IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 4492 OF 2004
WITH
CRIMINAL APPLICATION NO.5516 of 2004
IN
CRIMINAL APPLICATION NO.4492 OF 2004

Mr. Mahendra Kishore Khatau ..Applicant

v/s.

The State of Maharashtra & Anr. ..Respondents

Mr. Abad H.H.Ponda for the Applicant
Mr. Y.M.Nakhwa, APP for the Respondent-State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : JANUARY 21, 2016.

P.C.

1. This is an application under Section482 of Cr.P.C. filed by the aforesaid applicant who is accused no.4 in C.C. No.875/S/2001 on the file of the Metropolitan Magistrate's 24th Court, Borivali, Mumbai seeking to quash the complaint and the process issued against him under Section 138 of the N.I.Act.

2. Heard the learned counsel Shri Ponda for the applicant and the learned APP for the State. The respondent no.2 had lodged a complaint under Section 138 of the N.I.Act against M/s. Indokem Ltd., situated at Logul Lane, Mahim and M/s. Shubhlabh Chem. Co Ltd. registered under the companies Act. The applicant and the other co-accused were stated to be the Directors and were prosecuted with the aid of Section 141 of N.I.Act for the offence allegedly committed by the company.

3. The complainant had averred that it had sold and supplied manganese oxide to the accused nos.1 and 2 company and that the accused nos.1 and 2 company had issued three cheques viz. one cheque dated 5.6.2001 for Rs.1,50,000/- and two cheques dated 23/6/2001 and 25.6.2001 for Rs.50,000/- each towards the price of the said manganese oxide. Since the said cheques were dishonoured, the accused no.1 company issued two cheques both dated 17.2.2001 for Rs.50,000/- and Rs.60,000/- each respectively. The said cheques were also dishonoured for insufficient funds. Hence the complainant issued a statutory notice and called upon the accused to pay the cheque amount. The complainant had alleged that the accused had

not paid the cheque amount despite the receipt of the statutory notice. Hence the complainant firm had filed a complaint under Section 138 of the N.I.Act.

4. The applicant herein, who is accused no.4 in the said complaint had challenged the said order of issuance of process mainly on the ground that there were no specific averments against him in the complaint that he was incharge or responsible for the conduct of the business and affairs of the respondent. By order dated 21.10.2004 this court had granted ad-interim relief in terms of prayer clause (e). Subsequently, by order dated 26.9.2001 rule was granted, the ad-interim order dated 21.10.2004 was continued subject to the condition that the petitioner would deposit an amount of Rs.5 lakhs in the court within the period of four days from the date of the order. The learned counsel for the applicant has submitted that the said amount has been deposited and the order has been complied with.

5. Learned Counsel Shri Ponda has submitted that there are no basic averments in the complaint to hold the applicant vicariously

liable for the offence allegedly committed by the company. In the absence of such averment the applicant cannot be prosecuted for the offence punishable under Section 138 of the N.I.Act.

6. I have perused the records and considered the submissions advanced by the learned counsel for the applicant and the learned APP for the State. At the outset it may be mentioned that in the case of SMS Pharma the three Judge Bench of the Apex Court has held 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 requirements of Section 141 cannot be said to be satisfied.*
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> *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."

7. 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.*
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> *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.*

8. In the case of P***ooja 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"

In the instant case, in para 1 of the complaint, the complainant had averred that "the accused nos.1 and 2 are the companies , incorporated and registered under the Companies Act, carrying on their business at their aforesaid addresses. The accused nos.3 to 9 are learnt to be directors or persons in the control and management of business and affiaris of the accused nos.1 and 2. The accused no.1 and accused no.2 are companies of Khatau Group, as known in the market".

9. The complaint does not contain specific averments that the applicants herein at the time of the offence committed, was in charge of and responsible for the conduct and business of the company as well as for the company. The complaint also does not indicate that the applicant was the Managing Director or the signatory to the

cheque. The averments made in para 1 of the complaint do not satisfy the basic requirements of Section 141 of the N.I.Act and in the absence of such requirements the applicant cannot be held vicariously liable for the offence allegedly committed by the company and consequently cannot be prosecuted for the offence punishable under Section 138 of the N.I.Act.

10. Under the circumstances, and in view of the discussion supra, the application is allowed. The order of issuance of process under Section 138 of the N.I.Act in C.C.No.875/S/2001 is quashed and set aside qua the applicant.

i) The amount of Rs.5 lakh deposited by the applicant pursuant to the order dated 26.9.2001 be refunded to the applicant along with the accrued interest.

. In view of the above order, Criminal Application No.5516 of 2004 does not survive and the same stand disposed.

(ANUJA PRABHUDESSAI, J.)