



2024:DHC:7248



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

% Reserved on : 06.09.2024
Pronounced on : 19.09.2024

+ **CRL.M.C. 2654/2023 & CRL.M.A. 9938/2023**

RAHUL VIJAYVARGIA

.....Petitioner

Through: Mr. Rachit Sharma, Advocate.

versus

THE STATE OF DELHI AND ORS.

.....Respondents

Through: Mr. Laksh Khanna, APP for State.
Mr. Rakesh Mukhija and Ms. Ananya
Singhal, Advs. for R-2.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. By way of the present petition, the petitioner seeks to assail the order dated 27.09.2022, passed by the Ld. Judicial Magistrate, First Class (IMFC-03), Northwest District Rohini Courts, in Complaint Case No. 1739/2022 titled “ACME RESOURCES LIMITED v. JHANDELWALAS FOODS LIMITED & ORS.”

2. The subject complaint case came to be instituted under Section 138 read with 141 of the Negotiable Instruments Act (hereinafter, referred to as “NI Act”) against one company-*Jhandewalas Foods Limited*/respondent No. 3 and as well as 3 other individuals i.e. respondent Nos.4 & 5 and the present petitioner who have all been arrayed in their capacity as Director of respondent No. 3/accused company.



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3. Facts, as per the complaint are that in the year 2013, respondent Nos. 3 to 5 approached the complainant company/respondent No. 2 to avail the loan facility. Accordingly, respondent No. 2 agreed to provide the loan facility to respondent No. 3/accused company. It is the case of the respondent No. 2 that Respondent No. 4 & 5 approached it and represented themselves and others as Directors, Authorized Signatories and responsible persons for managing the day-to-day affairs of the accused company/respondent No. 3. Respondent No. 2 provided a loan of Rs. 1,75,00,000/- on 22.04.2013 in the name of respondent No. 3 for a period of 30 months vide Cheque No. 361758 dated 22.04.2013, drawn on State Bank of India, Netaji Subhash Place, Pitampura, New Delhi which was duly accepted and admitted by the accused. In the month of April 2021, Respondent Nos. 4 & 5 along with the petitioner approached respondent No. 2 and requested for extension of time of another 12 months to make the repayment of the loan amount which was agreed by respondent No. 2 with the condition that there will be an interest on the loan amount @ 15 % per annum. That against the above stated and in discharge of their liability respondent Nos. 4, 5 and the present petitioner handed over the following cheques to respondent No.2/Company :-

Cheque Nos.	Dated	Amount
001599	21.03.2022	Rs. 1,96,875/-
001600	21.04.2022	Rs. 1,96,875/-
001601	21.04.2022	Rs. 1,75,00,000/-

4. However, upon presentment, the abovementioned cheques got dishonoured and the same were returned unpaid vide return memos dated



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25.04.2022, 22.04.2022 and 22.04.2022 respectively, with the remarks “Account Blocked”. Subsequently, a legal notice dated 02.05.2022 was issued to the petitioner and respondent Nos. 3 to 5. However, upon failure to pay the amount under the subject cheques, the subject criminal complaint under Section 138 NI Act came to be filed and the learned Trial Court issued summons against the petitioner and other accused persons vide order dated 27.09.2022.

5. Learned counsel for the petitioner submits that the Trial Court has passed the summoning order in a mechanical manner without appreciating the facts and applying the law on the subject. It is submitted that the learned Trial Court did not take into consideration that the Respondent Nos. 3 to 5 had taken the loan in the year 2013 i.e. at the time when the petitioner was not the Director of the Company. The petitioner was appointed only on 26.02.2020 in the capacity of an Additional Independent Non-Executive Director and even otherwise, at the time when the cheque was dishonoured on 22.04.2022, the petitioner was not in the Board of Directors/management of the accused company/respondent No.3. In support, the petitioner has placed on record the e-form DIR-12, Appointment Letter which shows the status of the petitioner as Additional Independent Non-Executive Director. Reliance is also placed on the judgement of Supreme Court in the case of Pooja Ravinder Devidasani v. State of Maharashtra and Anr. reported as **(2014) 16 SCC 1**. It is stated that the present petitioner had resigned w.e.f. 08.12.2021. Therefore, in no manner the petitioner is concerned with the said transaction. In support of this submission, the petitioner has placed on record a copy of DIR-11 form.



