

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.478 OF 2017

- 1) Mukeshbhai Balabhai Patel
Aged - 50 years;
- 2) Mrs.Ranjanben Mukeshbhai Patel,
Aged - 46 years,
Both Mumbai Inhabitant
R/at.2253/A, Shree Ram Villa,
Phool Wadi Chowk,
Hill Drive, Bhavnagar,
Gujrat - 364 002. .. Petitioner

Vs.

- 1) State of Maharashtra
Through Public Prosecutor;
- 2) Jayesh Ratilal Jogia,
Aged - 48 years,
R/at.11, Girnar Apartments,
S.V. Road, Malad (West),
Mumbai - 400 064;
- 3) Tulip Shapes & Structure Pvt.Ltd.
A company incorporated under thereafter
Provisions of Companies Act
Having its office at
"A" Wing, 6th Floor,
Universal Business Park,
Kandivali, Farm Road,
Opp. Saki Vihar Road,
Andheri (East), Mumbai - 400 097.
- 4) Mrs.Roopal Rajesh Madhani,
Adult,

And

- 5) Rajesh Madhani
Adult,
Both R/at. Flat No.9, 9th Floor,
Plot No.2, Ugam Building,
Near South Road No.9,
JVPD Scheme, Juhu,
Mumbai - 400 049. .. Respondents

**WITH
CRIMINAL APPLICATION NO.186 OF 2017**

Mrs.Roopal Rajesh Madhani,
Adult,
Both R/at. Flat No.9, 9th Floor,
Plot No.2, Ugam Building,
Near South Road No.9,
JVPD Scheme, Juhu,
Mumbai - 400 049. .. Applicant

Vs.

- 1) Jayesh Ratilal Jogia
Aged - 48 years,
R/at.11, Girnar Apartments,
S.V. Road, Malad (West),
Mumbai - 400 064;
- 2) Tulip Shapes & Structures Pvt. Ltd.
A company incorporated under thereafter
Provisions of Companies Act
Having its office at
"A" Wing, 6th Floor,
Universal Business Park,
Kandivali, Farm Road,
Opp. Saki Vihar Road,
Andheri (East), Mumbai - 400 097.
- 3) Rajesh Madhani
Adult,
R/at. Flat No.9, 9th Floor,
Plot No.2, Ugam Building,
Near South Road No.9,
JVPD Scheme, Juhu,
Mumbai - 400 049;

- 4) State of Maharashtra
Through Public Prosecutor. .. Respondents

.....
Mr.Akhilesh Dubey a/w. Mr.Samir Singh i/b. M/s.T.D. Joshi & Associates, Advocate for the Petitioners in Cri.W.P.No.478 of 2017.

Mr.Kapil P. Shah, Advocate for Respondent No.2, in Cri.W.P.No.478 of 2017 and for Respondent no.1 in Cri. Appln. No.186 of 2017.

Mr.Ganesh S. Vaidya, Advocate for Respondent Nos.3,4, and 5, in Cri.W.P.No.478 of 2017 and for applicant in Cri. Appln. No.186 of 2017.

Mr.A.R. Patil, APP for the Respondent - State.

.....

CORAM : PRAKASH D. NAIK, J.

DATED : AUGUST 16, 2018.

JUDGMENT :

The petitioners in writ petition no.478 of 2017 and the applicant in criminal application no.186 of 2017, are arrayed as accused in complaint bearing No.2648/SS/2915, for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 ("NI Act", for short). The petitioner in writ petition no.478 of 2017 were impleaded as accused nos.2 and 3, whereas, applicant in Criminal Application No.186 of 2017, was impleaded as accused no.4.

