

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

CRIMINAL WRIT PETITION NO.2156 OF 2016

National Spot Exchange Ltd. ...Petitioner
V/s.
The State of Maharashtra & Ors. ...Respondents

Mr. Yashpal Thakur a/w Mr. Jalpa Shah, Adv. Nimeet Sharma i/by
MZM Legal LLP for Petitioner.

Mr. A. R. Patil, APP for the Respondent No.1 (State).

Mr. Dilip H. Shukla for the Respondent No.2.

CORAM : AMIT BORKAR, J.

DATE : OCTOBER 3, 2022

P.C.:

- 1.** **Rule** is made returnable forthwith.
- 2.** By this Writ Petition under Article 227 of the Constitution of India, the Petitioner is challenging the order passed by Sessions Judge partly allowing Revision Application of respondent No.2 holding that respondent No.2, being a Director of a Company, averments in the complaint are not sufficient to constitute an offence under the provision of Negotiable

Instruments Act, 1881.

3. The relevant facts giving rise to the present Petition are as under:

(i). Petitioner is the original Complainant who has filed a complaint under Section 138 read with 141 of the Negotiable Instruments Act, 1881 against respondent No.2 and two other accused. According to the Complainant, there was a settlement of liability of the accused in relation to option and forward contracts. The total outstanding liability of the accused was Rs.2,52,56,09,912.10/-. Towards discharge of the said liability, the accused company issued a post-dated cheque for the said amount but was dishonoured with the remark payment stopped by the drawer. On 28th August 2013, Petitioner issued a statutory demand notice to Accused Nos.1 to 3. Accused Nos.1 to 3 replied to the notice jointly disputing the liability.

(ii). Due to failure to repay the amount within 15 days from the date of receipt of the notice, the Petitioner filed a Complaint vide Complaint No.2977/SS/2013 under Section 138 of the Negotiable Instruments Act, 1881.

(iii). On 17th February 2014, the process was issued against the accused. Therefore all Accused filed a Revision Application No.499 of 2014 before the learned Sessions Judge challenging the order of issuance of process. After hearing both sides, the learned Sessions Judge partly allowed the revision quashing order of issuance of process against respondent No.2. Aggrieved thereby, the present Petition is filed.

4. It needs to be noted that along with the present Petition, Accused No.2 had filed Criminal Writ Petition No.915 of 2016. Both Writ Petitions were connected and tagged vide order dated 1st July 2016. Thereafter, Advocate Mr. D. H. Shukla consistently represented respondents Nos.2 and 3 in the present Petition. Most of the previous orders mark the presence of Advocate Mr. D. H. Shukla as the Advocate representing respondent No.2 herein.

5. Today, Mr. Shukla, on instructions, withdrew Criminal Writ Petition No.915 of 2016, but when the Court called him to make submissions on behalf of respondent No.2 in the present Petition, he submitted that he had no instructions to appear in the matter rather he never appeared for respondent No.2 in the

present Writ Petition. He stated that he had not filed Vakalatnama on behalf of respondent No.2. In my opinion, Respondent No. 2 and his Advocate have knowledge of their appearance marked in the earlier orders. They made the Petitioner and this Court believe that Advocate Mr. D. H. Shukla, is representing respondent No.2. Now, it is not permissible for them to state that his Advocate never appeared for respondent No.2 in the present Petition and has no instructions to appear in the present matter. If the appearance of Mr. Shukla was wrongly recorded in the earlier orders, it was their duty to take out appropriate proceedings to correct the appearance in most of the earlier orders.

6. This Court, on 2nd May 2017, passed the following order in relation to Writ Petition No.2156 of 2016 in express terms:

2. As far as Writ Petition No.2156 of 2016 is concerned, it appears that the Revisional Court had discharged respondent no.2 on the ground that apart from the allegations, there is nothing available on record to show that the applicant No.3 is conducting the day to day business of applicant no.1 company and that the applicant No.3 is being prosecuted only because he happens to be a Director. The Revisional

Court has considered the Judgment of the Hon'ble Apex Court in the case of SMS Pharmaceuticals Ltd. vs. Neeta Bhalla and Anr. AIR 2005 SC 3512. That is the case of Ramrajsingh vs. State of M.P. and Anr. 2009 (4) Bom.C.R.213, the Hon'ble Court had held as follows :-

“ It is true that precise words from the provisions of the Act need not be reproduced and the court can always come to a conclusion in facts of each case.”

