

(2009) 09 DEL CK 0059

In the Delhi High Court

Case No : Criminal M.C. No. 2586 of 2007

Nitin Meshram

APPELLANT

Vs

Softmart Solutions

RESPONDENT

Date of Decision : 22-09-2009

Acts Referred:

Air (Prevention and Control of Pollution) Act, 1981 — Section 40
Companies Act, 1956 — Section 2, 2(24), 291, 5
Criminal Procedure Code, 1973 (CrPC) — Section 200, 482
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14A
Employees State Insurance Act, 1948 — Section 86A
Income Tax Act, 1961 — Section 278B
Minimum Wages Act, 1948 — Section 22C
Negotiable Instruments Act, 1881 (NI) — Section 138, 139, 140, 141, 142
Payment of Bonus Act, 1965 — Section 29
Penal Code, 1860 (IPC) — Section 420
Water (Prevention and Control of Pollution) Act, 1974 — Section 47

Citation : (2009) 09 DEL CK 0059

Hon'ble Judges : Gita Mittal, J

Bench : Single Bench

Advocate : Anand and Rajshree N. Reddy, for the Appellant; Vivek Sood, for the Respondent

Final Decision : Dismissed

Judgement

Gita Mittal, J.—The present case raises a fundamental issue with regard to necessary averments to invite vicarious liability of persons concerned with the affairs of the company by virtue of Section 141 of the Negotiable Instruments Act for commission of an offence u/s 138 thereof in relation to dishonouring of a cheque, the primary liability for which falls on the drawer company.

2. The petitioner has sought quashing of the proceedings arising out of Complaint Case No. 1718/1/03 filed by the respondent for commission of such offences, on the ground that there is no averment in the complaint as to how or in what manner the petitioner was responsible for the conduct of the business of

the company or otherwise responsible in regard to its functioning. It is submitted that the petitioner has not issued any cheque and the averments in the complaint taken in their entirety do not disclose commission of any offence under the Negotiable Instruments Act, 1881 by the petitioner.

3. The respondent filed a complaint under Sections 138 to 142 of the Negotiable Instruments Act, 1881, read with Section 420 of the Indian Penal Code against the Digitech Solutions Limited; Shri Anoop Sareen; Shri Rajiv Goel and Shri Nitin Mishra its directors and one Darshan its accountant on the allegations that they approached and transacted with the respondent-complainant for the purchase of computer software items and that in partial discharge of liability, issued four cheques being Cheque Nos. 705515, 705516, 705517 & 705518 which were dishonoured on presentation due to insufficiency of funds in the bank account of the company. Proceedings against the accountant were not pressed.

4. In support of the contention noticed hereinabove, reliance is placed on several pronouncements of the Apex Court reported at 2005 SCC (Cri.) 1975 SMS Pharmaceutical Limited v. Neeta Bhalla and Anr.; Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another, ; Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya, ; Green Earth Asphalt and Power P. Ltd. Vs. State of Maharashtra Tr. P.S.O. and Others, & Jugesh Sehgal Vs. Shamsheer Singh Gogi, .

5. On the other hand, learned Counsel for the respondent has vehemently opposed the submissions made by the petitioner. It is contended that the complaint was filed in the year 2003 and the petitioner has waited to raise this challenge in the year 2007. It is urged that the matter is at the stage of evidence and no interference is called for at this stage. It is further urged that the respondent-complainant has placed reliance not on Section 138 alone but the complaint contains substantive allegations inviting the applicability of Section 141(2) of the Negotiable Instruments Act, 1881. The submission is that the pronouncements relied upon by the petitioner do not deal with the necessary averments and ingredients laid down u/s 141 of the Negotiable Instruments Act, 1881. Learned Counsel has urged at length that the expression "consent", "connivance" and "neglect" as appear in Section 141 of the Negotiable Instruments Act, have not been explained by the legislature and have to derive their meaning from the meaning given to them in common parlance. My attention is drawn to the meaning of this expression given in the Legal Glossary issued by the Government. In support of this contention, reliance is placed on the pronouncements of the Apex Court reported at 2007 (4) JCC 364 Ramji Lal v. Amit Ved & 2007 (4) JCC 3083 Krishana Dwivedi v. Surender Kumar.

