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

\+ CRL.M.C. 436/2018 & Crl.M.A. Nos.1682/2018 & 1684/2018

ATUL HIMANI ..... Petitioner

Through: Mr.Sanja Gupta, Adv.

versus

CISCO SYSTEM CAPITAL PVT LTD ..... Respondent

Through: Mr.Puneet K. Bhalla, Adv.

CORAM:
HON'BLE MR. JUSTICE A.K. PATHAK

<u>O R D E R</u>

% **07.09.2018**

1. Learned counsel for the respondent submits that no reply is to be filed. Since short point is involved, with the consent of learned counsel for the parties arguments heard and material placed on record perused.

2. By this petition under Section 482 Cr.P.C. petitioner has prayed for quashing of Complaint Case no. 536760/16, filed by the respondent against M/s. Omnitech Infosolutions Limited, under Section 138 of the Negotiable Instruments Act, 1881 ("the Act", for short). Petitioner has been impleaded as accused no. 2, being Managing Director of M/s. Omnitech Infosolutions Limited.

3. Learned counsel for the petitioner has contended that M/s. Omnitech Infosolutions Limited had availed the financial facility from respondent in

the month of March, 2013. A Master Lease and Finance Agreement dated 13th March, 2013 was executed between the parties. Pursuant to the Agreement, post-dated cheques were handed over to respondent, including the cheque involved in this case, that is, cheque no. 023249 dated 22nd December, 2015 for ₹68,12,708/- drawn on Axis Bank Ltd., Mumbai. Cheques were issued by M/s. Omnitech Infosolutions Limited. On presentation, aforesaid cheque was returned dishonoured on 23rd December, 2015. It is submitted that much prior to the presentation of cheques for encashment by the respondent, M/s. Omnitech Infosolutions Limited was wound up by the High Court of Judicature at Bombay, vide order dated 18th March, 2015 passed in Company Petition no. 499/2014 titled L&T Finance Limited vs. M/s. Omnitech Infosolutions Limited. When the cheque was presented and returned, company was in liquidation. Even when legal notice was issued and amount was not paid within 15 days, company was in liquidation. Learned counsel for the petitioner contends that ingredients of offence under Section 138 of the Act are thus not attracted against the M/s. Omnitech Infosolutions Limited since as on the date of presentation of cheques for encashment and its return as dishonoured, inasmuch as, when amount was not paid within fifteen days of legal notice, the company was in liquidation. Reliance has been placed on M.L. Gupta & Anr. vs. M/s. Ceat Financial Services Ltd., 2007 (1) JCC (NI) 18, Kusum Ingots & Alloys Ltd., etc. vs. Pennar Peterson Securities Ltd. and Ors. 2000 (1) JCC 170. and judgment dated 5th August, 2015 passed by a learned Single Judge of this Court in W.P.(Crl.) No. 1821/2014 titled M/s. Vijay Steel Tubes & Fittings Pvt. Ltd. vs. M/s. Apollo Pipes Ltd.

4. Per contra, learned counsel for respondent has contended that no reply to legal notice was served on M/s. Omnitech Infosolutions Limited and petitioner by the respondent, stating therein that company had been wound up vide order dated 18th March, 2015 passed by the High Court of Judicature at Bombay. In absence thereof, trial court has rightly issued summons to petitioner. It is open for the petitioner to approach the trial court and place on record the copy of winding up order. It is for the trial court to take a call, on the basis of material placed on record, whether case has to be proceeded further or not. Reliance has been placed on the judgment dated 25th January, 2011 passed by a learned Single Judge of this Court in Crl. M.C. No. 3010/2004 titled V.K. Jain vs. M/s. Ranbaxy Laboratories Ltd.

5. I have considered the rival contentions of both the parties. A specific averment has been made in the petition that a Master Lease and Finance

Agreement dated 13th March, 2013 was executed between the parties, pursuant whereof post-dated cheques, were issued in favour of the respondent including the cheque involved in this case. This averment has remained uncontroverted as no reply has been filed despite opportunities granted to the respondent, inasmuch as, it is stated by the learned counsel that no reply is to be filed. So far as the winding up order passed by the High Court of Judicature at Bombay in Company Petition no. 499 of 2014 concerned, a copy thereof has been placed on record. It is not the case of respondent that the copy of the order is not genuine or that no such winding up order was passed. It is, thus, clear that post-dated cheque involved in this case was issued at the time of execution of Master Lease and Finance Agreement dated 13th March, 2013. This cheque was, however, presented for encashment after M/s. Omnitech Infosolutions Limited had already been wound up. The company was in liquidation. In view of the winding up order, the management was divested of the control on the company. Thus, petitioner cannot be said to be responsible for the day-to-day affairs of M/s. Omnitech Infosolutions Limited as the date when cheque was presented, returned dishonoured and amount was not paid despite legal notice. Since company was in liquidation cheque could not have been honoured.

6. In Kusum Ingots (supra), Supreme Court in the context of Section 22-A of SICA, held as under:-

> "In a case in which the BIFR has submitted its report declaring a company as 'sick' and has also issued a direction under Section 22-A restraining the company or its directors not to dispose of any of its assets except with consent of the Board then the contention raised on behalf of the appellants that a criminal case for the alleged offence under Section 138 NI Act cannot be instituted during the period in which the restraint order passed by the BIFR remains operative cannot be rejected outright. Whether the contention can be accepted or not will depend on the facts and circumstances of the case. Take for instance, before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order of the BIFR under Section 22-A was passed against the company then it cannot be said that the offence under Section 138 NI Act was completed. In such a case it may reasonably be said that the dishonouring of the cheque by the bank and failure to make payment of the amount by the company and/or its Directors is for reasons beyond the control of the accused. It may also be contended that the amount claimed by the complainant is not recoverable from the assets of the company in view of the ban order passed by the BIFR. In such circumstances it would be unjust and unfair and against the intent and purpose of the statute to hold that the Directors should be compelled to face trial in a criminal case".

7. In M.L. Gupta (Supra) it has been held as under:-

> "21. On the aforesaid averments, complaint under Section 138 of the Negotiable Instruments Act cannot be filed as on the date of presentation of the cheque, the company was in liquidation and cannot be stated to have

> committed any offence. Even second and third accused (petitioners herein) were not the incharge of day-to-day affairs and conduct of the business of the company on that date."

8. In Vijay Steel Tubes & Fittings Pvt. Ltd. (supra), by following M.L. Gupta (supra), complaint case under Section 138 of the Act was quashed in view of the fact that company had already been wound up prior to presentation of the cheque for encashment. The judgment relied on by the learned counsel for respondent is in the context of different facts and is of no help to respondent.

9. For the foregoing reasons, present petition is allowed. Complaint case no. 536760/16 is quashed qua the petitioner. Miscellaneous applications are disposed of as infructuous.

A.K. PATHAK, J.

SEPTEMBER 07, 2018
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