

Orient Syntex Limited and others Vs Besant Capital Tech Limited

Court: Bombay High Court (Nagpur Bench)

Date of Decision: June 7, 1999

Acts Referred: Air (Prevention and Control of Pollution) Act, 1981 â€” Section 10

Companies Act, 1956 â€” Section 292(1), 633

Criminal Procedure Code, 1973 (CrPC) â€” Section 202, 203, 204, 319

Drugs and Cosmetics Act, 1940 â€” Section 34(1)

Negotiable Instruments Act, 1881 (NI) â€” Section 138, 139, 141, 142, 143

Prevention of Food Adulteration Act, 1954 â€” Section 17, 17, 17(1)

Water (Prevention and Control of Pollution) Act, 1974 â€” Section 25, 44, 47

Citation: (2000) 5 BomCR 345 : (2001) 104 CompCas 669 : (2000) CriLJ 210

Hon'ble Judges: J.N. Patel, J

Bench: Single Bench

Advocate: Sunil V. Manohar, for the Appellant; S.P. Dharmadhikari, Anilkumar Thakkar and R.B. Agrawal, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

J.N. Patel, J.

On dishonour of Cheque No. 434881 dated 26-1-1995, drawn by the petitioner Company Orient Syntex Limited in the

sum of Rs. 12,56,212/- in favour of Besant Capital Tech Limited, the complainant Besant Capital Tech Limited issued notice to the petitioner

Company and its Directors, demanding payment within 15 days from the receipt of the notice failing which the petitioner Company and its

Directors would be prosecuted for having committed offence punishable u/s 138 of the Negotiable Instruments Act, 1881. As the petitioner

Company and its Directors refused to comply with the notice, a complaint u/s 138 of the Negotiable Instruments Act, 1881 came to be filed in the

Court of the Judicial Magistrate, Akola, against the petitioner Company and its Directors, which came to be registered as Complaint Case No.

1120 of 1996.

2. The learned Chief Judicial Magistrate, after verification of the complaint, passed an order issuing process against the accused u/s 138 of the

Negotiable Instruments Act, 1881, by his order dated 16-7-1996. Thereafter, it appears that the accused failed to appear in response to the

summons. On 11-9-1996, non-bailable warrants came to be issued against the accused Nos. 3 to 9 who were Directors of the petitioner

Company. This issuance of process came to be challenged before this Court vide Criminal Application No. 1227 of 1996. By the order dated 14-

1-1997, this Court recorded that the petitioners/accused having already moved an application before the learned Magistrate to recall the process,

it ordered that the learned Magistrate would consider the said application and decide the same with reasonable expediency after hearing both the

sides and also made certain observations and, therefore, the petitioners did not press for reliefs based on various contentions raised before this

Court, which came to be disposed of accordingly.

3. The learned 9th Joint Judicial Magistrate, First Class, Akola, heard the Counsel appearing for the petitioner Company, accused Nos. 3, 7, 9

and 10, and rejected their application Exhs. 11 and 67 which were filed for recall of the process. It is this order of the learned Magistrate which is

challenged before this Court by this petition.

4. This petition is filed by the accused Company/Orient Syntex Limited, Shri S.K. Kejriwal, its Vice Chairman-cum-Director; Shri G.L. Lath,

Managing Director; Shri K.R. Vishwanathan, Nominee Director nominated by the Industrial Development Bank of India; and one Shri R.M.

Mehta, Director. It is the contention of the petitioners that apart from the Vice Chairman-cum-Director and the Managing Director, i.e., the

petitioner Nos. 2 and 3, there are other non-working Directors of the Company who are wholly unconcerned with day-to-day work of the

Company and have no concern whatsoever and these Directors are neither incharge nor are the working Directors and the petitioners have

explained the position of the Directors vis-a-vis the company and their functions. Out of the petitioners, the petitioner No. 4 K.R. Vishwanathan

has been nominated on the Board of Directors by the Industrial Development Bank of India, since the Industrial Development Bank of India has

financed the petitioner Company and he is merely nominee Director, and in respect of petitioner No. 5, it is merely stated that he is a leading

industrialist and Director of the petitioner Company. As regards the contentions in respect of the other Directors are concerned for the purpose of

deciding this petition, this Court need not refer to it as none of the other directors have come before this Court taking such a plea that the issuance

of process against them, deserves to be quashed and set aside.

5. It is the case of the petitioners that the petitioner Company has made payment to the respondent-Company for the exact amount of Rs.

