

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

+ **Crl.M.C. Nos.1798/2007, 1799/2007, 2192/2007 2197/2007**

% Date of Decision : 14.5.2008

1. Crl.M.C. No. 1798/2007

Shambhu Kumar Aggarwal Petitioner
Through: Mr. Rajesh Goswami, Advocate

versus

Ved Prakash Respondent
Through: Mr. P.D. Gupta & Mr. Kamal
Gupta, Advocates

2. Crl.M.C. No. 1799/2007

Shambhu Kumar Aggarwal Petitioner
Through: Mr. Rajesh Goswami, Advocate

versus

Ved Prakash Respondent
Through: Mr. P.D. Gupta & Mr. Kamal
Gupta

3. Crl.M.C. No. 2192/2007

Shri Prakash Chand Saraf & Anr. Petitioner
Through: Mr. Rajesh Goswami, Advocate

versus

Ved Prakash Respondent
Through: Mr. P.D. Gupta & Mr. Kamal
Gupta

4. Crl.M.C. No. 2197/2007

Shri Prakash Chand Saraf & Anr. Petitioner
Through: Mr. Rajesh Goswami, Advocate

versus

Ved Prakash Respondent
Through: Mr. P.D. Gupta & Mr. Kamal
Gupta

**CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI**

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

VIPIN SANGHI, J. (Oral)

1. These four petitions under Section 482 of Cr.P.C. have been heard together and are being disposed of by this common order since they raise identical issues and the respondent in all the petitions is common. These petitions seek quashing of the summoning order dated 14.9.2005 in complaint case No.3891/2007 and the aforesaid complaint case, and the summoning order dated 16.5.2005 in complaint case No.3890/2007 as well as the said complaint case pending in the Court of Metropolitan Magistrate, Tis Hazari Courts, Delhi. The aforesaid two complaint cases under Section 138 read with Section 141 and 142 of the Negotiable Instruments Act (the Act) have been filed by the same complainant, namely, Shri Ved Prakash, who is the respondent in all these petitions. The petitioner in Crl.M.C. No.1798/2007 (pertaining to complaint case No.3891/2007) and Crl.M.C. No.1799/2007 (pertaining to complaint case No.3890/2007) is Shri Shambhu Kumar Aggarwal, whereas Crl.M.C. No.2192/2007 and Crl.M.C. No.2197 (which arises out of complaint case No.3890/2007 and complaint case No.3891/2007 respectively) have been preferred by Shri Prakash Chand Saraf and Shri Amit Aggarwal.

2. The respondent Shri Ved Prakash who is the sole proprietor of M/s N.K. Industries has preferred the aforesaid two

complaints wherein Shri Shambhu Kukmar Aggarwal is arrayed as accused No.5 in both the complaints, and Shri Prakash Chand Saraf and Shri Amit Gupta are arrayed as accused Nos.6 & 4 respectively in the said complaints. Accused No.1 is the company M/s Chetak Spintex Ltd. in both the complaint cases. I first proceed to deal with the petitions filed by Shri Shambhu Kumar Aggarwal, i.e., Crl.M.C. No. 1798/2007 and Crl.M.C.No.1799/2007.

3. The submission of learned counsel for the petitioner is that a bare perusal of the complaints does not make out a case against the petitioner Shri Shambhu Kumar Aggarwal. He submits that respondent has, by making a sweeping averment, roped in all the directors of the company M/s Chetak Spintex Ltd., who is accused No.1 in the aforesaid two complaints. He submits that the omnibus statement made in paragraph 2 of the two complaints to the effect: *“that accused Nos.2 to 7 have been the directors of accused No.1. The accused Nos.2 to 7 have been the in charge of and were responsible to the accused No.1 company for the conduct of the business of the said company at the time of purchasing of the goods, issuing the cheque of and responsible for conduct of its business even at the time of service of legal notice and continue to be so till date.”*, is not sufficient to fix liability upon the petitioner in terms of Section 138 read with Section 142 of the Act. Learned counsel for the petitioner has referred various decisions of the Supreme Court which have been rendered from time to time, namely, ***S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla & Anr.*** (2005) 8 SCC 89 (hereinafter referred to as ***S.M.S. Pharmaceuticals Ltd. (I)***), ***Saroj Kumar Poddar vs. State (NCT of Delhi) and Anr.*** (2007) 3 SCC 693, ***Sabitha Ramamurthy &***

