IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 4425 OF 2013
WITH
CRIMINAL WRIT PETITION NO. 4435 OF 2013
WITH
CRIMINAL APPLICATION NO. 382 OF 2015
IN
CRIMINAL WRIT PETITION NO. 4435 OF 2015

Ketan Krishnakant Lakhani. ... Petitioner.
Versus
The State of Maharashtra & ors. ... Respondents.

Mr. Mahendra V. Swar, advocate for petitioner.

Mr. Anil Agarwal, advocate for respondent No. 2.

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

CORAM : SMT. SADHANA S. JADHAV, J
DATE : JULY 18, 2016

P.C.:

1 Heard the learned Counsel for the petitioner and the learned Counsel for the respondent.

2 Rule. Rule made returnable forthwith with the consent of the parties.

3 The Petitioner herein happens to be the original accused No. 2 in C.C. No. 3566/SS/2009 and C.C. No. 3565/SS/2009, where the accused is being tried under section 138 read with section 144 of the Negotiable Instruments Act. In the year 2009, plea of the accused was recorded. The learned Counsel for the Petitioner submits that the Petitioner i.e. accused No. 2 is the signatory of the disputed cheque. The plea of the accused No. 2 was recorded in his individual capacity. Besides, the plea of the accused No. 2 was also recorded on behalf of the company, which is accused No. 1 in the said case.

4 It appears that during the pendency of the proceedings, the company was wound up on 20th March, 2012. The existence of the company by itself was disputed at that stage by the accused No. 2. On 18/6/2013, the present petitioner, who is an accused No. 2, filed an applications seeking withdrawal of his plea for accused No. 1 by

accused No. 2 contending that the company is wound up and the official liquidator was appointed and therefore, the directors of accused No. 1 would be legally barred to act or represent the company.

Section 305(3) and (6) of the Code of Criminal Procedure, 1973 reads as under :

> 305. Procedure when corporation or registered society is an accused. Right of person against whom proceedings are instituted to be defended.
>
> (1) ......
>
> (2) ......
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> (3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a requirement that the representative shall be examined.
>
> (4) ......
>
> (5) ......

(6) If a question arises as to whether any person, appearing as the representative of a corporation in an inquiry or trial before a Court is or is not such representative, the question shall be determined by the Court.

5 The learned Counsel for the respondent submits that in fact, the company was run by 3 directors. However, the accused No. 2 is the signatory of the disputed cheque and therefore, in all fairness, he was the only director, who was arraigned as an accused.

6 The said applications were rejected by the Metropolitan Magistrate, 6th Court, Mazgaon, Mumbai on 18/6/2013. The learned Magistrate had rightly observed that -

> "7] Apart from this, the accused No. 1 is a juristic person. Accused No. 1 is company. Company means board of directors through whom company can run its business. Accused No. 2 was alleged to be responsible director who appears to be incharge of and are responsible for the affairs of the company. Circumstances appearing from pleading of complainant that accused No. 2 is a person whose consent or connivance or because of negligence attributed to whom, alleged offence has

> been committed. Then under such facts and circumstances, it can be stated that legal grounds are available on record to prosecute him (accused No. 2). Therefore, subsequent appointment of official liquidator for accused No. 1 company does not absolve accused No. 2 in any manner from facing such litigation. Therefore, he cannot be allowed to withdraw his representation for accused No. 1 as prayed. As per section 138 and 141 of N.I. Act, accused No. 2 for the act done on behalf of accused No. 1 is liable to be prosecuted for himself and for accused No. 1 company. As such, there is no legal ground available on record so as to allow his application."

The applications were rejected on the ground that they were not tenable and were filed without any legal base.

7 Being aggrieved by the said order, the Petitioner had filed Criminal Revision Application Nos. 262 of 2013 and 263 of 2013 before the Sessions Court. The learned Sessions Court in paragraph-10 of Cri. Revision Application No. 262/13 has observed as follows :

> 10 The Ld. Magistrate may consider the point raised by accused/applicant/director at final stage and as per the

impugned orders, the evidence is already started before the Ld. Lower Court. It would be better if the Official Liquidator is heard in such type of matters. So the Ld. Lower Court can decide the issue on merits finally. In the limited jurisdiction of Revision, it is not possible to go into merits at this stage, that too, without hearing the Official Liquidator who has not appeared before the court and therefore, the Criminal Revision Application No. 262/13, fails. Hence, I answer Point No. 1 in the negative and pass the following order:"

Hence, the present Writ Petition.

