

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

% DATE OF RESERVE: March 3, 2009

DATE OF DECISION: April 13, 2009

+ **CRL.M.C.1764/2007 and Crl. M.A.6162/2007**

Vinay Kumar @ Vinay Kumar Kedia Petitioner
Through: Mr.R.N.Mittal, Sr.Advocate with Mr.P.Mittal
and Mr.Manoj Kumar, Advocates

versus

State & Another Respondents
Through: Mr.U.L.Watwani, APP for the State/R-1
Mr.Abhinav Mahajan, Advocate for the
respondent No.2

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: **REVA KHETRAPAL, J.**

1. This petition under Section 482 of the Code of Criminal Procedure has been filed by the petitioner Vinay Kumar Kedia seeking his discharge in Criminal Complaint No.5096/01/04 dated 06.03.2000 titled "**Times Guarantee Limited Vs. Kedia Castle Delleon Industries Limited & Others**" pending in the Court of Mr.Vikas Dhull, Metropolitan Magistrate, New Delhi for the offences under Section 138 of the Negotiable Instruments Act, 1881.

2. The brief facts leading to the filing of the present petition are that the respondent No.2-complainant instituted the aforesaid criminal complaint against the petitioner and ten others, alleging therein that the complainant is a Company engaged in the business of financing, and the accused No.1, i.e., Kedia Castle Delleon Industries Limited had approached the complainant with a proposal for grant of lease facility, resulting in the execution of a lease agreement dated 25.03.1995 between them. It is further alleged that in order to fulfil the contractual obligation, i.e., payment of installments under the lease agreement, the accuseds (sic) issued cheque No.483577 dated 30.12.1999 for Rs.3,33,234/- drawn on the State Bank of India, Government Colony, Bandra East, Mumbai Branch, which on presentation was returned vide Cheque Returning Memo dated 06.01.2000 with the remarks "ACCOUNT CLOSED". Thereupon, allegedly the complainant is stated to have addressed to the accuseds (sic) a legal notice dated 28.01.1999 despatched duly on 28.01.2000 through registered acknowledgment due post, calling upon them to pay the complainant the cheque amount together with future interest and notice charges.

3. On the basis of the aforementioned complaint, the petitioner was summoned by the learned Metropolitan Magistrate, New Delhi on 15.03.2002 and subsequently non-bailable warrants were ordered to be issued against the

petitioner and thereafter process under Sections 82/83 Cr.P.C., though no process/summons/warrants were in fact ever served upon him directing his presence.

4. Aggrieved by the summoning order dated 15.03.2002 and the issuance of process under Sections 82/83 Cr.P.C., the petitioner has preferred the present petition invoking the inherent powers of this Court seeking quashing of the summoning order as well as the proceedings pending against him in the Court of the learned Metropolitan Magistrate.

5. Mr.R.N.Mittal, the learned Senior Counsel for the petitioner submitted that the petitioner had resigned from the accused Company on 30.04.1996 and severed all relations with the Company on the said date, while the present complaint was filed on 06.03.2000 on the basis of a cheque issued on 30.12.1999, which was dishonoured vide Cheque Returning Memo dated 06.01.2000. Form No.32 dated 28.09.1996 under the Companies Act, 1956 was also filed by the Company with the Registrar of Companies, reflecting his resignation from the Directorship on 30.04.1996. Mr.Mittal further submitted that thereafter the petitioner had no concern whatsoever with the affairs of the Company and thus the entire allegations pertained to the period much beyond his resignation when the petitioner had ceased to be a Director or Office Bearer of the Company. No specific allegations have been leveled against the

petitioner other than the general allegation that the petitioner was the Director of the Company and incharge of and responsible for the affairs of the Company, without any specific detail with regard to the time, place etc. of the alleged offence. As a matter of fact, Mr.Mittal urges, the complaint is bereft of any allegation that the petitioner was incharge of and responsible for the conduct and business of the Company at the time of the commission of offence. He further submits that the complainant has miserably failed to comply with the provisions of Section 141 of the Act, as is evident from paragraph-3 of the complaint, which reads as under:-

“The Accused is a company incorporated under the provisions of the Companies Act, 1956 having its registered and Corporate Office at the addresses mentioned above. Accused No.2 to 11 are the Directors/Officers of the Accused No.1 who were/are in charge of and were/are responsible for running of affairs of the Accused No.1 Company and also conducting business and are deemed to be guilty of the offences mentioned hereinbelow.”

6. A bare perusal of the above-quoted para-3, Mr.Mittal urges, is sufficient to show that the petitioner has been summoned only on the bald allegation that he was Vice-Chairman/Director of the Company without any reference to any specific time, date or period and the same is also contrary to the record of the Registrar of Companies, as evidenced by Form No.32, referred to hereinabove. Further, the petitioner was neither a signatory to the cheque in question nor was served with any legal notice obviously for the reason that the legal notice

must have been sent to the registered office of the Company alone.

7. Referring to the judgments of the Supreme Court in *S.M.S.Pharmaceuticals Ltd. Vs. Neeta Bhalla & Another I*, (2005) 8 SCC 89, *S.M.S.Pharmaceuticals Ltd. Vs. Neeta Bhalla & Another II*, (2007)4 SCC 70, *Sabitha Ramamurthy Vs. R.B.S.Channabasavaradhya*, (2006)10 SCC 581, *N.K.Wahi Vs. Shekhar Singh & Others*, (2007) 9 SCC 481, *Saroj Kumar Poddar Vs. State (NCT of Delhi) & Another*, (2007) 3 SCC 693 and *DCM Financial Services Ltd. Vs. J.N.Sareen & Another*, (2008)8 SCC 1, it is submitted that no deemed liability can attach to a Director in terms of Section 141 of the Negotiable Instruments Act merely on account of his being a Director of the Company, who was not incharge of and not responsible for the conduct and business of the Company at the relevant time. Paragraphs-10, 11, 12 and 18 in the case of *Neeta Bhalla I (supra)*, which are apposite, are reproduced hereunder:-

“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.

