SMT JUSTICE T. RAJANI

CRIMINAL PETITION Nos.3703, 3715, 3717, 3725, 4350, 4354, 4355, 4356, 4357, 4363, 4364 and 4365 of 2013 and 4317 and 5166 of 2014

COMMON ORDER:

Though the petitioners are different, since the complainant and since the cause of action arises out of the same business transaction, the criminal petitions are disposed of together by this common order.

2. The complainant-bank, though, has filed a complaint against A1 to A9 for the offence under Section 138 of the Negotiable Instruments Act (for short 'the Act'), A6, A7 and A9 are before this Court by way of respective criminal petitions, seeking for quash of proceedings in CC.No.4 of 2013 on the file of the IX Special Metropolitan Magistrate at Hyderabad, CC.Nos.116, 117 and 119 of 2013 on the file of the XIII Special Metropolitan Magistrate, Hyderabad and CC.No.447 of 2013 on the file of the XX Additional Chief Metropolitan Magistrate, Hyderabad respectively.

3. Heard the counsel for the petitioners, the counsel for the second respondent and the learned Public Prosecutor, appearing for the first respondent.

4. The facts, in CRLP.No.3703 of 2013, would suffice for the purpose of disposal of these cases, which are as under:

The complainant is a banking company, A1 is a company incorporated under the provisions of the Companies Act, A2 to A4 are the Whole-Time Directors of A1, A5 is the Managing Director of A1 and A6 to A9 are the Directors of A1. A2 to A9 are responsible for the day to day affairs and management of A1. A1 is the publisher of daily Newspaper circulated in the whole of South India. A1 availed financial assistance from the complainant from time to time, for meeting its working capital requirements. At the request of the accused, among other credit facilities, the complainant sanctioned a sum of Rs.50,00,00,000/- (Rupees Fifty Crores only) as a short term loan, vide sanction letter dated 22.06.2010, issued by the complainant, which was inadvertently mentioned as 11.01.2011 in the notice dated 25.06.2012, issued by the complainant, for meeting the working capital requirements of A1. A1 executed the necessary facility agreements in relation thereto. In continuation of the aforesaid sanction, the complainant approved the further disbursal, based on the request letter dated 22.09.2011 and credited an amount of Rs.50,00,00,000/-to the account of A1, which was due and payable on 20.03.2012.

In discharge of its liability, A3, who is the whole time director and authorized signatory of A1, signed and issued a cheque dated 29.05.2012, for an amount of Rs.50,00,00,000/-, drawn on ICICI Bank Limited, Secunderabad and requested the complainant to defer the presentation of the said cheque for encashment till 08.06.2012, to enable A1 to make arrangements of sufficient funds to honour the said cheque by such date. As such, the presentation of cheque was deferred. On 04.06.2012, the accused credited an amount of Rs.6,20,00,000/- to the complainant's account through RTGS, with further promise of making balance payment on the committed date, i.e. 08.06.2012. The balance payment was not made. Hence, the complainant presented the cheque, which was dishonoured on the ground of insufficient funds. A notice was issued to the accused. A3 replied to the said notice admitting the liability and informing the complainant that they could not honour the said cheque due to mismatch of cash flows and liquidity crunch at their end and indicated its intent to pay the amount due to the complainant and requested for additional time, till end of August 2012, to repay the dues. The accused also undertook to remit some amount on a daily basis, starting from 28.06.2012, which they failed to do. Hence, the complaint.

5. The petitioners seek for quash of the proceedings on the ground that the Courts below grossly erred in taking cognizance of the offence without applying judicious mind to the facts and circumstances of the case, though there are no allegations against the petitioners that they are responsible for the day to day affairs of the company nor were they signatories of the cheque. The petitioners were only directors of A1 company and were no way concerned with the alleged offences. The Courts below ought to have seen that the alleged cheque was signed by A3 on behalf of A1 company and the petitioners have nothing to do with its day to day business.

6. The counsel for the petitioners submits that the petitioners are only directors in the company and they are not in charge of day to day affairs. The counsel further contends that there are no details pertaining to the duties that were being performed by the petitioners. A simple averment that they were in charge of and were responsible

for the conduct of the business of A1 company would not suffice to prosecute the petitioners.

7. The counsel for the respondent, by relying on the decision of the Supreme Court in S.M.S. PHARMACEUTICALS v. NEETA BHALLA[1] contends that a mere averment in the complaint that the petitioners are in charge of day to day affairs would suffice to launch prosecution on the directors. The Supreme Court was dealing with a reference made by a two Judge Bench on three questions, one of which is as under:

> "(a) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfil the requirements of the said section and it is not necessary to specifically state in the complaint that the persons accused was in charge of, or responsible for, the conduct of the business of the company."

The question was answered holding that it is necessary to specifically aver in a complaint under Section 141 of the Act that at the time the offence was committed the person accused was in charge of and responsible for the conduct of the business of the company.

