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

% *Date of decision: 21.02.2023*

\+ **CRL.M.C. 1210/2023**

BODUGU SUDHAKAR ..... Petitioner

Through: Mr. Sandeep Bajaj, Ms. Aakanksha Nehra and Ms. Sakshi Digvijay, Advocates.

Versus

PEC LIMITED & ORS. ..... Respondents

Through: Mr. Krish Kalra, Advocate for R-1.

CORAM:
HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

RAJNISH BHATNAGAR, J. (ORAL)

CRL.M.A. 4659/2023 (exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

CRL.M.C. 1210/2023, CRL.M.A. 4656/2023 (seeking interim directions), CRL.M.A. 4657/2023 (seeking summoning of the trial court record) and CRL.M.A. 4658/2023 (seeking deletion of respondent nos. 2 to 8)

1. The present petition under Section 482 and 483 of the Code of Criminal Procedure, 1973 has been filed by the petitioner seeking the following reliefs:-

> *"Quash the Summon issued against the Petitioner in Complaint Case No. 28507/2016 by the Court of Learned Metropolitan Magistrate, New Delhi, Patiala House Court and all consequential proceedings arising therefrom"*

2. In brief the facts of the case are that on 02.09.2015 respondent no.1 filed a complaint under Section 138 read with Section 142 of Negotiable Instruments Act, 1881 and Section 415, 418 and 420 IPC against respondent no. 2 to 8 before the Ld. Trial Court in respect of fifty-seven dishonored cheques dated 16.06.2015 for a cumulative sum of Rs.77,67,61,266/-, all drawn on ICICI Bank, Ballygunge Branch, Calcutta alleged to have been issued by Sri Vasavi Industries Limited (respondent no.2 herein). Legal notice dated 17.07.2015 was also issued against the respondent nos. 2 to 8 and on 23.10.2018 learned trial court issued summons against respondent nos. 2 to 8. On 28.10.2019 Corporate Insolvency Resolution Process (CIRP) was commenced in respect of accused no.1 company, and complainant was a member of the committee of Creditors with 25.52% voting right as an unsecured financial creditor. Further, on 02.03.2020 the invitation of expression of interest was circulated by the Resolution Professional and pursuant thereto, the petitioner as the successful resolution applicant submitted the plan dated 15.06.2020 on 15.07.2020 along with the Earnest Money Deposit. By the 15th meeting of the Committee of Creditors of accused no.1 company held on 31.12.2020 the resolution plan of the petitioner was approved by the majority of

74.47% of the voting share of the financial creditor in accordance with Section 30(4) of the Insolvency and Bankruptcy Code, 2016. The petitioner's resolution plan was approved by National Company Law Tribunal Amravati Bench vide order dated 10.11.2021, as a result of which, the petitioner took over the respondent no. 2 company as a successful resolution applicant.

3. On 13.01.2023, the petitioner received a summon issued as an accused person in a summons case under Section 138 of NI Act to appear on 21.02.2023 before the Learned Trial Court. Brief inspection of the record was conducted on 03.02.2023, however, no order was passed directing issuance of summons against the petitioner in his personal capacity. Hence, the present petition.

4. It has been mainly argued by the Ld. counsel for the petitioner that the petitioner has no connection with the alleged offence referred to in the Complaint Case No. 28507/2016 and the petitioner has neither received any notice as per the mandatory procedure prescribed under Section 138 of NI Act nor he was arrayed as a party in the said complaint. He submits that the petitioner has no role to play in the entire transactions and the cheques in question were not signed by the petitioner nor was the petitioner acting as the director/key personnel when the cheques were issued by the Accused No. 1 Company, furthermore, the summons were directed to be issued as early as 23.01.2018 and after the cognizance having been taken, no proceedings can be issued against new parties in the manner as sought to have been done in the present Complaint and therefore, the summon

