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

\+ CRL.M.C. 1063/2020

ASHISH MEHRA ..... Petitioner

Through: Mr. Sushant Mahajan, Advocate

versus

MAHALAXMI EMBROIDERY ..... Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% **26.02.2020**

Crl.M.A. Nos.4233/2020

1. Exemption allowed, subject to just exceptions.

Crl.M.C. No. 1063/2020 and Crl.M.A. No. 4232/2020

2. The present petition under Section 482 of the Cr.P.C., 1973, seeks quashing of the complaint being **CC No. 7227/2017** (***Mahalaxmi Embroidery v. Zynke Exports Pvt. Ltd***.), pending before the Metropolitan Magistrate, Patiala House Courts, New Delhi.

3. The brief facts of the case as made out in the petition are that a complaint was filed under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter 'NI Act'), wherein the petitioner has been impleaded as co-accused in the capacity of being a director of the respondent - Zynke Exports Pvt. Ltd., (accused No. 1). As per the averments contained in the complaint, certain amounts remained due and payable by Zynke Exports Pvt. Ltd. on account of certain clothing material supplied by the Respondent. In

discharge of the outstanding payment, the said company tendered a Cheque (No. 692190) to the Respondent which was dishonoured on presentation. As a result of the same, a complaint under Section 138 of the NI Act was filed, arraying the petitioner as an accused.

4. The short ground urged for quashing the complaint is that the words "*at the time of commission of offence*" are missing in the complaint, in relation to the allegations pertaining to the petitioner. Learned counsel for the petitioner submits that if the allegations in the complaint are not specific to the above effect, the complaint is liable to be quashed. Reliance has been placed upon the decision of this Court in ***ECL Finance Ltd. V. Ms.Sukhmani Bedi & Anr.,*** **2018 SCC OnLine Del 11213** and ***Jwala Devi Enterprises P. Ltd. V. Fadi El Jaouni***, **2018 SCC OnLine Del 10030**.

5. I have carefully perused the aforesaid judgments. In my view, the judgments hold to the contrary. This Court in its decision in ***Jwala Devi Enterprises P. Ltd***. (Supra) has carefully analyzed and summarized the requirements of law in a complaint under NI Act, in paragraph No. 14 of the said judgment, which reads as follows:

> ***14.*** *The guiding principles with reference to Section 141 of the Negotiable Instruments Act, 1881, which are now well settled by judicial pronouncements, some of which have been noted above, may be summarised thus:—*
>
> *(i) It is only those persons who are in charge of or responsible for the conduct of the business of the company at the time of commission of the offence under Section 138 of the Negotiable Instruments Act, 1881 who can be subjected to criminal action with reference to Section 141;*

(ii). If the person committing an offence under Section 138 of the Negotiable Instruments Act, 1881 is a company, the person who was signatory to the cheque which is dishonoured is clearly responsible for the incriminating act and would be liable to be proceeded against under Section 141 (2);

(iii). By virtue of the office they hold, the persons working in the capacity of the Managing Director or Joint Managing Director are deemed to be in charge of, and responsible for the conduct of the business of, the company and, therefore, can be proceeded against in terms of Section 141;

(iv). Merely because a person is a director of the company is not sufficient to make him liable under Section 141, there being no deeming that by holding such position he is in charge of, or responsible for the conduct of the business of, the company within the meaning of Section 141;

(v). It is necessary for the complainant to specifically aver in the complaint that at the time the offence was committed, the person sought to be prosecuted was in charge of, or responsible for the conduct of the business of, the company in terms of Section 141, there being no need for further particulars to be given in the complaint about his role, this being subject to proof at the trial;

(vi). The person who has been summoned as an accused for offence under Section 138 of the Negotiable Instruments Act, 1881 on the basis of averment that he was director of the company accused, he being in charge of or responsible for the conduct of its business cannot get the complaint quashed by the High Court by filing a petition under Section 482 of the Code of Criminal Procedure, 1973 merely on the ground that no particulars as to his role have been set out in the complaint; and

(vii). ***The person who has been summoned as an accused for offence under Section 138 of the Negotiable Instruments Act, 1881 by invoking the provision contained in Section 141 may persuade the High Court to quash the process in exercise of its inherent power under Section 482 of the Code of Criminal Procedure, 1973 by furnishing "some sterling incontrovertible material or acceptable circumstances" substantiating his***

contention that he was not in charge of nor responsible for the conduct of the business of the company "at the time the offence was committed" and thereby showing a case that making him stand the trial would be an abuse of the process of court, but not otherwise.