In support of his contention that mere averment in the petition that the petitioners are in charge of day to day affairs would suffice, he also relies on a decision of the Supreme Court in STANDARD CHARTERED BANK v. STATE OF MAHARASHTRA[2]. The Supreme Court summarized the position under Section 141 of the Act stating

---

[1] (2005) 8 SCC 89
[2] (2016) 6 SCC 62

that in case of Director, Secretary or Manager of the Companies Act or a person referred to in Clauses (e) and (f) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of and was responsible to the company for the conduct of the business of the company is necessary to bring the case under Section 141 (1) of the Act and no further averment would be necessary in the complaint, though some particulars will be desirable. The Supreme Court also took note of the decision in *GUMMALA SALES PVT. LTD. v. ANU MEHTA* [(2015) 1 SCC 103] wherein it was held as under:

> "30. 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 allegation 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. In another case, the High Court may quash the complaint despite the basic averment. It may come across some unimpeachable evidence or acceptable circumstances which may in its opinion lead to a conclusion that the Director could never have been in charge of and responsible for the conduct of the business of the company at the relevant time and therefore making him stand the trial would be abuse of the process of court as no offence is made out against him.
>
> 31. When in view of the basic averment process is issued the complaint must proceed against the Directors. But, if any Director wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he is really not concerned with the issuance of the

> cheque, he must in order to persuade the High Court to quash the process either furnish some sterling uncontrovertible material or acceptable circumstances to substantiate his contention. He must make out a case that making him stand the trial would be abuse of the process of court. He cannot get the complaint quashed merely on the ground that apart from the basic averment no particulars are given in the complaint about his role, because ordinarily the basic averment would be sufficient to send him to trial and it could be argued that his further role could be brought out in the trial. Quashing of a complaint is a serious matter. Complaint cannot be quashed for the asking. For quashing of a complaint it must be shown that no offence is made out at all against the Director."

8. The counsel for the petitioners contends that though the law is that an averment that a director is in charge of day to day affairs would suffice, to prosecute a person, the law does not shun unimpeachable evidence, which would prove that the directors were not in charge of day to day affairs, coming before the Court. In order to prove that the petitioners are not in charge of day to day affairs, he submits that the petitioners are independent directors and hence, they cannot be assumed as being responsible for the conduct of business by A1 company. In order to draw support to the contention that the petitioners are only independent directors and did not have any role to play in the day to day affairs of the company, the annual reports pertaining to the years 2009-2010. 2010-2011 and 2011-2012 were filed, which show that the petitioners are directors and the category is non-executive independent.

9. The definition of Independent Director under section 149 of The Companies Act, runs as follows:

> "149. Company to have Board of Directors. –
>
> ...
>
> (6) An independent director in relation to a company, means a director other than a managing director or a whole-time director or a nominee director,—
>
> (a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;
>
> (b) (i) who is or was not a promoter of the company or its holding, subsidiary or associate company;
>
> (ii) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;
>
> (c) who has or had no pecuniary relationship, other than remuneration as such director or having transaction not exceeding ten per cent. of his total income or such amount as may be prescribed, with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year;]
>
> (d) none of whose relatives has or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or their promoter, or directions, amounting to two per cent. or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;

(e) who, neither himself nor any of his relatives—

(i) holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed;

(ii) is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of—

(A) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or

(B) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to ten per cent. or more of the gross turnover of such firm;

(iii) holds together with his relatives two per cent. or more of the total voting power of the company; or

(iv) is a Chief Executive or director, by whatever name called, of any non-profit organisation that receives twenty-five per cent. or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds two per cent. or more of the total voting power of the company; or

(f) who possesses such other qualifications as may be prescribed.

Hence, the above definition would make it clear that the petitioners cannot be said to be persons in charge of day to day affairs. There is no argument that the petitioners have any exceptional position under section 149.

The contention that the question whether the petitioners are independent directors and whether they are not in charge of day to day affairs, can be left to be decided after trial, is not in the spirit of the law, which directs quash of proceedings, when the contents of the complaint, coupled with the unimpeachable material produced by the petitioners, would not make out a case against the petitioners. In view of the above, this Court opines that continuation of further proceedings against the petitioners would only result in abuse of process of law.

In the light of the above, the criminal petitions are allowed and the proceedings in CC.No.4 of 2013 on the file of the IX Special Metropolitan Magistrate at Hyderabad, CC.Nos.116, 117 and 119 of 2013 on the file of the XIII Special Metropolitan Magistrate, Hyderabad and CC.No.447 of 2013 on the file of the XX Additional Chief Metropolitan Magistrate, Hyderabad respectively, against the petitioners, who are A6, A7 and A9, are hereby quashed. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

____
T. RAJANI, J

September 14, 2018
DSK