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

Date of decision: 10th SEPTEMBER, 2024

IN THE MATTER OF:

\+ **CRL.M.C. 5939/2022 & CRL.M.A. 23278/2022**

MS. SEEMA ASTHANA .....Petitioner

Through: Mr. Brijesh Kumar Singh, Advocate.

versus

SH. JAIDEEP ARORA .....Respondent

Through: Mr. Pradeep Kumar Mishra, Advocate.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. Petitioner has approached this Court challenging the Order dated 13.05.2022, passed by the learned Additional Sessions Judge, East Karkardooma Courts, in CRL. REV. No.289/2019, upholding the Order dated 11.01.2019, passed by the learned Metropolitan Magistrate, Karakardooma Courts, issuing summons qua the Petitioner herein in CC No.5112/2018 filed by the Respondent herein under Section 138 NI Act.

2. The facts, in brief, as stated in the Complaint filed by the Respondent herein reveals that the Petitioner herein is a Director of Asia Travel and Tours Pvt. Ltd. (*hereinafter referred to as 'the ATT'*). Other than the Petitioner herein, other co-accused in the complaint filed by the Respondent herein are Asia Travel and Tours Pvt. Ltd., which is arrayed as accused No.1; Mr. Shailesh Asthana, who is the Director of ATT has been arrayed as accused No.2; Ms. Poonam Asthana, who is the Director of ATT has been arrayed as accused No.4. The Petitioner herein is also a Director of ATT and

has been arrayed as accused No.3 in the complaint. It is stated that accused No.1 is an unlisted company and Accused Nos. 2 to 4, including the Petitioner herein are the Directors of the Accused company and are responsible for the conduct of the business of the accused No.1 company. It is stated that the Accused No.1 availed interest free financial assistance of Rs.10,00,000/- from the Complainant herein on 25.05.2018 by way of cheque bearing No.902506. The said loan was given by the Respondent herein for a period of three months only. It is stated that in discharge of their liabilities and to fulfil their commitments, the accused persons issued a cheque bearing No.574873, dated 20.10.2018, for a sum of Rs.10 lakhs drawn on Punjab National Bank, in favour of the Respondent herein. It is stated that when the said cheque was presented for encashment, the same was dishonoured and was returned vide Memo dated 18.10.2018 with the endorsement "account blocked". It is stated that notice under Section 138 of the NI Act was sent by the Respondent herein to the accused persons, including the Petitioner herein, on 05.11.2018 demanding repayment of Rs.10 lakhs. It is stated that the said notice was received by the accused persons on 12.11.2018. However, the amount was not paid to the Respondent herein. Accordingly, the Respondent herein filed a complaint under Section 138 NI Act against the accused persons, including the Petitioner herein.

3. The only averment against the Petitioner herein in the complaint is in paragraph No.2 of the complaint and the same reads as under:

> "2. *The accused No. 2 to 4 are the Director of the accused no.1 company and wholly responsible for the conduct of the accused company, The affairs of the accused No. 1 company are managed by accused no.2*

> *to 4 and as such they are In control of the affairs of the accused No. 1 company & liable of all the facts and deeds committed by the accused No.1 company."*

4. Other than this there is no averment against the Petitioner herein in the complaint filed by the Petitioner herein.

5. Summons were issued in the complaint on 11.01.2019.

6. A revision Petition was filed by the Petitioner challenging the Order issuing summons. In the Revision Petition it was contended by Petitioner herein that he was not responsible for the day-to-day administration of the accused No.1 and that there is no specific averment in the complaint that the Petitioner was responsible in issuance of cheque in question. It was also stated that the Petitioner was not the signatory of the cheque in question and that the Petitioner had no knowledge of any friendly loan availed by the ATT from the Respondent herein/Complainant. It was also contended by the Petitioner herein that he is a Non-Executive Director of ATT. DIR-12 is the information provided by the Ministry of Corporate Affairs regarding the Directors of the company. Form DIR-12 does indicate that the Petitioner is only a Non-Executive Director of ATT. The Revision Petition was dismissed by the learned Additional Sessions Judge on the ground that this Court *vide* Order dated 08.09.2021 in CRL. M.C. 1118/2021, which was filed by Accused No.4 – Ms. Poonam Singh, regarding the same transaction, who is similarly placed as the Petitioner herein, has dismissed the said Revision Petition.