2 The brief facts as alleged in the complaint are as follows:

- (a) Accused no.1 is the company incorporated under the Companies Act and accused nos.2 to 5 are incharge in respect of the company of accused no.1 and at all relevant point of time, have been dealing with the present complainant for and on behalf of the company and had also represented to the complaint that they are also personally responsible for all the affairs in respect of the company.
- (b) On the basis of the representation made by accused no.2 to 5, the complainant had dealt with accused no.1. Accused represented that they are in the business of construction and as such they are in process of development of residential complex known as "Tulip Garden" on the plot at land bearing survey no.115, village Kandivali.
- (c) Accused further represented that they are in need of necessary financial assistance for completing the building. Accordingly, accused offered to sell five flats to be

constructed in the building in total admeasuring 12.170 sq. feet as against the payment of Rs.5 crores. It was further agreed that the accused would be entitled to refund money along with necessary compensation in case, if they do not intend to sell the flat to the complainant as narrated in the agreement signed between the parties being the agreement dated 2nd August, 2013.

- (d) As per the agreement, the complainant had paid the entire sum of Rs.5 crores by RTGS which has been duly received by the accused. They have acknowledge the receipt of the said amount vide letter dated 8th August, 2013.
- (e) Alongwith the said letter, the accused have also confirmed payment schedule in respect of the said amount. The accused issued necessary receipt for the sum of Rs.5 crores and also confirmed the allotment in respect to the flat to the complainant.
- (f) As per the agreement, upon completion of period of 15 months, the accused have also issued a cheque of Rs.7,50,00,000/-, in favour of the complainant being

cheque dated 12th January, 2015, with a specific assurance that the cheque would be encashed on due presentation. However, when the cheque was presented, the same was returned by the banker with remark "Funds insufficient".

- (g) At all relevant point of time, the accused have been admitting their liability and as per the said admission, they have issued necessary cheque in favour of the complainant. The complainant is in possession of various such correspondence.
- (h) In view of the return of the cheque, notice was issued on 29th March, 2015 to the accused and they were called upon to make payment in respect to the said cheque. Notice was replied by letter dated 10th April, 2015 and 27th April, 2015. In spite of notice, the accused have failed and neglected to make payment. Hence, the complaint was filed on 8th May, 2015.
- (i) Verification statement of the complainant was recorded and thereafter by order dated 8th October, 2015, learned Metropolitan Magistrate 43rd Court, Borivli, Mumbai

issued process against the accused under the provisions of Section 138 read with Section 41 of the NI Act.

3 The petitioners in writ petition no.478 of 2017, challenged the order of process by preferring revision application before the Sessions Court, which was numbered as Criminal Revision Application No.13 of 2016. The applicant in Criminal Application No.186 of 2017, was impleaded as respondent no.4 in the said Revision Application. Accused nos.1, 4 and 5 were arrayed as respondent nos.3, 4 and 5. Respondent no.3 in the revision application (accused no.1) and respondent no.5 therein (accused no.5) filed reply to the said revision application. In the said reply, it was stated that the petitioners herein who are revision applicant in the said revision application as well as the applicant in criminal application no.186 of 2015, has nothing to do with the issuance of cheque. They do not have any role in these transactions. It was further stated that the present petitioners and the applicant in Criminal Application No.186 of 2017, are mere directors and noway connected or responsible for the day to day conduct of business of respondent no.3. They are falsely implicated in this case. It was also stated that only accused no.5 had transacted with the complainant on behalf of

the company. The applicant in criminal application no.186 of 2917 also challenged the order of process by preferring Revision Application before the Sessions Court. The said application was numbered as Criminal Revision Application No.78 of 2016. Petitioners herein were impleaded as respondents in the said application. Reply was filed by them opposing revision application preferred by the original accused no.4 and it was contended that accused nos.1, 4 and 5 are also responsible for the offence. The complainant has also opposed the application preferred by the petitioners by filing reply. Revision Application preferred by the petitioners as well as accused no.4 were rejected by the Sessions Court.

