IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 1169 OF 2018
WITH
CRIMINAL APPLICATION NO. 1175 OF 2018
WITH
CRIMINAL APPLICATION NO. 1176 OF 2018
WITH
CRIMINAL APPLICATION NO. 1177 OF 2018

1. Anand Sadashiv Kapre,
Aged 70 years, Occupation: Professional,
Resident of A-805, Harsh Vardhan,
Saki Vihar Road, Andheri (E),
Mumbai – 400 072 (Ori. Accused No.5)

2. Virindar Kumar Sood,
Aged 78 years, Occupation: Professional,
Resident of C-5/40, SDA,
New Delhi – 110 016 (Ori. Accused No.7)

3. Ms.Monica Gupta,
Aged 47 years, Occupation: Professional,
Resident of 31, Deshbandhu Apartments.
Kalkaji, New Delhi – 110 019 (Ori. Accused No.8)

...Applicants

Versus

1. M/s. Thyssenkrupp Industries India
Private Limited, A Company incorporated
under the Companies Act, having its
registered office at 154-C, Mittal Tower,
15th Floor, 210, Nariman Point,
Mumbai – 400 021 and Chief Place of
Business at Pimpri Pune – 411 018

2. State of Maharashtra through
Government Pleader, High Court,
Bombay Non-Applicants
(Original Complainant)

WITH
CRIMINAL APPLICATION NO. 1170 OF 2018
WITH
CRIMINAL APPLICATION NO. 1172 OF 2018
WITH
CRIMINAL APPLICATION NO. 1173 OF 2018
WITH
CRIMINAL APPLICATION NO.1174 OF 2018

Rakesh Sareen
Aged 60 years, Occupation: Profession,
Resident of Flat No. 77, Vikas Sheel,
Apartments, Plot No. 9, Sector 13,
Rohini, New Delhi – 110 086 ...Applicant
(Ori. Accused No.9)

Versus

1. M/s. Thyssenkrupp Industries India
Private Limited, A Company incorporated
under the Companies Act, having its
registered office at 154-C, Mittal Tower,
15th Floor, 210, Nariman Point,
Mumbai – 400 021 and Chief Place of
Business at Pimpri Pune – 411 018

2. State of Maharashtra through
Government Pleader, High Court,
Bombay ...Non-Applicants
(Original Complainant)

WITH
CRIMINAL APPLICATION NO. 1171 OF 2018
WITH
CRIMINAL APPLICATION NO. 1178 OF 2018

WITH
CRIMINAL APPLICATION NO. 1179 OF 2018
WITH
CRIMINAL APPLICATION NO. 1180 OF 2018

1. Ashish Ramkisan Saraf,
Aged 53 years, Occupation: Business,
Resident of Shreeram Bhavan, 41-E,
Ashok Avenue, Sainik Farma,
New Delhi – 110 062 (Ori. Accused No.2)

2. Vineet Vithaldas Saraf,
Aged 60 years, Occupation: Business,
Resident of 16/1, Friends Colony (West),
New Delhi 110 065 (Ori. Accused No.3)

3. Anurag Murlidhar Saraf,
Aged 47 years, Occupation: Business,
Resident of Shreeram Bhavan,
Ramdaspeth, Nagpur – 440010 (Ori.Accused No.4)

4. Yogeshkumar Umashankar Saraf
Aged 60 years, Occupation: Business,
Resident of Shreeram Bhavan, Tumsar,
Maharashtra-441912 (Ori.Accused No.6)
...Applicants

Versus

1. M/s. Thyssenkrupp Industries India
Private Limited, A Company incorporated
under the Companies Act, having its
registered office at 154-C, Mittal Tower,
15th Floor, 210, Nariman Point,
Mumbai – 400 021 and Chief Place of
Business at Pimpri Pune – 411 018

2. State of Maharashtra through
Government Pleader, High Court,
Bombay Non-Applicants
(Original Complainant)

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Mr.Shyam Dewani a/w. Mr.Sumit Khanna, Mr.Chirag Chanani I/b. Dewani and Associates for the Applicants.

Mr.Subodh Desai a/w. Mr.Omkar Bade I/b. M/s.Desai and Diwanji for Respondent No.1.

Mr.A.R.Patil, APP for Respondent No.2- State.

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CORAM : MRS.MRIDULA BHATKAR, J.
DATE OF RESERVED : 29 JANUARY 2019
DATE OF PRONOUNCEMENT : 14 FEBRUARY 2019

JUDGMENT

1. These all Criminal Applications are heard and decided together by a common order, as the original complainant, who is respondent No.1, and the applicants, who are the original accused, in four complaints are the same.

