IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.1307 OF 2017
WITH
CRIMINAL APPLICATION NO.216 OF 2017
IN
WRIT PETITION NO.1307 OF 2017
WITH
WRIT PETITION NO.1308 OF 2017
WITH
CRIMINAL APPLICATION NO.217 OF 2017
IN
WRIT PETITION NO.1308 OF 2017
WITH
WRIT PETITION NO.1309 OF 2017
WITH
CRIMINAL APPLICATION NO.218 OF 2017
IN
WRIT PETITION NO.1309 OF 2017
WITH
WRIT PETITION NO.1310 OF 2017
WITH
CRIMINAL APPLICATION NO.219 OF 2017
IN
WRIT PETITION NO.1310 OF 2017
WITH
WRIT PETITION NO.1311 OF 2017
WITH
WRIT PETITION NO.1312 OF 2017
WITH
WRIT PETITION NO.1313 OF 2017
WITH
WRIT PETITION NO.1417 OF 2017

Arvind Satpaul Gupta Partner of
M/s.Shree Tirupati Greenfield ... **Petitioner**

V/s.
The State of Maharashtra & Anr. ... **Respondents**

.....

Mr.Samrat J. Thakker with Ms.K.H.Rajani, Advocate for the Petitioner.

Mrs.M.R.Tidke, APP for the Respondent No.1/State.

Mr.S.K.Dubey, Advocate for the Respondent No.2.

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CORAM : A.M.BADAR J.

DATED : 6th September 2017.

ORAL JUDGMENT :

1 Heard.

2 Rule. Rule made returnable forthwith. Heard finally by consent of parties.

3 These are petitions filed by original accused No.4 in a complaints alleging commission of offence punishable under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "N.I.Act" for the sake of brevity) filed by respondent No.2 herein/original complainant and which are reportedly pending before the learned Metropolitan Magistrate, 53rd Court at Mulund, Mumbai and in the Court of learned Metropolitan Magistrate, 73rd Court at Vikroli, Mumbai. The writ petitioner is accused No.4 in Criminal Cases bearing

Nos.484/SS/2016, 485/SS/2016, 486/SS/2016 and 487/SS/2016 pending in 53rd Court, Mulund, Mumbai and in Criminal Cases bearing Nos. 422/SS/2016, 428/SS/2016, 429/SS/2016 and 430/SS/2016 pending in 73rd Court, Vikroli, Mumbai. By these petitions, the petitioner/accused No.4 is praying for quashing and setting aside the Order of issuance of process against him passed by the learned trial Court on taking cognizance of offence alleged against him by respondent No.2.

4 Heard the learned Advocate appearing for the petitioner/accused No.4. He vehemently argued that only bald allegations are made against accused persons by respondent No.2/complainant. Averments against accused persons are general in nature with no specific act attributable to them. So far as the petitioner is concerned, the complaint has not alleged even mens rea against him and no specific act in the alleged transaction has averred against him. It is further argued that the petitioner/accused No.4 was not recipient of cash from respondent No.2/original complainant. He is neither signatory to the cheque nor signatory to the bill of exchange allegedly issued. The petitioner/respondent No.4 was merely a sleeping partner of the firm having no concern with affairs of the firm. He was not Managing Partner of accused No.1 partnership firm. The learned Advocate further argued that the learned trial Court erred in not conducting inquiry under Section 202 of the Code of Criminal

Procedure and, as such, the petitioner/respondent No.4 could not point out all these facts. In a very casual manner, verification statement is made wherein it was alleged that accused No.3 is the partner of the firm – a fact which is totally incorrect. Ultimately, this Court was required to quash proceedings against original accused No.3. According to the learned Advocate appearing for the petitioner *mens rea* can be inferred only when the knowledge of the transaction is attributed or participation in action is alleged by the complainant. In the case in hand, there is no evidence to connect the writ petitioner/accused No.4 with the crime in question and, as such, the learned trial Court ought not to have taken cognizance of the alleged offence against the petitioner/ respondent No.4.