deserves to be quashed forthwith. He further submits that the petitioner is a Successful Resolution Applicant and has been taken over as per the provisions of the Insolvency and Bankruptcy Code. Ld. Counsel for the petitioner has laid emphasis on the fact that that *clean slate theory* applies to the Corporate Debtor as well as the *Successful Resolution Applicant* and when the Corporate Debtor is taken over by the Successful Resolution Applicant, they both deserve a fresh start and that accordingly as per the provisions of the Code, the Corporate Debtor as well as the Successful Resolution Applicant cannot be held liable for any of the liabilities, whether civil or criminal in respect of the period that relates to prior to the commencement of the Corporate Insolvency Resolution Process which in the present case commenced on 28.10.2019. He submits that any monetary claims and/or liability of the Accused No. 1 (Corporate Debtor herein) for an offence committed prior to or during the Corporate Insolvency Resolution Process would stand extinguished from the date of the Resolution Plan being approved i.e., in the present case on 10.11.2021 and hence, once the Accused No. 1 stands statutorily discharged, it's future shareholders/ new management also stands absolved from any liability in respect of such offences.

5. Ld. Counsel for the petitioner further submits that the Respondent no. 1 was a member of the Committee of Creditors of the Accused No. 1 Company/Corporate Debtor and had duly participated in the Corporate Insolvency Resolution Process of the Accused No. 1 Company and ought to have presented the correct and complete facts

before the Learned Trial Court and therefore, the manner in which said summon was issued reflects the lack of due diligence at the end of the complainant. He submits that the complainant being a creditor of the Accused No. 1 is also bound by the terms of the resolution plan and the same specifically absolved the petitioner from any liability arising out of acts/ omissions/ offences committed by the accused no.1 prior to the initiation of Corporate Insolvency Resolution Process. In fact, the complainant should have itself not pursued the complaint to the extent it relates to Accused No. 1 company, in light of the mandatory provisions of the Insolvency and Bankruptcy Code granting statutory discharge upon the approval of a resolution plan.

6. Ld. Counsel for the petitioner has placed reliance on the following judgments:-

- ***Committee of Creditors of Essar Steel India Ltd. vs. Satish Kumar Gupta & Ors. (Civil Appeal No. 8766-67 of 2019 decided on 15.11.2019)***
- ***Ghanashaym Mishra and Sons vs. Edelweiss Asset Reconstruction Co. Ltd. (Civil Appeal No. 8129 of 2019, 1554 of 2021, 1550-1553 of 2021 decided on 13.04.2021)***
- ***P. Mohanraj and Ors. vs. Shah Brothers Ispat Pvt. Ltd. [(2021) 6 SCC 258]***

7. Ld. Counsel for the respondent no. 1 appears on advance notice and accepts notice and in fact, has not disputed the settled legal position.

8. In the instant case, fifty-seven cheques dated 16.06.2015 were dishonored for a sum of Rs.77,67,61,266/-, issued by Sri Vasavi Industries Limited (Accused No. 1 Company/respondent no.2 herein). Legal notice dated 17.07.2015 was issued against the respondent nos. 2 to 8, however, in the meanwhile, on 28.10.2019, Corporate Insolvency Resolution Process was initiated in respect of accused no.1 company, and complainant was also a member of the committee of Creditors with 25.52% voting right as an unsecured financial creditor. On 31.12.2020, in the 15th meeting of the Committee of Creditors of accused no.1 Company, the resolution plan of the petitioner was approved by the majority of 74.47% of the voting share of the financial creditor in accordance with Section 30(4) of the Insolvency and Bankruptcy Code, 2016. The petitioner's resolution plan was, accordingly, approved by National Company Law Tribunal, Amravati Bench vide order dated 10.11.2021, as a result of which, the petitioner took over the respondent no. 2 company as a *Successful Resolution Applicant.*

9. It is trite law that after the resolution plan under Section 31 of the Insolvency and Bankruptcy Code, 2016, has been approved by the adjudicating authority, the criminal proceedings under Section 138 of the Negotiable Instruments Act, 1881 shall stand terminated only with respect to the corporate debtor when the same is taken over by a new management, in view of the provisions of Section 32A of the Insolvency and Bankruptcy Code, 2016 and the *Successful Resolution Applicant* should not be held liable for any offence committed prior to

the commencement of the Corporate Insolvency Resolution Process, unless the successful resolution applicant was also involved in the commission of the offence, or was a related party, promoter or other person in management and control of the corporate debtor at the time of or any time following the commission of the offence.