12,56,212/-against which the debit note dated 21-3-1996 issued by the respondent-company in favour of the petitioner-company, clearly shows

that the petitioners have made the payment of the entire amount towards the said cheque bearing No. 134881. In addition to this, they have also

paid interest for the period from 26-12-1995 till the date of payment, to the tune of Rs. 86,730/-and, therefore, the complaint filed by the

respondent/Company is only with a view to harass and pressurize the petitioners and extract amount from the petitioners; which is not due and

payable to the respondent-company. The next contention is that with a view to pressurize the petitioner company and its Directors, the

respondent-company has deliberately joined all the non-working and sleeping Directors as the accused persons, though they had no control over

the day-to-day administration of the petitioner Company or over the working of the company, and further the complaint fails to disclose any liability

on the part of any of the accused persons by which the cheque came to be issued and, therefore, the learned Chief Judicial Magistrate, without any

application of mind, mechanically, issued the process against all the accused persons on 16-7-1996. It is contended that though summons were not

served against the accused Nos. 3 to 9, the learned Chief Judicial Magistrate issued non-bailable warrants against all the accused persons,

including the accused Nos. 3 to 9, who were not even served, and it is under these circumstances, that the petitioners are approaching this Court

by invoke its extraordinary writ jurisdiction to quash and set aside the process issued against the petitioners.

6. It is submitted on behalf of the petitioners that the learned Magistrate has erred in issuing the process against the petitioner-company and its

Directors and particularly against the Directors of the petitioner-company when the entire complaint is silent as to how and in which manner the

Directors of the petitioner-company were incharge of or responsible to the company for the conduct of the business of the Company, and,

therefore, in the absence of any such averments in the complaint, the complaint needs to be dismissed. It is further submitted that in the verification

recorded by the learned Magistrate, there is no mention of the fact as to whether the accused are responsible to the conduct of the business or to

the day-to-day business of the company except for that the accused Nos. 2 to 10 are Directors of the Company which does not make out any

prima facie case against the Directors of the Company. The impugned order is clearly vitiated and needs to be set aside.

7. It is contended by the petitioners that the complaint does not disclose that the cheque was issued in pursuance of the debt or liability and the

complainant ought to have alleged that the cheque was issued in pursuance of some debt or liability which is a legal requirement and necessary

ingredient for attracting the provisions of section 138 of the Negotiable Instruments Act, 1881. In the absence of such pleadings, the benefit of the

presumption contemplated u/s 139 of the Negotiable Instruments Act, 1881, is not available to the complainant and, therefore, the learned

Magistrate has gravely erred in law in holding that it was not necessary for the complainant to state and aver that the cheque was issued with

respect to some liability of the complainant in view of the provisions of section 139 of the Negotiable Instruments Act, 1881.

8. It is further contended by the petitioners that the learned Magistrate did not consider that the accused Nos. 7 and 9 were, in fact, nominee

Directors of the Financial Institution and had no role to play in the affairs of the petitioner No. 1 Company and similarly accused No. 8 was, in fact,

died in July, 1996 itself and this fact was brought to the notice of the learned Magistrate, who failed to recall the order of process against the

accused No. 8 and similarly accused No. 6 is only legal Director and is a leading Advocate and Solicitor being a partner with the leading solicitor

firm Mulla & Mulla & Cragie Blunt and Carow Limited, Mumbai, and in spite of these facts placed before the learned Magistrate, the learned

Magistrate gravely erred in law in not recalling the order of process against the sleeping and non-working Directors.

9. It is further contended that only endorsement made by the Bankers was Referred to drawer and, therefore, it would not attract the provisions of

section 138 of the Negotiable Instruments Act, 1881, which require that unless the cheque is rejected either for want of funds in the account or for

the reason that it exceeds arrangement, no offence u/s 138, of the Negotiable Instruments Act, 1881 is committed and the learned Chief Judicial

Magistrate ought to have taken this into consideration before issuing the process. It is, therefore, submitted that the complaint filed by the

respondent is false, frivolous and fabricated and is filed only with a motive to extract money from the petitioner-Company which is neither due nor

payable to the respondent, and that the complainant having received the entire amount on 26-12-1996 itself along with interest, clearly

demonstrates that the complaint is an abuse of the process of the law and should be quashed.

