

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 1482 OF 2015
WITH
CRIMINAL WRIT PETITION NO. 1483 OF 2015
AND
CRIMINAL WRIT PETITION NO. 1484 OF 2015

Dhananjay Datar & Ors.

..Petitioners

v/s.

The State of Maharashtra & Anr.

..Respondents

Mr. S.N.Raj for the Petitioners.

Mr.Girish Kulkarni a/w. Hiren Mehta, for the Respondent.

Mrs. R.V.Newton, APP for the State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
RESERVED ON : SEPTEMBER 07.2015.
JUDGMENT DATED : OCTOBER 13, 2015.

JUDGMENT.

. Rule. Rule made returnable forthwith. With the consent of parties, matters are taken up for hearing.

1. The petitioners in Writ Petition No.1482 of 2015, WP/1483/2015 and WP/1484/2015 are accused nos. 5, 4 and 2 in C.C.Nos. 843/SS/2013, 451/SS/2013 and 1145/SS/2013 filed before the Metropolitan Magistrate's 23rd Court, at Esplanade, Mumbai, under Section 138 of the Negotiable Instruments Act. By these petitions, the aforesaid petitioners/ accused nos. 4, 5 and 2

have challenged the order of issuance of process under Section 138 of the Negotiable Instruments Act.

2. Brief facts leading to these petitions are as under:

The complainant bank/respondent no.2 had filed the complaints viz. Complaint No.843/SS/2013, 451/SS/2013 and 1145/SS/2013 against the aforesaid petitioners and others for offence under Section 138 of the Negotiable Instruments Act. The respondent no.2 company had alleged that it had extended short term loan facility to the accused no.1 ABG Shipyard Ltd., a company of which the petitioners herein are the Chairman, Executive Director and Whole Time Director/ Chief Financial Officer, and as such were responsible for and incharge of day to day business of the accused no.1 company. The respondent no.2 bank had alleged that the accused no.1 company through accused nos.6 and 7 had issued three cheques dated 15.1.2013 for Rs.66,67,00,000/- towards the partial repayment of the liability facility. The said cheques were dishonoured for "Insufficient Funds". A statutory notice was issued to the company as well as the petitioners and the other accused. The

said notice was duly received by the petitioners and other accused. Since the accused failed and neglected to pay the amount, the respondent no.2 bank filed complaint under Section 138 of the Negotiable Instruments Act.

3. The learned Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai took cognizance of the complaints and issued process against the petitioners and other accused for the offence under Section 138 of the Negotiable Instruments Act. Aggrieved by the said order, the petitioners filed Revision Application Nos.1124 of 2014, 1123 of 2014 and 1125 of 2014 before the learned City Civil & Sessions Court, Mumbai. The said revision applications were dismissed vide order dated 16th March, 2015. The petitioners have therefore invoked the powers of this court under Section 482 of Cr.P.C. for setting aside the order dtd. 16th March, 2015 and quashing the process issued against them for the offence under Section 138 a/w. Section 141 of the Negotiable Instruments Act.

4. Mr.Raj, the learned Counsel for the petitioners has submitted

that the petitioners are not the signatories to the agreement or to the cheque. He has submitted that there are no averments in the complaints that the petitioners were incharge of and responsible for the day to day affairs and functioning of the company. He has submitted that no specific role has been attributed to the petitioners. On the contrary, the complaint proceeds on an assumption that being the Chairman, Executive Director, and Whole Time Director of the company, the petitioners were and are the persons responsible and incharge of day-to-day business of the company. The learned Counsel for the petitioners submitted that the complaint does not disclose essential ingredients of the offence to attract vicarious liability and in the absence of the averments as regards the specific role or overt act, the petitioners cannot be held to be vicariously liable for the said offence. He has placed reliance on the judgement of the Apex Court in case of *Pooja Devidasini vs. State of Maharashtra & Anr. Cri. Appeal No.2604-2610 of 2014*, *SMS Pharmaceuticals (2007) 4 SCC 70*, *National Small Scale Industries Corporation Ltd. vs. Harmeet Singh Paintal & Anr.*

(2010) 3 SCC 330, Shrikant Singh vs. North East Securities Ltd. & Anr. (2007) 12 SCC 788.

5. Mr. Hiren Mehta, the learned Counsel for the respondents has submitted that the complaint discloses the necessary averments. He has further stated that there is series of correspondence between the petitioners and the respondent no.2 bank, which clearly indicate that the petitioners were incharge and responsible for the day-to-day affairs of the company. He has submitted that the complaint has been filed only against those incharge and responsible persons for the affairs of the company, and as such the petition is not maintainable and is liable to be dismissed.

6. At the outset it may be mentioned that the petitioners who are the Directors of a company are arrayed as the accused with the aid of Section 141 of the Negotiable Instruments Act which reads as under:

“Section 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 in charge 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 diligence 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 by a company and it is proved that the offence 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 of the company, such director, manager, secretary or other officer shall also be

deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation.

