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

## CRIMINAL WRIT PETITION NO. 3208 OF 2019

1. Balkrishna A. Bhandari
   14 Gavdevi Co-op Housing Society
   Gavdevi Road, Bhandup (West)
   Mumbai 400 078.

2. Raghav Somayya Shetty
   A/16, Shiv Shraddha Kutir CHS Ltd.
   Nadivali Road, Dombivali (East),
   Dombivali (East) 421 201.

3. Avinash Moreshwar More
   At Post Shirgaon, Taluka Palghar
   Dist. Palghar 401 404. ...Petitioners

**Versus**

1. Sandeep Mehta
   Proprietor of Osain (India)
   Having his office at 16th Annanthwadi,
   3rd Floor, Room No.42, Bhuleshwar,
   Mumbai 400 002.

2. State of Maharashtra ...Respondents

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Mr. Pradnyesh G. Sabnis with Ms. Kashimira Khedkar, Advocate for the Petitioners.

Mr. Ajay Panicker i/by Ajay Law Associates, Advocate for Respondent No.1.

Mr. A. D. Kamkhedkar, APP for the Respondent – State.

**CORAM : PRAKASH D. NAIK, J.**
**DATE : 30th JUNE, 2022.**

**PER COURT:**

1. The Petitioner has challenged the order issuing process dated 28th September, 2018 passed by the Court of learned Metropolitan

Magistrate 48th Court, Andheri, Mumbai, for offence punishable under Section 138 of Negotiable Instruments Act.

2. The complainant has alleged that the accused No.1 is a Company registered under the Companies Act, carrying on the business of manufacturing of Specialty Surfactants. The accused No.2 is managing director and signatory of the two cheques. The accused No.3 is alternative Director and accused No.4 is the whole time Director. Accused No.5 is the Director. Accused Nos. 6, 7 & 8 are also the persons in charge of the day to day affairs of Accused No.1 - Company and they were duty bound to arrange the funds in the account of accused No.1 – company to ensure the passing of the subject cheques issued to the complainant. The accused No.2 to 8 are the persons in charge of and responsible for the conduct of day to day affairs of the business of accused No.-1 – company. All the accused are in charge of all acts, deeds and responsible for day to day affairs and in charge of the Company for the conduct of the business and day to day affairs of accused No.1. The Company placed orders for chemicals from the complainant by purchase order dated 17th September, 2013 and the said chemicals were delivered. In discharge of liability, the accused issued three cheques for an amount of Rs.3,32,514/-, Rs.2,35,683/- & Rs.3,00,000/- bearing different dates. The said cheques were

presented by the complainant which were dishonoured on account 'Insufficient Funds'. The complainant issued Demand Notice dated 26th December, 2013 to accused No.1 and its directors calling upon them to pay the amount of Rs.8,68,197/-. The demand notice was served on the accused. The accused Nos. 2 to 8 are liable for dishonor of cheques along with the directors and committed offences under Section 138 r/w Section 141 of the Negotiable Instruments Act, 1881.

3. Vide order dated 28th September, 2018, the learned Metropolitan Magistrate 48th Court, Andheri, Mumbai noted that the demand notice was not sent to accused Nos. 2, 3 & 5 by complainant's Advocate. The complainant has not filed extract of Registrar of Companies on record. Hence, it cannot be presumed that cause of action arose against accused Nos. 2, 3 & 5. However, there is sufficient material on record to proceed against accused Nos.1 4, 6 to 8. The process was issued against accused Nos. 1, 4, 6, 7 & 8 under Section 138 r/w 141 of Negotiable Instruments Act, 1881.

4. The learned counsel for Petitioners urged as follows :-

i. The Petitioners are not signatories to the cheques.

ii. The Petitioners are not directors of the accused No.1-Company.

iii. The complaint does disclose the commission of offence under Section 138 of Negotiable Instruments Act, 1881 against the Petitioners. The averments in the complaint do not show that the Petitioners were directors of the company. The complaint does not provide any details whatsoever in respect to the role played by the Petitioners in the business and the affairs of the Company. The complaint does not disclose any role played by the Petitioners in issuance of the cheques or transactions.

iv. The learned Magistrate failed to take into consideration that for an accused to be brought within the purview of Section 141 of the Negotiable Instruments Act, the person should be in charge of and responsible for the overall business of the company as a whole and not the part of the business. The learned Magistrate failed to appreciate that the complaint does not provide any material to show that any of the Petitioners were in charge of overall business of the Company.

