

AGK

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO.2018 OF 2017

Indermal Pannalal Jain & Ors. ... Petitioners
V/s.
The State of Maharashtra & Anr. ... Respondents

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Mr. Yashpal M. Thakur for the petitioners.

Mr. R.M. Pethe, APP for respondent no.1/State.

Mr. Zain Shroff with Mr. Zubin Sheth i/by Y&A Legal
Advocates for respondent no.2.

CORAM : AMIT BORKAR, J.

DATED : NOVEMBER 22, 2022

PC.:

1. The petitioners, accused in a proceeding under section 138 of the Negotiable Instruments Act, 1881 (hereafter “NI Act”, for short), are challenging the order of issuance of process on the following grounds:

(a) the averments in the complaint are not sufficient to constitute pleading as mandatorily required under section 141 of the NI Act;

(b) petitioner no.2 resigned with effect from 16th September 2014 and petitioner no.3 has resigned with effect from 20th September 2015 before the fifteenth (15th) day of dishonor of cheque; and

(c) petitioner no.3 being independent non-executive director, cannot be proceeded against.

2. Facts giving rise to the filing of the present petition relevant for the adjudication of the issue involved are as under:

3. Respondent no.2 filed a complaint before the learned Metropolitan Magistrate, 43rd Court at Borivali, Mumbai (hereafter “learned Magistrate”, for short) alleging that he had sold polypropylene and towards satisfaction of the price of the goods, cheques in question have been issued. Both the cheques were dated 23rd August 2014. The date of dishonor of cheque is 25th August 2014. The date of receipt of demand notice is 20th September 2014. Fifteenth (15th) day after the date of receipt of demand notice is 4th October 2014.

4. Respondent no.2, therefore, filed a complaint before the learned Magistrate and the learned Magistrate by order dated 23rd January 2015 issued process against the petitioners. Aggrieved thereby, the petitioners have filed present writ petition.

5. Learned advocate for the petitioners submitted that the averments in the complaint are not sufficient to attract liability under section 141 of the NI Act. To bolster his submission, he relied on the judgment of the Apex Court in the case of **SMS Pharmaceuticals v. Neeta Bhalla & Anr.** reported in (2005) 8 SCC 89. In so far as the said averment is concerned, the relevant averments in the complaint read as under:

“1. ... I say that accused No.2 to 5 are the Directors of the accused No.1. I say that accused Nos.2 to 5 are looking

after day to day affairs of the business of the accused No.1 and are fully liable and responsible for the act of the accused No.1. ...”

6. On perusal of the averments quoted above, in my opinion, the said averments constitute sufficient compliance as mandated by section 141 of the NI Act.

7. Learned advocate for the petitioners submitted that the words ‘at the time of offence’ have not been incorporated in the complaint and, therefore, there is non-compliance of the averments as mandated by section 141 of the NI Act. The interpretation of the averments and the approach of the Court while interpreting the averments is no longer *res integra* in view of the authoritative pronouncements of the Apex Court in **S.P. Mani and Mohan Dairy v. Dr. Snehalata Elangovan** reported in 2022 SCC OnLine SC 1238. In paragraph 33, the Apex Court has laid down the legal principles to be adopted by the Courts while approaching the averments as required under section 141 of the NI Act as under:

“**33.** Thus, the legal principles discernible from the aforesaid decision of this Court may be summarised as under:—

(a) Vicarious liability can be fastened on those who are in-charge of and responsible to the company or firm for the conduct of its business. For the purpose of Section 141, the firm comes within the ambit of a company;

(b) It is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole’

(c) If the substance of the allegations made in the complaint fulfill the requirements of Section 141, the complaint has to proceed in regards the law.

- (d) In construing a complaint a hyper-technical approach should not be adopted so as to quash the same;
- (e) The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in the enactment of Sections 138 and 141 respectively should be kept in mind by the Court concerned.
- (f) These provisions create a statutory presumption of dishonesty exposing a person to criminal liability if payment is not made within the statutory period even after the issue of notice.
- (g) The power of quashing should be exercised very sparingly and where, read as a whole, the factual foundation for the offence has been laid in the complaint, it should not be quashed.
- (h) The Court concerned would owe a duty to discharge the accused if taking everything stated in the complaint is correct and construing the allegations made therein liberally in favour of the complainant, the ingredients of the offence are altogether lacking.”

8. The Apex Court has held that it is not necessary to reproduce the language of section 141 verbatim in the complaint and the complaint needs to be read as a whole. It is further held that in construing the complaint hyper-technical approach should not be adopted considering laudable object of preventing bouncing of cheques and sustaining credibility of commercial transactions. In my opinion, therefore, the averments in the complaint as quoted above is sufficient compliance as mandated under section 141 of the NI Act.

9. It is next submitted on behalf of the petitioners that petitioner no.2 resigned with effect from 16th September 2014 and petitioner no.3 resigned with effect from 20th September 2014.

Fifteenth (15th) day from the date of receipt of demand notice was 4th October 2014 and, therefore, process could not have been issued against petitioner nos.2 and 3 as they had already resigned before the date of offence. According to him, fifteenth (15th) day from the date of receipt of notice is the date of offence (relevant time).

