IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 4525 OF 2002

1. Uday Madhu Rawal
   res. at 5, Hindu Colony Rd,
   Parvati Villa, 1st Floor,
   Dadar (E), Mumbai 14.

2. Mr. Vinay Surendra Shah
   res. at 201, Indiara Apartment,
   Car Michael Road,
   Mumbai 400 026

3. Mr.Viki Vijay Taksali
   res. at 6, Venu Apartment,
   Devi Dayal Road,
   Mulund (W),
   Mumbai 400 080 ..Applicant

v/s.

1. The State of Maharashtra.

2. Smt. Rita Anwar Khan
   res at 72/2442 Nehru Nagar,
   Kurla (E), Mumbai 400 024 ..Respondents

Mr. Husayn Kopty i/b. Subodh Desai for the Applicant
Mrs. Veera Shinde APP for the Respondent-State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : DECEMBER 05, 2015.

ORAL JUDGMENT.

1. This is an application filed under Section 482 of Cr.P.C. filed by the applicants, original accused nos.2, 5 and 7 for quashing the proceeding in C.C.No. 221/S/2002 pending on the file of the learned Metropolitan Magistrate's 34th Court, Vikhroli, for offence under Section 138 of the Negotiable Instruments Act.

2. Shri. Kopty, the learned Counsel for the applicant has submitted that the complaint does not contain any averment as regards the role played by the aforesaid applicant in commission of the said offence. Relying upon the decision of the Apex Court in ***Gunmala Sales Pvt. Ltd. vs. Anu Mehta and Ors. Dated 17.10.2014,*** submits that in the absence of basic averments against the applicants, they cannot be prosecuted for offence under Section 138 of the Negotiable Instruments Act.

3. I have perused the records and considered the submissions advanced by the learned Counsel for the applicant and the APP for

the state. The records reveal that the respondent no.2 herein had lodged a complaint under Section 138 of the Negotiable Instruments Act against M/s. Pharma Off-set Ltd., (now known as M/s. Pharmacom (India) Ltd.) being the accused no.1 and six others. The present applicants are accused no.2, 5 and 7 in the said complaint. The complainant had alleged that all the accused are the Directors and partners of the firm known as M/s. Pharmacom (India) Ltd. The complainant has further stated that the accused no.1 firm had availed from her loan of Rs.3 lakhs and had issued a cheque bearing No.300854 towards repayment of the said loan. It is stated that the cheque was dishonoured with endorsement "refer to drawer". The statutory notice which was issued to the said firm and other accused has returned unclaimed. Since the accused no.1 firm and the other Directors did not pay the amount, the complainant filed complaint under Section 138 of the Negotiable Instruments Act.

4. It is pertinent to note that the applicants herein are prosecuted for the offence allegedly committed by the accused no.1 firm. Section 141 of the Negotiable Instruments Act which deals with the

offence commited by the companies and firms reads as under:-

> "141. **Offences by companies-** (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was incharge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.
>
> Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due deligence to prevent the commission of such offence.
>
> [Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter]
>
> (2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer shall also be deemed to be guilty of tht offence and shall be liable to be proceeded agaisnt any punished accordingly.
>
> *Explanation* _ For the purpose of this section-
>
> (a) "Company" means any body corporate and

includes a firm or other assoacition of individuals; and
(b) “director” in relation to a firm, means a partner in the firm”

5. A plain reading of this section indicates that a person can be held vicariously liable for the offence committed by the company or firm only if at the time the offence was committed, such a person was incharge or and was responsible to the company or the firm for conduct of the business of the company, as well as the company.

6. In ***SMS Pharmaceuticals Ltd. vs. Neeta Bhalla & Anr. (2005) 8 SCC 89*** the following questions were referred to the Three Judges Bench of the Apex Court :

“a) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfils the requirements of the said section and it is not necessary to specifically state in the complaint that the person accused was in charge of, or responsible for, the conduct of the business of the company.

b) Whether a Director of a company would be deemed to be *in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.*

c) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and/or the Managing Directors or Joint Managing Director who admittedly would be incharge of the company and responsible to the company for conduct of its business would be proceeded against ."

7. The Bench of the Supreme Court consisting of Three Honourable Judges has answered the said three questions as under:

"10. ….

a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section [4] and has to be made in a complaint. Without this averment being made in a complaint, the requirments of Section 141 cannot be said to be satisfied.

b) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a Director of a company is not sufficient to make the person liable under Section 141 of the Act. A Director in a company cannot be deemed to be incharge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases.

c) The answer to Question c) has to be in the affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsinble for the conduct of business of the company. Therefore, they get covered under Section 141 . So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."

8. These principles have been reiterted in ***Pooja Devidasani v. State of Maharashtra & Anr. Cri. Appeal 2604-2610 of 2014 and Gunmala Sales Pvt. Ltd. vs. Anu Mehta and Anr. 2015 (1) SCC 103***. In the instant case, the complaint does not contain the basic averments that the applicants herein were the Directors of the accused no.1 firm or that they were incharge of and were responsible to the company or the firm for the conduct of business of the company. In the absence of such basic averments, the applicants cannot be prosecuted for the offence under Section 138 and 141 of the Negotiable Instruments Act.

9. Under the circumstances and in view of the discussion supra, the application is allowed.

10. The proceeding in C.C.No.221/S/2002 pending before the learned Metropolitan Magistrate's 34th Court, Vikhroli, Mumbai is quashed and set aside qua the petitioners.

(ANUJA PRABHUDESSAI, J.)