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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 867 OF 2016

Mr. Anil Harish … Petitioner

vs.

State of Maharashtra & Anr. … Respondents

Mr. Haresh Jagtiani, Senior Advocate a/w. Mr.Siddhesh Bhole, Ms. Mittali Harish, Mr. Royden, Ms. Sonali Mishra and Mr. Nikhil Ghate i/b. M/s.Haresh Jagtiani & Associates for the Petitioners.
Mr. Vivek Patil a/w. Mr.Arjun Pawar and Mr. Shrikant Patil i/b. M/s.Vivek Patil and Associates for the Respondents.
Mr. Vinod Chate, APP for the State.

CORAM : A.K. MENON, J.
RESERVED ON : 5th JULY, 2017
PRONOUNCED ON : 3rd AUGUST, 2017

P.C.:

1. Rule. Rule made returnable forthwith. By order dated 5th July, 2017 parties were put to notice that the petition could be disposed of finally at the admission stage. By consent of parties taken up for final hearing and disposal.

2. By this Writ Petition, the petitioner seeks to challenge a order dated 1st April, 2015 passed by the Metropolitan Magistrate, 63rd Court, Andheri issuing process against him. The petitioner was accused no. 5 in a complaint filed by respondent no. 2 in respect of an offence under Section 138 of the Negotiable

Instruments Act, 1881 allegedly committed by one M/s. Valecha Engineering Limited (the Company) which had entered into a Sale of Receivables agreement under which the complainant disbursed sale consideration in respect of the liability relating to the Company. The Company issued cheque no. 26956 dated 3rd February, 2015 drawn on Axis Bank Ltd. for a sum of Rs.1,72,00,352/-. The said cheque when presented for payment, was dishonoured for reason that "Funds were insufficient". Statutory notice came to be issued on 13th February, 2015, including one addressed to the present petitioner who had failed to respond. The complaint records that the cheque was signed by accused no. 4 who was a whole time director of the Company. Since the statutory notice was not complied with, the complaint came to be filed.

3. It is the case of the petitioner that he was only Additional Director and was not in-charge of the day-to-day affairs and management of the Company. Furthermore, he had resigned from the Board of Directors of the Company with effect from 30th September, 2014. The petitioner has relied upon the certified copy of the Form DIR-12 dated 30th September, 2014. The attachments to the form were

(i) a copy of the resolution.

(ii) Resignation letter and

(iii) Resignation acknowledgement.

The petitioner relies upon this as evidence of having resigned before the issuance of the cheque. There was no other reason for the respondent no. 2 to accuse the petitioner of any offence under section 138. Mr. Jagtiani relied on the following decisions :-

(i) Harshendra Kumar D. Vs. Rebatilata Koley and Others [(2011) 3 SCC 351].
(ii) Suhas Bhand vs. State of Maharashtra & Anr. [2009 SCC Online Bom 1245]
(iii) Pooja Ravinder Devidasani vs. State of Maharashtra & Anr [(2014) 16 SCC 1].
(iv) K. K. Ahuja vs. V. K. Vora and Anr [(2009) 10 SCC 48]
(v) National Small Industries Corporation Limited vs. Harmeet Singh Paintal and Anr. [(2010) 3 SCC 330].

He submitted that the Supreme Court had held that in cases where resignation of the Director of the Company had been accepted and notified to the Registrar of the Companies as on date of alleged offence in the prescribed form and on the date on which offence was committed by the Company the accused was neither director nor had anything to do with the affairs of the Company, it would not be permissible to allow a Criminal Complaint to proceed against such accused as it would result in gross injustice and tantamount to abuse of process of the Court.

4. This proposition he pointed out was evident from the decision of the Supreme Court in the case of *Harshendra Kumar (supra)* even otherwise it is submitted by the learned Counsel that in case of *K. K. Ahuja (supra)* the Supreme Court held that unless there is a specific averment in the complaint giving the role of each accused, including to the effect that accused was at the material time in charge and responsible for the conduct of business of the Company and was

vicariously liable for the offence committed by the Company, it would not be proper to proceed against such persons. A person can be held vicariously liable only if he was in charge of business of the Company. It is not the legislative intent that in respect of an offence by the Company every Officer of the Company can be impleaded as accused.

5. Referring to section of 141(1) of the Negotiable Instruments Act Mr. Jagtiani further submitted that these decisions have been followed by the Supreme Court in various other cases. Making specific reference to yet another decision of the Supreme Court in *National Small Industries Corporation (supra),* Mr. Jagtiani pointed out that not every person engaged by the Company can be held vicariously liable and there is no presumption that every Director knows about all the transaction. That in the absence of a specific averment as to the role of the co-accused Director, trial Court's orders summoning them were quashed by the High Court and only those in-charge of the affairs of the Company and the conduct of its business at the time of commission of offence can be held vicariously liable.

6. Mr. Jagtiani submitted that the said decision are also been followed by our Court in *Suhas Bhand (supra)* in Criminal Writ Petition Nos. 1194 of 2008, 2331 of 2006, 608 of 2008 and 2330 of 2006. He therefore submitted that the Court order dated 1st April, 2015 is liable to be quashed and set aside.

7. The respondent no. 2 represented by Mr. Patil opposed the petition on the ground that the petitioner at all times was aware of and completely involved in the business of the Company. That merely by relying upon resignation, the petitioner cannot be made to be liable under the Act. According to Mr. Patil the base transaction pertaining to a Master Rental Agreement and Sale of Receivable agreement was within the knowledge of the petitioner. He submitted that petitioner was a Non-Executive and Independent Director though he was aware of the affairs of the Company since he is also an Advocate. In his professional capacity he was aware of the consequences of holding the post of a Director in a Company.

