

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

Reserved on: 02nd April, 2014

% **Date of Decision: 21st May, 2014**

+ **CRL.M.C. 1870/2013**

HARVINDER SNGH Petitioner
Through : Mr. D.S.Kohli, Adv.

versus

STATE & ANR. Respondents
Through : Mr. Praveen Bhati, APP for
State.
Ms. Chaitali Jain and
Ms. Gousia Shah, Adv. for R-2.

CORAM:
HON'BLE MR. JUSTICE VED PRAKASH VAISH

JUDGMENT

1. By this application under Section 482 of the Code of the Criminal Procedure, the petitioner seeks quashing of complaint case No.818/2011 titled as 'Vikas Grover vs. A.J.S. Builders Ltd. & Ors.' for the offence under Section 138 of the Negotiable Instruments Act.

2. The brief facts giving rise to the present petition are that respondent No.2/complainant herein filed a complaint under Section 138 read with Section 141 of the Negotiable Instruments Act on the grounds, inter alia, that accused Nos.2 to 10 along with one Mr.Prabhjot Singh (since expired), for and on behalf of

respondent No.1, approached the complainant and represented that accused No.1 is having good reputation in the field of developing real estate and persuaded complainant to invest in its township project at AJS City, Ganour, Sonapat, Haryana. The accused No.2 to 10 further represented that accused No.1 has already acquired the required land and has obtained NOC, CLU and a valid licence from the concerned authorities for their said project. The accused Nos.2 to 10 represented that they are directors and/or responsible officers of accused No.1 and are persons incharge and responsible for day to day business of accused No.1 company. Upon representations and assurances, a Memorandum of Understanding was entered with the complainant on 27.10.2009, whereby it was assured that the balance outstanding/debt amount of Rs.4,34,350/- (Rupees four lakhs thirty four thousand three hundred and fifty) was payable to complainant by accused No.1, after adjustment of payments made by accused No.1 till that date, will be paid by way of post dated cheques. The said MOU was signed and executed by accused No.11 namely Ravi Bhushan, for and on behalf of accused No.1 company. In partial discharge of the said liability, accused No.1 issued various post dated cheques including cheque Nos.003018 and 002710 dated 30.06.2010 and 20.05.2010 amounting to Rs.1,86,150/- and Rs.62,050/- respectively. On presentation, both the cheques were dishonoured with the remarks 'Funds Insufficient'. A statutory notice dated 15.07.2010 (posted on 20.07.2010) was served on

the accused and despite service of notice, the accused persons failed to make payment of the cheques.

3. Vide order dated 10.1.2011, learned Metropolitan Magistrate, New Delhi issued summons against accused Nos.1, 2, 3, 4, 7 and 11. The petitioner was arrayed as accused No.7 in the complaint.

4. Feeling aggrieved by the said order, the petitioner filed petition bearing CrI.M.C. No.639/2012 which was disposed of vide order dated 29.02.2012. In the said petition, it was contended that since all contradictory orders have been passed in two complaints, therefore, the petitioner may be permitted to approach the learned Metropolitan Magistrate for rectification of the order and in case, the petitioner feels aggrieved, he may be permitted to assail the same by way of an appropriate remedy. Vide order dated 29.02.2012 the said petition was dismissed as withdrawn.

5. The petitioner who is accused No.7 in the complaint case, moved an application for rectification of records in terms of order dated 29.02.2012 in CrI.M.C. 639/2012. In the said application, petitioner claimed that he neither had relations with accused No.1 company nor had any role in day-to-day affairs in the accused company. As such the petitioner prayed for dropping the proceedings against him.

6. Vide order dated 14.02.2013, the trial Court passed an order for framing of notice of accusation against the petitioner/accused no. 7.

7. I have given my anxious thought to the submissions made by the learned counsel for the petitioner and the respondent and perused the materials on record.

8. Learned counsel for the petitioner urged that the petitioner was neither director nor functionary in the accused company. He also submitted that petitioner and his family members are investors in Gurgaon Housing Project floated by the accused company in the year 2007 and had purchased a property from the accused company. During the said time, the petitioner was induced by the Managing Director of the accused company Ms.Madhu Singh (accused No.3 in the complaint) and her associates that the accused company was in need of finances and the petitioner was induced to invest money. The petitioner conceded to the request of making funds available to the accused company by purchasing 50% equity of the accused company. The petitioner has been victimized of an additional amount to the tune of Rs.4,35,35,200/-(Rupees four crores thirty five lakhs thirty five thousand two hundred) towards purchase of 50% equity of the accused company.