Anr. vs. R.B.S. Channabasavaradhya, 2006(9) Scale 212, **N. Rangachari vs. Bharat Sanchar Nigam Ltd.** 2007 V AD (SC) 210, **N.K. Wahi vs. Shekhar Singh & Ors.** AIR 2007 SC 1454, **K. Srikant Singh vs. M/s North East Securities Ltd. & Anr.** , 2007(3) JCC [NI] 268, **Maksud Saiyed vs. State of Gujarat & Ors.** JT 2007(11) SC 276 and **S.K. Alag vs. State of U.P. & Ors.** 2008 III AD (SC) 661

4. Based on the aforesaid decisions, submission of learned counsel for the petitioner is that the respondent should have disclosed in the complaint as to in what manner, and how the petitioner was incharge of, and responsible to the accused No.1 company for conduct of its business. He further submits that even before the issuance of the cheques in question, namely, cheque No. 292370 dated 15.4.2005 for Rs.5 lakhs drawn on Indian Bank, Chandni Chowk, Delhi which is the subject matter of the complaint case No.3891/2007 to which Crl.M.C. No.1798/2007 relates, and cheque No.292371 dated 15.3.2005 for Rs.5 lakhs drawn on Chandni Chowk, Delhi which relates to Crl.M.C. No.1799/2007, the petitioner Shambhu Kumar has already resigned from the directorship of the accused No.1 company. For this purpose he refers to the resignation letter dated 10.9.2004 stated to have been sent to the Chairman of the board of directors of the accused No.1 company as well as the acceptance of the resignation by the Chairman communicated to him on 13.9.2004. He further submits that he was merely a professional director who has lent his name to the accused company and was not in any way incharge of or responsible to the said company for the conduct of its business. He states that he has been serving in various capacities in other organisations, and to substantiate the same he has placed copies of his appointment letters/TDS

certificate etc. on record.

5. Learned counsel for respondent has opposed the petitions. He submits that the complaints make sufficient averments with regard to the involvement of the petitioner Shri Shambhu Kumar Aggarwal. He also relies on the averments contained in paragraph 2 of the two complaints, which are identical. Reliance is also placed on the decisions of the Supreme Court in **S.M.S. Pharmaceuticals Ltd.(I)** (supra). Learned counsel for the respondent submits that the decision of the Supreme Court in **Saroj Kumar Poddar** (supra) has been explained in **S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla & Anr.** (2007) 4 SCC 70 (hereinafter referred to as **S.M.S. Pharmaceuticals Ltd. II**) which is also decided by the same Bench consisting of Hon'ble Mr. Justice S.B. Sinha and Hon'ble Mr. Justice Markandey Katju. He also relies on the decision in **N. Rangachari** (supra).

6. It is also pointed out by learned counsel for respondent that admittedly the alleged resignation of the petitioner has not been formalised and Form No.32, admittedly has not been filed. He submits that the so called resignation and its acceptance relied upon by the petitioner are concocted merely to wriggle out the aforesaid complaints. He has also relied on the decision in **State of M.P. vs. Awadh Kishore Gupta & Ors.** (2004) 1 SCC 691 wherein the Supreme Court has dealt with the aspect of jurisdiction of the Court under Section 482 of the Code to quash the complaints and the Supreme Court has held that the court should not act on the annexures of the petition under Section 482 of the Code which cannot be termed as evidence

without being tested and proved. His further submission is that in the case of Prakash Chand Saraf and Amit Aggarwal the petitioners have sought to rely on photocopies of Form-32 claimed to have been filed on 9.3.2005 wherein it is claimed that the said persons had resigned from the office of the director on 16.2.2005. He submits that even if the said position were to be accepted, for the sake of argument, it is evident that so far as the petitioner Shambhu Kumar Aggarwal is concerned his alleged resignation was not conveyed in Form-32 to the Registrar of Companies even his alleged resignation is prior to the alleged filing of Form-32 on 9.3.2005.

7. Having considered the rival submissions of the parties, I see no merit in these petition and the same deserves to be dismissed with costs.