10. In ***P. Mohanraj & Ors. vs. M/s. Shah Brothers Ispat Pvt. Ltd [(2021) 6 SCC 258]***, decided by the Hon'ble Supreme Court on 01.03.2021, it is observed and held as under:

> *"31. The raison d'être for the enactment of Section 32A has been stated by the Report of the Insolvency Law Committee of February, 2020, which is as follows:*
>
> > ***"17. LIABILITY OF CORPORATE DEBTOR FOR OFFENCES COMMITTED PRIOR TO INITIATION OF CIRP***
> >
> > ***17.1***. *Section 17 of the Code provides that on commencement of the CIRP, the powers of management of the corporate debtor vest with the interim resolution professional. Further, the powers of the Board of Directors or partners of the corporate debtor stand suspended, and are to be exercised by the interim resolution professional. Thereafter, Section 29A, read with Section 35(1)(f), places restrictions on related parties of the corporate debtor from proposing a resolution plan and purchasing the property of the corporate debtor in the CIRP and liquidation process, respectively. Thus, in most cases, the provisions of the Code effectuate a change in control of the corporate debtor that results in a clean break of the corporate debtor from its erstwhile management. However, the legal form of the corporate debtor continues in the CIRP, and may be preserved in the resolution plan. Additionally, while the property of the corporate debtor*

may also change hands upon resolution or liquidation, such property also continues to exist, either as property of the corporate debtor, or in the hands of the purchaser.

17.2. *However, even after commencement of CIRP or after its successful resolution or liquidation, the corporate debtor, along with its property, would be susceptible to investigations or proceedings related to criminal offences committed by it prior to the commencement of a CIRP, leading to the imposition of certain liabilities and restrictions on the corporate debtor and its properties even after they were lawfully acquired by a resolution applicant or a successful bidder, respectively.*

Liability where a Resolution Plan has been Approved

17.3*. It was brought to the Committee that this had created apprehension amongst potential resolution applicants, who did not want to take on the liability for any offences committed prior to commencement of CIRP. In one case, JSW Steel had specifically sought certain reliefs and concessions, within an annexure to the resolution plan it had submitted for approval of the Adjudicating Authority. Without relief from imposition of the such liability, the Committee noted that in the long run, potential resolution applicants could be disincentivised from proposing a resolution plan. The Committee was also concerned that resolution plans could be priced lower on an average, even where the corporate debtor did not commit any offence and was not subject to investigation, due to adverse selection by resolution applicants who might be apprehensive that they might be held liable for offences that they have not been able to detect due to information asymmetry. Thus, the threat of liability falling on bona fide persons who acquire the legal entity, could substantially lower the chances of its successful takeover by potential resolution applicants.*

17.4. *<u>This could have substantially hampered the Code's goal of value maximisation, and lowered recoveries to creditors, including financial institutions who take recourse to the Code for resolution of the NPAs on their balance sheet. At the same time, the Committee was also conscious that authorities are duty bound to penalise the commission of any offence, especially in cases involving substantial public interest. Thus, two competing concerns need to be balanced.</u>*

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17.6. *Given this, the Committee felt that a distinction must be drawn between the corporate debtor which may have committed offences under the control of its previous management, prior to the CIRP, and the corporate debtor that is resolved, and taken over by an unconnected resolution applicant. While the corporate debtor's actions prior to the commencement of the CIRP must be investigated and penalised, the liability must be affixed only upon those who were responsible for the corporate debtor's actions in this period. However, the new management of the corporate debtor, which has nothing to do with such past offences, should not be penalised for the actions of the erstwhile management of the corporate debtor, unless they themselves were involved in the commission of the offence, or were related parties, promoters or other persons in management and control of the corporate debtor at the time of or any time following the commission of the offence, and could acquire the corporate debtor, notwithstanding the prohibition under Section 29A.*

17.7. Thus, the Committee agreed that a new Section should be inserted to provide that where the corporate debtor is successfully resolved, it should not be held liable for any offence committed prior to the commencement of the CIRP, unless the successful resolution applicant was also involved in the commission of the offence, or was a related party,

> ***promoter or other person in management and control of the corporate debtor at the time of or any time following the commission of the offence.***
>
> ***17.8. Notwithstanding this, those persons who were responsible to the corporate debtor for the conduct of its business at the time of the commission of such offence, should continue to be liable for such an offence, vicariously or otherwise, regardless of the fact that the corporate debtor's liability has ceased."***"

