

NEUTRAL CITATION NO. 2022/DHC/005060

NEUTRAL CITATION NO. 2022/DHC/005061

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

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Reserved on: 13.09.2022

Pronounced on: 23.11.2022

+ **CRL.M.C.2359/2022 & CRL.M.A.9965/2022**

VISHAL ARORA

..... Petitioner

Through: Mr. Siddharth Aggarwal, Sr.
Advocate with Mr. Kumar
Vaibhaw, Mr. Abhinav Sekhri,
Ms. Arshia Gosh, Mr. S. Uday
Bhanu and Ms. Somaya
Gupta, Advocates.

versus

YES BANK LIMITED

..... Respondent

Through: Mr. Manish Vashishth, Sr.
Advocate with Mr. V.K.
Anand, Mr. Rishab Singh, Mr.
Kumar Shashank, Mr. Harish
Nedda and Mr. Anant Singh,
Advocates.

+ **CRL.M.C.2360/2022, CRL.M.A.13159/2022 &
CRL.M.A.9968/2022**

HEMANT DHINGRA

..... Petitioner

Through: Mr. Siddharth Aggarwal, Sr.
Advocate with Mr. Kumar
Vaibhaw, Mr. Abhinav Sekhri,
Ms. Arshia Gosh, Mr. S. Uday
Bhanu and Ms. Somaya
Gupta, Advocates.

versus

YES BANK LIMITED

..... Respondent

Through: Mr. Manish Vashishth, Sr.
Advocate with Mr. V.K.
Anand, Mr. Rishab Singh, Mr.
Kumar Shashank, Mr. Harish
Nedda and Mr. Anant Singh,
Advocates.

CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J

1. This judgment shall govern the disposal of CRL.M.C. 2359/2022 and CRL.M.C. 2359/2022, along with pending applications, arising out of common set of facts, contentions and prayer.
2. Petitioners have preferred the instant petition under Section 482 of the Criminal Procedure Code, 1973 seeking quashing of the Criminal Complaint No. 4162/2020 titled "*Yes Bank Ltd. v. Oscar Investments Ltd. & Ors.*" and the Summoning Order dated 24.12.2020 passed by learned Metropolitan Magistrate (N.I.Act)-03, Rouse Avenue Court, New Delhi.
3. The facts of the case are summarized as under:
 - a. The complainant/respondent Yes Bank Limited is a company engaged in offering wide range of banking services to its clients. Oscar Investments Limited (accused no. 1) is a public listed company, promoters/directors of which are accused no. 2 and 3.

- b. RHC Holding Pvt. Ltd. happens to be the holding company emanating from Oscar Investments Ltd./accused no. 1. The petitioner in CRL.M.C. 2359/2022 namely Mr. Vishal Arora i.e., accused no. 4, was employed as the Senior Manager-Finance in RHC Holding Pvt. Ltd., and the petitioner in CRL.M.C. 2360/2022 namely Mr. Hemant Dhingra i.e., accused no. 5, was employed as Director (Finance) in RHC Holding Pvt. Ltd. Both the petitioners, however, were not part of the Board of Directors. For the ease of operations, the petitioners were appointed as the Authorized Signatories in the bank account of Oscar Investments Limited/accused no. 1.
- c. On 23.12.2016, accused no. 1 availed credit facility from the complainant bank for a total sum of Rs.5,65,00,00,000/- (Rupees Five Hundred and Sixty Five Crores). The petitioners, in the capacity of Authorized Signatories of accused no. 1, signed a declaration for submission of cheques towards discharge of the liability of accused no. 1 under the credit facility. In furtherance, the Cheque bearing no. 932400 drawn on Yes Bank Ltd. for an amount of Rs.2,00,00,00,000/- (Rupees Two Hundred Crores) and Cheque bearing no. 932401 drawn on Yes Bank Ltd. for an amount of Rs.25,00,00,000/- (Rupees Twenty Five Crores) signed by the petitioners, were also submitted by accused no. 1 to the complainant on 23.12.2016.
- d. On 17.01.2017, the complainant and accused no. 1 entered into a loan agreement, and a deed of guarantee was executed in

favour of the complainant by accused no. 2 i.e., the director of accused no.1.