8. While exercising jurisdiction under Section 482 Cr.P.C. it is well established that the Court cannot go into disputes of fact. The submission of the petitioner based on the so called letter of resignation and its acceptance, photocopies whereof have been filed on record is a matter which is in serious dispute and cannot be gone into these proceedings. In case the certified copy of Form-32 evidencing resignation by the director of a company is placed on record in such like proceedings, there may still be some justification, but in the present case admittedly the return in Form-32 has not been filed by the company to communicate the resignation of the petitioner Shri Shambhu Kumar Aggarwal from his position as a director of the accused No.1 company. There is no merit in the submission of the petitioner that the obligation to file the said form was that of the accused

company, and that the petitioner cannot be held responsible in case the accused company had not filed the said form before the Registrar of Companies. Admittedly, the petitioner is a chartered accountant who would be well aware of the procedure to be adopted post submission of the resignation of a director. In any event, these are disputed questions of fact since the respondent has categorically denied the correctness and genuineness of the so called resignation letters and its acceptance and, therefore, cannot be gone into in these proceedings.

9. The submission with regard to the averment in the petition not being sufficient to rope in the petitioner is also devoid of any merit. No doubt in **Saroj Kumar Poddar** (supra), the Supreme Court while analysing the relevant averments made in the complaint made the observations that “.....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 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 made in paragraph 3, thus, in our opinion do not satisfy the requirements of Section 141 of the Act.” However, the same Bench of the Supreme Court while dealing with the **S.M.S. Pharmaceuticals Ltd.(II)** (supra) observed as follows:

“26. A faint suggestion was made that this Court in Saroj Kumar Poddar has laid down the law that the complaint petition not only must contain averments satisfying the requirements of Section 141 of the Act but must also show 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. A plain reading of the said judgment would

show that no such general law was laid down therein. The observations were made in the context of the said case as it was dealing with a contention that although no direct averments was made as against the appellant of the said case fulfilling the requirements of Section 141 of the Act but there were other case fulfilling the requirements of Section 141 of the Act but there were other averments which would show that the appellant therein was liable therefor.”

The Supreme Court has clarified that no such general proposition was laid down in **Saroj Kumar Poddar** (supra) that the complaint must also show as to how and in what manner the accused was responsible for the conduct of the business of the company or otherwise responsible to it in regard to its functioning. The observations made in **Saroj Kumar Poddar** (supra) were made in the content of that case itself. Therefore, reliance sought to be placed by the petitioner on the decision **Saroj Kumar Poddar** (supra) is of no avail.

10. Except the decision of the Supreme Court in **S.M.S. Pharmaceuticals Ltd.-(I)** (supra), which has been rendered by three Hon'ble Judges, all other decisions cited on both sides have been rendered by two Hon'ble Judges. The larger Bench decision in **S.M.S. Pharmaceuticals Ltd.-(I)** (supra) has been followed in **N. Rangachari** (supra), and in **N. Rangachari** (supra) the Supreme Court has extracted the legal position in para 9 to 11 which are reads as follow:

9. After referring to a number of earlier decisions, this court summed up the legal position and laid down: [SCC p. 103, para 19(a)]

“(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.”

10. Dealing with the question whether a Director of a company would be deemed to be in charge of, or 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, this Court held:[SCCp.103, para 19(b)]

“(b) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a director of a company it 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 there is no deemed liability of a director in such cases.”

11. Answering the question whether even in the absence of averments the signatory of the cheque or the Managing Directors could be taken to be in charge of the company and responsible to the company for the conduct of its business and could be proceeded against, the answer was as follows: [SCC p.103 para 19(c)]

(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.

11. From the aforesaid it is clear that a director does not get

roped in a complaint under Section 138 of the Act merely on the ground that he is a director of the accused company. It is necessary to specifically aver in the complaint under Section 138 of the Act that at the time when the offence was committed, the person accused was incharge of and responsible for the conduct of the business of the company. This averment is essential to meet the requirement of Section 141 of the Act and has to be made in the complaint. Without this averment being made in the complaint, the requirement of Section 141 cannot be said to be satisfied.

12. Coming to the averments made in the two complaints aforesaid which are identical, it is seen that the respondent had in clear terms stated that accused Nos.2 to 7 (which includes Shri Shambhu Kumar Aggarwal) have been the directors of accused No.1 company and they have been incharge of and responsible to the accused No.1 company for the conduct of the business of the said company at the time of purchasing of goods, issuing cheques and responsible for the conduct of its business even at the time of service of legal notice and they continue to be so till date. Therefore, the averment made in paragraph 2 of two complaints clearly satisfies the requirement of Section 141 of the Act as interpreted by the Supreme Court. For the aforesaid reasons, I see no merit in these petitions filed by Shri Shambhu Kumar Aggarwal and dismiss the same.

