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

CRIMINAL APPLICATION NO. 739 OF 2013

- (1) Mr. Rajiv Ramniranjan Tibrewala, Adult,
Aged about 53 Director of Automatic Hotels and Restaurant India Ltd, Having its office at Dream Square, C-1821, Dalia Estate, Off New Link Road, Andheri (West), Mumbai – 400053.
- (2) Mrs. Anju Rajesh Choudhary, Adult, Aged about 43,
Director of Automatic Hotels and Restaurant India Ltd, Having its office at Dream Square, C-1821, Dalia Estate, Off New Link Road, Andheri (West), Mumbai – 400053.
- (3) Mr. Rajan Bhalchandra Mantri, Adult, Aged about 62
Director of Automatic Hotels and Restaurant India Ltd, Having its office at Dream Square, C-1821, Dalia Estate, Off New Link Road, Andheri (West), Mumbai – 400053. ... APPLICANTS

VERSUS

- (1) The State of Maharashtra.
- (2) PRIDE Hotels Ltd.
Having its office at 908, Dalamal Towers, Nariman Point, Mumbai – 400021.
- (3) AUTOMATIC HOTELS AND RESTAURANT (INDIA) LTD
Having its office at Dream Square, C-1821, Dalia Estate, Off New Link Road, Andheri (West), Mumbai – 400053.
- (4) PRIDE BIZNOTEL THE AURES (A Unit of Automatic Hotels and Restaurant India Ltd), Having its office at Dream Square, C-1821, Dalia Estate, Off New Link Road, Andheri (West), Mumbai – 400053.
- (5) Mr. Rajesh Vishambhar Chaudhary, Adult, Aged about 62
Director of Automatic Hotels and Restaurant India Ltd, Having its office at Dream Square, C-1821, Dalia Estate, Off New Link Road, Andheri (West), Mumbai – 400053. ... RESPONDENTS

...
Mr Sandeep R. Jalan, Advocate for the applicants
Mr Rajesh More, APP for State/R-1
None present for respondent No. 2 though served.
...

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

RESERVED ON : 10/4/2015.

PRONOUNCED ON : 04/08/2015.

JUDGMENT:

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

2. Being aggrieved by order dt. 30/7/2013, passed in Criminal Revision Application No. 568/2013 by Addl. Sessions Judge, Greater Bombay, the applicants have preferred this application.

3. In brief, the facts leading to filing of this application are as under :

The application was originally filed by six applicants but during the pendency of the application, the names of original applicants No. 1, 2 and 4 (i.e. respondents No. 3 to 5) were deleted and they are transposed as respondents No. 3 to 5. Therefore, the present application is survived and prosecuted by Mr. Ramranjan Tibrewala (orig. accused no. 3), Mrs. Anju Rajesh Chaudhari (orig. accused no. 5) and Mr Rajan Bhalchandra Mantri (orig. accused no. 6) the accused in the criminal complaint filed by complainant. The complainant (Resp. no. 2) has filed complaint u/s 138 r/w 141 of Negotiable Instruments Act (hereinafter to be referred as 'said Act') as against the accused i.e. respondents No. 3 & 4 Company and the applicants no. 1 to 3 as well as respondent No. 5 as Directors of accused No. 3 and 4, alleging therein that the cheque of Rs. 1,69,057/- issued by accused persons drawn and payable from their account with IDBI Bank when presented for

realization, same was returned dishonoured with reason “payment stopped” by drawer. It is the say of the complainant that there was an agreement between the complainant and accused persons to use the name of complainant – company for the purpose of running the hotel business. Later on, it was mutually agreed between the parties to terminate the said agreement. As per the settlement arrived, the accused have agreed to pay Rs. 1,69,057/- to complainant towards use of the brand name of the complainant. The said cheque was issued by respondents No. 3 and 4 – Company with full knowledge of its Directors. According to the complainant, the accused Nos. 3, 4, 5 and 6 are in-charge of day to day affairs of accused Nos. 1 and 2 – Company as its Directors and look after day to day affairs and management of accused Nos. 1 and 2 - Company and also persons responsible for conduct of the business of accused Nos. 1 and 2 – Company. Since the cheque was dishonoured, the complainant issued statutory notice and called upon the accused persons to pay the cheque amount within stipulated time. However, the accused have failed to make payment towards cheque dishonoured. Therefore, the complainant filed complaint u/s 138 r/w 141 of NI Act. On due consideration of the averments made in the complaint and the documents relied in support of the complaint, the learned Metropolitan Magistrate pleased to pass order to issue process u/s 138 of N.I. Act as against accused vide order dated 4/12/2012. Being aggrieved by the said order, the applicants preferred criminal revision u/s 397 of Cr.P.C. in the Court of City Civil and Sessions, Mumbai, which was registered as Criminal Revn. Application No. 568 of 2013. The said revision petition was heard and decided vide order dt. 30/7/2013 as against the applicants. Being aggrieved by order dated 30/7/2013, passed by the learned Addl. Sessions Judge, Greater Bombay, the applicants have approached this Court u/s 482 of Cr.P.C.

