

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

+ **CRL.M.C. 1895/2011**

% *Judgment reserved on: 06th March, 2012*
Judgment delivered on: 30th May, 2012.

DEEPIKA MALHOTRA & ORS Petitioner
Through : Mr.Praveen Mahajan, Adv.

versus

KANTI LAL JAIN Respondent
Through : Through : Mr. D. Hasija and
Ms. Sandhavi B. Saikia, Advs.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. The instant petition is being filed to quash the summoning order dated 31.10.2009 and consequent criminal proceedings initiated under Section 200 Cr. P.C. 1973 read with Section 138 read with Section 141/142 of NI Act against the petitioner in the complaint pending in the Saket Court titled as 'Kanti Lal Jain vs. Nitisree Infrastructure Limited and Ors.'
2. The cheque in question bearing no. 414842 dated 27.7.2009 for a sum of Rs.3,48,206/- drawn on Punjab and Sindh Bank, Connaught Circus, New Delhi, which was alleged to be issued by accused no. 1 Company i.e. M/s. Nitishree Infrastructure Limited and the said cheque was alleged to be signed solely by Mr. Anil Jain, Director of accuse no. 1 / company.

3. The said cheque was presented by the complainant on 27.07.2009 with his Banker at the Axis Bank, Cittaranjan Park, New Delhi and same was dishonoured by the Banker of the accused with remarks "*Exceeds arrangement*" on 29.07.2009.
4. Another cheque bearing no. 288713 dated 26.08.2009 for Rs.3,48,206 drawn on Noble Cooperative Bank Limited, NOIDA, UP was alleged to be issued in lieu of cheque no. 414842. The said cheque was deposited with the Banker of the Complainant at the Axis Bank, Chittaranjan Park, New Delhi and the same was dishonoured by the Banker of accused with the remarks "*Exceeds arrangement*" on 28.08.2009.
5. On 17.09.2009, respondent issued legal notice against the accused persons demanding the amount of cheque no. 288713. The said legal notice was alleged to be sent through Speed Post and Courier Service on 23.09.2009.
6. The cause of action arose in favour of the respondent to file the complaint on 10.10.2009, since there was no payment against the dishonoured cheque as alleged by the respondent.
7. The respondent has filed 2 separate criminal complaint arising out of same alleged transaction i.e. alleged refund for booking of one plot, one such complaint for cheque bearing no. 414843 dated 22.08.2009 for Rs.3,50,000/- and another complaint was filed in respect of dishonoured cheque bearing no. 288713 dated 26.08.2009 for Rs.3,48,206.
8. Ld. Counsel for the petitioner has submitted that in the complaint

under Section 200 of the Cr. P.C. the allegation of the complainants are that:

“That the accused no. 1 is a company which engaged in the business of real estate and is having its registered office at 78-B, Sector D-2, DDA Flats, Group-II, Kondli Gharoli, Mayur Vihar Phase-III, Delhi – 110096; and offices at B-111, Sector-5, NOIDA-201301 (UP), at D-44, Sector-6, NOIDA-201301 (UP) and at C-68, Sector 30, NOIDA-201301 (UP). The accused no. 2 to 4 are the Directors of the accused no. 1, company and are actively involved in the day to day working of the accused no.1, company. The accused no. 5 to 11 are the managers of the accused no. 1, company, are incharge of and responsible to the accused no.1, company for the conduct of the business and day to day affairs of the accused no.1, company. All the accused nos. 2 to 11 have been dealing with the complainant from time to time.

That the complainant had booked to the accused no.1, company, one plot admeasuring 175 Sq. Yds. in the so called upcoming project of the accused no.1, company at Shourya Puram, NH-24, Ghaziabad. The accused no.1, company had given to the complainant a registration No.GP-1175 and had provisionally allotted one plot with No.G-1278 in the said project. The complete payments for the said booking/provisional allotment were duly made to the accused no.1, company, by the complainant from time to time as per the demand of the accused no.1, company.”

