IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2650 OF 2004
WITH
CRIMINAL WRIT PETITION NO.2651 OF 2004

R.K. Verma ...Petitioner

Versus

M/s. Krishna Texoport Industries
Ltd.& Anr. ...Respondents

CRIMINAL WRIT PETITION NO.2652 OF 2004
WITH
CRIMINAL WRIT PETITION NO.2653 OF 2004

Ashwani Kumar ...Petitioner

Versus

M/s. Krishna Texoport Industries
Ltd.& Anr. ...Respondents

.....

Mr. S.P. Bharati for the Petitioners.
Ms Soni Sangle i/b. M/s. Kulkarni and Associates for the Respondent No.1.
Mr. Rajesh More, APP for Respondent No.2-State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATE : 26th OCTOBER, 2015.

<u>P. C.</u> :

The Petitioners in Writ Petition Nos.2650 of 2004 and 2653 of 2004, who are the accused Nos.5 and 6 respectively in C.C.

No.529/S/2002 and in connected writ petition Nos.2651 of 2004 and 2652 of 2004, they were the accused Nos.5 and 6 in C.C. No.1366/S/2002, which were earlier pending on the file of the Metropolitan Magistrate, 40th Court, Girgaum, Mumbai and presently pending before the learned Metropolitan Magistrate, 14th Court, Girgaum, Mumbai, have challenged the orders dated 29th April, 1998 and 30th March, 2000 of issuance of process under section 138 r/w. section 141 of the Negotiable Instruments Act.

2. The Respondent No.1-M/s. Krishna Texoport Industries Ltd. had lodged a complaint No.529/S/2002 against the Petitioners-the accused Nos.5 and 6 and the other accused. It was the case of the complainant that the accused No.1- Company had issued two cheques viz. Cheque No.789715 dated 29th December, 1997 for Rs.50,00,000/- and Cheque No.789716 dated 17th January, 1998 for Rs.50,00,000/- towards discharge of their legally enforceable debt. The said cheques were dishonoured and despite receipt of the statutory notice, the accused No.1-Company and its Directors did not pay the cheques amount. The Respondent No.1-complainant therefore, initiated proceedings against accused No.1-Company and its Directors for the offence punishable under section 138 of the Negotiable Instruments

Act. Present Petitioners have been arrayed as accused Nos.5 and 6 being the Directors of the accused No.1- Company.

3. The learned counsel for the Petitioners has submitted that the averments in the complaint do not satisfy the requirement of section 141 of the Negotiable Instruments Act. The learned counsel for the Petitioners has further submitted that the Petitioners had resigned as Directors much before the issuance of the subject cheques and as on the date of the offence, they were neither incharge of nor responsible for the conduct of the business of the Company.

4. The learned counsel for the Respondent No.1 submits that the factum of resignation is a matter of trial and cannot be decided at this stage. She has further submitted that the Petitioners had signed the agreement which had led to the issuance of the subject cheques.

5. It may be mentioned here that the Petitioners herein are arrayed as accused on the ground that they were the Directors of the accused No.1-company and are sought to be fastened with vicarious liability for the offence alleged to have been committed by the accused No.1-Company. Section 141 of the Negotiable Instruments Act, which deals with the offences committed by the company, 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 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,—*

6. A plain reading of this section reveals that a person can be fastened with vicarious liability only if, at the time of commission of the

offence he was incharge of, and was responsible to the company for the conduct of the business of the company as well as the company. The law laid down by the Hon'ble Apex Court in the case of **S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla & Anr., AIR 2010 SC 2835** 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. 2013, ALL MR (cri) 4098 SC and M/s. Gunmala Sales Private Ltd. Vs. Anu Mehta 2015 (1) SCC 103,** 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.

7. In the light of the above, in the present case the question is whether the complaint contains basic averments so as to take cognizance and issue process against these Petitioners under section 138 of the Negotiable Instruments Act. For this purpose it is necessary to refer to the averments in para Nos.2 and 6 of the complaint, which read as under :

> *2.....Accused No.1 is a Company duly incorporated/under the Companies Act, 1956 and rest of the Accused are its Directors who are jointly and severally, in charge of the business of the Accused No.1 and also its day to day affairs.*
>
> *6. ..... The Accused No.2 to 8 are Director of the Accused No.1 and are in-charge of the business of the Accused No.1 and also its day to day affairs. Hence, all the Accused are liable for offence under Section 138 of the Negotiable Instruments Act.*