7. It is this Order which has been challenged in the present Petition.

8. Heard the Counsels and perused the material on record.

9. It is not disputed that the Petitioner herein is a Non-Executive

Director of ATT. While dealing with the nature of averments that are required against a Non-Executive Director while filing a complaint under Section 138 NI Act, the Apex Court in Pooja Ravinder Devidasani v. State of Maharashtra, **(2014) 16 SCC 1**, has observed as under:

> "***16***. *Before delving into the merits of the case, it would be apt to take note of relevant portions of the complaints filed by Respondent 2 which read thus:*
>
>> *"I say that Accused 2 to 5 on behalf of Accused 1 have approached us with request for trade finance facility and accordingly the said facility has been granted by us to the accused as per their request and requirement.*
>>
>> ***I say that Accused 1 is a private limited company of which Accused 2, 3 and 5 are Directors and Accused 4 is the Director and authorised signatory of Accused 1 M/s Elite International (P) Ltd.—Imprest. At all material time relevant and relating to the complaint, Accused 2 to 5 were and are in charge of and responsible for the conduct of business of Accused 1 and are also looking after the day-to-day affairs of Accused 1.*** *It is further submitted that Accused 2 to 5 with Accused 1 are liable to be prosecuted and/or connived in the commission of the present offence, in their capacity as a Director/signatory of the said private limited company.*
>>
>> *I say that as narrated in para 4 Accused 2 to 5 being responsible for the affairs of Accused 1 i.e. private limited company are liable to be prosecuted for having committed a criminal offence in the event of failure on their part to comply with the requisitions contained in the statutory notice dated 3-11-2008, which was sent*

to them both under RPAD and UPC on 6-11-2008. I say that notice was received by all the accused on or about 8-11-2008 and notice sent through UPC are deemed to have been served. However, the accused have failed and neglected to make our payment under the abovesaid dishonoured cheques."

17**. There is no dispute that the appellant, who was wife of the Managing Director, was appointed as a Director of the Company—M/s Elite International (P) Ltd. on 1-7-2004 and had also executed a letter of guarantee on 19-1-2005. The cheques in question were issued during April 2008 to September 2008. So far as the dishonour of cheques is concerned, admittedly the cheques were not signed by the appellant.* ***There is also no dispute that the appellant was not the Managing Director but only a non-executive Director of the Company. 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." (emphasis in original)*

*****

19*. A Director of a company is liable to be convicted for an offence committed by the company if he/she was in charge of and was responsible to the company for the conduct of its business or if it is proved that the offence was committed with the consent or connivance* *of, or was attributable to any negligence on the part of the Director concerned (see State of Karnataka v. Pratap Chand [State of Karnataka v. Pratap Chand, (1981) 2 SCC 335 : 1981 SCC (Cri) 453]).*

***20**. In other words, the law laid down by this Court is that for making a Director of a company liable for the offences committed by the company under Section 141 of the NI Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the company."* (emphasis supplied)

10. The Coordinate Bench of this Court while dealing with the case of Ms. Poonam Singh, who is accused No.4 in the complaint filed by the Respondent, has not seen as to whether Ms. Poonam Singh is a Non-Executive Director or a regular Director. There is no discussion in the judgment of the Coordinate Bench regarding this aspect. In the present case it was specifically pleaded that the Petitioner is a non-executive Director and is not responsible for the day-to-day affairs of the company. Form DIR-12, which has been placed and the veracity of which has not been denied, shows that the Petitioner is a non-executive director. In the entire complaint there is no averment as to whether the Petitioner herein was involved in the loan transaction or not and as to whether the Complainant has dealt with the Petitioner at any point of time or not.

11. The Judgment passed by the Apex Court in Pooja (supra) has been followed by the Apex Court in <u>Sunita Palita v. Panchami Stone Quarry</u>, **(2022) 10 SCC 152**, wherein the Apex Court, while dealing with the case of an independent Non-Executive Director of a company has held that an independent Non-Executive Director do not participate in the day-to-day

affairs of the company.

12. In view of the above, this Court is of the opinion that the case of the Petitioner herein is distinguishable from that of Ms. Poonam Singh inasmuch as the Petitioner herein is a Non-Executive Director and without any specific averment against the Petitioner herein in the complaint filed by the Respondent herein as to whether the Petitioner herein is involved in the loan transaction or not and as to whether the Complainant has dealt with the Petitioner at any point of time or not, the complaint against the Petitioner herein cannot be permitted to continue. Accordingly, the complaint qua the Petitioner herein is quashed.

13. The petition is disposed of along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

SEPTEMBER 10, 2024
Rahul