9. Ld. Counsel for the petitioner has referred Annexure – 2, which is at Page 62, as he was working with “AURA”. The same is reproduced as under:-

“This is to certify that Mr. Upendra Joshi was working with our organization as General Manager in Construction Department since 1st December, 2006 till 30th April, 2010. During his tenure, his dedication towards the organization and towards his work as tremendous and his performance was good. We wish him good luck for his future endeavours.”

10. Ld. Counsel has drawn the attention of this court to the cheque in

question not issued by said AURA Company, whereas in complaint Mr. Upender Joshi is mentioned as alleged accused.

11. Ld. Counsel for the petitioner has relied upon a case of **K.K. Ahuja vs. V.K. Vora and Anr. (2009) 10 SCC 48** wherein it is held as under:-

“20. The position under section 141 of the Act can be summarized thus:

(iv) Other Officers of a company cannot 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, be 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.

21. 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 and section 141 of the Act are not fulfilled.”

12. He further referred Para 2 of the complaint and submitted that he is neither a signatory and no categorical averments were made and he is not employee of the said company, which issued cheque.

13. He has further relied upon a judgment decided by Coordinate Bench of this Court on 29.03.2011 in *Satyapal Talwar vs. State Crl. M.C. 410/2011* qua directors wherein it is held as under:-

“6. The allegations to fix the vicarious liability of the petitioners with the aid of Section 141 N.I. Act are in Para 7 and 8 of the complaint which are reproduced thus:

“7. That the Complainant immediately informed accused persons but, no heed was given towards the same. The accused No. 3 is the Chairman and the accused No. 4 to 7 are the Directors of the accused No. 1.

8. That the accused No. 2 to 7 are vicariously liable for the commission of the offence on behalf of the company as such the accused No. 2 issued the said cheques and the accused No. 3 to 7 are incharge and responsible to the accused No. 1 for the conduct of its business. The accused persons are also associated with the management of day to day affairs of the company.”

13. From the above judgments, it is apparent that in order to rope in a director of a company for the offence under Section 138 N.I. Act with the aid of Section 141 of N.I. Act, the complainant is not only required to make a clear allegation that the person concerned was the director of the company, but he is also required to make specific allegation of the facts indicating as to how and in what manner the said director was in-charge and responsible for conduct of the business of the company.

14. As regards the petitioners Om Dutt Sharma, Jagdish Kumar Gupta, Vikram Mittal and Satyapal Talwar, on reading of the complaint filed by the respondent No. 2, it would be seen that they are not alleged to be signatories of the cheques in question. In order to rope in the above four petitioners vicariously for the offence under Section 138 N.I. Act committed by the company, in the

name of allegations respondent has simply reproduced the language of Section 141 N.I. Act in the complaint. There is no allegation in the complaint to show as to how and in what manner the petitioner directors were in-charge and responsible for the day to day affairs and business of the company. In absence of specific allegation in this regard, in my considered view, the requirement of Section 141 N.I. Act to hold the petitioners vicariously liable for the offence committed by the company is not fulfilled. Even in the affidavit evidence given by the respondent before the Magistrate, there is no mention as to how and in what manner the petitioner directors were in-charge of or were responsible to the company for its day to day affairs and conduct of business. Thus, I am of the considered view that the impugned order of learned M.M. dated 05.05.2010 summoning the petitioners Vikram Mittal, Jagdish Kumar Gupta, Om Dutt Sharma and Satyapal Talwar for the offence under Section 138 N.I.Act committed by the company with the aid of Section 141 N.I.Act is not sustainable in law as there is neither a specific allegation nor prima facie evidence on record to show that the petitioners were Incharge and responsible for the conduct of the business and the day-to-day affairs of Hotel Indraprastha.

15. The case of the petitioner Ashok Kumar Mittal, however, stands on a different footing. On perusal of the complaint under Section 138 N.I.Act filed by respondent No.2, it transpires that as regards the petitioner Ashok Mittal, the complainant has specifically alleged that he is the Chairman of the accused company. This imply that petitioner Ashok Mittal was the Executive Head of the accused company M/s. Hotel Indraprastha and in that capacity, he was prima facie Incharge of running the business of the company and was responsible for day-today affairs of the company. Thus, his case squarely falls within the ambit of Section 141 N.I. Act to make him vicariously liable for the offence under Section 138 N.I. Act committed by the company.”

