IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 971 OF 2017

Mr. Prasanna Prabhakar Rege
Aged about 54 years
B-605, Sabarmati Apartments,
Sahakargram, Ashok Nagar,
Cross Road, #3, Kandivali (East),
Mumbai 400 101. … Applicant

V E R S U S

1. Lawyers Chambers Premises Co-operative Society Ltd; 27-B, 1st Floor, Lawyers Chambers, Picket Road, Mumbai 400002.

2. The State of Maharashtra … Respondents

Mr. Subodh Desai I/by Husayn Kopty for Applicant.
Mr. Kishor Bhatia for Respondent No.1
Mr. P. H. Gaikwad, APP for Respondent No.2 – State.

CORAM : NITIN W. SAMBRE, J.

DATE : MARCH 5, 2018.

ORDER

. Heard respective Counsel for the parties.

2. This Application is under Section 482 of the Code of Criminal Procedure, 1973 questioning the proceedings bearing C. C. No. 2801792/SS/2015 pending on the file of 28th Court of Metropolitan Magistrate, Esplanade, Mumbai for an offence punishable under Section 138 read with Section 141 of the Negotiable Instruments Act.

3. Facts necessary for deciding the present Application are as under:

The Respondent No.1 - Original Complainant claimed to have engaged services of one M/s. Hail Mary Enterprises Pvt. Ltd. (formerly known as M/s. Pentagon Elevators Pvt. Ltd.) for the purpose of installation of elevator. In the said contract, the Complainant paid certain advance amount and since the differences arose between the Complainant and Original Non-applicant No.1 – Company towards repayment of the advance amount cheques issued came to be dishonoured. As a consequences thereof, the complaint referred supra for an offence punishable under Section 138 read with Section 141 of the Negotiable Instruments Act came to be initiated.

4. The Applicant is named as one of the Accused i.e. Accused No.5 being Director of Accused No.1 – Company against whom also the process came to be ordered by the learned Metropolitan Magistrate. The proceedings initiated for prosecuting the Applicant for an offence punishable under Section 138 read with Section 141 of the Negotiable Instruments Act are questioned herein on the following grounds amongst other.

5. Mr Desai, the learned Counsel for applicant – Original Accused No.5 would urge that the Applicant was admittedly Director of the Accused No.1 – Company with effect from 23rd September 2009 upto 28th May 2010. According to him, the Applicant stood resigned from the said Company as a Director on 28th May 2010 which resignation as professional and a Non-Executive Director was duly accepted by the Accused No.1 – Company and Form 32 under the relevant rules and Companies Act was submitted to the Registrar of Companies.

6. According to Mr. Desai, the Applicant being professional and a Non-Executive Director, is neither a signatory nor participating in the decision making process of issuance of cheques. According to him, the dishonoured cheques are dated 19th March 2012 dishonoured on 20th

March 2012, whereas, the Applicant stood resigned from the Accused No.1 – Company with effect from 28th May 2010. He would invite attention of this Court to the copy of the Form 32 produced at Exhibit – 'C' and Exhibit – 'E' so as to substantiate his contention of resigning from Accused No.1 – Company before the issuance of cheques.

7. According to Mr. Desai, though in response to the statutory notice issued under Section 138 of the Negotiable Instruments Act the aforesaid fact was brought to the notice of the Complainant i.e. Respondent No.1. By suppressing the said factual matrix from the Court of the Magistrate, the order of issuance of process came to be issued against him. He would urge that in view of the aforesaid events, the Applicant cannot be held vicariously liable and proceeded against under the Negotiable Instruments Act. He would draw support from the Judgment of the Apex Court in the matter of ***Harshendra Kumar D. V/s Rebatilata Koley and others***[1], ***Ashok Mal Bafna V/s M/s. Upper India Steel Mfg. & Engg. Co. Ltd***.[2] and ***Anita Malhotra V/s Apparel Export Promotion Council and Another***[3].

