IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 1433 OF 2018
WITH
CRIMINAL APPLICATION NO. 1023 OF 2019
WITH
CRIMINAL APPLICATION NO. 1024 OF 2019
WITH
CRIMINAL APPLICATION NO. 1025 OF 2019
WITH
CRIMINAL APPLICATION NO. 1026 OF 2019
WITH
CRIMINAL APPLICATION NO. 1027 OF 2019
WITH
CRIMINAL APPLICATION NO. 1029 OF 2019
WITH
CRIMINAL APPLICATION NO. 1030 OF 2019
WITH
CRIMINAL APPLICATION NO. 1031 OF 2019
WITH
CRIMINAL APPLICATION NO. 1032 OF 2019

1. Kulwant Chauhan,]
Age : 67 Years, Occ : Housewife,]
F-1303, Sector – A, Jal Vayu Vihar,]
Powai – IIT, Mumbai – 400 076]
Also At:]
100, Sushant Lok, Phase – I,]
Sector – 27, Gurgaon,]
Haryana – 122 022.]

2. Upneet Chauhan,]
F-1303, Sector – A, Jal Vayu Vihar,]
Powai – IIT, Mumbai – 400 076]
Also At:]
100, Sushant Lok, Phase – I,]
Sector – 27, Gurgaon,]
Haryana – 122 022.] ...Applicants

Versus

1. The State of Maharashtra]

Through the Learned Public Prosecutor,]
High Court, Bombay]

2. Transasia Bio-Medicals Ltd.]
Transasia House, 8 Chandivali Studio,]
Road, Andheri (East), Mumbai – 400 072] **...Respondents**

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Mr. Niranjan Mundargi a/w. Mr. Dnyaneshwar Jadhav, Ms. Anuja Desai and Ms. Saloni Vyas i/by. Legasis Partners for Applicants.
Mr. A.R. Patil, APP for Respondent no. 1 – State.
Ms. Shyamli Hajela i/by. H & M Legal Associates for Respondent No. 2.

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CORAM : S.S. SHINDE, J.

DATE : 23rd September 2019

JUDGMENT

1. **Rule**. Rule made returnable forthwith. Since all these Criminal Applications involves common question of law and fact, by consent of counsel for the parties, the same are heard together and being disposed of finally at an admission stage.

2. It is submitted that, the facts involved in all the above matters are similar, except the cheque numbers and criminal complaint numbers therefore, Criminal Application No. 1433 of 2018 would be treated as a lead matter.

3. These Criminal Applications take an exception to the order passed by the learned Metropolitan Magistrate 44th Court at Andheri, Mumbai (for short "said Court") dated 03rd February 2018 thereby issuing process against the applicants for an offence punishable under Section 138

r/w 141 of the Negotiable Instruments Act, 1881 (for short “the said Act”).

4. The learned counsel appearing for the applicants submit that, if the allegations in the complaint are taken on its face value and read in its entirety an alleged offences are not disclosed. It is submitted that, learned Metropolitan Magistrate has not appreciated the legal position concerning the vicarious liability of a director in a company which is being prosecuted for the offence under Section 138 r/w. 141 of the Said Act. The learned Magistrate has not properly appreciate that, what is required is that the persons who are seeking to be made vicariously liable for a criminal offence under Section 141 of the Said Act should be, at the time the offence was committed, was in charge of and was responsible for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the said provision. Only those persons who are in charge of and responsible for the conduct of the business of the company at the time of commission of an offence will be liable for criminal action. 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 for a criminal offence under the provisions. The liability arises from being in charge of and responsible for the conduct of the 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. Section

141 of the said Act is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is, therefore, not sufficient to make a bald cursory statement in a complaint that a Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company. This is in consonance with a strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

5. The learned Metropolitan Magistrate made grave error in not taking into consideration the uncontroverted documents relating to applicants resignation from the post of Director of the company, had these documents been considered by the learned Magistrate. It would have been apparent that the applicant has resigned much before the cheques were issued by the company. In fact, the document, a company master data and signatory details annexed by the Original Complainant himself clearly indicates the date as January 21st, 2017 of resignation of the present applicants as Directors / Signatory.

6. It is submitted that, before issuance of process the learned Magistrate has not applied his mind to the allegations made in the complaint and mechanically issued the process. The learned counsel invites attention of this Court to the photo copies of the form No. DIR-11 and submits that, the applicants resigned on 21st January 2017 as it is apparent from Clause –

4(a) of the said Form no. DIR – 11. It is submitted that, in Clause – 5 reasons for resignation is also mentioned. The said resignation has been accepted by the Registrar of the Company and therefore, the applicant cannot be prosecuted. They have resigned even before issuance of cheque. In support of the contention that, if the Director of the Company has resigned, even before the cheque is presented in the bank in that case also the said Director cannot be held responsible for issuance of cheque. The learned counsel invites attention of this Court to the judgment of the Supreme Court in the case of **DCM Financial Services Limited *Versus* J.N. Sareen and Another**[1] and in particular paragraph nos. 21 to 24 thereof.