14. Further relied upon a judgment decided by Coordinate Bench of this Court on 24.02.2011 in **Gaurav Kumar & Ors. vs. Surinder Patwa, Crl.**

M.C. 3298/2010 and same Judgment in B.T. Gokhale vs. State and Anr. in Crl. M.C. 1345/2008 decided on 02.08.2011.

15. On the other hand, ld. counsel for the respondent has submitted that it is stated in the complaint as under:-

“That the complainant had booked to the accused no.1, company, one plot admeasuring 175 Sq. Yds. in the so called upcoming project of the accused no.1, company at Shourya Puram, NH-24, Ghaziabad. The accused no.1, company had given to the complainant a registration No. GP-1175 and had provisionally allotted one plot with No.G-1278 in the said project. The complete payments for the said booking / provisional allotment were duly made to the accused no.1, company, by the complainant from time to time as per the demand of the accused no.1, company.

That the accused persons could not fulfil their commitments and the so called project of the accused no.1, company at Shourya Puram, NH-24, Ghaziabad never materialized. Ultimately, the complainant was constrained to cancel its aforesaid registration and provisional allotment for the aforesaid plot and after much deliberations, persuasions and repeated follow ups by the complainant, on 20.11.2008, the accused persons had agreed to refund to the complainant the registration amount of Rs.6,98,206/- .”

16. Ld. Counsel further submitted that cheque issued on 22.08.2009 presented on the same day. Legal notice issued on 19.09.2009 and complaint filed on 22.10.2009. The Court took cognizance on 21.10.2009.

17. Further submitted that the petitioner cheated the respondent persons and an amount of Rs.7 Lacs is involved in both the cases. The accused company admitted to settle the matter with the respondent, but the same was declined by the respondent.

18. Ld. Counsel for the respondent has referred the memo of parties at page B that everyone has given the address of the company. Everyone has given the name. None has signed the addresses.

19. Ld. Counsel has submitted that the application moved before the ld. MM, Saket Court by Mr. Kanti Lal Jain for disposal of the complaint under Section 138 of NI Act on account of tendering the payment of bounced cheque by DD as per the judgment of Rajesh Aggarwal vs. State, Crl. M.C. 1996/2010.

20. Ld. Counsel for the respondent has pointed out that this application filed without ticket and proforma. Ld. Counsel has referred the following orders:

“12.08.2010

Present: Complainant with Counsel.

Sh. Brijesh Jha, Adv. Counsel for accused no. 1 to 4, 9 and 10.

Other accused are absent despite B/W.

Today I am also working as Link MM of two Courts.

Seen the report. Orally, personal exemption is sought on behalf of all the accused submitting that they are out of Delhi. Opposed by the ld. Counsel for complainant submitting that warrants have already been issued against all the accused persons despite that none is appeared. B/W against accused no. 1 to 4, 9 and 10 are cancelled subject to cost of Rs.1,000/- to e paid by the each accused to the complainant. Issue fresh B/W in the sum of Rs.15,000/- against accused no. 5,8 and 11 on PF. Dasti Prayed, allowed.

Put up on 07.09.2010. Counsel for accused is directed to file the Vakalatnama by the next date of hearing.

(Munish Markan)

MM/S.E/N.D./12.08.2010

15.12.2010

Present: Complainant in person along with Counsel Ms. Sandhari Sakia.

All the accused persons are absent.

Sh. Brajesh Jha, Counsel, for the accused No. 1,2,3,4 & 10.

An application on behalf of accused persons has been moved stating therein that accused persons are willing to pay the cheque amount in question by way of DD. Copy of the application supplied to the Counsel for the complainant. Counsel for the accused has brought today a D.D. of Rs. 6,98,206/- but the complainant refuses to accept the same praying that interest and the other expenses be given to him. Counsel for accused seeks pass over to file exemption application on the behalf of the accused person as well as his Vakalatnama.

Pass over is granted.

Put up at 2.00 p.m.

