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

CRIMINAL APPLICATION (APL) NO. 790 OF 2014

1. Vijay Khairatilal Bhatia
Aged about 72 years,
22, Sita Mahal, B. D. Petit Road,
Near Parsee General Hospital,
Mumbai – 400 036.
2. Hariom Baldevprasad Tulsiyan
Aged about 68 Years,
19-B, Lands End Society, Malbar Hill,
Near Elizabeth Hospital,
Mumbai – 400 006.
3. Gaurav Bhatia
Aged about 45 Years
22, Sita Mahal, B. D. Petit Road,
Near Parsee General Hospital,
Mumbai – 400 036.

... APPLICANTS

(Original Accused No.s 6, 8 and 10)

VERSUS

1. Mrs. Bela Kamlesh Ganeriwala,
Flat No. E-402, Amar Ambience,
Survey No. 61, Behind Empress Garden,
Ghorpadi, Pune – 411 001.
2. State of Maharashtra.

... RESPONDENTS

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Mr Manoj S. Mohite, Advocate i/b Mr. Amol J. Phoujdar, Advocate for the
applicants

Mr Vipul Shukla, Advocate for respondent No. 1.

Mrs. A. A. Mane, APP for respondent/State

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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 applicants/accused No. 6, 8 and 10 in the complaint have filed this application u/s 482 of Code of Criminal Procedure (Cr.P.C.) to set aside the order of issuance of process dt. 25/04/2013 passed in S.C.C. No. 3670/2012, by Jt. Judicial Magistrate F.C., Cantonment Court, Pune-1 and further to quash the said criminal complaint to the extent of applicants.

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 – M/s. Tricom India Limited and twelve other persons, which include the present applicants as Directors of accused No. 1 – Company. In the complaint filed, the complainant has alleged that the accused No. 1 was in need of financial assistance for the conduct of its business and, therefore, approached the complainant through accused Nos. 2 to 13, the Directors of accused No. 1 – Company, for the same. It is further alleged that, the complainant and the accused entered into an agreement on 20/4/2012 at Pune, by which the complainant agreed to advance accused No. 1 a loan of Rs. 47,00,000/- and as per the agreement, accused No. 1 availed the said loan of Rs. 47,00,000/- from the complainant. Towards the repayment of loan received, accused No. 1 issued four cheques to the complainant viz. cheques bearing No. 456316, 456318, 456314 drawn and payable from PMC Bank and 443678 drawn and payable from SBI Bank. According to the complainant, two cheques bearing No. 456318 of PMC Bank and Cheque No. 443678 of SBI Bank were issued by the accused No. 1 towards the interest against the loan taken by the accused. The cheque No. 456314 of PMC Bank dt. 17.10.2012 for an amount of Rs. 47,00,000/- when presented for realization with HDFC Bank, Shivaji Nagar, Pune 411 016, same was dishonoured by bankers of accused No. 1 – Company with

endorsement “account was closed”. It is also alleged in the complaint that, cheque bearing No. 443678 of SBI Bank dt. 30/9/2012 for an amount of Rs. 2,29,231/- when presented for realization with HDFC Bank, Shivaji Nagar, Pune 411 016, same was also dishonoured by bankers of accused No. 1 – Company with endorsement “payment stopped by drawer”. According to the complainant, though she has given considerable time, the amount was not paid. Therefore she issued notice dt. 3/11/2012 to all the accused through her Advocate, the receipt of which report of service/acknowledgement reveals that, she has sent letter to Postal Dept., to know the status of delivery of notice. 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 21/12/2012. Learned Jt. Judicial Magistrate on consideration of the complaint and documents filed on record, pleased to issue process u/s 138 of NI Act, against the accused persons making it returnable on 21/06/2013. Being aggrieved by the said order, the applicants/accused Nos. 6, 8 and 10 have filed the present application u/s 482 of the Code of Criminal Procedure to set aside the order passed by Ld. Jt. JMFC and further to quash the complaint to the extent of the applicants.

4. I have heard the submissions advanced by Mr Manoj S. Mohite, learned Counsel appearing on behalf of the applicants, Mrs Mane, learned APP for respondent/State and Mr. Vipul Shukla i/b Jayesh Vyas, learned Counsel for respondent No. 1.

5. By referring the contents of the complaint filed by the complainant, the learned Counsel for the applicants 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 Nos. 6, 8 and 10. 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 were 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 applicants for the alleged dishonour of cheques 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 Directors i.e. accused Nos. 6, 8 and 10 in the complaint are 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 applicants/accused No. 6, 8 and 10, 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 applicants has further assailed the order passed by the learned Jt. JMFC 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 applicants were 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 applicants except alleging that they are the Directors of the accused No. 1 – Company, still the process was issued against the applicants / accused Nos. 6, 8 and 10.

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 applicants / accused Nos. 6, 8 and 10 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 applicants/accused Nos. 6, 8 and 10. In this context, it is useful to refer to the averments made in para Nos. 3, 4, 5, 9, 10, 13, 14, 15, 16, 23 and 25.