8 It is the contention of the learned Counsel for the Petitioner that in view of the fact that the company is wound up, the petitioner cannot be called upon to answer the plea, which was recorded till the case is taken to its logical end. However, what would be relevant is the date of recording the plea since it relates to the date when the offence was committed. On the date of the recording of the plea of the petitioner on behalf of the accused No. 1 company, the company was in existence and the petitioner was duly authorised by the

company to represent it at the time of trial. No subsequent event can set the clock back. The final adjudication would depend upon the evidence adduced by the complainant and the rebuttal of the presumption put forth by the accused. There is no such stage of withdrawing the plea recorded of the company due to any subsequent event. The plea is recorded on the basis of the avernments in the complaint in respect of commission under Section 138 of Negotiable Instruments Act. The Official Liquidator would be empowered to protect the interest of the company as well as the claimant and he may resume the role at an appropriate state. As on today, there cannot be transfer of plea from the accused company to the official liquidator, since the company is a juristic person.

9 In the case of **Firth (India) Steel Co. Ltd. reported in AIR 1999 Bombay 75,** the Hon'ble Court had placed reliance upon the Judgment of the Division Bench of this Court in the case of **Orkay Industries Ltd. v/s. State of Maharashtra reported in 1998(2)**

Mah. L.J. 910. In paragraph-53 of the Judgment, the Hon'ble Division Bench noted that -

> “a subsequent order appointing a Provisional Liquidator or winding up of the company can have no bearing on the proceedings under section 138 of the Negotiable Instruments Act once the offence is deemed committed prior to such an order being passed. The learned Bench observed, if prior to the order of winding up or appointment of Provisional Liquidator an offence has already been committed then the subsequent order cannot absolve the Company or its Directors of the offence nor give rise to any defence in the proceedings under section 138 of the Negotiable Instruments Act.”

10 In the present case, the plea of the present petitioner was also recorded on behalf of the company and at that stage, the company was a juristic person duly represented by the present petitioner. Winding up proceeding is subsequent event. The application filed by the present petitioner is at the stage of recording of evidence and before final adjudication. In these circumstances, the application filed by the petitioner was rightly rejected. The company is also made

liable, merely because a fine or compensation may be imposed, which will have to be paid from the assets of the company, the company cannot be exonerated in a trial under Section 138 of the Negotiable Instruments Act and it is also not expected that the company would appoint another director to answer the plea, which was recorded through the present petitioner as winding up is a subsequent event. At the stage of the judgment, the trial court could recover the fine or compensation through official liquidator.

11 In the case of **Firth (I) Steel Co. Ltd. (In Liqn)(cited supra)**, the Hon'ble Single Bench of this Court has held as follows :

> "In a rare case if the Liquidator himself is to be held liable for acts of the company there are always powers in him to seek permission of the Company Court to prosecute or defend such prosecution."

12 In view of the above the reasons assigned by the learned Magistrate as well as the learned Revisional Court call for no interference, as justifiable reasons have been assigned.

13 The learned Counsel for the petitioner vehemently submits that since the plea of accused No. 2 was recorded on behalf of accused No. 1, it was necessary and incumbent upon him to file the said application.

14 In any case, any irregularity in recording the plea can be corrected subsequently and the same would not vitiate any proceedings. No case for interference is made out.

15 The learned Counsel for the respondent submits that the proceedings are in progress. The evidence of P.W. 1 has been recorded and he is being subjected to cross-examination.

16 In view of this, no case for interference is made out. The Petitions being sans merits, stand rejected. All contentions are kept open.

17 Rule is discharged on the above terms.

18 In view of the disposal of the Writ Petitions, nothing survives in the Criminal Application. The same is also disposed of accordingly.

(SMT. SADHANA S. JADHAV, J)