



VIPIN AGGARWAL Respondent

+ CRL.M.C. 5239/2022 & CRL.M.A. 20881/2022
VARUN Petitioner

versus

MANJU GUPTA Respondent

Present: Mr. Puneet Singh Bindra, Mr. Naveen Kumar Jain, Ms. Simran Jeet, Mr. Akshay Sharma and Mr. Rishabh Gupta, Advs. for petitioners

CORAM:
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J :

1. The present petitions have been filed under section 482 CrPC seeking to quash the complaint cases and the summoning orders vide which the petitioner has been summoned for the offence alleged under section 138 NIA. The respective complaint case numbers, summoning orders along with other details regarding each petition have been tabulated below for ease of reference:

Item Nos.	Respondents	CC Nos.	Impugned Summoning Order	Cheque Nos.	Date of Issuance of Cheque	Legal Notice	Date of Appointment of the Petitioner as an Additional Director/Non-Executive as per FORM 32/DIR -12
32	Amit Khanna	1971/2020	05.02.2020	787712 & 206924	24.07.2019	10.12.2019	25.10.2019
33	Rajesh Kumar	1973/2020	05.02.2020	787718 & 206820	24.07.2019	10.12.2019	25.10.2019



34	Rajesh Kumar Gupta	1969/2020	05.02.2020	787711 & 206923	24.07.2019	10.12.2019	25.10.2019
35	Rajat Mehta	1974/2020	05.02.2020	787717 & 206819	24.07.2019	10.12.2019	25.10.2019
36	Rukmani Gupta	9170/2020	01.04.2020	787733 & 787753	24.07.2019	29.04.2020	25.10.2019
37	Vipin Aggarwal	9169/2020	01.04.2020	787730 & 787750	24.07.2019	01.05.2020	25.10.2019
38	Manju Gupta	1935/2020	18.02.2020	787697 & 206910	24.07.2019	10.12.2019	25.10.2019

2. Petitioner is an Indian citizen belonging to the legal profession and practicing before the Courts in Delhi since 2008.
3. Today Homes and Infrastructure Pvt. Ltd (hereinafter referred to as 'accused company') is a private limited company having its registered office at Upper Ground Floor 8-9, Pragati Tower, Rajendra Place, New Delhi – 110008. The accused company was engaged in the business of construction and was developing a residential project namely, Canary Greens at Sector 73, Gurugram. The respondents herein are the complainant homebuyers who were allotted residential flats in the said project.
4. Briefly alleged the facts are that local brokers and associates of 'Today Homes and Infrastructure Pvt Ltd' (accused company) approached the complainants for investing in their upcoming residential project. Upon being induced, the complainants entered into separate but identical agreements with the company as per which the company was to deliver the possession of the flats within 36 months from the date of the execution of the agreements and were also



entitled to a grace period of six months for unforeseen delays beyond its control. The complainants were allotted one residential flat each and due considerations were made. However, the company failed to give the possession of the flats within the stipulated time.

5. Upon failure to deliver the possession of the said flats, the complainants moved the Ld. NCDRC, whereby, vide order dated 31.01.2017, the company was directed to refund the entire amount taken from the complainants with respect to the flats that could not be delivered by the accused company along with service tax, VAT and simple interest @ 10% p.a. accrued thereon, within three months from the said order. Additionally, the company was also directed to pay the cost of litigation @ Rs. 10,000/- in each complaint.
6. Subsequently, the complainant homebuyers preferred execution applications for the enforcement of the order of the Ld. NCDRC, whereby, vide consent order, it was mutually decided that the accused company will repay the amounts due, in terms of the order of the Ld. NCDRC, by way of four equal installments.
7. In order to discharge the liability, Mr. Naveen Thakur and Mr. Rajesh Kumar (accused Nos. 4 and 5 in the complaints) acting for and on behalf of the accused company issued six (6) 'At par' cheques in favor of each complainant. The cheques were to be honored at the time of presentation and upon this assurance, the complainants presented the first two cheques of Rs 5,00,000/- each, which were duly honored. However, when the subsequent 2 cheques dated 24.07.2019 were deposited amounting to Rs 10,00,000/- each, drawn on Indusland Bank, the same came to be dishonoured.



