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

\+ CRL.M.C. 5140/2024 and CRL.M.A. 19588/2024

MAYANK JHA & ORS. .....Petitioners

Through: Mr.Harpreet Singh and Mr.Rajesh Gupta, Advocates

versus

M/S S.S. TECHNO MARKETING PVT. LTD. & ANR. .....Respondents

Through: Mr.Vardhman Kaushik, Advocate

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

ORDER

% **04.09.2024**

1. By way of the present petition, the petitioners seek quashing of Criminal Complaint No.993/2021 against the petitioners filed under section 138 of Negotiable Instruments Act, 1881 (hereinafter, referred to as *"NI Act"*) pending before the learned Judicial Magistrate (NI Act)-04, Delhi, as well as the summoning order dated 11.10.2021.

2. Vide order dated 11.10.2021, the Trial Court issued summoning order thereby summoning the present petitioners and respondent No. 2.

3. Briefly, the facts are that the respondent No.1/complainant had initiated proceedings under Section 138 of the Negotiable Instruments Act, 1881, alleging that the accused company has defrauded respondent No. 1 of approximately Rs.1.50 crores on the pretext of investment in the accused company. Subsequently, on the repeated demand of the respondent No. 1 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 petitioners/accused towards part satisfaction of the outstanding 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 respondent No. 1 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.

4. Learned counsel for the petitioners submits that the complaint filed by respondent No. 1 does not fulfil the essential ingredients of the provisions of Section 138 of the Negotiable Instruments Act. It is submitted that although a reading of the complaint reveals that it has been alleged that petitioner Nos. 1 and 2 were working as Directors in Basic Comtech Private Limited; and that even though respondent No. 1 was aware that the cheques in question belonged to the company; and in the complaint, respondent No. 1 keeps referring to "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. It is further stated that merely, the factum that after filing of the complaint, the complainant/respondent no.1 filed the amended memorandum of parties arraying therein petitioner no.3 as accused no.4 in the complaint does not mean and connote that the said accused has been allowed to be impleaded as a party/accused to the complaint case. It is submitted that Trial Court failed

to note that in absence of the company, who is the principal, the purported persons responsible for the conduct of the company cannot be impleaded as an accused under the provisions of Section 138 read with Section 141 of the NI Act. Thus, without petitioner no.3 being a party/accused named in the complaint, the summoning order passed is bad in law and needs to be quashed. In this regard, the reliance has been placed on the decision of Supreme Court in case of Dilip Hariramani v. Bank of Baroda reported as **2022 SCC OnLine SC 579** and Himanshu v. B. Shivamurthy reported as **(2019) 3 SCC 797.**

Insofar as petitioner No. 2 is concerned, it is contended that although petitioner No. 2 has been arrayed in the complaint case being the Director of the aforesaid company, he has never been involved either with the day-to-day functioning or working of the company at any stage. It is further submitted that he had shifted to United States of America in the year of 2012 and during the period of transaction as pleaded in the complaint he was not in India and in support of the said contention, petitioner No. 2 has placed on record relevant pages of his passport along with table showing his visits and stay in India from the year 2013 till date.

5. *Per contra*, learned counsel for respondent No. 1 opposes the present petition and submits that the captioned petition is an attempt to frustrate and disrupt the ongoing proceeding in the District Court. It is submitted that respondent No. 1 has duly filed the amended memo of parties and made M/s Basic Comtech as an accused. It is only after the said process that Ld. Trial court was satisfied and proceeded with issuance of summons in the said complaint case. It is further submitted that the petitioners concealed the fact that they have already admitted their lability in mediation, wherein it was

decided that the petitioners shall pay Rs. 72 lacs as full and final settlement in twelve monthly instalments. However, the petitioners failed to adhere to the terms of the settlement, attempting to evade their legally enforceable liability.

6. I have heard the learned counsels of the parties and perused the material available on record.

7. The issue whether a company needs to be impleaded as an accused or has been settled by catena of decisions beginning with Aneeta Hada v. Godfather Travels & Tours Pvt. Ltd.[1], 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"*

[1] (2012) 5 SCC 661

8. The submission of respondent No. 1 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 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.[2] , Charanjit Pal Jindal v. L.N. Metalics[3] and N. Harihara Krishnan v. J. Thomas.[4]]

9. The controversy in the present case revolves around the legal issue as to whether a complaint under Section 138 of Negotiable Instruments Act, 1881 ought to be preceded with a statutory demand notice, as envisaged under Section 138 of NI Act, when the cheque is issued on behalf of the company. Fortunately, the issue is no longer *res integra*. In Himanshu vs. B.

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[2] (2013) 1 SCC 177
[3] (2015) 15 SCC 768
[4] (2018) 13 SCC 663

Shivamurthy and Another, reported as **(2019) 3 SCC 797**, Supreme Court while expounding on the said issue observed as under:

> *"11. In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. The complaint was lodged only against the appellant without arraigning the company as an accused.*
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> *xx xx xx*
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> *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.*

10. 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. Even though it has not been disclosed by the petitioners that a settlement has been entered into between the parties, the complaint itself is inherently defective. Therefore, since the company cannot be impleaded as an accused by simply filing an amending the memo of parties, the continuation of the proceedings against the petitioners would be nothing but an abuse of process of law.

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

12. A copy of this order be also communicated to the learned Trial Court.

MANOJ KUMAR OHRI, J

SEPTEMBER 4, 2024
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