

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

+ **CrI.M.C.1761/2009**

Reserved on: 3rd February, 2010

Pronounced on: 4th February, 2010

KAMAL GOYAL. Petitioner
! Through: Mr.Vikas Mahajan & Mr.Vishal
Mahajan, Advocates.

versus

\$ M/S UNITED PHOSPHORUS LTD. Respondent
^ Through: Mr.Vikas Sharma, Advocate

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

: **V.K. JAIN, J.**

1. This is a petition under Section 482 of the Code of Criminal Procedure, for quashing criminal complaint filed by the respondent under Section 138 of the Negotiable Instruments Act.

2. A perusal of the complaint would show that in the title only a company, Vijay Remedies Limited has been made accused and it was sought to be served through the petitioner as its Director.

The case of the complainant was that the accused company, which was engaged in the business of agro-chemicals, issued a cheque No.028257 dated 15.7.1997 for Rs.13,72,772.96 to it, against its outstanding dues. The cheque, when presented to the bank of the accused company, was dishonoured for want of funds. The amount of the cheque was not paid to the complainant company despite legal notice of demand dated 21.8.1997. Despite impleading only the company as accused, the prayer made by the complainant was to take cognizance of the offence committed by both the accused, which obviously meant the company M/s.Vijay Remedies Limited and the petitioner Kamal Goyal.

3. The case of the petitioner is that he continued to be Director of M/s.Vijay Remedies Limited only till 29th May, 1997 when he resigned. It has also been claimed by him that the accused company had issued a blank cheque to the complainant company under his signature, towards security, with an understanding that the cheque will not be presented for clearance.

4. The petitioner has filed, in the trial court, a certified copy of Form-32 issued by Registrar of Companies. A perusal of the document would show that the petitioner Kamal Goyal resigned

as a Director of Vijay Remedies Limited with effect from 29th May, 1997 and intimation in this regard was given to the Registrar of Companies on 18th June, 1997. This is complainant's own case that the cheque in question is dated 15.7.1997. Thus, the petitioner was not a Director of the company, Vijay Remedies Limited even on the date when this cheque purports to have been issued. Since the cheque in question was issued by the company and not by the petitioner in his individual and since he had resigned from the directorship of the company even before the cheque was presented for encashment, there is no way he could have ensured that the cheque was encashed when presented to the bank of the complainant. The petitioner was not a director of the company when demand notice is alleged to have been issued by the complainant/respondent. Therefore, he was not in a position to comply with the demand made in the notice by making payment of the cheque as the payment was to be made by the company and not by the petitioner in his personal capacity.

5. There are five essential ingredients of offence under Section 138 of the Negotiable Instruments Act, (i) drawing of the cheque, (ii) presentation of the cheque to the bank of the payee, (iii) return of the cheque unpaid by the drawee bank, (iv) giving

of notice to the drawer of the cheque demanding payment of the cheque amount and (v) failure of the drawer to make payment within 15 days of the receipt of the notice.

6. The issue involved in this petition was considered at length by this Court in "***Shri Raj Chawla Vs. Securities and Exchange Board of India (SEBI) & Another***", Crl.M.C.3937/09 decided on 12th of January, 2010. Referring to an earlier decision of this Court in "***Dr.(Mrs.) Sarla Kumar vs. Srei International Finance Ltd.***", 2007 (2) NIJ 208 (Del) and the recent decision of the Hon'ble Supreme Court in "***K.K. Ahuja vs. V.K. Vora and Anr.***", 2009 (3) JCC (NI) 194, this court, inter alia held as under:

"Since the petitioner was not a Director of the company on the date Regulations were framed by SEBI, he cannot be held vicariously liable for violation of those Regulations and the directions, issued to SEBI by M/s Fair Deal Forests Limited. This is not the case of the respondent that the petitioner was Manager, Secretary or a person in accordance with whose directions or instructions, the Board of Directors of the company was accustomed to act. He is not stated to be one of the persons falling in any of the categories (a) to (g) mentioned in Section 5 of Companies Act at the time offence under SEBI Act was committed by the company. Therefore, he could not have been a person in charge of business of the company on the date the offence was committed.

There is no allegation that the regulations, framed by SEBI, were violated or the direction, issued by it, was ignored by the company with the consent or connivance of the petitioner or it was otherwise attributable to any act on the part of the petitioner. Therefore, he has not covered even by sub Section (2) of Section 27of SEBI Act.”