12. The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable.

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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.”

8. In a subsequent decision rendered by the Supreme Court in *Neeta Bhalla II (supra)*, the Supreme Court in paragraph-16 again spelt out the minimum averments required to be met in the complaint in order to attract

vicarious liability for the commission of the offence of the Company qua a Director or officer of the Company. Paragraph-16 reads as under:-

“The liability of a Director must be determined on the date on which the offence is committed. Only because Respondent No.1 herein was a party to a purported resolution dated 15.02.1995 by itself does not lead to an inference that she was actively associated with the management of the affairs of the Company. This Court in this case has categorically held that there may be a large number of Directors but some of them may not associate themselves in the management of the day to day affairs of the Company and, thus, are not responsible for conduct of the business of the Company. The averments must state that the person who is vicariously liable for commission of the offence of the Company both was incharge of and was responsible for the conduct of the business of the Company. Requirements laid down therein must be read conjointly and not disjunctively. When a legal fiction is raised, the ingredients therefore must be satisfied.”

9. The aforesaid aspect was also considered by the Hon'ble Supreme Court in *Sabitha Ramamurthy Vs. R.B.S.Channabasavaradhya, (2006)10 SCC 581*, wherein it is observed (SCC p-585, para-7) :-

“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.”

10. In a subsequent decision rendered by Hon'ble Supreme Court in

N.K.Wahi Vs. Shekhar Singh & Others, (2007) 9 SCC 481, the Hon'ble

Supreme Court in paragraph-8 stated:-

“To launch a prosecution, therefore, against the alleged Directors there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are in-charge and responsible for the conduct of the business of the company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and the court can always come to a conclusion in facts of each case. But still, in the absence of any averment or specific evidence the net result would be that complaint would not be entertainable.”

11. In yet another decision rendered in *Saroj Kumar Poddar Vs. State*

(NCT of Delhi) & Another, (2007) 3 SCC 693, referring to its earlier three

Judge Bench decision in *Neeta Bhalla I (supra)*, the Hon'ble Supreme Court

held as under:-

“The appellant did not issue any cheque. He had resigned from the directorship of the Company. It may be true that as to exactly on what date the said resignation was accepted by the Company is not known, but, even otherwise, there is no averment in the complaint petitions as to how and in what manner the appellant was responsible for the conduct of the business of the Company or otherwise responsible to it in regard to its functioning. He had not issued any cheque. How he is responsible for dishonour of the cheque has not been stated. The allegations, thus, do not satisfy the requirements of Section 141 of the Act.

Allegations to satisfy the requirements of Section 138 of the Act might have been made in the complaint petition but the same principally relate to the purported offence made by the Company. With a view to make a Director of a company

vicariously liable for the acts of the company, it was obligatory on the part of the complainant to make specific allegations as are required in law.”

12. In a recent judgment in *DCM Financial Services Ltd. Vs. J.N.Sareen & Another, (2008) 8 SCC 1*, the Hon'ble Supreme Court in paragraph-18 dealt with the legal fiction created by Section 141 as under:-

“Section 141 of the Act provides for a constructive liability. A legal fiction has been created thereby. The statute being a penal one, should receive strict construction. It requires strict compliance of the provision. Specific averments in the complaint petition so as to satisfy the requirements of Section 141 of the Act are imperative. Mere fact that at one point of time some role has been played by the accused may not by itself be sufficient to attract the constructive liability under Section 141 of the Act. [See *K.Srikanth Singh Vs. North East Securities Ltd. & Another, (2007) 12 SCC 788*].”

13. In the light of the law as enunciated by the Supreme Court, it stands established that unless the complainant is able to show that on the date of the commission of the offence, the petitioner was incharge of the affairs of the accused Company and responsible to it for the conduct of its business, the complaint against the petitioner would not be maintainable. In the instant case Form No.32 has been filed to show that the petitioner had resigned from the Company much prior to the date of the commission of the alleged offence and had ceased to be a Director on the date of the issuance of the cheque itself. Form No.32 under the Companies Act, 1956 is a statutory document, which is to be mandatorily filed to show any change in the Company and to reflect the

resignation of Directors, Managers, etc., (pursuant to Section 303[2] of the Companies Act). Form No.32 filed in the instant case has not been disputed by the complainant-respondent No.2 inasmuch as no attempt has been made by the complainant to show that Form No.32 produced is not a genuine document and/or that it does not reflect the correct state of affairs. The necessary corollary is that on the date of issuance of the cheque (and even subsequently at the time of its dishonour), the petitioner was not a Director of the Company having resigned from the Directorship on 30.04.1996. The petitioner not being a Director of the Company and there being no allegation against him in terms of Section 141 of the Negotiable Instruments Act, the necessary corollary is that the allegations made in the complaint even if taken to be correct in their entirety, do not disclose any of the offences for which the complaint has been filed and the summoning order passed.

14. The summoning order as well as the proceedings against the petitioner are, therefore, liable to be quashed and are hereby quashed.

CRL.M.C.1764/2007 and CrI.M.A.6162/2007 stand disposed of accordingly.

REVA KHETRAPAL, J.

APRIL 13, 2009

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