IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1447 OF 2021

1. Imperial Techsol Pvt.Ltd.
Office at H.No.603, Near Air Force Camp,
Rajokari, New Delhi-110 038.
2. Rakesh Kumr Singh, 37 years,
R/o.Plot No8, Flat No.18,
R.P.Block-A, Ali Vihar Sarita Vihar,
Delhi-110 076.
3. Rashmi Singh, Age 42 years,
B-503, Plot No.9, Door Darshan
Apartment, Sector-45, Kanahi (73),
Gurgaon-122 003.
4. Dinesh Kumar, Age 46 years,
R/o.D-1/903, Summer Palm, Sector-86,
Sector-16, Faridabad-121002. Petitioners

versus

1. The State of Maharashtra.
2. Xtreme Media Pvt.Ltd.
Office at 8/33, Meghchhaya Shrisai Baba Road,
Lalbaug, Mumbai-400 012. Respondents

Mr.Yashpal M. Thakur, Advocate for Petitioners.
Mr.Siddharth Murarka with Mr.Devendra Tiwari i/by Law Chamber of Siddharth Murarka, Advocate for Respondent no.2.
Mr.A.D.Kamkhedkar, APP, for State.
Mr.Shailendra Jagdale, API, BKC Police Station, present.

CORAM : PRAKASH D. NAIK, J.

DATE : 1st August 2022

PC :

1. The Petitioners are challenging the order dated 10th April 2019 passed by learned Metropolitan Magistrate, 6th Court, Mazgaon, Sewree, Mumbai, issuing process against accused/Petitioners under

Section 138 r/w 141 of Negotiable Instruments Act (N.I.Act).

2. The brief facts of complaint are as follows :-

(i) Respondent no.2 is the Private Limited Company engaged in the business of manufacture and sale of LED Displays and Digital Signage solutions. The accused no.1 company is a company engaged in the business of providing integrated solutions with respect to LED video wall, LED display, LED display screen, LCD video wall, large format displays, digital signage, Signage media player, Signage software solution etc. Accused no.2 to 4 being directors were and are the persons in-charge of and responsible for the conduct of the business of accused no.1 when the offence was committed. Both the cheques which are subject matter of the complaint have been signed by one person as authorized signatory of accused no.1. The accused no.2, 3 and 4 are also liable to be prosecuted being the Directors of accused no.1 who have been under the law, entrusted by the management of accused no.1. Hence they are directly liable for dishonour of the said two cheques. All the accused neglected and failed to comply with the requisitions made in the demand notice issued under the provisions of Section 138(c) of the Negotiable Instruments Act, within the stipulated period. The accused are therefore liable to be proceeded against;

(ii) The accused no.1 referred to as the purchasers in purchase order No.PO/DEL/18-19/15 voucher No.PO/DEL/18-19/15, dated 6th June 2018 and purchase order No.PO/DEL/18-19/15, voucher No.PO/DEL/18-19/16, dated 6th June 2018 placed on the complainant company as suppliers for providing P3 indoor LED on the terms and conditions mentioned therein;

(iii) The accused company was required to make payment of Rs.22,24,980/- and Rs.26,48,115/- within 30 days of delivery Two post dated cheques were handed over to the complainant company by the accused no.1 vide cheque no.000531 dated 15th October 2018 for Rs.26,48,115/- and cheque no.000532 dated 15th October 2018 for Rs.22,24,980/- in favour of the complainant company;

(iv) The complainant presented the above cheques with its bankers. The cheques were returned vide memos dated 15th January 2019 with remarks `payment stopped by the drawer';

(v) On 22nd January 2019 the complainant company through its advocate sent a demand notice under Section 138, 141 of Negotiable Instruments Act to accused calling upon them to pay the aggregate amount of Rs.48,73,095/-;

(vi) Demand notice was sent to the accused at the registered office of accused no.1. It was received by accused no.1 on 28th January 2018. Demand notice was replied by the advocate of accused no.1 vide their letter dated 13th February 2019. Complaint was filed on 11th March 2019.