- e. Subsequently, petitioner in CRL.M.C. 2360/2022, Mr. Hemant Dhingra, resigned from the employment of RHC Holdings Pvt. Ltd. with effect from 30.09.2017, and petitioner in CRL.M.C. 2359/2022, Mr. Vishal Arora, also tendered his resignation on 27.08.2018.
- f. Since the total outstanding amount under the credit facility was Rs.4,41,72,87,888.67/- as on 08.01.2020, the complainant presented the Cheques dated 09.01.2020 issued by accused no.1 for encashment to recover its dues, but the said Cheques were returned unpaid/dishonoured vide returning memo dated 09.01.2020 with remarks "Funds Insufficient".
- g. Statutory notice under Section 138 of Negotiable Instruments Act, 1881 was sent by the complainant calling upon the accused company to make good the amount mentioned in the cheques. The notice was addressed to the company, its directors, and the authorized signatories i.e., the petitioners herein.
- h. The complainant, thereafter, proceeded to file a complaint under Sections 138/141/142 of Negotiable Instruments Act, 1881 against the accused company and its directors and signatories. After considering the material on record and pre-summoning evidence, learned Trial Court thought it fit to summon all the accused persons to answer the charge under Section 138 of NI Act, 1881.

- i. Hence the present petitions for quashing of complaint and summons issued against the present petitioners.

4. Mr. Siddharth Aggarwal, learned senior counsel for the petitioners submits that accused no. 5 had ceased to be an employee of RHC Holdings Pvt. Ltd. with effect from 30.09.2017, and was also replaced as a member of the Asset Liability Management Committee with effect from 17.08.2017. It was further submitted that accused no. 4 also ceased to be an employee of RHC Holdings Pvt. Ltd. with effect from 27.08.2018, and was rather an employee of Hair Rejuvenation and Revitalization Nigeria Ltd. when the Cheques were allegedly dishonoured on 09.01.2020. It is stated that both the accused persons stopped having any association with the accused company post their resignations. It was further stated that in view of the same, petitioners could clearly not have been the person in charge of or responsible for the conduct of day to day business of the accused company in the year 2020.

5. It is stated that accused no. 5 had addressed a letter dated 06.10.2017 to the Board of Directors of RHC Holdings Pvt. Ltd., informing that the cheques signed by him would no longer be valid and a request was made that the said cheques be replaced with ones executed by the Authorised Signatories of the company at the earliest. Accordingly, after the resignation of accused no. 4 also, Mr. Sanjeev Kumar Singhal, Mr. Chandra Shekhar Jha, and Mr. Rajendra Kumar were appointed as the new authorized signatories *vide* Board Resolution dated 30.08.2018. Thus, at the time of commission of

offence, the petitioners were not the authorised signatories of the accused company, and the said fact was in the knowledge of the complainant from the board resolution dated 30.08.2018 as well as from other publicly available documents, the same was also brought to its knowledge by accused no. 5 *vide* reply to legal notice dated 03.02.2020.

6. Disputing the averments in the complaint, Mr. Aggarwal submits that only a blank declaration and undated cheques were signed and issued to the complainant as part of Loan Documentation on 23.12.2016, and the details in the declaration and date in the cheques were filled by the complainant in 2020, i.e., after the petitioners had already severed their ties from the accused company.

7. It was argued by learned senior counsel for petitioners that the cheques in dispute were issued by accused company and not by petitioners in their individual capacities, and since they ceased to have any association with the accused company long before the Cheques were presented for encashment, there was no way they could have ensured that the Cheques were honoured. It was further argued that even when the demand notice under Section 138 of NI Act was issued, the petitioners were not in the position to comply with any demands raised in the said notice as it was the accused company who was liable to make the payment.

8. Mr. Aggarwal states that it is settled law that when a person who had signed the cheque, resigned prior to the dishonour of the said cheque i.e., when the cause of action under Section 138 arose, he cannot be made vicariously liable under Section 141 of the NI Act

because he would have no say in seeing that the cheque is not dishonoured. To advance his case, learned senior counsel places reliance upon the following judgments: (i) ***DCM Financial Services Ltd. v. J.N. Sareen, (2008) 8 SCC 1***; (ii) ***Kamal Goyal v. United Phosphorus Ltd., 2010 SCC OnLine Del 447***; and (iii) ***Nikhil P. Gandhi v. State of Gujarat, 2016 SCC OnLine Guj 1856***