7. The plea taken by the complainant that the information contained in Form No.32 was a defence available to the accused which could not be considered at the initial stage was dealt with by this Court as under:

“Though as a general proposition of law, the defence available to the accused is not to be examined at this stage, there can be no valid objection to considering an authentic Public Document such as certified copy of Form-32, issued by Registrar of Companies, in a petition under Section 482 of the Code of Criminal Procedure, when the genuineness of the documents is not disputed and the matter can be finally disposed of on the basis of such a documents.

A criminal trial is a serious matter, having grave implications for an accused, who not only has to engage a lawyer and incur substantial expenditure on defending him, but, has also to undergo the ordeal of appearing in the Court on every date of hearing, sacrificing all his engagements fixed for that day. If he is in business or profession, he has to do it at the cost of affecting his business or profession, as the case may be. If he is in service, he has to take leave on every date of hearing. Besides inconvenience and expenditure involved, a person facing criminal trial undergoes constant anxiety and mental agony, as the

sword of possible conviction keeps hanging on his head throughout the trial. Therefore, when there is a reasonably certainty that the trial is not going to result in conviction, it would be neither fair nor reasonable to allow it to proceed against a person such as the petitioner in this case.”

8. In taking a view that certified copy of Form 32 being a public document, authenticity of which had not been disputed, it could be considered in proceedings under Section 482 of the Code of Criminal Procedure, this Court also relied upon the decision of the Hon'ble Supreme Court in “**All Carogo Movers (I) Pvt. Ltd. Vs. Dhanesh Badarmal Jain & Anr.**” (2007) 12 SCALE 39, “**V.Y. Jose & Anr. Vs. State of Gujarat & Anr.**” 2009 I AD (Cr.) (S.C.) 567, and “**Minakshi Bala v. Sudhir Kumar**”, (1994) 4 SCC 142. I must note here that the authenticity of the certified copies of Form 32 filed by the petitioners has not been disputed by the respondent. This is not the case of the respondent that it had got the record of the Registrar of Companies verified and that these Forms were not issued by his office.

9. In the present case also, the complainant does not assail the genuineness of form 32 filed by the petitioner. This is not the case of the complainant that it had got the record of Registrar of Companies inspected and that the certified copy of

form 32, filed by the petitioner, is a forged document. This is not the case of the complainant that even after resigning as a Director of Vijay Remedies Limited the petitioner continued to be associated with that company and was occupying any such position in the company on account of which he continued to be person in charge and responsible in the company for conduct of its business, even after retiring from its directorship. This is also not the case of the complainant that the petitioner was an employee of Vijay Remedies Limited and even after resigning from its directorship, he continued to be its employee and in that capacity he continued to be the person in charge and responsible to the company for conduct of its business. Vicarious liability to the petitioner has been imputed solely on account of his being a Director of Vijay Remedies Limited, as is evident from paragraph 4 of the complaint wherein it is alleged that Kamal Goyal, one of the Directors of the Company, is looking after day-to-day working of the company. This is also not the case of the complainant that cheque in question was dishonoured or the notice of demand was not complied with the consent or connivance of the petitioner or that it was otherwise attributable to any negligence on the part of the petitioner. This is also not the case of the complainant that even after resigning

as Director of the company, the petitioner continued to control the affairs of Vijay Remedies Limited and was a person who could have given instructions to the Board of Directors of the Company to ensure that the cheque signed by him, when presented for encashment, was honoured or that the notice of demand sent to the company was duly complied with by making payment of the amount of the cheque. Therefore, the petitioner is not a person covered even under sub-Section 2 of Section 141 of the Negotiable Instruments Act.

10. The learned counsel for the complainant/respondent has referred to the decision of the Hon'ble Supreme Court in "***Malwa Cotton & Spinning Mills Limited Vs. Virsa Singh Sidhu & Others***", 2008 (4) RCR (Criminal) 25. A perusal of the judgment would show that in the case before the Hon'ble Supreme Court, the appellant had claimed that cheques in question were issued between December, 2000 and February, 2001, whereas the respondent No.1 claimed to have resigned on 2nd April, 1999. It was also pointed out that Form No.32 was filed with Registrar of Companies only on 5th July, 2001, much after cheques were issued. In the present case, the cheque in question is dated 15th July, 1997 whereas the petitioner resigned from the directorship of the Company on 29th May, 1997. Not

only that Form 32 was also filed with Registrar of Companies on 18th June 1997, much before the date appearing on cheque in question. In any case, the petitioner was not a Director of Vijay Remedies Limited on the date the cheque in question was dishonoured by the bank, notice of demand was issued by the complainant company and the stipulated period for making payment of the amount of the cheque, in terms of notice of demand, expired. Therefore, he was not a Director of the Company on the date the offence under Section 138 of the Negotiable Instruments Act was complete. Hence, the judgment relied upon by the learned counsel for the complainant/respondent does not apply to the facts of the present case.

