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

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Reserved on: 12.01.2023

Pronounced on: 17.01.2023

+ **CRL.M.C. 5211/2019 & CRL.M.A. 38048/2019**

MOHIT SHAH

..... Petitioner

Through: Mr. Aayushmaan Vatsyayana,
Ms. Aditi Warriar and Mr.
Manas Tripathi, Advocates.

versus

STATE & ANR.

..... Respondents

Through: Mr. Manoj Pant, APP for the
State.
Mr. N.P.Singh, Mr. Harsh
Bhatia, Mr. Vikalp Mishra and
Ms. Anupama Kaul, Advocates
for R-2.

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present application under Section 482 of Code of Criminal Procedure, 1973 (hereinafter "Cr.P.C.") has been filed by the petitioner seeking quashing of summons issued against him by the Court of learned Metropolitan Magistrate-01, New Delhi District, Patiala House Courts, New Delhi *vide* order dated 19.02.2019 in Complaint Case No. 4825/2019 filed under Sections 138/141 of the Negotiable Instruments Act, 1881 (hereinafter "NI Act, 1881").

2. The brief facts of the case are that on 05.04.2018, the accused Company i.e. M/s Ashapura Intimates Fashion Ltd. (hereinafter “Company”) borrowed a loan of Rs. 1,00,00,000/- (Rupees One Crore Only) from respondent no. 2 in the form of an Inter Corporate Deposit through an RTGS Transfer for a period of 124 days @ 13 per cent per annum. Three post-dated cheques, signed by the Managing Director, of amounts Rs.3,97,480/- (interest), Rs. 50,00,000/- (principal) and Rs.50,00,000/- (principal) were issued by the Company in view of the said deposit. The interest amounting to Rs. 3,97,840/- on the abovestated principal amount was realised by respondent no. 2 on 06.08.2018 whereas, upon request from Company, an extension of the loan term was made on similar terms and conditions as made earlier. Thereafter, three Post Dated Cheques, which are in dispute, signed by the Managing Director of the Company were issued against the said loan amount on 06.08.2018. The details of these cheques are as follows: Cheque bearing No. 939494, 939493 and 939492 for Rs. 3,84,657/- (interest), Rs. 50,00,000/- (principal) and Rs.50,00,000/- (principal) respectively, dated 05.12.2018, drawn on State Bank of India. Thereafter, upon completion of the term of deposit, respondent no. 2 deposited the said cheques with their bankers i.e. ICICI Bank, Janpath Branch, New Delhi, but the same were returned by their bank with a remark “Funds Insufficient” which was confirmed to respondent no. 2 by its Banker vide returning Memos dated 14.12.2018. On 03.01.2019, a legal notice of demand under Section 138 of NI Act, 1881 was sent to the accused persons at their office and residential addresses calling upon them to pay and clear a sum of Rs.

1,03,84,657/- (Rupees One Crore Three Lacs Eighty Four Thousand and Six Flundred Fifty Seven Only) within 15 days. On 16.02.2019, the respondent no. 2 moved the Court of learned MM, Patiala House Courts and initiated the Criminal Complaint under Section 138 of NI Act, 1881 against the Company, its directors, as well as CEO and CFO, and the case came up for hearing before the learned Court on 19.02.2019. The summons as issued by the learned Trial Court *vide* order dated 19.02.2019 were served to the petitioner herein on 31.08.2019, directing him to appear before the learned Trial Court on 15.10.2019.

