Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.1130-31 OF 2003

K.K. Ahuja … Appellant

Vs.

V.K. Vora & Anr. … Respondents

J U D G M E N T

R. V. RAVEENDRAN, J.

The question as to who can be said to be persons "in-charge of, and was responsible to the company for the business of the company" referred to in section 141 of the Negotiable Instruments Act, 1881 (for short 'the Act') arises for consideration in this appeal by special leave by a complainant.

2. The appellant filed two complaints (Crl. Comp.No.58/2001 and 59/2001) in the Court of the Metropolitan Magistrate, Delhi, against M/s. Motorol Speciality Oils Ltd. ('the Company' for short) and eight others under section 138 of the Act. The first complaint was in regard to dishonour

of five cheques (each for Rs.5,00,000/-, all dated 28.2.2001). The second complaint was in regard to dishonour of three cheques (for Rs.3 lakhs, 3 lakhs and 10 lakhs dated 31.10.2000, 30.11.2000 and 20.12.2000 respectively). The cheques were alleged to have been drawn in favour of the appellant's proprietary concern (M/s Delhi Paints & Oil Traders) by the company represented by its Chairman. In the said complaints, the appellant had impleaded nine persons as accused, namely, the company (A-1), its Chairman (A-2), four Directors (A-3 to A-6) as also its Vice-President (Finance), General Manager and Deputy General Manager (A-7, A-8 and A-9 respectively). In the complaint the complainant averred that "at the time of the commission of offence, accused 2 to 9 were in-charge of and responsible for the conduct of day to day business of accused No.1" and that therefore they were deemed to be guilty of offence under section 138 read with section 141 of the Act and section 420 of the Indian Penal Code. The appellant also alleged that respondents 2 to 9 were directly and actively involved in the financial dealings of the company and that the accused had failed to make payment of the cheques which were dishonoured. In the pre-summoning evidence, the appellant reiterated that accused 2 to 9 were responsible for the conduct of day to day business of first accused company at the time of commission of offence. The learned Magistrate by order dated 3.10.2001 directed issue of summons to all the accused.

3. Accused no. 9 (first respondent herein) filed two petitions under section 482 Cr.P.C. for quashing the proceedings against him on the ground that as "Deputy General Manager", he was not "in-charge of and was responsible to the company for the conduct of the business of the company". He also contended that merely stating that he was directly and actively involved in the financial dealings of the accused or was responsible for the conduct of day to day business would not be sufficient to fasten criminal liability on him. He submitted that neither the complaint nor the sworn statement gave any particulars of the part played by him or part attributed to him in the alleged offence. At the hearing before the High Court, the Learned counsel for the appellant-complainant conceded that details as to how the first respondent could be said to be "in charge of, and was responsible to the company for the conduct of the business of the company" were not given in the complaint or the statement on oath. It was also conceded that the averments necessary to make out an offence under section 420 IPC were not contained in the complaint. The High Court by order dated 10.10.2002 allowed the said petitions and quashed the orders summoning the first respondent on the ground that he was not a signatory to the cheques nor was a party to the decision to allow the cheques to be dishonoured. The said order is under challenge.

4. The appellant contends that having regard to the specific averment in the complaint that the accused 2 to 9 were in charge of and responsible for the conduct of day to day business of the company, the order summoning the first respondent could not have been quashed under section 482 Cr.P.C. It is also submitted that at the stage of summoning the accused, when evidence was yet to be led by the parties, the High Court committed an error in quashing the order summoning the first respondent, on the basis of an unwarranted assumption that the first respondent was not responsible for or involved in the conduct of the business of the company. Reliance is placed on the decision of this Court in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla & Anr*. [2005 (8) SCC 89 for short '*SMS Pharma (I)'*].

5. Section 141 of the Act deals with offences by companies. Relevant portions of the said section are extracted below :

> "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:
>
> xxxxx
>
> (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."
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> Explanation – For the purposes of this section, -
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> (a) "company means any body corporate and includes a firm or other association of individuals; and
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> (b) "director" in relation to a firm, means a partner in the firm.

6. A three-Judge Bench of this Court considered the scope of section 141 of the Act in *SMS Pharma (I)* and held that it is necessary to specifically aver in a complaint under Sections 138 and 141 of the Act, that at the time when the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company and that in the absence of such averment, section 141 cannot be invoked . This Court held:

> "What is required is that the persons who are sought to be made criminally liable under Section 141 should be at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. *Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action.* It follows from this that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. *The liability arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company*. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of "every person" the section would have said "every Director, Manager or Secretary in a Company is liable"....etc. The legislature is aware that it is a

> case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. *Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action*."
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> "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."
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> *(emphasis supplied)*

This Court then proceeded identified the nature of allegations required to be made against members of Board of Directors and person signing the cheque as follows :

(i) Managing Director/Joint Managing Director: By virtue of the office they hold, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they would fall under Section 141(1), even though there is no specific averment against them.

(ii) Person signing the cheque: The signatory of a cheque which is dishonoured, is clearly responsible for the act and will be covered under sub-section (2) of Section 141. Therefore, no special averment would be necessary to make him liable.