6. I have heard learned Counsels at great length. In order to appreciate the submissions which have been made before this Court, it becomes necessary to notice the relevant provisions of Sections 138 & 141 of the Negotiable Instruments Act, 1881 which read thus:

138. Dishonour of cheque for insufficiency, etc. of funds in the account: Where

any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for (a term which may be extended to two years) or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque (within thirty days) of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

141. Offences by companies: (1) If the person committing an offence u/s 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:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

(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.

7. In view of the primary submissions on behalf of the petitioner noted hereinabove, it also becomes necessary to notice some of the material averments in the complaint which read as follows:

1. That the complainant, a Partnership Firm is engaged in the business of Computer Software. The accused No. 1 through accused Nos. 2 to 5 approached and transacted with the Complainant for the purchase of the following Computer Software items:

No./Date	Description	of	Software	Qty.	S. No.	Inv. Amount
MS WINDOWS 2000 SERVER 3	96,720.00	11-03-2003	(5 USER)	CD	1.	DO3-1256
XP PROF. OEM 2	29,120.00	AUTODESK	AUTOCAD 2002	1		1,12,320.00
SYMANTEC NAV 2003	SYMANTEC 5	7,280.00	ANTIVIRUS MULTI-TIER PROTECTION (5 USER)	2		14,040.00
MS WINDOWS 2000 PROF OEM CD	9	63,882.00				
DO3-1264	AUTODESK	AUTOCAD 2002	1	1,12,320.00	13-03-2003	SYMANTEC NAV
	2003		15			21,840.00
MS PROJECT 2002 SERVER (5 USER)	1	63,440.00	27-03-2003	MS PROJECT 2002	3.	DO3-1323
	1					25,324.00
MS WINDOWS 2000 CAL MOLP NL	10	13,000.00	3-03-2003	MS PROJECT 2002 SERVER	4.	DO3-1353
CAL	5	29,068.00		MOLP		NL

2. That in partial discharge of liability, the accused persons issued the following cheques to the complainant:

Bank	Amount	Ch. No.	Dated
705515	30-04-03 Syndicate Bank	1,20,000.00	C-34, 1st Floor, Defence Colony, Lajpat Nagar, New Delhi-110024
705516	06-05-03 Syndicate Bank	1,20,000.00	C-34, 1st Floor, Defence Colony, Lajpat Nagar, New Delhi-110024
705517	06-05-03 Syndicate Bank	1,20,000.00	C-34, 1st Floor, Defence Colony, Lajpat Nagar, New Delhi-110024
705518	06-05-03 Syndicate Bank	1,26,283.00	C-34, 1st Floor, Defence Colony, Lajpat Nagar, New Delhi-110024

3. That on the presentation of the aforesaid cheques, the same were returned as dishonoured due to insufficiency of funds in the Bank account of accused No. 1. The said cheques were presented on several occasions, on each of which they were returned as dishonoured for insufficiency of funds in the Bank account of accused No. 1. The intimation of dishonour was received by complainant on/around 20th July, 2003. It is apparent from their conduct that they never had the intentions of making payment to the complainant for the purchase of the aforesaid

software. The accused Nos. 2 to 5 have fraudulently induced the complainant to supply the aforesaid software, without the intention of making payment, thereby leading to financial losses to the complainant. This act of commission and omission also amount to cheating for which the accused persons are liable to be punished u/s 420 I.P.C.

4. That the legal notice dated 17.08.2003 was sent on 18.08.2003 on behalf of the complainant to the accused persons vide which the accused were asked to make the payment of the amount of the said cheques with interest @ 15% per annum within 15 days of the said legal notice. The legal notice was sent by the complainant by Regd. A.D. Post, Speed Post and through U.P.C. And the same have been received by the accused persons.