8. The complainants approached the accused persons/company on several occasions demanding for the remainder payment, however to no avail. Resultantly, the complainants served legal notices to the company, the petitioner (arrayed as director of the accused company), the two authorized signatories i.e., Mr. Naveen Thakur and Mr. Rajesh Kumar, one Mr. Gulshan Kumar Gambhir, Ex Director/Key Person/ Major Shareholder and one Mr. RK Gambhir, Major Shareholder, on their addresses, demanding to make payment of Rs. 20,00,000/- to each complainant within 15 days from the date of receipt of the notices.
9. However, since the requisite payment was not done within the time stipulated, various complaint cases were instituted under section 138 NIA whereby the petitioner has been arrayed as Accused No. 3 and has been summoned in the capacity of a Director of the accused company.
10. Meanwhile, the accused company in Company Petition No. (IB)-2130 (ND) 2019 titled "***M/s. Dynacon Projects Pvt. Ltd. vs M/s Today Homes and Infrastructure Pvt. Ltd.***" vide order dated 31.10.2019 came under CIRP and an IRP was appointed after which the accused company ceased to have any control over its bank accounts.
11. Ld. Counsel for the petitioner submits that in his response to the legal notice of the complainants, the general false averments with respect to him being a director of the accused company when the cheques were issued or that he was handling the day-to-day affairs of the accused company have been vehemently refuted.



12.Ld. Counsel submits that however the Ld. MM mechanically took cognizance and summoned the petitioner for the alleged offences under 138 NIA. Aggrieved thus, the present petitions have been filed raising the following salient grievances of the petitioner:

- a) Petitioner was appointed as an Additional Director Non-Executive of the accused company on 25.10.2019 as per the ROC record, whereas the cheques in question were issued on 24.07.2019. The averment in the complaint regarding the petitioner being a director of the accused company at the time when the cheques were issued is contrary to the record and should have been rejected by the Ld. MM at the very threshold. It has been submitted that in fact the petitioner was merely a salaried employee who joined the accused company w.e.f. 01.10.2019 and the liability had already incurred on the accused company before his appointment as an Additional Director Non-Executive from 25.10.2019 to 13.01.2020.
- b) It is an admitted fact that the cheques were issued by the company in compliance of the order of the Ld. NCDRC dated 31.01.2017 and pursuant to the consent order arrived in the execution applications. It has been pointed out that the petitioner was neither made a party in the proceedings before the Ld. Consumer Courts towards which the cheques in question were issued, nor in any of the previous litigations initiated by the respondents against the company.
- c) It is also an admitted fact that the petitioner was not a signatory to the cheques in question.



- d) Petitioner had no knowledge of the liability of the company towards the complainants and nor did he have any knowledge of the cheques which were issued, which subsequently got dishonoured.
- e) The company went into CIRP proceedings under the IBC vide order of the Ld. NCLT dated 31.10.2019 after which the day-to-day affairs of the company and its accounts were taken over by the IRP.
- f) In the complaint no specific role has been played or ascribed to the petitioner to attract the vicarious liability under section 141 NIA. Blanket and general accusations have been made mechanically and deliberately to rope in the petitioner.
- g) In the complaint, the role ascribed to the present petitioner is that he along with other accused persons were the Directors as well as Authorized signatories, engaged in the day-to-day business affairs of the accused company. It has been averred that accused Nos. 2 to 5 (wherein petitioner is Accused no. 3) are liable for all acts and deeds done for and on behalf of the accused company towards discharging its liability. It has been generally averred in the complaints that the accused person(s) not only failed to give possession of the flats within the stipulated time, but also failed to honour the cheques issued towards discharging their liability.

13. It is pertinent to mention that the respondents have not appeared before this Court and have not filed their response to the present petitions.



14.I have considered the submissions and perused the records. This court deems it befitting to not delve into the nitty gritty of the various issues propelled by the petitioner. What needs to be ascertained first and foremost by this Court is whether the petitioner was even a director or was handling the day to day affairs of the accused company at the relevant time when the cheques were issued.