3. The case of the petitioner before this Court is that he was employed on 11.08.2016 as the Chief Executive Officer of the Company at its head office at Dadar, Mumbai on a monthly salary of Rs. 2,25,000. As per his employment letter, the petitioner was to report to Mr. Harshad Thakkar, the Managing Director, and his job was to manage the retail vertical of the Company. The loan in the form of Inter Corporate Deposit, as stated above, was obtained by the Company and cheques in that respect were issued by the Managing Director. It is stated that on 03.10.2018, the Managing Director of the Company went missing and a missing report was registered at the Police Station Dadar, Mumbai, Maharashtra on 03.10.2018. It is further averred that the petitioner *vide* a letter dated 25.10.2018 to Sh. Dinesh Sodha, Director of the Company, resigned from the post of the Chief Executive Officer and the said letter was duly received by the directors of the Company. However, *vide* an e-mail correspondence dated 22.11.2018, Sh. Hitesh Punjani (HR) refused to accept the resignation of the petitioner and

requested him to extend his exit. On an oral discussion, it was stated that the resignation of the complainant would be accepted once the ROC compliance in regard to the petitioner's resignation are complete. Thereafter, the petitioner wrote several correspondences to Sh. Hitesh Punjani and other directors, requesting them to complete the ROC compliance but the same was delayed by the Directors of the Company by way of no reply or a reply requesting to postpone the resignation, as per the case of petitioner. Thereafter, the cheques in dispute were dishonored on 14.12.2018 and complaint was filed before the Court. It is stated that on 25.02.2019, Sh. Hitesh Punjani one of the directors who played a pivotal role in delaying the exit of the petitioner herein by postponing the acceptance of the resignation of the petitioner dated 25.10.2018, on one pretext or another, himself resigned from the post of the Director after completing all the compliance in regard to his resignation with the Registrar of Companies. After that on 11.03.2019, petitioner, (on finding out about the resignation of Sh. Hitesh Punjani, Director and the intentions of Sh. Dinesh Shodha to resign from the post of Director), *vide* his letter dated 11.03.2019 to the Board of Director resigned from the post of CEO with the immediate effect. On 18.03.2019, Sh. Dinesh Shodha also resigned from the post of Director of the Company after completing all the ROC compliance in regard to his resignation. It is also the case of petitioner that on 29.03.2019, he requested the Directors and Other Responsible Persons (Previous Directors) of the Company to release his pending salary from 01.02.2019 to 11.03.2019. However, on 28.06.2019, the Company went into liquidation and on invitation of claims by the learned IRP, the

same was filed by the petitioner before the NCLT *vide* a Declaration dated 15.07.2019.

4. Learned counsel for the petitioner submits that petitioner herein was neither a signatory to the cheque nor a director, rather only an employee in the Company. It is stated that the averments in the complaint are not clearly made out against the petitioner which does not reveal at all that the alleged deal with the complainant was made in connivance with the present petitioner. It is also stated that the petitioner had resigned quite earlier to the dishonour of the cheque, however, his resignation was not accepted by the senior officers, and because of the same, his name continued to appear on the record of Registrar of Companies. However, as contended, he was not a part of the Company on the date the alleged offence was committed.

5. Learned counsel also argues that at present, the Company is in liquidation and even the claims of petitioner are before the liquidator. It is submitted that the Managing Director who was also the signatory of the cheque in question had gone missing before the dishonor of cheque and had shared his suicide notes with several employees of the company.

6. On the other hand, learned counsel for complainant/respondent no. 2 submits that the cheque in dispute was dishonored on 14.12.2018 and as per records, the petitioner was employed in the Company on the said date. It is stated that there are clear averments in the complaint against all the accused persons and specific role of the petitioner has also been mentioned in the complaint. It is also argued by learned counsel that the arguments on behalf of petitioner are premised upon

the proviso of Section 141, but the said arguments cannot be taken in an application under Section 482 Cr.P.C. since the same is a matter of trial.

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

8. Before advertng to the facts of the present case, it is deemed appropriate to 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.”

9. The Hon’ble Apex Court in ***S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla (2005) 8 SCC 89*** had discussed the aim and object of Section 141 in depth, wherein it was held as under:

*“10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. **The key words which occur in the section are “every person”.** These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words:*

“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, etc.”

