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Date of Decision: 2nd December, 2013

..... Petitioner

Through

**Mr. Anurag Ahluwalia and Mr.
Prashant, Advocates**

Versus

VED PRAKASH KAUSHIK & ANR.

..... Respondent

Through

Mr. Sunil K. Jha, Advocate for
R-1.

Ms.Aashaa Tiwari, APP for
State/R-2.

AND

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CRL.M.C. 3163/2013 & CrI.M.A.11812/2013

..... Petitioner

Through

Mr. Anurag Ahluwalia and Mr.
Prashant, Advocates

versus

..... Respondent

Through

Ms.Aashaa Tiwari, APP for
State/R-1

Mr. Sunil K. Jha, Advocate for
R-2.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

JUDGMENT

: SUNITA GUPTA, J:

1. Challenge in these petitions i.e. CrI.M.C. 2564/2013 and CrI.M.C. 3163/2013 is to the order dated 16.01.2013 passed by the learned Metropolitan Magistrate in Complaint Case No.259/12/12 u/s 138 read with Section 142 Negotiable Instruments Act whereby the petitioners were ordered to be summoned.

2. The petitioners seek quashing of the summoning order dated 16.01.2013 and all the proceedings emanating therefrom, inter alia, on the allegations that M/s NKG Steel (India) Pvt. Ltd was incorporated through its Directors Naresh Gupta and Rita Gupta with an authorised share capital of Rs.10 lakhs only. Naresh Gupta approached the petitioners and asked them to become Additional Directors of his company. The petitioners were appointed as Additional Directors on 25.03.2011. However, there were not attributed any role or duties and thus they were not a part of day-to-day affairs or conduct of NKG Steel (India) Pvt. Ltd. Respondent no.1 gave Naresh Gupta a loan of Rs. 10 lakhs by RTGs transaction for a period of four months. The petitioners were not a part of the monetary deal nor had any knowledge about the same. After four months, a cheque signed and issued by NKG Steel (India) Pvt. Ltd in

favour of respondent no.1 for an amount of Rs.10 lakhs was given but the same was dishonoured on two occasions upon presentation with the remarks “Insufficient funds” and “Stop Payment” respectively. Again two fresh cheques were signed by Naresh Gupta for an amount of Rs. 5 lakhs each and were issued in favour of the proprietorship firm of respondent no.1 in lieu of previously dishonoured cheque. Both the cheques were returned unpaid with the remark “Stop Payment”. The petitioner received a legal notice sent by respondent no.1 wherein it was falsely alleged that the petitioners along with the other Directors of NKG Steel (India) Pvt. Ltd were responsible for making false promises and giving assurances with respect to the dishonoured cheque amounting to Rs. 10 lakhs which was duly signed and issued by NKG Steel (India) Pvt. Ltd in favour of respondent no.1. To avoid being falsely implicated and also due to some pre-occupation, the petitioners submitted their resignation and duly filled Form 32 and resigned from the post of Additional Directors.

3. A complaint was filed by respondent no.1 wherein in a mechanical manner, without application of mind, the impugned order

was passed whereby the petitioners were summoned. It is alleged that the petitioners were only Additional Directors of NKG Steel (India) Pvt. Ltd who never attended any board meetings nor were attributed any role or duties. No specific role had been allotted to the petitioners to make them vicariously liable for the transaction that took place between NKG Steel (India) Pvt. Ltd and respondent no.1, as such the summoning order qua the petitioners is bad in the eye of law and same is liable to be quashed.

4. I have heard Mr. Anurag Ahluwalia, Advocate for the petitioner, Mr. Sunil K. Jha, Advocate for respondent No.1 and Ms. Aasha Tiwari, APP for the State and have perused the record.

5. It was urged by learned counsel for the petitioners that the company was incorporated in the year 2005. The petitioners were made Additional Directors only in the year 2011 and they were not holding any share in the company nor responsible for any profit and loss of the company. There is no specific averment in the complaint qua the petitioners as to the role played by them. The petitioners were not concerned with the day to day affairs of the company nor were the signatories of the cheques. Role of accused no.3 Rita Gupta

was far more serious than the petitioners, however, she was dropped by the complainant and therefore on parity, the petitioners are also liable to be dropped.

6. Reliance was placed on *Harshendra Kumar D v. Rebatilata Koley and Others*, (2011) 3 SCC 351; *Meera Gupta & Ors. v. Madan Lal Batra*, 184(2011) DLT 570; *Central Bank of India v. Asian Global Ltd. & Ors.*, (2010) 11 SCC 203; *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr.*, (2005) 8 SCC 89; *N.K.Wahi v. Shekhar Singh and Ors.*, (200&) 9 SCC 481; *Pepsi Foods Ltd & Anr v. Special Judicial Magistrate*, (1998) 5 SCC 749; *Ravinder Goel and Anr v. State and Anr.*, 2007(1) JCC 465 for submitting that since the petitioners were neither the Managing Directors of the company nor were concerned with the day to day affairs of the company nor were signatories to the cheques, as such in the absence of any specific averments against them, the summoning order, complaint and proceedings emanating therefrom are liable to be quashed.

