**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPLICATION NO.4578 OF 2004**
**WITH**
**CRIMINAL APPLICATION NO.4579 OF 2004**
**WITH**
**CRIMINAL APPLICATION NO.4580 OF 2004**
**WITH**
**CRIMINAL APPLICATION NO.4582 OF 2004**
**WITH**
**CRIMINAL APPLICATION NO.4583 OF 2004**
**WITH**
**CRIMINAL APPLICATION NO.4584 OF 2004**

Sashi Gupta & Ors. ...Applicants

Versus

Jet Speed Audio Private Limited &
Anr. ...Respondents

.....

Mr. Prakash Naik with Ms Vaishali Raje, Mr. Ganesh Bhujbal and Mr. Pawan Mali for the Applicants.
Mr. Suneel D. Mogre for Respondent No.1.
Ms R.V. Newton, APP for Respondent No.2-State.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.**

**DATE : 13th OCTOBER, 2015.**

**P. C. :**

The Applicants in the aforesaid applications are the accused Nos.2,3,6 and 7 in Criminal Case Nos.19/S/2003, 20/S/2003, 21/S/2003, 22/S/2003, 23/S/2003 and 168/S/2003 pending on the file of the Metropolitan Magistrate, 28th Court, Esplanade, Mumbai for the offence punishable under section 138 of the Negotiable Instruments Act and shall be hereinafter referred to as 'the Applicants'. By these applications the Applicants have challenged the order of issuance of process under section 138 of the Negotiable Instruments Act in the respective criminal cases stated above.

2. The brief facts leading to these applications are as under:-

The Respondent No.1-complainant had filed the aforestated complaints against these Applicants and others for the offence punishable under section 138 of the Negotiable Instruments Act. The Respondent No.1-complainant had alleged that the Applicant No.1-accused No.2 is the chairman of the accused No.1-company i.e. Magnasound India Limited and that the Applicant No.2 was the director of the said company and the Applicants No.3 and 4 are the authorised signatories of the said company and were responsible to the day to day affairs of the company. The Respondent No.1-complainant had further stated that on 10.8.2001 the Applicants No.3 and 4 (accused Nos.6 and 7), had issued cheques in favour of the complainant-company. The said cheques were dishonoured with endorsement 'refer to drawer'. The Respondent No.1-complainant issued a statutory notice and called upon the Applicants and the other accused to pay the cheque amount. The Applicants and other accused having failed to pay the cheque amount, the Respondent No.1-complainant filed aforesaid six criminal cases before the learned Metropolitan Magistrate, 28th Court, Esplanade, Mumbai.

3. The learned Magistrate issued process under section 138 of the Negotiable Instruments Act in each of these criminal cases. Aggrieved by the said order the Applicants have invoked powers of this Court under section 482 of the Criminal Procedure Code for setting aside the order dated 20th May, 2004 and for quashing the proceedings in respect of each of these criminal cases stated above.

4. At the outset, it may be mentioned that the Applicants No.3 and 4 (accused nos.6 and 7) are the signatories to the subject cheques. Mr. Prakash Naik, the learned senior counsel concedes that in view of the settled position of law, as enunciated in **SMS Pharmaceuticals Ltd. Vs. Neeta Bhalla & Anr 2010 SCC (cri) 2835** the Applicants No.3 and 4 can be proceeded against without there being any specific averments in the complaint. The learned counsel submits that the prayer for quashing is restricted only qua the Applicants No.1 and 2, who being the directors of the accused No.1-Company are prosecuted for the offence under section 138 r/w. Section 141 of the Negotiable

Instruments Act alleged to have been committed by the accused No.1-Company.

5. Section 141 of the Act which deals with offenecs by companies 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 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 ….*
>
> *(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."*

6. A three Judge Bench of the Hon'ble Supreme Court in **S.M.S. Pharmaceuticals (supra)** has held that merely being a director of a company is not sufficient to make him liable under section 141 of the Act. A director of a compnay cannot be deemed to be in charge of

and responsible to the company for the conduct of the business. The requirement of section 141 is that the person sought to be made liable should be incharge and responsible for the conduct of the company at the relevant time. The Hon'ble Supreme Court has held that 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.