1 **(2011) 3 Supreme Court Cases 351**
2 **AIR 2017 Supreme Court 2854**
3 **(2012) 1 Supreme Court Cases 520**

8. Based on the aforesaid Judgments, Mr. Desai, the learned Counsel for Applicant would urge that there are no specific attribution in the complaint against the Applicant and in absence of specific attribution or specific role, he cannot be proceeded against. According to him, gross injustice is caused to the present Applicant by impleading him as an accused, as he is neither signatory to the cheques nor a Director responsible for the decision of issuance of cheques. In the aforesaid background, he sought quashing of the complaint against the Applicant including that of order of issuance of process.

9. Per contra, Mr. Bhatia, the learned Counsel for Respondent No.1 would urge that whether the Applicant was a professional and a Non-Executive Director on the board of Accused No.1 – Company, whether his tenure was for a period from 23rd September 2009 to 28th May 2010, whether he was involved in day today decision making process of the Accused No.1 – Company, are the issues which can be gone into at the stage of trial. According to him, the Applicant has to prove his defence which cannot be appreciated at this stage.

10. As regards Applicant's vicarious criminal liability in the case in hand, which according to him can be gone into, at the final stage of the

complaint, Mr. Bhatia submits that the contents of the complaint *prima facie* satisfies the requirement of an offence alleged. According to him, the Application is liable to be dismissed. Mr. Bhatia, the learned Counsel for Respondent No.1 would draw support from the Judgment of the Apex Court in the matter of ***Rallis India Ltd. V/s Poduru Vidya Bhusan & Ors***.[1] so as to claim that this Court at the preliminary stage cannot appreciate the defence of the Accused.

11. Considered rival submissions.

12. Upon perusal of the complaint in which the Applicant is added as Accused No.5 and Company, of which he is Director to be added as Accused No.1, it is noted that the Applicant is shown to be one of the Director of Accused No.1 – Company. A vague allegation about Applicant along with other Directors is responsible for day today conduct of the business of Accused No.1 – Company would be noticed in para nos. 2 and 9 of the complaint.

13. The complainant's case is based on a statutory notice dated 4th April 2012 which were duly replied by the Applicant giving details, as to how he cannot be held responsible and proceeded against, for vicarious

1 **2011 ALL MR (Cri) 1645 (S.C.)**

criminal liability. In the said reply to the statutory notice, the Applicant in categorical terms has narrated as under :

He was professional and a Non-Executive Director on the erstwhile M/s Pentagon Elevators Pvt. Ltd., which was later on named as 'M/s. Hail Mary Enterprises Pvt. Ltd.' i.e. Accused No.1 for a period from 23rd September 2009 till 28th May 2010. During the said period he was no way involved in day today operational matters of the Accused No.1 – Company. He was ceased to be a Director of Accused No.1 with effect from 28th May 2010.

14. Suppressing the said facts in the complaint, the Respondent – Complainant has initiated the complaint against the present Applicant. Apart from above, the Form 32 which are produced at Exhibit – 'C' and Exhibit – 'E' certifies the resignation of the Applicant from the Accused No.1 – Company. The copy of resignation letter dated 28th May 2010 in voluminous terms speaks of the date of appointment and date of resignation.

15. From the aforesaid factual background, it could be easily infer that the cheques which were formed to be the basis for initiation of prosecution are dated 19th March 2012, dishonoured on 20th March 2012

were issued, when the Applicant was neither a Director nor any way concerned with the Accused No.1 – Company. There is no material whatsoever brought on record by the Respondent – Complainant so as to justify their claim that Applicant was responsible for the issuance of cheques, which are formed to be the basis for initiation of prosecution against him.

16. In the aforesaid factual background, the leaned Counsel for Applicant was right in relying upon the judgments in the matter of ***Harshendra Kumar D., Ashok Mal Bafna*** and ***Anita Malhotra*** *(cited supra)* so as to claim that the Applicant cannot be held responsible for vicarious criminal liability in the case in hand.

17. The Apex Court in the matter of ***Harshendra Kumar D.*** in para nos. 16 and 17 has observed thus :

> *"**16.** Every company is required to keep at its registered office a register of its Directors, Managing Director, Manager and secretary containing the particulars with respect to each of them as set out in clauses (a) to (e) of sub-section (1) of Section 303 of the Companies Act, 1956. Sub-section (2) of Section 303 mandates every company to send to the Registrar a return in duplicate containing the particulars specified in the register. Any change among its Directors, Managing*

Directors, managers or secretaries specifying the date of change is also required to be furnished to the Registrar of Companies in the prescribed from within 30 days of such change. There is, thus, statutory requirement of informing the Registrar of Companies about change among Directors of the Company.