5. That however the accused persons have not made any payment towards the said cheques, to the complainant within the statutory period of 15 days from the legal notice or even till date, and therefore the accused persons have committed the offence of dishonour of cheques under Sections 138-142 of the Negotiable Instruments Act, 1881 and hence are liable for punishment for the said offence.

6. That accused Nos. 2 to 5 are the principal officers of the accused No. 1. The accused Nos. 2 to 5 are in charge of and responsible for the conduct of the business of the accused No. 1. The accused Nos. 2 to 5 with the consent and connivance of each other have committed the aforesaid offence. They have actively participated in the transaction with the complainant in their capacity as principal officers.

7. That the cause of action for filing the instant complaint arose when the said cheques were dishonoured and when the payment was not made to the complainant within the stipulated period of 15 days from the receipt of the legal notice by the accused persons.

8. The issue which has been raised before this Court has arisen for consideration in the several judgments noticed hereinabove. Each time, the expressions used in the complaint varied slightly. The same can be usefully considered as to facilitate examination of the issue as to what would constitute adequate pleadings in a complaint to impose vicarious liability upon a person who was either a director or a person controlling the affairs of the company.

9. The exposition of law by the Supreme Court in 2005 SCC (Cri.) 1975 SMS Pharmaceutical Limited v. Neeta Bhalla and Anr. sets out the applicable principles succinctly and can be usefully adverted to. They read as follows:

4. In the present case, we are concerned with criminal liability on account of dishonour of cheque. It primarily falls on the drawer company and is extended to officers of the Company. The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in statutes extending liability to others. Section

141 of the Act is an instance of specific provision which in case an offence u/s 138 is committed by a Company, extends criminal liability for dishonour of cheque to officers of the Company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the Company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. In other words, persons who had nothing to do with the matter need not be roped in. A company being a juristic person, all its deeds and functions are result of acts of others. Therefore, officers of a Company who are responsible for acts done in the name of the Company are sought to be made personally liable for acts which result in criminal action being taken against the Company. It makes every person who. at the time the offence was committed, was incharge of and was responsible to the Company for the conduct of business of the Company, the Company, liable for the offence. The proviso to the sub-section contains an escape route for persons who are able to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence.

xxx xxx xxx 10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence u/s 138 is committed by a company. The key words which occur in the Section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words "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 etc." What is required is that the persons who are sought to be made criminally liable u/s 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.

18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a persons can be subjected to criminal process. A liability u/s 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 spelt 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 respondent tallies within 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 u/s 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.

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 u/s 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 question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable u/s 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for 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 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 conduct of its business. When that is so, holders of such positions in a company become liable u/s 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 u/s 141. So far as 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.

10. In Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya, this issue was considered in the light of the complaint and supporting deposition. It was held as follows:

3. In support of the said complaint petition, one Ravidraradya, son of the complainant filed a sworn affidavit stating:

...The accused No. 2 is the M.D. and others are Chairman and partners. The accused-company towards repayment of the loan, issued a cheque in favour of the complainant. The M.D. signed and issued the cheque dated 23.6.2001 for Rs. 1,24,406/-on the account maintained by the company. On presentation of the said cheque to the Bank for collection, the same was returned on 30.6.2001 as insufficient funds. Notice dated 12.7.2001 was issued through Advocate to the accused was served on 13.7.2001. The case was filed on 27.8.2001....

Processes were directed to be issued on the said statement for alleged commission of an offence u/s 138 of the Negotiable Instruments Act.

xxx xxx xxx 7. 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 therefore. 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. Not only the averments made in paragraph 7 of the complaint petitions does not meet the said statutory requirements, the sworn statement of the witness made by the son of Respondent herein, does not contain any statement that Appellants were in charge of the business of the company. 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 on strict compliance of the statutory requirements. In terms

of Section 200 of the Code of Criminal procedure, the complainant is bound to make statements on oath as to how the offence has been committed and how the accused persons are responsible therefore. In the event, ultimately, the prosecution is found to be frivolous or otherwise mala fide, the court may direct registration of case against the complainant for mala fide prosecution of the accused. The accused would also be entitled to file a suit for damages. The relevant provisions of the Code of Criminal Procedure are required to be construed from the aforementioned point of view.

