Anand

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.3441 OF 2004

Karlheinz Hermann Sieverding .Applicant

Vs.

Hi Tech Corporation & anr. .Respondents

Mr.Mihir Gheewala a/w.Mr.Ishan Joshi, Advocate, for the Applicant
Mr.Rajesh P. Behere, Advocate, for the Respondent No.1
Smt.Veera Shinde, APP, for the Respondent No.2 – State

CORAM : SMT.ANUJA PRABHUDESAI, J.

DATE : 16.02.2016

P.C.

. Leave to amend, to correct the date of order on page No.14 of the Application, is granted. Amendment to be carried out forthwith.

2. By this Application filed under Section 482 of the Code of Criminal Procedure, the accused No.4 in Criminal Case No.1255 of 2001 has challenged the order dated 14.08.2001, whereby the Learned Magistrate, Pune has issued process against him for the offence punishable under Section 138 of the Negotiable Instruments

Act, 1881 and the order dated 12.05.2004 in Cri.Revision No.181 of 2004 passed by the learned Additional Sessions Judge, Pune, whereby the learned Sessions Judge dismissed the Cri.Revision No.181 of 2004.

3. The brief facts necessary to decide this Application are as under :-

The Respondent No.1 had lodged a complaint against the aforesaid Applicant and the other co-accused for the offence punishable under Section 138 r/w.141 of the Negotiable Instruments Act, 1881. The case of the Respondent No.1/Complainant was that the present Applicant was one of the Directors of the Accused No.1/Company and was responsible for conducting the business of the Respondent No.1/Complainant. It was alleged that the Accused No.1/Company through the Directors had placed certain orders for certain goods and had issued a cheque dated 10.04.2001 towards price of the goods. The said cheque was deposited in the Janata Sahakari Bank, Pune on 26.05.2001 and was dishonoured “for want of insufficient funds”. It is alleged that the statutory notice was issued to the Applicant and the other co-accused. Since the payment was not made within the stipulated period, a complaint under Section 138 of the Negotiable Instruments Act, 1881 came to be filed against the Applicant and the other co-accused.

4. By the impugned order, the learned Magistrate, Pune had ordered to issue a process against all the accused including the present Applicant. The learned counsel for the Applicant has submitted that the Applicant herein is prosecuted for the offence allegedly committed by the Company. He submitted that the complaint does not contain the basic averments to attract vicarious liability and in the absence of such averments, the Applicant cannot be held to be vicariously liable for the said offence.

5. The learned counsel for the Respondent No.1 has submitted that the averments made in para 2 of the complaint are sufficient to satisfy the requirements of Section 141 of the N.I.Act.

6. I have perused the records and considered the submissions

advanced by the learned counsels for the respective parties.

7. At the outset, it may be mentioned that the Applicant herein is sought to be prosecuted with the aid of Section 141 of the Negotiable Instruments Act for the offences allegedly committed by the Company. It is, therefore, necessary to consider the ingredients of the Section 141 of the N.I.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 subsection 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 subsection (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.]

8. A plain reading of this section reveals that, a person can be fastened with vicarious liability for the offence committed by the company, if at the time the offence was committed, such person was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company.

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 armtwisting 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;
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> 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 instant case, the only averment made in the complaint is that the Applicant Nos.2 to 4 are the Directors of the Applicant No.1 and as such, are responsible for conducting the business of the Accused No.1. These averments indicate that, by virtue of being directors, the Applicant Nos.2 to 4 are presumed to be responsible for conducting the business of the Applicant No.1 - Company. Needless to state that every director cannot be deemed to be incharge and responsible for the conduct of the company. Further more the requirement of Section 141 is that such person should be incharge and responsible for the conduct of the business of the

company, at the time the offence was committed. In the present case, the averments do not meet the basic requirements of Section 141 of the N.I.Act. Consequently, in the absence of such specific averments, the Applicant cannot be prosecuted for the offence punishable under Section 141 of the N.I.Act which is allegedly committed by the Company.

11. In the facts & circumstances, the Application is allowed. The impugned orders dated 14.08.2001 and 12.05.2004 are quashed and set aside qua the Applicant. Rule is made absolute.

(ANUJA PRABHUDESAI, J.)