IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2715 OF 2021
WITH
CRIMINAL WRIT PETITION NO. 2716 OF 2021
WITH
CRIMINAL WRIT PETITION NO. 2717 OF 2021
WITH
CRIMINAL WRIT PETITION NO. 2718 OF 2021
WITH
CRIMINAL WRIT PETITION NO. 2719 OF 2021

Vimmi Sandeep Saxena
Aged 46 years, Occ: Business and
having office at Sadguru Tower,
CP-47-A, Sector-E, Jankipuram,
Lucknow 226 021, Uttar Pradesh. ...Petitioner

Versus

1. The State of Maharashtra
2. Mr. Rajkapoor L. P. Gupta ...Respondents

Mr. Manish Bohra i/by M/s. A. S. Khan & Associates, for the Petitioner.
Mr. A. R. Patil APP for the Respondent/State.
Mr. Dharmendra Tiwari h/f Mr. Santosh Thakur for Respondent No.2

CORAM : PRAKASH D. NAIK, J.

DATE : 19th JULY 2022

PC :

1. Petitioner is prosecuted for offence under Section 138 of the Negotiable Instrument Act in C.C. No.797/SS/2020, C.C.No.798/SS/2020, C.C. No.1070/SS/2020, C.C. No.1071/SS/2020 and C.C. No.1155/SS/2020 pending before the Court of Metropolitan

Magistrate, 7th Court, Dadar, Mumbai. All the complaints were filed by Respondent No.2.

2. C. C. No. 797/SS/2020 and order issuing process dated 3rd November 2020 is challenged vide Criminal Writ Petition No. 2715 of 2021. C.C. No.798/SS/2020 and Order issuing process dated 10th November 2020 is the subject matter of challenge in Criminal Writ Petition No.2716 of 2021. C. C. No.1070/SS/2020 and order issuing process dated 22nd January 2021 is challenged vide Criminal Writ Petition No. 2717 of 2021. C. C. No.1071/SS/2020 and order issuing process dated 22nd January 2021 are assailed in Criminal Writ Petition No.2718 of 2021. C. C. No.1155/SS/2020 and order issuing process dated 1st February 2021 is the subject matter of challenge in Criminal Writ Petition No. 2719 of 2021.

3. The brief facts of impugned complaints are as under:-

(i) The complainant is the joint owner of a commercial office premises, with his wife Dindu Gupta situated at R.K. Plaza, Nawal Kishore Road, Hazratganj, Lucknow, Uttar Pradesh. The Accused Nos. 2 and 3 approached the complainant and his wife to let them the said premises.

(ii) In the year 2013, Lease Agreement was executed between complainant and the accused No.1 through accused No.2 and it was renewed on 25th April 2014 for 36 months, upon monthly consideration of Rs. 6,00,000/-. As per agreement it was agreed by accused for monthly compensation shall be payable between 1st and 7th day of each month.

(iii) The accused Nos. 2 and 3 have paid the complainant monthly consideration by deducting TDS and thereafter they started making various excuses of financial crunches from April 2017. The accused cleared the dues till February 2018. Rent was due from April 2018 till April 2019.

(iv) Accused issued five post dated cheques in the name of complainant and one post dated cheque in the name of his wife towards the part payment of pending dues, which comes to Rs.77,75,626/- till 30th April 2019 and along with interest @ 18@ p.a. which comes to Rs.88,37,486/- and with electricity bills was Rs.20,28,606/-. The total amount due payable by the accused to the complainant was Rs.1,08,66,092/-. The cheques were deposited on respective dates. Three cheques were honoured and two cheques were dishonoured with endorsement ‘funds insufficient’.

(v) Vide letter dated 5th April 2019, the accused No.2 admitted liability and undertook to pay monthly installment of Rs. 4,00,000/- for remaining rent due and payable to the complainant.

(vi) The complainant filed criminal case bearing No.1014/SS/2019 before the Court of Metropolitan Magistrate 28th Court at Esplanade, Mumbai under Section 138 of the Negotiable Instruments Act, 1881 and Summary Suit No.905 of 2019 before the Bombay City Civil Court at Bombay and application before the National Company Law Tribunal, New Delhi under Rule 6 of the Insolvency and Bankruptcy application to adjudicating Authority Rules, 2016 for dishonoured cheque and for recovery of pending amount.

(vii) Memorandum of understanding dated 31st December 2019 was executed between the complainant and the accused at Lucknow. However, the same was not handed over by accused to the complainant.

(viii) On the date of execution of memorandum of understanding dated 31st December 2019, the accused handed over to the complainant one demand draft of Rs.4,02,504/- and fourteen post dated cheques each amounting to Rs.4,00,000/- and one post dated cheque Rs.97,496/- with understanding that all the cheques would be honoured. The demand draft dated 1st January 2020 for Rs.4,02,504/- was honoured. The cheque dated 30th May 2020 bearing No.000071 for Rs.4,00,000 was dishonoured on 28th August 2020. The statutory notice was forwarded to the accused on 8th September 2020. The complaint was filed on 29th September 2020.

