$~52, 49, 51 & 17

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

Date of decision: 10th October , 2014

\+ CRL.M.C. 629/2013

SANJIV SINGHAL ..... Petitioner
Through: Mr.Krishan Kumar, Adv.

versus

ECE INDUSTRIES LTD. ..... Respondent
Through: Mr.Dilraj Kumar, Adv.

\+ CRL.M.C. 631/2013

BHARAT BANKA ..... Petitioner
Through: Mr.Vikas Pahwa, Sr. Adv with
Mr.Rajiv Bhatnagar, Adv.

versus

STATE & ORS. ..... Respondents
Through: Mr.Parveen Bhati, APP for the State.
Mr.Dilraj Kumar, Adv.

\+ CRL.M.C. 1301/2013

SUBHASH CHANDER DUGGAL ..... Petitioner
Through: Mr.Krishan Kumar, Adv.

Versus

ECE INDUSTRIES LTD. ..... Respondent
Through: Mr.Dilraj Kumar, Adv.

+ CRL.M.C. 1821/2013

SUDEEP JAIN ..... Petitioner
Through: Mr. Krishan Kumar, Adv.

versus

ECE INDUSTRIES LTD. ..... Respondent
Through: Mr. Dilraj Kumar, Adv.

CORAM:
HON'BLE MR. JUSTICE VED PRAKASH VAISH

VED PRAKASH VAISH, J. (ORAL)

1. These are four petitions under Section 482 Cr.P.C. seeking quashing of order dated 29.09.2012 passed by learned Metropolitan Magistrate, NI Act, New Delhi whereby the petitioners have been summoned for the offence punishable under Sections 138/141 of the Negotiable Instruments Act (hereinafter referred to as 'NI Act') in CC No.422/1/12 titled as 'M/s. ECE Industries Ltd. vs. M/s. GEI Industrial Systems Ltd. & Ors.'.

2. Shorn off unnecessary details, the facts of the case are that the respondent filed a complaint under Sections 138/141 of the NI Act regarding dishonour of cheque bearing Nos. 001539 dated 12.08.2012 for a sum of Rs.50,00,000/-, and No.001541 dated 12.08.2012 for a sum of Rs.84,822/- drawn on Kotak Mahindra Bank Ltd. On presentation, cheque No.001539 and 001541 were dishonoured with the remarks 'funds insufficient'. Despite service of statutory notice dated

30.08.2012, the accused persons failed to make payment of the amount of cheques.

3. Vide order dated 29.09.2012, learned trial Court took cognizance and summoned the accused persons including the petitioners who are accused Nos.13, 11, 9 and 6 in complaint case bearing No.422/1/12.

4. Since all the four petitions are arising out of the common order dated 29.09.2012 passed by learned trial Court in CC No.422/1/12, therefore, all the petitions are disposed of by this common order.

5. Learned counsel for the petitioners contends that in Crl.M.C. No.1821/2013, petitioner Sudeep Jain is Company Secretary in the accused Company namely, M/s. GEI Industrial Systems Ltd. The accused company has issued a certificate dated 10.12.2012 stating that the petitioner Sudeep Jain is working as a Company Secretary and his job portfolio is to ensure proper observance and compliances made by the said company and the petitioner is not responsible for day-to-day functioning of the said company and he has no knowledge or any role in the issuance of any cheque on behalf of the accused company.

6. Learned counsel for the petitioners further submits that the other petitioners in Crl.M.C. Nos.631/2013, 1301/2013 and 629/2013 are independent non-executive Directors of the accused company namely M/s. GEI Industrial Systems Ltd. and are not associated with the accused company in any manner.

The same is mentioned in Form-32 which was filed with the Registrar of Companies.

7. Learned senior counsel for the petitioners have pointed out that the co-accused, who were accused Nos.7, 8 and 10 in the complaint filed a petition under Section 482 Cr.P.C. for quashing of the complaint which was dismissed by this Court vide order dated 14.12.2012. The said accused persons filed Special leave to appeal (Crl.) No.2770/2013 arising out of order dated 14.12.2012 in Crl.M.C. No.4250/2012. Vide order dated 04.08.2014, the Hon'ble Supreme Court has quashed the complaint(s) bearing CC Nos.422/1/12 and 423/1/12 qua accused Nos.7, 8 and 10.

8. On the other hand, learned counsel for the respondent urges that the accused persons are responsible for day-to-day affairs of the accused company and the offence committed is within the knowledge of the petitioners.

9. I have given thoughtful consideration to the submissions made by learned counsel for the petitioners as well as counsel for the respondent. I have also perused the material on record.