9. During arguments learned counsel for the petitioner tendered some documents and submitted that directors of the accused company, namely, Ms. Madhu Singh and her associates are habitual offenders and Madhu Singh as well as her family members have a history of cheating thousands of gullible investors and have been cheating people under a well hatched conspiracy. They had been working under the different names like Skipper Builders, Technology Park Ltd. and AJS Builders

Pvt. Ltd. Etc. and have no respect for law and duped the petitioner to the tune of crores of rupees. In January 2009 the petitioner was introduced to Ms. Madhu Singh, Managing Director of the accused company by the Marketing G.M. and the Manager, of the accused company. The petitioner paid the third installments of ten apartments booked at Gurgaon project. Mr. Tejwant Singh and Madhu Singh offered to sell the office of the accused company at Gole Market to the petitioner, who after continuous persuasion agreed to purchase the office property in March, 2009. The sale deed was executed on 15.12.2009. It was revealed in the year 2013 that the property sold to the petitioner was already mortgaged at the time of sale. The accused company through Ms. Madhu Singh and her associates also threatened the petitioner at various occasions.

10. The counsel for petitioner also urged that Form 32 of the accused company filed on behalf of the petitioner evidences that prior to investment in the equity of the accused company, petitioner as well as family members had invested in different residential projects of the accused company. Further, certified copy of Form 32 placed on record, makes it clear that even after buying equity of the accused company, petitioner had never been on the board of the accused company to invoke the provisions of Section 141 of the Negotiable Instruments Act (hereinafter referred to as 'Act'). He has relied upon judgments in **Rajiv Thapar vs. Madan Lal Kapoor, (2013)3 SCC 330, Anita Malhotra vs. Apparel Export Promotion Council & Anr.,**

(2012) 1 SCC 520 and **Birthe Foster (Ms) vs. State & Anr.**, 2007 IAD (Delhi) 187.

11. Learned counsel for the petitioner further submitted that the petitioner himself has been a victim of fraud committed by the officials of the accused under a well hatched conspiracy. There is no specific allegations in the complaint that the petitioner was an employee in accused No. 1 company or was actively responsible for day to day affairs of the accused company. The fact regarding issue or dishonour of the cheque in question was never brought to the knowledge of the petitioner.

12. It is also submitted that mere stake in the equity or purchase of office of the accused company cannot make petitioner responsible for conduct of the business of the accused. It is also submitted that the petitioner has been implicated as respondent No.7 in the complaint case with an ulterior motive of exerting pressure upon him and the criminal law cannot be set into motion as an arm twisting measure.

13. The counsel for the petitioner has also pointed out that another complaint titled as ‘Ashok Narang vs. M/s. AJS Builders Pvt. Ltd. & Ors.’ bearing complaint case No.833/2011 was filed wherein also the petitioner was arrayed as one of the accused on similar allegations. In the said complaint, the proceedings against the petitioner were dropped by learned Metropolitan Magistrate vide order dated 15.10.2011.

14. Per contra, learned counsel for respondent No.2/complainant urged that the petitioner is trying to delay the matter.

15. Section 138 of the Act refers about penalty in case of dishonour of cheques for insufficiency of funds in the account. In the instant case, it is necessary to reproduce the relevant provisions of Section 141 of the Act, which reads 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.”

16. On perusal of proviso of Section 141 of the 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 criminal offence under the provisions of Section 141 of the Act.

17. 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.

18. 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 Act.

19. 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:

‘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.”

20. As held in the case of ***Rajesh Aggarwal vs. State and Anr.***, 171 (2010) DLT 51, this Court ought not to interfere at the stage of summoning in a case under Section 138 of the Act. However, this Court may interfere under its inherent powers under Section 482 Cr.P.C. if there is any apparent gross irregularity which has caused miscarriage of justice or has caused undue harassment. This power, however, should be used cautiously and sparingly.

21. In the instant case, there is no specific allegation against the petitioner that the petitioner was responsible and incharge of the business affairs of the accused company and therefore, the

petitioner is not covered under the proviso to Section 141 of the Act. Further, the record of Registrar of Companies shows that petitioner was neither Director nor concerned with the accused company.

21. In the light of aforesaid discussion, the petition is allowed. The complaint case bearing No.818/2011 titled as ‘Vikas Grover vs. A.J.S. Builders Ltd. & Ors.’ for the offence under Section 138 of the Negotiable Instruments Act qua the petitioner is quashed.

Crl.M.A. No.5766/2013

The application is dismissed as infructuous.

**(VED PRAKASH VAISH)
JUDGE**

May 21st, 2014/gm