(underlined supplied)

11. The Apex Court had occasion to consider this issue again in the pronouncement reported at Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another, . On a consideration of the averments made in the complaint laid before the court, the principles laid in the earlier pronouncements were reiterated and it was held thus:

12. A person would be vicariously liable for commission of an offence on the part of a Company only in the event the conditions precedent laid down therefore in Section 141 of the Act stand satisfied. For the aforementioned purpose, a strict construction would be necessary.

13. The purported averments which have been made in the complaint so as to make the appellant vicariously liable for the offence committed by the Company read as under:

That the accused No. 1 is a public limited company incorporated and registered under the Companies Act, 1956, and the 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 the incharge of the conduct and business of the company - Accused No. 1. However, cheques referred to in the complaint have been signed by the Accused No. 3 & 8 i.e. Shri K.K. Pilania and Shri N.K. Munjal for and on behalf of the Accused Company No. 1.

14. 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.

12. So far as the averments made in the complaint which was considered by the Apex Court in Sabitha Ramamurthy and Another Vs. R.B.S.

Channabasavaradhya, are concerned, the complainant had merely stated that the accused being the company, all directors were responsible for the clearance of the liability u/s 141 of the Act and their acts and deeds were punishable u/s 138 of the Act. In this background, it was held by the Apex Court that vicarious liability u/s 141 of the Act could be inferred only if the requisite statements which are required to be averred in the complaint petition are made so as to make the accused person vicariously liable for the offence committed by the company.

13. In *Green Earth Asphalt and Power P. Ltd. Vs. State of Maharashtra Tr. P.S.O. and Others*, , the high court had quashed proceedings even against the respondent No. 2 firm and the authorised signatory of the firm in which he had signed the cheque. It was in this background held those partners which were in charge of the affairs of the firm and responsible to it could be proceeded against u/s 141.

14. In *Jugesh Sehgal Vs. Shamsher Singh Gogi*, , the complainant had filed a complaint u/s 138 of the Negotiable Instruments Act, 1881 against four accused persons. Para 3 of the complaint clearly stated that the cheque in question was issued from an account which was non-existent on the date when it was issued or that the account from where the cheque was issued pertained to someone else. Since, as per the complainant's own pleadings, the bank account from where the cheque had been issued was not held in the name of the appellant who was seeking quashing of proceedings u/s 482 of CrPC in this case, it was held that one of the requisite ingredients of Section 138 of the Negotiable Instruments Act was not satisfied and, therefore, continuance of the further proceedings in the complaint against appellant/accused u/s 138 of the NI act would be an abuse of process of court. The Apex Court thus set aside the order of the high court declared such a case to be a fit case wherein the high court should exercise jurisdiction u/s 482 of CrPC.

15. A recent pronouncement of the Apex Court reported at *K.K. Ahuja Vs. V.K. Vora and Another*, is relevant on the issues raised. On a consideration of the entire law laid down by the Apex Court has laid down the applicable principles thus:

8. In *Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another*, , 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 - S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, and Everest Advertising Pvt. Ltd. Vs. State, Govt. of NCT of Delhi and Others, , 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 and Others, , DCM Financial Services Ltd. Vs. J.N. Sareen and Another, , and Ramrajsingh Vs. State of M.P. and Another, , 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.

xxx xxx xxx 11. The criminal liability for the offence by a company u/s 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. and Another*, , 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 u/s 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.

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 278B 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 Vs. D.H. Mehta and Another*, followed in *State of Karnataka Vs. Pratap Chand and Others*, and *Smt. Katta Sujatha Vs. Fertilizers and Chem. Travancore Ltd. and Another*, . 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 u/s 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 u/s 141(2), the mechanical repetition of the requirements u/s 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 u/s 141 of the Act can be summarized thus:

(i) xxx xxx xxx(ii) xxx xxx xxx (iii) In the case of a Director, Secretary or Manager (as defined in Section 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 u/s 141(1). No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable u/s 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.