9. On the other hand, Mr. Manish Vashishth, learned senior counsel argues on behalf of the respondent bank that once a cheque is tendered towards a liability and discharge of an obligation, the dishonor of the same makes the signatory liable to be prosecuted. In this regard, reliance has been placed on the decisions in ***Rajeshbhai Muljibhai Patel & Ors. v. State of Gujarat & Anr. (2020) 3 SCC 794*** and ***Bhupesh rathod v. Dayashankar Prasad Chaurasia & Anr. (2022) 2 SCC 355***. It is argued that the contentions of the petitioners that they had rendered the cheque undated is also misconceived and legally untenable under the provisions of the Negotiable Instruments Act, 1881, for which reliance is also placed on the decision in ***Mojj Engineering Systems Ltd. & Ors. v. A.B. Sugars Ltd. 154 (2008) DLT 579***. It is further stated that the petitioners were duly authorized to act on behalf of accused company at the time of issuance of cheques in favour of respondent bank towards discharge of the undisputed liabilities towards credit facility.

10. Mr. Vashishth submits that specific allegations and averments have been made against the petitioners in the complaint, and accused persons have been summoned by the learned Trial Court after due application of mind and considering all the material before it. It is

argued that as held in catena of judgments, the contentions raised on behalf of the petitioners are triable issues and thus, no mini trial is contemplated at this stage, more particularly when the complaint discloses a clear commission of an offence.

11. The rival contentions raised by learned senior counsels for the parties have been heard and the material placed on record has been perused.

12. Before adverting to the facts of the present case, it will be relevant to consider the law as laid down in statutes and through precedents. It will be appropriate to first refer to Section 138 and 141 of the Negotiable Instruments Act, 1881, which are reproduced as under:

“138. Dishonour of cheque for insufficiency, etc., of funds in the account — Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless —

(a) the cheque has been 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 thirty 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.

Explanation.—For the purposes of this section, “debt of other liability” means a legally enforceable debt or other liability.”

“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:

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:

[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.]

(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.”

13. It is the case of petitioners that they were not the directors in the accused company and were merely employees in the holding company of accused no. 1, who for the ease of operations, were appointed as the Authorized Signatories of accused company. Moreover, they were not the persons incharge of or responsible for the conduct of business of the accused company in the year 2020 and had resigned much prior to that, and thus, cannot fall under the purview of Section 141 of NI Act, 1881.

14. To consider the said contentions of the petitioners, a reference can be made to the judgment of Hon’ble Apex Court in ***S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla (2005) 8 SCC 89***, wherein it was held as under:

“19. In view of the above discussion, our answers to the questions posed in the Reference are as under:

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an

essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) ...Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) ...The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141...

(emphasis supplied)

15. In **K.K. Ahuja v. V.K. Vohra (2009) 10 SCC 48**, the Hon'ble Supreme Court had summarised the position under Section 141 as under:

“20. The position under section 141 of the Act can be summarized 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 Sec. 2(24) of the Companies Act) or a person referred to in clauses (e) and (f) of section 5 of 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). 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 can not 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, be 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)

16. On similar lines, the Hon'ble Apex Court in ***National Small Industries Corp. Ltd. v. Harmeet Singh Paintal (2010) 3 SCC 330*** carved out the following principles:

“39. From the above discussion, the following principles emerge:

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

(vi) If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.

(vii) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases...”

(emphasis supplied)

17. Thus, the settled position of law is that the signatory of a cheque which is dishonoured, is responsible for the act and will be covered under sub-section (2) of Section 141. Therefore, no special averments would be necessary to make him liable. A perusal of the complaint in the present case, however, reveals that specific averments have even been made against the petitioners i.e. accused no. 4 and 5 and their specific role has been highlighted by the complainant bank/respondent. The relevant portions of the complaint, filed before the learned Trial Court, are as under:

“6. The Accused no. 4 is the signatory of the cheque dated 09-01-2020 on behalf of Accused No.1. Further, Accused No.4 was authorized signatory of the Accused No.1 and also in-charge and responsible For the conduct of the day-to-day affairs of Accused no. 1 at the time of commission of the offence.

7. The Accused No.5 is the signatory of the cheque dated 09-01-2020 on behalf of Accused No.1. Further, Accused No.5 was authorized signatory of the Accused No.1 and also in-charge and responsible for the conduct of the day-to-day affairs of Accused no.1 at the time of commission of the offence.

12. That the Accused No. 4 & 5 duly authorized to act on behalf of accused no.1 at the time of issuance of Cheques issued certain Cheques in favour of the Complainant Bank towards the discharge of the admitted and undisputed

liabilities of payment towards the "Facility"...

