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

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Reserved on: 24.01.2023

Pronounced on: 01.05.2023

+ CRL.M.C. 2456/2019

AMIT KUMAR GUPTA Petitioner

Through: Mr. Kunal Madan and Mr.
Shyam Babu, Advocates

versus

M/S DELHI SAFE DEPOSIT LTD. Respondent

Through: Mr.Vivek Bhagat, Advocate

+ CRL.M.C. 4378/2019 & CRL.M.A. 34857/2019

VIPUL KANT UPADHYAY & ORS.Petitioners

Through: Mr. Kunal Madan and Mr.
Shyam Babu, Advocates

versus

M/S DELHI SAFE DEPOSIT LTD. Respondent

Through: Mr.Vivek Bhagat, Advocate

+ CRL.M.C. 4379/2019 & CRL.M.A. 34859/2019

VIPUL KANT UPADHYAY & ORS.Petitioners

Through: Mr. Kunal Madan and Mr.
Shyam Babu, Advocates

versus

M/S DELHI SAFE DEPOSIT LTD. Respondent

Through: Mr.Vivek Bhagat, Advocate

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. This judgment shall govern the disposal of CRL.M.C. 2456/2019, CRL.M.C. 4378/2019 and CRL.M.C. 4379/2019, along with pending applications, arising out of similar set of facts, contentions and prayers.

2. By way of above-captioned petitions filed under Section 482 of the Code of Criminal Procedure, 1973 (*hereinafter* 'Cr.P.C. '), the following reliefs have been sought:

- i. In *CRL.M.C. 2456/2019*, the petitioner seeks quashing of summoning order dated 21.03.2018 passed by learned Metropolitan Magistrate-1, Patiala House Court, New Delhi and proceedings pursuant thereto in Complaint Case No. 7944/2018 titled as 'The Delhi Safe Deposit Company v. IAP Company Pvt. Ltd';
- ii. In *CRL.M.C. 4378/2019*, the petitioners seek quashing of summoning order dated 14.12.2017 passed by learned Metropolitan Magistrate-1, Patiala House Court, New Delhi and proceedings pursuant thereto in Complaint Case No. 6719/2018 titled as 'The Delhi Safe Deposit Company v. IAP Company Pvt. Ltd'.
- iii. In *CRL.M.C. 4379/2019*, the petitioners seek quashing of summoning order dated 09.01.2018 passed by learned

Metropolitan Magistrate-1, Patiala House Court, New Delhi and proceedings pursuant thereto in Complaint Case No. 6719/2018 titled as 'The Delhi Safe Deposit Company v. IAP Company Pvt. Ltd'.

3. A perusal of the complaints filed under Section 138 of Negotiable Instruments Act, 1881 (*hereinafter 'NI Act'*) reveals that the complainant/respondent i.e. 'M/s. The Delhi Safe Deposit Company' was engaged in the business of financial activities such as giving loans. It was alleged that the accused company had approached the complainant for grant of loan and documents in this regard were executed by petitioners Vipul Kant Upadhyay and Amit Kumar Gupta. The accused company had taken loans from the complainant *vide* loan agreement no. 3112 dated 23.04.2016 and loan agreement no. 3143 dated 20.09.2016, and had agreed to re-pay the same in installments, as per schedule.

4. In Complaint Case No. 16649/2017 (*subject matter of CRL.M.C. 4378/2019*) the complainant had alleged that in partial discharge of liability in respect of loan agreement no. 3112 dated 23.04.2016, the accused company had issued cheque bearing No. 891479 dated 07.11.2017 of Rs.1,77,917/- drawn on HDFC Bank at C-5/32, Safdarjung Development Area, New Delhi-110016 in favour of the complainant. Upon presentation of said cheque by the complainant for encashment with its bank within the validity period, the cheque was returned unpaid *vide* return memo dated 08.11.2017 with the remarks 'Funds Insufficient'. Thereafter, in consonance with the provisions of Section 138 read with Section 141/142 of the NI Act, the complainant

had sent a legal notice dated 10.11.2017 through Speed Post to the accused persons demanding payment of the cheque amount of Rs.1,77,917/- *vide* postal receipt dated 16.11.2017 and the notice was served upon the accused, as per Internet Acknowledgment. Having not received any payment from the accused persons, the present complaint was filed by the complainant. Learned Magistrate vide order dated 14.12.2017 had issued summons against all the accused persons.