8. Averments made in para Nos.2 and 6 reveal that the complainant had merely alleged that the Petitioners and other directors are incharge of the business of the accused No.1-Company and also its day to day affairs. At this stage, it will be advantageous to refer to the judgment of **K.K. Ahuja Vs. V.K. Vora 2009 (10) SCC 48,** wherein the Hon'ble Apex Court has held as under :

> *"15. Section 141 uses the words "was in charge of, and was responsible to the company for the conduct of the business of the company". It is evidence that a person who can be made vicariously liable under Sub-section (1) of Section 141 is a person who is responsible to the company for the conduct of the business of the company and in addition is also in charge of the business of the company at all. The meaning of the words "person in charge of the*

business of the compnay" was considered by this Court in Girdhari Lal Gupta V.D.N. Mehta followed in State of Karnataka v. Pratap Chand and Katta Sujatha v. Fertilizer & Chemicals Travancore Ltd. This Court held that the words refer to a person who is in overall control of the day to day business of the company. This Court pointed out that a person may be a director and thus belongs to the group of persons making the policy followed by the company, but yet may not be in charge of the business of the company; that a person may be a Manager who is in charge of the business but may not be in overall charge of the business; and that a person may be an officer who may be in charge of only some part of the business.

16. Therefore, if a person does not meet the first requirement, that is being a person who is responsible to the company for the conduct of the business of the company, neither the question of his meeting the second requirement (being a person in charge of the business of the company), nor the question of such person being liable under Sub-section (1) of Section 141 arises. To put is differently, to be vicariously liable under Sub-section (1) of Section 141, a person should fulfill the 'legal requirement' of being a person in law (under the statute governing companies) responsible to the company for the conduct of the business of the company and also fulfill the 'factual requirement' of being a person in charge of the business of the company.

> *17. Therefore, the averment in a complaint that an accused is a director and that he is in charge of and is responsible to the company for the conduct of the business of the company, duly affirmed in the sworn statement, may be sufficient for the purpose of issuing summons to him. But if the accused is not one of the persons who falls under the category of 'persons who are responsible to the company for the conduct of the business of the company' (listed in para 14 above), then merely by stating that 'he was in charge of the business of the company' or by stating that 'he was in charge of the day to day management of the company' or by stating that 'he was in charge of, and was responsible to the company for the conduct of the business of the company', he cannot be made vicariously liable under Section 141 (1) of the Act."*

9. In the instant case, the Respondent No.1-complainant has merely averred that the Petitioners are in-charge of the business of the accused No.1-company and its day to day affairs. There are no averments to indicate that they are responsible for the conduct of the business of the company. In the light of the principles laid down in **K.K. Ahuja Vs. V.K. Vora and Gunmala Sales (supra)** the Petitioners cannot be made vicariously liable for the offence committed by the Company.

10. In the case No.1366/S/2002, the subject cheque was issued on 7th December, 1999 and the same was deposited on 8th December, 1999 and dishonoured on the same day. The statutory notice was issued on 18th December, 1999 and the complaint was lodged on 24th January, 2000. Mr. R.K. Verma, Petitioner in Writ Petition Nos.2650 of 2004 and 2651 of 2004 has placed on record the certified copy of Form No.32 filed before the Registrar of Companies. A Perusal of the said Form No.32 reveals that the Petitioner – R.K. Verma had resigned as a director w.e.f. 9th July, 1997, which is much before the issuance of the cheques. The Respondent No.1-complainant herein has not disputed the genuineness of Form No.-32.

11. Similarly, Ashwani Kumar- the Petitioner in Writ Petition Nos.2652 of 2004 and 2653 of 2004 had placed on record a certified copy of Form No.32 filed before Registrar of Companies reporting the cessation of directorship. The Respondent No.1-complainant herein has not disputed the genuineness of Form No.-32. A perusal of Form No.-32 reveals that he had resigned as a director on 8th March, 1999, which was much before the issuance of the cheque. Thus, as on the date the offence was committed the Petitioners in Writ Petition

No.2650 of 2004 and 2652 of 2004 were not incharge or responsible for the conduct of business of the company and as such they cannot be prosecuted of the offence alleged to have been committed by the Company.

12. Under the circumstances and in view of the discussions supra, the petitions are allowed. The impugned orders dated 29th April, 1998 and 30th March, 2000 are hereby quashed and set aside qua the Petitioners. Consequently, process issued under section 138 r/w. section 141 of the Negotiable Instruments Act, is quashed and set aside qua the Petitioners.

(ANUJA PRABHUDESSAI, J.)