IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

(136) **CRM-M-19684-2024**
Date of Decision: 22.04.2024

Lovely Pathak ……..Petitioner

Versus

Greater Mohali Area Development Authority ……..Respondent

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present: Mr. Munish Gupta, Advocate, for the petitioner.

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PANKAJ JAIN, J.(ORAL)

1. Prayer in the instant petition filed under Section 482 Cr.P.C. is for quashing of Complaint No.NACT/555/2023 dated 01.06.2023 (Annexure P-2) filed by respondent under Section 138 of the Negotiable Instruments Act, 1881, pending before the learned JMIC, SAS Nagar and summoning order dated 01.06.2023 (Annexure P-3) passed by learned JMIC, SAS Nagar and all subsequent proceedings arising therefrom.

2. The petitioner has been summoned in this case for an offence punishable under Sections 138 of the Negotiable Instruments Act, 1881, on the complaint filed by respondent.

3. While attacking the complaint as well as the summoning order, counsel for the petitioner has submitted that as per Form DIR-12 (Annexure P-1), petitioner was related to the accused-company only in the capacity of Additional Director, Professional Category non-executive and thus, she cannot be held liable under Section 141 of the Negotiable Instruments Act. In

support of his contention, heavy reliance has been placed upon ***Sunita Palita & Others Vs. M/s Panchami Stone Quarry, 2022 (4) R. C. R. (Criminal) 118.***

4. I have heard learned counsel for the petitioner and have carefully gone through the case file.

5. Before appreciating the contention raised by the counsel representing the petitioner, it shall be apt to peruse Sections 138 and 141 of the Negotiable Instruments Act which read as under:-

> *Section 138 of Negotiable Instruments Act, 1981.*
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> ***Dishonour of cheque for insufficiency, etc., of funds in the account.—***
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> *"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 provisions of this Act, be punished with imprisonment for 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:*
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> *Provided that nothing contained in this section shall apply unless—*
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> *(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;*
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> *(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*
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> *(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 or other liability" means a legally enforceable debt or other liability.

Section 141 of the Negotiable Instruments Act 1981

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,—

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

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

6. Section 141 of the Negotiable Instruments Act has been subject matter of continuous debate before the Hon'ble Supreme Court larger Bench in ***S.M.S.Pharmaceuticals Ltd. Vs. Neeta Bhalla (2005) 8 SCC 89*** wherein the following three questions came for consideration before the Larger Bench:

> *"(a) whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfill the requirements of the said section and it is not necessary to specifically state in the complaint that the persons accused was in charge of, or responsible for, the conduct of the business of the company?*
> *(b) whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary ?*
> *(c) even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the Managing Directors of Joint Managing Director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against?"*

7. The Larger Bench answered the same as under:

> *"21. In view of the above discussion, our answers to the questions posed in the Reference are as under :*
> *(a) 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.*
> *(b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and*

responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."

8. The next judgment in the series is ***Gunmala Sales Private Limited v. Anu in SLP (Crl.) 12 of 2020*** which was reiterated and followed in ***S.P. Mani and Mohan Dairy v. Dr.Snehalatha Elangovan passed in 2022 AIR (SC) 4883.*** Learned counsel for the petitioner has further relied upon the para-46 and 47 of the **Sunita Palita's case (supra)** which is read as under:

*"46. As held by this Court in **National Small Industries Corporation Ltd Vs. Harmeet Singh Paintal** quoted with approval in the subsequent decision of this Court in Pooja Ravinder Devidasani vs. State of Maharashtra and anr. (supra) the impleadment of all Directors of an Accused Company on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company, without anything more, does not fulfil the requirements of Section 41of the NI Act.*

47. In any event there could be no justification for not dispensing with the personal appearance of the Appellants, when the Company had entered appearance through an authorized officer. As held by this Court in Pepsi Foods Ltd. Vs. Special Judicial Magistrate and Ors.(1998) 5 SCC 749 summoning an accused person cannot be resorted to as a matter of course and the order must show application of mind."