14. That the Accused No.2, 3, 4 & 5 acting on behalf of the Accused No.1 were fully aware of the transaction and were also aware of the cheques being issued towards the legally recoverable liability towards the Complainant Bank. The Accused No. 4 & 5 signed the cheques being the Authorized Signatory of Accused No.1. Further, Accused No. 2 & 3 were the Directors of the Accused No.1 at the relevant time when offence was committed. The Accused No. 2, 3, 4 & 5 were the person in charge of the Accused no.1 and also responsible for the conduct of the day-to-day affairs of the Accused no.1. Accused no.2 was also the personal guarantor for the Facility.

15. That the Accused persons, were aware of the cheques being issued towards the legally recoverable liability towards the Complainant Bank..."

18. In the present case, the admitted and undisputed facts that emerge from the material on record are that the accused company had availed a credit facility of Rs.5,65,00,00,000/- from the respondent bank, and towards the discharge of liability under the facility, the accused company, through its authorised signatories i.e. the present petitioners, had submitted a declaration along with signed cheques of Rs.200,00,00,000/- and Rs.25,00,00,000/- to the respondent bank on 23.12.2016. Thereafter, the loan agreement was entered into between the accused company and complainant on 17.01.2017. The cheques in question were presented for encashment on 09.01.2020 and the same were dishonoured.

19. The petitioners, however, contend that a blank declaration and undated cheques, signed by them, were forwarded to the complainant

bank on 23.12.2016. Thereafter, both the petitioners had subsequently resigned from their positions in the holding company of accused no. 1 in the years 2017 and 2018. It was argued on behalf of petitioners that the details in the declaration, as well as the date on the cheques, were filled by the respondent on 09.01.2020 before presenting the same for encashment, however, the petitioners had already resigned, much prior to the said date. The petitioners have annexed both the filled as well as unfilled declaration/cheques along with the petitions to prove their stand. It is further the case of the petitioners that when they had resigned prior to the dishonour of the said cheque, they cannot be made vicariously liable for commission of offence under Section 138 NI Act, 1881. These contentions, on the other hand, were refuted by the respondent on the ground that once a signed cheque is tendered towards the discharge of a liability, dishonor of the same makes the signatory liable to be prosecuted, and whether the cheque was undated/post-dated or not is immaterial.

20. In the case at hand, firstly, neither the signatures of the petitioners on the cheques nor the liability for which the cheques were issued has been denied. In such a case, the presumption under Section 139 of NI Act, 1881 would certainly arise in favour of the holder of the cheque i.e., the respondent bank/complainant. For reference, Section 139 is reproduced as under:

“139. Presumption in favour of holder.—It shall be presumed, unless the contrary is proved, that the holder of a 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.”

21. Three-judge bench of Hon'ble Supreme Court in ***Kalamani Tex & Anr. v. P. Balasubramanian (2021) 5 SCC 283*** held that if the signatures on the cheque are admitted, presumption under Section 139 NI Act, 1881 would be attracted. The relevant observations are as under:

“14. Adverting to the case in hand, we find on a plain reading of its judgment that the trial Court completely overlooked the provisions and failed to appreciate the statutory presumption drawn under Section 118 and Section 139 of NIA. The Statute mandates that once the signature(s) of an accused on the cheque/negotiable instrument are established, then these ‘reverse onus’ clauses become operative. In such a situation, the obligation shifts upon the accused to discharge the presumption imposed upon him. This point of law has been crystalized by this Court in Rohitbhai Jivanlal Patel v. State of Gujarat in the following words:

“In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the trial court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the trial court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the appellant-accused.....”