10. In the course of hearing Mr. Sunil Manohar, the learned Counsel for the petitioners, restricted his challenge to the impugned order of issue of

process and that of rejecting the application for recalling the process by the learned Judicial Magistrate, on the sole ground that as the complaint

and the verification recorded by the learned Magistrate is silent about the liability of the Directors of the Company who are made accused, none of

the other Directors excluding the Vice Chairman-cum-Managing Director and the Managing Director of the Company are liable to be proceeded

against and punished for having committed offence u/s 138 of the Negotiable Instruments Act, 1881. Mr. Manohar pointed out to this Court that

the Complaint does not specify as to in what manner the other Directors of the Company were incharge of and were responsible to the Company

for the conduct of its business. It only records that the accused Nos. 3 to 10 are the other Directors of the said Company and they are responsible

to the Company for the conduct of the business as well as the Company and non-payment of the said amount is attributable to and by the

negligence on the part of the accused Nos. 2 to 10. In addition to these averments in the complaint in the verification statement recorded on behalf

of the complainant-Company, it is only mentioned that the accused Nos. 3 to 10 are other Directors of the company. Therefore, there was no

material before the learned Magistrate and that there is no sufficient ground for proceeding against the other Directors and, therefore, he ought to

have dismissed the complaint against the other Directors of the petitioner-Company. Mr. Manohar submitted that section 141 of the Negotiable

Instruments Act, 1881, lays down that if the person committing an offence u/s 138 of the Negotiable Instruments Act, 1881, is a company, every

person who, at the time the offence is committed, was incharge 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, and, therefore, it is necessary for the complainant to make out a case in the complaint as well as in the verification statement as to how

the persons who have been arrayed as accused, were in-charge of and were responsible for the Company for the conduct of the business of the

Company and unless there is sufficient material to prima facie show the involvement of the accused persons, the Magistrate has no option but to

dismiss the complaint on the basis that there is no sufficient ground for proceeding. Mr. Manohar cited the case of Municipal Corporation of Delhi

Vs. Ram Kishan Rohtagi and Others, , in which Supreme Court held that the complaint was filed against the Company, its Directors and the

Manager. So far as the Directors are concerned, there is not even a whisper nor a shred of evidence nor anything to show, apart from the

presumption drawn by the complainant, that there is any act committed by the Directors from which a reasonable inference can be drawn that they

could also be vicariously liable. In these circumstances, therefore, it can be said that no case against the Directors has been made out ex facie on

the allegations made in the complaint and the proceedings against them were rightly quashed by the High Court. The Supreme Court further held

that the Manager of the Company is directly incharge of its affairs, could not fall in the same category as the Directors. It could not be reasonably

argued that no case is made out against the Manager because from the very nature of his duties, it is manifest that he must be in the knowledge

about the affairs of the sale and manufacture of the disputed sample. From the very nature of his duties, it can be safely inferred that the Manager

would undoubtedly be vicariously liable for the offence; vicarious liability being an incident of an offence under the Act. Mr. Manohar submitted

that the Court went to observe that section 319 of Criminal Procedure Code gives ample powers to any Court to take cognizance and add any

person not being an accused before it and try him along with the other accused. In these circumstances, therefore, if the prosecution can at any

stage produce evidence which satisfies the Court that the other accused are those who have not been arrayed as accused against whom

proceedings have been quashed have also committed the offence, the Court can take cognizance against them and try them along with the other

accused. Mr. Manohar, therefore, submitted that this sufficiently makes it clear that the Directors of the Company can be made vicariously liable

for offences committed by the Company only if they were incharge of and were responsible to the Company for the conduct of the business of the

Company relating to the nature of the transaction in which the offence is alleged to have been committed and in absence of such a case being made

out by the complainant, the Court is justified in quashing the proceedings.

11. Mr. Manohar cited another case of State of Haryana Vs. Brij Lal Mittal and Others, , in which the Supreme Court referred the case of Delhi

Municipality v. Ram Kishan (cited supra). This was the case under the Drugs and Cosmetics Act, 1940, and the Supreme Court was concerned

with similar provisions u/s 34(1) of the Drugs and Cosmetics Act, and it held the vicarious liability of a person for being prosecuted for an offence

committed under the Act by the Company arises if at the material time he was incharge of and was also responsible to the company for the

conduct of its business. Simply because a person is a Director of the Company, it will not necessarily mean that he fulfils both the above

requirements so as to make him liable. Conversely, without being a Director a person can be incharge of and responsible to the company for the

conduct of its business. In the said case, the Supreme Court found from the complaint in question that except a bald statement that the respondents

were Directors of the manufacturers, there is no other allegation to indicate, even prima facie, that they were in-charge of the Company and also

responsible to the Company for the conduct of its business and quashed the prosecution against the respondent-Directors on this ground.