7. In the instant case, it is not in dispute that the complaint contains the basic averments that the Applicants herein were at the time the offence committed were incharge and responsible for the conduct of the business of the company. Mr. Prakash Naik, the learned senior counsel contends that in addition to these averments the complaint should also spell out the role of the Director. The complaint should indicate as to how and in what manner the directors were responsible for the accused company for the conduct of its business. In support of these contentions he has relied upon the judgments of 1)

**Pepsico India Holdings Pvt. Ltd. Vs. Food Inspector & Anr. 2011 2) National Small Industries Corporation Limited Vs. Harmeet Singh Paintal and Anr. (2010) 3 SCC 330. 3)Pooja Ravinder Devidasani Vs. State of Maharashtra & Anr. ALL MR (CRI) 419 SCC, (2) BOM. C.R. (Cri) 427.**

8. Per contra Mr. Suneel D. Mogre the learned counsel for the Respondent No.1-complainant has submitted that the complaint discloses basic averments and that the same are sufficient for taking cognizance and issuing process under section 138 of the Negotiable Instruments Act.

9. In the case of **Pepsico India** (supra), based on the report of the public analyst process was issued against the Appellant and its Directors for offenes under Prevention of Food Adulteration Act, 1954. The application under section 482 of the Cr.P.C. for quashing the said order was dismissed by the High Court and aggrieved by the said order the Appellant and its Directors had filed appeals before the Hon'ble Supreme Court challenging the cognizance taken by the Magistrate. One of the grounds raised in the said case was about the liability of the director of a company which is said to have committed defaults within the meaning of section 17 of Prevention of Food Adulteration Act,

1954, in the light of the decision in SMS Pharmaceuticals, (supra), when they were neither in charge of nor responsible for the conduct of the business of the company. In the said case there were no allegations in the complaint against the directors of the company that they were either incharge or responsible to the company for its day-to-day management. On the facts of the said case, the Apex Court held that the High Court had gone beyond the ratio in SMS Pharmaceuticals. The Hon'ble Supreme Court has reiterated that in a complaint against a company and its Directors, the complainant has to indicate in the complaint itself as to whether the Directors concerned were either incharge of or responsible to the company for its day-to-day management, or whether they were responsible to the company for the conduct of its business. A mere bald statement that a person was a Director of the company, against which certain allegations had been made, is not sufficient to make such Director liable in the absence of any specific allegations regarding his role in the management of the company.

10. This decision does not disturb the proposition of law laid down by the coordinate Bench in SMS Pharmaceuticals, on the contrary reiterates the same principles. The said decision therefore,

does not support the arguments advanced by Mr. Prakash Naik, the learned senior counsel for the Applicants.

11. In **National Small Industries Corporation Limited (supra),** the Hon'ble Apex Court has held that Section 141 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 that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent No.1 was incharge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

12. It is however, to be noted that in a subsequent judgment of **Mr. A.K. Singhania V/s. Gujarat State Fertilizer Co. Ltd. & Anr. J.T. 2013(13) SC 583** in Criminal Appeal No.1692-1718 of 2013 the Hon'ble Apex Court has dealt with the said question after referring **SMS Pharmaceuticals Ltd. (supra)** has held as under:-

> "*From a plain reading of the aforesaid provision it is*

> *evident that every person who at the time the offence was committed is in charge of and responsible to the Company shall be deemed to be guilty of the offence under Section 138 of the Act. In the face ofit, will it be necessary to specifically state in the complaint that the person accused was in charge of and responsible for the conduct of the business of the Company? In our opinion, in the case of offence by Company, to bring its Directors within the mischief of Section 138 of the Act, it shall be necessary to allege that they were in charge of and responsible to the conduct of the business of the Company. It is necessary ingredient which would be sufficient to proceed against such Directors. However, we may add that as no particular form is prescribed, it may not be necessary to reproduce the words of the section. If reading of the complaint shows and substance of accusation discloses necessary averments, that would be sufficient to proceed against such of the Directors and no particular form is necessary. However, it may not be necessary to allege and prove that, in fact, such of the Directors have any specific role in respect of the transaction leading to issuance of cheque. Section 141 of the Act makes the Directors in charge and responsible to Company "for the conduct of the business of the Company" within the mischief of Section 138 of the Act and not particular business for which the cheque was issued. We cannot read more than what has been mandated in Section 141 of the Act.*

