IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of Decision: 15.07.2024

\+ **CRL.M.C. 4187/2023, CRL.M.A. 15713/2023**

NIPUN PADHA ..... Petitioner
Through: Mr. Deepak Z. Mehta, Advocate

versus

S S TECHNO MARKETING PVT. LTD ..... Respondents
Through: Mr. Vardhaman Kaushik, Advocate

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. By way of the present petition, the petitioner seeks quashing of Criminal Complaint No.993/2021 filed under section 138 of NI Act pending before the learned Metropolitan Magistrate (NI Act)-04, Delhi, as well as the summoning order dated 11.10.2021.

2. Briefly, the facts are that the respondent/complainant had initiated proceedings under Section 138 of the Negotiable Instruments Act, 1881, alleging that the accused company has defrauded the complainant company of approximately Rs.1,50,00,000/- (Rupees One Crore Fifty Lakhs only) on the pretext of investment in the accused company. Subsequently, on the repeated demand of the complainant for refund of the money lent by it to the accused company, three cheques bearing No. 606413 dated 20.02.2020; 606414 dated 25.02.2020 and 606415 dated 28.02.2020 of Rs. 30 lacs, 25

lacs and 16 lacs respectively were furnished by the accused towards part satisfaction of its liability. However, the said cheques when presented for encashment, were dishonoured with the remarks "*Kindly contact Drawer/Drawee bank and please present again*" as reflected in the return memo dated 24.03.2020.Consequently, the complainant issued demand notice dated 01.06.2020, and upon petitioner's failure to repay the amount, the present criminal complaint under Section 138 NI Act came to be filed with respect to all three cheques.

3. The issue arising in the present petition is that although a reading of the complaint reveals that the complainant has alleged that accused No. 1, 2 and 3 were working as Directors in *Basic Comtech Private Limited*; and that the accused were aware that the cheques in question belonged to the company; and in the complaint, the complainant keeps referring to an "accused company" yet, the said company, i.e., *M/s Basic Comtech Private Limited* was not arrayed as an accused in the complaint under Section 138 Negotiable Instruments Act. Further, vide order dated 15.03.2021, the Ld. Trial Court observed that the *"Ld. Counsel for the complainant seeks some time to file amended memo of parties and Form no. 32."* It appears that on 08.10.2021, an amended memo of parties came to be filed wherein the accused company was arrayed as accused No. 4 and vide order dated 11.10.2021, summons came to be issued. Additionally, the issue raised is that the complainant has wrongly arrayed the present petitioner (Accused No. 3 in the original complaint) to be a Director of the company at the time of the issuance of the said cheques. Though the petitioner has been appointed as a Director on 06.08.2012, he had resigned on 18.03.2016. In this regard, reference has been made to Company Master Data from the site

of Ministry of Corporate Affairs, with respect to *M/s Basics Comtech Private Limited*.

4. Firstly, the law as regards to 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. As observed in a catena of judgements, 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, can be held liable for the offence under Section 138 NI Act. The word 'in-charge of a business' has been interpreted to mean a person having overall control of the day-to-day business of the company.[3] As noted above, In the present case, the petitioner has denied liability by contending that he was not even a Director in the company at the time of issuance of the cheque. To support the said contention, the petitioner has placed on record Company Master Data from the site of Ministry of Corporate Affairs ("the MCA"), as per which the petitioner had resigned from the Directorship w.e.f. 18.03.2016 i.e. much before the issuance of the subject cheque dated 20.02.2020, 25.02.2020 and 28.02.2020.

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[1] (2005) 8 SCC 89
[2] 2024 SCC OnLine SC 311
[3] Girdhari Lal Gupta vs. B.H. Mehta, (1971) 3 SCC 189

5. Secondly, the issue whether a company needs to be impleaded as an accused or not has been settled by catena of decisions beginning with Aneeta Hada v. Godfather Travels & Tours Pvt. Ltd.[4], wherein it has been held: -

> *"xxx*
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> *58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted.*
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> *59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself...*
> *xxx"*

6. The submission of the complainant thereby seeking permission to file an amended memo of parties, to implead the company as an accused is misconceived inasmuch as the complaint is to be mandatorily proceeded by steps as stipulated in proviso to Section 138, which must be fulfilled before the offence is said to be made out. The first condition is that the cheque ought to be presented to the bank within a period of six months from the

[4] (2012) 5 SCC 661

date on which it is drawn or within the period of its validity, whichever is earlier. The second condition is that the payee or the holder in due course of the cheque, as the case may be, must make a demand for the said money by giving a notice in writing to the drawer of the cheque within 30 days of receiving the information from the bank regarding the dishonour of the cheque. The third condition states that there should be a failure on the part of the drawer of cheque to make the payment of the amount under the cheque to the payee or the holder in due course, as the case may be, within 15 days of the receipt of the said notice. When all these three conditions are fulfilled, then only an offence under Section 138 of the NI Act can be said to be committed by the person issuing the cheque [Ref: MSR Leathers v. S. Palaniappan&Anr.[5] , Charanjit Pal Jindal v. L.N. Metalics[6] and N. Harihara Krishnan v. J. Thomas.[7]]

7. Recently, in Himanshu v. B. Shivamurthy & Ors.[8], the Supreme Court has held as under:-

> *"xxx*
> *13.In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.*
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> *xxx"*

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[5] (2013) 1 SCC 177
[6] (2015) 15 SCC 768
[7] (2018) 13 SCC 663
[8] (2019) 3 SCC 797

8. In the present case, it was necessary that a demand notice be issued to the company and only upon its failure to repay, could the company have been impleaded as an accused and the Directors could have been impleaded in their vicarious capacity. However, no such course of action was undertaken. Thus, the company cannot be impleaded as an accused by way of amendment in the memo of parties and the law, as noted and extracted above, is well settled that the liability of a Director is only vicarious. Concededly, the present petitioner is not the authorised signatory or someone who had signed the subject cheques. The petitioner's resignation prior to issuance of subject cheque is also duly established by the document from Master Data available on *the MCA* website. Therefore, the proceedings pending are liable to be quashed against the present petitioner.

9. Consequently, the petition is allowed and the criminal complaint filed under Section 138 NI Act against the petitioner is quashed. As a necessary sequitur, the summoning order dated 11.10.2021 is also set aside. Pending application is also disposed of as infructuous.

MANOJ KUMAR OHRI
(JUDGE)

JULY 15, 2024
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