5. In Complaint Case No. 6719/2018 (*subject matter of CRL.M.C. 4379/2019*) and Complaint Case No. 7944/2018 (*subject matter of CRL.M.C. 2456/2019*), it was alleged by the complainant that in partial discharge of liability in respect of loan agreement no. 3143 dated 20.09.2016, the accused company had issued cheque bearing no. 891566 dated 26.11.2017 and cheque bearing no. 891568 dated 26.01.2018, of Rs.2,33,750/- each, both drawn on HDFC Bank at C-5/32, Safdarjung Development Area, New Delhi-110016 in favour of the complainant. Upon presentation for encashment, the cheque bearing no. 891566 dated 26.11.2017 was returned unpaid *vide* return memo dated 30.11.2017 with the remarks 'Funds Insufficient'. The statutory legal notice dated 04.12.2017 was sent by the complainant through Speed Post to the accused persons demanding payment of the cheque amount of Rs.2,33,750/- *vide* postal receipt dated 05.12.2017 and the notice was served upon the accused, as per Internet Acknowledgment. Similarly, the cheque bearing no. 891568 dated 26.01.2018 was also returned unpaid *vide* return memo dated 30.01.2018 with the remarks 'Funds Insufficient'. The complainant had sent a legal notice dated 01.02.2018 through Speed Post to the accused persons demanding

payment of the cheque amount of Rs.2,33,750/- *vide* postal receipt dated 06.02.2018 and the notice was served upon the accused, as per Internet Acknowledgment. Having not received any payment from the accused persons, the present complaints were filed by the complainant. Learned Magistrate *vide* orders dated 09.01.2018 and 21.03.2018 had issued summons against all the accused persons in these cases.

6. Learned counsel for the petitioners argues that the summons have been issued against the petitioners by the learned Magistrate without applying judicial mind. It is stated that petitioners were not concerned with the affairs of the company on the date when the offence was alleged to have been committed. It is also stated that petitioner Amit Kumar Gupta had ceased to act as a Director in the accused company with effect from 17.07.2017, which is much prior to the issuance of cheque in question and its date of dishonor, and he was also not the signatory of the cheque and has been falsely implicated in the impugned complaint. It is further contended that petitioner Vipul Kant Upadhyay had ceased to act as a director in the accused company with effect from 18.10.2017 i.e. before the cheque is alleged to have been issued and dishonored. In respect of petitioner Mahender Singh, it is submitted that he was neither concerned with the day to day affairs of the company nor was he signatory to the cheques in question. It is, thus, argued that in view of several decisions of Hon'ble Apex Court, since no specific roles have been assigned or averred against the petitioners by the complainant, the summoning orders and complaint qua these petitioners be quashed.

7. Learned counsel for the respondent, on the other hand, argues

that all the contentions raised before this Court are a matter of trial and cannot be adjudicated upon at this stage. It is stated that the petitioner Vipul Kant Upadhyay was the Managing Director and petitioner Amit Kumar Gupta was the Whole Time Director of the accused company at the time of obtaining loans from the complainant and they had executed all the documents and had signed and issued the cheques in question. It is also stated that petitioner Mahneder Singh was also a Director of the company at the time of commission of offence and cheques in question were issued in connivance, consent and knowledge of all the Directors.

8. This Court has heard arguments advanced by both the parties and has considered the material placed on record.

9. At the outset, this Court deems it fit to refer to Section 138 and 141 of NI Act, 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.”

