CASE NO.:
Appeal (crl.) 664 of 2002

PETITIONER:
S.M.S. Pharmaceuticals Ltd

RESPONDENT:
Neeta Bhalla & Anr

DATE OF JUDGMENT: 20/02/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T

S.B. Sinha, J.

Appellant herein is a company registered and incorporated under the Companies Act. Respondent No. 1 was a Director of a company known as M/s. Direct Finance and Investment Ltd., New Delhi. She allegedly submitted her resignation on 15.04.1994.

Against the said company, the Managing Director thereof, Respondent No. 1 herein as also another director, a complaint petition was filed by the appellant alleging that the Company represented by its Managing Director had called for inter-corporate deposit for a short period of 15 days to the extent of rupees two crores and to such a proposal it agreed. The rate of interest for such deposit was stipulated at 25% per annum therefor payable within 15 days. A promissory note was executed by the accused No. 2 on behalf of the Company. The date of maturity of the said deposit was fixed on 15.03.1995. Upon expiry of the period of deposit, the accused \026 Company represented by its Managing Director allegedly issued a cheque for a sum of rupees two crores as also a cheque for a sum of Rs. 1,58,219.00 and another cheque for a sum of Rs. 8,33,334.00 drawn on Canara Bank, Janpath, New Delhi. All the cheques were dated 15.08.1996. The cheques for Rs. 8,33,334.00 and Rs. 1,58,219.00 represented the interest part on the deposit of rupees two crores for 15 days. The said cheques upon presentation were dishonoured on the ground of insufficient funds. It stands accepted that a notice dated 21.09.1996 was issued by the appellant asking the accused No. 1 \026 Company to pay the said sum. The said notice was served upon the accused Nos. 2 and 3, viz., the Managing Director and another Director of the Company. Respondent No. 1 who was arrayed as the accused No. 4 in the complaint petition was however not served with any notice. The address of Respondent No. 1 herein \026 accused No. 4 was shown as the Director of the Company being resident of 353, Bhera Enclave, Outer Ring Road, Delhi \026 110 041. We may, however, notice that in the complaint petition her address had been shown to be Outer Ring Road, Paschin Vihar, Delhi \026 110 041.

In the complaint petition the allegations made inter alia are as under:

"The Accused No. 1 is a duly incorporated Company, having its registered office at the address mentioned above, represented by the Director, Accused no. 2. The accused No. 3 and 4 are also the Directors of the Accused No. 1 company and the accused 2 to 4 are actively involved in the management of the affairs of the Accused No. 1 Company."

Appellant along with the said complaint petition annexed a purported resolution dated 15.02.1995 authorizing the Managing Director of the Company to execute the promissory note which reads as under:

"RESOVED THAT the Company to avail an Inter Corporate Deposit of Rs. 2 Crores (Rupees Two Crores Only) for 15 days @ 25% p.a. from Reddy Nagar, Hyderabad and that Mr. Rajiv Anand, Director be and is hereby authorized to sign and execute Demand Promissory Note, Post Dated Cheques and other documents as may be required by M/s. SMS Pharmaceuticals Ltd. on behalf of the Company and deliver the same to M/s. SMS Pharmaceuticals Ltd.

RESOVED FURTHER THAT Mr. Rajiv Anand, Director of the Company be and is hereby authorized to affix common seal of the Company on such documents and papers as may be required in this connection pursuant to the Articles of Association of the Company."

In the said proceedings, a petition for discharge was filed by Respondent No. 1 which was rejected by the learned Trial Judge. A revision petition filed thereagainst was also dismissed by the learned Sessions Judge. An application under Section 482 of the Code of Criminal Procedure was filed questioning the said orders which, however, was permitted to be withdrawn by the High Court stating:

"The learned counsel for the petitioner seeks leave of the Court to withdraw this application. The same shall accordingly stand dismissed as withdrawn.

Leave granted to the petitioner to avail the remedies if any available to him in law.

The trial Court shall expeditiously dispose of the matter in accordance with law. The Trial Court is directed not to grant any unreasonable adjournments to any of the parties to the proceedings."

Another discharge application was filed which was dismissed on 03.08.2000. The application for quashing of the proceeding was filed thereafter.

The High Court by reason of the impugned judgment opining that the allegations contained in the complaint petition as against Respondent No. 1 are vague and indefinite and do not satisfy the requirements of law as contained in Section 141 of the Negotiable Instruments Act (for short "the Act"), held that no case had been made out for issuance of any summons against her. As regards the contention raised by the appellant herein that the involvement of Respondent No. 1 in the affairs of the Company is evident from the resolution dated 15.02.1995, the High Court opined that the same by itself did not disclose commission of any offence on the day of commission of the offence.

Appellant has filed the appeal aggrieved by the said judgment.

Requirements of law for proceeding against the Directors of the Company for their purported constructive liability came up for consideration

in this case before a Division Bench of this Court, wherein the following questions were posed:

"(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."