4. I have heard the learned Counsel for the applicants and the learned Additional Public Prosecutor for the State. Respondent No.

2/complainant though served and recorded appearance in the proceeding through their advocate, failed to appear at the time of hearing of the application. The counsel representing the applicants though intimated in writing to respondent No. 2 vide letter dated 8/4/2015 that the case is listed on 10/4/2014 for final disposal, still the respondent No. 2 and their advocate failed to appear in the matter.

5. Learned Counsel representing the applicants argued that, to invite the vicarious liability as contemplated u/s 141 of NI Act, it is necessary on the part of the complainant to make specific averments in the complaint as to how and in what manner the accused were responsible in the conduct of the business of the company. So also, the complainant must state in what capacity the accused were in-charge of day to day affairs of the Company at the relevant time and more particularly, when the cheques were issued. According to learned Counsel for applicants/accused, on the face of complaint, the complainant does not disclose requisite averments so as to invite vicarious liability of the applicants. By referring the averments made in the complaint learned Counsel strenuously contended that, the complaint lacks of necessary particulars so as to *prima facie* attract the liability of applicants and to establish that they have committed an offence u/s 138 r/w Section 141 of NI Act. Learned Counsel has specifically invited attention to following contents of para 3 of the complaint, which according to the applicants, only averments made in the complaint on the basis of which the learned Magistrate has issued process u/s 138 r/w 141 of NI Act against the applicants.

Para 3 : "The accused Nos. 1 & 2 is being a Company in the control and under day to day management of accused no. 3, 4, 5 & 6 being in charge of day to day affairs of you No. 1 and 2 as the Director and looked day to day business affairs and management of 1 & 2 being in charge and responsible persons of the business No. 1 & 2 as a Company."

6. The learned Counsel has also invited attention to following order dt. 4/12/2012 passed by learned Magistrate to issue process against the applicants/accused.

“ORDER

I have read the complaint. Complainant has filed statement of verification on affidavit. Heard Ld. Advocate for the complainant. Perused the original papers i.e. cheques, memos, office copy of notice and postal receipts. Prima facie from these documents, it appears that the complainant has made out the case. Therefore, issue process against the accused u/sec. 138 of the Negotiable Instruments Act, 1881.

Date : 04/12/2012.

Sd/-.”

7. In the light of the above mentioned averments made in the complaint and the order passed by the learned Magistrate, it is strenuously contended that, on the face of the record the order has been passed without observing the mandate of section 204 of Cr.P.C. and Section 141 of NI Act. It is strenuously contended that in order to invite vicarious liability u/s 141 of NI Act, it is incumbent on the part of complainant to make specific averment that at the material time of filing of complaint the applicants – accused were in-charge and responsible for the conduct of the business of accused No. 1 – Company and also looking after day to day affairs of accused No. 1 – Company. In nutshell, it is contended that in order to attract the offence u/s 138 r/w 141 of NI Act, and to make the Directors of the Company liable for the offence committed by the company, there must be specific averments against the Directors showing as to how and in what manner the Directors were responsible for the conduct of the business of the company. In support of this proposition, the learned Counsel has relied on the decision of the Apex Court in the case of **Pooja Ranvinder Devidasani Vs. State of Maharashtra and others** reported in 2015 Cr.L.J. 165.

8. I have thoroughly considered the submissions advanced by the learned Counsel for the applicants in the light of averments made in the

complaint so as to examine as to whether prima facie case was made out or not to issue process u/s 138 r/w 141 of NI Act, against the applicants. Section 141 of NI Act 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 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:

⁶⁰*[Provided further that where 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 tis 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.

9. Plain reading of above quoted provisions of Section 141 of NI Act, spells out that if the person committing an offence is a company then every person who at the time of commission of offence was incharge of and 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. 1st proviso to Section 141 of NI Act, provides the defence which is available to such

Director/s against whom the Court proceeded u/s 138 r/w 141 of NI Act. He can prove his innocence by establishing that the offence was committed without his knowledge or by establishing the fact that he had exercised all due diligence to prevent the commission of such offence. 2Nd proviso to Section 141, prescribes the certain category of nominated Director who cannot be prosecuted on the principle of vicarious liability. Sub-clause 2 of Section 141 of NI Act, specifically lays down that notwithstanding anything contained in sub-section 1 of Section 141, if the offence has been committed by the company and if 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 then such Director, Manager, Secretary or other officer shall also be deemed to be guilty of offence u/s 141 of NI Act. Thus, if we consider Section 141 of NI Act, in its totality, then it can safely be gathered that the legislative intent behind incorporating the Section 141 of NI Act, appears to be to make all such persons who are responsible for the affairs of the company liable for commission of offence, who are either in-charge or responsible for the conduct of the business of the company other than the persons holding the post of Director as a nominee of the State or Central Govt. or by virtue of office such person was holding on account of employment with the Central or State govt. All such Directors who hold the office as Director and responsible for the conduct of affairs and the business of the company are presumed to be guilty for the act of the company unless they prove that the act in question amounting to an offence of dishonour of cheque was committed without their knowledge or despite they exercised due diligence to prevent the commission of such offence. Therefore, the purpose of the section appears to bring all the Directors of the Company within the ambit of commission of offence on the principle of vicarious liability except those Directors who are really not concerned with the day to day affairs of the company and its business or holding the post of Director as nominee of State or Central Government or by

virtue of the office they held with State or Central Government.