[Emphasis Supplied]

6. The petitioner does not dispute that he was a director of the accused Company on the date of the commission of the alleged offence. However, he contends that the complaint is liable to be quashed as it lacks the ingredients to constitute the commission of an offence under Section 138 of the Act. At this stage, it would be apposite to refer Section 141 of the NI Act, which reads as under:

> ***"141. Offences by companies.—****(1) If the person committing an offence under Section 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:*
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> *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:*
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> *Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.*
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> *(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.

Explanation.—For the purposes of this section—

*(a) "**company**" means any body corporate and includes a firm or other association of individuals; and*

*(b) "**Director**", in relation to a firm, means a partner in the firm."*

7. Besides a perusal of the averments made in the complaint is also necessary. The allegation pertaining to the petitioner read as under:-

"1. The Complainant is a Partnership Firm having its head office at 4952-4955, Hauz Qazi, Delhi- 110006 and work office at 15/2, Mathura Road, Faridabad, Haryana. The Complainant Firm deals in the embroidery work on the cloth material supplied by the client/customer. Mr.Rajiv Kumar, Mrs. Ruchika Arora and Mr. Manik ARora are the partners of the complainant firm. It is submitted that Mr.Santosh Kumar Jha who is Special Power of Attorney holder of the Complainant firm and is also looking day to day affairs of the firm and as such is well conversant with the facts and circumstances of the case. A copy of the special power of attorney issued in his favour is annexed herewith as Annexure-C/1(OSR).

2. The accused no.1 is a company duly registered as per companies act. The accused no. 2 to 5 are the directors of the accused no. 1 company. The accused no. 2 is also one of the signatory of the cheque in question. The accused no.6 is also authorized signatory of the accused no.1 company and has signed the cheque in question. ***The accused no. 3 to 5 are the active director of the accused no.1 company and the accused no. 3 to 5 had on several occasions interacted with the***

complainant firm with respect to the orders placed by the accused no.1 company. Hence all the accused persons are jointly and severally liable for the offence as above mentioned.

3. The accused company has the business dealing with the complainant firm and during the course of such business accused person used to have business with complainant at Delhi from time to time. The accused persons used to collect the material after placing the orders from time to time. The complainant firm has maintained the statement of accounts with the accused company. In order to clear the legally recoverable dues in respect of the said embroidery works, the accused company issued cheques in favour of the complainant firm. Purchase order and statement of account of Accused are attached as ANNEXURE-C/2 (COLLY).

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7. ***The accused are liable to be prosecuted and punished as the accused no. 2 is the director and signatory of the cheque and the accused no. 2 to 5 are the directors of the company and responsible for the day to day business of the company and has on several occasions interacted with the complainant with respect to the orders placed and bill raised by the complainant.*** *The accused no. 6 is signatory of the cheque and also responsible for the business of the accused company. Hence all accused are jointly and severally liable for the offence committed by them."*

[Emphasis Supplied]

8. The Apex Court in ***K.K. Ahuja* v. *V.K. Vora*, (2009) 10 SCC 48** , while deciding the question as to whether every officer of the Company could be impleaded as an accused in a complaint under 138 r/w 141 of the NI Act, held as under:

"27. The position under Section 141 of the Act can be summarised thus:

(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix "Managing" to the word "Director" makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii) In the case of a Director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141.

(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 the 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 under Section 141(1) of the Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 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 cannot 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, by 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."