12. In case of one of the accused namely Shri B.N. Antia, it was submitted that he is Senior Solicitor and Advocate of Bombay and is a

partner/solicitor in Mulla & Mulla & Cragie Blunt and Carow Limited, a very leading Solicitor firm in Bombay and is appointed Director by virtue

of being Legal Advisor and has no concern with the day-to-day administration of the activities of the Company nor he has exercised any control

over the Company and, therefore, the Court ought to have recall the process against him. Mr. Manohar submitted that Delhi High Court in the case

of Om Prakash Kahitan v. Shree Keshariya Investment Ltd., 1978 ComP.Cas. 85, considering the case of the petitioner who was the solicitor,

granted him relief u/s 633 of the Companies Act. By relieving him from his liability arising out of number of defaults and breaches committed by the

Company in relation to its obligation arising out of the Employees Provident Fund Act, the Employee's State Insurance Act, the Sales Tax Act, the

Essential Commodities Act and the Companies Act, on the basis that he was on the Board of number of companies as such legal advisor but had

not concerned himself with the day to day affairs of the company or its management, and that he had always acted honestly and reasonably and

given proper advice to the management to act in accordance with law in relation to matters that were brought before its Board and the Court held

that it would be proper in such cases to relieve such Directors of consequence of the defaults or breaches unless they are directly involved in the

act or omission complained of or had otherwise not acted honestly or reasonably or had financial involvement in the Company. But, the trial Court

ignored this plea.

13. Mr. Manohar submitted that in the case of Nucor Wires Ltd. and others v. H.M.T. International Ltd., 2000 DoCh. (Kart.) 582 : 1998(91)

Comp.Cas 850, the Karnataka High Court quashed the proceedings issued against other Directors for having committed offence under sections

138 and 143 of the Negotiable Instruments Act, 1881, holding that the other Directors are not to be prosecuted merely because they are

Directors. Mr. Manohar submitted that in this case, there was no allegation whatsoever with regard to the other Directors and they were merely

arrayed as accused in their capacity as Directors. The Court held that to launch a prosecution against the Director of the Company, there must be

specific allegations in the complaint as to the part played by them in the transactions and there must be clear and unambiguous allegations as to how

all the partners are incharge of and responsible for the conduct of the business. There should be clear description and also allegations that the

offence was committed with their knowledge and that they had not exercised due diligence to prevent the commission of such offence. The Court

should also make attempt to find out whether on the available allegations the offence was committed with the consent or connivance or is

attributable to any negligence on the part of the Directors or partners or members of any Association or a group of persons, and as there was

absolutely no allegations made against them, proceedings against them may be quashed and they be discharged.

14. Mr. Manohar submitted that in the case of N.A. Palkhivala and Another Vs. Madhya Pradesh Pradushan Niwaran Mandal, , the Court was

considering the similar provision u/s 10 of the Air (Prevention and Control of Pollution) Act, 1981, and held that the complaint did not contain any

allegations from which it could be reasonably inferred that the Chairman and Deputy Chairman were directly in charge of and responsible for the

conduct of the business of the company and quashed the proceedings pending before the Magistrate against the petitioner. Similar was the view

taken by the Delhi High Court in In the Matter of: Bonneswar Dutta and Others, . Another case cited by Mr. Manohar is of R. Banerjee and

others Vs. H.D. Dubey and others, wherein the Court held that unless a case is made out, prosecution of Directors is unjustified which was in

reference to section 17 of the Prevention of Food Adulteration Act (37 of 1950).

Therefore, Mr. Manohar submitted that considering the legal position as laid down in the aforesaid decisions, the proceedings against the other

Directors of the petitioner company deserve to be quashed and set aside.

15. Mr. Dharmadhikari, the learned Counsel for the respondent complainant submitted that the petition filed by the accused company and others is

supported by affidavit of one Manoj Goverdhandasji Mundhada, Secretarial Assistant of petitioner No. 1 /company and none of the Directors of

the petitioner No. 1 company has come forward to swear an affidavit in support of the petitioner company and, therefore, the contention of the

petitioner company that its Directors are wholly unconcerned with its day-to-day activities, cannot be accepted, as none of the Directors have

stated on oath that they are neither in-charge of the day-to-day activities of the petitioner company nor they are the working Directors, also cannot

be accepted. It is submitted that the petitioners were, from time to time, obtaining financial facilities from the respondent/company and the monies

so borrowed were repaid under the arrangement, but were keeping limit of Rs. 25 Lakhs more or less exhausted. This was in accordance with the

Resolution of the company, dated 25-9-1995 and supported by the consent of the Directors given by letter dated 28th July, 1994, which clearly

records that all the Directors of the company guarantee in their personal capacity the payment of the amount under cheque with interest and

commission. It is submitted that the cheques were issued by the petitioner/company against the repayment of such loans and the complaint u/s 138

of the Negotiable Instruments Act (for short "NI Act") is in respect of such debt and liability towards which a cheque was issued by the

petitioner/company in favour of the respondent/company drawn on State Bank of India, Commercial Branch, Bombay, bearing No. 434881,

dated 26-12-1995 for Rs. 12,56,242/-, which came to be dishonoured. The respondent/company issued a registered notice as required and as no

payment came forward even after the lapse of fifteen days therefrom, the complaint came to be filed against the petitioner/company and its