3. Learned Magistrate vide order dated 10th April 2019 issued process against accused for offence punishable u/s.138 u/s.141 of N.I.Act.

4. Learned advocate for Petitioners submitted that statutory demand notice is not issued to the drawer of cheque i.e. Petitioner no.1 and therefore the order of issuance of process passed by learned Magistrate is without application of mind. The complaint u/s.138 of N.I.Act can be initiated only if the statutory demand notice issued to the drawer of the cheque and the drawer fails to make the payment

of the amount demanded. The statutory demand notice has been sent only to the Board of Directors of Petitioner no.1. In the absence of such demand notice the learned Magistrate ought not to have issued process against petitioner no.1. In order to make the petitioner no.2 to 4 vicariously liable for the alleged offence, it is necessary that the demand notice is issued to the petitioner no.1 which is the drawer of the cheques. Since no demand notice is issued to the petitioner no.1, the petitioner no.2 to 4 cannot be made vicariously liable and therefore the process ought not to have been issued. Learned Magistrate failed to consider that the statutory demand notice dated 22nd January 2019 was sent to `The Board of Directors, Imperial Techsol Private Limited'. However, the same is not issued to the drawer of the cheque who is `Imperial Techsol Pvt.Ltd.'. Therefore, in absence of compliance of clause (b) of Section 138 of N.I.Act, the present proceedings cannot be proceeded against the petitioner. To attract the offence and penalty under Section 138 clause (b) of N.I.Act, it is imperative on the part of payee or holder in due course of the cheque to make a demand for payment of said amount of the cheque by giving notice in writing and the said demand has to be raised on the drawer of the cheque. The statutory notice is not issued to the drawer of the cheque. Service of notice of demand as per clause (b) of Section 138 of N.I.Act is a condition precedent for filing a complaint. Though the matter has reached at the stage of evidence, this Court in exercise of its inherent powers can quash the proceedings as prima facie there is non-compliance of the statutory provisions contemplated under Section 138 of N.I.Act.

5. Learned advocate for Petitioners has relied upon decision in the case of **Krishna Texport and Capital Markets Ltd. Vs. Ila A.**

Agrawal and others (AIR-2015-SC-2091), **Shehzad V.Merchant Vs. Saiyed Ghulam Abbas Zaidi and others** 2019-ALL MR (Cri)-5001 and **Pradeep Khetshi Shah Vs. State of Maharashtra and others** 2019-ALL MR (Cri)-1281.

6. Learned advocate for Respondent no.2 submitted that there is no illegality in the order issuing process. Notice was issued to Board of Directors. Notice was received by Petitioner no.1. Reply was forwarded on behalf of Petitioner no.1. The object of issuing notice contemplated u/s.138 of N.I.Act is to intimate the drawer of cheque about dishonour of the cheque and to give him an opportunity to repay the amount of cheque which has been dishonoured. The object of said provision has been fulfilled as the complainant through its reply has denied the liability. The affidavit of evidence of complainant is filed. At this stage this Court may not entertain this petition for quashing the proceedings. As per Section 138 of N.I.Act the payee/holder of the cheque has to make a demand for the payment of the said cheque of the money by giving notice in writing to the drawer of the cheque. It nowhere states that the notice must be strictly addressed to the drawer of the cheque. Thus, the requirement is giving a notice under Section 138 of the N.I.Act to the drawer. When the notice is addressed to the Board of Directors of the company and the same is acknowledged and replied on behalf of the company through the advocate, it is deemed that the notice is served to the company. The notice was replied by company and thus it is admitted to have been served upon the company. The company has denied the liability.

7. Reliance is placed on following decisions :

(i) Maxworth Realty India Ltd. Vs. M.K.Veerendra Basu (2019)-SCC OnLine-Kar-1652;

(ii) Bhupesh Rathod Vs. Daya Shankar Prasad Chaurasia Criminal Appeal No.1105 of 2021).