10. The Hon’ble Apex Court in *S.P. Mani & Mohan Dairy v. Dr. Snehalatha Elangovan* 2022 SCC OnLine SC 1238, while analysing Section 141 of the Act, had observed as under:

“26. While the essential element for implicating a person under sub-section (1) is his or her being in charge of and responsible to the company in the conduct of its business at the time of commission of the offence, the emphasis in sub-section (2) is upon the holding of an office and consent, connivance or negligence of such officer irrespective of his or her being or not being actually in charge of and responsible to the company in the conduct of its business. **Thus, the important and distinguishing feature in sub-section (1) is the control of a responsible person over the affairs of the company rather than his holding of an office or his designation, while the liability under sub-section (2) arises out of holding an office and consent, connivance or neglect.** While all the persons covered by sub-section (1) and subsection (2) are liable to be proceeded against and also punished upon the proof of their being either in charge of and responsible to the company in the conduct of its business or of their holding of the office and having been guilty of consent, connivance or neglect in the matter of commission of the offence by the company, the person covered by sub-section (1) may, by virtue of the first proviso, escape only punishment if he proves that the offence was committed without his knowledge or despite his due diligence.”

(Emphasis supplied)

11. Coming to the facts of the case, a perusal of record reveals that the complainant has made specific averments qua the role of petitioners

in the commission of offence in question. The allegations against the petitioner Vipul Kant Upadhyay, arraigned as accused no. 2 in the complaints, and petitioner Amit Kumar Gupta, arraigned as accused no. 3 in the complaints are that they both had approached the complainant on behalf of the accused company for the purpose of obtaining loans. As per loan agreement no. 3143 dated 20.09.2016, the accused company through its directors i.e. the aforesaid petitioners had obtained loan to the tune of Rs.55,00,000/- for a period of 30 months and in lieu thereof, had agreed to issue 29 EMI cheques in favour of complainant. Similarly, as per loan agreement no. 3112 dated 23.04.2016, the accused company through its aforesaid petitioners had obtained loan to the tune of Rs.35,00,000/- for a period of 24 months and in lieu thereof, had agreed to issue 23 EMI cheques in favour of complainant. The present petitioners i.e. Vipul Kant Upadhyay and Amit Kumar Gupta were the two 'Borrowers' in the loan agreements and the said agreements also bear the signatures of both these petitioners. The Demand Promissory Notes and their Receipts have also been executed and signed by these petitioners.

12. Further, copies of the Board Resolution dated 19.09.2016 in respect of loan agreement no. 3143 dated 20.09.2016, and Board Resolution dated 22.04.2016 in respect of loan agreement no. 3112 dated 23.04.2016, placed on record by respondent, bearing signatures of the aforesaid petitioners reflect that they were instrumental in obtaining loan from the complainant and assuring the complainant about the repayment of the same by issuing post-dated EMI cheques. The said resolutions also mention that the Directors signing the resolution i.e.

Vipul Kant Upadhyay and Amit Kumar Gupta shall be fully collectively or individually responsible for repayment of the loan and other dues and for encashment of the EMI cheques for they being actively involved in the day to day business of the company and that they shall be liable for any criminal proceedings under the NI Act or any civil proceedings arising due to dishonoring of the cheques issued by them.

13. The petitioner Vipul Kant Upadhyay was also one of the guarantors in these loan agreements. Moreover, he was the Managing Director of the accused company at the time of entering into the loan agreements and issuing several cheques. Even if the plea of learned counsel for petitioners that blank signed cheques or post-dated cheques were misused by the complainant is concerned, in this context, it will be relevant to take note of the decision of Hon'ble Apex Court in *Bir Singh v. Mukesh Kumar* (2019) 4 SCC 197, reiterated in *Oriental Bank of Commerce v. Prabodh Kumar Tiwari* 2022 SCC OnLine SC 1089, whereby it was held that:

“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.”

(Emphasis supplied)

14. Further, the petitioner Vipul Kant Upadhyay was also the signatory of the cheques in question. As far as law on signatory of a cheque is concerned, it will be appropriate to reproduce the observations of Hon'ble Apex Court in this regard in case of ***K.K. Ahuja v. V.K. Vohra*** (2009) 10 SCC 48, which are as under:

“20. The position under section 141 of the Act can be summarized thus:

(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.”