22. The Hon'ble Apex Court in **Rajeshbhai Muljibhai Patel v. State Of Gujarat (2020) 3 SCC 794** had observed as under:

“22. The High Court, in our view, erred in quashing the criminal case in C.C.No.367/2016 filed by appellant No.3-Hasmukhbhai under Section 138 of N.I. Act. As pointed out earlier, Yogeshbhai has admitted the issuance of cheques. When once the issuance of cheque is admitted/established, the presumption would arise under Section 139 of the N.I. Act in favour of the holder of cheque that is the complainant-appellant No.3. The nature of presumptions under Section 139 of the N.I. Act and Section 118(a) of the Indian Evidence Act are rebuttable. Yogeshbhai has of course, raised the defence that there is no illegally enforceable debt and he issued the cheques to help appellant No.3-Hasmukhbhai for purchase of lands. The burden lies upon the accused to rebut the presumption by adducing evidence. The High Court did not keep in view that until the accused discharges his burden, the presumption under Section 139 of N.I. Act will continue to remain. It is for Yogeshbhai to adduce evidence to rebut the statutory presumption. When disputed questions of facts are involved which need to be adjudicated after the parties adduce evidence, the complaint under Section 138 of the N.I. Act ought not to have been quashed by the High Court by taking recourse to Section 482 Cr.P.C. Though, the Court has the power to quash the criminal complaint filed under Section 138 of the N.I. Act on the legal issues like limitation, etc. Criminal complaint filed under Section 138 of the N.I. Act against Yogeshbhai ought not have been quashed merely on the ground that there are inter se dispute between appellant No.3 and respondent No.2. Without keeping in view the statutory presumption raised under Section 139 of the N.I. Act, the High Court, in our view, committed a serious error in quashing the criminal complaint in C.C.No.367/2016 filed under Section 138 of N.I. Act.”

23. Now, the submission made on behalf of the petitioners that the date on the cheque was not filled by the petitioners, would also not make much difference to the liability of the drawer. The declaration and undated cheques were issued to the respondent bank with an underlying consent that the bank may use the same as and when required towards the recovery of their dues. Even the perusal of the contents of declaration submitted to the bank on 23.12.2016 highlight the same, which reads as under:

“...Towards due and prompt repayment and discharge of the Borrower's outstanding debt obligations under the Facility ("Outstanding Debt Obligations"), the Borrower hereby deliver to the Bank, cheque(s) (as detailed in Annexure attached hereto) drawn in favour of the Bank, to discharge Borrower's pecuniary obligations.

The Borrower do hereby authorise and empower the Bank/its officers to present the cheque(s) (more particularly described in Annexure I hereto) in terms of Section 20 of the Negotiable Instruments Act 1881 towards payment of our Outstanding Debt Obligations....”

24. To this effect, the Hon’ble Supreme Court in ***Bir Singh v. Mukesh Kumar, (2019) 4 SCC 197***, has observed as under:

“33. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of

Section 138 would be attracted.

34. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

35. It is not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor is it the case of the respondent-accused that the unfilled signed cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act, in the absence of evidence of exercise of undue influence or coercion. The second question is also answered in the negative.

36. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.”

(emphasis supplied)

25. Recently, the Apex Court in ***Oriental Bank of Commerce v. Prabodh Kumar Tiwari*** 2022 SCC OnLine SC 1089, while following the decisions in ***Bir Singh (supra)*** and ***Kalamani Tex (supra)***, has observed as under:

“18. For such a determination, the fact that the details in the cheque have been filled up not by the drawer, but by some other person would be immaterial. The presumption which arises on the signing of the cheque cannot be

rebutted merely by the report of a hand-writing expert. Even if the details in the cheque have not been filled up by drawer but by another person, this is not relevant to the defense whether cheque was issued towards payment of a debt or in discharge of a liability.

19. Undoubtedly, it would be open to the respondents to raise all other defenses which they may legitimately be entitled to otherwise raise in support of their plea that the cheque was not issued in pursuance of a pre-existing debt or outstanding liability.”

26. It is then the case of petitioners that at the time of presentation and dishonour of cheques, they were not connected with the operations and conduct of business of the accused company and had resigned much prior to the same, and thus, cannot be made liable vicariously liable for commission of offence under Section 138. Several documents have been filed on record to establish the said fact. Reliance in this regard was placed upon the decision in ***DCM Financial Services Ltd. v. J.N. Sareen, (2008) 8 SCC 1***. The Hon’ble Apex Court in this case, however, had expressed that the role of respondent/director as signatory to a post-dated cheque was not specifically averred in the complaint and the said plea was raised for the first time before the Supreme Court. The Court had observed as under:

“20. The cheque in question was admittedly a post dated one. It was signed on 3rd April, 1995. It was presented only sometimes in June, 1998. In the meantime he had resigned from the directorship of the Company. The complaint petition was filed on or about 20th August, 1998. Intimation about his resignation was given to the complainant in writing by the 1st respondent on several

occasions. Appellant was, therefore, aware thereof. Despite having the knowledge, the 1st respondent was impleaded one of the accused in the complaint as a Director Incharge of the affairs of the Company on the date of commission of the offence, which he was not. If he was proceeded against as a signatory to the cheques, it should have been disclosed before the learned Judge as also the High Court so as to enable him to apply his mind in that behalf. It was not done. Although, therefore, it may be that as an authorized signatory he will be deemed to be person incharge, in the facts and circumstances of the case, we are of the opinion that the said contention should not be permitted to be raised for the first time before us... ”

27. Reliance placed upon the decisions in ***Kamal Goyal v. United Phosphorus Ltd., 2010 SCC OnLine Del 447***, and ***Nikhil P. Gandhi v. State of Gujarat, 2016 SCC OnLine Guj 1856*** cannot come to the rescue of the petitioners at this stage, being distinguishable on facts. In all the decisions placed for consideration before this Court, the person exonerated was the director of the company, whose resignation could be easily inferred from the documents on record such as Form 32.

28. This is a case where it is not in dispute that the cheques in question were signed by the petitioners on behalf of the accused company. It is also not in dispute that the cheques and accompanying declaration were submitted to the complainant bank in acknowledgement and discharge of the liability towards the complainant under the ‘Credit Facility’. The amounts mentioned in the cheques also remain undisputed. As already observed in preceding discussion, presumption under Section 139 NI Act, 1881

would certainly arise in favour of the respondent bank in the given facts and circumstances, in view of the dictum of Hon'ble Apex Court in *Rajeshbhai Muljibhai Patel (supra)* and *Kalamani Tex (supra)*.

29. The primary dispute in the present case pertains to the question as to whether the cheques issued by the petitioners on behalf of the accused company on 23.12.2016 were undated or not, and whether the signatories to the cheques i.e. the petitioners were a part of the accused company at the time of commission of offence or not. As observed in the preceding discussion, the plea regarding the cheques in dispute being undated at the time of issuance cannot come to the rescue of the petitioners at this stage, in light of the decisions of Hon'ble Apex Court in *Bir Singh (supra)* and *Oriental Bank of Commerce (supra)*, and the contentions of the parties qua the same may be looked into during the trial. The petitioners have also placed on record their resignation letters, board resolution of the accused company and documents pertaining to their subsequent employments to show that they could not have been the authorised signatories of the accused company at the time the cheques in dispute were dishonoured. However, this Court is of the opinion that the issue as to whether the petitioners had resigned before the presentation of cheques or not is a disputed question of facts and has to be decided on the basis of relevant documents and evidence to be produced at the stage of trial. This is not a case involving a resignation of a director which can be simply verified by this Court by perusing Form 32 issued by Registrar of Companies.

30. The petitioners herein were admittedly the employees in the holding company of accused no. 1 and were its authorised signatories at the time when the credit facility was obtained from the respondent bank. It is also not the case of petitioners that they had informed the respondent about their resignations, rather, they had merely asked the accused company to do the same. Nothing is placed on record to show that the respondent bank was informed by the accused company about the resignations of the authorised signatories to cheques issued to it, before the same were presented for encashment. Further, respondent bank was informed about the factum of resignations of the petitioners only through a reply to legal notice under Section 138 NI Act, 1888, dated 03.02.2020 by petitioner Hemant Dhingra. Therefore, the facts that emerge from the preceding discussion are that (i) the amount in dispute is Rupees Two Hundred and Twenty Five Crores of public money, (ii) the petitioners are the signatories to the cheques which have been dishonoured, (iii) the liability of accused company is also not disputed by the petitioners, (iv) statutory legal notices sent by the complainant were also addressed to the present petitioners, and (v) specific averments have been made against the petitioners in the complaint. Now, at this stage and under such circumstances, if the plea of petitioners is accepted that since they were not a part of the accused company at the time when cheques signed by them were dishonoured, it would in fact, amount to snatching away the right of respondent bank to examine the signatories of the cheques before the learned Trial Court. In such a situation, it would be prudent and appropriate to permit the

respondent bank to lead evidence in support of its claim, and dropping the proceedings against both the signatories of the cheques, at the very initial stage, would amount to throttling the trial.

31. In view of the foregoing discussion, the present petitions are dismissed.

32. It is however clarified that the observations made by this Court are only for the purposes of deciding the present petitions and the same shall not have any bearing on the merits of the case during the trial.

SWARANA KANTA SHARMA, J

NOVEMBER 23, 2022/kss