13. In the case of **Gunmala Sales Private Ltd. Vs. Anu Mehta & Ors.** (supra) dated 17th October 2014 the Hon'ble Apex Court after considering the decision in SMS Pharmaceuticals as well as the decision in National Small Industries and A.K. Singhania and other previous judgments has held as under :-

> *33. We may summarize our conclusions as follows:*
> *a) Once in a complaint filed under Section 138 read with Section 141 of the NI Act the basic averment is made that the Director was in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, the Magistrate can issue process against such Director;*

14. In **Pooja Devidasani V/s. State of Maharashtra & Anr.,** (supra) the Appellant was a house wife and a non executive Director of the accused-company. She had already resigned about two and half years before issuance of the cheque in question and this fact was known to the complainant. On the facts of the case, the Hon'ble Supreme Court held that in the entire complaint neither the role of the Appellant in as far as the company was explained nor in what manner the Appellant was responsible for the conduct of the business of the company was explained. Considering the fact that the Appellant had resigned much before the issuance of the cheque, it was held that continuation of the criminal proceedings against her would be a pure abuse of process of law and it has to be interdicted at the threshold.

15. The law laid down by the Hon'ble Apex Court in the case of **S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla & Anr.,** by the Bench of three Hon'ble Judges, which has been followed in the subsequent

judgments in the case of **A.K. Singhania Vs. Gujarat State Fertilizer Co. Ltd. & Anr. and M/s. Gunmala Sales Private Ltd. Vs. Anu Mehta (supra),** clearly indicates that every Director cannot be deemed to be incharge and responsible for the conduct of the Company. It is necessary to specifically aver that the person who is sought to be held vicariously liable was incharge of and responsible for the conduct of the business of the company. Such basic averments are sufficient to take cognizance and issue process against the Directors.

16. Mr. Prakash Naik, the learned senior counsel for the Applicants further submits that there are no averments in the complaint to indicate that the subject cheques were issued towards discharge of legally enforceable debt. He has further submitted that correspondence dated 5th April, 2001, 23rd April, 2002 and 13th July, 2001, which are produced by the Applicants in these proceedings clearly indicate that there was no legally enforceable debt and as such no proceedings could have been initiated under section 138 of the Negotiable Instruments Act.

17. He has further submitted that the Applicants had earlier filed a criminal writ petition bearing No.976 of 2003 for quashing the process issued in C.C. No.21/S/2003. He has further submitted that

said petition was dismissed by this Court vide judgment dated 19th November, 2003. The contention regarding the agreement between the parties as well as the issue of legally enforceable debt was already considered in the said petition. The learned counsel for the Respondent No.1-complainant has further submitted that the documents produced by the Applicants cannot be looked into at this stage and will have to be dealt with at the stage of trial.

18. The complaint prima facie discloses that the accused Nos.6 and 7 had issued cheques under the instructions of the accused No.1-Company and its Directors. The presumption under sections 118 and 139 of the Negotiable Instruments Act is in favour of the Respondent No.1-complainant. The correspondence which has been brought to my notice by Mr. Prakash Naik, learned senior counsel for the Applicants, in my considered view, cannot be looked into at this stage for rebutting the presumption under sections 118 and 139 of the Negotiable Instruments Act and the same will have to be dealt with on merits at the stage of trial.

19. Under the circumstances and in view of reasons stated herein above, in my considered view the complaint discloses basic ingredients of offence under section 138 r/w section 141 of the N.I.

Act. Hence, no grounds are made out to interfere with the impugned order. The applications are accordingly dismissed. Rule is discharged.

20. Considering that the case is of the year 2003, the learned Magistrate is directed to dispose of these complaints as expeditiously as possible and in any case within a period of one year from the date of the receipt of the order. The parties are directed to appear before the learned Metropolitan Magistrate, 28th Court, Esplanade, Mumbai on **2.11.2015** at 11.00 a.m.

**(ANUJA PRABHUDESSAI, J.)**