What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the

company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a director or manager or secretary was enough to cast criminal liability, the section would have said so. Instead of "every person" the section would have said "every director, manager or secretary in a company is liable"..., etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

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)

10. 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)

11. Reiterating the aforesaid view, recently in *Sunita Palita & ors. v. Panchami Stone Quarry 2022 SCC OnLine SC 945*, the Hon'ble

Supreme Court has observed as under:

*“30. As held in K.K. Ahuja v. V.K. Vora (supra) when the accused is the Managing Director or a Joint Managing Director of a company, 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. This is because the prefix “Managing” to the word “Director” makes it clear that the Director was in charge of and responsible to the company, for the conduct of the business of the company. A Director or an Officer of the company who signed the cheque renders himself liable in case of dishonour. **Other officers of a company can be made liable only under sub-section (2) of Section 141 of the NI Act 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)

12. The Apex Court in *National Small Industries Corp. Ltd. v. Harmeet Singh Paintal (2010) 3 SCC 330* had also laid down certain principles qua Section 138 and 141 of Negotiable Instruments Act, 1881 as under:

“22. Therefore, this Court has distinguished the case of persons who are in charge of and responsible for the conduct of the business of the company at the time of the offence and the persons who are merely holding the post in a company and are not in charge of and responsible for the conduct of the business of the company. Further, in order to fasten the vicarious liability in accordance with Section 141, the averment as to the role of the Directors concerned should be specific. The description should be clear and there should be some unambiguous allegations as to how the Directors concerned were alleged to be in charge of and were responsible for the conduct and affairs of the

company.

38. But if the accused is not one of the persons who falls under the category of “persons who are responsible to the company for the conduct of the business of the company” then merely by stating that “he was in charge of the business of the company” or by stating that “he was in charge of the day-to-day management of the company” or by stating that “he was in charge of, and was responsible to the company for the conduct of the business of the company”, he cannot be made vicariously liable under Section 141(1) of the Act. **To put it clear that for making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act.**

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)

13. As per the settled law under Sections 138 and 141, as far as an officer of an accused company is concerned who is not a signatory of the cheque, specific averments must be made in the complaint itself highlighting the role of the said officer as to how he was either responsible for day-to-day affairs and conduct of business of the company or as to how and in what manner the officer was guilty of consent and connivance or negligence in the commission of the offence. This Court has perused the complaint which was filed by respondent no. 2 before the learned Trial Court. The same shows that the respondent no. 2 has made specific averments, highlighting the role of the petitioner herein in persuading the complainant to enter into the transaction with the Company by showing the financial position of the

Company as well as making them believe in the capacity of the same to repay the debts. The said averments made in the complaint against the petitioner are reproduced as under:

*“3. That the Accused No. 2 is the Managing Director-Cum-Chairman as well as signatory of all the cheques in question issued of the Complainant Company on behalf of Accused no. 1 Company, whereas Accused no. 3-5 are the other Directors In-charge of Accused No. 1 Company who were/are involved and managing the day-to-day business affairs of the Accused No. 1 Company **alongwith Accused No. 6 and Accused No. 7 being the CEO and CFO of Accused no. 1 Company, respectively. The names of the Accused Directors, CEO and CFO as mentioned in the complaint are part of the records as per the Registrar of the Companies, Ministry of Corporate Affairs.***

4. That the above named accused persons mentioned hereinabove have approached Complainat Company with a request for advancing a loan to Accused no. 1 Company in the shape of Inter Corporate Deposit (ICD) of Rs. 1,00,00,000/- Rupees One Crore Only), and confirming their positions as Directors, CEO and CFO of the Accused no. 1 Company as given in to the Registrar of Companies.

5. That the Complainant Company during the discussion was informed that the accused nos. 2 to 7 are the responsible officers and the entire management and day-to-day business of the accused no. 1 Company are being conducted/ supervised by Accused No. 2 to 7. The acceptance of inter corporate deposits and its refund are being discussed, accepted and approved by the accused no. 2 to 7 for and on behalf of Accused no. 1 Company.