15.In light of this, it would also be advantageous to advert to the provisions contained under section 141 NIA, a plain reading of which, makes it amply clear that if an offence under section 138 NIA has been committed by a company then 'every person' who was in charge of and responsible to the company for its conduct of business at the relevant time when such offence was committed will be held guilty under the said provision, provided the accused person proves that the offence occurred without his knowledge or despite his due diligence. The section further extends the liability to any such director, manager, secretary or other officer of the company in case it is proved that the offence was committed with the consent or connivance or is attributable to neglect on their part.

16.Thus merely mentioning the designation of the accused person in the company or reproducing the phraseology of the section 141 NIA is not sufficient to attract the guilt under section 141 NIA. The law is no longer *res integra* that specific allegations/averments have to be made as to how and in what manner the accused alleged to have committed an offence under section 138 NIA, was responsible for, or had a role in the conduct of the business of the company, at the relevant time, when the offence is said to have been committed. Simply because the



accused person was a Director or was holding some other office in the company, the vicarious liability cannot be extend to such persons.

17. In *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla &Anr.*, (2005) 8 SCC 89, a Three Judge Bench of the Hon'ble Apex Court held that to attract vicarious liability under section 141 NIA it is *sine qua non* that the person accused was in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed.

18. In *K.K. Ahuja v. V.K. Vora &Anr.*, (2009) 10 SCC 48, the Hon'ble Supreme Court, while observing that in cases of non-Director officers, it is all the more necessary to aver their role played in the conduct of business of the company and in what manner they are liable, and *inter alia* held as under:

“21. A combined reading of Sections 5 and 291 of the 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.”

19. Further the Hon'ble Supreme Court in ***National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal***, (2010) 3 SCC 330, reiterating the above principles enumerated in ***SMS Pharmaceuticals Ltd.*** (supra) and ***KK Ahuja*** (supra) and relying on several other judgements on this issue, summarised the following principles:

“39. From the above discussion, the following principles emerge:

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in



charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 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 offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

(vi) If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.

(vii) 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.



20. Thus the law is well settled on the issue that to attract vicarious liability under section 141 NIA, specific role must have been played and ascribed qua the accused. In light of this, it is also vital to refer to the judgement of the Hon'ble Supreme Court in *Pooja Ravinder Devidasani v. State of Maharashtra & Anr.*, (2014) 16 SCC 1. In the said case, the appellant was a housewife and the wife of the MD of the accused company and was arrayed as an accused in the case under section 138 NIA. The High Court refused to quash the petition moved by the appellant. However the Hon'ble Apex Court while allowing the appeals held that since the appellant was neither a director of the accused company nor responsible or in charge of the day to day affairs of the company at the time when the offence was committed, therefore, vicarious liability cannot be extended to her. The Court held that there was not a shred of evidence on record to show that the offence was committed by the appellant. Thus in absence of any specific averments qua the accused and since the appellant had already resigned from the Directorship of the accused company prior to the issuance of the cheques in question, the Hon'ble Court held that continuing with the criminal proceedings against the appellant would be an abuse of the process of the Courts.

21. This settled law was further crystallised in *Sunita Palita & Others vs M/s Panchami Stone Quarry*, (2022) 10 SCC 152, wherein the Hon'ble Apex Court set aside the order of the High Court rejecting the quashing petition and allowed the said appeal on the ground that the appellants therein were not the Managing Director or Joint managing Director of the accused company and nor were they



signatories to the cheques in question. The Court held that the accused persons were merely independent, non-executive directors who had no role to play in the day to day affairs of the accused company.