7. Learned counsel furthers submitted that, unless complaint demonstrates that how and in, what manner accused was responsible, simply because the person is a Director of defaulter company, does not make him liable under the Act. In support of aforesaid contention learned counsel pressed into service exposition by the Supreme Court in the case of **Ashoke Mal Bafna *Versus* Upper India Steel Manufacturing and Engineering Company Limited**[2]. Therefore, relying upon the averments in the application, grounds taken therein and annexure thereto, learned counsel appearing for the Applicants prays that applications deserve to be allowed.

8. On the other hand, learned counsel appearing for contesting

1 (2008) 8 SCC 1
2 (2018) 14 SCC 202

Respondent No. 2 invites attention of this Court to the affidavit in reply and submits that, though the applicants tendered resignation to the board of directors of the company, as per the requirement of law the said board of directors has to approve such resignation and forward it in Form No. DIR – 32 to the Registrar of the Company for approval and acceptance. In support of the aforesaid contention, learned counsel appearing for second Respondent invites attention of the Court to Section 168 of the Companies Act. The present applicants are not simply the Directors of the Company but they are also the promoters of the company. The material placed on record would clearly indicate, their active role in the company. Learned counsel invites attention of this Court to the averments in the complaint and submits that, there are averments in the complaint that the applicants are responsible for day to day affairs of the company. The main accused was authorized by the present applicants to sign the cheques and therefore, the applicants cannot escape from their responsibility since the said cheque on presentation has been dishonoured.

9. It is submitted that, the Respondent No. 2 Transasia Bio-Medicals Limited is a Company incorporated under the provisions of the Companies Act, 1956 and is into the business of manufacturing and marketing of Bio-Medical equipment. That the applicants are Directors of Hamara Doctor Limited, a company incorporated under the provisions of

Companies Act, 1956. It is submitted that, on 27th September 2016, the applicants alongwith the other directors Pahal Chawla on behalf of the company Hamara Doctor Limited had placed an order with the Respondent No. 2 for Bio-Medical Instruments and Reagents at Mumbai Office and as per the requirements of the company products worth Rs. 8,00,000/- (Eight Lacs) which were duly supplied and acknowledged. The company while placing the order for supply of Bio-Medical instruments on 27.09.2016 had issued and handed over post dated cheques towards payment of the amount of Rs. 8,00,000/- (Eight Lacs only) towards supply of the products as mentioned in the order.

10. It is submitted that, as per order dated 27.09.2016 all the products were duly supplied and received by the applicants on behalf of the company Hamara Doctor Limited, the Respondent No. 2 then deposited the Post dated cheques mentioned in order dated 27.09.2016 however, all the cheques have been dishonoured and the Respondent No. 2 has initiated proceedings against the company, the applicants and the other directors under Section 138 r/w. 141 of the Said Act, and the same are pending, including the cheques, for which the present petition is filed.

11. It is further submitted that, the Company Hamara Doctors Limited has issued cheque bearing no. 786084 dated 01.04.2017 for Rs. 1,20,000/-drawn on Yes Bank ltd, Gurgaon branch duly signed by Director

Pahal Chawla on behalf of Hamara Doctor Limited, towards part payment of the products supplied by the Respondent No. 2 to it. This cheque was also issued alongwith the order dated 27.09.2016. The cheque was deposited for encashment and it got dishonoured and as per the provisions of Section 138 of the said Act. Demand notice was send to the Drawer of the cheque, Hamara Doctor Limited and all the Directors of the Company responsible for the affairs of the Company, including the present applicants. They all refused to take / accept the demand notice. After expiry of 15 days period, the Respondent No. 2 filed complaint under Section 138 r/w. 141 of the Said Act against drawer of the cheque Hamara Doctor Limited, Director Pahal Chawla signatory of the cheque and the applicants as responsible directors of Hamara Doctors Limited. Cognizance of the complainant was taken and process came to be issued against them.

12. It is further submitted that, the applicants in connivance with the other Director namely Pahal Chawla who is signatory of the cheque, have induced and represented Respondent No. 2 on behalf of Company Hamara Doctor Limited and based on it Respondent No. 2 had supplied products worth Rs. 8,00,000/- (Eight Lacs) as ordered by the company vide order dated 27.09.2016. The applicants were the only directors apart from Pahal Chawla and were actively involved and were in-charge of the day to day affairs of the company. It is pertinent to note that the disputed cheque

was handed over to the Respondent No. 2 alongwith order dated 27.09.2016 duly signed and executed by Pahal Chawla on behalf of the Company Hamara Doctor Limited, at that time, the applicants were very much involved with the day to day affairs of the company Hamara Doctor Limited, as they were in Board of Directors and every decision making was done with their confirmation and knowledge and hence they were aware about the fact that cheques have been issued by Pahal Chawla on behalf of the company Hamara Doctor Limited towards payment of goods received.

