IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 3743 OF 2013

Saket Kanoria .. Petitioner

v/s.

Anil Raghunath Suroliya
Constituted attorney & Agent,
M/s. BASP Chemical Products Ltd., & Anr. .. Respondents

Mr. Prakash Naik a/w Mr. Ganesh Bhujbal i/b Shichta Thapar for Khaitan & Company for the petitioner
MR. Hrishikesh Mundargi for the respondent no.1
Mr. J.H. Ramugade, APP for the respondent State

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED : 29TH SEPTEMBER, 2015.

P.C. :

. Heard the learned Counsel for the respective parties. Rule. Rule made a returnable forthwith. By consent, the Writ Petition is taken up for final hearing.

1. The petitioner herein has challenged the order dated 17.01.2012 passed by the learned Sessions Court, Vasai whereby the

learned Sessions Judge dismissed the Criminal Revision No.75 of 2007 challenging the issuance of process issued u/s 138 of the N.I. Act.

2. The brief facts necessary to decide this petition are as under. The respondent no.1 company is dealing in various chemical products and allied material. It is the case of the respondent no.1 company that it had supplied chemical products to the accused company and their various sister concerns. The respondent no.1 complainant had alleged that the accused no.5 – Bharat Vora, had issued a Cheque bearing No.723513 dated 21.07.2006 for an amount of Rs.2,00,000/- towards discharge of the liability. The said cheque was presented in the bank but was dishonoured for insufficient funds. The respondent no.1 company issued notice to the accused firm and its partners to pay the outstanding liability including the cheque amount. The accused firm and its partners received the said notice but failed and neglected to pay the amount. Hence, the respondent no.1-company filed a complaint under Section 138 of the

N.I. Act.

3. By order dated 28th November, 2006, the learned Magistrate issued process against the accused firm and the partners under Section 138 of the N.I. Act. The petitioner - accused no.2 challenged the said order by filing Criminal Revision Application No.75 of 2007 before the learned Additional Sessions Judge, Vasai. The said Revision Application was dismissed by order dated 17th January, 2012. Aggrieved by the said order, the petitioner has filed the present petition.

4. The learned Senior Counsel Mr. Prakash Naik, has submitted that the Cheque was issued by the accused no.5 Bharat N. Vora as a partner of M/s. Shree Enterprises. He has submitted that the petitioner herein has been arrayed as accused no.2 as a partner of M/s. Shree Enterprises. The learned Counsel Shri. Prakash Naik has submitted that there is absolutely no material on record to indicate that such a partnership firm in the name and style M/s. Shree Enterprises exists and that the petitioner – accused no.2 is a partner

of the said partnership firm. He contends that the petitioner is not associated in any manner with M/s. Shree Enterprises and, therefore, he is not liable to be prosecuted for the offence allegedly committed by M/s. Shree Enterprises.

5. The learned Counsel for the respondent has submitted that the petitioner is the Director of M/s. Kanoria Dye Chem Ltd. He had entered into an Agreement for sale with the respondent no.1 company, dated 18.04.1996 for the sale of pharmaceutical and chemical material. As per the said agreement, the payment was to be made by the M/s. Kanoria Dye Chem Ltd. or the petitioner herein. He further stated that the petitioner had also proposed to form partnership firm in the name of M/s. Shree Enterprises in order to carry out business with the complainant company. He has submitted that the petitioner has played an active role in the business transaction and had appointed the accused no.5 Mr. Bharat Vora as his constituted attorney as well as the attorney of the partnership firm.

6. The learned Counsel for the respondent no.2 has further submitted that the subject cheque was issued by the accused no.5 as a partner of Shree Enterprises and that the petitioner herein has been arrayed as an accused as he was responsible for the said transaction and had played a major role in executing the said agreement. He further stated that the petitioner is a beneficiary of the entire transaction and as such is liable to be prosecuted under Section 138 r/w 141 of the N.I. Act.

7. It is pertinent to note that the complainant refers to several transactions between the complainant company and M/s. Kanoria Dye Chem Ltd. The complainant has also asserted that the petitioner as a Director of M/s. Kanoria Dye Chem Ltd., had entered into an agreement for sale of chemical products, wherein the petitioner had undertaken to make the payment. Suffice it to state that the present prosecution is not launched against M/s. Kanoira Dye Chem Ltd., or against the petitioner as a director of M/s. Kanoria Dye Chem Ltd. On the contrary, the averments made in para 9 of the complaint reveal that the present petitioner has been arrayed as an accused as a partner of the accused no.7 partnership firm M/s. Shree Enterprises

with the aid of Section 141 of the N.I. Act.

Section 141 (1) of the N.I. 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".* ....

8. Needless to state that in order to fasten vicarious liability u/s 141 of the N.I. Act, it is necessary that on the date of the commission of offence, the person accused was incharge of and was responsible to the company or the partnership firm for the conduct of its business of the company / as well as company. In the instant case, the cheque in question was not issued by the petitioner but was issued by the accused no.5 Bharat Vora, as a partner of the accused no.7 M/s. Shree Enterprises. The petitioner has stated that he was not a partner of the accused no.7 M/s. Shree Enterprises and further that he is not associated with M/s. Shree Enterprises in any manner. The petitioner has further stated that accused no7 M/s. Shree Enterprises

is not a partnership firm and that it is a proprietor concern. He has produced a letter dated 16.10.2006 issued by the Oriental Bank of Commerce, on which date the said cheque in question was drawn. The said letter states that the petitioner is not a partner of M/s. Shree Enterprises and that it is a proprietary concern. Even if the said letter is ignored and discarded as not being of sterling incontrovertible nature, the fact remains that the respondent no.1 complainant has not been able to show any material to indicate that the petitioner is a partner of any firm registered in the name and style M/s. Shree Enterprises. Moreover, the respondent no-1 complainant has not disputed the fact that M/s. Shree Enterprises is not registered as a partnership firm and that the petitioner herein is not a partner of any such firm. There is absolutely no material to indicate that the petitioner was a partner of accused no.7 M/s. Shree Enterprises. Hence, he cannot be held vicariously liable for the offence committed by the said partnership firm.

9. Under the circumstances, the allegations levelled against the petitioner do not constitute offence and hence, the petitioner cannot

be prosecuted under Section 138 r/w 141 of the N.I. Act.

10. For the reasons stated hereinabove, the petition is allowed. The order dated 30th May, 2007 in C.C. No. 2571 of 2006, J.M.F.C., Vasai as well as the order dated 17.01.2012 in Criminal Revision Application No.75 of 2007, Sessions Court, Vasai is hereby quashed and set aside qua the petitioner.

(ANUJA PRABHUDESSAI, J.)