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IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION (APL) NO. 337 OF 2014

Gaurav Vijay Bhatia
Aged about 45 years,
22, Sita Mahal, B. D. Petit Road,
Near Parsee General Hospital,
Mumbai – 400 036. … APPLICANT
(Original Accused No. 3)

VERSUS

1. Ramnath P. Subramaniam,
302, Mahalaxmi Apartment,
Rajkamal Studio Compound,
Rajkamal Lane, Parel
Mumbai – 400 012.

2. State of Maharashtra. … RESPONDENTS

…..........

Mr Manoj S. Mohite, Advocate i/b Mr. Amol J. Phoujdar, Advocate for the applicant
Respondent No. 1 in-person absent.
Mrs. A. A. Mane, APP for respondent/State

…...........

CORAM : **V. L. ACHLIYA, J.**

RESERVED ON : 20/4/2015
PRONOUNCED ON : 14/08/2015

JUDGMENT:

. Rule. Rule made returnable forthwith. By consent, taken up for final disposal at the stage of admission.

2. The applicant/accused No. 3 in the complaint has filed this application u/s 482 of Code of Criminal Procedure (Cr.P.C.) to set aside the order of issuance of process dt. 6/1/2014 passed in Criminal Complaint Case No. 3752/SS/2013, by Metropolitan Magistrate, 7th Court at Dadar, Mumbai

and further to quash the said criminal proceedings to the extent of applicant.

3. Few facts leading to filing of the present application are as under :

The complainant (respondent No. 1) herein filed criminal complaint u/s 138 r/w 141 of the Negotiable Instruments Act, 1881 (in short “NI Act”) as against accused No. 1 – Managing Director of M/s. Tricom India Limited and three others, which include the present applicant as Director of accused No. 4 – Company. In the complaint filed, the complainant has alleged that in discharge of liabilities of legitimate dues on account of part payment towards full and final payment of I.C.D. (Inter Corporate Deposit) Loan / re-payment of the loan by the accused to complainant, the original accused No. 4 – Company had issued cheques to the complainant. Towards the repayment of loan, accused No. 4 – Company issued four cheques viz. Cheque bearing No. 009229 dt. 25.6.2013 for Rs. 2,00,000/-, Cheque bearing No. 009230 dt. 25.7.2013 for Rs. 2,00,000/-, Cheque bearing No. 000231 dt. 25.8.2013 for Rs. 2,00,000/- and Cheque bearing No. 000232 dt. 25.9.2013 for Rs. 2,00,000/- drawn and payable from the account of accused with the Axis Bank Ltd, Kurla (W), Mumbai – 400 070. The cheques were issued on behalf of accused No. 4 under the signature of authorized signatory. Out of four cheques, three cheques were presented for realization on 31/8/2013 and fourth last one was presented for realization on 25/9/2013 with HDFC Bank Ltd, Parel Branch, but same were dishonoured by bankers of accused with endorsement “funds insufficient” and was communicated vide memos dt. 3/9/2013 and 26/9/2013, respectively. According to the complainant though he has given considerable time, the amount was not paid. Therefore he issued notice on 27/9/2013 to all the accused through his Advocate. The notice issued by Regd. A.D. and Speed Post was duly served upon accused Nos. 1 to 3 on 01/10/2013 and accused No. 4 - Company on 30/9/2013. It appears from the complaint that, accused No. 3 in the complaint sent reply dt.

11/10/2013 through his Advocate denying his liability, as Exh. H to complaint. Since the payment towards the cheques dishonoured was not made by the accused, the complainant has filed complaint. The complaint appears to be filed on 11/11/2013. Learned Metropolitan Magistrate on consideration of the complaint documents filed on record pleased to issue process u/s 138 r/w 141 of the NI Act, against the accused persons making it returnable on 26/02/2014. Being aggrieved by the said order, the applicant/accused No. 3 has filed the present application u/s 482 of the Code of Criminal Procedure to set aside the order passed by Ld. Metropolitan Magistrate and further to quash the criminal proceedings to the extent of the applicant.

4. I have heard the submissions advanced by Mr Manoj S. Mohite, learned Counsel appearing on behalf of the applicant and Mrs Mane, learned APP for respondent/State. Respondent No. 1 in-person has not caused his presence, though served.