4 Learned counsel for the petitioners in writ petition no.478 of 2017, submitted that the petitioners has no role to play in the subject transaction. They are not signatories to the cheque. They have not signed any documents. There are no sufficient averments in the complaint invoke vicarious liability under Section 141 of the NI Act. The respondent nos.4 and 5 are responsible for the business of the company. Petitioners are not responsible for day to day affairs of accused no.1 company. They have not signed the receipts or allotment letter on behalf of the

company. The petitioners were never aware about the alleged transactions of respondent no.2 with the company. The complaint does not specify the statutory requirements of Section 141 of NI Act, as to how and in what manner, and, the role described and specific allegations against the petitioners. Operations of the company was managed by respondent nos.4 and 5. Learned Magistrate had mechanically issued process without understanding the requirement of Section 141 of NI Act. The Sessions Court has rejected Revision Application without any cogent reasons. The Courts below failed to take into consideration several decisions of the Supreme Court relating to vicarious liability enunciated under Section 141 of the NI Act. The petitioners had filed company petition against respondent nos.2 to 5 before National Company Law Tribunal for operation and mismanagement. The Tribunal has passed requisite orders. The petitioners had also filed complaints against the said accused. It is, thus, submitted that there is nothing on record to indicate that the petitioner at any point of time transacted with the complainant and had participated in day to day affairs of the business of accused no.1 company. The petitioners were residents of Bhavnagar Gujarat and hence it was necessary for trial Court to conduct enquiry under Section 202 of Cr.P.C. It is submitted

that the petitioner no.1 had lodged FIR dated 25th January,2017, against respondent nos.4 and 5 under Sections 420, 406, 120B of IPC. The complaint was also lodged with EOW on 19th February, 2017, against respondent nos.4 and 5. Reliance is also placed on public notice issued by petitioners intimating public at large not to deal with respondent nos.4 and 5 with respect to property of respondent no.3. It is, thus, contended that, the petitioner were not involved in day to day affairs of company and the petitioners had grievance against conduct of co-accused and their misdeeds.

5 Learned counsel relied upon the decision of the Supreme Court in the case of ***Gunmala Sales Private Limited Vs. Anu Mehta and Ors***¹. He also placed reliance upon the compilation of documents in support of his submissions, including, the orders passed by National Company Law Tribunal. Reliance is also placed on the decision of the Supreme Court in the case of ***Pooja Ravinder Devidasani Vs. State of Maharashtra***².

6 Learned counsel for the applicant in criminal application no.186 of 2017, has also made similar submissions on

1 Supreme Court in Cri. Appeal No2228 of 2014, decided on 17.10.2014

2 Supreme Court in Cri.Appeal No.2604-2610 of 2014, decided on 17.12.2014

the point of the vicarious liability stipulated under Section 141 of NI Act. It is submitted that the trial Court has mechanically issued process. The Sessions Court has rejected the Revision Application without considering the issues raised therein in proper perspectives. The Sessions Court did not take into consideration the affidavit filed by the co-accused stating that the applicant is not involved in day to day affairs of the accused no.1 company. The averements in the complaint are insufficient to invoke Section 141 against the applicant. Applicant is not signatory to the cheque. The applicant is not concerned with the alleged transactions and on the basis of vague statements in the complaint she cannot be prosecuted for the said offence. There is nothing to show on record that the applicant was incharge and was responsible for the day to day conduct of the business of respondent no.2 company. The law contemplates necessary averments in the absence of the same the proceedings are required to be quashed against the applicant.

7 Learned counsel for the respondent - complainant vehemently opposed the prayers in the petition/application. It is submitted that there is no infirmity in the order taking cognizance and the order passed by the Sessions Court rejecting

the Revision Application. The reply filed by the respective parties before the revisinal court indicate that they are blaming each other. The complaint specifically mentions the involvement of the accused. At the stage of issuance of process, the Court is required to peruse the averments in the complaint, verification statement and the documents on record.