7. Per contra, it was submitted by learned counsel for respondent no.1/complainant that there are specific allegations against the

petitioners in the complaint itself, inasmuch as, the petitioners along with accused no.2 NKG Steel (India) Pvt. Ltd had approached the complainant for business loan of Rs. 10 lakhs, as such the complainant paid the amount of Rs. 10 lakhs. Thereafter a cheque was given by accused no.2 in discharge of the liability which was dishonoured on presentation. The complainant approached the respondents. Thereafter a meeting was organised which was attended by the petitioners and the cheque was returned and in lieu of dishonoured cheque, fresh cheques were given on the assurance given by the accused persons that the same would be encashed on presentation. However, the same were again dishonoured with the remarks "Stop Payment", as such it was submitted that in view of the specific allegations against the petitioners, at this stage there is no merit in the petitions and the same are liable to be dismissed.

8. I have given my considerable thoughts to the respective submissions of learned counsel for the parties and have carefully perused the record.

9. Sections 138 and Section 141 were brought in the N.I Act by the Banking, Public Financial Institutions and Negotiable Instruments

Laws (Amendment) Act, 1988 (Act 66 of 1988) with effect from April 1, 1989. These provisions, as amended from time to time read as under:

“138. Dishonour of cheque for insufficiency, etc., of funds in the accounts.-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 years, or with fine which may extend to twice the amount of the cheque, or with both:

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 in due 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 cheque 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.

Explanation.-For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

141. Offences by companies.-(1) If the person committing an offence under Section 138 is a company, every person 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 and shall be liable to be proceeded against and punished accordingly:

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:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in Sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on

the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.-For the purposes of this section,-

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

10. The legal position concerning the vicarious liability of a director in a company which is being prosecuted for the offence under Section 138, NI Act came up for consideration in the case of ***S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr***(supra) where the following questions were referred to a three-Judge Bench for determination:

“(a) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfil the requirements of the said section and it is not necessary to specifically state in the complaint that the person accused was in charge of, or responsible for, the conduct of the business of the company.

(b) Whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

(c) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the managing directors or joint managing director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against.”

11. The aforesaid questions were answered thus:

“(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 the question posed in sub-para (b) has to be in the 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 the 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 the 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 the 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 the 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.”

12. It was also observed:-

“10.....The liability arises from being in charge of and responsible for 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 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.

11. A reference to Sub-section (2) of Section 141 fortifies the above reasoning because Sub-section (2) envisages direct involvement of any Director, Manager, Secretary or other officer of a company in commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these offices in a company. In such a case, such persons are to be held liable. Provision has been made for Directors, Managers, Secretaries and other officers of a company to cover them in cases of their proved involvement.

12. The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a 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 a person liable.”

13. In *K.K. Ahuja v. V.K. Vora and Anr.*, (2009) 10 SCC 48, the legal position was summarised as under:

“(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix "Managing" to the word "Director" makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii) In the case of a Director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under Sub-section (2) of Section 141.

(iii) In the case of a Director, secretary or manager as defined in Section 2(24) of the Companies Act or a person referred to in Clauses (e) and (f) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 141(1) of the Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that Sub-section.

(iv) Other officers of a company cannot be made liable under Sub-section (1) of Section 141. Other officers of a company can be made liable only under Sub-section (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence.”

14. In all the authorities relied upon by learned counsel for the petitioner, the ratio of *S.M.S Pharmaceuticals*(supra) was reiterated. The legal position regarding the liability of the Directors from the authorities referred above, crystalises to the effect that so far as the Managing Director or Joint Managing Director of the company, it is not essential to allege that they were in charge and responsible to the

company for the conduct of the business of the company because the prefix 'Managing' to the word 'Director' makes it clear that they were in charge of and responsible to the company for the conduct of the business of the company. Similarly the signatory of the cheque which is dishonoured is responsible for the incriminating act. As regards the other Directors or other officers of the company, specific averment is required to be made in the complaint. As per sub-section 2 of Section 141, if the complainant is able to prove that offence has been committed with the consent or connivance of or is attributable to, any neglect on the part of, any Director, Manager, Secretary or officer of the company they shall also be deemed to be guilty of that offence and shall also be liable to be proceeded against and punished accordingly.

15. As per the case of the petitioners themselves, they became Additional Directors of the company in the year 2011. A cheque for a sum of Rs. 10 lakhs was given in September, 2011 by respondent no.2 which was dishonoured. Thereafter two more fresh cheques were given in the year 2012 which were again dishonoured. The petitioners submitted their resignation only thereafter. Therefore,

when the alleged offence was committed, they were Additional Directors of the Company. Petitioners have been arrayed as respondents 5 and 6 in the complaint. As regards the role assigned to them, the averments made in para 2 and 3 of the complaint are reproduced as under:-

“2. That being directors of company i.e. the accused No.1, **the accused No.2, 4 and 5 approached the complainant for business loan of Rs.10,00,000/- (Rupees Ten Lakhs) to the aforesaid accused-company.** With great efforts coupled with his reputation in business circle, **the complainant paid the amount of Rs.10,00,000/-(Rupees Ten Lakhs) on dated 29.04.2011 through RTGS transaction in favour of accused company** as business loan on the promise made by the accused to return the same within 4 months to the Complainant.