5. By referring the contents of the complaint filed by the complainant, the learned Counsel for the applicant has contended that on the face of the complaint filed, no *prima facie* case has been made out for issuance of process u/s 138 r/w 141 of NI Act, as against the applicant/accused No. 3. By referring the provisions of Section 141 of NI Act, the learned Counsel has submitted that, in order to attract the vicarious liability u/s 141 of NI Act, it is obligatory on the part of the complainant to specifically plead as to how and in what manner the accused was guilty of commission of offence u/s 138 r/w 141 of the NI Act. It is pointed out that the facts pleaded in the complaint nowhere make out any case to attract the vicarious liability of the applicant for the alleged dishonour of cheque and commission of offence u/s 138 of NI Act. It is submitted that, in order to attract offence u/s 138 r/w 141 of NI Act, there must be specific averments. It is not sufficient to make a bald statement in complaint that the Director

i.e. accused in the complaint is incharge or/and responsible for the conduct of the business of the Company. In support of the contention that the averments made in the complaint are not sufficient to attract the offence u/s 138 r/w 141 of NI Act as against the applicant/accused No. 3, the learned Counsel has relied upon the decision of the Hon'ble Apex Court in the case of ***National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal & Anr.*** reported in *2010 ALL MR (Cri) 921 (S.C.)* and further relied upon the decision of the Hon'ble Apex Court in the case of ***Pooja Ravinder Devidasani Vs. State of Maharashtra*** reported in *2015 ALL MR (Cri) 419 (S.C.)*. Learned Counsel for the applicant has further assailed the order passed by the learned Metropolitan Magistrate with contention that the order has been passed in a gross non-application of mind and without any material available on record. Learned Counsel has submitted that, neither the complaint nor the documents filed by the complainant remotely disclose that the applicant was concerned with the day-to-day affairs of the Company or anyway responsible for the conduct of the business of the Company. In the entire complaint, the complainant has not attributed any role to the applicant except alleging that he is one of the Directors. The learned Counsel submitted that the accused No. 3 has responded to the notice. In the notice sent by applicant to respondent No. 1, it has been specifically informed that the present applicant is no more Director of the Company, still the process was issued against the applicant / accused No. 3.

6. In order to appreciate the submissions advanced, I have thoroughly perused the averments made in the complaint so as to attract the vicarious liability of the applicant / accused No. 3 in commission of offence u/s 138 r/w 141 of NI Act. In my view, on the face of the complaint, no case for issuance of process u/s 138 r/w 141 of NI Act have been made out against the applicant / accused No. 3. In this context, it is useful to refer to the averments made in para Nos. 2, 3, 5, 7, 11 and 14.

“2) I say that pursuant to valuable consideration and in discharge of liabilities of legitimate dues on account of part payment towards full and final payment of I.C.D. (Inter Corporate Deposit) Loan/Repayment of Loan by the accused to me the Complainant. That towards the payment of the said dues, on account of part payment towards full and final payment of I.C.D. (Inter Corporate Deposit) Loan/Repayment of Loan accused are liable to pay a sum of Rs. 11,00,000/- therein, the Accused above issued part payment against said final payment by four Cheques in discharge of debts in favour of me drawn on Axis Bank Ltd, Kurla (W), Mumbai – 400 070 the details whereof is set out hereunder: -

Cheque No.	Date	Amount
009229	25.6.2013	Rs. 2,00,000/-
009230	25.7.2013	Rs. 2,00,000/-
000231	25.8.2013	Rs. 2,00,000/-
000232	25.9.2013	Rs. 2,00,000/-

		Rs. 8,00,000/-

Copies of the above Cheques bearing No. 009229 dated 25.6.2013 for Rs. 2,00,000/-, Cheque No. 009230 dated 25.7.2013 for Rs. 2,00,000/-, Cheque No. 000231 dated 25.8.2013 for Rs. 2,00,000/- and Cheque No. 000232 dated 25.9.2013 for Rs. 2,00,000/- drawn on Axis Bank Ltd, Kurla (W), Mumbai – 400 070 are annexed as Exhibit – A to A-3 with this Complaint.