Directors. It is submitted that the respondent/complainant has made a specific averment in para 4 of the complaint that all the petitioners before this

Court as well as the accused in the complaint are responsible to the petitioner/ company for the conduct of its business, as well as the company,

and nonpayment of the said amount is attributable to and by negligence on the part of the accused Nos. 2 to 10 and, hence, all the accused are

liable to be prosecuted for having committed an offence u/s 138 of the NI Act. It is submitted that even in the verification statement recorded by

the learned Magistrate, this fact has been mentioned and, therefore, in the circumstances, issuance of process against the petitioner/company and

its Directors is justified.

16. Mr. Dharmadhikari submitted that the learned Magistrate has considered the applications filed by the petitioners for recalling of process and

rightly rejected the same. It is submitted that the scope of enquiry u/s 202 of the Code of Criminal Procedure is extremely limited-limited only to

the ascertainment of the truth or falsehood of the allegations made in the complaint - (i) on the material placed by the complainant before the Court;

(ii) for the limited purpose of finding whether a prima facie case for issue of process has been out; and (iii) for deciding the question purely from the

point of view of the complainant, without at all advertng to any defence that the accused may have, as held in the case of Smt. Nagawwa Vs.

Veeranna Shivalingappa Konjalgi and Others, . It is further submitted that once the Magistrate has exercised his discretion, it is not for the High

Court, or even the Supreme Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find

out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. Mr. Dharmadhikari placed reliance

on the case of Mohinder Singh Vs. Gulwant Singh and others, , in order to emphasise that the scope of enquiry u/s 202 of the Code of Criminal

Procedure is extremely restricted only to find out the truth or otherwise of the allegations made in the complaint, in order to determine whether

process should issue or not u/s 204 of the Code or whether the complaint should be dismissed by resorting to section 203 of the Code on the

footing that there is no sufficient ground for proceeding on the basis of the statements of the complainant and of his witnesses, if any. But the

enquiry at that stage does not partake the character of a full dress trial which can only take place after process is issued u/s 204 of the Code calling

upon the proposed accused to answer the accusation made against him for adjudging the guilt or otherwise of the said accused person, and in view

of these two authorities, it is contended that this Court will have to examine the question of issuance of process is whether justified or not in the

facts and circumstances of the case. Mr. Dharmadhikari submitted that the complainant, having made out a prima facie case against the petitioners

in its complaint as well as in the verification statement recorded by the Magistrate supported by the documents, i.e., the material on record placed

along with the complaint, which meets the requirement of law, the order of the learned Magistrate does not call for any interference by this Court.

17. Mr. Dharmadhikari submitted that in case of N. Doraisamy and another etc. Vs. M/s. Archana Enterprises and etc., , the Madras High Court

has taken a view that in case of prosecution u/s 138 of the NI Act, if the offences are committed by a company, then persons in-charge and

responsible to the Company for the conduct of its business are liable to be prosecuted and they can escape from their liability only if they prove

that the offence was committed without their knowledge or that they had exercised all due diligence to prevent the commission of such an offence.

It is submitted that in the said case, the Court held that it is sufficient if the persons in charge of and responsible to the company for the conduct of

its business, or the persons, with whose consent or connivance or due to any neglect on their part, the offence had been committed, that

prosecution proceedings are maintainable against them, irrespective of whether the Company is prosecuted or not. Further, it is also not necessary

that there should be specific averment in the complaint as to the persons responsible to and in charge of the company, as the same is not material

for the prosecution of such persons as described in section 141 of the NI Act. On the other hand, in the instant case filed by the

respondent/Company, there is specific averment to that effect.

18. Mr. Dharmadhikari submitted that once a process is issued on the basis of the allegations in the complaint, the statement of the complainant

and/or evidence of witnesses examined and material on record, quashing of complaint on additional materials filed by the accused was held not to

be justified by the Supreme Court in the case of Smt. Chand Dhawan Vs. Jawahar Lal and others, , and that the respective liabilities of the

petitioners and the accused before the Court will have to be determined in accordance with law.