10. Section 138 of the NI Act refers about penalty in case of dishonour of cheques for insufficiency of funds in the account. At this juncture, it is relevant to reproduce Section 141 of the NI Act which provides as under:-

"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 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 attribute to, any neglect on the part of, any director, Manager, secretary, or other office 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 purpose of this section, -

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

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

11. On perusal of proviso of Section 141 of the NI Act, it is manifestly clear that what is required is that the persons who are sought to be made vicariously liable for a criminal offence under Section 141 of the Act should be, at the time when the offence was committed, incharge of and responsible for the conduct of the business of the company. Every person connected with the company shall fall within the ambit of the provision and only those persons who were incharge of and responsible for the conduct of the business of the company at the time of commission of an offence, shall be liable for criminal action. It follows from the fact that if a Director of company who was not incharge of and was not responsible for the conduct of the business of the company at the relevant time will not be liable for a criminal offence under the provisions of Section 141 of the Act.

12. Section 141 of the Act is a penal provision creating vicarious liability and which as per settled law must be strictly construed. It is, therefore, not sufficient to make a bald cursory statement in a complaint and that the Director (arrayed as an accused) was incharge of and responsible for the conduct of the business of the company without anything more as to the role of the Director. The complainant should spell out as to how and in what manner the petitioner was incharge or was responsible to the accused company for the conduct of its business. This is in

consonance with the strict interpretation of penal statutes especially where special statutes create vicarious liability.

13. In a catena of decisions, it was held that for making Directors liable for the offences committed by the company under Section 141 of the Act, there must be specific averments against the Directors showing as to how and in what manner, the Directors were responsible for the conduct of the business of the company. The facts of every case have to be analyzed on the touchstone of the various judgments of the Supreme Court on the law on vicarious liability under Section 141 of the NI Act.

14. The question came up for consideration before three Judges Bench of the Hon'ble Supreme Court in '**SMS Pharmaceuticals Ltd. Vs. Neeta Bhalla & Anr.,'** *(2005) 8 SCC 89* wherein upon consideration of a large number of decisions it was opined as under:-

> "*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:
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> '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. 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

the 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."

It was further opined:

"*18*. 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 the respondent falls within the 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."

17**.** This aspect of the matter has also been considered by the Apex Court in ***Sabitha Ramamurthy*** **v** ***R.B.S. Channabasavaradhya*** (2006) 10 SCC 581 :-

> "Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance with the statutory requirements would be insisted."

15. The relevant Para 9 of the complaint reads as under:-

> **"**That the accused No.2 being the Chairman-cum-Managing Director, the addressee No.3, 4 and 5 being the Whole Time Directors, the accused No.6 as Nominee Director, accused Nos.7, 8, 9, 10, 11 being the Directors, the accused No.12 being the Additional Director, and the accused No.13 being the Company Secretary of accused No.1 company, at the time placement of the Inter Corporate Deposit, issuance of the impugned cheques as well as on the date of dishonour of the cheques and thereafter also were/are in full effective control of all the business affairs and day to day conduct of business of accused No.1

> company, therefore, the accused Nos.2 to 13 are also deemed to have committed the offence, punishable under Section 138 and 141 of the Negotiable Instruments Act, and are liable to be prosecuted and punished, along with accused No.1, in accordance with law. The complainant submits that the offence has been committed with the full knowledge, consent, active connivance of accused No.2 to 13, therefore, under Section 5 of the Companies Act, 1956 the said accused even otherwise also are liable to be prosecuted and punished for commitence the offence along with accused No.1 company."

16. In the instant case, there is no specific allegation against the petitioners that they were responsible and incharge of day-to-day affairs of the business of the company and therefore, the petitioners are not covered under proviso to Section 141 of the NI Act. Moreover, the Apex Court in Special Leave to Appeal (Crl.) No.2770/2013 quashed the complaint(s) against accused Nos.7, 8 and 10 of the original complaint. The petitioners are on the same footing as that of accused Nos.7, 8 and 10.

17. For the aforesaid reasons, impugned order dated 29.09.2012 passed by learned trial Court is set aside for the offence under Section 138 of the NI Act qua the petitioners and complaint case No.422/1/12 titled as 'M/s. ECE Industries Ltd. vs. M/s. GEI Industrial Systems Ltd. & Ors.' under Sections 138/141 of the NI Act is quashed qua the petitioners.

18. All the petitions stand disposed of.

Crl.M.A. No.5629/2013 in Crl.M.C. No.1821/2013
Crl.M.A. Nos. 2045/2013 & 2046/2013 in Crl.M.C. No.631/2013
Crl.M.A. No.4052/2013 in Crl.M.C. No.1301/2013
Crl.M.A. No.2040/2013 in Crl.M.C. No.629/2013

The applications are dismissed as infructuous.

V.P.VAISH, J

OCTOBER 10, 2014/gm