$~23 to 30 *(common order)*

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

Reserved on: 17th July, 2018
Pronounced on: 23rd July, 2018

\+ CRL.M.C. 334/2016 & CRL.M.A.1446/2016

FADI EL JAOUNI ..... Petitioner

Through: Mr. J.K. Das, Sr. Adv. with Ms. Varuna Bhanrale and Ms. Vatsala Kumar, Advocates

versus

GIAN CHAND GARG ..... Respondent

Through: Mr. Rishi Manchanda, Advocate with Ms. Divya Singh, Advocate

\+ CRL.M.C. 346/2016 & CRL.M.A. 1463/2016

FADI EL JAOUNI ..... Petitioner

Through: Mr. J.K. Das, Sr. Adv. with Ms. Varuna Bhanrale and Ms. Vatsala Kumar, Advocates

versus

GIAN CHAND GARG ..... Respondent

Through: Mr. Rishi Manchanda, Advocate with Ms. Divya Singh, Advocate

\+ CRL.M.C. 347/2016 & CRL.M.A.1465/2016

FADI EL JAOUNI ..... Petitioner

Through: Mr. J.K. Das, Sr. Adv. with Ms. Varuna Bhanrale and Ms. Vatsala Kumar, Advocates

versus

GIAN CHAND GARG ..... Respondent

Through: Mr. Rishi Manchanda, Advocate with Ms. Divya Singh, Advocate

\+ CRL.M.C. 348/2016 & CRL.M.A.1467/2016

FADI EL JAOUNI ..... Petitioner

Through: Mr. J.K. Das, Sr. Adv. with Ms. Varuna Bhanrale and Ms. Vatsala Kumar, Advocates

versus

GIAN CHAND GARG ..... Respondent

Through: Mr. Rishi Manchanda, Advocate with Ms. Divya Singh, Advocate

\+ CRL.M.C. 349/2016 & CRL.M.A. 1469/2016

KHALED ABDELRAHMAN RADI ..... Petitioner

Through: Mr. J.K. Das, Sr. Adv. with Ms. Varuna Bhanrale and Ms. Vatsala Kumar, Advocates

versus

GIAN CHAND GARG ..... Respondent

Through: Mr. Rishi Manchanda, Advocate with Ms. Divya Singh, Advocate

\+ CRL.M.C. 350/2016 & CRL.M.A. 1471/2016

KHALED ABDELRAHMAN RADI ..... Petitioner

Through: Mr. J.K. Das, Sr. Adv. with Ms. Varuna Bhanrale and Ms. Vatsala Kumar, Advocates versus

GIAN CHAND GARG ..... Respondent
Through: Mr. Rishi Manchanda, Advocate with Ms. Divya Singh, Advocate

\+ CRL.M.C. 351/2016 & CRL.M.A. 1473/2016

KHALED ABDELRAHMAN RADI ..... Petitioner
Through: Mr. J.K. Das, Sr. Adv. with Ms. Varuna Bhanrale and Ms. Vatsala Kumar, Advocates

versus

GIAN CHAND GARG ..... Respondent
Through: Mr. Rishi Manchanda, Advocate with Ms. Divya Singh, Advocate

\+ CRL.M.C. 352/2016 & CRL.M.A. 1475/2016

KHALED ABDELRAHMAN RADI ..... Petitioner
Through: Mr. J.K. Das, Sr. Adv. with Ms. Varuna Bhanrale and Ms. Vatsala Kumar, Advocates

versus

GIAN CHAND GARG ..... Respondent
Through: Mr. Rishi Manchanda, Advocate with Ms. Divya Singh, Advocate

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

1. On 30/31.01.2014, certain criminal complaints were filed in the court of the Metropolitan Magistrate by the respondent, each seeking prosecution of the parties, including the petitioners herein for offences punishable under Section 138 of the Negotiable Instruments Act, 1881, they including criminal complaint nos.440-443/1/14 from which the present petitions arise. Each of the said criminal complaints were directed against several persons including a company described as M/s. Bush Foods Overseas Pvt. Ltd. It may be added here that Mr. Rahul Shivam and Mr. Nicholas Fortune were reflected in the array of accused as the Authorized Signatory and Chief Financial Officer respectively, while Mr. Vir Karan Awasthy was described as the Managing Director of the company accused.

2. On the basis of preliminary inquiry in each case, the Metropolitan Magistrate issued process including against the petitioners herein. The petitioners, besides certain others, feeling aggrieved, approached the Court of Sessions invoking its revisional jurisdiction by separate petitions (CR Nos.97-108/2015), the prime contentions urged on their behalf being that there was no case made out for they being summoned as accused on the basis of allegations that they were the Directors of the company accused, denying that they had any concern or responsibility with the conduct of the day-to-day business of the company.

3. The afore-mentioned revision petitions were decided by the court of Sessions by a common order dated 03.08.2015. While revision petitions of co-accused Naseer Mohd. MF Al Hajri, were allowed, the proceedings against him having been dropped, the revision petitions of the petitioners herein were dismissed.