3. That in discharge of their aforesaid legally enforceable debt and liability, the accused issued a cheque bearing No.014640, drawn from Axis Bank, Geeta Ratan Jindal School, Sector-7, Rohini, New Delhi branch, duly signed by the accused no.2 in the favour of aforesaid proprietorship firm of the Complainant for the amount of Rs.10,00,000/-(Rupees Ten Lakhs). However, the said cheque was returned unpaid by the accused's bank on two occasions on its presentation by the complainant before his bank i.e. Bank of Baroda, Vishakha Enclave, New Delhi with the remarks of “Insufficient Funds_ and “Stop Payment” respectively. Thereafter the complainant approached the accused No.2 & 3 at their aforesaid address at Rohini and stated about the fate of aforesaid cheque. Both the accused No.2 & 3 assured the complainant to repay the aforesaid amount of Rs.10 lakh to the

complainant and thereafter a meeting with the accused no.2, 4,5 and 6 and the complainant was organized at 900, Best Sky tower, Netaji Subhash Place, Wazirpur, New Delhi-110034 and the said cheque was returned back by the complainant and in lieu of the said cheque other two fresh cheques bearing no.014647 & 014648 for the amount of Rs.5 lacs each, drawn from Axis Bank, Geeta Ratan Jindal School, Sector-7, Rohini, New Delhi branch, was issued in favour of aforesaid proprietorship firm to the complainant for the total amount of Rs.10,00,000/-(Rupees Ten Lakhs), which was duly signed by the accused no.2 with the promise and reassurance by all the accused persons no.2, 4 5 and 6 that same would be definitely encashed on its their presentation.”(emphasis supplied)

16. It is alleged by the petitioners that when the loan of Rs. 10 lakhs was given by the complainant to NKG Steel (India) Pvt. Ltd, they were not part of the monetary deal and were not having knowledge about the same. However, specific allegations have been made by the complainant regarding the role played by the petitioners in paragraphs 2 and 3 of the complaint as reproduced above that the offence has been committed with the consent or connivance on the part of the petitioners including other accused person. Petitioners were admittedly Directors of the company. At this stage a presumption u/s 141 of the N.I Act would have to be drawn against the petitioners. Needless to say, the aforesaid presumption is a

rebuttable one but evidence to the contrary would have to be led by the petitioners. At this stage, the allegations made in the complaint reiterated in the sworn affidavit of the respondent-petitioner has to be accepted on the face of it and truth or falsity cannot be entered into by the Court at this stage. Since disputed questions of facts are involved, same are required to be adjudicated during the course of trial. Substantially, similar view was taken in ***Krishna Murari Lal vs. IFCI Factors Ltd***, 2012 X AD(Delhi) 539 and ***Susanna Jacob vs. Pyroguard Engineers P.Ltd & Ors***, 2012 IX AD(Delhi) 173.

17. Moreover, it is well settled that power to quash proceedings at the initial stage have to be exercised sparingly with circumspection and in rarest of rare cases. In ***Iridium India Telecom Limited vs. Motorola Incorporated & Ors***, (2011)1 SCC 74, it was observed by Hon'ble Supreme Court as under:-

“44. This Court has repeatedly held that power to quash proceedings at the initial stage have to be exercised sparingly with circumspection and in the rarest of the rare cases. The power is to be exercised ex debito justitiae. Such power can be exercised where a criminal proceeding is manifestly attended with malafide and have been instituted maliciously with ulterior motive. This inherent power ought not to be exercised to stifle a legitimate prosecution. In the present case, the parties are yet to place on the record the entire material in support of

their claims. The issues involved are of considerable importance to the parties in particular, and the world of trade and commerce in general.

45. In such circumstances, in our opinion, the High Court ought to have refrained from indulging in detailed analysis of very complicated commercial documents and reaching any definite conclusions. In our opinion, the High Court clearly exceeded its jurisdiction in quashing the criminal proceeding in the peculiar facts and circumstances of this case. The High Court noticed that while exercising jurisdiction under Section 482 Cr.P.C. "the complaint in its entirety will have to be examined on the basis of the allegations made therein. But the High Court has no authority or jurisdiction to go into the matter or examine its correctness. The allegations in the complaint will have to be accepted on the face of it and the truth or falsity cannot be entered into by the Court at this stage...."

18. Substantially similar view was taken in *MMTC Ltd & Anr. vs. MEDCHL Chemicals and Pharma(P) Ltd & Anr*, (2002)1 SCC 234:-

"13. It is settled law that at this stage the Court is not justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint. The inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice. At this stage the court could not have gone into merits and or come to conclusion that there was no existing debt or liability."

19. Consequently the petitions and the pending applications, if any, are dismissed. Needless to say, the Trial Court after recording

evidence would examine whether the petitioners are liable for the offence punishable u/s 138 of the N.I.Act.

**SUNITA GUPTA
(JUDGE)**

DECEMBER 02, 2013
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