(iii) Director: The fact that a person is a director of a company is not by itself sufficient to make him 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 there is no deemed liability upon a director .

7. In *Sabitha Ramamurthy vs. RBS Channabasavaradhya* – 2006 (10) SCC 581, this Court re-stated the requirements of section 141 of Act thus, in the context of a petition for quashing the process under Sec.482 Cr PC:

> "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..... In a case where the court is required to issue summons which would put the accused to some sort of harassment, the court should insist strict compliance with the statutory requirements."*
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> [emphasis supplied]

8. In *Saroj Kumar Poddar v State (NCT of Delhi)* – 2007 (3) SCC 693, while dealing with an appeal against the refusal to quash the order taking cognizance, by an Ex-Director who had resigned from the Board prior to the date of issuance of the cheque, this Court held that making some bald averment was not sufficient. In that case, the complaint contained the following averments:

> "That Accused 1 is a public limited company incorporated and registered under the Companies Act, 1956, and Accused 2 to 8 are/were its Directors at the relevant time and the said Company is managed by the Board of Directors and they are responsible for and in charge of the conduct and business of the Company, Accused 1. However, cheques referred to in the complaint have been signed by Accused 3 and 8 for and on behalf of Accused 1 Company."

In spite of the averment that accused were Directors at the relevant time and were responsible for and in charge of the conduct of the business of the company, this Court held that allegations in the complaint, even if taken to be correct in their entirety, did not disclose any offence by the appellant, on the following reasoning :

> "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."

[emphasis supplied]

9. In two subsequent decisions - *SMS Pharmaceuticals* v. *Neeta Bhalla* – 2007 (4) SCC 70 [for short '*SMS Pharma (II)*'] and *Everest Advertising (P) Ltd*. v. *State, Govt. of NCT of Delhi* – 2007 (5) SCC 54, relating to complaints against Directors of a company, the very same two-Judge Bench which decided *Saroj Kumar Poddar*, clarified that the observations therein that '*the complaint should contain averments as to how and in what manner the accused was responsible for the conduct of the business of the company, or otherwise responsible for its functioning*' were with reference to the particular facts of that case and should not be considered as a general proposition of law. But latter decisions dealing with liability of directors – *N. K. Wahi vs. Shekhar Singh* - 2007 (9) SCC 481, *DCM Financial Services Ltd.* vs. *J. N. Sareen* – 2008 (8) SCC 1, and *Ramraj Singh vs. State of MP* (a decision of a Bench of three Judges) - 2009 (5) SCALE 670, have reiterated the principle laid down in *Saroj Kumar Poddar.* The prevailing trend appears to require the complainant to state how a Director who is sought to be made an accused, was in charge of the business of the company, as every director need not be and is not in charge of the business of the company. If that is the position in regard to a director, it is needless to emphasise that in the case of non-director officers, there is all the more the

need to state what his part is with regard to conduct of business of the company and how and in what manner he is liable.

10. Having regard to section 141, when a cheque issued by a company (incorporated under the Companies Act, 1956) is dishonoured, in addition to the company, the following persons are deemed to be guilty of the offence and shall be liable to be proceeded against and punished :

(i) 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;

(ii) any Director, Manager, Secretary or other officer of the company with whose consent and connivance, the offence under section 138 has been committed; and

(iii) any Director, Manager, Secretary or other officer of the company whose negligence resulted in the offence under section 138 of the Act, being committed by the company.

While liability of persons in the first category arises under sub-section (1) of Section 141, the liability of persons mentioned in categories (ii) and (iii) arises under sub-section (2). The scheme of the Act, therefore is, that a person who is responsible to the company for the conduct of the business of the company and who is in charge of business of the company is vicariously liable by reason only of his fulfilling the requirements of sub-section (1). But if the person responsible to the company for the conduct of business of the company, was not in charge of the conduct of the business of

the company, then he can be made liable only if the offence was committed with his consent or connivance or as a result of his negligence.

11. The criminal liability for the offence by a company under section 138, is fastened vicariously on the persons referred to in sub-section (1) of section 141 by virtue of a legal fiction. Penal statutes are to be construed strictly. Penal statutes providing constructive vicarious liability should be construed much more strictly. When conditions are prescribed for extending such constructive criminal liability to others, courts will insist upon strict literal compliance. There is no question of inferential or implied compliance. Therefore, a specific averment complying with the requirements of section 141 is imperative. As pointed out in *K. Srikanth Singh vs. North East Securities Ltd* – 2007 (12) SCC 788, the mere fact that at some point of time, an officer of a company had played some role in the financial affairs of the company, will not be sufficient to attract the constructive liability under section 141 of the Act.

12. Sub-section (2) of section 141 provides that a Director, Manager, Secretary or other officer, though not in charge of the conduct of the business of the company will be liable if the offence had been committed with his consent or connivance or if the offence was a result of any

negligence on his part. The liability of persons mentioned in sub-section (2) is not on account of any legal fiction but on account of the specific part played – consent and connivance or negligence. If a person is to be made liable under sub-section (2) of section 141, then it is necessary to aver consent and connivance, or negligence on his part.