22. Further this Court vide order dated 06.05.2013 in *Sudeep Jain vs M/s ECE Industries Ltd.*, CrI. M.C. 1821/2013 & CrI. M.C. 1822/2013, while issuing notice in a case wherein the petitioner was neither responsible nor instrumental in the day to day affairs of the accused company and having no knowledge of the issuance of cheques in question, directed the Magistrates to carefully examine and scrutinise the complaint cases under sections 138/141 NIA at the pre-summoning stage itself. The Court relying on the dicta in *SMS Pharmaceuticals* (supra), *National Small Industries Corp.* (supra), directed that the notices should only be issued to those directors or employees of the company who satisfy the principles enunciated laid down in the said judgements. This Court directed that the summons must only be issued after properly examining and weighing the allegations and materials placed on record by the complainant. It was observed in several cases, the complaints aver against even those persons who might not have been directors at any point in the accused company or had resigned prior to the commission of an offence. This Court directed that issuing summons to all such persons who have been mechanically arrayed as an accused without ascertaining their actual role in the company and the commission of the alleged offence, not only frustrates the innocent but also places an unreasonable burden on the criminal justice system. This Court thus directed the magistrates to seek copies of FORM 32 from the complainant along



with the following details to *prima facie* satisfy itself with respect to the directors of the accused company at the relevant time.

a. Name of the accused Company:

b. Particulars of the dishonoured cheque/cheques;

- *Person/Company in whose favour the cheque/cheques were issued*
- *Drawer of the cheque/cheques*
- *Date of issuance of cheque/cheques*
- *Name of the drawer bank, its location*
- *Name of the drawee bank, its location*
- *Cheque No. /Nos.*
- *Signatory of the cheque/cheques*

c. Reasons due to which the cheque/cheques were dishonoured;

d. Name and Designation of the persons sought to be vicariously liable for the commission of the offence by the accused Company and their exact role as to how and in what manner they were responsible for the commission of the alleged offence;

e. Particulars of the legal notice and status of its service;

f. Particulars of reply to the legal notice, if any.

23.It is pertinent to mention that the Courts are bound to follow the directions in letter and spirit. A perusal of the FORM 32/ Form No.



DIR -12 makes it manifestly evident that the petitioner was only appointed in the capacity of an Additional Director-Non Executive w.e.f. 25.10.2019 in the accused company. A perusal of the complaint reveals that the subject cheques which came to be disowned were in fact issued on 24.07.2019, which is prior to the date of appointment of the petitioner as an Additional/Non-Executive Director in the accused company.

24. In view of the above it can be easily inferred that the petitioner could not possibly have been responsible for or in charge of the day to day affairs of the company or its conduct of business at the relevant time when the cheques were issued. Moreover, neither was he a signatory to the cheques in question. It would thus be travesty of justice and abuse of the process of the courts if the complaints were kept pending qua the petitioner especially in absence of any cogent material against him for committing the said offence. Ld. MM while issuing summons took cognizance of the offence under section 138 NIA and mechanically summoned the petitioner in the capacity of a Director of the accused company without applying his judicial mind.

25. The Hon'ble Supreme Court in *Pepsi Foods Ltd. vs Special Judicial Magistrate*, (1998) 5 SCC 749, highlighted on the significance of the Magistrates applying their judicial mind while passing summoning orders. The Hon'ble Apex Court held that summoning of an accused is a serious matter and the criminal law machinery cannot be set in motion as a matter of due course. The Hon'ble Court held that the Magistrate is not a mute spectator and has to carefully examine and



scrutinise the evidence brought on record in order to discover the truthfulness in the allegations hurled in the complaint.

26. In the present case, the Ld. MM committed an error by summoning the petitioner, who was not even an Additional Director- Non Executive in the accused company at the time when the cheques were issued and thus was not handling the affairs or the conduct of business of the accused company at the relevant time. These facts were also mentioned in the reply on behalf of the petitioner to the legal notices of the complainants. However, Ld. MM ignoring such vital aspects, mechanically proceeded to issue summons to the present petitioner.

27. In view of the above discussion, the summoning orders qua petitioner are hereby set aside. The petitioner is acquitted for the offences alleged under section 138 NIA.

28. Accordingly, the petitions are allowed.

29. In view of the above, the present petitions along with pending applications stand disposed of.

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DINESH KUMAR SHARMA, J

SEPTEMBER 21, 2023

Pallavi