4. The petitions at hand have been filed invoking inherent jurisdiction of this court under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.) and Article 227 of the Constitution of India to pray for the afore-mentioned order of the Sessions Court in the context of each of the said four criminal cases to be set aside and the proceedings against the petitioners herein also to be dropped. Reliance is placed on the decision of bench of three Hon'ble Judges of the Supreme Court in *SMS Pharmaceuticals Pvt. Ltd. Vs. Neeta Bhalla, (2005) 8 SCC 89.*

5. The petitions have been resisted by the respondent (complainant of the afore mentioned cases) and at the hearing reference was also made to two other rulings of the Supreme Court, they being *Gunmala Sales (P) Ltd. vs. Anu Mehta and Ors, (2015) 1 SCC 103* and *Standard Chartered Bank vs. State of Maharashtra and Ors., (2016) 6 SCC 62*.

6. There can be no quarrel with the proposition, as advanced by the counsel for the respondents, that the ruling of the bench of three Hon'ble Judges in *SMS Pharmaceuticals* (supra), continues to hold the field, the decisions in *Gunmala Sales (P) Ltd.* (supra) and *Standard Chartered Bank* (supra) having accepted this position and the said subsequent rulings being in a slightly different context.

7. It may be mentioned herein that the petitioners before this court had also been facing similar criminal prosecution for offences again under Section 138 of the Negotiable Instruments Act, 1881 in altleast eleven other criminal complaints, though they having been filed at the instance of two other complainants. On their revision petition in the context of the said other criminal complaints, the proceedings against them in those cases were dropped by the court of Sessions accepting their above noted plea. The said order of dropping of proceedings by the revisional court were challenged by the complainants of those other eleven cases by a batch of twenty-nine other petitions under Section 482 Cr.P.C., led by Crl.M.C. No.3257/2016 before this court. The said batch of twenty-nine other similarly placed petitions, giving rise to similar questions of law is being decided by a common judgment of even date.

8. These matters pertain to the penal clause contained in Section 138 of the Negotiable Instruments Act, 1881, which reads thus :-

> *138. Dishonour of cheque for insufficiency, etc., of funds in the account — 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 provision of this Act, be punished with imprisonment for 8 [a term which may be extended 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 of other liability" means a legally enforceable debt or other liability.

9. In that context, in the judgment of even date in Crl.M.C. No.3257/2016, titled *Jwala Devi Enterprises Pvt. Ltd. vs. Fadi El Jaouni, Etc.,* this court has observed thus:-

"6. It is clear from the plain reading of the above quoted provision and is now also well settled that the offence under Section 138 of the Negotiable Instruments Act does not stand constituted merely upon dishonor of a cheque. The dishonor of a cheque which had been issued by the person (who is sought to be prosecuted) in favour of the complainant must be followed by a notice of demand within the stipulated period. It is the non-payment of the amount of the cheque within the statutory period after service of the notice of demand which

constitutes the offence that is punishable under the aforementioned provision of law."

10. There is no dispute as to the fact that for dealing with cases involving companies and the persons connected thereto as the accused, the provision of Section 141 of the Negotiable Instruments Act, 1881 is relevant. The above quoted provision of law has been the subject matter of interpretation by this court and in various rulings of the Supreme Court, particularly, three cases mentioned above. On basis of principles laid down in the said cases, *i.e., SMS Pharmaceuticals* (supra), *Gunmala Sales (P) Ltd.* (supra) and *Standard Chartered Bank* (supra), this court has culled out the guidelines in the judgment of even date in Crl.M.C.3257/2016, titled *Jwala Devi Enterprises Pvt. Ltd. vs. Fadi El Jaouni, Etc.,* as under:-

"14. The guiding principles with reference to Section 141 of the Negotiable Instruments Act, 1881, which are now well settled by judicial pronouncements, some of which have been noted above, may be summarised thus :-

> *(i). It is only those persons who are in charge of, or responsible for the conduct of the business, of the company at the time of commission of the offence under Section 138 of the Negotiable Instruments Act, 1881 who can be subjected to criminal action with reference to Section 141;*
>
> *(ii). If the person committing an offence under Section 138 of the Negotiable Instruments Act, 1881 is a company, the person who was signatory to the cheque which is dishonoured is clearly responsible for the*

incriminating act and would be liable to be proceeded against under Section 141 (2);

(iii). By virtue of the office they hold, the persons working in the capacity of the Managing Director or Joint Managing Director are deemed to be in charge of, and responsible for the conduct of the business of, the company and, therefore, can be proceeded against in terms of Section 141;

(iv). Merely because a person is a director of the company is not sufficient to make him liable under Section 141, there being no deeming that by holding such position he is in charge of, or responsible for the conduct of the business of, the company within the meaning of Section 141;

