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* Ajay Rampal Sarda
Aged about 40 years
Occu: Business, R/o Nisarga Plaza
Near Shakil Garage
Murtizapur Road
Toshniwal Layout
Akola, Tq. & Dist. Akola. .. **APPLICANT**

- 1) Pankaj s/o Ravilal Shah
Aged adult, Occu: service
R/o New Cloth market,
Akola Tq. & Dist. Akola
Through Its Partners
- 2) The State of Maharashtra
Through Superintendent of Police
Akola.

.. RESPONDENTS

Mrs. Ritu P. Jog, Adv. for applicant
Ms. Neha Khune, Adv.h/for Mr. Ritesh Dawda, Adv.
for respondent no.1
Ms. Shamsi Haider, APP for Respondent No.2-State

ORAL JUDGMENT:

1. ***Admit.*** Heard finally with the consent of learned counsel

appearing on behalf of respective parties, at the stage of admission stage itself.

2. By this Application, the applicant has prayed for quashing of Criminal Complaint bearing No.3717/2017 filed by respondent no.1, dated 1st September 2017, under Section 138 of the Negotiable Instruments Act (for short “ N.I. Act”) as well as the order dated 3rd October 2017, passed by learned Judicial Magistrate, First Class, Akola, to the extent of present applicant i.e. original accused no.2.

3. It is alleged in the said complaint that the complainant deposited an amount of Rs. 2 lakhs *via* Cheque No. 0007 drawn on Akola Janata Commercial Cooperative Bank Limited, Akola, through a broker. On receipt of this amount, the accused had duly executed deposit chit in favour of complainant on 28th July 2016 and thus agreed to repay the said amount as and when demanded, along with interest @Rs.1.25 per cent *per annum*. The learned Judicial Magistrate, First Class, Akola on 3rd October 2017 passed an order of issuance of process against the applicant, along with other accused/ partners. The applicant then filed an application for dismissing the complaint on the ground that the respondent no.1 has made certain bald and vague allegations in the complaint and has not filed the partnership deed. The applicant has now approached this Court for

quashing the complaint filed by the complainant on 1st September, 2017.

4. Ms.Ritu Jog, learned Advocate for the applicant vehemently argued that on a plain reading of the complaint, it is noticed that no *prima facie* case is made out against the applicant and even if the contents in the complaint are accepted as it is, no offence whatsoever is made out as such, against the present applicant and thus continuing the case before the learned JMFC would certainly be an abuse of the process of the Court. She further submitted that the present applicant (accused no.2) has not at all signed the cheque; so also the partnership-deed executed between the applicant and other accused shows that the accused was merely a sleeping partner and it no way shows that he was a working partner. Furthermore, the said partnership-deed was in respect of the business in manufacturing of oil, oil-cake etc. and also treating of oil, oil-cakes, oil seeds, grains and allied commodities whereas the present transaction as reflected in the complaint, indicates that the transaction was in respect of accepting the deposit made by the complainant and providing interest over the said amount by accused no.5 as the cheque was signed by accused no.5. She further invited my attention to various clauses in the partnership-deed showing that the applicant was not a working

partner and the present applicant was not responsible for the day-to-day affairs of the firm. She submitted that no role of the applicant has been averred in the complaint and in the absence of specific averment as to what role is attributed and played by the applicant/accused, particularly when he has not signed the cheque, the complaint itself is not maintainable as it does not attract Section 138 r/ws.141 of the NI Act. It is contended that the partnership-deed stipulates the business of the firm. However, the cheque issued is not in pursuance to the mentioned business in the deed, hence there is no legally enforceable liability of the firm and its partners as such. It is submitted that in these circumstances, the person who has signed the cheque can only be held liable and not the firm in any manner and, as such, the complaint needs to be quashed and set aside.

5. *Per contra*, Ms.Neha Khune, learned Advocate h/for Mr. Ritesh Dawda, learned Advocate for Respondent no.1/complainant for the respondent no.1 invited my attention to the Clause (11) of the partnership-deed wherein it is mentioned that all partners shall be entitled to manage the business of the partnership firm; so also clause (7) demonstrates that the account of the firm shall be operated by all the partners and by signature of any one of them and the power to overdraw as may be decided by the partners from time to time.

Similarly, Clause (5) indicates that all the partners were authorised to act on behalf of the other partner firm to sign, to execute the required papers, documents and undertaking. In these circumstances, she submitted that the instant Application be dismissed.

6. After hearing both sides and on a perusal of the contents of the partnership-deed and the relevant documents filed, it is noticed that the complaint does not reveal specific averment against the present applicant as to how he was responsible and what particular act he has committed. Admittedly, the partnership-deed is not registered under the provisions of Section 69(2) of the Partnership Act. Clause (9) of the partnership-deed makes it crystal clear that the applicant is not a working partner. Clause (9) of the Deed stipulates as under :-

“9. SALARY OF THE PARTNER :

That ALL parties except Shri Ajay Rampal Sarda, Akola have agreed to work in the partnership firm as the working partner. It is hereby agreed that for considering of working in the partnership they shall be entitled to remuneration inclusive of salary, bonus and commission of Rs. 75,000/- per month, which shall be payable at the end of the year.