13. Turning to the two petitions filed by Shri Prakash Chand Saraf and Shri Amit Aggarwal, apart from the submission that the averments made in the complaints are deficient to meet the requirement of Section 141 of the Act, learned counsel for the

petitioners submits that in the case of these two directors the Form-32 was duly filed on 9.3.2005 which shows that these directors have resigned from the directorship of the company on 16.2.2005. He relies on the photocopy of Form-32 which is placed on record.

14. Learned counsel for the respondent, to meet this averment of the petitioner submit that firstly the certified copy itself has not been filed and merely a photocopy has been filed on record. Secondly, he submits that Shri Prakash Chand Saraf had in fact sworn an affidavit on 21.9.2005 that is after the purported resignation on 16.2.2005 which has been filed before the Punjab and Haryana High Court in Crl.M.C. No.52942-M/2005 “ J.S. Aggarwal vs. State of Haryana & Ors.” In the said affidavit Shri Prakash Chand Saraf has described himself as a director of M/s Chetak Spintex Ltd. i.e. the accused No.1 company and in paragraph-1 of the affidavit he states that petitioner Nos.1 to 3, wherein he is petitioner No.2 and Shri Amit Aggarwal is petitioner No.3 respectively, are the directors of the company known as M/s Chetak Spintex Ltd., accused No.1 in the present complaint cases. He submits that, therefore, the so called resignation on 16.2.2005 is an eyewash and, in any event, is highly disputed. He submits that the copy of Form-32 filed on record cannot be taken by this Court as a document worthy of reliance. He also submits that the signatures in the said documents attributed to Shri G.L. Aggarwal, the Chairman of the accused company is on the face of it is strikingly different from those to be found on the cheques signed and issued by the same gentleman, namely, Shri G.L. Aggarwal, the chairman of the company. He has referred to the three cheques bearing No.292369-71 which purportedly bear the signature of Shri G.L. Aggarwal as the Chairman

of the accused company. He also refers to the alleged acceptance of resignation of Shri Shambhu Kumar Aggarwal which is also allegedly accepted by Shri G.L. Aggarwal, chairman of the accused company to submit that the signature on the letter of resignation, and on the acceptance of resignation, and on purported Form-32 are strikingly different.

15. So far as the submission with regard to the averment made in paragraph 2 of the two complaints being deficient, is concerned, the same has already been taken care by me while dealing with the petitions of Shri Shambhu Kumar Aggarwal. So far as the purported resignations of Shri Prakash Chand Saraf and Shri Amit Aggarwal from directorship of the accused company are concerned, firstly, I may notice that only photocopies of Form-32 have been placed on record. They can certainly not be relied upon in these proceedings under Section 482 of the Code. Moreover, the respondent has raised enough doubt with regard to the authenticity of the same by referring to the affidavit dated 21.9.2005 stated to have been filed by Shri Prakash Chand Saraf before the Punjab and Haryana High Court, wherein he has described himself and Shri Amit Aggarwal as the directors of the accused company. If the said directors had in fact resigned on 16.2.2005, it does not stand to reason why Shri Prakash Chand Saraf described himself, as well as Shri Amit Aggarwal, as directors of the accused company on 21.9.2005. Though the original documents are not before me, from the photocopies of Form-32 as well as the cheques issued by Shri G.L. Aggarwal and the alleged acceptance of resignation by Shri G.L. Aggarwal in relation to Shri Shambhu Kumar Aggarwal, prima facie it appears that the signature of Shri G.L.

Aggarwal on Form-32 are somewhat different from the other signatures attributed to him. This also raises disputed questions of fact. As I have already stated, in these petitions it is not for me to proceed on the basis of documents and averments which are disputed, and I cannot undertake an enquiry into such facts while exercising jurisdiction under Section 482 of the Code. For the aforesaid reasons I dismiss all these petitions with costs quantified at Rs.5000/- in each of these petitions.

16. The costs shall be paid by each of the petitioners before the trial court on the next date.

May 14, 2008

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VIPIN SANGHI
Judge