10. In the case of **S.P. Mani and Mohan Dairy** (supra), the Apex Court had occasion to interpret the expression “at the time the offence was committed”. While interpreting the said expression in the light of earlier judgment of the Apex Court in **K. Bhaskaran v. Sankaran Vaidhyan Balan** reported in 1999 (7) SCC 510, the Apex Court in paragraphs 29 and 30 held as under:

“29. The seminal issue raised and requires to be settled in the present case is one relating to a person liable to be proceeded against under the provisions of sub-section (1) of Section 141 for being in-charge of and responsible to the company “*at the time of offence was committed.*” It would, therefore, be important to find out the “time” when the offence under Section 138 can be said to have been committed by the company. It is common place that an offence means an aggregate of facts of omissions which are punishable by law and, therefore, can consist of several parts, each part being committed at different time and place involving different persons. The provisions of Section 138 would require a series of acts of commission and omission to happen before the offence of, what may be loosely called “dishonour of cheque” can be constituted for the purpose of prosecution and punishment. It is held by the Supreme Court in *K. Bhaskaran v. Sankaran Vaidhyan Balan*, (1999) 7 SCC 510, that:—

“14. *The offence under Section 138 of the Act can be completed only with the concatenation of a number of*

acts. The following are the acts which are components of the said offence : (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice.”

30. Different persons can be in-charge of the company when each of the series of acts of commission and omission essential to complete the commission of offence by the company were being committed. To take an example, in the case of a company, “A” might be in charge of the company at the time of drawing the cheque, “B” might be in charge of the company at the time of dishonour of cheque and “C” might be in charge of the company at the time of failure to pay within 15 days of the receipt of the demand notice. In such a case, the permissibility of prosecution of A, B and C respily or any of them would advance the purpose of the provision and, if none can be prosecuted or punished, it would frustrate the purpose of the provisions of Section 138 as well as Section 141. The key to this interpretation lies in the use of the phrase: “every person shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly” as it occurs in sub-section (1) of Section 141 and the use of the phrase “provided that nothing contained in this subsection shall render any person liable to punishment if he proves...” that occurs in the first proviso. Every person who was in charge of and was responsible to the company for the conduct of its business at the time any of the components necessary for the commission of the offence occurred may be “proceeded against”, but may not be “punished” if he succeeds in proving that the offence was committed without his knowledge and despite his due diligence; the burden of proving that remaining on him. Therefore, it also has to be held that the time of commission of the offence of dishonour of cheque cannot be on the stroke of a clock or during 15 days after the demand notice has to be construed as the time when each of the acts of commission and omission essential to constitute

the offence was committed. The word “every” points to the possibility of plurality of responsible persons at the same point of time as also to the possibility of a series of persons being in charge when the sequence of events culminating into the commission of offence by the company were taking place. As to what this ‘relevant time’ is, was a question that this Court was called to answer, inter alia, in *N Rangachari v. Bharati Sanchar Nigam Limited*, (2007) 5 SCC 108 : AIR 2007 SC 1682. In this case, Data Access, a company had issued two cheques to the BSNL, which were duly presented, but were dishonoured for insufficiency of funds. A complaint under Section 138 of the NI Act was filed. While the BSNL held the directors liable, the appellant, a chairman in the company contended that he being a nominated chairman and holding an Honorary post in the Company, was never assigned with any of the company’s financial or other business activities. He was the Chairman for name sake and was never entrusted with any job or business or constituted a signing authority. Resolving the issue of when the liability could be fastened, this Court said:

“In the case on hand, reading the complaint as a whole, it is clear that the allegations in the complaint are that at the time at which the two dishonoured cheques were issued by the company, the appellant and another were the Directors of the company and were in charge of the affairs of the company. It is not proper to split hairs in reading the complaint so as to come to a conclusion that the allegations as a whole are not sufficient to show that at the relevant point of time, the appellant and the other are not alleged to be persons in-charge of the affairs of the company. Obviously, the complaint refers to the point of time when the two cheques were issued, their presentment, dishonour and failure to pay in spite of notice of dishonour.”

Emphasis supplied

11. Reading of paragraph 30 quoted above makes it clear that the persons who are in-charge at the time of drawing of cheque; on the date of dishonor of cheque; and on the fifteenth (15th) day from the date of receipt of demand notice are all liable for

prosecution. The Apex Court by giving illustration has explained the said expression in clear terms. In the present case, petitioner nos.2 and 3 were directors of accused no.1-company on the date of drawing of cheque (23rd August 2014), date of dishonor of cheque (25th August 2014) and resigned with effect from 16th September 2014 and 20th September 2014 respective, therefore, in view of authoritative pronouncement in paragraph 30, the submission made on behalf of the petitioners cannot be accepted.

12. The last submission made on behalf of the petitioners is that petitioner no.3 is an independent non-executive director. In support of the said submission, the petitioners placed on record Form No.32 pursuant to sections 303(2), 264(2), 266(1)(a) and 266(1)(b)(iii) of the Companies Act, 1956. Form No.32 which is an unimpeachable and uncontrovertible document shows that petitioner no.3 was an independent and non-executive director appointed on 17th December 2011.

13. The Apex Court in **Sunita Palita v. Panchali Stone Quarry** reported in 2022 SCC OnLine SC 945 granted relief to the independent non-executive director by quashing process against him.

14. In that view of the matter, the petition succeeds in so far as petitioner no.3 is concerned. Hence, following order:

- a) The impugned order dated 23rd January 2015 passed by the learned Metropolitan Magistrate, 43rd Court at Borivali, Mumbai in Criminal Complaint No.4161/SS/2014 confirmed by the learned Sessions Judge in Criminal

Revision Application No.329 of 2016 dated 24th April 2017 is quashed and set aside to the extent of petitioner no.3;

b) Rest of the order of issuance of process against petitioner nos.1 and 2 is confirmed.

15. Rule is partly made absolute in above terms. No costs.

(AMIT BORKAR, J.)