IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 224 OF 2015

Suresh Anandrao Pawar & Ors. .. Applicants

v/s.

Gulf Oil Corporation & Ors. ..Respondents

Mr. Sandip R. Karnik a/w Himanshu Pradhan for the applicants
Mr. M.S. Dhavale for the respondent no.1
Mr. Rajesh More, APP for respondent State

CORAM: SMT. ANUJA PRABHUDESSAI, J.
DATED: 14th OCTOBER, 2015.

P.C.

1. Heard the learned Counsels for the respective parties. Rule. By consent, rule is made returnable forthwith.

2. By this application filed under Section 482 of the Cr.P.C., the applicants have challenged the order dated 10.06.2013 whereby the learned Metropolitan Magistrate, 28th Court, Esplanade, Mumbai issued process against the applicants for offence under Section 138 of the Negotiable Instrument Act.

3. The respondent no.2 had lodged a complaint under Section 138 of the Negotiable Instrument Act alleging that the complainant company had supplied lubricant oil to the accused no.1 company under two invoices for total sum of Rs.10,08,784/-. It was alleged that the accused no.2 is the Managing Director, whereas the applicants being the accused nos. 3, 4 and 5 were the directors / authorized signatories of the accused no.2 company. It is the case of the complainant that the Managing Director i.e. accused no.2 had issued cheque for Rs.10 lakhs towards the price of the lubricant oil. The said cheque was dishonoured with an endorsement 'payment stopped by drawer'. A statutory notice was issued to the company and the Managing Director and other Directors. The accused no.1 company and the Directors did not pay the cheque amount and hence complaint is lodged u/s 138 of the Negotiable Instrument Act.

4. By the impugned order dated 10.06.2013, the learned Magistrate issued process against the accused no.1 company, Managing Director and other Managing Directors. Being

aggrieved by the said order, the applicants being accused nos. 3, 4 and 5 have filed the present application for quashing the said order for issuance of process.

5. The learned Counsel for the applicants has submitted that the complaint does not contain basic averments as required under Section 141 of the Negotiable Instrument Act. He further submitted that the applicants are non-executive Directors and were not responsible for day-to-day conduct of the company. He submitted that the applicants are not liable to be prosecuted under Section 138 of the Negotiable Instrument Act.

6. The learned Counsel for the respondent has submitted that the averments in paragraph 2 of the complaint, essentially meet a requirement of Section 141 of the Negotiable Instrument Act. He has relied upon the judgment in the case of ***Tamil Nadu News Print & Papers Ltd. Vs. D. Karunakar & Ors. 2015 SCC 741***. He has placed on record, copy of the form 32. He has further submitted that the form 32, cannot be relied upon as it does not

disclose the date on which the designation of the Directors were changed as non-executive director.

7. I have perused the records and heard the learned Counsels for the respective parties.

8. In the case of ***SMS Pharmaceuticals Ltd. Vs. Neeta Bhalla and Anr. AIR 2005 SC 3512***, the Apex Court has held, which reads as under :-

> *"19(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 141 and has to be made in a complaint."*

9. In the case of ***Gunmala Sales Pvt. Ltd. V/s. Anu Mehta & Ors. AIR 2015, SC 1072***, the Apex Court after considering the decision in the case of *SMS Pharmaceuticals Ltd. (Supra)* and several other judgments, summarised law, which reads as under :-

> *"33. We may summarize our conclusions as follows:*
>
> *a) Once in a complaint filed under Section 138 read with Section 141 of the NI Act the basic averment is made that the Director was in charge of and responsible for the*

conduct of the business of the company at the relevant time when the offence was committed, the Magistrate can issue process against such Director;

b) If a petition is filed under Section 482 of the Code for quashing of such a complaint by the Director, the High Court may, in the facts of a particular case, on an overall reading of the complaint, refuse to quash the complaint because the complaint contains the basic averment which is sufficient to make out a case against the Director.

c) In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about role of the Director in the complaint. It may do so having come across some unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of the process of the court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an arm-twisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out. In the absence of such evidence or circumstances, complaint cannot be quashed;

d) *No restriction can be placed on the High Court's*

> *powers under Section 482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of the Court. There are no fixed formulae to be followed by the High Court in this regard and the exercise of this power depends upon the facts and circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but, nothing prevents it from taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director.*

10. It is thus, well settled that in order to fasten vicarious liability in terms of Section 141 of the Negotiable Instrument Act, it is necessary to make basic averments in the complaint that at the relevant time, the director was incharge and responsible for the conduct of the company. In the instant case, the averments in the complaint read as under :-

> *"2. …. I say that the accused no.1 is a Limited Company of which accused no.2 is Managing Director and accused no. 3 to 5 are its Directors / authorized signatories and all are in control, manage and responsible and liable for day to day affairs and business conduct of accused no.1 and having their addresses as stated in the cause title above."*

11. It is to be noted that the cheque in question was issued by the accused no.2, who was the Managing Director of the accused no.1 company. As can be seen from form 32, the accused nos. 3 to

5 are non-executive Directors. There are no averments in the complaint that they were incharge of and responsible for the conduct of the business of the company **at the time the offence was committed**. In the absence of such specific averments, these applicants cannot be prosecuted under Section 138 of the N.I. Act with the aid of Section 141.

12. Under the circumstances, the application is allowed. The impugned order dated 10.06.2013 passed by the learned Metropolitan Magistrate 28th Court, Esplanade, Mumbai (transferred from learned Metropolitan Magistrate 48th Court, Andheri, Mumbai) in C.C. No.2056/SS/2014 (old C.C. No.1081/SS/2013) issuing process against the accused is quashed and set aside qua the applicants. Rule is made absolute.

(ANUJA PRABHUDESSAI, J.)