9. In view of the above, learned counsel submits that being additional Director that too in executive capacity itself is enough to exercise jurisdiction under Section 482 Cr.P.C. to quash the complaint. The aforesaid plea is also misconceived and cannot be sustained in view of the following observations made by the Supreme Court in the case of ***Rallies India Ltd. vs. Poduru Vidya Bhusan & Ors., (2011) 13 SCC 88:-***

> *12. The primary responsibility of the complainant is to make specific averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no legal requirement for the complainant to show that the accused partner of the firm was aware about each and every transaction.*
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> *On the other hand, proviso to Section 141 of the Act clearly lays down that if the accused is able to prove to the satisfaction of the Court that the offence was committed without his knowledge or he had exercised due diligence to prevent the commission of such offence, he will not be liable of punishment. Needless to say, final judgment and order would depend on the evidence adduced. Criminal liability is attracted only on those, who at the time of commission of the offence, were in charge of and were responsible for the conduct of the business of the firm. But vicarious criminal liability can be inferred against the partners of a firm when it is specifically averred in the complaint about the status of the partners "qua" the firm. This would make them liable to face the prosecution but it does not lead to automatic conviction. Hence, they are not adversely prejudiced - if they are*
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> *eventually found to be not guilty, as a necessary consequence thereof would be acquitted.*
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> *13. At the threshold, the High Court should not have interfered with the cognizance of the complaints having been taken by the trial court. The High Court could not have discharged the respondents of the said liability at the threshold. Unless parties are given opportunity to lead evidence, it is not possible to come to definite conclusion as to what was the date when the earlier partnership was dissolved and since what date the Respondents ceased to be the partners of the firm.*
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> *14. <u>Before concluding the present discussion, we also take this opportunity to strike a cautionary note with regard to the manner in which High Courts ought to exercise their power to quash criminal</u>*

proceedings when such proceeding is related to offences committed by companies. The world of commercial transactions contains numerous unique intricacies, many of which are yet to be statutorily regulated. More particularly, the principle laid down in Section 141 of the Act (which is pari materia with identical sections in other Acts like the Food Safety and Standards Act, the erstwhile Prevention of Food Adulteration Act etc. etc.) is susceptible to abuse by unscrupulous companies to the detriment of unsuspecting third parties. In the present case, there are several disputed facts involved - for instance, the date when the partnership came into being, who were the initial partners, if and when the Respondents had actually retired from the partnership firm etc.

15. Strictly speaking, the ratio of the SMS Pharmaceuticals (supra) can be followed only, after the factum that accused were the Directors or Partners of a Company or Firm respectively at the relevant point of time, stands fully established. However, in cases like the present, where there are allegations and counter allegations between the parties regarding the very composition of the firm, the above rule of 'specific averment' must be broadly construed. Indeed, it would be nothing short of a travesty of justice if the Directors of a Company of Partners of a Firm, who, having duped a third-party by producing false documents (like a fake partnership deed) or making false statements (that some others were in charge of the Company/Firm), at a subsequent stage, seek protection from prosecution on the ground that they were not directly indicted in the complaint - such a proposition strikes against one of the very basic tenets of the law of natural justice, which is, that none shall be allowed to take advantage of his own default. Of course, the above observation is of a general nature, and has no bearing on the present case, but nonetheless, the power to quash a criminal proceeding with respect to an offence under Section 141 of the Act, must be exercised keeping this advisory note and caveat in mind."

10. Apart from this following observations made by the Apex Court in **Sunita Palita's case (supra)** itself answer the plea raised by the learned for the petitioner:-

42. A Director of a company who was not in charge or responsible for the conduct of the business of the company at the relevant time, will *not be liable under those provisions. As held by this Court in, inter alia, S.M.S.Pharmaceuticals (supra), the liability under Section138/141 of the NI Act arises from being in charge of and responsible for the conduct of the 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. It would be a travesty of justice to drag Directors, who may not even be connected with the issuance of a cheque or dishonour thereof, such as Director (Personnel), Director (Human Resources Development) etc. into criminal proceedings under the NI Act, only because of their designation.*

43. Liability depends on the role one plays in the affairs of a com-pany and not on designation or status alone as held by this Court in S.M.S.Pharmaceuticals (supra). The materials on record clearly show that these Appellants were independent, non-executive Directors of the company. As held by this Court in Pooja Ravinder Devidasani v. State of Maharashtra and Anr. (supra) a non-Executive Director is not involved in the day-to-day affairs of the company or in the running of its business. Such Director is in no way responsible for the day-to-day running of the Accused Company. Moreover, when a complaint is filed against a Director of the company, who is not the signatory of the dishonoured cheque, specific averments have to be made in the pleadings to substantiate the contention in the complaint, that such Director was in charge of and responsible for conduct of the business of the Company or the Company, unless such Director is the designated Managing Director or Joint Managing Director who would obviously be responsible for the company and/or its business and affairs.