19. Mr. Dharmadhikari relying upon the case of U.P. Pollution Control Board v. M/s. Modi Distillery and others, , submitted that in the aforesaid

case, which was in respect of prosecution of Chairman, Managing Director and other Directors of the Company in contravention of sections 47,

25, 26 and 44 of the Water (Prevention and Control of Pollution) Act (6 of 1974), in which section 47(1) and (2) are pari materia to the

provisions of section 141(1) and (2) of the NI Act, the Supreme Court held that it is true that there can be no vicarious liability of the Chairman,

Vice Chairman, Managing Director and members of the Board of Directors under sub-section (1) or (2) of section 47 of the Act unless the

Company owning the industrial unit, is prosecuted. However, where the industrial unit itself wilfully failed to furnish the requisite information to the

Board regarding the particulars and names of the Managing Director, Directors and other persons responsible for the conduct of the Company

resulting in mentioning incorrect name of the Company in complaint Modi Distillery instead of Modi industries Ltd., in the instant case it was not

open to them to take advantage of the lapse of their own industrial unit (Modi Distillery) and claim that prosecution be quashed against them. The

technical flaw of describing the name of the Company wrongly could be rectified by amending the complaint accordingly. It further held that the

Chairman, Vice Chairman, Managing Director and members of the Board of Directors of M/s. Modi Industries Limited in such capacity were in

charge and responsible for conduct of the business of the Company and were, therefore, deemed to be guilty of the said offence and liable to be

proceeded against and punished u/s 47 of the Act. Therefore, according to Mr. Dharmadhikari, the petitioners before the Court, in their capacity

as Vice Chairman-cum-Managing Director, Managing Director, Nominee Director and Director of the petitioner No. 1/Company, were the

persons in charge of and responsible for the conduct of the business of the petitioner/Company and by virtue of section 141 of the NI Act shall be

deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

20. Mr. Dharmadhikari submitted that in case of vicarious liability of the Directors of the Company and their prosecution for having committed

offence u/s 138 of the NI Act, our High Court as well as various other High Courts have held the Company and its Directors liable for being

prosecuted and the question as to whether they were actually in charge of and responsible to the Company for the conduct of its business, will

have to be decided during the trial. Further, it is open to such persons to take up a plea that the offence was committed without their knowledge or

that they had exercised all due diligence to prevent commission of such offence. See (1) Rajan Kinnerkar Vs. Eric Cordeiro and another, ; (2)

Mrs. Manju Podar and another v. Ashwani Kumar and others, 1996(86) Comp.Cas. 631 and (3) T.P. Singh Kalra v. Star Wire India Ltd.,

1998(3) Comp.Cas. 186.

21. The petitioners, having limited their challenge to the issue of process against the Directors of the petitioner/Company, this Court is left with this

sole question for examination. Let us examine the scheme of the Amending Act (56 of 1983) which introduced the Chapter of penalties in case of

dishonour of certain cheques for insufficiency of funds in the Accounts as to the limited purpose of appreciating the rival contentions of the parties

in the backdrop of the facts of the case.

22. u/s 138 of the NI Act, in case of dishonour of a cheque, which has been issued for the discharge, in whole or in part, of any debt or other

liability, the drawer of the cheque shall be deemed to have committed an offence and shall, without prejudice to any other provision of the said Act,

be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with

both; and for the said purpose, (a) the cheque has to be 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 fifteen 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. In order that the Court should take cognizance of the offence, section 142 provides that a complaint in writing should be made by the payee

or, as the case may be, the holder in due course of the cheque. Such a complaint is made within one month on the date on which the cause of

action arises under Clause (c) of the proviso to section 138, and that no Court inferior to that of a Metropolitan Magistrate or Judicial Magistrate

of the First Class shall try any offence punishable u/s 138. In respect of offences by Companies, section 141 provides as under:-

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 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.

Therefore, it can be seen that there are two categories of persons who can be deemed to be guilty of the offence u/s 138 of the NI Act, if the

person who committed an offence under that section is a Company. First category consists of every person who, at the time the offence was

committed, was in charge of and was responsible to the company for the conduct of its business. The second category of persons as given in sub-

section (2) of section 141 are those against whom it is proved that the offence has been committed with the consent or connivance of, or

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 be liable to be proceeded against and punished accordingly. The only defence provided in case of these persons and which is

available at the trial is in proviso to subsection (1) of section 141 of the NI Act, which reads as under:

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.

23. The necessary ingredients of section 138 of the NI Act are incorporated in the said section, namely, that there should be the dishonour of the

cheque which has been issued for the discharge, in whole or in part, of any debt or other liability, and that such dishonour should be when the

cheque is presented within the prescribed period of six months from the date on which it is drawn or within the period of its validity, of which

notice is given in writing to the drawer of the cheque within 15 days of the receipt of information by him from the bank, and on receipt of such

notice, the drawer of such cheque fails to make the payment of the said amount of money to 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. The explanation to section 138 makes it clear that the debt or other

liability means a legally enforceable debt or other liability. Further section 139 provides for presumption in favour of the holder, that unless the

contrary is proved, the holder of the cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of

any debt or other liability. As regards fulfilment of these ingredients, there is not much dispute between the parties before the Court. The question

is, who all are liable to be proceeded against and punished for having committed the said offence.