13. This takes us to the next question under sub-section (1) of section 141, as to (i) who are the persons who are responsible to the company for the conduct of the business of the company, and (ii) who could be said to be in charge and was responsible to the company for the conduct of the business of the company.

14. The words "*every person who, at the time of the offence was committed, was in charge of, and was responsible for the conduct of the business of the company*" occurs not only in section 141(1) of the Act but in several enactments dealing with offences by companies, to mention a few – Section 278 B of the Income Tax Act, 1961, Section 22C of Minimum Wages Act, 1948, Section 86A of the Employees State Insurance Act, 1948, Section 14A of Employees Provident Fund and Miscellaneous Provisions Act, 1952, Section 29 of Payment of Bonus Act, 1965, Section 40 of The Air

(Prevention and Control of Pollution) Act, 1981 and section 47 of Water (Prevention and Control of Pollution) Act, 1974. But neither section 141(1) of the Act, nor the *pari materia* provisions in other enactments give any indication as to who are the persons responsible to the company, for the conduct of the business of the company. Therefore, we will have to fall back upon the provisions of Companies Act, 1956 which is the law relating to and regulating companies. Section 291 of the said Act 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.

15. Section 141 uses the words "was in charge of, *and* was responsible to the company for the conduct of the business of the company". It is evident that a person who can be made vicariously liable under sub-section (1) of Section 141 is a person who is responsible to the company for the conduct of the business of the company and *in addition* is also in charge of the business of the company. There may be many directors and secretaries who are not in charge of the business of the company at all. The meaning of the words "person in charge of the business of the company" was considered by this Court in *Girdhari Lal Gupta* v. *D.N. Mehta* [1971 (3) SCC 189] followed in *State of Karnataka* v. *Pratap Chand* [1981 (2) SCC 335] and *Katta Sujatha*

vs. Fertiliser & Chemicals Travancore Ltd. [2002 (7) SCC 655]. This Court held that the words refer to a person who is in overall control of the day to day business of the company. This Court pointed out that a person may be a director and thus belongs to the group of persons making the policy followed by the company, but yet may not be in charge of the business of the company; that a person may be a Manager who is in charge of the business but may not be in overall charge of the business; and that a person may be an officer who may be in charge of only some part of the business.

16. Therefore, if a person does not meet the first requirement, that is being a person who is responsible to the company for the conduct of the business of the company, neither the question of his meeting the second requirement (being a person in charge of the business of the company), nor the question of such person being liable under sub-section (1) of section 141 does not arise. To put it differently, to be vicariously liable under sub-section (1) of Section 141, a person should fulfill the 'legal requirement' of being a person in law (under the statute governing companies) responsible to the company for the conduct of the business of the company and also fulfill the 'factual requirement' of being a person in charge of the business of the company.

17. Therefore, 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. But if the accused is not one of the persons who falls under the category of 'persons who are responsible to the company for the conduct of the business of the company' (listed in para 14 above), then merely by stating that 'he was in charge of the business of the company' or by stating that 'he was in charge of the day to day management of the company' or by stating that he was in charge of, and was responsible to the company for the conduct of the business of the company', he cannot be made vicariously liable under section 141(1) of the Act.

18. It should, however, be kept in view that even an officer who was not in charge of and was responsible to the company for the conduct of the business of the company can be made liable under sub-section (2) of Section 141. For making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in

what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of section 141 of the Act.

19. Another aspect that requires to be noticed is that only a Director, Manager, Secretary or other officer can be made liable under sub-section (2) of section 141. But under sub-section (1) of section 141, it is theoretically possible to make even a person who is not a director or officer, liable, as for example, a person falling under category (e) and (f) of section 5 of Companies Act, 1956. When in *SMS Pharma (I)*, this Court observed that *'conversely, a person not holding any office or designation in a company may be liable if he satisfies the requirement of being in charge of and responsible for conduct of the business of the company',* this Court obviously had in mind, persons described in clauses (e) and (f) of section 5 of Companies Act. Be that as it may.

20. 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, 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.

22. A Deputy General Manger is not a person who is responsible to the company for the conduct of the business of the company. He does not fall under any of the categories (a) to (g) listed in section 5 of the Companies Act (extracted in para 14 above). Therefore the question whether he was in charge of the business of the company or not, is irrelevant. He cannot be made vicariously liable under Section 141(1) of the Act. If he has to be made liable under Section 141(2), the necessary averments relating to consent/connivance/negligence should have been made. In this case, no such averment is made. Hence the first respondent, who was the Deputy General

Manger, could not be prosecuted either under sub-section (1) or under sub-section (2) of Section 141 of the Act.

23. Thus, we find no error/infirmity in the order quashing the summons as against the first respondent who was the Deputy General Manager of the company which issued the dishonoured cheque. The appeals are therefore dismissed.

.....J.
(R V Raveendran)

New Delhi;
July 6, 2009.

.....J.
(Dr. Mukundakam Sharma)