence cannot claim ignorance of the factum of issue or dishonour of cheques, without leading evidence in this regard. However, petitioner no. 1 can be given the benefit of lack of knowledge for the reason of his ceasing to be a director of the company prior to the issue of the cheques. At this stage of summoning, by virtue of the legal fiction created by Section 141 of the Act, it can be safely assumed that petitioner no. 2 and 3 were active participants in the transaction and well aware of the issue of the dishonoured cheques which can be construed to show that they were responsible for the conduct of the business of the accused company at the relevant time.

17.As held in the case of *Rajesh Agarwal v. State & Anr* 171 (*Supra*) and *Rallis India Ltd (Supra)* , this court ought not to interfere at the summoning stage in a case under 138 of the Act. However, this court may interfere under its inherent powers under Section 482 CrPC, if there is any apparent gross irregularity in the order of the Ld. MM which has caused miscarriage of justice or has caused undue harassment to the person. This power is however used cautiously and sparingly.

18.In view of the above observations, the summoning order qua petitioner no. 1 is quashed. Petitioner no. 2 and 3 shall be at liberty to lead their defence evidence before the Ld. MM and raise all such contentions there.

19.With the above observations, the petition is party allowed and disposed of accordingly.

M.L. MEHTA, J.

APRIL 20, 2012/awanish