8 It is submitted that the grounds raised by the petitioner / applicant in these proceedings are required to be tested during the trial. This is not the stage to appreciate the contentions of the accused. The learned counsel drew my attention to the averments in the complaint and pointed that it is categorically mentioned that the accused herein have participated in the affairs of the company. It is not necessary to give further details in the complaint. He relied upon the affidavit-in-reply which is filed before the Sessions Court as well as in this proceedings dealing with the grounds raised by the accused. Reliance is placed on several documents which are annexed to the reply.

9 Reliance is placed on the decision of the Supreme Court in the case of ***Standard Chartered Bank Vs. State of***

***Maharashtra and Ors.*³**, Reliance is also placed on the order passed by this Court in the case of ***Arvind Gupta Vs. State of Maharashtra & Another*⁴**, and the decision of the Supreme Court in the case of ***Indian Bank Association and Ors. Vs. Union of India*⁵**.

10 Having heard both parties and on perusal of documents, it can be seen that the complaint was filed against the accused herein for offence under Section 138 of NI Act and the trial Court has taken cognizance of the same. On perusal of the complaint, it appears that the complainant has alleged that accused nos.2 to 5 are incharge in respect of accused no.1 company and at all relevant point of time have been dealing with the present complainant and had represented to the complainant that they are also personally responsible for all the affairs of the said company. It is further mentioned that on the basis of the representation of the accused no.2 to 5, the complaint had dealt with accused no.1 hereinabove. They had represented that they are in the business of construction and are in the process of development of residential complex and they are in need of necessary financial assistance for the purpose of construction.

3 Cri. Appeal Nos.271-273 of 2016 arising out of SLP (Cri)484 – 486 of 2016;

4 Cri.W.P. No.1307 of 2017, decided on 6.09.2017;

5 WritPetition (Civil) No.18 of 2013, decided on 21.04.2014.

Accordingly the accused offered to sell five flats against payment of Rs.5 crores. In pursuant to the representation the amount was parted to the accused company which is acknowledged by receipt, and, thereafter, the cheque was issued by the accused which was dishonoured on account of "Insufficient funds". The notice dated 29th March, 2015, which has been annexed to the petition was issued at the instance of the complainant to the accused wherein it was stated that the accused nos.2 to 5 had personally assured the complainant that apart from the company, they would be responsible to refund the amount. The notice was replied through advocate by accused nos.2 and 3, wherein it was stated that the said accused were not incharge of day to day operations of accused no.1 company. However, they were financial investors in the capacity of share holders and launders to the company and since they are financial investors into the company, they have become the Directors of the company. However, the entire management and control of day to day business of the company is carried out by the promoters of the company, namely, Rajesh Madhani and Rupal Madhani (applicant in criminal application no.186 of 2017). The reply filed in the revision application preferred by petitioners, accused nos.1 and 5 who were respondent nos.3 and 5 therein stated that the present

petitioners and the applicant herein were not responsible for day to day conduct of business of accused no.1 company but, they were mere directors, whereas the petitioners by filing reply before the Sessions Court had opposed for grant of any relief to accused no.4 who had preferred criminal revision application no.78 of 2018. The accused no.4, however by filling reply in criminal revision application no.13 of 2016, preferred by petitioners, had stated that the petitioners and the said accused are not connected to alleged agreement and have no role to play in transaction. Looking into the nature of allegations made in the complaint, the submissions made by the counsel for the petitioners/applicant, cannot be accepted. The submissions are to be tested at the time of trial and at this stage accused cannot be exonerated from proceeding.

11 Section 141 of the NI Act, can be quoted for reference, which reads as follows:

“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."*

12 The requirement to invoke the vicarious liability as stipulated under Section 141 of NI Act, is that the accused other than the company were incharge and responsible for the company. In the light of averments in the complaint, the submissions that they were not responsible or that they were not incharge would be probable defence which can be adjudicated at the time of trial. The complaint herein mentions details attributing sufficient role to the accused. On perusal of the averments in the present complaint, I find that they were sufficient to issue process against the applicant. The contention of respective parties emanating from Revision Applications filed before the Sessions Court, reply filed by respective parties in the said application and this petition had created debatable issues which are required to be tested during trial. The other submissions advanced by the advocate for the petitioner that

several complaints were filed against co-accused, proceedings were initiated before Company Law Board etc., cannot be accepted at this stage when *prima facie* case is made out against the accused for issuing process under Section 138 read with 141 of NI Act.