24. On issuance of process, the petitioner/company as well as the other accused applied to the trial Court for recalling of the order of issuance of

process. It was the case of the petitioner Company in the application filed by accused No. 10, Shri G.L. Lath, Managing Director, that the present

complaint is filed with intention to harass and pressurise the accused Company and its Directors and to make illegal gain. It was submitted that

accused Nos. 3 to 9 are unnecessarily joined as parties to the complaint. As per the provision of section 141 of the NI Act, only the persons in

charge of the business of the Company can be made party, in case of prosecution. It was submitted that accused Nos. 3 to 9 are not in charge of

the business of the petitioner/Company, nor any fact is brought on record which attracts any negligence towards all these accused persons.

Accused Nos. 3 to 7 and 9, through their Counsel, moved an application for recalling of the process, and it was submitted that these accused

persons are not liable as Directors and as per information received, the amount under cheque is not due, hence, the complaint against these

accused may be dismissed. It was also contended that the order of issue of process against them is required to be recalled, as there is no material

against them to proceed with the case. As already submitted by the learned Counsel for the petitioners, the question requiring examination is about

the vicarious liability of the Directors of the Company; so this Court need not take into consideration the other grounds raised by the accused

persons in their application.

25. At least, there can be no challenge to the prosecution of the signatories of the cheque on behalf of the petitioner/Company. Obviously by

signing the cheque on behalf of the Company, the accused No. 2, Shri S.K. Kejriwal, Vice-Chairman-cum-Managing Director, as well as accused

No. 10, Shri G.L. Lath, as the Managing Director cannot disown their liability, as contemplated in sub-section (1) of section 141 of the NI Act.

26. In the case of State of Haryana Vs. Brij Lal Mittal and Others, , the Apex Court, while considering the vicarious liability for offence committed

by companies held as under :---

8. Nonetheless, we find that the impugned judgment of the High Court has got to be upheld for an altogether different reason. Admittedly, the

three respondents were being prosecuted as directors of the manufacturers with the aid of section 34(1) of the Act which reads as under :---

"OFFENCES BY COMPANIES :

(1) Where an offence under this Act has been committed by 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 such person liable to any punishment provided in this Act if he proves that the

offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence".

It is thus seen that the vicarious liability of a person for being prosecuted for an offence committed under the Act by a Company arises if at the

material time he was in-charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of

the company it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without being a director

a person can be in-charge of and responsible to the company for the conduct of its business. From the complaint in question we, however, find that

except a bald statement that the respondents were directors of the manufacturers, there is no other allegation to indicate, even prima facie, that they

were in-charge of the company and also responsible to the company for the conduct of its business.

9. In Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, while dealing with the applicability of section 17(1) of the Prevention of

the Food Adulteration Act, 1954, which is in pari materia with section 34(1) of the Act, on similar facts, this Court observed as under :---

"So far as the Manager is concerned, we are satisfied that from the very nature of his duties it can be safely inferred that he would undoubtedly be

vicariously liable for the offence, vicarious liability being an incident of an offence under the Act. So far as the Directors are concerned, there is not

even a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, that there is any act

committed by the Directors from which a reasonable inference can be drawn that they could also be vicariously liable. In these circumstances,

therefore, we find ourselves in complete agreement with the argument of the High Court that no case against the Directors (accused Nos. 4 to 7)

has been made out ex facie on the allegations made in the complaint and the proceedings against them were rightly quashed".

The Apex Court was considering the case under the Drugs and Cosmetics Act, 1940, of which section 34(1) relates to offence by companies,

which is in pari materia with section 141 of the NI Act. This can be accepted as a settled proposition of law as regard vicarious liability.

27. Insofar as the complaint, the verification on behalf of the complainant and the material placed before the Court is concerned, it does make a

specific mention of the fact that the accused No. 2 is the Managing Director of the accused No. 1, and accused Nos. 3 to 10 are other Directors

of the said Company, who are responsible to the Company for the conduct of its business, and non payment of the said amount is attributable to

and negligence on the part of, the accused Nos. 2 to 10 and, therefore, they are liable to be prosecuted under the amending provision of section

138 of the NI Act. This fact is also supported by the notice issued under proviso (b) to section 138 of the NI Act. The said fact is stated on oath

by one Anil Nandlal Mundhada on behalf of the complainant in his verification statement before the learned Magistrate and, therefore, what this

Court finds is that the necessary requirement to issue process against the petitioner/Company and the other accused has been fulfilled.

