IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1816 OF 2019

Karishma Vishal Khanna … Petitioner
Versus
1. The State of Maharashtra
2. M/s. V.R.L. Logistics Limited …Respondents

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Mr. Rishi Bhuta with Mr.Ujjwal Gandhi, Mr. Manish Bohra, Advocate for the Petitioner.

Mr. Rajesh S. Singh, Advocate for Respondent No.2.

Mr. S. R. Agarkar, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 28th JULY 2022

PC :

1. Petitioner is charged for an offence punishable under Section 138 of the Negotiable Instruments Act. The complaint is filed by Respondent No.2 before the Court of 4th Judicial Magistrate, First Class, Vashi, Navi Mumbai and it was registered as SCC No. 6073 of 2016.

2. The brief allegations in the complaint are as under:-

(i) By virtue of contract dated 15th June 2015 executed between the accused and complainant, the accused have been availing the services of complainant in transporting the materials of the accused from Mumbai to various destinations in the country. The contract contained various terms and conditions, which the accused are bound to follow, during the course of business. As per clause 16 of the contract, the credit period, the accused have been enjoying is that the accused is bound to make the payment of the bills within 30 days from the date of submission of the bills and failing which, in accordance with clause No.17 of the contract, the accused are required to pay financial charges @ of Rs. 2% per month calculated on the actual number of days delayed.

(ii) The complainant raised four bills bearing No.2204151 dated 31st August 2015 for Rs.4,77,252/-, bill No.2204282 dated 30th September 2015 for Rs.551/-, bill No. 2204500/- dated 31st October 2015 for Rs.6416/- and bill No.2204593/- dated 30th November 2015 for Rs.4957/-. Totalling to Rs.4,89,176/-.

(iii) Towards part payment, the accused issued cheque bearing the signature of accused as a Authorised signatory bearing cheque No. 334028 dated 16th January 2016 for Rs.2,32,034/- in favour of complainant.

(iv) The complainant deposited the said cheque with their bank.

(v) The cheque was returned unpaid by bank of accused with remark ‘payment stopped by drawer’ on 2nd March 2016.

(vi) The complainant addressed a legal notice to the accused on 15th March 2016, which was received by accused on 26th March 2016. The accused failed to comply with requisitions of the notice. Hence, complaint was filed before the Court of learned JMFC Vashi, Navi Mumbai.

3. Vide order dated 29th June 2016, the learned Judicial Magistrate, First Class, Vashi, Navi Mumbai issued process against the accused for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

4. Learned Advocate for Petitioner submitted that, the petitioner was tried being the director of M/s. Momentum Solutions Pvt. Ltd. However, no demand notice under Section 138 of Negotiable Instruments Act was issued against the Company. The company is not arraigned as an accused in the complaint. Learned Magistrate has mechanically issued process. Learned Magistrate failed to understand the scope of section 141 of the Negotiable Instruments Act. For maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative.

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

(i) Aneeta Hada and Ors. Vs. M/s. Godfather Travels & Tours Pvt. Ltd. & Anr. 2012 (5) SCC 661.

(ii) Dayle De'Souza Vs. Government of India, AIR 2021 SC

5626.

(iii) Dilip Hariramani Vs. Bank of Baroda arising out of Special Leave Petition (Cri.) No. 641 of 2021.

(iv) Himanshu Vs. B. Shivamurthy & Anr. decided by Apex Court on 17th January 2019 vide Criminal Appeal No.1465 of 2009.

(v) A. C. Narayanan Vs. The State of Maharashtra & Ors. decided by this Court vide Criminal Application Nos.464, 465, 466, 1070, 1070 & 1072 of 2016.

6. Learned Advocate for Respondent No.2 submitted that, the Petitioner was director of M/s. Momentum Solutions Pvt. Ltd. She has participated in day to day affairs of company. She has signed the cheque as Authorised signatory. It was not necessary to implead the company as an accused in the criminal complaint for offence under Section 138 of the N.I. Act. In the title of complaint it is stated that, the Petitioner is the director of M/s. Momentum Solutions Pvt. Ltd.. Complaint can be amended to implead company as accused. The grounds urged by Petitioner can be considered during the trial.

7. Learned Advocate for Respondent No.2 has relied upon decision in the case of *S.R. Sukumar Vs. S. Sunaad Raghuram*[1].