3) I say that the three chques of aforesaid Cheques was deposited on 31.8.2013 for realization with Banker HDFC BANK Ltd, Parel branch which is annexed as exhibit – B and the same was returned dishonoured by the Banker for want of funds for the reasons “Funds Insufficient”, as the Accused had not arranged for the funds in his Account. Hereto annexed the copies of the Cheque Return Memos dated 3.9.2013 issued by Axis Bank Ltd Mumbai service Branch to Axis Bank Ltd Lower parel as Exhibit C to C-2 & the cheque return memos dated 3.9.2013 of HDFC Bank Ltd., Mumbai clearing branch to me through my banker H.D.F.C. Bank Ltd which are exhibits – D & D-2 respectively. I say that the cheque return memos received by me on 6.9.2013.

5) I say that after receipt of dishonoured Cheques from the Banker, my Advocate by his Notice dated 27.9.2013 recorded all the aforesaid facqts and called upon the Accused to pay the *amount of the said dishonoured Cheques of Rs. 8,00,000/- within the statutory period. Hereto annexed and marked as Exhibit – G the copy of said Advocate's Notice dated 27.9.2013.*

7) I say that the said Speed post packet & Registered A/D Packets addressed to the Accused No. 1 at the above address was received by the accused No. 1 on 1.10.2013 and the Registered A.D. on or around 1.10.2013 and given the Speed post acknowledgement on 1.10.2013. Hereto to annexed and marked as Exhibit – H-2 & H-3, the acknowledged copies of Speed post acknowledgement dated 1.10.2013 & Registered Postal Acknowledgement by the accused No. 1.

11) I say that the Accused No. 3 sent the reply dated 11.10.2013 through his advocate and denied (without furnishing any document in support) his liability in the present matter which reply is annexed as Exhibit – I.

14) I say that the Complaint is not barred by Law of Limitation as the demand notice dated 27.9.2013 sent by Speed post & Registered A. D. n 27.9.2013 to all the accused after the receipt of the dishonoured cheques on 3.9.2013 & 26.9.2013 and the said notice sent by Speed post envelope received by the accused No. 1 on 1.10.2013 and the other accused received same either on 30.9.2013 or on 1.10.2013. I say that the notice addressed to the accused at the Accused No. 4's Office address by Speed post returned with remark "left" as per the endorsement dated 28.9.2013 and this Hon'ble Court has jurisdiction to entertain and try this Complaint as the Complainant is residing within the jurisdiction of this Hon'ble Court and the demand notice sent from the residential address of the Complainant demanding the dishonoured cheques amount and the cause of action arises are within the jurisdiction of this Hon'ble Court.

7. Thus, bare perusal of the aforesaid averments noway satisfy the ingredients of Section 141 of NI Act, to attract the vicarious liability of the applicant/accused No. 3. The entire averments made in the complaint if read in its totality, then at the most the role attributed to the applicant in commission of offence is that he was one of the Directors of the Company at the time of alleged transaction. In the instant case, the fact is not in dispute

that the cheques in question have not been signed by applicant / accused No. 3. So also the applicant / accused No. 3 has not been described as Managing Director or person in-charge of and responsible for the conduct of business and affairs of accused No. 4–Company. According to the complainant, the applicant was Non-executive Director and he has resigned way back in the year 2012 i.e. on 26/3/2012, much before the cause of action arose for filing of the complaint. Section 141 of NI Act, being a penal provision creating vicarious liability needs to be strictly construed. In this context, it is useful to refer the decision of the Hon'ble Apex Court in the case of **Pooja Ravinder Devidasani** (supra) and in particular paragraph 17 thereof, wherein it is held as under:

> *"17. …......... 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 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 N.I. 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 N.I. Act. In National Small Industries Corporation, [2010 ALL MR (Cri) 921 (S.C.)] (supra) this Court observed:*
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> *"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. 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 fulfillment of the requirements under Section 141.

