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

\+ CRL.M.C. 3015/2023 and CRL.M.A. 11305/2023

LALIT KUMAR .....Petitioner

Through: Mr.Durgesh Gupta and Mr.Ashish Gupta, Advocates

versus

M/S MODTECH INFRAVENTURES PVT LTD .....Respondent

Through: Mr.Amit Mehra, Advocate

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

<u>O R D E R</u>

% 11.09.2024

1. By way of the present petition, the petitioner seeks setting aside of the summoning order dated 19.11.2019 in Complaint Case No. 20619/2018 titled '<u>M/S MODTECH INFRAVENTURES PVT. LTD. v. SRS REAL ESTATE LIMITED & OTHERS</u>' whereby the petitioner was summoned under Section 138 read with Sections 141/142 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the *'NI Act'*). The petitioner is also seeking the consequential relief of quashing of the aforesaid complaint case qua him.

2. The subject complaint case came to be instituted by the respondent/complainant company under Section 138 read with 141/142 of the NI Act against one SRS Real Estate Limited and Others/accused company as well as 7 other individuals and the present petitioner (accused

No. 7 in the complaint) who has been arrayed in his capacity as a Director of the accused company.

3. Facts, as per the complaint, are that in the year 2014, the accused company through its Chairman and Directors at the relevant time approached the respondent/complainant and executed a Memorandum of Understanding (MOU) dated 26.07.2014 with M/s SRS Real Estate Limited for purchase of 50% stake in Tower N of Group Housing Society at Sector-87 Faridabad being developed by the SRS Real Estate Limited and paid Rs. 5,65,00,000/- to the accused company. Accused No. 3 in the complaint, is a Director of the accused company and also a signatory to the MOU dated 26.07.2014. Subsequently, it was found by the respondent that despite passage of substantial period of time, no building activity with respect to the said Housing Society commenced. After certain failed attempts to contact the accused persons and apprehending foul play, the respondent lodged an FIR No. 21/2017. While the matter was under investigation, the accused persons came forward and handed over to complainant three post-dated cheques bearing Nos. 000562, 000563 & 000564 dated 15.8.2018, 15.9.2018 & 15.10.2018 respectively each for an amount of Rs. 45,00,000/ to settle the dispute for a lump sum amount and show their bona fide with an assurance that the cheques issued would honour their commitment on presentation.

4. Upon presentment, the abovementioned cheques got dishonoured and were returned unpaid vide return memos dated 17.10.2018, all with remarks "Account Closed". Subsequently, a legal notice dated 29.10.2018 was issued to the petitioner and the other accused persons. However, upon failure to pay the amount under the subject cheques, the said criminal complaint under Section 138 read with 141/142 of the NI Act came to be filed and the

learned Trial Court issued summons against the petitioner and other accused persons. The details of the cheques dishonoured have been summarized herein below:

Cheque Nos.	**Dated**	**Drawn on Bank**	**Amount**	**Reason**
000562	15.08.2018	The Karur Vysya Bank Limited, Faridabad-121001	Rs. 45,00,000/-	Account Closed
000563	15.09.2018	The Karur Vysya Bank Limited, Faridabad-121001	Rs. 45,00,000/-	Account Closed
000564	15.10.2018	The Karur Vysya Bank Limited, Faridabad-121001	Rs. 45,00,000/-	Account Closed

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. It is submitted that the learned Trial Court did not take into consideration that the petitioner is not the signatory of the aforementioned cheques and was merely an Independent Non-Executive Director of the accused company. It has been further submitted that the petitioner was not a signatory to the said MoU and cannot be held liable with the aid of Section 141 of the NI Act. It is contended that the petitioner had resigned from the accused company as on 30.09.2017 and in this regard has placed on record a copy of Form No. DIR-12 submitted to the Registrar of Companies on 30.09.2017 whereby the petitioner had resigned as a Director of M/s SRS Real Estate/accused company and cannot be held liable for the affairs of the company. *De hors* the aforesaid submissions, it is argued that the complaint lacks necessary averments inasmuch as it has not

been alleged that the petitioner was in-charge of and responsible to the company for the conduct of business at the time of commission of the offence nor is there any specific role assigned to the petitioner, hence the complaint case is liable to be quashed qua the petitioner.

6. The petition is contested by learned counsel of the respondent by contending that the complaint has all the necessary averments and consequently, a trial would be required to determine the petitioner's liability.