5 Mr.Samrat Thakkar, learned Advocate appearing for the petitioner further argued that basic doctrine test is not fulfilled in the case in hand and the learned trial Court has ignored the law laid down in the Judgment of the Honourable Apex Court in the matter of ***Gunmala Sales Private Ltd. v. Anu Mehta & Ors.*** reported in **(2015) 4 Cal. Law Times 310 (HC)**. The learned Advocate drew my attention to paragraph Nos.8, 9(c), as well as paragraph No.33 from the said Judgment and contended that this Court can quash the complaint because of absence of more particulars of role of the Director/Partner in the Company or Firm, as the case may be, and it is not sufficient to take cognizance on

the basis of bald statement that the accused being a partner in the firm is in-charge of and responsible to the Company/Firm, as the case may be. In his submissions, in the case in hand, no detail averments are made to infer commission of alleged offence by the petitioner/accused No.4, who is merely a sleeping partner of the Firm.

6 The learned Advocate further relied on the Judgment of the Honourable Apex Court in the matter of ***Standard Chartered Bank v. State of Maharashtra & Ors.*** reported in **2016 (5) Mh.L.J. 44** and particularly, paragraph No.16 thereof in order to demonstrate that the liability arises only when it is established that the accused was in-charge of and responsible for the conduct of business of Firm at the time of commission of the offence. Paragraph 16 of the said Judgment reads thus :

> "16. After so stating, the Court adverted to the complaint filed under Section 138 of the Act and opined that the complaint should make out a case for issue of process. As far as the officers responsbile for conducting the affairs of the company are concerned, the Court referred to various provisions of the Companies Act, 1956 and analysed Section 141 of the Act to lay down as follows :-
>
> > "What is required is that the persons who are sought tobe made criminally liable under Sedtion 141 should be, at the time the offence was committed, in charge of and responsible to the

compay for the conduct of the business of the company. Everny person connected with the company shall not fall within the abmit of the provision. It is only those persons who were in charge of an responsible for the conduct of business of the company at the time of commission of an offence, who willb e liable for criminal action. It follows from this that if a director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of an responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any offence or designation in a company may be liable if he satisfies the maini reequirement of being in charge of an responsible for the conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a director or manager or secretary was enough to cast criminal liability, the section would have said so. Instead of "every person" the section would have said "every director, manager or secretary in a company is liable"..... etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons

> who canb e said to be connected with the commission of a crime at the relevant time have been subjected to action."

7 He further relied on the Judgment in the matter of ***Monaben Ketanbhai Shah & Anr. v. State of Gujarat & Ors.*** reported in **(2004) 7 SCC 15**. By relying on last paragraph of that Judgment, the learned Advocate averred that criminal liability under Section 141 of the N.I.Act cannot be fastened against the Partner or a Director, who at the time of commission of offence was a sleeping Partner or ladies as well as others, who may not be knowing anything about the business of the Firm. There cannot be any presumption that every partner knows about the transaction.

8 As against this, the learned Advocate appearing for respondent No.2/original complainant contended that even the title of the present petitions demonstrate that the petitioner is Partner of accused No.1 M/s.Shree Tirupati Greenfield. The learned Advocate took me through the averments made in the complaint for the offence punishable under Section 138 of the N.I.Act and contended that basic averments attributing commission of offence by the petitioner/accused No.4 are already made and pleaded in the complaint. The learned Advocate drew my attention to the reply filed by respondent No.2 and more particularly to Exhibit 'B' – affidavit annexed to that reply and

contended that one of accused namely Haresh Gurbux Doulatani had sworn an affidavit by stating that the present petitioner/ accused No.4 is co-partner in accused No.1 M/s.Tirupati Greenfield Developers and, therefore, it does not lie in the mouth of the writ petitioner that he is not concerned with the affairs of the Partnership Firm.

9 I have carefully considered the rival submissions and also perused material produced on record including the complaint for the offence punishable under Section 138 of the N.I.Act. At the outset, in order to decide the controversy, involved in the instant case, it is necessary to put on record the provision of Section 141 of the N.I.Act, which read thus :

> "S.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 sub-section 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 sub-section (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.”