8. In paragraph 28 and 30 of the judgment in the case of Pooja (supra), the Apex Court has held as under :

> *"28. In the entire complaint, neither the role of the appellant in the affairs of the Company was explained nor in what manner the appellant is responsible for the conduct of business of the Company, was explained. From the record it appears that the trade finance facility was extended by the Respondent No. 2 to the default Company during the period from 13th April, 2008 to 14th October, 2008, against which the Cheque were issued by the Company which stood dishonoured. Much before that on 17th December, 2005 the appellant resigned from the Board of Directors. Hence, we have no hesitation to hold that continuation of the criminal proceedings against the appellant under Section 138 read with Section 141 of the N. I. Act is a pure abuse of process of law and it has to be interdicted at the threshold.*
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> *30. Putting the criminal law into motion is not a matter of course. To settle the scores between the parties which are more in the nature of a civil dispute, the parties cannot be permitted to put the criminal law into motion and Courts cannot be a mere spectator to it. Before a Magistrate taking cognizance of an offence under Section 138/141 of the N.I. Act, making a person vicariously liable has to ensure strict compliance of the statutory requirements. The Superior Courts should maintain purity in the administration of Justice and should not allow abuse of the process of the Court. The High Court ought to have quashed the complaint against the appellant which is nothing but a pure abuse of process of law."*

9. In the light of discussion made in foregoing paras, I am of the view that the complaint filed by the complainant makes out no case for issuance of process u/s 138 r/w 141 of N.I. Act, against the applicant/accused No. 3. Ld. Metropolitan Magistrate appears to have passed the order mechanically. Learned Metropolitan Magistrate has not taken any pains to read the complaint and the documents relied on to find out as to whether a *prima facie* case has been made out or not to attract the vicarious liability of the applicant as contemplated u/s 138 r/w 141 of NI Act. No doubt, the detailed enquiry is not contemplated at the stage of exercise of powers under

Section 204 of Cr.P.C., but, certainly the magistrate is bound to consider as to whether the facts averred in the complaint and the documents, if any, relied make out a *prima facie* case for issuance of process u/s 138 r/w 141 of NI Act. It is pertinent to note that in the instant case, there are specific averments made in the complaint itself in paragraph 11 that the accused No. 3 had replied the notice and denied his liability in the matter annexed as Exhibit I to complaint. The copy of that reply appears to have been produced along with the complaint as Exh. I. However, the Magistrate has not taken any pains to go through the contents of the said notice. It is the say of the applicant that, the notice was duly replied by him through his Advocate on 11/10/2013. In reply sent to the notice, the applicant has specifically stated that the applicant was appointed as Non-executive Director and he had resigned from the Company on 26/3/2012, which was accepted by the Board of Directors and also intimated in prescribed proforma i.e. Form No. 32 to the Registrar of the Company. Not only this, the applicant has also informed about recording of this fact in the 20th Annual Report of accused No. 4 – Company for the financial year 2011-12. *In spite* of that the learned magistrate has passed the order of issuance of process as against the applicant / accused No. 3. The order passed by learned Metropolitan Magistrate, which is impugned in this petition, reads as under:

> *“ORDER BELOW EX-1*
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> *1. Complainant is present along with counsel. Complainant has filed affidavit Exh. 3 by way of verification in view of recent judgment delivered by Hon'ble Bombay High Court in a case between Rajesh B. Chalke Vs State of Maharashtra and 1 other reported in 2011(1) Mh.L.J. 244.*
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> *2. Perused the complaint, documents attached there to and the statement of the complainant on oath. Acording to the complainant, accused No. 4 is a Private Limited Company. The accused no. 1 is the Managing Director of accused No. 4. The accused No. 2 and 3 are the directors and Authorized Signatories of accused no. 4. The accused Nos. 1 to 3 are all persons who were in charge of and responsible for the conduct of the business of the accused No. 1, its day-to-day*

affairs and administration and functioning at all relevant times and at the time of commission of offence. Complainant has reiterated the case as per complaint averments in the affidavit Exh. 3. The complainant has made out prima facie case against the accused for an offence punishable under Section 138 r/w 141 of Negotiable Instruments Act. Hence issue process agaisnt the accused for the offence punishable under Section 138 r/w 141 of Negotiable Instruments Act, returnable on 26.02.2014. Complainant to supply all the documents tot he accused. Summons to be served through R.P.A.D. or Speed Post. Case be tried as summons case.

Sd/-
(R. B. Bhagwat)
Metropolitan Magistrate,
7th Court, Dadar, Mumbai.