3. The matters be listed for hearing on 7.6.2017. It is made clear that the Petition will be finally decided at the stage of admission.

7. Respondent No.2 did not take steps either to clarify or to correct the appearance of the matter. Even thereafter, Advocate's name was expressly shown as appearing for respondent No.2 in Writ Petition No.2156 of 2016. Therefore, in my opinion, at this stage, it cannot be accepted that respondent No.2 was not aware of the pendency of this Writ Petition. This Court cannot countenance such conduct on behalf of respondent No.2. The Court proceedings are required to be taken seriously by the litigants, and it is not expected of the litigants to play hide and seek with the Court. From the conduct of respondent No.2, it appears that there is a deliberate attempt on the part of

respondent No.2 to delay the hearing of this Writ Petition in the teeth of the order passed by this Court on 2nd May 2017.

8. In that view of the matter, it is necessary to send the appropriate signal to such litigants not to play hide and seek with the process of the Court. I, therefore, heard the Advocate for the Petitioner on merits.

9. He invited my attention to relevant averments in the complaint. In para 3, Petitioner stated as under:-

3. Accused Nos.2 and 3 are wholly in charge and responsible for carrying out the day-to-day business of the Accused No.1. The affairs of the Accused No.1 are managed by Accused Nos.2 and 3, and as such, they are in control of the affairs of the Accused No.1 and liable for all the acts and deeds committed by the Accused No.1.

10. In para 4(b), the petitioner states as under:-

4(b). The Accused Nos.2 and 3 had signed all the documents pertaining to the Membership of Accused No.1 including the undertaking as required in accordance with the Rules and Byelaws of the Complainant. As a precondition to membership, Accused No.1 was bound to comply with the Rules and Byelaws of Complainant Exchange prescribed from time to time and has also issued undertaking to this effect. Accused No.1 had also opened Clearing Member Pool

Account with the empanelled depository participant of the Complainant and from time to time submitted its net worth as per the Rules and Byelaws of the Complainant.

11. He invited my attention to the reply filed by respondent No.2, alongwith other accused, to the statutory demand notice, wherein respondent No.2 failed to state that he is not in charge or concerned with the Company's day-to-day affairs. He relied on the Apex Court's recent Judgment in the case of *S P Mani and Mohan Dairy vs Dr. Snehalatha Elangovan, (2022) SCC Online SC 123*. Wherein the Apex Court has held that the Complainant is supposed to have general knowledge about the affairs of the Company and once the Complainant makes such averments, it is for the accused to establish that he is neither the incharge nor to concerned with the day to day affairs of the Company.

12. Having considered the submissions made on behalf of the Petitioner and having scrutinized the impugned order passed by the learned Sessions Judge. In my opinion, the learned Sessions Judge has acted in excess of his jurisdiction by partly allowing the Revision Application quashing order of issuance of process to the extent of respondent No.2 holding that mere

allegations in the complaint are not sufficient, and there is nothing on record to show that respondent No.2 is conducting day to day business of the company.

13. The above-quoted paragraphs in the complaint, in my opinion, are prima facie sufficient for passing an order of issuance of the process, particularly in view of the reply to the statutory notice by respondent No.2, wherein respondent No.2 failed to state that he is neither incharge nor concerned with day to day affairs of the company.

14. Learned Advocate appearing for the Petitioner has rightly placed reliance upon the Judgment of the Apex Court in the case of S P Mani and Mohan Dairy (supra), wherein the Apex Court in paragraph 33 held 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 fulfil the requirements of Section 141, the complaint has to proceed in regards to 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.

15. In the facts of the case, failure to raise the defence of reply to statutory notice that respondent No.2 is not concerned with the day-to-day affairs of the company and he is not in charge

of the company, in my opinion, sufficient to raise the presumption at the stage of issuance of process to proceed with the complaint.

16. In the circumstances, in my opinion, the learned Sessions Judge has exceeded its jurisdiction conferred by law by setting aside the order of issuance of the process as against respondent No.2. I, therefore, passed the following order;

(i). Rule is made absolute in terms of prayer clause (b).

(ii). In view of setting aside the order of the Revisional Court, the order dated 17th February 2014 shall remain.

(AMIT BORKAR, J.)