6. That pursuant to the approval of the accused nos. 2 to 7 for acceptance of he inter-corporate deposits for a limited period on interest and its refund, from the Complainant Company,for and on behalf of Accused no. 1 Company In

which they are the responsible officers having decision making authority, the Complainant Company has agreed to extend a loan in the form of inter corporate deposit of Rs. 1,00,00,000.00 (Rs. Once Crore only) on agreed rate of interest for a fixed term.

*7. That the Complainant Company in order to verify the information and the credentials of the Accused no. 2-7 verified from the portal of Registrar of Companies and found that information furnished with respect to their position in the Accused no. 1 as mentioned in the preceeding paragraph is found to be correct. **The Accused no. 6 & 7 being the CEO and CFO showed the Company master Data, complete financial position, net worth and strength of the Accused No. 1 Company with a view to convince the Complainant Company that their investment is safe and the Accused no. 1 Company is having sufficient source of fund and asset to refund the loan amount to be invested in the Accused no. 1 company the nature of inter-corporate deposit which appeared to be very convincing to the Complainant on papers. The Company's Master Data also depleted the accused nos. 2 to 7 are the active management personnel's of the accused no. 1 Company in Registrar of Companies.***

8. That the Complainant Company after satisfying that the facts given in the Company Master Data, financial position network etc as shown by the respondent 2 to 7 for and on behalf of Accused no. 1 Company, the Complainant Company has agreed to advance the loan amount of Rs. 1,00,00,000.00 to the accused no. 1 Company in the form of inter-corporate deposit on the mutually agreed terms..."

(Emphasis supplied)

14. Therefore, as far as the requirement of law under Section 141 is concerned, the complainant has fulfilled the basic criteria of carving out the role of present petitioner in the complaint, for the commission

of offence under Sections 138 and 141 of Negotiable Instruments Act, 1881. Even otherwise, it was observed by this Court in ***Sushil Kumar v. IBM India Pvt. Ltd. 2010 SCC OnLine Del 3442***, as under:

“Chief Executive Officer (CEO) of a company, as its nomenclature suggests, would be responsible for the day to day affairs of the company. As per Webster's Law dictionary CEO means "the highest executive officer of a company, organization etc." In business parlance, CEO means the highest ranking executive in a company whose main responsibilities include developing and implementing high-level strategies, making major corporate decisions, managing the overall operations and resources of a company, and acting as the main point of communication between the Board of Directors and the corporate operations. Thus, CEO cannot be equated with any other officer of the company necessitating the elaborate averment in the complaint regarding his duties to indicate that he was responsible for the day to day affairs of the company.”

15. Further, as per the Company Master Data filed by the complainant before the learned Trial Court, the petitioner was a part of the Company on the date the alleged offence took place and when the complaint was filed before the learned Trial Court. In such circumstances, the contentions of the learned counsel for petitioner, that the petitioner had already resigned from the Company prior to dishonor of cheque and that his resignation was not accepted because of which his name continued to appear on the ROC records, cannot be accepted at this stage, since prime facie, the material on record reflects the petitioner to be the Chief Executive Officer of Company at the time of commission of offence. This Court, in a petition under Section 482

Cr.P.C. cannot decide the genuineness of such records, and these contentions of the petitioner can be raised and appropriately dealt with during the course of trial.

16. Therefore, in view of the aforesaid facts and circumstances of the case and the settled position of law in that regard, this Court is of the opinion that no case for quashing of complaint against the petitioner is made out.

17. Accordingly, the present petition stands dismissed.

18. However, it is made clear that the observations made by this Court are for the purpose of deciding the present petition and the Trial Court will not be influenced by the same. It is further clarified that whether or not the averments made in the complaint against the petitioner are correct or false, has to be decided during the trial.

SWARANA KANTA SHARMA, J

JANUARY 17, 2023/ns