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

**DATE OF DECISION: 3<sup>rd</sup> DECEMBER, 2013**

+ **CRL.M.C. 2726/2013**

M/S SWASTIK POLYVINYLS (P) LTD. .... Petitioner  
Through Mr. Ashok Bhalla, Advocate  
versus

B M GUPTA & ORS. .... Respondents  
Through Mr. Rajiv Rajan Prasadam, Advocate

**WITH**

+ **CRL.M.C. 2730/2013**

M/S SWASTIK POLYVINYLS (P) LTD. .... Petitioner  
Through Mr. Ashok Bhalla, Advocate  
versus

B M GUPTA & ORS. .... Respondents  
Through Mr. Rajiv Rajan Prasadam, Advocate

**AND**

+ **CRL.M.C. 2731/2013**

M/S SWASTIK POLYVINYLS (P) LTD. .... Petitioner  
Through Mr. Ashok Bhalla, Advocate  
versus

B M GUPTA & ORS. .... Respondents  
Through Mr. Rajiv Rajan Prasadam, Advocate

**CORAM:  
HON'BLE MS. JUSTICE SUNITA GUPTA**

**J U D G M E N T**

**: SUNITA GUPTA, J.**

1. Three criminal miscellaneous petitions bearing Nos. CrI. M.C. Nos. 2726/2013, 2730/2013 and 2731/2013 under Section 482 of Code of Criminal Procedure, 1973 have been filed for quashing the order dated 10<sup>th</sup> April, 2013 passed by learned Additional Sessions Judge whereby Criminal Revision No. 20/2013 filed by respondent No. 1-3 was allowed.

2. The factual matrix of the case leading to the filing of the present petitions are that the petitioner Company has been carrying out the business of rubber/plastic compound and master batches for cable, footwear and automobiles and in the normal course of its business had despatched/supplied PVC compound on various dates to M/s Brimson Cables Private Limited, of which respondent Nos. 1-3 are Directors. The company admitted its liability as on 31<sup>st</sup> March, 2011 by issuing

confirmation of accounts to the petitioner Company on 1<sup>st</sup> April, 2011 and towards part payment/partial discharge of its legal liability issued cheques under the signature of Sh. Hardesh Gupta as director of the company. On presentation, the cheques were returned unpaid for the reasons “*exceeds arrangement*” whereafter the petitioner company issued legal notice to the company and all its four directors. However, the company and its directors did not pay the amount despite service of legal notice. There upon, the petitioner company filed criminal complaint dated 16<sup>th</sup> November, 2011 under Section 138 read with Sections 141 and 142 of Negotiable Instruments Act, 1881. Vide order dated 24<sup>th</sup> December, 2011 the learned Metropolitan Magistrate summoned the company and all the four directors including respondent Nos. 1-3. Respondent Nos. 1-3, herein, filed criminal revision dated 17<sup>th</sup> December, 2012 against the order of summoning dated 24<sup>th</sup> December, 2011 on the plea that they had nothing to do with the alleged offence as they had neither issued the cheques to the petitioner company nor had placed any purchase order for purchasing the goods. The criminal revision petition was allowed

by the learned Additional Sessions Judge vide order dated 10<sup>th</sup> April, 2013.

3. This order has been challenged, *inter alia*, on the ground that in the case of ***K.K. Ahuja v. V.K. Vohra and Another*** 2009(9) Scale 87 Hon'ble Supreme Court has held that 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. Relying upon the judgment of ***K.K. Ahuja*** (supra) in the case of ***Krishna Murari Lal v. IFCI Factors Limited*** 2012 X AD (Delhi) 539 and ***Susanna Jacob v. Pyroguard Engineers Private Limited and Others*** 2012 IX AD (Delhi) 173, High Court held that in view of specific averments made in the complaint and the fact that the petitioner was admittedly a director of the company, a presumption under Section 141 of N.I Act would have to be drawn against the petitioner. However, the presumption is rebuttable one, but evidence to the contrary would have to be led by the petitioner. The petitioner company has led pre-summoning evidence by filing

duly sworn affidavit of CW1 clearly reiterating the averments set out in the complaint, which were sufficient at this stage for summoning the company and the directors. The learned Metropolitan Magistrate has rightly summoned the respondents. The summoning order do not suffer from any infirmity, as such, it was prayed that the impugned order dated 10<sup>th</sup> April, 2013 passed by learned Additional Sessions Judge be set aside and the order dated 24<sup>th</sup> December, 2011 summoning respondent Nos. 1-3 be restored.

4. Notice of the petition was given to the respondents.

5. I have heard Mr. Ashok Bhalla, learned counsel for the petitioner and Mr. Rajiv Rajan Prasadam, learned counsel for the respondents and have perused the record.

6. It was submitted by learned counsel for the petitioner that the summoning order do not suffer from any infirmity and without considering the ratio of *K.K. Ahuja* (supra) and the other authorities referred by him in the petition, learned Additional Sessions Judge wrongly quashed the summoning order qua respondent Nos. 1 to 3. It is liable to be set aside.