11. In ***Ajay Kumar Radheshyam Goenka vs. Tourism Finance Corporation of India Ltd., Criminal Appeal No. 170 of 2023 (Arising out of SLP (CRL) No. 417 of 2020)***, decided by the Hon'ble Supreme Court on 15.03.2023, it is observed and held as under:

> *"85. Thus, the upshot of all the decisions referred to above is where the proceedings under Section 138 of the NI Act had already commenced with the Magistrate taking cognizance upon the complaint and during the pendency, the company gets dissolved, the signatories/directors cannot escape from their penal liability under Section 138 of the NI Act by citing its dissolution. What is dissolved, is only the company, not the personal penal liability of the accused covered under Section 141 of the NI Act.*
>
> *86. I may draw my final conclusions as under:*
>
> *(a) After passing of the resolution plan under Section 31 of the IBC by the adjudi- cating authority & in the light of the provisions of Section 32A of the IBC,* ***the criminal proceedings under Section 138 of the NI Act will stand terminated only in relation to the corporate debtor if the same is taken over by a new man- agement.***
>
> *(b) Section 138 proceedings in relation to the signatories/directors who are liable/covered by the two*

> *provisos to Section 32A(1) will continue in accordance with law."*

12. The sum and substance of the propositions of law, which can be culled out from the aforesaid judgments is that a *Successful Resolution Applicant*, who is a part of the '*New Management*' cannot be held liable for any offence committed by the Corporate Debtor prior to the commencement of the Corporate Insolvency Resolution Process and the criminal proceedings under Section 138 of the Negotiable Instruments Act, 1881, after passing of the resolution plan shall stand terminated qua the said *Successful Resolution Applicant.* However, proceedings under Section 138 of the Negotiable Instruments Act, 1881, in relation to the management of the accused company, who are liable and covered under the two provisos to Section 32A(1) of the Insolvency and Bankruptcy Code, 2016 shall continue in accordance with law.

13. Perusal of the material on record shows that the fifty-seven cheques in question got dishonored way back in 2015 and even the legal notice was issued only against respondent nos. 2 to 8 as they were in the management and control of the Accused No. 1 Company, namely, Sri Vasavi Industries Ltd. at the time of the commission of the offence. The complaint under Sections 138 and 142 of Negotiable Instruments Act, 1881 with respect to the said cheques was filed by the complainant, namely, PEC Ltd. on 02.09.2015 and the petitioner has not even been mentioned in the said complaint. It is only in the year 2023 that the petitioner received a summon issued as an accused person in a summons case under Section 138 of Negotiable

Instruments Act, 1881 to appear on 21.02.2023 before the Learned Trial Court. It is pertinent to note that the offence took place in 2015 and it is much later after the commission of offence that the resolution plan of the petitioner was approved by National Company Law Tribunal, Amravati Bench vide order dated 10.11.2021 and the petitioner took over the respondent no. 2 company as a *Successful Resolution Applicant,* and therefore, since the company has been taken over by a new management, the petitioner being a part of the *new management* cannot be held liable for the offence committed prior to the commencement of the Corporate Insolvency Resolution Process.

14. Furthermore, a bare reading of the Order dated 10.11.2021, wherein, National Company Law Tribunal, Amravati Bench, has approved the resolution plan of the petitioner shows that it has been duly observed in the '*Terms of the Resolution plan'* that the Resolution Applicant- Petitioner herein shall not be responsible for any other liabilities/claims other than the offer made in the Resolution Plan.

15. Keeping in view the aforesaid judgments and the entire facts and circumstances of this case, the Summon issued against the Petitioner in Complaint Case No. 28507/2016 by the Learned Metropolitan Magistrate, New Delhi, Patiala House Court, is thus, not maintainable. Consequentially, this petition is allowed and the Summon issued against the Petitioner in Complaint Case No. 28507/2016 and all the proceedings emanating therefrom shall stand quashed qua the petitioner, namely, Bodugu Sudhakar. It would be,

however, open for the complainant-Respondent No. 1 to seek redressal in accordance with law in relation to the stated fifty-seven dishonored cheques dated 16.06.2015.

16. Accordingly, the present petition stands disposed of along with pending applications, if any.

RAJNISH BHATNAGAR, J

FEBRUARY 21, 2023