(v). It is necessary for the complainant to specifically aver in the complaint that at the time the offence was committed, the person sought to be prosecuted was in charge of, or responsible for the conduct of the business of, the company in terms of Section 141, there being no need for further particulars to be given in the complaint about his role, this being subject to proof at the trial;

(vi). The person who has been summoned as an accused for offence under Section 138 of the Negotiable Instruments Act, 1881 on the basis of averment that he was director of the company accused, he being in charge of or responsible for the conduct of its business cannot get the complaint quashed by the High Court by filing a petition under Section 482 of the Code of Criminal Procedure, 1973 merely on the ground that no particulars as to his role have been set out in the complaint; and

> *(vii). The person who has been summoned as an accused for offence under Section 138 of the Negotiable Instruments Act, 1881 by invoking the provision contained in Section 141 may persuade the High Court to quash the process in exercise of its inherent power under Section 482 of the Code of Criminal Procedure, 1973 by furnishing "some sterling incontrovertible material or acceptable circumstances" substantiating his contention that he was not in charge of nor responsible for the conduct of the business of the company "at the time the offence was committed" and thereby showing a case that making him stand the trial would be an abuse of the process of court, but not otherwise."*

11. A perusal of four complaints from which the present petitions arise reveals that they are founded on almost identical averments, exception being with regard to the particulars of the cheques or the background facts against which they had been issued or the dates on which they were presented or dishonored leading to demand notices in their respect being issued, there being no payment made pursuant to such demand notices. The averments crucial to pass the muster of Section 141 of the Negotiable Instruments Act, 1881, however, are identically worded in the said four cases. For illustration, the crucial averments appearing in one of such complaints (Crl. Complaint No.440/1/2014), it being the first in chronology (Crl.M.C. 348/2016), may be extracted as under :-

"2. That the accused no.1 is a Pvt. Ltd. company which is run and managed by accused no.2 to 6, being its directors and authorized signatory/M.C./C.F.O. in the name and style of M/s. Bush Foods Overseas Pvt. Ltd., 505-506, 5th Floor, DLF South Court, Saket, New Delhi-110017 and are engaged in the business of supply and export of different kind of Rice etc.

3. That the accused no.2 to 6, apart from being Directors/authorized signatory/Managing Director/C.F.O. of the accused no.1, are also the in-charge of day-to-day affairs & conduct of their business including procurement of business including export of rice, placing of orders for polishing of rice to be exported and issuance of cheque/s on behalf of the above said accused company after mutual discussions, verification of accounts of the suppliers, such as the complainant and other expenses borne by the accused company in its daily routine basis. Further all the accused persons no.2 to 6 are regularly in touch with each other and no cheque can be issued without their consultation amongst them and consenting for the cheque to be issued after a green signal by the chief financial officer (A-4), who always keeps an eye upon the financial matters of the company apart from being responsible for the financial health of the company.

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11. That it is now clear that the intentions of all the accused were not good when the above said two cheques were issued after mutual consultations, in discharge of the aforesaid liability of their company, as they have assured that the same shall be honoured upon presentation in clearing on due dates but deliberately have got the funds insufficient in the company's account nor made any *arrangement for payment of the said two cheques, which shows their malafide intentions and false representations knowing fully well that they had got insufficient funds in the account to honour the said two cheques.*

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17. That as both the above noted <u>two cheques issued by the accused after mutual consultations, knowledge and in discharge of their liability</u> are dishonoured for the reason of "EXCEEDS ARRANGEMENT", therefore all the accused may be held liable civilly as well as criminally, jointly as well as severally particularly under section 420 of the Indian Penal Code 1860, under section 138 to 142 of the Negotiable Instrument Act, 1881 as amended up to date and under order XXXVII of the Code of Civil Procedure, 1908 and for this purpose this complaint is being filed before the Hon'ble Court."

(emphasis supplied)

12. It is clear from the bare perusal of the above-quoted averments that they are deficient to the effect that there is not even a whisper of allegation that the petitioners are persons who were in charge of or responsible to the company accused for the conduct of its business "*at the time the offence was committed*".

13. The petitioners are not stated to be signatories to the cheques in question. They cannot be roped in merely because they have been directors of the company accused. The general averments that they were responsible for all the business dealings and for the circumstances leading to the dishonour of the cheques or that they had given any assurance as to the cheques, do not suffice.

14. The view taken by the revisional court, therefore, cannot be upheld. The complaint cases, in so far as these petitioners are concerned, do not pass the muster of the requisite basic averments.

15. Thus, the petitions are allowed. The impugned order of the Sessions Court to the extent thereby the revision petitions of the petitioners were dismissed with reference to the aforementioned four criminal cases is set aside. The proceedings against the petitioners in the four criminal complaint cases (CC Nos.440/1/14 to 443/1/14) are hereby dropped.

16. The petitions and the applications filed therewith stand disposed of in above terms.

(R.K. GAUBA)
JUDGE

JULY 23, 2018
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