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

8. The law as regards the liability of a Director for an offence under Section 138 NI Act committed by a company is no longer res integra. Starting from the decision in S.M.S Pharmaceuticals Ltd. *v.* Neeta Bhalla & Anr.[1] upto the recent decision of Supreme Court in Susela Padmawathy Amma *v.* Bharti Airtel Ltd.[2], it has been observed that while a Director holds special/unique position in a company, having authority to take decisions, however, the mere nomenclature or mention of an individual as Director cannot itself bring him/her into the fold of Section 138 by assistance of Section 141 NI Act, the latter of which relates to vicarious liability of a Director.

9. As observed in a catena of judgements, Section 141 being a penal provision, has to be strictly construed. It is only those Directors who were in-charge of the day-to-day affairs and responsible for the conduct of the business of the company who can be held liable for the offence under Section 138 NI Act. The word 'in-charge of a business' has been interpreted

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[1] 2005 8 SCC 89
[2] 2024 SCC OnLine SC 311

to mean a person having overall control of the day-to-day business of the company.[3] Thus, for a Director to be vicariously liable, the complainant has to show that the said Director was indeed associated with the day-to-day affairs and management of the business. A Director cannot be arrayed as an accused on the basis of a cursory statement or vague averment. What would be appropriate pleadings/averments would be determined on a case-to-case basis.

10. Insofar as the legal position regarding quashing of complaints filed under Section 138 NI Act against the Directors in exercise of the powers conferred under Section 482 Cr.P.C. is concerned, the same has been discussed in detail by the Supreme Court in Sunita Palita *v.* Panchami Stone Quarry[4] and S.P. Mani & Mohan Dairy *v.* Snehalatha Elangovan[5]. In S.P. Mani (Supra), it has been observed: -

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> *58. Our final conclusions may be summarised as under:*
> *58.1. The primary responsibility of the complainant is to make specific averments in the complaint so as to make the accused vicariously liable… On the other hand, the first proviso to sub-section (1) of Section 141 of the Act clearly lays down that if the accused is able to prove to the satisfaction of the Court that the offence was committed without his/her knowledge or he/she had exercised due diligence to prevent the commission of such offence, he/she will not be liable of punishment.*
> *58.2. The complainant is supposed to know only generally as to who were in charge of the affairs of the company or firm, as the case may be. The other administrative matters would be within the special knowledge of the company or the firm and those who are in charge of it. In such circumstances, the complainant is expected to allege that the persons named in the complaint are*

[3] Girdhari Lal Gupta vs. B.H. Mehta, (1971) 3 SCC 189
[4] (2022) 10 SCC 152
[5] (2023) 10 SCC 685

in charge of the affairs of the company/firm… The existence of any special circumstance that makes them not liable is something that is peculiarly within their knowledge and it is for them to establish at the trial to show that at the relevant time they were not in charge of the affairs of the company or the firm.
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58.4. 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.
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11. From the above-mentioned cases, it can be seen that if any Director seeks quashing of a complaint under Section 138 NI Act or any process issued therein, then he would have to show that the complaint is bereft of the appropriate pleadings/averments which would bring him into the fold of the rigours of Section 141 NI Act and in this regard, he would have to bring on record certain sterling and incontrovertible evidence showing that he is not concerned with issuance of the cheques.

12. In the present case, as noted above, though the petitioner has denied any liability by claiming that he was appointed as an Independent Non-Executive Director of the company, however, Form DIR-12 only relates to factum of resignation and the said form shows that the petitioner had resigned as a Director of the company w.e.f. 30.09.2017 i.e. much before the issuance of the subject cheques. A Copy of Form No. DIR-12, as downloaded from the MCA website and placed on record in the present

proceedings, is a document of incontrovertible nature, and the respondent has failed to place on record any evidence to counter the factual situation as established by the said Form. In these facts, the said Form can indeed be looked into and considered by this Court while exercising its jurisdiction under Section 482 Cr.P.C. Further, a reading of the complaint would show that only a bald averment has been made that the petitioner was responsible for the day-to-day affairs of the company. Additionally, the petitioner is also not a signatory to the MoU executed between the respondent and the accused company. In this backdrop, merely the mention of the petitioner as the Director of the company in the complaint cannot be the basis of bringing the petitioner into the fold of Section 138 NI Act through the aid of Section 141 NI Act.

13. Keeping in view the legal position as enumerated hereinabove and upon a reading of the complaint, this Court is of the considered opinion that as the petitioner had ceased to be a Director of the company before the issuance of the subject cheques as well as the fact that the subject criminal complaint is bereft of the adequate averments against the petitioner, the continuation of the proceedings against the petitioner would be an abuse of process of law.

14. 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, J

SEPTEMBER 11, 2024
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