(Underlining supplied)

16. So far as the expressions "neglect", "consent" and "connivance" are concerned, the same have been described in the legal glossary of the Government of India thus:

Neglect: to disregard; to pay little or no attention to; to fail to perform, render, discharge (a duty) to take (a precaution).

Consent: a concurrence of will

Connivance: passive consent; a corrupt or guilt assent to wrong doing not involving actual participation in it, but implying knowledge of and failure to prevent or oppose it.

These meanings would guide the consideration of the acts and omissions attributed to the petitioner under Sub-section 2 of Section 141 of the statute.

17. Before this Court, the respondent has not only described the petitioner as a director of the company but the complaint makes a specific allegation that the petitioner along with the other accused persons approached and transacted with the complainant for the purchase of software items; the accused persons (which included the petitioner arrayed as accused person No. 4 in the complaint) issued cheques to the complainant; that the accused persons never had any intention of making payment to the complainant for the purchase of the software; the accused Nos. 2 to 5 (including the present petitioner) have fraudulently induced the complainant to supply software without the intention of making payment, thereby leading to financial loss to the complainant; the legal notice dated 17th August, 2003 was sent on 18th August, 2003 on behalf of the complainant to all the accused persons which asked them to make payment of the amount of cheque. Despite receipt of the legal notice, the accused persons (including the petitioner), have not made any payment towards the amount of the cheques to the complainant within fifteen days from the receipt of the legal notice and consequently have committed the offence of dishonour of cheques u/s 138/141 of the Negotiable Instruments Act, 1881. It has been specifically averred in para 6 of the complaint that the petitioner as well as the other accused are principal officers of the accused company and are responsible for the conduct of its business. It is urged that the accused persons have with the consent and connivance of one another, committed the said offences. In para 6 noticed hereinabove, the respondent has made a specific averment that accused Nos. 2 to 5 have actively participated in the transaction with the complainant in their capacity as principal officers of the company.

So far as the cause of action for filing the complaint is concerned, in para 7 of the complaint, the complainant has stated that the cause of action arose when the cheques were dishonoured and on the failure to make the payment to the complainant within the stipulated period of 15 days from the receipt of the legal notice by the accused person.

18. From the above it appears that the respondent-complainant has not merely

reproduced the words of the statute merely but has actually attributed certain acts of commission and omission against the petitioner. Apart from the averment that the petitioner is a director, it has been specifically averred that the petitioner negotiated and participated in the dealings and transactions with the complainant. It has also been contended that despite the service of the legal notice upon the petitioner, the petitioner has failed to make payment of the same. In addition to the above, it has been urged that the offence alleged by the company has been committed with the consent and connivance of the accused Nos. 2 to 5 with one another. No reply was even sent by the petitioner to the legal notice.

19. It needs no elaboration that while testing the maintainability of a complaint on the ground that it fails to disclose any commission of offence or the order of summoning by the trial court, it is trite that the complaint has to be examined and the averments made therein have to be taken as true at their face value.

20. The pleas taken up by the petitioner are undoubtedly in the nature of defence which could be urged before the trial court. However on a consideration of the allegations made in the complaint taken at the face value as noted hereinabove, the complaint filed by the petitioner is one in which the necessary averments attracting the applicability of Section 138 and 141 of the Negotiable Instruments Act are made out.

The present case challenges a summoning order. In view of the principles laid down in para 17 of *K.K. Ahuja v. V.K. Vora and Anr.* (supra), the challenge in the instant case is misconceived.

21. Yet another submission urged on behalf of the petitioner deserves to be considered. It is contended that the respondent has arrived at a settlement and in this behalf on 7th October, 2005, an amount of Rs. 1 lakh has been received before the trial court by way of a demand draft. Learned Counsel for the respondent/complainant has explained that a settlement was being explored with Sh. Anoop Sareen and Shri Rajeev Goel who were arrayed as accused person Nos. 2 and 3. No settlement was ever contemplated or negotiated with the present petitioner. No payment has been made or received from the petitioner. No details of any settlement have also been placed on record. In this background, settlement, if any, with any of the other accused persons would not assist the petitioner in any manner.