13 As far as the submission relating to inquiry contemplated under Section 202 of Cr.P.C.,i have already taken a view based on earlier decision of this Court that inquiry as contemplated under Section 202 of Cr.P.C. is not mandatory in respect to the proceedings under Section 138 of NI Act. There was sufficient material before trial Court to issue process. In the circumstances, the said submission also required to be rejected.

14 It is pertinent to note that in the reply notice dated 29th March, 2015,the petitioners had stated that, on account of financial investor into the company they have become the director of the company. In the affidavit-in-reply, filed byh respondent no.2 in W.P.No.478 of 2017, it is stated that, the petitioners are directors and share holders of company since 2010. Reliance is placed on private website which shows them as Directors and shareholders. It is further stated that the

petitioners have attended all Board Meetings and AGM and General Body Meeting of company. In the company petition filed by petitioners before NCLT, it is stated that, petitioners were on Board of Company and respondent nos.4 and 5 were required to report and act under control and direction of the Board of company. In the affidavit-in-reply, filed by complainant in Criminal Application No.186 of 2017, it is stated that the applicant/accused is involved in day to day conduct of business of accused company as well as various other companies, where she is a Director. The list of such companies is annexed to the reply. It is further stated that the applicant had signed the balance sheet of accused company the relevant part of balance sheet for the year ended March 2014 has been annexed to reply. The petitioners in paragraph no.1 of the writ petition No.478 of 2017, it is stated that, the applicant hereinabove and accused no.5 are Directors of accused company who are incharge of day to day affairs of company.

15 In the case of ***Gunmala Sales Private Ltd. (Supra)***, the Supreme Court has observed that, basic averments of the Director concerned, regarding his being incharge and responsible for conduct of business of the company at the relevant time is

essential and in the absence of such averment, the Magistrate is justified in not issuing process. It was further observed that, when a petition is filed for quashing the process, in a given case, on an overall reading of the complaint, the High Court may find that, the basic averment is sufficient, that it makes out a case against the Director, that there is nothing to suggest that the substratum of the allegations against the Director is destroyed rendering the basic averment insufficient and that since offence is made out against him, his further role can be brought out in the trial. The High Court may quash the complaint despite basic averment if it comes across unimpeachable evidence or acceptable circumstances which may in its opinion lead to conclusion that the Director could never have been incharge of and responsible for conduct of business of company at relevant time. In the decision in the case of **Pooja Devidasani (Supra)**, it was observed that taking complaint in entirety, no sufficient role is attributed to accused. The factual matrix of the said decision indicate that the appellant had resigned from company which was known to complainant. Except making bald statement and throwing burden on appellant/accused to prove documents, complainant had not pleaded that public document of Form - 32 is forged and fabricated. In the case of **Standard Chartered**

Bank (Supra), after analysing various decisions relating to Section 141 of NI Act, it was observed that the averments clearly meet the requisite test.

16 Taking into consideration the totality of circumstances, including admission in reply to notice, averments in respective reply filed in revision applications filed before Sessions Court as well as averments in present proceedings and affidavit-in-reply in these matters, no case is made out to exercise inherent powers to quash proceedings which are based on debatable issues.

17 Hence, I pass the following order:

:: ORDER ::

- (i) Criminal Writ Petition No.478 of 2017 and Criminal Application No.186 of 2017, are dismissed;
- (ii) It is clarified that the observations made in these proceedings are only for adjudicating the issues involved herein and the trial Court shall not be influenced by the same during the trial.

(PRAKASH D. NAIK, J.)