(Dheeraj Mittal)

MM-02(N.I.ACT)/South-East

New Delhi/15.12.2010

At 1:15 pm

Present: Sh. Brajesh Jha, Counsel for the accused no. 1,2,3,4 & 10 appeared and filed his Vakalatnama on the behalf of accused no. 1,2,3,4 & 10. He has also moved an application for the personal exemption of the accused no. 3, 4 & 10 on the ground that accused persons are out of town and not able to attend the court today.

Heard.

Application is allowed for today only.

Perusal of the record shows that NBWs were issued against the accused no. 3,4,9 & 10. However, NBWs returned back unexecuted. Counsel submits that as the accused persons are willing to pay the cheque amount in question by way of Demand Draft so NBWs Issued against the accused be stayed till the next date of hearing.

Considering submissions and the fact that accused persons are willing to compromise the present complaint, NBWs issued

against accused no. 3,4 &10 are stayed till the next date of hearing. Necessary Robkar be issued accordingly. B/W issued against the accused no. 5 to 8 & 11 received back unserved. Issue fresh B/W against accused no. 5 to 8 & 11 in the sum of Rs 25,000/- for the next date of hearing. NBWs issued against accused no. 9 also received back unexecuted.

Issue fresh NBW against accused no. 9 for the date fixed. Put up on 17.02.2011 for reply to the application moved on behalf of the accused persons and arguments on the above said application and further proceedings.

(Dheeraj Mittal)

MM-02(N.I.ACT)/South-East
New Delhi/15.12.2010

Vide this order, I shall dispose off application moved on behalf of the accused for disposal of the present complaint case on account of tendering the payment of the bounced cheques by way of DD as per the judgment of Hon'ble High Court of Delhi in "Rajesh Aggarwal vs. State" delivered in Crl. M.C. No. 1996/2010.

Vide this application, it is submitted by the accused that they are ready to pay the cheque amount in question by way of DD through their counsel to the complainant. It is further submitted that in view of the judgment of High Court o Delhi in "Rajesh Aggarwal Vs. State" delivered in Crl. M.C. No. 1996/2010 the present complaint case be disposed off as accused persons are ready to pay the cheque amount in question to the complainant.

Counsel for the complainant did not file any written reply to the application. However, he argued that court cannot force the complainant to compound the offence on payment of cheque amount in question. He further submitted that complainant is not ready to accept the cheque amount. I have heard the arguments from both the sides and perused the record including the judgment relied by the counsel for the accused. In my opinion consent of the complainant is very much required for compounding of offence as decided in 173 (2010) DLT 712 titled as "High tech Industry (Bihar) Ltd. & other vs. State of Delhi & Anr., wherein it is held that court cannot force the respondent to compromise on deposit of cheque amount or penalty by the accused.

For the reasons mentioned above, application in hand is dismissed.

**Announced in the open Court
On 17.02.2011**

**(Dheeraj Mittal)
M.M. (N.I.Act) – 02:SED:
New Delhi**

04.05.2011

*Present: Complainant along with counsel Sh.D.Hasija.
None for the accused.*

NBW issued against all the accused received back unexecuted. Reports perused. Issue fresh NBW against all the accused through SHO P.S. Sunlight Colony Delhi on filing of PF for 08.06.2011. PF be filed within three days from today.

Perusal of the record shows that counsel Sh.Brijesh Jha appeared for the accused No.1,2,3,4 & 10 on earlier two dates. Let court notice be issued to the counsel Sh.Brijesh Jha for the date fixed.

**(Dheeraj Mittal)
MM-02(N.I.ACT)/South-East
New Delhi/04.05.2011”**

21. Ld. Counsel for the respondent has relied upon a case of **N. Rangachari vs. Bharat Sanchar Nigam Ltd. (2007) 5 SCC 108** wherein it is held as under:-

“Company, though a legal entity, cannot act by itself but can only act through its directors. Normally, the Board of Directors act for and on behalf of the company. This is clear from Section 291 of the Companies Act which provides that subject to the provisions of that Act, the Board of Directors of a Company shall be entitled to exercise all such powers and to do all such acts and things as the Company is authorized to exercise and do. Palmer described the position thus:

"A company can only act by agents, and usually the persons by whom it acts and by whom the business of the company is carried on or superintended are termed directors."