13. It is submitted that, the refusal to take the demand notice by the applicants at the Registered office address of the company (which is also the residential address of both), itself proves that they were aware about the dishonour of the cheque issued by Pahal Chawla on behalf of the company Hamara Doctor Limited and hence they refused to accept the demand notice and therefore, the first opportunity of taking the stand that they were not involved in the offence was “Refused” by them. The reply dated 22.08.2017 is a reply to notice dated 17.08.2017 bearing number TBM/1302/Lo907/17/18 dated 17th August 2017 and not to the demand notice dated 27.04.2017 as stated in the applications. Demand notice dated 27.04.2017 was sent in respect of the cheque bearing no. 786084 dated 01.04.2017 for Rs. 1,20,000/- duly signed by Director Pahal Chawla on behalf of Hamara Doctor Limited.

14. It is further submitted that, the demand notice issued after the dishonour of cheque bearing no. 786084 dated 01.04.2017 for Rs. 1,20,000/- drawn by the Company Hamara Doctor Limited, contained the fact that the applicants had full consent and knowledge about the cheque being issued, further they along with the other Directors had placed order of products from the Respondent No. 2. It is also stated that they were aware about the supply of the goods / products and delivery of the same. It also speaks about the issuance of the cheque which was issued towards discharge of legally enforceable debt due from company and Directors and the cheque was deposited as per the instructions of the Directors, as the statutory demand notice was not replied, hence the specific statements made against them were controverted and rebutted at the first possible opportunity.

15. It is further submitted that, the so called resignation letters which were written and sent to the Board of Directors at the address which is also the residence of the applicants were never accepted by the Board of Directors, which is evident from the fact that no documents i.e. Minutes Book or any resolution is produced to show that the Board of Directors has accepted the resignation of the applicants. The documents produced by the applicant only reveal that they have informed the Registrar of Companies (ROC) about their resignation and the same has accordingly recorded in the system, however the applicants have not produced form no. 32, which will

reveal, whether the resignation of the applicants was accepted by the board of directors on behalf of the company and the company has accordingly informed and updated the Registrar of Companies about it.

16. It is submitted that, the applicants were in-charge and responsible for day to day affairs of the company as and when the order dated 27.09.2016 was placed before the Respondent No. 2. Upon they realising that post dated cheques issued by the company have got dishonoured and there was a single cheque remaining to be deposited, they with malafide intentions have resigned from the company as directors before the cheque could be deposited and had written resignation letters and submitted to the Board of Directors compromising of them and the other director Pahal Chawla, however as stated above the resignation was accepted or not needs to be proved by various documents which the applicants have failed to prove.

17. It is submitted that, at this initial stage the proceedings against applicants cannot be dismissed, without furnishing an opportunity to the Respondent No. 2 of establishing its allegations by bringing necessary evidence. All the contentions of the applicants, could be their defence and they need to establish the same in trial. The Respondent No. 2 submits that there is sufficient evidence to proceed against the applicants and the Respondent No. 2 should be given opportunity to get evidence material on

record to show the involvement of the applicants in the offence under Section 138 r/w. 141 of the Said Act. Therefore, learned counsel appearing for the second Respondent submits that, the Criminal Applications may be rejected.

18. Heard learned counsel appearing for the Applicants, learned APP appearing for Respondent No. 1 – State and learned counsel appearing for second Respondent. With their able assistance perused the grounds taken in the applications, annexure thereto and reply filed by the second Respondent, so also the other documents placed on record.

19. I have carefully perused the averments in the complaint, it is specifically averred in the complaint that, the accused no. 1 is the limited company duly registered under the Companies Act, 1956. That the accused nos. 2, 3 and 4 are the Directors of the Accused No. 1. That the accused Nos. 2, 3 and 4 are in-charge and responsible for the day to day trade, supervision, affairs and business management of the accused no. 1 being the Directors of the accused no. 1. That the accused no. 2, 3 and 4 are also signatories for and on behalf of the accused no. 1 and the accused no. 2 had issued the cheque. There are other details also mentioned in the complaint before filing the complaint, and the complainant has taken all necessary procedural steps. I find considerable substance in the contention of the counsel appearing for

second Respondent that the applicants are also promoters of the said company.