Having regard to the importance of the questions, the matter was referred to a 3-Judge Bench of this Court. Upon noticing the rival contentions of the parties as also the precedents operating in the field, the questions were answered by the larger bench in the following terms:

"19. In view of the above discussion, our answers to the questions posed in the reference are as under:
(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.
(b) The answer to 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."

The Bench, however, referred the matter back to the Division Bench for determination on merit. The matter is, thus, before us.

Mr. P.S. Mishra, learned senior counsel appearing on behalf of the appellant, would submit that the averments made in paragraph 2 of the complaint petition are sufficient to attract the provisions of Section 141 of the Act inasmuch as the involvement of Respondent No. 1 insofar as the management of the affairs of the Company is concerned is evident from the documents appended to the complaint petition.

The learned counsel brought to our notice that the well-settled principle of law that for the purpose of attracting the provisions of Section 141 of the Act, it is not necessary to reproduce the exact wordings of the statute and submitted that the involvement of an accused as a Director of a Company being incharge of or responsible to the conduct of the Company must be gathered from the other averments made in the complaint petition as also the documents appended thereto.

It was submitted that for the said purpose, the term "management" should be given its ordinary or dictionary meaning which would include the act or manner of managing, controlling or conducting.

Mr. Ranjit Kumar, learned senior counsel appearing on behalf of Respondent No. 1, on the other hand submitted that no allegation has been made as against Respondent No. 1 herein in the complaint petition which satisfies the requirements of Section 141 of the Act but as would appear from the facts of the case that she had no role to play in commission of the offence at all.

Section 141 of the Act does not say that a Director of a Company shall automatically be vicariously liable for commission of an offence on behalf of the Company. What is necessary is that sufficient averments should be made to show that the person who is sought to be proceeded against on the premise of his being vicariously liable for commission of an offence by the Company must be incharge and shall also be responsible to the Company for the conduct of its business.

By reason of the said provision, a legal fiction has been created. The larger Bench in this case [since reported in (2005) 8 SCC 89] categorically held:

"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."

Referring to this Court's earlier decisions in K.P.G. Nair v. Jindal Menthol India Ltd. [(2001) 10 SCC 218] and Monaben Ketanbhai Shah and Another v. State of Gujarat and Others [(2004) 7 SCC 15], it was stated:

"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."

In terms of Section 138 of the Act, a complaint petition alleging an offence thereto must demonstrate that the following ingredients exist that:

(i) a cheque was issued;
(ii) the same was presented;
(iii) but, it was dishonoured;
(iv) a notice in terms of the said provision was served on the person sought to be made liable; and
(v) despite service of notice, neither any payment was made nor other obligations, if any, were complied with within fifteen days from the date of receipt of the notice.

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 therefor must be satisfied.

If the complaint petition is read in its entirety, the same would show

that the only person who was actively associated in the matter of obtaining loan, signing cheques and other affairs of the company which would lead to commission of the alleged offence was the accused No. 2. By reason of the purported resolution dated 15.02.1995, whereupon strong reliance has been placed by Mr. Mishra, only the accused No. 2 was authorized to do certain acts on behalf of the Company. The cheques were issued on 15.08.1996, i.e., after a period of 17 months from the date of the said resolution. As is evident from the averments made in the complaint petition, the cheques represented the amount of interest payable for a total period of 15 days only calculated at the rate of 25% per annum on the amount of deposit, viz., rupees two crores.

The High Court has gone into the matter at some length. The High Court found that the resolution by itself did not constitute an offence even assuming that the same bore the signature of Respondent No. 1 (although the genuineness thereof was disputed).

On a plain reading of the averments made in the complaint petition, we are satisfied that the statutory requirements as contemplated under Section 141 of the Act were not satisfied.

This aspect of the matter has recently been considered by this Court in Sabitha Ramamurthy & Anr. v. R.B.S. Channabasavaradhya [2006 (9) SCALE 212], wherein it was held:

"A bare perusal of the complaint petitions demonstrates that the statutory requirements contained in Section 141 of the Negotiable Instruments Act had not been complied with. It may be true that it is not necessary for the complainant to specifically reproduce the wordings of the section but what is required is a clear statement of fact so as to enable the court to arrive at a prima facie opinion that the accused are vicariously liable. 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 of the statutory requirements would be insisted..."

Yet again in Saroj Kumar Poddar v. State (NCT of Delhi) and Anr. [2007 (2) SCALE 36], the said legal principle was reiterated stating:

"Apart from the Company and the appellant, as noticed hereinbefore, the Managing Director and all other Directors were also made accused. The appellant did not issue any cheque. He, as noticed hereinbefore, 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 made in paragraph 3, thus, in our opinion do not satisfy the requirements of Section 141 of the Act."

A faint suggestion was made that this Court in Saroj Kumar Poddar (supra) 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 averment was made as against the appellant of the said 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.

We, therefore, are of the opinion that the judgment of the High Court cannot be faulted.