8. The documents on record indicate that, the transactions were executed by complainant/company with M/s. Momentum Solutions

1 AIR 2015 SC 2757

Pvt. Ltd. The title of the complaint mentions that, the Petitioner is director of M/s. Momentum Solutions Pvt. Ltd. Process was issued against the accused for an offence under Section 138 of the N.I. Act. M/s. Momentum Solutions Pvt. Ltd. was not arraigned as an accused in the complaint. The demand notice under Section 138 of the N.I. Act was not forwarded to M/s. Momentum Solutions Pvt. Ltd. Director of the company can be impleaded as an accused by invoking Section 141 of the N.I. Act. The Petitioner being director of the company would be prosecuted in the event the company is impleaded as an accused. Learned Magistrate has failed to consider the said aspect while passing order issuing process. The cheque was issued towards alleged liability of M/s. Momentum Solutions Pvt. Ltd. The services of complainant in transporting the material was availed by M/s. Momentum Solutions Pvt. Ltd. The Freight Bills relied upon by complainant shows that the company was consignor. The cheque was issued by accused as authorised signatory of the company M/s. Momentum Solutions Pvt. Ltd. There was no legal impediment in impleading the company as accused. The drawer of the cheque was company. The drawer cannot be impleaded as an accused without satisfying the requirement of Section 142 of N.I. Act. To initiate proceedings under Section 138 of N.I. Act, there are conditions precedent to be fullfilled viz. Notice be served on the drawer of the cheque and thereafter in the event the drawer of the cheque fails to make payment as called upon vide the notice, a complaint against the drawer can thereafter be instituted within stipulated time. Although the complainant was conscious of the fact that, cheque was issued by company had chosen to arraign the petitioner only as an accused and not the company. The complaint cannot be amended now to arraign company as accused.

9. In *Aneeta Hada and Ors. Vs. M/s. Godfather Travels & Tours Pvt. Ltd. & Anr.* (supra), the issue which fell for consideration was whether an authorised signatory of a company would be liable for prosecution under section 138 of the N.I. Act, without the company being arraigned as an accused. It was held that,

> "58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicated".
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> "59. In view of out aforesaid analysis, we arrive at the

> irresistible conclusion that for maintaining the prosecution under section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself".

10. In the case of *Himanshu Vs. B. Shivamurthy & Anr.* (supra), the appellant had contended that, the cheque was issued by director on behalf of company. The complaint ought to have been instituted against the company and its directors and not against the appellant. The appellant could not be prosecuted without the company being named as an accused. It was also urged that the observations of the High Court that the company can now be proceeded against in the complaint is misconceived. The offence under Section 138 is complete only upon the issuance of notice of demand and the failure of payment within the prescribed period. In the absence of compliance with the requirements of Section 138 the direction of the High Court that the company could be impleaded at this stage is erroneous. The Apex Court referred to the decision in the case of *Aneeta Hada* (supra); *Charanjit Pal Jindal Vs. L. N. Metalics*[2] MSR Leathers Vs. S. Palaniappan (2013) 1 SCC 177 and N. Harihara Krishnan Vs. J. Thomas (2018) 13 SC 663. It was held that the proviso to section 138 contains the preconditions which must be

2 (2015) 15 SCC 768

fulfilled before an offence under the provision is made out. These conditions are (i) presentation of the cheque to the bank within six months from the date on which it is drawn or within the period of its validity, whichever is earlier (ii) a demand being made in writing by the payee or holder in due course by issuance of a notice in writing to the drawer of the cheque within thirty days of the receipt of information from the bank of the return of the cheques and (iii) the failure of the drawer to make payment of the amount of money to the payee or the holder in due course within fifteen days of the receipt of the notice. The cheque was drawn by appellant for company, as its Director. Notice of demand was served only on the appellant. The complaint was lodged only against appellant without arraigning the company as an accused. The provisions of section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or 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. In the absence of the company being arraigned as an accused, the complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a director of the company and for and on its behalf. In the absence of a notice of demand being served on the company and without compliance with the proviso to section 138, the High Court was in error in holding that the company could now be arraigned as an accused.

11. In Dayle De'Souza Vs. Government of India (supra) the appellant was prosecuted vide Section 22(c) of Minimum Wages Act 1948. The said provision relates to offences by companies and liability of person in-charge of and responsible to the company for the conduct of the business of the company as well as the company, at the time the offence was committed. In the complaint, company was not made an accused. The appellant was the director of the company. The Court referred to several decisions and held that company being a juristic person cannot be imprisoned, but it can be subjected to a fine, which in itself is a punishment. Every punishment has adverse consequences, and therefore, prosecution of the company is mandatory. The exception would possibly be when the company itself has ceased to exist or cannot be prosecuted due to a statutory bar.

12. In the case of *Dilip Hariramani Vs. Bank of Baroda* (supra) The appellant therein was convicted for an offence under Section 138 read with 141 of the Negotiable Instruments Act. The complaint was filed against the appellant and another accused. The firm was not

made an accused. Demand notice was solely served to one accused who was authorised signatory to cheque. It was held that, provisions of Section 141 impose vicarious liability by deeming fiction which presupposes and requires the commission of offence by the company or firm. Therefore, unless the company or firm has committed offence as a principal accused, the persons mentioned in sub-section (1) or (2) would not be liable and convicted as vicariously liable. Section 141 of the N.I. Act extends vicarious criminal liability to officers associated with the company or firm when one of the twin requirements of section 141 has been satisfied, which person then, by deeming fiction, is made vicariously liable and punished. However, such vicarious liability arises only when the company or firm commits the offence as the primary offender.