Additionally, learned counsel for the petitioner has also referred to the Annual Report for the year 2020-21 of respondent No. 3 which shows the status of petitioner as an Additional Independent Non-Executive Director. It is also stated that as per the Annual Report of the year 2020-21 of respondent No. 3, it can be seen that in all 9 Board Meetings held during the financial year 2020-21, and the Annual General Meeting held on 31.12.2020, none was attended by the petitioner which reflects that he was not involved in day to day affairs of the company.

6. *De hors* the aforesaid submission, it is also contended that the petitioner is neither signatory of cheque nor privy to any transaction and as such no liability accrues towards the petitioner. It is submitted that since the bank account from where the alleged cheque has been issued is not held in the name of the petitioner and the petitioner was infact not served with the legal notice dated 02.05.2022, the basic requisite ingredient of Section 138 NI Act has not been fulfilled, hence the complaint case is liable to be quashed.

7. The petition is contested by learned counsel of respondent No. 2 by contending that the complaint has the necessary averments and consequently, a trial would be required to determine the liability of the petitioner.

8. I have heard learned counsels for the parties and have also perused the material placed on record.

9. The criminal complaint has been filed under Section 138 read with Section 141 of the NI Act. The petitioner has been impleaded in the capacity of Director of the accused company. The present petition is accompanied by Form No. DIR-11 and DIR-12. The said documents i.e. DIR-11 and DIR-12



indicate that the petitioner was appointed as an Additional Independent Non-Executive Director on 26.02.2020 and that he resigned on 08.12.2021.

10. The above would show that while the cheques were presented for encashment and dishonoured on 22.04.2022, the petitioner had resigned from his position as Additional Independent Non-Executive Director four months prior i.e., on 08.12.2021.

11. The issue whether requisite allegations are to be made against Directors and more particularly against the Directors who are Additional Independent Non-Executive, has come up before the Supreme Court in a catena of decisions. In Pooja Ravinder Devidasani (Supra), the Supreme Court, while following the ratio of the decision in National Small Industries Corp. Ltd. v. Harmeet Singh Paintal reported as **(2010) 3 SCC 330**, made the following observations with regard to fastening vicarious liability on Directors who are not in charge of day-to-day affairs of the company:—

“xxx

17... Non-executive Director is no doubt a custodian of the governance of the company but is not involved in the day-to-day affairs of the running of its business and only monitors the executive activity. To fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the company, one who actively looks after the day-to-day activities of the company and is particularly responsible for the conduct of its business. Simply because a person is a Director of a company, does not make him liable under the NI Act. Every person connected with the Company will not fall into the ambit of the provision. Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, 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 for an offence under Section 141 of the NI Act. In National Small Industries Corpn. [National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal, (2010) 3 SCC 330 : (2010) 1 SCC (Civ) 677 : (2010) 2 SCC (Cri) 1113] this Court observed : (SCC p. 336, paras 13-14)

“13. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

14. A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfilment of the requirements under Section 141.”

xxx”

12. Most recently, the Supreme Court in Sunita Palita v. Panchami Stone Quarry reported as (2022) 10 SCC 152, observed as under : -

“xxx

42. Liability depends on the role one plays in the affairs of a company and not on designation or status alone as held by this Court in S.M.S. Pharmaceuticals. The materials on record clearly show that these appellants were independent, non-executive Directors of the company. As held by this Court in Pooja Ravinder Devidasani v. State of Maharashtra, a non-executive Director is not involved in the day-to-day affairs of the company or in the running of its business. Such Director is



in no way responsible for the day-to-day running of the accused Company. Moreover, when a complaint is filed against a Director of the company, who is not the signatory of the dishonoured cheque, specific averments have to be made in the pleadings to substantiate the contention in the complaint, that such Director was in charge of and responsible for conduct of the business of the Company or the Company, unless such Director is the designated Managing Director or Joint Managing Director who would obviously be responsible for the company and/or its business and affairs.
xxx”

13. Reference may also be made to the decision of this Court in Sunita Palta & Ors. v. Kit Marketing Pvt. Ltd. reported as **2020 SCC OnLine Del 2592**, while dealing with a situation wherein the petitioners claimed to be non-executive directors observed: -

“xxx

16. Admittedly, the petitioners are neither the Managing Directors nor the Authorized Signatories of the accused company. The accused company and the Managing Director are arrayed as accused No. 1 and 2 along with others in the complaint pending before the concerned Metropolitan Magistrate. A perusal of the complaint filed under Section 138 r/w Sections 141/142 of NI Act filed by the complainant shows that except for the general allegation stating that the petitioners were responsible for control and management and day to day affairs of the accused company, no specific role has been attributed to the petitioners. To fasten the criminal liability under The Negotiable Instruments Act, 1881, the above generalised averment without any specific details as to how and in what manner, the petitioners were responsible for the control and management of affairs of the company, is not enough.
xxx”