8. He relied upon a decision of this Court in case of ***Lata Pramod Dave vs. Mode Export Private Limited and Anr.*** [2016(2) Bom.C.R. (Cri) 484] in which a defence similar to the one in the present case has been taken to the effect that the accused had issued a cheque as Director of the Company but she had resigned before the date of dishonour of the cheque. On facts the contentions were disputed and the petition filed by the said Director was dismissed. He urged that reference to pages 19 to 23 of the said judgment reveals that the petitioner was indeed involved in the business of the Company. The contention that the petitioner had discharged her obligation as Director by tendering the resignation having been accepted by the Company she cannot escape liability. He therefore submitted that the petitioner in the present case also cannot escape liability.

9. In the complaint an averment had been made to the effect that the present petitioner who is accused no. 5 and the other accused are all responsible for the day today affairs of the Company. This statement has been made and effected in the statement made in paragraph 3. In paragraph 4 a further statement is made that cheque in question was issued with the knowledge and consent of accused nos. 2, 3 and 5 to 8 under signature of accused no.4. He therefore submitted that the petition is devoid of merit and deserved to be rejected.

10. I have heard both Counsel at length. On facts there cannot be any dispute that Form DIR-12 was duly submitted online which clearly records that the petitioner is not associated with the Company from 30th September, 2014 due to his resignation under Section 168 of the Companies Act. On page no. 4 to the form attachments are listed which reads as follows :-

> "RESO-MR. ANIL HARISH.pdf
> RESIGNATION LTR_ANIL HARISH.pdf
> RESIGNATION-ACKNOW-ANIL HARISH.pdf"

The form appears to be complete in all respects including mentioning the DIN of the Director. Filing of the form appears to be validated by the Board of Directors in Resolution No. 25 dated 13th August, 2014. It is found to be digitally signed by the Company Secretary. A true extract of the said form has been certified by the Dy. Asstt. Registrar of Companies on 9th March, 2016. Although initially Mr. Patil sought to question the veracity of the resignation and Form DIR-12 when faced with the certified copy Mr. Patil submitted that the contents of the form are not being admitted by the respondent.

11. In the course of arguments Mr. Patil submitted that at the time the agreement was entered into the petitioner was very much part of the Company's Management. In this respect Exhibit-H to the petition is a certified copy of the Annual Report of the Company to the effect that the petitioner was an independent Director who was not authorised to sign any contract or operation of the bank account or was not involved in the day today working of the Company. This has also been disputed across the bar. There is no denial on oath.

12. According to the respondent no. 2 the cheque was signed by the petitioner herein. There was a dispute as to whether the resignation was valid since according to the respondent in Lata Pramod Dave (supra) there was every reason to believe that resolution was ante-dated and there was no uncontroverted evidence on record to show that petitioner therein was director of the accused Company. The Court observed that the High Court could not enter into factual aspects. Mr. Patil had also referred to the landmark decision in ***SMS Pharmaceuticals Limited vs. Neeta Bhalla [2005(8) SCC 89]*** which required a specific averment to be made in the complaint as to the involvement of the Director. Although it is not possible to elaborate fully, the role of each Director at the time of filing the complaint, that is an aspect which is within the internal management of the Company. The court held that an overall reading of the complaint reveals presence of basic averments, but because of absence of particulars about the role of the Director the High Court was convinced that prosecuting the director in question could not be permitted. In that case,

however, there is a serious dispute as to whether the petitioner had tendered a resignation since it was believed that resignation and resolution were ante-dated to escape liability. Furthermore on the date of filing complaint and issuance of process against that petitioner, the alleged resignation of the Director was not acted upon which is the apparent reason that the resignation was ante-dated.

13. In the present case, the petitioner is not a signatory to the cheque, there is no dispute that he was an independent Director. This is also evident from the copies of the Annual Report, 2014. Mr. Patil had also argued that if the resignation was accepted as of 13th August, 2014 the Annual Report would not have effectively name of the petitioner in the annexure in the report on Corporate Governance. In this behalf it is case of the petitioner that he was required to resign in view of requirement prescribed by SEBI in Circular dated 17th April, 2014. Thus there was no occasion for the petitioner to resign prior to the circular dated 17th April, 2014. The petitioner seemed to have attended three meetings during 2013-14 and last of these meeting is seen to have been held on 12th February, 2014. Assuming that the petitioner attended these meetings there is no substance in the contention that the petitioner's resignation is questionable, inasmuch as the resignation has obviously occasioned after April, 2014 i.e. after the last meeting of the Board of Directors in the year 2013-14. By then the petitioner may have submitted his resignation which is effective September, 2014. The cheque in question is dated 3rd February, 2015 well after the resignation.

14. In my view there is nothing in the facts of the case at hand to show that this case was akin to that of *Dave (supra)* wherein the resignation was prima facie found to be ante-dated. In the present case the SEBI Circular is dated 17th April 2014, the resignation is dated 30th September, 2014. The cheque is issued after 4 months after the resignation was accepted in Form 5. In the circumstances, there is no merit in the contention of the respondent that the Annual Report of 2013-14 could not have reflected the name of the petitioner in Board of Directors.

15. Thus it is evident that in the instant case the applicant was not in charge of the day-to-day business affairs of the Company. The respondent has not been able to establish otherwise. Nothing on record is indicative of the petitioners involvement in the running business of the company /actual working of the company. In the circumstances, the petitioner must succeed.

16. I therefore pass the following order :

(i) The impugned order dated 1st April, 2015 passed in issuing process in case no. 3909/SS/2015 before the Metropolitan Magistrate, 33rd Court is quashed and set aside.

(ii) Rule is made absolute in the above terms.

(A. K. MENON, J.)