- “3. That you the Accused No. 1 were in need of financial assistance and therefore approached my client through you the Accused No. 2 to Accused No. 13 who are the directors of the Accused No. 1 and at relevant times in charge of and were responsible to the company you Accused No. 1 for the conduct of its business and therefore the persons liable to be dealt with in accordance with law.*
- 4. That the complainant, Mrs. Bela Kamlesh Ganeriwala and the Accused, thus entered into an agreement dated 20-4-2012 in Pune by which the complainant agreed to pay Accused No. 1 a total amount of Rs. 47,00,000/- (Forty Seven Lacs) as a loan. Hereto marked and annexed as Sr no 1 is the copy of the Agreement dated 20-4-2012.*
- 5. That according to the agreement dated 20-4-2012, Accused No. 1 availed a loan of total 47,00,000/- (Forty Seven Lacs) from the complainant.*
- 9. That against the loan given, Accused No. 1 issued four cheques to the complainant for the purpose of repayment of the loan amount bearing numbers 456316, 456318, 45614 of PMC Bank and 443678 of SBI to the Complainant to reimburse the deposit along with the required interest.*
- 10. That the Cheque no. 456318 of PMC Bank and Cheque no. 443678 of SBI were paid by the Accused as a lump sum towards the interest against the loan taken by the Accused.*
- 13. That Cheque no 456314 of PMC Bank dated 17-10-2012 bearing an amount of 47,00,000/- was returned by the bank as the concerned account was closed. Hereto marked and annexed as Sr no 4 is the copy of the cheque bearing number 456314.*
- 14. That the complainant says that when the said cheque was deposited by him in his Bankers, i.e. HDFC Bank, Shivajinagar, Pune 411 016, the same was returned to him with remarks to the effect that the concerned account was closed. Hereto*

marked and annexed as Sr no 5 is the copy of the remark of the bank.

15. *That Cheque no. 443678 of SBI dated 30-9-2012 bearing an amount of Rs. 2,29,231/- was returned by the bank. Hereto marked and annexed Sr no 6 is the copy of the cheque bearing number 443678.*
16. *That the Complainant says that when the said cheque was deposited by him in his Bankers, i.e. HDFC Bank, Shivajinagar, Pune 411 016, the same was returned to him with remarks to the effect "PAYMENT STOPPED BY DRAWER". Hereto marked and annexed as Sr no 7 is the copy of the remark of the bank.*
23. *That the Complainant had accordingly sent a notice, dated 3-11-2012 to the Accused, demanding payment of the said amount of Rs. 49,69,097/- (Rs Forty Nine Lacs Sixty Nine Thousand And Ninety Seven), the receipt of which the Accused is yet to acknowledge. Hereto marked and annexed as Sr no 10 is the copy of the notice.*
25. *That the cause of action for this Complaint first arose on 22-11-2012 and hence this Complaint filed today is well within limitation.*

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 applicants/accused No. 6, 8 and 10. The entire averments made in the complaint if read in its totality, then at the most the role attributed to the applicants in commission of offence is that they were 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 applicants / accused No. 6, 8 and 10. So also the applicants / accused Nos. 6, 8 and 10 have not been described as Managing Director or persons in-charge of and responsible for the conduct of business and affairs of accused No. 1—Company. According to the complainant, the applicants were Non-executive Directors and they have resigned way back in the year 2012 i.e. on 4/9/2012, 6/1/2012 and 26/3/2012, respectively, 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:

“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 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 applicants/accused Nos. 6, 8 and 10. Ld. JMFC appears to have passed the order mechanically. Ld. JMFC 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. The applicants have specifically stated that the applicants were appointed as Non-executive Directors and they had resigned from the Company on 4/9/2012, 6/1/2012 and 26/3/2012, which were 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 applicants have also informed about recording of this fact in the 20th Annual Report of accused No. 1 – Company for the financial year 2011-12. As the applicants claim to have not received the notice sent by complainant through her Advocate, they have not replied the same. The order passed by learned Jt. JMFC, which is impugned in this application, reads as under:

1“ORDER BELOW EXH. 1

Perused the complaint, the statement on oath of the complainant and documents relied upon. Heard the learned advocate for the complainant. There are reasonable grounds to proceed against accused to make him answerable to the allegations of the offence U/s. 138 of the Negotiable Instruments Act. Hence the following order.

ORDER

Issue process against the accused for the offence punishable U/s. 138 of the Negotiable Instruments Act on payment of requisite process fee returnable on 21/06/2013.

Sd/-

(J. A. Kotnis)

*Jt. Judicial Magistrate F.C.,
Cantonment Court, Pune 1*

Pune.

Date : 25/04/2013.”

Thus, the bare perusal of order passed by JMFC leads to conclusion that the order has been passed without perusing the contents of

complaint and documents relied in support of complaint. It is a glaring case of non-application of mind. Hence, in my view, the order is not sustainable in law.

9. 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 applicants/accused No. 6, 8 and 10. The order passed by the learned JMFC 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 applicants / accused Nos. 6, 8 and 10 for commission of offence u/s 138 r/w 141 of NI Act.