14. This court in **CRL.M.C. 3864/2018** titled Sai Girdhar Raj Kumar v. Arun Kapoor & Ors. while taking note of the Master Circular issued by the Reserve Bank of India observed: -

“xxx

*the Reserve Bank of India issued a Master Circular no. RBI/2012-13/43 dated 02.07.2012 on “Willful Defaulters” with respect to reporting of names of Directors and the position regarding independent and nominee Directors. The said circular came to be challenged before a Division Bench of the Gujarat High Court in the case of Ionic Metalliks v. Union of India reported as **2014 SCC OnLine Guj 10066**. The court while upholding the legality and validity of the circular, noted the categories of Directors under the Companies Act and the “Listing Agreement” prescribed by Securities and Exchange Board of India as under: -*

“A. Classification under the Companies Act

Categories of Directors

The Companies Act refers to the following two specific categories of Directors:

- 1. Managing Directors; and*
- 2. Whole-time Directors.*

A Managing Director is a Director who has substantial powers of management of the affairs of the company subject to the superintendence, control and direction of the Board in question. A Whole-time Director includes a Director who is in the whole- time employment of the company, devotes his whole-time of working hours to the company in question and has a significant personal interest in the company as his source of income.

Every public company and private company, which is a subsidiary of a public company, having a share capital of more than Five Crore rupees (Rs. 5,00,00,000/-) must have a Managing or Whole-time Director or a Manager.



Further classification of Directors

Based on the circumstances surrounding their appointment, the Companies Act recognizes the following further types of Directors:

- 1. First Directors: Subject to any regulations in the Articles of a company, the subscribers to the Memorandum of Association, or the company's charter or constitution ("Memorandum"), shall be deemed to be the Directors of the company, until such time when Directors are duly appointed in the annual general meeting ("AGM").*
- 2. Casual vacancies: Where a Director appointed at the AGM vacates office before his or her term of office expires in the normal course, the resulting vacancy may, subject to the Articles, be filled by the Board. Such person so appointed shall hold office up to the time which the Director who vacated office would have held office if he or she had not so vacated such office.*
- 3. Additional Directors: If the Articles specifically so provide or enable, the Board has the discretion, where it feels it necessary and expedient, to appoint Additional Directors who will hold office until the next AGM. However, the number of Directors and Additional Directors together shall not exceed the maximum strength fixed in the Articles for the Board.*
- 4. Alternate Director: If so authorized by the Articles or by a resolution passed by the company in general meeting, the Board may appoint an Alternate Director to act for a Director ("Original Director"), who is absent for whatever reason for a minimum period of three months from the State in which the meetings of the Board are ordinarily held. Such Alternate Director will hold office until such period that the Original Director would have held his or her office. However, any provision for*



automatic re-appointment of retiring Directors applies to the Original Director and not to the Alternate Director.

5. 'Shadow' Director: A person, who is not appointed to the Board, but on whose directions the Board is accustomed to act, is liable as a Director of the company, unless he or she is giving advice in his or her professional capacity. Thus, such a 'shadow' Director may be treated as an 'officer in default' under the Companies Act.

6. De facto Director: Where a person who is not actually appointed as a Director, but acts as a Director and is held out by the company as such, such person is considered as a de facto Director. Unlike a 'shadow' Director, a de facto Director purports to act, and is seen to the outside world as acting, as a Director of the company. Such a de facto Director is liable as a Director under the Companies Act.

7. Rotational Directors: At least two-thirds of the Directors of a public company or of a private company subsidiary of a public company have to retire by rotation and the term "rotational Director" refers to such Directors who have to retire (and may, subject to the Articles, be eligible for re-appointment) at the end of his or her tenure.