It is further stated in Palmer that:

"Directors are, in the eye of the law, agents of the company for which they act, and the general principles of the law of principal and agent regulate in most respects the relationship of the company and its directors."

Therefore, a person in the commercial world having a transaction with a company is entitled to presume that the directors of the company are incharge of the affairs of the company. If any restrictions on their powers are placed by the memorandum or articles of the company, it is for the directors to establish it at the trial. It is in that context that Section 141 of the Negotiable Instruments Act provides that when the offender is a company, every person, who at the time when the offence was committed was incharge of and was responsible to the company for the conduct of the business of the company, shall also be deemed to be guilty of the offence along with the company. It appears to us that an allegation in the complaint that the named accused are directors of the company itself would usher in the element of their acting for and on behalf of the company and of their being incharge of the company. In Gower and Davies' Principles of Modern Company Law (Seventh Edition), the theory behind the idea of identification is traced as follows:

"It is possible to find in the cases varying formulations of the under-lying principle, and the most recent definitions suggest that the courts are prepared today to give the rule of attribution based on identification a somewhat broader scope. In the original formulation in the Lennard's Carrying Company case Lord Haldane based identification on a person

"who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation". Recently, however, such an approach has been castigated by the Privy Council through Lord Hoffmann in the Meridian Global case as a misleading "general metaphysic of companies". The true question in each case was who as a matter of construction of the statute in question, or presumably other rule of law, is to be regarded as the controller of the company for the purpose of the identification rule."

A person normally having business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its Memorandum or Articles of Association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. Therefore, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are in charge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of it. So, all that a payee of a cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in charge of its affairs. The Directors are prima facie in that position."

22. He further relied upon the case of **K.K. Ahuja (Supra)**, wherein it is held as under:-

Section 291 of the Companies Act, 1956 provides that subject to the provisions of that Act, the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and

things, as the company is authorised to exercise and do. A company though a legal entity can act only through its Board of Directors. The settled position is that a Managing Director is prima facie in charge of and responsible for the company's business and affairs and can be prosecuted for offences by the company. But insofar as other directors are concerned, they can be prosecuted only if they were in charge of and responsible for the conduct of the company's business.

A combined reading of Sections 5 and 291 of Companies Act, 1956 with the definitions in clauses (24), (26), (30), (31), (45) of section 2 of that Act would show that the following persons are considered to be the persons who are responsible to the company for the conduct of the business of the company : --

(a) the managing director/s;

(b) the whole-time director/s;

(c) the manager;

(d) the secretary;

(e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act;

(f) any person charged by the Board with the responsibility of complying with that provision (and who has given his consent in that behalf to the Board); and

(g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors.

It follows that other employees of the company, cannot be said to be persons who are responsible to the company, for the conduct of the business of the company.

The position under section 141 of the Act can be summarized 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 Sec. 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.

23. Ld. Counsel has further relied upon a judgment of ***Shree Raj Travels & Tours Ltd. & Ors. Vs. Destination of the World (Subcontinent) Private Limited 2010 (4) JCC 9NI) 313***, wherein it is held as under:

“7. It is a matter of common knowledge that when companies are floated and public issues are brought, big advertisements are issued giving big names as Directors and promoters of the company. These names are the names of successful CEOs, or Directors who have achieved success in other fields. Due to these names at the very inception and formation of company, when there is no wealth or property of the company, the share of the company is sold at a premium promising big business and success. Once money is mopped up from the public, in all those cases where the companies were created only for the purpose of mopping up hard earned money of public or to befool them, it is found that those big names disappear and in almost every litigation those Directors who formed part of the core of the company and gave promises that the Company would do roaring business quietly disappear from the scene or take plea that they were not responsible for business of the company. That is how the problem arises. While the public stands cheated and the persons who had mopped up wealth and pocketed the public wealth are not prepared to take responsibility.