Mumbai.
Date : 06.1.2014."

Thus, the bare perusal of order passed by Metropolitan Magistrate leads to conclusion that the order has been passed without perusing the contents of complaint and documents relied in support of complaint particularly the reply notice in reply sent by applicant/accused No. 3 on 11/10/2013, which was produced as Exhibit H to complaint. It is a glaring case of non-application of mind. Hence, in my view, the order is not sustainable in law.

10. In the light of the discussion made in the foregoing paragraphs, I have no hesitation to hold that, on the face of the complaint, no case was made out for issuance of process u/s 138 r/w 141 of the NI Act as against the applicant/accused No. 3. The order passed by the learned Magistrate appears to be passed without application of mind and due consideration of averments made in the complaint. The averments made in the complaint make out no case to attract the vicarious liability of the applicant / accused No. 3 for commission of offence u/s 138 r/w 141 of NI Act.

11. The applicant has approached with a case that he was Non- executive Director of the Company. He has resigned as a Director of the

Company on 26/3/2012. The resignation of the applicant was accepted in the Board of Directors meeting held on 14/5/2012. The fact in respect of the resignation of the applicant was duly intimated in a prescribed proforma i.e. Form No. 32, to the Registrar of the Company on 14/5/2012. This was also reflected in the 20th Annual Report of the Company for the fiscal year 2011-12 published on 24/11/2012. In support of this submission, the applicant has produced on record the following documents.

(i) Copy of resignation.
(ii) Copy of Resolution dt. 14/5/2012 passed in the meeting of Board of Directors.
(iii) Copy of notice given to the Registrar of the Company in a prescribed proforma i.e. Form No. 32.
(iv) Copy of 20th Annual Report of the Company for the financial year 2011-12.
(v) Copy of reply notice dt. 11/10/2013 sent to complainant through his Advocate by the applicant.

12. As per the complaint, the cause of action for filing of the complaint arose on 11/11/2013. There is no dispute as to the fact that the cheques in question were issued on 25/6/2013, 25/7/2013, 25/8/2013 and 25/9/2013. Those were dishonoured on 3/9/2013 and 26/9/2013. The notice of demand was issued on 27/9/2013 and cause of action for filing of complaint arose on 11/11/2013. Thus, the act of dishonour of cheque has taken place much after the resignation tendered by the applicant / accused No. 3. Learned Counsel for the applicant has placed reliance upon the decision of the Hon'ble Apex Court in the case of ***Anita Malhotra Versus Apparel Export Promotion Council and Another*** reported in *(2012) 1 SCC 520.* In a case based upon similar facts, the Apex Court has held that in exercise of jurisdiction u/s 482 of Cr.P.C., if on the face of documents relied upon by accused which are beyond suspicion of doubt, if it is considered that accusation against accused cannot stand, the High Court can consider such documents in exercise of jurisdiction u/s 482 of Cr.P.C. In paragraph 20 of the said Judgment, the Hon'ble Apex Court has observed as under :

> "20. *As rightly stated so, though it is not proper for the High Court to consider the defence of the accused or conduct a roving enquiry in respect of merits of the accusation, but if on the face of the document which is beyond suspicion or doubt, placed by the accused and if it is considered that the accusation against her cannot stand, in such a matter, in order to prevent injustice or abuse of process, it is incumbent on the High Court to look into those document/documents which have a bearing on the matter even at the initial stage and grant relief to the person concerned by exercising jurisdiction under Section 482 of the Code."*

13. Thus, in view of the fact that the document placed on record by the applicant, the genuineness of which is not in doubt and disputed by respondent No. 1, clear case has been made out that the applicant has resigned as a Director of accused No. 4 **-** Company much prior to dishonour of cheque and cause of action for filing of the criminal complaint. The defence of the applicant is duly supported with the documentary evidence. Therefore, the order of issuance of process u/s 138 r/w 141 of NI Act, deserves to be set aside and proceeding is liable to be quashed to the extent of applicant.

14. I am, therefore, inclined to allow the application in terms of prayer clause 'A' to the extent of applicant / accused No. 3 and same is accordingly allowed.

15. Rule made absolute in above terms with no order as to costs.

[V. L. ACHLIYA, J.]