2. The applicants/accused are facing prosecution under section 138 of Negotiable Instruments Act, 1881 (hereinafter referred to as "the N.I. Act") and challenging the order of issuance of process dated 5th July, 2018 passed by the learned Addl. Chief Judicial Magistrate 138 of N.I.Act (Spl.) Court, Pune.

3. The complainant company and the original accused No.1 company had entered into a business contract of providing machinery and equipment for CFBC boilers. The complainant delivered the goods against which the original accused No.1 company issued 10 cheques. However, all the cheques were dishonored for want of “sufficient funds” and, therefore, the complainant company filed four complaints for recovery of the amounts of those cheques. The learned Magistrate issued process in all the complaints by an order dated 5th July, 2018, which is the subject matter of challenge in these Criminal Applications.

4. The learned counsel for the applicants/accused has submitted that there are no averments in the complaints against the applicants/accused to involve them as the directors of the original accused No.1 company. None of the applicants/accused are signatories to those cheques. The important two terms i.e., in charge and responsible for day to day activity, which are required to be mentioned in the complaints against the directors as per requirement of section 141 of the N.I. Act, are missing in the entire complaints. Therefore, no vicarious liability can be saddled on

these applicants/accused. He has further submitted that all the complaints filed beyond limitation. The cheques were dishonored on 8th July, 2017. Notices were given on 23rd July, 2017. Then the complaints ought to have been filed on 22nd July, 2017 instead there is a delay of 2 days, as the complaints were filed on 24th August, 2017. Thus, it is barred by limitation. He has argued that the applicants/accused challenged the order of issuance of process on the ground of the territorial jurisdiction. He has further argued that most of the applicants/accused are the residents of New Delhi and they are outside the territorial jurisdiction of Mumbai and, therefore, in view of section 202 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Cr.P.C."), no process ought to have been issued against them. He has further submitted that under SARFAESI Act, the management of the original accused No. 1 company is taken over and hence, it is impossible to perform. On the point of legality of issuance of process under section 141 of the said Act, he has referred to following three authorities :

(i) ***K.K.Ahuja Versus V.K.Vora and Another*** reported in ***(2009) 10 SCC 48***;

(ii) ***A.K.Singhania Versus Gujarat State Fertilizer Company Limited and Another*** reported in ***(2013) 16 SCC 630***;

(iii) ***Shri M.M.Shah v. The Deputy Director of Enforcement & Ors.*** reported in ***2010 SCC OnLine Bom 1367***.

He has further submitted that in the case of ***K.K.Ahuja*** (*supra),* the liability of the directors under section 141 of the N.I.Act and the position in respect of different type of directors is made clear and it is summarized.

5. The learned counsel for respondent No.1 while opposing these Applications, has submitted that the issue of limitation cannot be raised at this stage. In support of his submissions, he has relied on paragraph 11 of the complaints, wherein the specific averments in respect of the limitation are made by the complainant. He has further submitted that the provision and the procedure under section 202 of the Cr.P.C. is not binding, as the cases are filed under section 138 of the N.I.Act. He has further submitted that the directors of the original accused No.1 company i.e., the applicants/accused are vicariously liable to pay this legal liability of debt. However, he conceded that the process can be

quashed and set aside against the original accused No. 9 – Rakesh Sareen, who is a nominee director. On the point of legality of issuance of process under section 141 of the N.I. Act, he has relied on the following judgments :

(i) ***Standard Chartered Bank v. State of Maharashtra and others*** reported in ***AIR 2016 SC 1750;***

(ii) ***K.P.G.Nair Vs. Jindal Menthol India Ltd.*** reported in ***2001 ALLMR (Cri.) 1206 (SC);***

On the point of territorial jurisdiction under section 202 of the Cr.P.C., he has relied on the judgment of this Court in the case of ***Vijay Tata Ravipati Vs. Mediascope Publicitas (India) Pvt. Ltd. & Anr***. reported in ***2017 ALL MR (Cri) 4913.***

6. In the case of ***K.K.Ahuja*** (*supra),* the Supreme Court made it clear that if the accused is a Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. The accused in fact manages the company. The second category of the director is one who has signed the cheque on behalf of the

company. There also no specific averments are required. The third is the director, secretary or manager of the company referred to in clauses (e) and (f) of section 5 of the Companies Act. For them no further averments are required in the complaint, though some particulars will be desirable. Other officers of a company cannot be held liable under sub-section (1) of section 141 of the N.I. Act and they can be made liable only under sub-section (2) of section 141 of the N.I. Act by averments in the complaint about their position and duties in the company and their role in respect of dishonour of the cheque.