7. Per contra it was submitted by learned counsel for the respondent that it was incumbent upon the petitioner to have averred in the plaint the specific role of respondent Nos. 1-3 and the mere allegation that respondent Nos. 1-3 are directors is not sufficient as they were neither the signatory of the cheque nor had placed any order for purchase of goods. Only general allegations were levelled against the revisionist that did not meet the requirement of law as held in *S.M.S. Pharmaceuticals Limited v. Neeta Bhalla and Another*, 2005(8) SCC 89 therefore, the revision petition was filed which was rightly allowed by learned Additional Sessions Judge. The impugned order does not suffer from any infirmity which calls for interference, as such, these petitions are liable to be dismissed.

8. I have given my considerable thoughts to the respective submissions made by learned counsel for the parties and have perused the record.

9. A perusal of the complaint filed by the petitioner which was reproduced in his evidence reveals that the only allegation made against respondent Nos. 1 to 3 is to the effect that the company had

dispatched/supplied PVC compound to M/s Brimson Cables Private Limited, a Private Limited Company incorporated under the Companies Act, 1956 of which accused Nos. 2 to 5 (respondent Nos. 1 to 3 herein) are directors and incharge and responsible for the conduct of the business of the company.

10. The sole question to be considered is whether mere assertion in the complaint or in the pre-summoning evidence that respondent Nos. 2-4 are directors, in-charge and responsible for the conduct of the day to day business of the company is sufficient to hold the accused vicariously liable for the commission of offence punishable under Section 138 of NI Act.

11. Section 138 and Section 141 were brought in the NI Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (Act 66 of 1988) with effect from April 1, 1989. These provisions as amended from time to time read as under:

**“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 provisions of this Act, be punished with imprisonment for a term which may extend 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 or other liability' means a legally enforceable debt or other liability.

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,-

(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."

12. The legal position concerning the vicarious liability of a director in a company which is being prosecuted for the offence under Section 138, NI Act has come up for consideration before this Court on more than one occasion. In the case of *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr.* (2005) 8 SCC 89, the following questions were referred to a 3-Judge Bench for determination:

“(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 fulfil the requirements of the said section and it is not necessary to specifically state in the complaint that the person 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 or 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.

13. The three-Judge Bench of Hon'ble Supreme Court answered the aforesaid questions thus:

“(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 the question posed in sub-para (b) has to be in the 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 the 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 the 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 the 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 the 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.”

14. This view was reiterated in *K.K. Ahuja* (supra) which was relied upon by learned counsel for the petitioner. Learned counsel for the petitioner has relied upon the following portion of the judgment as appearing in para 17:-

“Therefore, the averment made in the complaint that an accused is a director and that he is in-charge 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...”

15. However, after detailed discussion, in para 20, the position under Section 141 of the Act was summarised thus:

(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix `Managing' to the word `Director' makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii) In the case of a director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was

responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under Sub-section (2) of Section 141.

(iii) In the case of a Director, Secretary or Manager (as defined in Section 2(24) of the Companies Act) or a person referred to in clauses (e) and (f) of Section 5 of Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 141(1). No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that Sub-section.

(iv) Other Officers of a company can not be made liable under Sub-section (1) of Section 141. Other officers of a company can be made liable only under Sub-section (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence.

16. In Para 21, it was further observed as under:

“If a mere reproduction of the wording of Section 141(1) in the complaint is sufficient to make a person liable to face prosecution, virtually every officer/employee of a company without exception could be impleaded as accused by merely making an averment that at the time when the offence was committed they were in charge of and were responsible to the company for the conduct and business of the company. This would mean that if a company had 100 branches and the cheque issued from one branch was dishonoured, the officers of all the 100 branches could be made accused by simply

making an allegation that they were in charge of and were responsible to the company for the conduct of the business of the company. That would be absurd and not intended under the Act. As the trauma, harassment and hardship of a criminal proceedings in such cases, may be more serious than the ultimate punishment, it is not proper to subject all and sundry to be impleaded as accused in a complaint against a company, even when the requirements of Section 138 read with Section 141 of the Act are not fulfilled.”

17. Therefore, even in this authority it was observed that mere bald averments in the complaint that accused persons were incharge and responsible for the conduct of day to day business of the company is not sufficient to hold them vicariously liable. It is incumbent upon the complainant to specifically spell out the role of each and every director if he is not the Managing Director or Joint Managing Director or signatory to the cheque and to explain how the other directors were in-charge and responsible for the conduct of day to day business of the company.

18. *Krishna Murari Lal* (supra) and *Susanna Jacob* (supra) also does not help the petitioner, inasmuch as, in those cases besides alleging that the accused were directors and in-charge and responsible for the conduct of day to day business of the company there were other

specific allegations against them, as such, it was observed that a presumption has to be drawn which is rebuttable, but evidence to the contrary would have to be led by the them.

19. Things are entirely different in the instant case, inasmuch as, except for reproducing the wording of Section 141(1) in the complaint, no specific role has been assigned to respondent Nos. 1 to 3. They are admittedly not the Managing Director or Joint Managing Director of the company, nor are the signatories to the cheque. Therefore, in the absence of making specific allegation against them as to how they were in-charge and responsible for the conduct of day to day business of the company, they could not be made vicariously liable.

20. In view of the above discussion, learned Additional Sessions Judge was right in setting aside the impugned order qua summoning of these accused persons which does not suffer from any infirmity.

21. That being so, the petitions are devoid of merit and the same are accordingly dismissed.

**SUNITA GUPTA  
(JUDGE)**

**DECEMBER 03, 2013**

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