IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 147 OF 2017

Proton Construction Ltd
Through Pawan Sakseria ...Petitioner
Versus
The State Of Maharashtra And Ors. ...Respondents

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Mr. Kedar Patil a/w Mr. Jitesh Mundhwa a/w Mr. Sakshi Kadam a/w Ms. Gargi Joshi, Advocate for the Petitioner.

Mr. Anoop Sharma, Advocate for Respondent Nos. 3 & 4.

Mr. A. R. Patil, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.
DATE : 20th AUGUST, 2022.

PER COURT:

1. The petitioner is complainant in C.C. No.318/SS/2013 filed in the Court of learned Metropolitan Magistrate 14th Court at Girgaon, Mumbai, for offence under Section 138 of the Negotiable Instruments Act, 1881 (for short "NI Act").

2. The petitioner is aggrieved by Order dated 24.11.2016 passed by the Sessions Court at Greater Bombay in Criminal Revision Application No.1028 of 2013.

3. The brief facts of the case are as follows :-

i) The accused company approached the complainant-company through its directors in May 2011 and impressed upon the complainant and its directors that, the accused No.1 - company is involved in construction having several projects. They are in need of finance.

ii) Agreement was executed with accused No.1- Arch Infra Projects Nirman Private Ltd. on 25.05.2011 and it was agreed by the parties that the complainant would make a deposit of Rs.5,50,00,000/- with an understanding that after due diligence by complainant for any reason, the complainant does not wish to go forward with the transaction then the amount of Rs.5,50,00,000/- shall be refunded back to the complainant company.

iii) The complainant paid Rs.2,00,00,000/- on 04.04.2011 through RTGS from Indian Over Seas Bank and 3,50,00,000/- vide Cheque No.002827 dated 11.04.2011.

iv) The complainant was of the opinion that, it was not worth investing the money with accused and it was realized that false representation were made and the complainant was deceived. The complainant demanded the money.

v) Accused Nos.2 to 4 agreed to return the amount to the complainant. Accused No.1 issued a cheque bearing No.000017 dated 15.04.2013 for Rs.3,50,00,000/- and another cheque bearing no.000018 dated 15.04.2013 for Rs.2,00,00,000/-. The cheques were signed by Director Sudhir Howale (Accused No.4) on behalf of all the accused in discharge of its liability towards repayment of the money paid by the complainant as per agreement dated 25.05.2011.

vi) The complainant presented the cheques with their Banker. The cheques were dishonoured and returned with remarks 'balance insufficient' vide return memo dated 22.04.2013.

vii) The complainant issued notice to the accused on 17.05.2013 and demanded the amount. The complainant did not receive any reply from the accused.

viii) All the accused were in-charge and responsible to the accused - company for the conduct of its business at the relevant time of commission of offence. All the accused are managing the affairs of accused No.1 company and in connivance with each other committed the offence under Section 138 of the Negotiable Instruments Act. Complaint was filed before the Court on 27.06.2013.

4. Verification statement of the complainant was recorded. Process was issued vide Order dated 28.06.2013.

5. The accused Nos. 2 & 3 preferred Criminal Revision Application No.1028 of 2013 challenging the order issuing process. The said revision application was allowed by the Sessions Court vide Order dated 24.11.2016.

6. The Revision Application preferred by the accused Nos.2 & 3 was allowed on the ground that, the accused No.2 had resigned from director of accused No.1- Company on 27.07.2009. The accused No.2 was not associated with the company with effect from 27.07.2009. The accused No.3 had resigned on 26.03.2023. There was a resolution accepting her resignation dated 26.03.2013. Form - 32 was submitted to Registrar and she ceased to be director with effect from 26.03.2013. Both the directors had resigned much prior to the issuance of cheques in question. The said fact was reported to Registrar and Form No.32 was filed on record.