The above partners shall not be entitled to draw any

remuneration inclusive of salary, bonus and commission in the accounting period in which the partnership firm has suffered loss on the basis of the book profits to computed under explanation 3 to Section 40(b) on the Income Tax Act,1961. Further the total remuneration shall in no case exceed the book profits.”

7. It is the case of the complainant that he had deposited an amount of R. 2 lakhs vide cheque bearing No.0007 through a broker from Akola. On receipt of the said amount, the accused acknowledged the receipt by executing a deposit-chit in favour of the complainant on 28th July 2016. The said document reveals that the accused no.5 agreed to repay the said amount as and when demanded along with interest @Rs. 1.25 *paise* per cent *per annum*. Thus, the receipt does not appear to be duly stamped and it does not reveal that it is in respect of the business of the firm, as reflected in clause (3) of the partnership-deed. Clause (3) of the Deed provides as under :

“3. BUSINESS OF THE FIRM:

The business of the partnership shall be manufacturer of oil, oil-cake etc. and also trading in oil, oil-cake, oil seeds grains and their products and allied commodities and same be extended to any other trade or industry as mutually agreed among the parties.”

8. The aforesaid clause does not indicate the business of accepting the amount and return it with interest.

9. The accused no.5 has issued a cheque in favour of the complainant dated 23rd July, 2017 for an amount of Rs. 2 lakhs with an assurance to honour the same on its due presentation for encashment. Pertinently, the said cheque has not been signed by the applicant herein i.e. applicant no.2. In this regard, Clauses (5) and 7 of the Deed read as under :-

“5. LOANS AND ADVANCES:

The partners may by mutual agreement shall be entitled to raise the loans on such terms and conditions including those by mortgaging or hypothecating or creating a charges over all or any of the assets-properties of the firm in the interest of the firm. In this respect if found necessary any of the partners can be authorised to act on behalf of the other partner to sign, to execute the required papers, documents and undertakings.”

7. BANK ACCOUNTS :

The firm shall maintain one or more bank accounts with one or more banks with the name of the Firm. These accounts shall be operated by ALL the partners and by signature of any one of them and the power to overdraw as may be decided by the partners

from time to time. In case of death or retirement of any of the partners or due to change in the constitution of the firm the amount deposited with or due from Bank(s) under any of the accounts shall not be freezed but the remaining partners and legal heirs of the deceased partner shall be entitled to operate the bank account (s) or to withdraw full business.”

10. No doubt, clause (5) of the partnership-deed shows that any of the partners can be authorized to act on behalf of the the partners to sign or to execute the required papers, documents and undertaking, however the said partnership deed does not in any manner depict that the business of the firm was to accept the deposit and with interest to return the said amount to the person who deposited the said amount. It is mentioned in Clause (5) of the Deed that the partners may by mutual agreement, be entitled to raise the loans on such terms and conditions including those by mortgaging or hypothetecating or creating a charge over any of the assets/ properties of the firm in the interest of the firm. However, in the present case, the complaint does not reveal that any property belonging to the firm was mortgaged or hypothetecated to the complainant. Even the complaint does not reveal that there was any loan transaction

between the complainant and the partnership firm.

11. Significantly, there is no document, such as, any mutual agreement between the partners to raise such a loan. Thus, clauses (5) and (7) are of no assistance to the case put up by the complainant/respondent no.1. So far as clause (11) of the partnership deed is concerned, it shows that all partners shall be entitled to manage the business of partnership firm. However, in the instant case, there is no *prima facie* evidence on record to show that the cheque was issued in respect of the business of the firm; so also it is not the case of the complainant.

12. Mrs. Ritu Jog, learned counsel for the applicant placed reliance on the judgment reported in (2004) 7 SCC 15 in the case of Monaben Ketanbhai Shah and another vs. State of Gujarat, to contend that in that case also, there were no specific averments in the complaint with regard to the specific role of the accused. The Hon'ble Apex Court observed in paragraph 6, as under :

“6. From the above, it is evident that in the complaint there are no averments against the appellants except stating in the title that they are partners of the firm. Learned counsel for the respondent complainants contended that a copy of the partnership-deed was also

filed which would show that the appellants were active in the business. No such document was filed with the complaint or made part thereof. The filing of the partnership deed later is of no consequence for determining the point in issue. Section 141 does not make all partners liable for the offence. The criminal liability has been fastened on those who, at the time of the commission of the offence, were in charge of and were responsible to the firm for the conduct of the business of the firm. These may be sleeping partners who are not required to take any part in the business of the firm; they may be ladies and others who may not know anything about the business of the firm. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and establishes that fact.”