8. It is necessary to consider that Petitioner no.1 (accused no.1) is the company, Petitioner nos.2 to 4 are the Directors of Petitioner no.1/accused no.1. Pursuant to dishonour of cheques, demand notice was sent on 22nd January 2019. Notice was addressed to Board of Directors of Imperial Techsol Pvt.Ltd. The title of notice indicated that it was notice u/s.138 of N.I.Act, for payment of the amount of dishonoured cheques. Notice referred to two cheques which are subject matter of this complaint, issued by accused no.1 and dishonoured vide return memos dated 15th January 2019. The addressee was called upon as per Section 138 of N.I.Act to make full payment of both the cheques aggregating to Rs.48,73,095/- to complainant within a period of 15 days from the date of notice failing which the complainant is determined to take appropriate legal action civil s well as criminal, particularly under Section 138 of the N.I.Act. Section 420 of IPC and Order XXXVII of CPC. Reply dated 13th February 2019 was sent by accused no.1 Imperial Techsol Pvt.Ltd. (petitioner no.1) through their advocates. The reply acknowledges receipt of notice dated 22nd January 2019 written by complainant company. It is also evident from contents of reply that it was sent on behalf of accused no.1. Thus, notice which was sent at the address of accused no.1 company is admitted to have been served upon the accused no.1 company. In reply the petitioner no.1 has denied each and every singular averments made in the notice. It was stated that P3 indoor Led Video walls for Cinepolls project

supplied by complainant were not as per the schedule and as per terms of agreement which has caused loss to accused no.1. Cheques were presented before the date of expiry of cheques without completing proper service. The accused no.1 has never committed penal offence of cheque dishonouring. It is denied that accused is required to make the payment of Rs.48,73,095/- to complainant. The complainant was called upon to withdraw the complaint.

9. ***Section 138 of N.I.Act reads as follows :***

> *"138. Dishonour of cheque for insufficiency, etc., of funds in the account.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is return by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both;*
>
> *Provided that nothing contained in this section shall apply unless-*
>
> *(a) the cheque has been presented to the bank within a period of three months from the date on which it is drawn on within the period of its validity, whichever is earlier;*
>
> *(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheques as unpaid; and*
>
> *(c) the drawer of such cheque fails to make the*

> *payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice."*

10. The requirement is giving notice under Section 138 of N.I.Act to the drawer. The accused no.1/petitioner no.1 is the drawer of the cheque. When the notice is addressed to the Board of Directors of accused company and the same is acknowledged and replied by company, it is deemed that the notice is served to the company. It is not the case of petitioners that the petitioner no.2 to 4 i.e. Directors are not liable or the cheque is not issued by drawer i.e. petitioner no.1.

11. In Krishna Texport and Capital Markets Ltd Vs. Ila Agrawal and Others (supra), the contention of appellant before the Apex Court was that it was not necessary to serve individual notice upon the directors and it was insufficient if the notice was served on the company Thus, the question before the Court was whether notice u/s.138 of the Act is mandatorily required to be sent to the directors of a company before a complaint could be filed against such directors along with the company. It is held that according to Section 138, where any cheque drawn by a person on an account maintained by him is returned by the bank unpaid for reasons mentioned in said section, such person shall be deemed to have committed an offence. The proviso to the section stipulates three conditions on the satisfaction of which the offence is said to be completed. The proviso inter alia obliges the payee to make a demand for the payment of said amount of money by giving a notice in writing to the drawer of the cheque and if the drawer fails to make the payment of the said amount within 15 days of the receipt of said notice, the stages

stipulated in the proviso stand fulfilled. The notice u/s.138 is required to be given to the drawer of the cheque so as to give the drawer an opportunity to make the payment and escape the penal consequences. No other person is contemplated by Section 138 as being entitled to be issued such notice. The plain language of Section 138 is very clear and leaves no room for nay doubt or ambiguity. There is nothing in Section 138 which may even remotely suggest issuance of notice to anyone other than the drawer. No notice is additionally contemplated to be given to directors. If the requirement that such individual notices to the directors must additionally be given is read in to the concerned provisions, it will not only be against the plain meaning an construction of the provision but will make the remedy under Section 138 wholly cumbersome.