15. The material on record also shows clearly that the petitioner Amit Kumar Gupta was a Whole-time Director of the accused company at the time of entering into the transactions with the accused company and it is not the case of petitioner that he was any non-functional or independent director, not concerned with the affairs of the company. As inferred *prima facie* from the loan agreement, the cheques in question were issued as post-dated duly signed cheques with the knowledge and consent of the said petitioner and he had also executed all the relevant documents for the purpose of obtaining loan from the complainant.

16. As far as contention of learned counsel for petitioner that petitioners Vipul Kant Upadhyay and Amit Kumar Gupta had resigned before the date of issuance of cheque is concerned, this Court notes that *firstly*, the copies of Form DIR-12 placed on record are not the certified copies issued by the Ministry of Corporate Affairs. *Secondly*, as already observed in preceding discussion, the complainant has carved out the specific role of these petitioners in obtaining loans, executing loan agreements as well as in signing and issuing cheques in question. The veracity of the allegations and the genuineness of the documents pertaining to alleged resignation of these petitioners before the dishonor of cheques cannot be tested at this stage before this Court and the same has to be decided on the basis of relevant documents and evidence to be produced at the stage of trial. If the plea of petitioners is accepted that since they were not a part of the accused company at the time when cheques were dishonoured, proceedings against them be quashed at the outset, it would in fact, amount to throttling the trial by snatching away the right of respondent to examine during before the Court, the signatory of the cheques as well as signatory of the loan agreements, board resolutions and other documents in that regard.

17. As far as petitioner Mahender Singh is concerned, he was appointed as a Director in the accused company on 17.10.2017. The cheques in question in the present petitions were dated 07.11.2017, 26.11.2017 and 26.01.2018, and were dishonored on 08.11.2017, 30.11.2017 and 30.01.2018 respectively. The said petitioner was undisputedly, the Director of the accused company at the time of dishonoring of cheque as well as on the date of issuance of cheques.

18. In such cases, the Hon'ble Apex Court has cautioned against the use of powers under Section 482 Cr.P.C. in case of *S.P. Mani & Mohan Dairy (supra)* whereby it has been observed as under:

“33. Thus, the legal principles discernible from the aforesaid decision of this Court may be summarised as under:—

(b) It is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole;

(c) If the substance of the allegations made in the complaint fulfil the requirements of Section 141, the complaint has to proceed in regards the law.

(d) In construing a complaint **a hyper-technical approach should not be adopted so as to quash the same.**

(e) The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in the enactment of Sections 138 and 141 respectively should be kept in mind by the Court concerned.

(g) The **power of quashing should be exercised very sparingly** and where, read as a whole, the factual foundation for the offence has been laid in the complaint, it should not be quashed.....

47. Our final conclusions may be summarised as under:—

d.) If any Director wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he/she is really not concerned with the issuance of the cheque, **he/she must in order to persuade the High Court to quash the process either furnish some sterling incontrovertible material or acceptable circumstances to substantiate his/her contention.** He/she must make out a case that making him/her stand the trial would be an abuse of process of Court.”

(Emphasis supplied)

19. Thus, considering the overall facts and circumstances of the case, this Court is of the opinion that there was sufficient material on record before the learned Magistrate to issue summons against the petitioners herein. The role of each petitioner in commission of offence, if any, can become clear only during the course of trial, and cannot be examined in detail by this Court while exercising jurisdiction under Section 482 Cr.P.C.

20. In view thereof, this Court finds no reasons to interfere with the impugned summoning orders passed by learned Magistrate.

21. Accordingly, the present petitions along with pending applications stand dismissed.

22. Needless to say, the petitioners shall be at liberty to raise all the contentions, which were raised before this Court, by placing on record the relevant material at appropriate stage before the learned Magistrate who shall adjudicate upon the same as per law, without being influenced by any of the observations made hereinabove by this Court as the same are only for the purpose of deciding the present petitions and are not to be construed as opinion on the merits of the case.

23. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

MAY 1, 2023/ns