13. In the instant case also, there are no specific averments in the complaint with regard to the fact that the applicant was a

working partner. On the contrary, Clause (9) of the Deed categorically indicates that the applicant was not a working partner.

14. Learned Advocate for the applicant further placed reliance in the case of **SMS Pharmaceuticals Ltd. Neeta Bhalla and another** reported in **AIR 2005 SC 3512**, more specifically on paragraph no. 15 which reads as under :-

15. The question of what should be averments in a criminal complaint has come up for consideration before various High Courts in the country as also before this Court. Secunderabad Health Care Ltd. and others Secunderabad Hospitals Pvt.Ltd. And others (1999 (96) CC (AP) 106) was a case under the Negotiable Instruments Act specifically dealing with with sections 138 and 141 thereof. The Andhra Pradesh High Court held that every Director of a company is not automatically vicariously liable for the offence committed by the company. Only such Directors or Director who were in charge of or responsible to the company for the conduct of business of the company at the material time when the offence was committed alone shall be deemed to be guilty of the offence. Further it was observed that the requirement of law is that “there must be clear, unambiguous and specific allegations against the persons who are impleaded as accused that they were in charge of and responsible to the company in the conduct of its business in the material time when the offence was committed.” The same High Court in V.Sudheer Reddy vs.State of Andhra Pradesh and others {(2000 (99) CCV (AP) 107)} held that “the purpose of Section 141 of the Negotiable Instruments Act would appear to be that a person who appears to

be merely a director of the company cannot be fastened with criminal liability for an offence under Section 138 of the Negotiable Instruments Act unless it is shown that he was involved in the day-to-day affairs of the company and was responsible to the company.”

15. In the same judgment, the Hon’ble Apex Court in paragraph 20 held that it is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirement of Section 141 cannot be said to be satisfied.

16. In the case in hand also, there are no specific averments in the complaint u/s.141 that at the time the offence was committed, the person accused was in charge of the conduct of business of the firm and responsible for issuance of the disputed cheque. Merely because the applicant was the partner in the partnership-firm is not sufficient to make him liable for offence u/s 141 of the N.I.

Act, particularly when no specific role is attributed to the applicant in the complaint. The applicant cannot be deemed to be in charge of and responsible for the conduct of day-to-day affairs of the business. The requirement is that the person sought to be made liable, should be in charge of and responsible for the conduct of the business of the firm at the relevant time. There is no such averment in the complaint and there is no deemed liability of the applicant as such in respect of issuance of the cheque.

17. In the case of *Gunmala Sales Pvt.Ltd. And others vs. Anu Mehta and others*, reported in *(2015) 1 SCC 103*, the Hon'ble Supreme Court in paragraph 34.3 observed thus:-

34.3 In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of the more particulars about the role of the Director in the complaint. It may do so having come across some unimpeachable, incontrovertible evidence which is beyond suspicion or about or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of process of Court.”.....

18. In summary, in my considered view, allowing the proceedings against the present applicant would certainly be the abuse of the process of the court as there is no basic averment in the complaint, as discussed above. It is further clear from the catena of judgments relied upon by the learned Advocate for the applicant that mere averments are not enough but *prima facie* it has to be shown by the complainant that the accused is responsible for the day-to-day affairs of the firm, to attract Section 141 of the NI Act. The purpose of Section 141 of the NI Act appears to be that a person who merely appears to be a director of a company or partner of a partnership firm, cannot be fastened with criminal liability for an offence under Section 138 of the NI Act unless it is shown that he was involved in day-to-day affairs of the company /partnership firm and was responsible to the company/partnership firm. So far as the issuance of process order is concerned, it is not a well reasoned order and no *prima facie* case is made out by the complainant against the present applicant and

therefore it needs to be quashed and set aside.

19. Considering the facts and circumstances of the case and law laid down by the Hon'ble Supreme Court, I am of the opinion that there are no specific and sufficient allegations against the applicant that he was looking after and responsible for day-to-day affairs of the firm. The allegations made in the complaint even if are taken at their face value and accepted in their entirety, do not *prima facie* constitute any offence against the present applicant i.e. accused no.2. In that view of the matter, contention of the applicant as regards continuing the case before the learned JMFC would be an abuse of the process of court, is liable to be accepted. Hence, it is necessary to invoke the powers u/s 482 of Cr.P.C. to secure the ends of justice. The order passed with regard to the issuance of process against the applicant is also liable to be set aside.

20. Thus, for the reasons stated above, the Application is allowed in following terms :-

- i) The Complaint No.3717/2017 @ document no. "1" filed by respondent no.1

pending before the Chief Judicial Magistrate, First Class, Akola under section 138 of the Negotiable Instrument as well as the order dated 3.10.2017 @ document no. "2" to the extent of present applicant, is hereby quashed and set aside.

21. Criminal Application stands disposed of.

JUDGE

sahare