12. The aforesaid decision dealt with question whether individual notices are required to be given to directors of company and it is held that notice has to be given to drawer of the cheque. It is pertinent to note that in the aforesaid decision it is observed that notice u/s.138 is required to be given to the drawer of the cheque so as to give the drawer an opportunity to make the payment and escape the penal consequences. In the present case, notice was addressed as Board of Directors of Imperial Techsol Pvt.Ltd and it was received by accused no.1 company and by submitting reply the liability has been denied.

13. In the case of Shehzad Valimohammad Merchant Vs. Saiyed Gulam Abbas Zaidi and others (supra), one of the issue before this Court was that notice was not addressed to the company which is the drawer of the cheque. It was observed that the object of issuing notice is to give a chance to the drawer of the cheque to rectify his

omissions and also to protect a honest drawer. When a statute requires a particular thing to be done in a particular manner, then that must be performed in the same manner and not in any other manner In absence of a notice being issued to the company, which is the drawer of the cheque in question, the invocation of proceedings u/s. 138 of the N.I.Act must necessarily fail in the absence of statutory compliance of sub-clause (b) of the Section 138.

14. There cannot be any debate about the ratio of the decision that notice is required to be given to the drawer of the cheque. However, for the observations made hereinabove about the complaint under challenge before this Court, this decision is of no assistance to the petitioners.

15. In Pradeep Khetshi Shah Vs. State of Maharashtra and others (supra), this Court has dealt with objection by complainant about maintainability of the petition since plea of the accused was recorded. Reliance was placed on decision of Apex Court in the case of Subramanium Pethuraman Vs. State of Maharashtra and another (2004)13-SCC-324. In the present case, it is urged by learned advocate for complainant that plea has been recorded by Trial Court and the petition should not be entertained. In the aforesaid decision this Court has considered various decisions and it is held that even if plea is recorded in the proceedings, it cannot be said that application u/s.482 of Cr.P.C is not maintainable. The present petition is adjudicated on merits.

16. In the case of Maxworth Realty India Ltd. Vs. M.K.Veerandra Babu (supra), the High Court of Karnataka has dealt with the submission that no notice was served on accused no.1 company.

Notice has been served on accused no.2 who was Managing Director of accused no.1. Reliance was placed on decision of Supreme Court in the case of Himanshu Vs. B.Shivamurthy (2019)3-SCC-797. It is observed that the reason for creating vicarious liability is plainly that a juristic entity i.e. a company would be run by living persons who are in charge of its affairs and who guide the actions of that company and if such juristic entity is guilty, ultimately it is the persons who are responsible for its affairs and they must be held responsible and convicted. The Chairman or Managing Director of a company will be having knowledge of a company. The accused no.2 is Managing Director of accused no.1. When the statutory notice is issued to the Chairman or Managing Director of the company and when the company and Managing Director are the person who are at the helms of affairs of the company, the company is vicariously liable. The court rejected the submission that in the absence of notice to company, there was no cause of action to initiate proceedings.

17. In the case of **Bilakchand Gyanchand Co. Vs. A.Chinnaswami (1999)5-SCC-693**, the notice was issued to the Managing Director of the company who had signed the cheques. It was held that there was no infirmity in the notice and High Court was not justified in quashing the complaint on the ground that notice was sent to the Managing Director at his office address could mean that notice was sent to the company itself.

18. In the case of Aneeta Hada Vs. Godfather Travels and Tours Pvt.Ltd (AIR-2012-SC-2795), the issue was different. It was held that if the offence was committed by a company, it can be punished only if the company is prosecuted.

19. As stated hereinabove, notice was received by accused no.1 company and within stipulated time it was replied by accused no.1 company with a counter that there was no existing liability. In the circumstances the submission of learned counsel for Petitioners that proceedings are required to be quashed on the ground of not issuing notice to the drawer of cheque, cannot be accepted and deserves to be rejected.

ORDER

(i) Criminal Writ Petition No.1447 of 2021 is rejected.

(PRAKASH D. NAIK, J.)

MST