11. Thus, in view of the aforesaid bindings precedents and proposition of law that emerges is as under:

(A) Offence punishable under Section 138 of the Negotiable Instruments Act is departure from the classic criminal law as Directors become vicariously liable along with accused company;

(B) In order to array a Director as one of the accused, it is necessary to plead and aver ;

(i) that he is the one who signed the cheque for

(ii) he was incharge and was responsible to the Company for the conduct of the business of the Company.

(iii) It is not necessary to show that he was award of each and every transaction.

12. The aforesaid being the test prescribed by the Supreme Court in the binding precedents starting from ***S.M.S.Pharmaceuticals (supra) up to Siby Thomas Vs. M/s. Somany Ceramics Ltd, 2024 (1) SCC 348*****,** the complaint needs to be tested on the touchstone thereof.

13. The relevant part of the complaint reads as under:

> "4.*That the accused No.1 is a company registered under The Companies Act and the accused No.2 is its Managing Directgor-cum-Authorized Signatory. The accused No.3 and 4 are its Directors. The accused No.5 is a company through its Director i.e. Shiwalik Site Planners Private Limited. It is pertinent to mention here that M/s ATS Infrabuild Private Limited and Shiwalik Site Planners Private Limited (the accuse No.5) have jointly agreed to develop as being the partner in CASA ESPANA, AT VILLAGE BADMAJRA, SECTOR-121, SAS NAGAR, LICENSE NO.14/2013 and submitted Development Agreement in the office of GMADA, Mohali. Hence, the present Legal Notice is being issued to all the accused persons as legally responsible for the issuance of cheque in question, to discharge their legal liability towards the complaint, thus, all the accused persons are jointly and severally liable to be prosecuted under The Negotiable Instruments Act, 1881, being the persons authorized and responsible for day-to-day business and functioning of the accused No.1.*
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> 9. *That it is important to mention here that at the time the offence under Section 138 and 141 was committed (after receipt of Legal Notice dated 05.05.2023), the accused persons being the Managing Director and Additional Director of the accused No.1 Company were in charge of, and responsible for the conduct of business of the company (accused No.1), Hence, in the present complaint accused No.1 to 5 are being arrayed as accused persons."*

Petitioner is accused No.3 and there is special averment as to him being responsible for the conduct of the business.

14. Considering the aforesaid averments made in the complaint, this Court does not find the complaint to be so bereft of the necessary allegations that the same can be forestalled at this initial stage.

15. At this stage counsel for petitioner has raised an argument regarding non-compliance of Section 202 of Code of Criminal Procedure, 1973. Section 202 of the Cr.P.C. is not applicable to the complaints under Section 138 of Negotiable Instruments Act, 1881, in light of the decision by Constitution Bench in re: Expeditious Trial of Cases under Section 138 of N.I. Act, 1881, 2021 AIR (Supreme Court) 1957 which is read as under:

> *"12…………….Section 145 of the Act provides that the evidence of the complainant may be given by him on affidavit, which shall be read in evidence in any inquiry, trial or other proceeding, notwithstanding anything contained in the Code. Section 145 (2) of the Act enables the court to summon and examine any person giving evidence on affidavit as to the facts contained therein, on an application of the prosecution or the accused. It is contended by the learned Amici Curiae that though there is no specific provision permitting the examination of witnesses on affidavit, Section 145 permits the complainant to be examined by way of an affidavit for the purpose of inquiry under Section 202. He suggested that Section 202 (2) should be read along with Section 145 and in respect of complaints under Section 138, the examination of witnesses also should be permitted on affidavit. Only in exceptional cases, the Magistrate may examine the witnesses personally. Section 145 of the Act is an exception to Section 202 in respect of examination of the complainant by way of an affidavit. There is no specific provision in relation to examination of the witnesses also on affidavit in Section 145. It becomes clear that Section 145 had been inserted in the Act, with effect from the year 2003, with the laudable object of speeding up trials in complaints filed under Section 138. If the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of the witnesses to be taken on oath. On a holistic reading of Section 145 along with Section 202, we hold that Section 202 (2) of the Code is inapplicable to complaints under Section 138 in respect of examination of witnesses on oath. The evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses. In suitable cases, the Magistrate can examine documents for*

satisfaction as to the sufficiency of grounds for proceeding under Section 202.

16. In view of the above, this Court does not find merit in the present case and the same is dismissed.

(PANKAJ JAIN)
JUDGE

22.04.2024
anil

Whether speaking/reasoned	:	Yes/No
Whether reportable	:	Yes/No