10. In the present case, it is nowhere the case of the applicants that they are not the Directors of the respondent No. 1 – Company and they had resigned as Director of the Company much before the cheque in question was issued and dishonoured by the Company. The entire thrust of the applicants is on the averments made in the complaint which according to applicants, are not sufficient to attract the offence u/s 138 r/w 141 of NI Act. As discussed in the foregoing paras, the complainant has specifically made averments that accused nos. 1 and 2 are the Company of which accused Nos. 3, 4, 5 and 6 are the Directors and incharge of day to day affairs of accused Nos. 1 and 2 Company. The complainant has also made averment that the accused Nos. 3, 4, 5 and 6 look after day to day business, affairs and management of accused Nos. 1 and 2 – Company and they are incharge and responsible for the business of accused Nos. 1 and 2 – Company. In my view, the averments made in para 3 of the complaint as well as other averments made in complaint are *prima facie* sufficient to attract the offence u/s 138 r/w 141 of NI Act.

11. It is settled position in law that, while construing the pleadings, the same needs to be considered in its totality. If we consider over all facts averred in the complaint together with documents, then according to complainant, the complainant-Company entered in to an agreement with the accused to allow them to use the name of the Complainant-Company for running their business. In para 4 to 6 of the complaint, the complainant has specifically pleaded the case which leads to issuance of cheques in question by the accused. The complainant has specifically averred that the accused approached the complainant with proposal to allow them to use the brand name of the complainant-company for running their hotel business. Accordingly, the complainant and accused have entered into an agreement which was signed by both of them. Subsequently, the accused and the

complainant have mutually agreed to terminate the agreement. As per the settlement arrived at, the accused has issued the cheque of Rs. 1,69,057/- bearing No. 082955, dt. 15/2/2012. The cheque was dishonoured as accused instructed their banker to stop payment. In spite of issuing statutory notice and notices being duly served, the accused have failed to make the payment of cheque dishonoured and, therefore, they have committed an offence punishable u/s 138 of NI Act. Therefore, reading the complaint as a whole clearly makes out the case for issuance of process u/s 138 r/w 141 of NI Act against the applicants. In view of this no case made out for interference in exercise of extraordinary jurisdiction u/s 482 of Cr.P.C.

12. It is pertinent to note that, except the say of the applicants that there are no specific averments as contemplated u/s 141 of NI Act, there is no other ground raised to assail the correctness of the order passed by the Magistrate as well as the learned Addl. Sessions Judge. So also it is nowhere the case of the applicants that they were not the Directors of accused Nos. 1 and 2 – Company at the relevant time of commission of offence. It is nowhere the case of the applicants that no agreement to terminate the contract to use the brand name of the complainant company was entered in between the complainant and the accused persons as specifically pleaded by complaint. Ld. Magistrate, on due consideration of the averments made in the complaint, the verification statement recorded and the document relied in support of the complaint, passed the impugned order. Therefore, the order passed by learned Magistrate can not be said to be passed without considering the mandate of Section 204 of Cr.P.C. and Section 141 of N. I. Act.

13. Ld. Addl. Sessions Judge while dealing with the revision petition has thoroughly considered all such contentions raised before this Court and passed the reasoned order. The reasons and findings recorded by the ld. Addl. Sessions Judge are based upon due appreciation of averments

made in the complaint together with documents relied in support of issuance of process. So also the Id. Addl. Sessions Judge thoroughly considered the factual as well as the legal aspects of the matter in the light of the precedents of law cited during the course of hearing. I am, therefore, of the view that the order passed by Id. Addl. Sessions Judge cannot be said to be perverse so as to interfere in exercise of inherent jurisdiction u/s 482 of Cr.P.C.

14. In view of discussion made in foregoing paragraphs, the decision of the Apex Court in the case of Pooja vs State of Maharashtra and ors (supra) have no bearing upon the facts of the present case. As discussed, the averments made in the complaint *prima facie* make out the case to issue process against the applicants for offence u/s 138 r/w 141 NI Act. It is nowhere the case of the applicants that they were not the Directors of the accused Company at the relevant time of commission of offence and they had resigned much before the issuance of cheque. In the case cited, a specific plea was raised by the accused that he has resigned as a Director of accused Company much prior to issuance of cheque and his resignation was duly accepted and after the period of about 2½ years of his resignation, the cheques were issued by Company and dishonoured which leads to filing of complaint. In the background of the facts of the case, the Apex Court pleased to quash the complaint against the appellant/accused. Whereas in the instant case, except the plea of the applicants that the averments made in the complaint are not sufficient to attract the vicarious liability, no other plea or defence has been raised.

15. In view of above, I find no merits in the instant application filed by applicants u/s 482 of Cr.P.C. In the result, the application deserves to be rejected. Accordingly, I reject the application with no order as to costs. Rule stands discharged.

[V. L. ACHLIYA, J.]