8. Nominee Directors: They can be appointed by certain shareholders, third parties through contracts, lending public financial institutions or banks, or by the Central Government in case of oppression or mismanagement. The extent of a nominee Director's rights and the scope of supervision by the shareholders, is contained in the contract that enables such appointments, or (as appropriate) the relevant statutes applicable to such public financial institution or bank. However, nominee Directors must be particularly careful not to act only in the interests of their nominators but must act in the best interests of the company and its shareholders as a whole. The fixing of liabilities on nominee Directors in India



does not turn on the circumstances of their appointment or, indeed, who nominated them as Directors. Chapter 4 and Chapter 5 that follow set out certain duties and liabilities that apply to, or can be affixed on, Directors in general. Whether nominee Directors are required by law to discharge such duties or bear such liabilities will depend on the application of the legal provisions in question, the fiduciary duties involved and whether such nominee Director is to be regarded as being in control or in charge of the company and its activities. This determination ultimately turns on the specific facts and circumstances involved in each case.

B. Classification under the Listing Agreement *The Securities Contracts (Regulation) Act, 1956, read with the rules and regulations made thereunder, requires every company desirous of listing its shares on a recognized Indian stock exchange, to execute a listing agreement ("Agreement") with such Indian stock exchange. This Agreement is in a standard format (prescribed by the Securities Exchange Board of India ("SEBI")), as amended by SEBI from time to time. The Agreement provides for the following further categories of Directors:*

Categories under the Listing Agreement

- 1. Executive Director;*
- 2. Non-executive Director; and*
- 3. Independent Director.*

Executive and non-executive Directors

An Executive Director can be either a Whole-time Director of the company (i.e, one who devotes his whole time of working hours to the company and has a significant personal interest in the company as his source of income), or a Managing Director (i.e, one who is employed by the company as such and has substantial powers of management over the affairs of the company subject to the superintendence, direction and control of



the Board). In contrast, a non-executive Director is a Director who is neither a Whole-time Director nor a Managing Director. Clause 49 of the Agreement prescribes that the Board shall have an optimum combination of executive and non- executive Directors, with not less than fifty percent (50%) of the Board comprising non-executive Directors. Where the Chairman of the Board is a non-executive Director, at least onethird of the Board should comprise independent Directors and in case he is an executive Director, at least half of the Board should comprise independent Directors. Where the non-executive Chairman is a promoter of the company or is related to any promoter or person occupying management positions at the Board level or at one level below the Board, at least one-half of the Board of the company shall consist of independent Directors.

Independent Directors *The Agreement defines an "Independent Director" as a non- executive Director of the company who:*

- a. apart from receiving Director's remuneration, does not have material pecuniary relationships or transactions with the company, its promoters, its Directors, its senior management, or its holding company, its subsidiaries, and associates which may affect independence of the Director;*
- b. is not related to promoters or persons occupying management positions at the board level or at one level below the board;*
- c. has not been an executive of the company in the immediately preceding three (3) financial years;*
- d. is not a partner or an executive or was not a partner or an executive during the preceding three (3) years, of any of the following:*



i. the statutory audit firm or the internal audit firm that is associated with the company, and
ii. the legal firms and consulting firms that have a material association with the company;

e. is not a material supplier, service provider or customer or a lessor or lessee of the company, which may affect the independence of the Director; or

f. he is not a substantial shareholder of the company, i.e., owning two percent (2%) or more of the block of voting shares; and

g. he is not less than twenty-one (21) years of age.

Nominee directors appointed by an institution that has invested in, or lent money to, the company are also treated as independent Directors.”

15. Coming to the facts of the present case, a reading of the complaint would show that the same is bereft of any specific allegations as to how being an Additional Independent Non-Executive Director, the petitioner (arrayed as accused No.4 in the complaint) was incharge of day-to-day affairs and conduct of the business of the accused company. The complaint itself is accompanied by the Master Data of the company, which did not reflect the name of the petitioner as a Director. Even if the Annual Report for the Financial Year 2020-21 of respondent No. 3 is to be considered, it brings to the notice the fact that during all the Nine (9) Board Meetings held during the Financial Year 2020-21 and of the Annual General Meeting held on 31.12.2020, none of it were attended by the petitioner which goes to show that he was not involved in day-to-day affairs of the accused Company. As such, it is the conceded case of the complainant that the



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petitioner was not the Director on the relevant date. The case of the petitioner squarely falls in the ratio of the aforementioned binding precedents. In the totality of the facts and circumstances, the petitioner cannot be made responsible for the dishonour of cheques, and the continuation of the criminal complaint against him would be nothing but an abuse of the process of law.

16. Consequently, the petition is allowed and the criminal complaint filed against the petitioner is quashed. As a necessary sequitur, the summoning order is also set aside. Pending application is disposed of as infructuous.

MANOJ KUMAR OHRI
(JUDGE)

SEPTEMBER 19, 2024

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