v. As per complaint, the Petitioners were acting as Chief Accountant, Purchase Head and Purchase Executive. In order to prosecute the persons other than the directors of the company there has to be material before the Court. Section 141(2) provides for the act committed by other officers of the company for which there has to be material before the Court to issue process.

vi. Reliance is placed on the decision of the Apex Court in the case of **K. K. Ahuja V/s. V. K. Vora and Another (2009) 10 SCC 48.**

5. Learned counsel for Respondent submitted that the order issuing process is not an interlocutory order and could be challenged by invoking Revisional Jurisdiction. The Petitioners had alternate remedy of preferring Revision Application under Section 397 of Cr.P.C. before the Sessions Court. There are requisite averments in the complaint which provides the role of the Petitioners. In the complaint it is stated that accused No.6, 7 & 8 (Petitioners) are the persons in charge of and responsible for the conduct of day to day affairs of the accused No.1-company and they were duty bound to arrange the funds in the account of the accused No.1 – Company to ensure passing of the cheques issued to the complainant. At all relevant time, the accused Nos. 2 to 8 were the persons in charge of and responsible for the conduct of day to day affairs business of company. They were in charge of all acts, deeds and responsible for day to day and in charge of the company. The grounds urged by Petitioners cannot be accepted at this stage. The averments in complaint are required to be tested

during trial. On the basis of material on record, the Court has issued process. The contents of complaint were sufficient to issue process. The complaint lays down the foundation to issue process and on the basis of grounds urged by the Petitioners at the threshold of the complaint cannot be quashed. Learned counsel relied upon the decision of the Hon'ble Supreme Court in the Case of **Rajendra Kumar Sitaram Pande and Others V.s Uttam and Another (1999) 3 SCC 134.**

6. In rejoinder learned counsel for Petitioners submitted that, this Court in exercise of powers under Section 482 of the Code of Criminal Procedure can quash the order of process. Merely on account of alternate remedy of preferring Revision Application, the Petitioners cannot be restrained from invoking powers of this Court under Article 227 of the Constitution of India or inherent powers under Section 482 of Cr.P.C. Reliance is placed on the decision in the case of **Dhariwal Tobacco Products Ltd. And Others V/s. State of Maharashtra and Another (2009) 2 SCC 370 and Vishwanath Ramkrishna Patil V/s. Ashok Murlidhar Sonar 2006(5) Mh.L.J. 671.**

7. Undisputedly the Petitioners are not the signatories to the cheques. In the title of the complaint it is stated that the Petitioner No.1 is Chief Accountant, Petitioner No.2 is the Purchase Head and the Petitioner Nos. 3 is the Purchase Executive. Thus, they are not

the directors of the company and at the most the employees of accused No.1 – Company.

8. The order issuing process refers to the fact that statutory demand notice was not duly sent to accused Nos. 2, 3 & 5 by complainant. The extract of Registrar of companies is not on record for perusal. It cannot be presumed that, cause of action arose against accused Nos. 2, 3 & 5. Process was issued against accused Nos. 1, 4, 6, 7 & 8. The Petitioners are arrayed as accused Nos. 6 to 8. Accused No.2 is described as managing Director and signatory of two cheques. Accused No.2 and 5 are Directors. Thus, the process was not issued against signatory of cheques and two Directors.

9. The preliminary objection urged by the learned counsel for Respondent No.1 that the Petitioners have to challenge impugned order of process by preferring revision application in accordance with Section 397 of the Code of Criminal Procedure.

10. In the case of **Rajendra Kumar Sitaram Pande** (supra) the Apex Court had observed that the order issuing process is not an interlocutory order and the bar under sub-section 2 of Section 397 would not apply. The revisional jurisdiction under Section 397 could be exercised against the same. It is further observed that the discretion in the exercise of revisional jurisdiction should be

exercised within the four corners of Section 397.

