*   IN THE HIGH COURT OF DELHI AT NEW DELHI

<u>CRL.M.C. 280/2021 and CRL.M.A. 1436/2021,</u>
<u>CRL.M.C. 281/2021 and CRL.M.A. 1440/2021,</u>
<u>CRL.M.C. 282/2021 and CRL.M.A. 1442/2021 and</u>
<u>CRL.M.C. 283/2021 and CRL.M.A. 1444/2021</u>

Reserved on : 27.10.2021.
Date of Decision: 21.12.2021.

<u>IN THE MATTER OF</u>:

SANJEEV KUMAR AGARWAL ..... Petitioner
Through: Dr. Abhishek Atrey, Advocate
versus
IFCI FACTORS LTD & ORS. ..... Respondents
Through: Mr. Sharique Hussain, Advocate for respondent No.1

SANJEEV KUMAR ..... Petitioner
Through: Dr. Abhishek Atrey, Advocate
Versus
IFCI FACTORS LTD. & ORS. ..... Respondents
Through: Mr. Sharique Hussain, Advocate for respondent No.1

SANJEEV KUMAR AGARWAL ..... Petitioner
Through: Dr. Abhishek Atrey, Advocate
versus
IFCI FACTORS LTD & ORS. ..... Respondents
Through: Mr. Sharique Hussain, Advocate for respondent No.1

SANJEEV KUMAR AGARWAL ..... Petitioner
Through: Dr. Abhishek Atrey, Advocate
Versus
IFCI FACTORS LTD & ORS. ..... Respondents
Through: Mr. Sharique Hussain, Advocate for respondent No.1

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

J U D G M E N T

MANOJ KUMAR OHRI, J.

1. The present petitions are instituted under Section 482 Cr.P.C. on behalf of the petitioner assailing the summoning orders dated 20.01.2017 passed in CC Nos. 635667/2016 and 635666/2016, the order dated 12.04.2016 passed in CC No. 1109/2016 and the order dated 02.02.2016 passed in CC No. 4429/2015 by the learned Metropolitan Magistrate-03 (NI Act), South-East District, Saket, Delhi.

2. The above-noted petitions arise out of different complaints filed under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the NI Act) and involve the same parties. Accordingly, the petitions are taken up for hearing together and shall be disposed of by a common order.

3. Learned counsel for the petitioner submits that vide the impugned orders, the petitioner has been summoned by the learned Magistrate in the aforesaid complaint cases without due application of mind. It is contended that while passing the impugned orders, learned Metropolitan Magistrate failed to appreciate that all the four cheques in question issued on behalf of respondent No. 2/company (hereinafter referred to as *"the accused company"*) from 30.03.2014 to 31.01.2016 were signed by respondent No. 3, being the sole authorized signatory and Managing Director thereof.

4. It is further submitted that prior to the issuance of the cheques in question, the petitioner had already resigned as a Director of the accused

company on 28.02.2014. In support of the submission, learned counsel for the petitioner has placed on record the petitioner's resignation letter dated 28.02.2014, a copy of Form DIR-12 and the company master data available on the website of the Registrar of Companies.

5. It is also submitted that the only specific role assigned to the present petitioner is that at earlier point of time, he had executed personal guarantee deeds dated 17.05.2011 and 18.06.2013 in favour of the complainant company. However, after he resigned from the accused company on 28.02.2014, he had no role to play. In simple words, the petitioner's case is that on the date of the alleged offence being committed, he was not in-charge of the day-to-day affairs of the accused company.

6. Learned counsel for respondent No. 1/company (hereinafter referred to as *"the complainant company"*), on the other hand, has supported the impugned orders. He submits that specific averments against the petitioner are evident in the complaints filed by the complainant company, wherein it is stated that the petitioner was a Director of the accused company and had executed a guarantee deed, thereby undertaking personal liability. It is also submitted that the proceedings before the Trial Court are at the nascent stage and may not be quashed at the outset.

7. I have heard learned counsels for the parties and have also gone through the material placed on record.

8. A perusal of the records would show that on dishonour of the aforesaid cheques, demand notices dated 13.06.2014, 29.04.2014, 17.02.2016 and 21.04.2015 respectively were issued, subsequent to which the accused company failed to pay the outstanding amounts and the

aforesaid criminal complaints came to be filed on 01.08.2014, 31.05.2014, 02.04.2016 and 28.05.2015 respectively.

9. Further, a reading of the aforesaid criminal complaints would show that it was alleged that while respondent No. 3 was the Managing Director of the accused company, the petitioner was a Director on the Board thereof and he alongwith respondent No. 3 was part of the senior management of the accused company and in-charge of the day-to-day business and management of the operational and financial affairs thereof. It was also alleged that cheques were usually issued by the accused company at the behest of respondent No. 3 and the petitioner with their full knowledge.

Insofar as the present petitioner is concerned, besides the aforesaid allegations, it was also claimed that he, alongwith respondent No. 3, had guaranteed repayment by the accused company of the amount involved, with respect to which the cheques in question were issued, and had executed guarantee deeds whereby personal liability was undertaken.

At the same time, it was also averred that it was respondent No. 3 who had undertaken to the complainant company that the cheques would be duly honoured on presentation. Notably, it was not the case of the complainant company that the cheques in question were post-dated cheques.

10. The short issue involved in the present case is whether execution of guarantee deeds by the petitioner prior to issuance of cheques in question would make him vicariously liable for the offence under Section 138 read with Section 141 NI Act, when he had tendered his resignation to the accused company prior to issuance thereof.