22. So far as a settlement is concerned, the legal principles which govern the same have been succinctly stated by this Court in the pronouncement reported at *Jindal Aromatic Vs. South Coast Spices Exports Pvt. Ltd.*, in the following terms:

23. The legal position which emerges from the aforesaid judgment is that an accord discharges the performance of obligations under the contract. A dispute pertaining to satisfaction furnishes a fresh and independent cause of action, until and unless it is provided that the performance of the satisfaction was a condition

precedent for discharge under the contract. If promise is received in satisfaction, it is a good satisfaction, but if the performance and not the promise is intended to operate in satisfaction, then there will be no satisfaction without performance. Wherever there is an accord, obligations under the original contract would be discharged until and unless it is specifically provided that the performance of the satisfaction would discharge the obligations under the contract.

23. The plea of a petitioner that the respondent-complainant had arrived at a settlement and received payment of amounts as well pursuant thereto meriting quashing of the criminal complaint therefore is contrary to the well settled principle on this issue. Apart from the fact that whether an accord having been arrived at between the parties would amount to discharge of performance of obligations under the contract between them and whether the same could discharge the criminal liability for commission of an offence under the Negotiable Instruments Act is a separate issue. The question which requires to be considered is as to whether there was any settlement of the original cause based whereon the complaint was filed. In the instant case, there is nothing on record to show that the parties had arrived at any settlement or the terms of accord if any, between the parties.

From the above, it is also evident that a mere plea of a settlement would not ipso facto lead to a conclusion that the original cause is therefore brought to an end. The accord or the terms of the settlement have to be placed and examined. The intent of the parties is required to be determined from a scrutiny thereof. It has to be ascertained as to whether the parties intended the accord by itself to bring the disputes to an end or the satisfaction of the terms thereof which would do so.

24. In the instant case no accord or terms or conditions of any settlement have been placed on record. There is nothing on record to show discharge of even the civil liability by any accord or terms or conditions thereof. In this background, the submission that there was a settlement which could defeat the maintainability of the criminal proceedings is factually baseless and devoid of legal merit.

25. In support of the plea that the present petition is highly belated, learned Counsel for the respondent has drawn my attention to the pronouncement of this Court reported at 2007 (4) JCC 364 Ramji Lal v. Anant Yadav (since expired) in this case, the court had refused to exercise inherent powers u/s 482 of the CrPC for quashing of a complaint case which was pending for trial for more than five years holding that the petition for quashing was an abuse of the process of law which was dismissed with costs.

26. Again in 2007 (4) JCC 3083 Krishna Dvivedi v. Sunder Kr., this Court held that the plea taken in the petition for quashing of the criminal complaint was really in the nature of the defence of the petitioner which he could take during the trial and that this Court was not the forum to conduct the trial between the parties. It was also observed that the order of summoning was passed more than two years before the challenge thereto and that there was no explanation for the

delay. In these circumstances, again the petition u/s 482 of the CrPC seeking quashing of the prosecution was allowed.

27. Before this Court, the matter has been pending before the trial court since 2003 and a challenge has been laid to the proceedings only in 2007. There is no explanation at all for the delay which has ensued.

28. The last submission on behalf of the petitioner was that he has been wrongly described as Nitin Meshram in the complaint whereas his correct name is Nitin Mishra. So far as this submission is concerned, it is noteworthy that in addition to the name, the complaint has indicated that the petitioner arrayed as respondent No. 5 was the director of the firm. The petitioner has rightly understood that the reference was to him and has made no objection after he was summoned to stand trial in the case. The petitioner accepted the summons as described in the complaint and applied for bail. No dispute as to identity has been raised at any time before the trial court where the complaint has remained pending since 2003.

29. In view of the above discussion, it is held that in the instant case, the complaint does not deserve to be rejected at the outset and the complainant is required to be given an opportunity to establish its case.

For all these reasons this petition is dismissed with costs which are quantified at Rs. 20,000/-.

30. It is made clear that nothing herein contained is an expression of opinion on the merits of the allegations in the complaint.