11. There is no debate that the order of process is not an interlocutory order and revisional powers under Section 397 of Cr.P.C. could be exercised challenging order of process. The question which arises for consideration whether in the light of the remedy under Section 397 this Court should relegate the Petitioners to exercise the remedy of revision under Section 397 of Cr.P.C. In the case of Dhariwal Tobacco Products Ltd. And Others (supra), the Apex Court has dealt with the question, whether an application under Section 482 of Cr.P.C. can be dismissed only on the premise that an alternative remedy of filing revision application under Section 397 of the Code is available. The High Court in the said case had observed that the jurisdiction under Section 482 of the Code will not be exercised if recourse can be taken to the remedy of filing Revision Application under Section 397 of the Code. The High Court relied on decision in the case of V.K. Jain V/s. Pratap Padole (2005) 30 Mh.L.J. 778. The apex Court referred to decision in **R.P. Kapur Vs. State of Punjab AIR 1960 SCC 866, Som Mittal V/s. Government of Karnataka (2008) 3 SCC 574** and observed that in the said decisions Court has laid down the Criterion for entertaining an application under Section 482. Only because a Revision Petition is maintainable, the same by itself,

would not constitute a bar for entertaning an application under Section 482 of the Code. The inherent Power of the High Court is not conferred by Statute but has merely been saved thereunder. It is thus difficult to conceive that the jurisdiction of the High Court would be held to be barred only because the revisional jurisdiction could also be availed of. The Supreme Court referred to two decision of this Court viz. Vishwanath Ramkrishna Patil (supra) where a similar question was raised and it was opined that, it is difficult to curtail this remedy merely because there is a revisional remedy available. The alternate remedy is no bar to invoke power under Article 227. What is required is to see the facts and circumstances of the case while entertaining such petition under Article 227 of the Constitution and/or under Section 482 of Cr.P.C. In Keki Bomi Dadiseth V/s. State of Maharashtra (2002) 3 Mah. L.J. 246 it was held that, in view of ratio laid down by the apex Court, it is well settled that inherent powers under Section 482 can be exercised by the accused in the appropriate case. The apex Court held that, the decision in the case of V.K. Jain(supra) does not lay down a good law and it is over ruled. In the case of **Adalat Prasad V/s. Rooplal Jindal (2004) 7 SCC 338** it was observed that, order of process can be challenged under Section 482 of the Code of Criminal Procedure Code.

12. Thus, it is settled law that the powers under Section 482 of Cr.P.C. could be exercised although the order of process could be challenged by preferring revision application.

13. The primary contention of the Petitioners is that to invoke the vicarious liability as embodied under Section 141 of the said Act there has to be requisite material before the Court. The Petitioners were Chief Accountant, Purchase Head and Purchase Executive. Section 141 of Negotiable Instruments Act reads as follows :

> " 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:
>
> [1] [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.]
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> (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. ”

14. In the case of **K. K. Ahuja V/s. V. K. Vora and Another** (supra), in Paragraphs 21, 22, 23, 24, 25, 26, 27 28, 29 & 30 are as follows :

21. A combined reading of Sections 5 and 291 of Companies Act, 1956 with the definitions in clauses (24), (26), (30), (31), (45) of section 2 of that Act would show that the following persons are considered to be the persons who are responsible to the company for the conduct of the business of the company : --

(a) the managing director/s;

(b) the whole-time director/s;

(c) the manager;

(d) the secretary;

(e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act;

(f) any person charged by the Board with the responsibility of complying with that provision (and who has given his consent in that behalf to the Board); and

(g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors. It follows that other employees of the company, cannot be said to be persons who are responsible to the company, for the conduct of the business of the company.

22. Section 141 uses the words "was in charge of, and was responsible to the company for the conduct of the business of the company". It is evident that a person who can be made vicariously liable under sub-section (1) of Section 141 is a person who is responsible to the company for the conduct of the business of the company and in addition is also in charge of the business of the company. There may be many directors and secretaries who are not in charge of the business of the company at all. The meaning of the words "person in charge of the business of the company" was considered by this Court in Girdhari Lal Gupta v. D.N. Mehta [1971 (3) SCC 189] followed in State of Karnataka v. Pratap Chand [1981 (2) SCC 335] and Katta Sujatha vs. Fertiliser & Chemicals Travancore Ltd. [2002 (7) SCC 655]. This Court held that the words refer to a person who is in overall control of the day to day business of the company. This Court pointed out that a person may be a director and thus belongs to the group of persons making the policy followed by the company, but yet may not be in charge of the business of the company; that a person may be a Manager who is in charge of the business but may not be in overall charge of the business; and that a person may be an officer who may be in charge of only some part of the business.

23. Therefore, if a person does not meet the first requirement, that is being a person who is responsible to the company for the conduct of the business of the company, neither the question of his meeting the second requirement (being a person in charge of the business of the company), nor the question of such person being liable under sub-section (1) of section 141 does not arise. To put it differently, to be vicariously liable under sub- section (1) of Section 141, a person should fulfill the 'legal requirement' of being a person in law (under

the statute governing companies) responsible to the company for the conduct of the business of the company and also fulfill the 'factual requirement' of being a person in charge of the business of the company.