10 Bare perusal of this Section shows that it is applicable

to the offences committed by Companies or by Partnership Firm. Sub-Section (1) of Section 141 of the N.I.Act provides that if a person commits an offence punishable under Section 138 of the N.I.Act, is a Company, then every person, who at the time of commission of alleged offence was in-charge of and was responsible to the Company for conduct of the business of the Company shall be deemed to be guilty of the offence. However, if such person during the trial is successful in proving that the offence was committed without his knowledge or that he had exercised due diligence to prevent the commission of such offence, he may not vicariously liable for commission of such offence. Explanation to this Section makes it clear that the term 'Company' used in this Section also covers the 'Partnership Firm'. Keeping in mind this provision of the N.I.Act, which to some extent create vicarious liability of a person, who had not even signed the disputed cheque, let us, examine the case in hand.

11 According to respondent No.2/original complainant, accused persons and more particularly, accused No.2 Haresh Gurbux Doulatani induced them to invest in the project of accused No.1 M/s.Shree Tirupati Greenfield Developers of which remaining accused including petitioner/accused No.4 is partner. Respondent No.2/original complainant further pleaded in the complaint that accordingly, the amount was paid and bill of exchange came to be executed by accused persons. It is further

averred that in order to repay the amount which was advanced by respondent No.2/original complainant, accused persons issued cheques, which were ultimately dishonoured.

12 It is not in dispute that accused No.1 M/s.Shree Tirupati Greenfield Developers is a Partnership Firm of which the present petitioner/accused No.4 is a partner. However, according to petitioner, he is merely a sleeping partner having no knowledge about the transaction and that he had not issued the cheque in question and had not signed any document in respect of the transaction. On this aspect, let us, therefore, consider what is averred in the complaint. In paragraph 2 of the complaint, respondent No.2/original complainant has made following averment :

> "The Complainant states that the Accused No.1 is a Partnership firm and Accused no.2 to 5 are the partners of the Accused no.1 firm and all of them are responsible for day to day conduct of the business and affairs for the Accused No.1 firm. The Accused no.2 to 5 are also authorized signatory of Accused no.1 and they are operating the bank account of the Accused no.1 as partners thereof."

13 In paragraph 5 of the complaint, relevant averment is to the following effect :

> "The cheques are issued with the knowledge and consent of all the accused and all the accused have taken active part in the transaction. The details of the said cheques are as under :-
>
> | Cheque Nos. | Date | Amount (Rs.) |
> |---|---|---|
> | 008234 | 01.01.2016 | 4,00,000/- |
> | 008480 | 01.01.2016 | 5,00,000/-" |

14 In other words, according to complainant/respondent No.2 herein, accused Nos.2 to 5 (excluding accused No.3) are Partners of accused No.1 Partnership Firm and as they are responsible for day to day conduct of the business and affairs of the accused No.1 Partnership Firm. The complaint depicts categorical averment that cheques were issued under knowledge and consent of all accused persons and that they had an active part in the transaction in question.

15 Veracity of these averments can be judged only during the course of cross-examination of the complainant. At this stage, let us examine whether such averment is sufficient to proceed against accused persons for the offence punishable under Section 138 read with Section 141 of the N.I.Act. As seen from the provision of this Section, what is required to be contended by the complainant is that at the time when the offence was committed, the person concerned, who is sought be arraigned as accused was in-charge and responsible to the Company/Firm for conducting the

business of the Company/Firm. Such person, who is arraigned as accused, can establish that the offence was committed without his knowledge or that he has exercised due diligence to prevent the commission of offence. However, this stage comes at the time of trial and this burden can be discharged even by preponderance of probability. In order to make out this contingency, the accused concerned has to stand for the trial.