7. Learned Advocate for the Petitioner submitted that the learned Sessions Judge has committed an error in setting aside the order of process. The case of accused Nos.2 & 3 that, they had resigned prior to issuance of cheques is based on disputed question of fact, which are required to be adjudicated in trial. There was sufficient evidence about their involvement in the complaint. Learned Magistrate had issued process on the basis of averments

made in the complaint. The Petitioner has filed additional Affidavit dated 04.02.2020 stating that, notice was issued to existing directors and there was no reply. Respondent No.4 was the director of the company during the relevant time when the cheques were issued and dishonoured. The accused No.1 is a family owned company and to protect the interest of Respondent No.4, it is shown that, she was resigned on 26.03.2013. The resignation letter and resolution are of same date. The resignation was not submitted to the Registrar of Company, during the trial when the cheques were issued and dishonoured. From - 32 of accused No.4 was submitted to Registrar of Company on 22.07.2013. She was director of the company when the cheque was issued and dishonoured. From 32 was filed 3 three months after the dishonour of the cheques. Digital signature was affixed on Form - 32 A is of 13.02.2017 which is beyond resignation. Reliance is placed on the resignation letter of Respondent No.4 dated 26.03.2013, the board resolution dated 26.03.2013, Snapshot of Registrar of Company (ROC) website showing date of Form - 32 submission as 22.07.2017, letter from Company Secretary confirming that the said documents were obtained on 16.07.2019 are from ROC web site.

8. Learned Advocate for Petitioner has relied upon the following decisions :

i) *Lata Pramod Dave V. Vode Export Pvt. Ltd,, Mumbai and Another*[1].

ii) *Suhas Bhand V. State of Maharashtra and Anr*. decided by this Court vide Criminal Writ Petition No.1194 of 2008.

9. Learned Advocate for the Respondent Nos.3 & 4 submitted that, the revision Application preferred by Respondent Nos.3 & 4 are allowed by the Court of Sessions. The respondent No.3 has expired and Respondent Nos. 2 & 5 were not party to the revision Application. Thus, only contesting party in the present proceedings is Respondent No.4.

10. The documents on record are sufficient to show that the Respondent No.4 was not the director of the accused Company when the cause of action had arisen. There is no reason to doubt the genuineness of the resignation, board resolution and Form-32. Merely on the ground that, the form-32 was filed subsequently, the factom of resignation cannot be discarded. It is for the Company to file Form-32 with the ROC. Even otherwise no role has been assigned to Respondent No.4. The averments in the complaint were not sufficient to invoke Section 141 of the NI Act against her.

1 2016 (4) Mh.L.J. 202

The Respondent No.4 was appointed in the Board of Directors on 21.11.2011. She had resigned from the complainant company on 26.03.2013. Form - 32 was filed with the ROC incorporating the change in the directorship of accused No.1 - Company. It is now revealed to Respondent No.4 that officials of accused No.1 had submitted and notified the resignation to the office of ROC on 22.07.2013. The Respondent Nos. 3 & 4 had resigned much prior to the commission of alleged offence. The cheques were presented for clearance on or around 16.04.2013 and returned unpaid vide return memo dated 22.04.2013. The statutory notice was issued on 17.05.2013 and the complaint was filed on 27.06.2013. At the time when the offence was committed, the Respondent Nos.3 & 4 were neither the director of Arch Infra Projects Nirman Private Ltd. nor had any role to play in the said company. They were not the signatory to the cheques in question.

11. Learned Advocate for the Respondents submitted that, the Respondent Nos.3 & 4 were not the directors of Company when the cause of action to file the complaint under Section 138 of the NI Act. The Revision Applications preferred by Respondent Nos.3 & 4 were allowed by the Sessions Court. Respondent No.3 has expired and the contesting party is Respondent No.4. Apart from the fact that, she had resigned from the company, no specific role has been

attributed to her.

12. Learned Advocate for Respondents had relied upon following decisions.

I. *Harshendra Kumar D. Vs. Rebatilata Koley and Others*[2].

II. *Dushyant D. Anjaria Vs. M/s. Wall Street Finance Ltd*[3].

III. *Saumil Dilip Mehta Vs. State of Maharashtra and others*[4].

13. From the averments in the complaint is apparent that, the Respondent Nos.3 & 4 were directors of accused No.1 M/s. Arch Infra Projects Nirman Private Ltd. They were not signatory to the cheques. The cheques bearing Nos. No.000017 and No.000018 dated 15.04.2013 were issued by accused No.1 and the same were returned dishonoured with remark 'balance insufficient' vide return memo dated 22.04.2013. Demand notice was forwarded on 14.05.2013. The complaint was filed on 27.06.2013. In paragraph No. 12 of the complaint it is stated that, all the accused were in-charge and were also responsible to the accused company for the conduct of its business at the relevant time of commission of offence and all the accused are managing the affairs of accused

