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

% Date of Decision: 04.04.2024

\+ **CRL.M.C. 4643/2023**

SADHU CHARAN DATTA ..... Petitioner

Through: Mr. Kunal Kher and Mr. Sandeep Thukral, Advocates

Versus

THE DELHI SAFE DEPOSIT CO LTD. ..... Respondent

Through: Mr. Tarang Srivastava, ASC for the State

Mr. Vivek Bhagat, Advocates.

**CORAM:**
**HON'BLE MR. JUSTICE MANOJ KUMAR OHRI**

**JUDGMENT (ORAL)**

1. By way of present petition filed under Section 482 Cr.P.C, the petitioner seeks quashing of the Criminal Complaint No.5367/2020 titled "The Delhi Safe Deposit Co. Ltd. vs M/s Emkay Automobile Industries Ltd. & Ors." pending before learned MM (New Delhi), Rouse Avenue District Court, Delhi as well as the summoning order dated 01.12.2021.

2. The present petition has been filed in the context of the proceedings initiated under Section 138 read with Section 141/142 Negotiable Instruments Act, 1881 (*'NI Act'*) at the behest of the present respondent, who is the complainant before the learned Trial Court. In his complaint, the complainant/respondent has alleged that the petitioner alongwith other individuals (impleaded as accused persons in the complaint) had approached it for grant of loan, which was granted to the accused company/*M/s Emkay Automobile Industries Ltd.* vide loan agreement dated 24.04.2018. In partial discharge of the liability, cheque number 740247 dated 25.02.2020 drawn on

SBI, SME Branch, M.G. Road, Gurgaon for a sum of Rs.2,50,000/- was issued, which on presentation for encashment was dishonoured with the remarks 'funds insufficient' vide return memo dated 26.02.2020. A demand notice dated 28.02.2020 was issued to the accused persons as well as the company, and upon their failure to repay the amount under the cheque, the subject criminal complaint came to be filed. In the said complaint, the petitioner has been arrayed as an accused by alleging that he was the Director of the accused company and that he had signed the loan agreement.

3. On the basis of the above averments, the learned Trial Court has summoned the petitioner along with the other accused persons vide the impugned order dated 01.12.2021.

4. Learned counsel for the petitioner states that the impugned order has been passed without application of mind inasmuch as the respondent alongwith the complaint had filed a list of documents including list of signatories downloaded from the MCA website which does not show the petitioner as one of the signatories of the accused company. It is stated that in the complaint, it has been wrongly stated that on the date of issuance of the subject cheque, the petitioner was a Director. Though the petitioner had been appointed as a Director on 01.11.2016, he had resigned on 01.05.2018. In this regard, reference has been made to Form No. DIR-12, as per which the petitioner had resigned from the directorship of the company w.e.f. 01.05.2018.

5. 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 <u>S.M.S Pharmaceuticals Ltd. *v.* Neeta Bhalla &</u>

Anr. (I)[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.

6. 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 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.

7. 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

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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

<u>Quarry</u>[4] and <u>S.P. Mani & Mohan Dairy *v.* Snehalatha Elangovan</u>[5]. In <u>S.P. Mani</u> (Supra), it has been observed:-

> *"xxx*
>
> *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 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.*
>
> *xxx*
>
> *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*

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[4] (2022) 10 SCC 152
[5] (2023) 10 SCC 685

*abuse of process of Court.*

*xxx"*

8. 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 cheque.

9. In the present case, as noted above, the petitioner has denied liability by contending that he was not a Director in the company at the time of issuance of the cheque. To support the said contention, the petitioner has placed on record Form No.DIR-12, as per which the petitioner had resigned from the Directorship w.e.f. 01.05.2018 i.e. much before the issuance of the subject cheque dated 25.02.2020. The petition is accompanied by the criminal complaint as well as the subject cheque. A perusal of the said cheque shows that the same has been drawn on the account of the accused company. Further, a reading of the complaint would show that the petitioner (impleaded as accused No.6 in the subject complaint) is sought to be impleaded by way of vicarious liability by describing him as a Director. The relevant extract of the complaint reads as under:-

*"xxx*

*4. That the accused approached the complainant for the grant of the loan and documents were executed by accused Nos. 2 & 4 to 6.*

*5. That the accused had taken loan from the complainant vide loan agreement no. 3296 Dt.24.04.2018 and agreed to re-pay to* *the complainant in installments as per schedule/Loan Agreement.*

*6. That in partial discharge of liability of M/s Emkay Automobile Industries Ltd., the accused No.1 had issued cheque bearing No.740247 dated 25.02.2020 of Rs. 250000 (Rupees Two Lakhs Fifty Thousand Only) drawn on State Bank of India, SME Branch, M.G. Road, Vatika, First India Place, M G Road, Gurgaon, Haryana-160001 under signature of the accused No.4 Mrs. Brinda Jajoo in favour of the complainant.*

*xxx*

*15. That the accused No. 2, 3 & 5 being Directors of accused No.1 and the cheque is signed by accused No.4 Mrs. Brinda Jajoo. The Board Resolution was passed and signed by accused No. 4 to 6 to take loan from the Complainant. The addressee no.2 & 4 to 6 signed the loan Agreement and all accused No. 2 to 6 are responsible for the day to day affairs of the accused No.1 and involved in the issuance of the cheques and its dishonour and are responsible for payment to the complainant…*

*xxx"*

A perusal of the extract of the complaint as extracted hereinabove would show that only a bald averment has been made that the petitioner was responsible for the day-to-day affairs of the company and further, the only averment against the petitioner is that he was one of the individuals who passed and signed the Board Resolution as well as one of the individuals who had signed the loan agreement. This averment in and of itself cannot be the basis for bringing the petitioner into the fold of Section 138 NI Act through the assistance of Section 141 NI Act. This becomes all the more significant in light of Form No.DIR-12 placed on record by the petitioner showing that he had resigned w.e.f. 01.05.2018. The averment that the petitioner was involved in the transaction of the loan, in the absence of any role played by him at the time of issuance/dishonour of the cheque, does not itself make him liable for the offence under Section 138 NI Act. 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.

10. Keeping in view the legal position as enumerated hereinabove and upon a reading of the complaint, this Court is of the considered opinion that the subject criminal complaint is bereft of the adequate averments against the petitioner and the continuation of the proceedings against the petitioner would be an abuse of process of law. Consequently, the petition is allowed and the subject criminal complaint is quashed. As a necessary sequitur, the summoning order dated 01.12.2021 is set aside.

11. Copy of this order be communicated to the learned Trial Court for information.

**MANOJ KUMAR OHRI**
**(JUDGE)**

**APRIL 4, 2024/*rd***