28. It is the case of the respondent that on receipt of the notice from the respondent/complainant, the petitioner/Company and its Directors failed

to give any reply to the said notice and also make payment of the said amount of money to the respondent/complainant, within 15 days of the

receipt of the said notice. This was the first opportunity available to the petitioner/Company to have brought on record as to who are the persons

who were in-charge of and responsible to the company for the conduct of its business, in reference to the said dishonour of the cheque. It is

submitted by the petitioners, that the petitioners/ Directors who are the accused before the trial Court, are neither in-charge of the day-to-day

activities of the petitioner/Company nor they are the working Directors of the petitioner/Company, by specifying as to how they are concerned

with the company which was not their case before the trial Court when the petitioner/Company moved an application for recalling of process and,

therefore, such material, even if it is to be considered, was not before the Magistrate at the time of issuance of process or at the time of considering

whether the process is required to be recalled in respect of these particular petitioners. Mr. Manohar, learned Counsel for the petitioners, tried to

demonstrate before this Court that the learned Magistrate even failed to take notice that one of the accused Directors, Shri S.K. Kejriwal had

expired somewhere in July, 1996, and still process has been issued against him. But then, it is not brought to the notice of the learned Magistrate

that Shri S.K. Kejriwal, one of the Directors (accused) has expired and at least the case against him would stand abated; if it is so, late Shri S.K.

Kejriwal would stand discharged.

29. Before this Court, it is only the petitioner No. 1/Company, Shri S.K. Kejriwal, Vice Chairman-cum-Managing Director; Shri G.L. Lath,

Managing Director; Shri K.R. Vishwanathan, Nominee Director, nominated by the Industrial Development Bank of India; and Shri R.M. Mehta,

Director have represented their case. Out of them, Shri S.K. Kejriwal and Shri G.L. Lath, by virtue of their position in the petitioner/Company as

Vice Chairman-cum-Managing Director as well as the Managing Director, do not much dispute their prosecution. In respect of petitioner No. 4,

Shri K.R. Vishwanathan who claims to be the Nominee Director nominated by the Industrial Development Bank of India, did not file any

application for recalling the process so as to make out such a case in his favour. As regards Shri R.M. Mehta, (petitioner No. 5), he is very much

Director of the petitioner Company. As regards other accused persons who are not before the Court, this Court need not take any cognizance of

their case as pleaded in the petition.

30. It is submitted by Mr. Dharmadhikari, that the cheque in question was issued in favour of the respondent/Company by the petitioner/Company

in discharge of their financial liability, i.e., according to the respondent/complainant, this liability arises out of the money borrowed by the

petitioners. The nature of debt and liability will be matter of evidence. What the petitioners have denied is their liability to pay the amount

mentioned in the cheque as, according to them, it is already paid, but it is not disputed that this payment was to be made against the monies

borrowed from the respondent/Company. If this is accepted, then section 292(1)(c) of the Companies Act, 1956, specifically provides that the

Board of Directors of a Company shall exercise the power to borrow monies otherwise than on debentures and it shall do so only by means of

resolutions passed at meetings of the Board. Mr. Dharmadhikari, on behalf of the respondent/Company, has canvassed the case that the

petitioner/Company did pass a resolution and accepted the liabilities of all the Directors to avail financial facilities from the respondent/Company

and this can be demonstrated from Annexures 11 and 12 (Resolution and Letter) annexed to their reply. Immediately, it was pointed out by Mr.

Manohar, learned Counsel for the petitioners, that the said Resolution and the Letter are not in respect of the respondent/Company, but in favour

of Ramanand Ramprasad, which is the Sister Concern of the complainant/Company. Even though these two documents at their face value may not

implead the petitioner/Company, but these documents form the part of the material relied upon by the complainant (respondent/Company herein).

Therefore, by virtue of the fact that the petitioner/Company and its Directors could avail of financial assistance from the respondent/Company and

their power to borrow monies otherwise than on debentures, solely rests with the Board of Directors of the Company as provided u/s 292 of the

Companies Act, 1956, there can be no hesitation to hold that the accused before the trial Court are prime facie liable to be proceeded against and

punished for having committed offence u/s 138 of the NI Act. To put it in the words of the Apex Court, while dealing with the case of U.P.

Pollution Control Board v. M/s. Modi Distillery and others, . "It cannot be doubted that in such capacity they were in-charge of and responsible

for the conduct of the business of the Company and were, therefore, deemed to be guilty of the said offence and liable to be proceeded against

and punished u/s 47 of the Act".

31. Therefore, considering the aforesaid facts and circumstances, this Court finds that the impugned order does not suffer from any error or

illegality. The petition is devoid of merits and deserves to be dismissed. The Criminal Writ Petition is dismissed with no order as to the costs. Rule

is discharged.

32. Petition dismissed.