7. In the case of ***A.K.Singhania*** *(supra),* though the Supreme Court found that there is no averment in respect of the two accused, who were in charge of and responsible for the conduct of the business of the company at the time when the offence was committed and, therefore, the prosecution did not allow to continue. In paragraph 14 of the said judgment, the Supreme Court has also held that no particular form is prescribed in respect of the terms used to make out the case under section 141 and the words of the section may not be reproduced in the complaint. If reading of the complaint shows and substance of accusation

discloses necessary averments, that would be sufficient to proceed against such of the Directors and no particular form is necessary.

8. In the case of ***Shri M.M.Shah*** *(supra)*, the Division Bench of this Court has held that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or position in a company.

9. In the case of ***Standard Chartered Bank*** *(supra)*, the Supreme Court has considered most of the landmark judgments on the point of limitation of issuance of process under section 141 of the N.I.Act including ***Gunmala Sales Pvt.Ltd.v. Anu Mehta and Ors.*** reported in **AIR 2015 SC 1072** and also reproduced relevant portion of the said judgment, which is as under :

> *"31. ...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 incontrovertible material or acceptable circumstances to substantiate his contention. He must make out a case that making him stand the trial would be an abuse of process of Court".*

The Supreme Court, in the case of ***Standard Chartered Bank*** *(supra)*, adopted and confirmed the same view taken in ***Gunmala Sales Pvt.Ltd.****(supra)*

10. In the case of ***K.P.G.Nair*** *(supra)*, the Supreme Court has held that the words of section 141 of the N.I. Act need not be incorporated as magic words, but substance of the allegations is to be read as a whole and it should be answered and fulfilled the requirements of the ingredients of the said provision.

11. In the case of ***Vijay Tata Ravipati*** *(supra),* the learned Single Judge of this Court has held that this Court in several decisions have consistently taken a view that in the proceedings under section 138 of the N.I.Act, it is not mandatory to hold an inquiry under section 202 of the Cr.P.C. in the event the accused are residing beyond the jurisdiction of the Court.

12. Perused complaints filed by the complainant against the applicants/accused. In paragraph No.2 of the complaints, the complainant has mentioned that the original accused No.1 company is having a registered office at the address mentioned in the title of the complaints and the original accused Nos. 2 to 9 are

the directors of original accused No.1 company. Original accused Nos. 2 to 9 are looking after the business of the company i.e., the original accused No.1 and also managing the day to day affairs of the company. Though the words “they are administering all the day to day business and responsible for the business of the company” are not mentioned, over all meaning, the averments in para 2 of the complaints convey that the allegations are made against these directors/ original accused Nos. 2 to 9 that they were in charge and managing the business. None of the applicants/original accused Nos. 2 to 9 are the signatories to these 10 disputed cheques. Though they have not issued cheques by applying doctrine of vicarious liability being the directors of the company, they fall within the sweep of section 141 of the N.I. Act. All the cheques were dishonored and returned unpaid for the reasons “insufficient funds”. A statutory notice was also given to the original accused No.1 company and the company filed a reply on 11th June, 2017. No reply was given independently by any of the director specifically excluding himself from the liability of the company. Nothing is shown that they had expressed due diligence to prevent the offence. The issue of limitation is always a mixed question of law and fact and if at all, there is a delay of 2 days, which can be considered at the stage of trial.

13. The original accused No. 9 -Rakesh Sareen is a nominee director and, therefore, he is covered under proviso of section 141 of the N.I.Act. Hence, the process qua the original accused No.9 -Rakesh Sareen in all the complaints is hereby quashed and set aside.

14. Criminal Application Nos. 1170 of 2018, 1172 of 2018, 1173 of 2018 and 1174 of 2018 are allowed in terms of prayer clause (b).

15. Criminal Application Nos. 1169 of 2018, 1175 of 2018, 1176 of 2018, 1177 of 2018, 1171 of 2018, 1178 of 2018, 1179 of 2018 and 1180 of 2018 are dismissed.

16. The learned counsel for the applicants/accused submits that the applicants/accused want to challenge this order and, therefore, interim relief granted earlier be continued for four weeks.

17. The learned counsel for respondent No.1 opposes the request of stay.

18. Interim relief granted earlier is continued till 15^{th} March, 2019.

(MRIDULA BHATKAR, J.)