10. The applicants have approached with a case that they were Non-executive Directors of the accused No. 1 - Company. They have resigned as Directors of the Company on 4/9/2012, 6/1/2012 and 26/3/2012, respectively. The resignations of the applicants were accepted in the Board of Directors meeting held on 16/10/2012. The fact in respect of the resignations of the applicants was duly intimated in a prescribed proforma i.e. Form No. 32, to the Registrar of the Company on 9/11/2012, 14/2/2012 and 15/5/2012, respectively. 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 applicants have produced on record the following documents.

- (i) *Copies of resignation.*
- (ii) *Copies of Resolutions dt. 16/10/2012, 14/2/2012 and 14/5/2012 passed in the meeting of Board of Directors.*
- (iii) *Copies of notice given to the Registrar of the Company in a prescribed proforma i.e. Form No. 32.*
- (iv) *Copies of 20th Annual Report of the Company for the financial year 2011-12.*

11. As per the complaint, the cause of action for filing of the complaint arose on 21/12/2012. There is no dispute as to the fact that the

cheques in question were issued on 30/9/2012 and 17/10/2012. Those were dishonoured on 12/10/2012 and 18/10/2012. The notice of demand was issued on 3/11/2012 and cause of action for filing of complaint arose on 21/12/2012. Thus, the act of issuance of cheque as well as dishonour of cheque has taken place much after the resignation tendered by the applicants / accused Nos. 6, 8 and 10. Learned Counsel for the applicants 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.”

12. Learned Counsel appearing for respondent No. 1 objected to the maintainability of the application u/s 482 of Cr.P.C., with contention that the alternate remedy u/s 397 of Cr.P.C. is available for the applicants against the order of issuance of process. The learned counsel has relied upon the decisions of the Hon'ble Apex Court in the cases of **Mohit alias Sonu and Anr. Vs. State of U.P. and Anr.** reported in **(2013) 7 SCC 789** and **Rajesh Bajaj Vs. State of NCT Delhi and Others** reported in **(1999) 3 SCC 259**.

13. I have thoroughly considered the submissions advanced as well as the rulings cited. In the case of Rajesh Bajaj (supra) the Hon'ble Bench of Supreme Court has observed that the powers of quashing criminal proceedings should be exercised sparingly and with circumspection, and that too in the rarest of the rare case. In light of the decision rendered in the case of Rajesh Bajaj (supra), it is necessary to consider as to whether the present case is a fit case to exercise the powers u/s 482 of Cr.P.C. It is well settled that, inherent powers u/s 482 of Cr.P.C. are of wide plenitude with no statutory limitation but same has to be exercised in accordance with the guidelines engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. It is further settled that no precise and inflexible guidelines can also be laid down so as to limit the exercise of such powers. The exercise of inherent powers would entirely depend on the facts and circumstances of each case. It should be exercised very sparingly and in a rarest of the rare case. In this context, it is useful to refer the decision of the Hon'ble Apex Court in the case of Gian Singh vs State of Punjab and anr. reported in (2012) 10 SCC 303 wherein the Bench consists of three Judges has considered the issue at length. In para 57 of the said judgment read as under:

57. *The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the*

dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominantly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.

14. Thus, exercise of powers u/s 482 of Cr.P.C., entirely depends upon the facts and circumstances of the case. Basic principle, which needs to be borne in mind while exercising such powers is: whether any case made out to invoke the powers u/s 482 of Cr.P.C. I am of the view that, in the facts and circumstances of the case, the jurisdiction u/s 482 of Cr.P.C., needs to be exercised in view of the discussion made in foregoing paras. In absence of any *prima facie* case been made out for issuance of process, the proceedings against the applicants would be an exercise in futility.

15. In the case of Pooja Ravinder Devidasani (supra), the Apex Court has considered the scope of exercise of jurisdiction and powers u/s 482 of Cr.P.C. in a case based upon identical facts. In paras 27, 28 and 30, the Apex Court has observed as under :

27. Unfortunately, the High Court did not deal the issue in a proper perspective and committed error in dismissing the writ petitions by holding that in the Complaints filed by the Respondent No. 2, specific averments were made against the appellant. But on the contrary, taking the complaint as a whole, it can be inferred that in the entire complaint, no specific role is attributed to the appellant in the commission of offence. It is settled law that to attract a case under [Section 141](#) of the N.I. Act a specific role must have been played by a Director of the Company for fastening vicarious liability. But in this case, the appellant was neither a Director of the accused Company nor in charge of or involved in the day to day affairs of the Company at the time of commission of the alleged offence. There is not even a whisper or shred of evidence on record to show that there is any act committed by the appellant from which a reasonable inference can be drawn that the appellant could be vicariously held liable for the offence with which she is charged.

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 Cheques were issued by the Company which stood dishonored. 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.

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.

16. I am, therefore, inclined to allow the application in terms of prayer clause 'A' to the extent of applicants / accused Nos. 6, 8 and 10 and same is accordingly allowed.

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

[V. L. ACHLIYA, J.]