8. Let us examine the role of Board of Directors (BoD) in terms of Companies Act and other legal provisions. Company is a legal personality and Board of Directors acts as its body and mind. Under Section 291 of the Companies Act, BoD is authorized to do what the company is authorized to do, unless barred by restrictions on their power by the provisions of the Companies Act. It is well settled that Directors, while exercising their powers, do not act as agents for the majority or even all the members and so the members

cannot by a resolution passed by a majority of even unanimously, supersede the Directors" power and instruct them how they shall exercise their power. The powers of management are vested in Directors and they and they alone can exercise these powers. The only way in which the General Body of a company can overrule the BoD is altering the Articles and refusing to re-elect the Directors, whose actions they disapprove. The shareholders cannot themselves usurp the powers, which by Articles are vested in the Directors. Thus the Crl.M.C.No. 2652-59/10, 2661-63/2010, 2665/2010, 2670/2010, 2678/2010, & 2692/2010 Page 4 of 13 relationship of BoD with the shareholders is more of a federation than that one of subordinate and superior.

9. Under the Companies Act, BoD has powers to make calls on shareholders in respect of money unpaid on their share, power to authorize the buy- back, power to issue debentures, power to borrow moneys otherwise than on debentures, power to invest the funds of the company and power to take and make loans. There is no doubt that BoD may, by a resolution passed at a meeting, delegate to any committee of Directors, the Managing Director, the Manager or any other principal officer of the company, the above powers. However the principal power still vests in BoD and the Manager or Managing Director acts only as an agent of the BoD. Apart from this, BoD has power to form opinion about the solvency of the company in respect of buy back shares (Section 77A), power to fill up casual vacancies in the office of Directors (Section 262), power to constitute Audit Committee and specify terms of reference thereof (Section 292A), power to make donation to political parties [Section 293A(2)], power to accord sanction for specified contracts in which one or more Directors are interested [Section 297(4)], power to receive notice of disclosure of Director"s interest [Section 299(3)(c)], power to appoint or employ a person as Managing Director or Manager [Section 316(2)], power to invest in shares or debentures of any other body corporate (Section 372A), power to

appoint or employ a person as its Manager [Section 386(2)], power to make a declaration of solvency, where it is proposed to wind up the company voluntarily [Section 488(1)], power to approve the text of advertising for inviting public deposits [Section 58A r/w Rule 4(4)]. Some of the powers can only be exercised by resolution passed at the meeting with consent of the Directors present at the meeting.”

24. I have heard learned counsels for the parties.

25. The petitioners / accused persons could not fulfill their commitment and the so called upcoming project of the accused no.1, never materialized. Ultimately, the complaint was constrained to cancel its aforesaid registration and provisional allotment for the aforesaid plot. After deliberations, persuasions and repeated follow-ups by complaint, on 20.11.2008, petitioners had agreed to refund the money to the complaint i.e. registration amount of Rs.6,98,206/-.

26. I note, it is recorded in the order dated 12.08.2010 by learned Metropolitan Magistrate, Delhi that the orally, personal exemption was sought on behalf of the accused by submitting that they were out of Delhi. Same was opposed by learned counsel appearing on behalf of the complainant and submitted that warrants were already been issued against all the accused persons, despite that none appeared. Accordingly,ailable Warrants against accused Nos.1 to 4, 9 & 10 were cancelled subject to costs of Rs.1,000/- to paid by each of the accused persons to the complaint. Learned Magistrate further issued freshailable warrants in the sum of Rs.15,000/- against accused Nos.5, 8, & 11 on PF.

27. I further note that on 15.12.2010, all accused persons were absent. Therefore, an application moved on behalf of accused stating therein that they were willing to pay the cheque amount in question by way of demand draft. Counsel for accused persons had brought the demand draft for an amount of Rs.6,98,206/-, but the complaint refused to accept the same praying that interest and other expenses should also be given to him. In that eventuality, learned counsel for accused persons sought pass over to file exemption application on behalf of accused persons as well as his *Vakaltnama*. At request, pass over was granted. On the second call, learned counsel for accused numbers 1, to 4, & 10 appeared and filed the *Vakaltnama*. He also moved application on behalf of said accused persons, as mentioned above for exemption on the ground that accused persons were out of town and were unable to attend the Court on that date.