— For the purposes of this section,—

(a) “company” means any body corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.]

7. 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 .”

8. 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 responsible 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.”

9. In the case of ***Gunmala Sales Pvt. Ltd. vs. Anu Mehta and Ors.*** Dated 17.10.2014 the Apex Court after considering the decision

in the case of SMS Pharmaceuticals (supra), and several previous judgments on the question has summarized the law as under:

33. “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. In the case of ***Pooja Devidasani vs. State of Maharashtra, Criminal Appeal No.2604-2610 of 2014***, the petitioner was a housewife and a Non-executive Director of the accused company. She had already resigned about two and half years before issuance of the cheques in question and this fact was known to the complainant. The Apex Court held that :

“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 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. “

11. The Apex Court examined the said case in the light of the principles laid down in National Small Industries Corporation vs. Harmitsingh Paintal & Anr. (2010)3 SCC 330, Girdhari Lal Gupta vs. D.H.Mehta & Anr. (1971) 3 SCC 189, State of Karnataka vs. pratap Chand & Ors. (1981) 2 SCC 335, Sabitha Ramamurthy & Anr vs. R.B.S.Channbasavaradhya (2006) 10 SCC 581, Pepsi Foods Ltd. &

Anr. Vs. Special Judicial Magistrate & Ors. (1998) 5 SCC 343, and Gunmala Sales Pvt. Ltd. vs. Anu Mehta & Ors. (Cri. Appeal No.2228 of 2014) and on the facts of the case has held that in the entire complaint neither the role of the appellant in the affairs of the company was explained nor in what manner the applicant was responsible for the conduct of the business of the company was explained. Considering the fact that the applicant had resigned much before the issuance of the cheque it was held that the continuation of the criminal proceeding against her would be a pure abuse of process of law and had to be interdicted at the threshold.

12. In a more recent judgment in ***Tamil Nadu News Print & papers Ltd. Vs. Karunakar & Ors. (2015) Scc Online SC 741*** the Apex Court has held that :

14. *It is an admitted position that simply because someone is a Director in a company, he cannot be held responsible in respect of a cheque issued on behalf of the company, but if the concerned Director is in-charge of and is responsible to the company for its conduct of business, he can be held to be guilty of the offence under Section 138 of the Act and*

therefore, the High Court ought not to have quashed the proceedings against such directors.”

On the facts of the case, the Apex Court set aside the quashing order as there was an allegation to the effect that accused nos.2 -10 were involved in day-to-day business of Accused no.1 Company.

13. Reverting to the present case, the complainant bank had instituted three complaint under 138 of N.I.Act for dishonour of three cheques viz.

(1) C.C.No.843/SS/2013 for dishonour of cheque no.334009 dt. 15.01.2013 for Rs.66,67,000/-.

(2) C.C.No. 451/SS/2013 for dishonour of cheque no.334008 dt.15.12.2012 for Rs.66,67,000/-.

(3) C.C.No.1145/SS/2013 for dishonour of cheque no.334010 dt. 15.02.2013 for Rs.66,66,000/-.

The relevant paragraphs which relate to the Directors of the company read as under:

“2.... The accused no.1 is a company incorporated under the Companies Act, 1956, having its registered address as mentioned in the cause title. The accused nos.2 to 7 are the Chairman, Managing Director, Executive Director and Whole Time Director and authorized signatories of Accused no.1 respectively. As such, being the Chairman, Managing Director, Executive Director and Whole Time Directors were and are the persons responsible and in charge of day to day business of the Accused No.1 viz. When the offence was committed. The Accused No.s6 and 7 being signatories of the cheques are aware of the transaction and therefore the accused nos.2 to 7 are liable to be prosecuted jointly or severally for having consented and/or connived in the commission of present offence in their capacity as the Chairman, Managing Director, Executive Director, Whole Time Director and authorized signatories of Accused no.1, further the offence is attributable to Accused Nos.2 to 7 on account of their neglect to ensure and make adequate arrangements to honour the cheque issued by Accused No.1 and further on account of the neglect of Accused No.1 to 7 to comply with the requisition made in the Demand Notice issued under the provisions of Section 138(c) of the Negotiable Instruments Act within the stipulated period. The

accused are therefore liable to be proceeded.

3. ...

4. *I say that the accused no.1 through accused nos.2 and 3 approached the complainant bank at its branch situated at Mumbai for a Short Term Loan facility for a sum of Rs.200 Crore to meet the expenditure of Four ORV Vessels being built at ABG Shipyard, after verifying the documents submitted the Complainant Bank vide its sanction letter dated 28th April, 2012 sanctioned the said facility for the purpose mentioned therein. ...*

5.

6.

7.

8.