[Emphasis Supplied]

9. In ***Gunmala Sales (P) Ltd. v. Anu Mehta,* (2015) 1 SCC 103**, the Supreme Court while deciding whether the High Court was justified in quashing the proceedings on the ground that the averments in the complaint were not sufficient to maintain a complaint under Section 141 of the NI Act, held as under:

> ***"30. When a petition is filed for quashing the process, in a given case, on an overall reading of the complaint, the High Court may find that the basic averment is sufficient, that it makes out a case against the Director; that there is nothing to suggest that the substratum of the allegation against the Director is destroyed rendering the basic averment insufficient; and that since offence is made out against him, his further role can be brought out in the trial. In another case, the High Court may quash the complaint despite the basic averment. It may come across some unimpeachable evidence or acceptable circumstances which may in its opinion lead to a conclusion that the Director could never have been in charge of and responsible for the conduct of the business of the company at the relevant time and therefore making him stand the trial would be an abuse of process of court as no offence is made out against him.***
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> ***31. When in view of the basic averment process is issued the complaint must proceed against the Directors. But, if any Director wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he is really not concerned with the issuance of the cheque, he must in order to persuade the High Court to quash the process either furnish some sterling incontrovertible material or acceptable circumstances to substantiate his contention. He must make out a case that making him stand the trial would be an abuse of process of court. He cannot get the complaint quashed merely on the ground that apart from the basic averment no particulars are given in the complaint about his role, because ordinarily the***

basic averment would be sufficient to send him to trial and it could be argued that his further role could be brought out in the trial. Quashing of a complaint is a serious matter. Complaint cannot be quashed for the asking. For quashing of a complaint it must be shown that no offence is made out at all against the Director."

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34. *We may summarise our conclusions as follows:*

34.1. *Once in a complaint filed under Section 138 read with Section 141 of the NI Act the basic averment is made that the Director was in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, the Magistrate can issue process against such Director.*

34.2. If a petition is filed under Section 482 of the Code for quashing of such a complaint by the Director, the High Court may, in the facts of a particular case, on an overall reading of the complaint, refuse to quash the complaint because the complaint contains the basic averment which is sufficient to make out a case against the Director.

34.3. In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about the role of the Director in the complaint. It may do so having come across some unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of process of court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a

Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an arm-twisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out. In the absence of such evidence or circumstances, complaint cannot be quashed.

34.4. No restriction can be placed on the High Court's powers under Section 482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of the court. There are no fixed formulae to be followed by the High Court in this regard and the exercise of this power depends upon the facts and circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but nothing prevents it from taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director.

[Emphasis Supplied]

10. The said principle was further reiterated in ***Jwala Devi Enterprises (supra),*** the decision relied upon by the petitioner, wherein the Court observed that the accused is required to furnish '*some sterling incontrovertible material or acceptable circumstances*' to substantiate his contention he/she was not in charge or was responsible for the conduct of the Company '*at the time of commission of offence*'. In the present case, the petitioner has not been able to show or produce any material to persuade this court to quash the complaint against him.

11. The averments made in the complaint are specific in so far as to ascribe the role of the petitioner. There are precise allegations against the petitioner (Accused No.3) that he was an active director of the accused No.1 Company and on several occasions had interacted with the complainant firm with respect to the subject matter which forms the basis for issuing of the cheque in question. Therefore, in the opinion of the Court, *prima facie*, the requirements of Section 141 of the NI Act have been primarily met. The culpability of the accused as to whether he is a non – active director or whether he is, in fact, not responsible for the day to day affairs of the Company are question that would be required to be examined during the course of Trial. At this stage, in view of the admitted position of fact that the petitioner was a director on the date of commission of the alleged offence, this Court does not find any good ground to quash the complaint or the proceeding emanating therefrom while exercising the jurisdiction under Section 482 of the Cr.P.C., 1973. Accordingly, the present petition is dismissed.

SANJEEV NARULA, J

FEBRUARY 26, 2020/SV