20. At this juncture it would be apt to reproduce herein below Section 168 of the Companies Act, which reads as under:-

> **168. Resignation of director.**-(1) A director may resign from his office by giving a notice in writing to the company and the Board shall on receipt of such notice take note of the same and the company shall intimate the Registrar in such manner, within such time and in such form as may be prescribed and shall also place the fact of such resignation in the report of directors laid in the immediately following general meeting by the company:
>
> Provided that a [director may also forward] a copy of his resignation along with detailed reasons for the resignation to the Registrar within thirty days of resignation in such manner as may be prescribed.
>
> (2) The resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later:
>
> Provided that the director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure.
>
> (3) Where all the directors of a company resign from

> their offices, or vacate their offices under Section 167, the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in general meeting.

21. The aforesaid provision would make it abundantly clear that, the Director who wish to resign from his office, he / she has to give notice in writing to the company and the board shall on receipt of such notice, take note of the same and company shall intimate the Registrar in such manner, within such time and in such form as may be prescribed and shall also place fact of such resignation in the report of the directors laid in the immediately following general meeting of the company.

In the present case, applicants have placed on record the copies of their letters addressed to the board of directors Hamara Doctor Limited wherein it is stated that, the applicants shall decided to resign from the post of Director from Hamara Doctor Limited with an immediate effect. However, there is no material placed on record to show the further steps taken by the said board of directors as contemplated under Section 168 of the Companies Act.

The documents produced by the applicant only reveal that they have informed the Registrar of Companies (ROC) about their resignation and the same has accordingly recorded in the system, however the applicants have not produced form no. 32, which will reveal, whether the resignation of the applicants was accepted by the board of directors on behalf of the company and the company has accordingly informed and updated the Registrar of Companies about it. Therefore, it appears that, without having the approval and recommendation of the board of directors the Form No. DIR – 11 has been accepted by the Registrar of the Companies. There is no denial to the fact that, till date the names of the applicants are being shown as director in the companies record. As rightly submitted by the learned counsel appearing for the Second Respondent that, if there are only three directors and if the two directors are allowed to resign out of three directors and their resignation is accepted, in that case company cannot run by only one director.

22. It will have to be held that, the documents placed on record by the applicants cannot be considered as uncontroverted or of impeachable character. Since said documents are disputed by respondent contending that, said documents do not fulfill the mandate of Section 168 of the Companies Act. As already observed if the averments in the complaint are read in its entirety an alleged offences are disclosed and therefore, as per settled principle of law the order of

issuance of process needs no interference by the learned Magistrate. The Supreme Court in the recent judgment in the case of **Sau. Kamal Shivaji Pokarnekar *Versus* State of Maharashtra and others**[3] has taken a view that quashing the criminal proceedings is called for only in a case where the complaint does not disclose an offence, or is frivolous, vexatious, or oppressive. Paragraph nos. 4, 5, 6 and 9 of the said judgment are relevant and the same are reproduced herein under for the sake of ready reference:

> 4. The only point that arises for our consideration in this case is whether the High Court was right in setting aside the order by which process was issued. It is settled law that the Magistrate, at the stage of taking cognizance and summoning, is required to apply his judicial mind only with a view to taking cognizance of the offence, or in other words, to find out whether a prima facie case has been made out for summoning the accused persons. The learned Magistrate is not required to evaluate the merits of the material or evidence in support of the complaint, because the Magistrate must not undertake the exercise to find out whether the materials would lead to a conviction or not.
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> 5. Quashing the criminal proceedings is called for only in a case where the complaint does not disclose any offence, or is frivolous, vexatious, or oppressive. If the allegations set out in the complaint do not constitute the offence of which

3 AIR 2019 SC 847

cognizance has been taken by the Magistrate, it is open to the High Court to quash the same. It is not necessary that a meticulous analysis of the case should be done before the Trial to find out whether the case would end in conviction or acquittal. If it appears on a reading of the complaint and consideration of the allegations therein, in the light of the statement made on oath that the ingredients of the offence are disclosed, there would be no justification for the High Court to interfere.

6. Defences that may be available, or facts/aspects which when established during the trial, may lead to acquittal, are not grounds for quashing the complaint at the threshold. At that stage, the only question relevant is whether the averments in the complaint spell out the ingredients of a criminal offence or not.

9. Having heard the learned Senior Counsel and examined the material on record, we are of the considered view that the High Court ought not to have set aside the order passed by the Trial Court issuing summons to the Respondents. A perusal of the complaint discloses that prima facie, offences that are alleged against the Respondents. The correctness or otherwise of the said allegations has to be decided only in the Trial. At the initial stage of issuance of process it is not open to the Courts to stifle the proceedings by entering into the merits of the contentions made on behalf of the accused. Criminal complaints cannot be quashed only on the ground that the allegations made therein appear to be

> of a civil nature. If the ingredients of the offence alleged against the accused are prima facie made out in the complaint, the criminal proceeding shall not be interdicted.

23. In that view of the matter, Criminal Applications are devoid of any merits and same stands rejected accordingly. Rule stands discharged.

(S.S. SHINDE, J.)