11. In ***DCM Financial Services Limited Vs. J.N.Sareen & Another***, 2008 (3) RCR (Crl.) 152, post-dated cheques were issued by the Company known as M/s. International Agro Allied Products Limited. The first respondent before the Hon'ble Supreme Court resigned from the Directorship of the Company on 25th of May, 1996. One of the post-dated cheques, which was issued in April, 1995, i.e., before he resigned from the Directorship of the Company, was dated 28.1.1998. The cheque when presented in the Bank for encashment was dishonoured.

The payment to the complainant was not made despite issue of Notice of Demand by it. The complaint against the first respondent before the Hon'ble Supreme Court was based on the allegation that he was the person in charge and responsible to the Company at the time when the offence was committed. It was also alleged that the offence had been committed by the Company with the consent and connivance of accused Nos.2 to 10, which included respondent No.1 before the Hon'ble Supreme Court. He filed an application seeking discharge, relying upon Form No.32 issued by Registrar of Companies in support of his contention that he had resigned as a Director of the Company much prior to dishonour of the cheque in question. The learned Additional Sessions Judge took note of Form No.32 and also noted that the complainant had not filed any affidavit to the effect that it had verified from the Registrar of Companies and Form No.32 filed by the accused was not genuine. A Criminal Revision Petition filed against the order of the learned Additional Sessions Judge was dismissed by the High Court. Relying upon its earlier decisions in the case of "***K.Srikanth Singh Vs. M/s.North East Securities Limited & Another***", 2007(3) RCR (Criminal) 934 : 207 (4) RAJ 226 : JT 2007 (9) SC 449, the Hon'ble Supreme Court observed as under:

“Section 141 of the Act provides for a constructive liability. A legal fiction has been created thereby. The statute being a penal one, should receive strict construction. It requires strict compliance of the provision. Specific averments in the complaint petition so as to satisfy the requirements of Section 141 of the Act are imperative. Mere fact that at one point of time some role has been played by the accused may not by itself be sufficient to attract the constructive liability under Section 141 of the Act.”

12. In the case before the Hon'ble Supreme Court, the respondent No.1 had resigned from the Directorship of the Company under intimation to the complainant and, in these circumstances, the Hon'ble Supreme Court was of the view that a person who had resigned with the knowledge of the complainant in the year 1996, could not be a person in charge of the Company in the year 1999 when the cheque was dishonoured as he had no say in the matter that the cheque is honoured and he could not have asked the Company to pay the amount. In my view even if resignation was not given by the petitioner under intimation to the complainant, that would not make any difference, once the Court relying upon certified copy of Form 32 accepts his plea that he was not a director of the Company, on the date the offence under Section 138 of Negotiable Instruments Act was committed. He having resigned

from the directorship much prior to even presentation of the cheque for encashment, he cannot be vicariously liable for the offence committed by the Company, unless it is alleged and shown that even after resigning from directorship, he continued to control the affairs of the company and therefore continued to be person in charge of and responsible to the company for the conduct of its business.

13. It was also contended by the learned counsel for the complainant/respondent that the petitioner being the signatory of cheque in question, he was its drawer within the meaning of Section 138 of Negotiable Instruments Act. In my view, the contention is totally misconceived. The cheque was issued by the Company and not by the petitioner. He only signed the cheque on behalf of the Company. He does not become a drawer of the cheque merely by signing it on behalf of the company when the cheque is issued by the company in discharge of its debt or liability and is not signed by him in his personal capacity. If the contention of the learned counsel for the complainant/respondent is accepted, even an employee of the Company, who on account of his being an authorized signatory signs a cheque issued by the Company towards discharge of the debt or other liability of the Company, would be liable to

prosecution and conviction under Section 138 of Negotiable Instruments Act even after he resigns from the company and is no more in its employment. This certainly could not have been the intention of the legislature. Even the vicarious liability created under Section 138 of Negotiable Instruments Act would not be attracted in respect of a Director or an employee of the Company who resigns and severs his connections with the company, unless the complainant is able to bring his case within the purview of sub-Section 2 of Section 141 of Negotiable Instruments Act, by proving that the offence had been committed with his consent or connivance or was otherwise attributable to any neglect on his part.

14. For the reasons given in the preceding paragraphs, summoning of the petitioner as an accused, in the criminal complaint filed by the respondent against Vijay Remedies Limited, and subsequent proceedings, to the extent they pertain to the petitioner, are, hereby, quashed. Trial Court will, however, proceed with the complaint as far as the Company Vijay Remedies Limited is concerned.

**V.K. JAIN
(JUDGE)**

**FEBRUARY 4, 2010
RS/**