Process was issued under Section 138 read with 141 of Negotiable Instruments Act on 3rd November 2020. Complaint was registered as C.C. No.797/SS/2020. Cheque bearing No.000069 dated 30th July 2020 for an amount of Rs. 4,00,000/- was dishonoured on 24th August 2020. The complaint viz. C.C. No.798/SS/2020 was filed on 29th September 2020. The process was issued against the accused for an offence under Section 138 read with 141 of the Negotiable Instrument Act by order dated 10th November 2020. The complaint in C.C. No.1070/SS/2020, which refers to the similar transaction and relates to cheque bearing No.000070 dated 30th June 2020 for an amount of Rs. 4,00,000/- was dishonoured on 28th September 2020. The complaint viz. C.C. No.1070/SS/2020 was filed on 10th November 2020. The Learned Magistrate issued process against the accused for an offence under Section 138 read with 141 of the Negotiable Instruments Act by order dated 22nd January 2021. The cheque No.000068 dated 30th August 2020 for an amount of Rs. 4,00,000/- was dishonoured on 29th September 2020. Demand notice was issued on 9th October 2020. Complaint viz. C.C. No.1071/ SS/2020 was filed on 10th November 2020. Learned Magistrate issued process against the accused for an offence under Section 138 read with 141 of the Negotiable Instruments Act on 22nd January 2021. Cheque bearing No.000067 dated 30th September 2020 for an amount of Rs. 4,00,000/- was dishonoured on 13th October 2020. The complaint viz. C.C. No.1155/SS/2020 was filed on 10th December 2020. The learned Magistrate issued process against the accused for offence under Section 138 read with 141 of the Negotiable Instruments Act by order dated 1st February 2021.

4. Learned Advocate for the Petitioner submitted that, in all the complaints, the learned Magistrate had issued process mechanically. The petitioner is impleaded as an accused No.3 in the said complaints. The petitioner is not signatory to the cheque. There is no averment in the complaint to invoke Section 141 of Negotiable Instruments Act. The petitioner has been arraigned as accused being director of accused No.1/company. However, in the complaints the required averment to invoke Section 141 of the Negotiable Instruments Act are missing. It is not stated that the petitioner was in-charge and was responsible to the company for the conduct of the business of the company as well as the company. Inspite of lack of averments in the complainat fastening vicarious liability, the learned Magistrate had issued process against the petitioner under Section 138 read with 141 of the Negotiable Instruments Act.

5. Learned Advocate for Respondent No.2/complainant submitted that, petitioner is the director of accused No.1/company. The petitioner had participated in the transactions. The petitioner

and the accused No.2 had assured the complainant that, they would pay the amount towards the lease. Cheques were issued by company of which the petitioner is the director. The petitioner and the accused No.2 had issued post dated cheques in the name of complainant and his wife. The grounds urged by petitioner are required to be tested during trial. Learned Magistrate has issued process after perusal of complaint, verification statement and the material on record.

6. The factual matrix of all the complaints indicates that lease agreement was executed between the complainant and accused No.1. The accused No.2 is the Managing Director of Amartech Convergence Indian (P) Ltd.. The accused No.3/petitioner is the director. The petitioner is not signatory to the cheque. The complaints are silent about the averments to invoke Section 141 of the Negotiable Instrument Act.

7. Section 141 of the Negotiable Instruments Act reads as follows:-

> "Section-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:

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."

8. In the complaints, it is not stated that, the Petitioner at the time which 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. However, the learned Magistrate has issued the process against the accused under Section 138 read with 141 of the Negotiable Instruments Act. Section 141 (1) of the Act states that, if a person committing an offence 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.

9. In the case of *National Small Industries Corporation Limited Vs.Harmeet Singh Paintal & Anr.*[1] it was observed that, 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. 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. 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 the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of any responsible for the business of the company and by virtue of their position they are liable to be proceeded with. Vicarious liability on the part of a person must be pleaded and proved and not inferred. The person

1 (2010) 3 SCC 330

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.

10. The scrutiny of the complaints under challenge in this petition reveal that there was averment in the complaints within the scope of the vicarious liability under Section 141 (1) of the Negotiable Instruments Act against the Petitioner. The order issuing process reflects non application of mind. The Petitioner was impleaded as accused being Director of accused No.1 company. For lack of material to invoke section 141 of N.I. Act against the Petitioner, the proceedings in all the complaints and impugned order of issuing process are required to be quashed and set aside.

ORDER

(i) Criminal Writ Petition Nos. 2715 of 2021, 2716 of 2021, 2717 of 2021, 2718 of 2021 and 2719 of 2021 are allowed.

(ii) Order dated 03.11.2020 issuing process under Section 138 read with 141 of the Negotiable Instruments Act and proceedings in C.C. No. 797/SS/2020, order dated 10.11.2020 issuing process under Section 138 of Negotiable Instruments Act and proceedings in C.C. No. 798/SS/2020, order dated 22.01.2021 issuing process under Section 138 read with 141 of Negotiable Instruments Act and proceedings in C.C. No. 1070/SS/2020, order dated 22.01.2021 issuing process under Section 138 of Negotiable Instruments Act and proceedings in C.C. No. 1071/SS/2020, order dated 01.02.2021 issuing process under section 138 of Negotiable Instruments Act and proceedings in C.C. No. 1155/SS/2020 against the petitioner are quashed and are set aside.

(PRAKASH D. NAIK, J.)