9. *I say that the accused nos.1 to 7 were aware that the aforesaid cheque would be dishonoured for being “Funds Insufficient” and all the Accused, in active connivance mischievously and intentionally issued the aforesaid cheques in favour of the Complainant Bank.”*

14. The averments made in the complaint reveal that the petitioner no.3- Rishi Agarwal (A2) was the Chairman and Authorized signatory of the accused no.1 company. Being the chairman of the company, by

virtue of his designation he would be responsible for the day to day affairs of the company. Furthermore, the averments made in the complaint also reveal that the accused no.2 Rishi Agarwal had approached the complainant bank at its branch situated at Mumbai for short term loan facilities for a sum of Rs.200 crores to make the expenditure of 4 ORV Vessels being built at ABG Shipyard.

15. It is to be noted that the petitioners have contended that the accused no.2 was a non executive Chariman. At this stage, there is no unimpeachable and uncontrovertible material on record to indicate that the accused no.2 was a non-executive Chairman and that he was not concerned with the day to day affairs of the company. On the contrary the complaint attributes a specific role to this accused.

16. The learned Counsel for the petitioner has submitted that the fact that the accused no.2 had approached the complainant bank for short term loan facility can not *per se* lead to an inference that he was

incharge of the day to day affairs of the company. In this context reliance has been placed on the judgment of the Apex Court in the case of *K. Shrikant Singh Vs. North East Securities Ltd.(Supra)*. The said decision, in my view will not apply to the facts of the case in hand as in the said case before the Apex Court the complainant had not stated that the accused was responsible to the company for the conduct of the business of the company. The allegation contained in the complaint was that all the accused Directors had participated in the negotiations for obtaining financial help for the accused no.1. It was held that in the absence of specific claim, such a statement would not give rise to an inference that the appellant/accused was responsible for the day to day affairs of the company and it was further held that a vicarious liability on the part of a person must be pleaded and proved.

17. In the instant case, accused no.2 is stated to be a Chairman of the company and hence would be responsible for the day to day affairs of the company and in addition to the designation held by the accused no.2, the complainant has specifically averred that the

accused no.2 had approached the bank for short term loan facility. The designation of the accused no.2, coupled with these averments prima facie bring out the essential ingredients of the offence. A perusal of the complaint therefore demonstrates that the statutory requirements contained in Section 141 of the Negotiable Instruments Act have been complied with qua the accused no.2.

18. As regards the accused nos. 4 and 5 are concerned, the complaint states that the accused no.4 was an Executive Director whereas the accused no.5 was Whole Time Director, and **as such**, they are the persons responsible and incharge of the day to day business of accused no.1. The averments made in the complaint indicate that the complainant has inferred that being the Executive Director and Whole Time Director, the accused nos. 4 and 5 are responsible and incharge of the day to day business of the accused no.1 company. Needless to state that every Director cannot be deemed to be incharge and responsible for the conduct of the company. As it has been held by the Apex Court in the case of Gunmala (supra), it is necessary to specifically aver that the present accused was incharge of and responsible for the conduct of the business of the company. The law laid down by the Apex Court in the case of SMS Pharmaceuticals by a Bench of three Honourable Judges is not yet disturbed by a co-ordinate Bench. The requirement of making requisite averments will be applicable even in case of the Executive Director or Whole Time Director. In the instant case, there are no specific averments that these accused being the Directors

of the accused no.1 company were incharge of and were responsible for the conduct of the company. In the absence of such averments, the accused nos.4 and 5 cannot be made liable under Section 141(1) of the N.I.Act.

19. It is pertinent to note that the complainant had also averred that the offences are attributable to these accused on account of their neglect to ensure and make adequate arrangement to honour the cheque issued by the accused no.1 and to comply with the requisition made in the demand notice issued under the provisions under Section 138 (c) of the N.I.Act.

20. It is to be noted that Sub Section (2) of Section 141 is a deeming provision and would be attracted only if it is averred and proved that the offence has been committed with consent or connivance of or is attributable to any neglect on the part of those persons. In the instant case, apart from the spacious statement that the offence is attributable to accused nos.2 to 7 on account of their neglect to ensure and make adequate arrangement to honour the

cheque, there are no specific averments to show that the offence was committed with the consent or connivance of these accused or that they were liable to make the payment and that despite being liable to make the payment they had neglected to make the payment. In the absence of such averments, the respondent nos. 4 and 5 cannot be prosecuted with the aid of Section 141(2) of the Negotiable Instruments Act.

. Under the circumstances, and in view of the discussion supra, the petitions are partly allowed. The impugned order is set aside qua the petitioner nos.1 and 2 (Original accused no.5 and 4). Consequently the process issued against the accused nos.4 and 5 is quashed and set aside. The case will proceed against petitioner no.3 (Original accused nos.2) in accordance with law.

(ANUJA PRABHUDESSAI, J.)