Another submission of Mr. Mishra was that the second application was not maintainable. Such a question had not been raised before the High Court. Even otherwise, the High Court was not denuded from exercising its inherent jurisdiction in a matter of this nature. The principles of res judicata are not attracted. Reliance placed by Mr. Mishra on Simrikhia v. Dolley Mukherjee and Chhabi Mukherjee and Another [(1990) 2 SCC 437] is misplaced. The question which arose for consideration therein was as to whether despite dismissal of an earlier application a second application would be maintainable which would virtually amount to review of the earlier order which would be contrary to the spirit of Section 362 of the Code of Criminal Procedure. It was held:

"7. The inherent jurisdiction of the High Court cannot be invoked to override bar of review under Section 362. It is clearly stated in Sooraj Devi v. Pyare Lal, that the inherent power of the court cannot be exercised for doing that which is specifically prohibited by the Code. The law is therefore clear that the inherent power cannot be exercised for doing that which cannot be done on account of the bar under other provisions of the Code. The court is not empowered to review its own decision under the purported exercise of inherent power. We find that the impugned order in this case is in effect one reviewing the earlier order on a reconsideration of the same materials. The High Court has grievously erred in doing so. Even on merits, we do not find any compelling reasons to quash the proceedings at that stage."

We have noticed the previous order passed by the High Court. The High Court gave liberty to Respondent No. 1 to agitate the matter once again. Respondent No. 1 merely took recourse thereto. Equally misplaced is the judgment of this Court in Rajinder Prasad v. Bashir and Others [(2001) 8 SCC 522]. Although therein it was held that when an earlier revision application under Section 397 of the Code of Criminal Procedure has been dismissed, as not pressed, a second application under Section 482 thereof for grant of same relief should not have been entertained, this Court opined:

"8. We are of the opinion that no special circumstances were spelt out in the subsequent application for invoking the jurisdiction of the

High Court under Section 482 of the Code and the impugned order is liable to be set aside on this ground alone."

It is, therefore, an authority for the proposition that the High Court is not completely denuded of its power to exercise inherent jurisdiction for the second time.

Furthermore, this court therein also went into the merit of the matter. In this case, not only the merit of the matter had been gone into by the High Court as also by this Court, the questions raised in the petition had been referred to a larger Bench for obtaining an authoritative pronouncement. It is, therefore, too late in the day for the appellant to contend that the application under Section 482 of the Code of Criminal Procedure was not maintainable.

We may, however, notice that this Court in Superintendent and Remembrancer of Legal Affairs, West Bengal v. Mohan Singh and Others [(1975) 3 SCC 706] held that when there is a changed set of circumstances, a second application under Section 561A of the Code of Criminal Procedure would be maintainable stating:

"2. The main question debated before us was whether the High Court had jurisdiction to make the order dated April 7, 1970 quashing the proceeding against Respondents 1, 2 and 3 when on an earlier application made by the first respondent, the High Court had by its order dated December 12, 1968 refused to quash the proceeding. Mr Chatterjee on behalf of the State strenuously contended that the High Court was not competent to entertain the subsequent application of Respondents 1 and 2 and make the order dated April 7, 1970 quashing the proceeding, because that was tantamount to a review of its earlier order by the High Court, which was outside the jurisdiction of the High Court to do. He relied on two decisions of the Punjab and Orissa High Courts in support of his contention, namely, Hoshiar Singh v. State and Namdeo Sindhi v. State. But we fail to see how these decisions can be of any help to him in his contention. They deal with a situation where an attempt was made to persuade the High Court in exercise of its revisional jurisdiction to reopen an earlier order passed by it in appeal or in revision finally disposing of a criminal proceeding and it was held that the High Court had no jurisdiction to revise its earlier order, because the power of revision could be exercised only against an order of a subordinate court. Mr Chatterjee also relied on a decision of this Court in U.J.S. Chopra v. State of Bombay where N.H. Bhagwati, J., speaking on behalf of himself and Imam, J., observed that once a judgment has been pronounced by the High Court either in exercise of its appellate or its revisional jurisdiction, no review or revision can be entertained against that judgment and there is no provision in the Criminal Procedure Code which would enable the High Court to review the same or to exercise revisional jurisdiction over the same. These observations were sought to be explained by Mr Mukherjee on behalf of the first respondent by saying that they should not be read as laying down any general proposition excluding the applicability

of Section 561-A in respect of an order made by the High Court in exercise of its appellate or revisional jurisdiction even if the conditions attracting the applicability of that section were satisfied in respect of such order, because that was not the question before the Court in that case and the Court was not concerned to inquire whether the High Court can in exercise of its inherent power under Section 5 61 A review an earlier order made by it in exercise of its appellate or revisional jurisdiction..."

For the reasons aforementioned, we do not find any error whatsoever in the impugned judgment. The appeal is dismissed with costs. Counsel's fee assessed at Rs. 10,000/-.