24. Therefore, the averment in a complaint that an accused is a director and that he is in charge of and is responsible to the company for the conduct of the business of the company, duly affirmed in the sworn statement, may be sufficient for the purpose of issuing summons to him. But if the accused is not one of the persons who falls under the category of 'persons who are responsible to the company for the conduct of the business of the company' (listed in para 14 above), then merely by stating that 'he was in charge of the business of the company' or by stating that 'he was in charge of the day to day management of the company' or by stating that he was in charge of, and was responsible to the company for the conduct of the business of the company', he cannot be made vicariously liable under section 141(1) of the Act.

25. It should, however, be kept in view that even an officer who was not in charge of and was responsible to the company for the conduct of the business of the company can be made liable under sub-section (2) of Section 141. For making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of section 141 of the Act.

26. Another aspect that requires to be noticed is that only a Director, Manager, Secretary or other officer can

be made liable under sub-section (2) of section 141. But under sub-section (1) of section 141, it is theoretically possible to make even a person who is not a director or officer, liable, as for example, a person falling under category (e) and (f) of section 5 of Companies Act, 1956. When in SMS Pharma (I), this Court observed that

" 10....Conversely, a person not holding any office or designation in a company may be liable if he satisfies the requirement of being in charge of and responsible for conduct of the business of the company...",

this Court obviously had in mind, persons described in clauses (e) and (f) of section 5 of Companies Act. Be that as it may.

27. The position under section 141 of the Act can be summarized thus :

(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix `Managing' to the word `Director' makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii)In the case of a director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141.

(iii) In the case of a Director, Secretary or Manager (as defined in Sec. 2(24) of the Companies Act) or a person referred to in clauses (e) and (f) of section 5 of Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under section 141(1). No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.

“ (iv) Other Officers of a company can not be made liable under sub-section (1) of section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, be averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence.

In the said judgment the Hon’ble Supreme Court further held as under :-

28. If a mere reproduction of the wording of section 141(1) in the complaint is sufficient to make a person liable to face prosecution, virtually every officer/employee of a company without exception could be impleaded as accused by merely making an averment that at the time when the offence was committed they were in charge of and were responsible to the company for the conduct and business of the company. This would mean that if a company had 100 branches and the cheque issued from one branch was dishonoured, the officers of all the 100 branches could be made accused by simply making an allegation that they were in charge of and were responsible to the company for the conduct of the business of the company. That would be absurd

> and not intended under the Act.
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> 29. As the trauma, harassment and hardship of a criminal proceedings in such cases, may be more serious than the ultimate punishment, it is not proper to subject all and sundry to be impleaded as accused in a complaint against a company, even when the requirements of section 138 read and section 141 of the Act are not fulfilled.
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> 30. A Deputy General Manger is not a person who is responsible to the company for the conduct of the business of the company. He does not fall under any of the categories (a) to (g) listed in section 5 of the Companies Act (extracted in para 14 above). Therefore the question whether he was in charge of the business of the company or not, is irrelevant. He cannot be made vicariously liable under Section 141(1) of the Act. If he has to be made liable under Section 141(2), the necessary averments relating to consent/connivance/ negligence should have been made. In this case, no such averment is made. Hence the first respondent, who was the Deputy General Manger, could not be prosecuted either under sub-section (1) or under sub- section (2) of Section 141 of the Act."

15. In the complaint itself it is mentioned that the Petitioners are Chief Accountant, Purchase Head and Purchase Executive. Sub-section 2 of Section 141 refers to the liability of the persons other than the directors referred to clause (1) of Section 141. The averments in the complaint are vague qua the Petitioners. The averments in the complaint does not falsify the requirements of Section 141 of Negotiable Instruments Act. The learned Magistrate issued the process mechanically. This is a fit case to

exercise power under Section 482 of Cr.P.C. and to set aside the order of process.

16. Hence, I pass the following order :-

**ORDER**

**i.** Writ Petition No.3208 of 2019 is allowed and disposed of;

**ii.** Order dated 28th September, 2018 issuing process passed by learned Metropolitan Magistrate, 48th Court, Andheri, Mumbai and proceedings in C.C. No.953/SS/2016 pending before the Court of learned Metropolitan Magistrate, 48th Court, Andheri, Mumbai are quashed and set aside.

**(PRAKASH D. NAIK, J.)**