***17**. In this view of the matter, in our opinion, it must be held that a Director, whose resignation has been accepted by the company and that has been duly notified to the Registrar of Companies, cannot be made accountable and fastened with liability for anything done by the company after the acceptance of his resignation. The words, "every person who, at the time the offence was committed", occurring in Section 141(1) of the NI Act are not without significance and these words indicate that criminal liability of a Director must be determined on the date the offence is alleged to have been committed."*

The present case is squarely covered by the aforesaid observations.

18. Similarly, in the matter of ***Ashok Mal Bafna*** *(cited supra)* in para nos. 12, 13 and 14 has observed thus :

*"**12.** Turning to the case on hand, admittedly the cheques dated 28-12-2004 were issued while the appellant was Director of the Company with validity for a period of six months but during that period they were not presented for realization at the bank. The appellant has resigned as Director w.e.f. 2-1-2006 and the fact of his resignation has been furnished by Form 32 to the Registrar of*

Companies on 24-03-2006 in conformity with the rules. Thereafter, the appellant had played no role in the activities of the default Company. This fact remains substantiated with the Statement filed by the default Company on 20-02-2006 with the Registrar of Companies that in an advertisement of the Company seeking deposits (Annexure P3), only the names of three Directors of the Company were shown as involved in the working of the Company and the name of appellant was not therein. Indisputably, therefore, the cheques bounced on 24-08-2006 due to insufficient funds were neither issued by the appellant nor the appellant was involved in the day to day affairs of the Company.

13. *Before summoning an accused under Section 138 of the Act, the Magistrate is expected to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and then to proceed further with proper application of mind to the legal principles on the issue. Impliedly, it is necessary for Courts to ensure strict compliance of the statutory requirements as well as settled principles of law before making a person vicariously liable.*

14. *The Superior Courts should maintain purity in the administration of Justice and should not allow abuse of the process of Court. Looking at the facts of the present case in the light of settled principles of law, we are of the view that this is a fit case for quashing the complaint. The High Court ought to have allowed the criminal miscellaneous application of the appellant because of the absence of* *clear particulars about role of the appellant at the relevant time in the day to day affairs of the Company."*

19. Admittedly, from the facts of the case in hand, it is amply clear that the cheques were neither issued nor signed by the Applicant in his capacity as a Director of the Accused No.1 – Company. The allegation in the complaint no where speaks of an act of participation in the decision making process in the matter of issuance of cheques by the Applicant. That being so, the case in hand is squarely governed by the law laid down in the said judgment.

20. The Apex Court in the matter of ***Anita Malhotra*** *(cited supra)* has observed that if the Form 32 was maintained pursuant to the provisions of Sections 303, 264, 266 of the Companies Act, 1956, it can be accepted as the proof of the Applicant having been resigned from the Company.

21. So far as the reliance placed on the judgment in the matter of ***Rallis India Ltd.*** *(cited supra)* by Mr. Bhatia, the learned Counsel for Respondent No.1 is concerned, though he was right in pointing out that the defence of the Accused cannot be appreciated at the stage of the proceedings, however, the exception that can be carved out to be basis in

the facts of the present case, that after resignation of the Applicant, the cheques were issued and Applicant was no way responsible for issuance of cheques, which facts are clearly established and borne out of the record.

22. That being so, this Court has no hesitation but to allow the present Application in terms of prayer clause – (b) to the extent of the claim made by the Applicant which reads thus :

> *“ (b) that this Hon'ble Court be pleased to quash and set aside the CC No. 2801792/SS/2015 (Old CC No. 2800781/2012) pending before the Metropolitan Magistrate, 28th Court, Esplanade, Mumbai and the order dated 25.06.2012 passed by the learned Metropolitan Magistrate, 28th Court, Esplanade, Mumbai.”*

23. The Criminal Application stands disposed of accordingly.

(NITIN W. SAMBRE, J.)