2 (2011) 3 SCC 351
3 2001 (1) Mh.L.J. 701
4 AIR 2002 BOMBAY 194

No.1 company and in connivance with each other committed the offence under Section 138 of NI Act. The Respondent No.4 had resigned on 26.03.2013. The resignation was approved by the board of directors with effect from 26.03.2013. Form No.32 regarding resignation of Respondent No.4 was filed. Except stating that, the company was run by the family and there was delay in filing Form-32, there was no serious dispute about the genuineness of the documents. The role ascribed to Respondent No.4 is vague. The complaint is silent about the specific role played by Respondent No.4 in the subject transaction.

14. In the case of *Lata Pramod Dave V. Vode Export Pvt. Ltd,, Mumbai and Another* (supra) it was observed that the transaction of cheque in question and issuance of cheques took place when the Petitioner was very much Director of the Company hence she cannot escape from liability and cannot avoid facing prosecution. Averments in complaint prima facie proved that involvement of the accused in alleged offence, hence inherent powers cannot be exercised to quash the proceedings initiated against Petitioner therein. In the case of *Suhas Bhand V. State of Maharashtra and Anr.* (supra) it is observed that, only if the production of certified copy of From No.32 by a Director of the Company is accepted by

the complainant as correct, the presumption as to genuineness of such certified copy would be complete even as to the truth of its contents. Upon such acceptance or admission of the document, the contents would not have to be separately proved.

15. In the case of *Harshendra Kumar D. Vs. Rebatilata Koley and Others* (supra) it was observed that, Every company is required to keep at its registered office a register of its Directors, Managing Direct,r 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 sent 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 form within 30 days of such change. There is thus, statutory requirement of informing the Registrar of Companies about change amount Directors of the company. A Director, who 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 the company after the acceptance of his resignation. The words every person who, at the time the offence was committed, occurring in Section 14(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 of the offence is alleged to have been committed. In a criminal case where the trial took place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the material which is beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code in an appropriate case, if on the face of the documents which are beyond suspicion or doubt placed by the accused, and accusations against him cannot stand, it would be travesty of justice if the accused is relegated to trial and he is asked to prove his defence before the trial Court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In the case of *Dushyant D. Anjaria Vs. M/s. Wall Street Finance Ltd* (supra) it was observed that, Once the petitioner resigned as additional director is ceased to have any control or access to the first accuse company and could not have furnished explanation on behalf of the first accused company for not filing the resignation tendered by the petitioner before the office of Registrar of Companies immediately. In Form No.32 it is clearly recorded that, the petitioner resigned as Additional Director and there is no reason to disbelieve the said form No.32. In the case of *Saumil Dilip Mehta Vs. State of Maharashtra and others* (supra) it was observed that, the director of the public limited company or private company can tender his resignation unilaterally and without filing Form No.32 and sending a notice to the Registrar of Companies. The filing in the said form and giving due intimation and information to Registrar of Companies is the duty of the Company Secretary and not of an individual Director what he has to is to send in writing in letter informing either the Chairman or the Secretary of the Company, as the case may be, his intention to resign from the post of the Director of the said Company. Thereafter the said letter has to be moved in the meeting of the Directors of the company.

16. Section 141 of the NI Act reads as follows :-

“ 141 Offences by companies. —

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence: 22 [Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation.— For the purposes of this section,—

(a) “company” means any body corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.”

17. In the case of National Small Industries Corporation Ltd. V. Harmeet Singh Paintlal[5], after survey of earlier decisions wherein legal position concerning Section 138 and Section 141 of the NI Act was considered, this Court culled out the following principles :-

> *" (i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.*
>
> *(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.*
>
> *(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in-charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.*
>
> *(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.*
>
> *(v) If accused is a Managing Director or Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.*
>
> *(vi) If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint.*

5 7(2010) 3 SCC 330

> *(vii) The person sought to be made liable should be in-charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases."*

18. There is no reason to doubt the genuineness of the documents relied upon by the Respondent No.4, she cannot be prosecuted for the offence under Section 138 of the NI Act. The Sessions Court has rightly allowed the revision application and set aside the order issuing process. Hence, no case is made out to interfere in the impugned Order.

ORDER

Writ Petition No.147 of 2017 is rejected and disposed off accordingly.

(PRAKASH D. NAIK, J.)