28. Learned Magistrate perused the record and it revealed that the NBWs were issued against accused Nos.3,4, 9 & 10; however, NBWs were returned back unexecuted. Learned counsel appearing on behalf of the accused persons submitted that they were willing to pay the cheque amount in question by way of demand draft, so NBWs be stayed till next date of hearing.

29. Considering the submissions and the fact that accused persons were willing to compromise the present complaint, NBWs issued against accused No.1,3,4 & 10 were stayed till next date of hearing by the learned M.M.. The application of the accused persons for disposal of the complaint case on account of tendering the payment of the bounced cheque by DD as per judgment of this Court in ***Rajesh Aggarwal v. State, Crl.M.C.No.1996/2010***,

learned counsel for complaint did not file any written reply to the application; however, he argued that the Court cannot force the complainant to compound the offence on payment of the cheque amount in question. He further submitted that the complainant was not ready to accept the cheque amount.

31. After hearing learned counsels for parties, learned Magistrate recorded that the consent of the complainant was very much required for compounding of the offence, as law has been settled in *High Tech Industry (Bihar) Ltd & Ors v. State of Delhi & Anr : 173 (2010) DLT 172* wherein it has been held that the Court cannot force the complainant to compromise on deposit of the cheque amount or penalty by the accused. Accordingly, said application was dismissed by the learned MM.

32. It has been held in *Rangachari (supra)* that the company, though a legal entity, cannot act by itself but can only act through its directors. Normally, the Board of Directors act for and on behalf of the company. This is clear from Section 291 of the Companies Act which provides that subject to the provisions of that Act, the Board of Directors of a Company shall be entitled to exercise all such powers and to do all such acts and things as the Company is authorized to exercise. It is further observed that the company can only act by agents, and usually the persons by whom it acts and by whom the business of the company is carried on or superintended are termed directors. The directors are, in the eye of the law, agents of the company for which they act, and the general principles of the law of principal and agent regulate in most respects the relationship of the company and its directors.

33. Therefore, a person in the commercial world having a transaction with a company is entitled to presume that the directors of the company are incharge of the affairs of the company. If any restrictions on their powers are placed by the memorandum or articles of the company, it is for the directors to establish it at the trial. It is in that context that Section 141 of the NI Act provides that when the offender is a company, every person, who at the time when the offence was committed was incharge of and was responsible to the company for the conduct of the business of the company. They shall also be deemed to be guilty of the offence along with the company.

34. When a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are incharge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. A company though a legal entity can act only through its board of directors. The settled proposition of law is that the managing director is *prima facie* in charge of the act and responsibility for the company's business and affairs and can be prosecuted for the offences by the company.

35. In so far as the other directors are concerned, they can be prosecuted only if they were in-charge and responsible for the conduct of company's business. In case of a director or an officer of the company who signed the cheque on behalf of the company, as is in the present case, there is no need to make a specific averment that he was in-charge and was responsible to the company, for the conduct of the business of the company or make any specific allegations 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 NI Act. For the conduct of the business of the company is necessary to bring the case under section 141(1) NI Act. 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) NI Act by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.

36. When companies are floated and public issues are brought, big advertisements are issued giving big names as directors and promoters of the company. These names are the names of successful CEOs, or Directors who have achieved success in other fields. Due to these names at the very inception and formation of company, when there is no wealth or property of the company, the share of the company is sold at a premium promising big business and success. Once money is mopped up from the public, in all those cases where the companies were created only for the purpose of mopping up hard earned money of public or to befool them. It is found that those big names disappear and in almost every litigation. Directors who formed part of the core of the company and gave promises that the Company would do roaring business quietly disappear from the scene or take plea that they were not responsible for business of the company.

37. The powers of management are vested in directors and they alone can exercise these powers. The only way in which the general body of a company can overrule the board of directors is altering the Articles and refusing to re-elect the directors, whose actions they disapprove.

38. In view of the above discussion, legal proposition, and submissions of both the parties, I find no merit in the instant petition.

39. The same is accordingly dismissed.

40. No order as to costs.

SURESH KAIT, J

MAY 30, 2012

Jg/Mk