13. In the decision of this Court in *A. C. Narayanan Vs. The State of Maharashtra and Ors.* (supra) the complaint was filed alleging offence under Section 138 of the Negotiable Instrument Act. The applicant therein was impleaded as the only accused in complaints. The applicant was impleaded as an accused being vice-chairman and managing director of company. The company was not arraigned as accused. There was no legal impediment in impleading the company as accused. Drawer of the cheque was company. The complainant had knowledge that the accused was impleaded by filing complaint,

as he was in-charge and responsible for conduct of the business of the said company. It was held that, the complainant ought to have impleaded the company as an accused.

14. In the case of *S. R. Sukumar Vs. S. Sunaad Raghuram* (supra) the complainant was permitted to carry out amendment in a criminal complaint for offences under Section 120(B), 499 and 500 of IPC on the premise that the amendment was made prior to taking cognizance of offence. It was held that although there is no specific provision in Code to amend complaint, the Courts have held that the petitions seeking such amendment to correct curable infirmities can be allowed even in respect of complaints. Reference was made to decision in the case of U.P. Pollution Control Board V. Modi Distillery and Ors. (1987) 3 SCC 684 wherein the name of the company was wrongly mentioned in the complaint. Hence, the name was sought to be amended. It was directed that complainant can make formal amendment to complaint by making application before the Court on referring the aforesaid decision it was observed that, what is discernible from the decision in the case of U.P. Pollution Control Board is that easily curable legal infirmity could be cured by means of a formal application for amendment. If the amendment sought to be made relates to a simple infirmity which is curable by means of a formal amendment any by allowing such amendment, no prejudice

could be caused to the other side, notwithstanding the fact that there is no enabling provision in the code for entertaining such amendment, the Court may permit such an amendment to be made. On the contrary, if the amendment is sought to be made in the complaint does not relate either to a curable infirmity or the same cannot be corrected by formal amendment or if there is likelihood of prejudice to the other side, then the court shall not allow such amendment in the complaint. The factual matrix of the case before Apex Court would indicate that, the amendment application for substantial amendment was filed and the magistrate allowed the said application mainly on the ground that no cognizance was taken of the complaint before the disposal of amendment application. The Magistrate was yet to apply judicial mind to the contents of the complaint and had not taken cognizance of the matter. Secondly, since summons was yet to be ordered to be issued to the accused, no prejudice would be caused to accused and the amendment did not change the original nature of the complaint being one for defamation, the amended version could have created new cause of action in favour of complainant which could have been prosecuted by filing separate complaint and to avoid multiplicity of proceedings, the trial court allowed the amendment application. Hence, the Supreme Court observed that, the above factors which weighed in the mind of the courts below and the High Court rightly declined to interfere with the order passed by Magistrate allowing the amendment application and the impugned order does not suffer from any serious infirmity warranting interference in exercise of jurisdiction under Article 136 of the Constitution of India.

15. Amendment of complaint cannot cure the defect at this stage. To initiate prosecution under Section 138 of the N.I. Act, there are conditions precedent to be fulfilled. Failure to comply the conditions would not permit complainant to file complaint against the drawer.

16. In MSR Leathers Vs. S. Palaniappan (supra) the Supreme court has observed as follows:-

> "12. The proviso to section 138, however, is all important and stipulates three distinct conditions precedent, which must be satisfied before the dishonour of a cheque can constitute an offence and become punishable. The first condition is that the cheque ought to have been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. The second condition is that the payee or the holder in due course of the cheque as the case may be, ought to make 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 cheque as unpaid. The third condition is that the drawer of such a cheque should have failed to make 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. It is

> only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to section 138 as clauses (a), (b) and (c) thereof that an offence under Section 138 can be said to have been committed by the person issuing the cheque".

17. In the light of principal enunciated in the aforesaid decisions and taking into consideration the factual matrix of the present case, the proceedings against the petitioner are not maintainable. In the absence of the company, who was the drawer of the cheque, the petitioner cannot be prosecuted by invoking Section 141 of Negotiable Instruments Act. In these circumstances, it would be an abuse of process of law to continue such proceeding and by exercising the inherent power under Section 482 of Cr.P.C. and or supervisory jurisdiction under Article 227 of the Constitution of India, the impugned order of process and the proceedings are required to be quashed and set aside.

ORDER

(i) Writ Petition is allowed and disposed off;

(ii) The order issuing process dated 29th June 2016 and proceedings in SCC No. 6073 of 2016 pending before the Court of 4th JMFC, Vashi are quashed and set aside.

(PRAKASH D. NAIK, J.)