11. It is no longer *res integra* that to attract vicarious liability under Section 141 NI Act against any person, the accused person should have been

in-charge and responsible for the conduct of the business of the accused company at the time of commission of offence. A person who was not a Director, and/or not in-charge of the affairs of the accused company or for the conduct of the business thereof, at the time when the offence was committed, cannot be held vicariously liable.

12. To make a Director of a company vicariously liable under Section 141 NI Act, specific allegations have to be made out against him in the complaint. In National Small Industries Corporation Limited *v.* Harmeet Singh Paintal and Another reported as **(2010) 3 SCC 330**, the Supreme Court has enunciated the law on the subject as follows:-

> *"13. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.*
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> *14. A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfilment of the requirements under Section 141."*

13. With respect to the contention raised on behalf of the complainant company that personal liability was undertaken by the petitioner by way of guarantee deeds, it is deemed expedient to refer to the decision rendered by the Supreme Court in Pooja Ravinder Devidasani *v.* State of Maharashtra

and Another reported as **(2014) 16 SCC 1** where, in a similar fact situation, it was opined that execution of guarantee deed/letter of guarantee by an erstwhile Director, who ceased to hold office prior to the issuance of the cheques in question, may attract civil liability but not one under Section 138 NI Act.

14. From a perusal of the said decision and considering that Section 141 NI Act is a deeming provision, whereby liability is attributed to Directors who were in-charge and responsible for the affairs of the accused company *"at the time when the offence was committed"*, it is discernible that regardless of a guarantee deed being executed as part of the impugned transaction, no criminal liability would be attributable to a Director of the accused company who executed such deed if he resigned therefrom prior to the issuance of the cheques in question. Relevant excerpt from Pooja Ravinder Devidasani (Supra) is extracted hereunder:

> *"28. ...From the record it appears that the trade finance facility was extended by Respondent 2 to the default Company during the period from 13-4-2008 to 14-10-2008, against which the cheques were issued by the Company which stood dishonoured. Much before that on 17-12-2005 the appellant resigned from the Board of Directors. Hence, we have no hesitation to hold that continuation of the criminal proceedings against the appellant under Section 138 read with Section 141 of the NI Act is a pure abuse of process of law and it has to be interdicted at the threshold.*
> *29. So far as the letter of guarantee is concerned, it gives way for a civil liability which Respondent 2 complainant can always pursue the remedy before the appropriate court. So, the contention that the cheques in question were issued by virtue of such letter of guarantee and hence the appellant is liable under Section 138 read with Section 141 of the NI Act, cannot also be accepted in these proceedings."*

(*emphasis added*)

15. It is also deemed apposite to refer to the decision recently rendered by the Supreme Court in Ashutosh Ashok Parasrampuriya and Another *v.* Gharrkul Industries Pvt. Ltd. and Others reported as **2021 SCC OnLine SC 915**, where the circumstances under which a case under Sections 138/141 NI Act may be quashed by this Court, in exercise of powers under Section 482 Cr.P.C., were enunciated as follows:-

> *"23. In the light of the ratio in S.M.S. Pharmaceuticals Ltd. (supra) and later judgments of which a reference has been made what is to be looked into is whether in the complaint, in addition to asserting that the appellants are the Directors of the Company and they are incharge of and responsible to the Company for the conduct of the business of the Company and if statutory compliance of Section 141 of the NI Act has been made, it may not open for the High Court to interfere under Section 482 CrPC unless it comes 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 particular Director for which there could be various reasons."*
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> (*emphasis added*)

16. Applying the ratio from the judicial dicta cited hereinabove to the facts of the present case, it is borne out from the material placed on record that the petitioner had ceased to be a Director of the accused company prior to the issuance of the cheques in question and thus, he could not be attributed vicarious liability for the offence punishable under Sections 138/141 NI Act. To support the contention that he was not a Director of the accused company at the relevant time, reliance has been placed on behalf of the petitioner upon the master data available on the website of the Registrar

of Companies and Form DIR-12, which material was not disputed on behalf of the complainant company during the course of arguments.

17. The petitioner had executed personal guarantee deeds dated 17.05.2011 and 18.06.2013. As the aforementioned relied-upon documents indicate, he ceased to be associated with the accused company as a Director with effect from 28.02.2014, whereas the cheques in question were issued only thereafter, i.e., from 30.03.2014 to 31.01.2016. Admittedly, the cheques were signed by respondent No. 3, who, as per the averment made in the complaints, alone undertook that the same would be duly honoured upon presentation. Such an undertaking/assurance was not attributed to the present petitioner. In this backdrop, the execution of guarantee deeds by the petitioner at an earlier point in time would not attract vicarious liability under Sections 138/141 NI Act. Besides, there is nothing on record to indicate that the petitioner was in-charge of and responsible for the conduct of the affairs of the accused company at the time of the commission of the offence under Sections 138/141 NI Act.

In addition to the aforesaid, note is taken of the fact that apart from the cheques in question, other documents including the Supplemental Agreements for the Factoring of Receivables dated 16.05.2011 and 08.03.2013, the copy of sanction letter dated 16.05.2011 issued by the complainant company to the accused company which was to be sent back as a token of acceptance of the terms and conditions, the promissory note dated 16.05.2011, the Deed of Hypothecation dated 08.03.2013 and the Agreement for Advance against Future Factorable Receivables dated 08.03.2013, executed between the complainant company and the accused company, were signed by respondent No. 3, being the Managing Director/Authorized Signatory of the accused company.

18. Keeping in view the aforesaid facts and circumstances, given the undisputed material placed on record, this Court is of the opinion that the summoning orders against the petitioner are liable to be set aside. Accordingly, the petitions are allowed and the summoning orders are set aside.

19. In the above terms, the petitions are disposed of, alongwith the pending applications.

(MANOJ KUMAR OHRI)
JUDGE

DECEMBER 21, 2021
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