16 Now, let us examine whether basic doctrine test as pressed in service by the learned Advocate appearing for the petitioner/accused No.4 is fulfilled by the complainant/respondent No.2 by making necessary averments in his complaint. Paragraph Nos.8(a) and 9(c), pointed out by the learned Advocate, from the Judgment of ***Gunmala Sales Private Ltd.*** (supra) are paragraphs in which written submissions of parties are reproduced by the Honourable Apex Court. The ratio of that Judgment can be found in paragraph No.33 thereof. For the sake of convenience, the same is reproduced herein and it reads thus :

> "33. We may summarize our conclusions as follows:
> 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, incontrovertible 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, incontrovertible 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 Courts 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."

17 It is thus crystal clear that in order to rope in a Director of a Company or a Partner of a Firm for the offence punishable under Section 138 read with Section 141 of the N.I.Act, what is necessary is basic averment that the Director/Partner was in-charge of and responsible in conduct of the business of the Company at the relevant time. If this criteria is fulfilled, the Magistrate can issue process against said

Director/Partner. If such Director/Partner wants process to be quashed on the ground of bald or vague averments, then he must either furnish some sterning, incontrovertible or unimpeachable material in order to demonstrate that he is not at all concerned with the alleged offence. Such Director or Partner has to make out a case that the trial would be abuse of process of the Court. He is required to make out circumstances to substantiate his contention in this regard.

18 By now, it is well settled that there needs to be averment in the complaint that Partner of Firm or Director of the Company was in-charge of and was responsible to the Firm or the Company, as the case may be for conduct of the business of the Firm/Company, as the case may be. The basic requirement under Section 141 of the N.I.Act is to make specific averment in the complaint that accused Partner or Director who was neither signatory to the cheque nor the Managing Director or Managing Partner, as the case may be, at the time of commission of offence was in-charge of and responsible to the Firm or Company for conduct of business. No particular form in this regard is necessary. It is not at all necessary to plead that such a Partner or Director has any specific role in respect of the transaction leading to issuance of the cheque. Section 141 of the N.I.Act makes the Partner or Director in-charge of and responsible for the Firm or the Company for conducting business of the Firm or Company, liable

for penal consequences. Valuable reference can be had to this proposition from the Judgments of the Honourable Apex Court in the matter of ***A.K.Singhaniya v. Gujrath State Fertilizers Company Ltd.*** reported in **AIR 2014 SC 71**, ***Katta Sujatha v. Fertilizer & Chemicals, Travancore*** reported in **(2002) 7 SCC 655**, ***K.K.Ahuja v. V.K.Vora***, reported in **(2009) 10 SCC 48** and ***National Small Scale Industries Corporation v. Harmeet Singh*** reported in **(2010) 3 SCC 330**.

19 When tested on the touchstone of this position of law, as stated in foregoing paragraphs, averments in the complaint made by respondent No.2/original complainant, satisfy all requirements of Section 141 of N.I.Act. It is categorically averred by respondent No.2/original complainant in paragraph Nos.2 and 5 of the compliant that petitioner/accused No.4 was in-charge of and was responsible for the affairs of the Partnership Firm in its day to day conduct of business. It is further averred that even cheques were issued with the knowledge and consent of all accused persons, who had taken active part in the transaction. These averments are certainly sufficient to put the writ petitioner/accused for trial. He may, on his part, establish that the offence was committed without his knowledge or that he had exercised due diligence to prevent the commission of offence, but that will be the subject matter of the defence in the trial and such defence may be established by cross-examining the complainant or

by adducing defence evidence. He may point out at the trial that he is just a sleeping partner of the firm. At this stage, what is required to be considered is whether there is sufficient ground for prosecuting the writ petitioner/accused No.4 and that ground is established by averments made in the complaint. Mere averments in the petition that the writ petitioner/accused No.4 was a sleeping partner having no knowledge of the transaction in question is not sufficient to quash process issued against him. This defence will have to be established during the trial.

20 In the wake of foregoing discussion, writ petitions are devoid of merit and the same are dismissed. Rule discharged.

21 In view of dismissal of writ petitions, interim applications, if any, also stand disposed of.

(A.M.BADAR J.)