IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.3995 OF 2019

1. Badrilal Sethia, Age 62 years,
228-S, Parshwanath Nagar, Vijay Nagar,
Keshar Bagh Road, Indore (M.P.)
2. Mrs.Sheetal Gupta, Age 40 years,
1518-D, Sudama Nagar, Indore (MK.P.) Petitioners

versus

1. M/s.J.C.Enterprises
through Mr.Ronak Jayantilal Mehta,
Age 52 years, Sole Proprietor,
201/211, Princess Street, Keshar Building,
1st Floor, Room No.17, Mumbai-400002.
2. The State of Maharashtra Respondents

Ms.Mrunmai Kulkarni, Advocate for Petitioners.
Mr.Priyadarshan V.Shah, Advocate for Respondent no.1.
Mr.A.R.Patil, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 5th August 2022

PC :

1. The petitioners have invoked jurisdiction of this Court under Article 227 of Constitution of India and inherent powers under Section 482 of Code of Criminal Procedure (Cr.P.C) challenging order issuing process dated 29th March 2019 passed in C.C No.217/SS/2019 by the Court of learned Metropolitan Magistrate, 63rd Court, Andheri, Mumbai Petitioners were arraigned as accused nos.3 and 5. Respondent no.1 is the complainant in the impugned proceedings.

2. The brief facts averred in the criminal complaint filed by respondent no.1 are as follows :-

(i) The complainant is a proprietorship concern engaged in the business of supply of pharmaceutical goods. Accused no.1 M/s.Sovereign Remedies Pvt.Ltd is a company incorporated under Companies Act and accused nos.2 to 5 are the Directors of accused no.1;

(ii) Accused nos.2 to 5 are in-charge and responsible for the day to day affairs of respondent no.1 and for the business, conduct and financial transactions at the material time.

(iii) Accused no.1 is the customer of complainant. As per understanding between complainant and accused, upon receipt of order from accused, the complainant would deliver the material and prepare invoices in respect of each order so delivered to the accused and thereafter accused would make payments in terms of invoices raised;

(iv) Accused received original copy of bill of transaction from complainant. There was no dispute regarding quality and quantity of the goods sold and delivered to the accused No.1 by complainant. Accused have not raised any grievance about the same;

(v) A sum of Rs,.5,85,522/- is due and receivable from the accused on account of goods sold and delivered to accused by complainant;

(vi) In discharge of legally enforceable liability and by way of part payment towards goods sold and delivered to the accused, the accused no.4 being a Director and authorized signatory, with the consent and knowledge with other Directors, had signed and issued two cheques from the bank account of accused no.1 in favour of complainant viz. Cheque bearing No.000568 dated 4th September

2018 for Rs.2,00,000/- and Cheque bearing No.000569 dated 4th November 2018 for Rs.2,25,000/-;

(vii) The complainant deposited the said cheques in its bank account. The cheques were dishonoured vide written memo dated 28th November 2018 with endorsement “exceeds arrangement”;

(viii) Complainant issued demand notice dated 24th December 2018 through advocate calling upon all the accused to pay the amount of dishonoured cheques. The notice was received by accused No.5. Notice to accused No.1 and 3 was returned by postal authority with endorsement “left”. Notice to accused Nos. 2 to 4 was returned unserved with remarks “refused”. The amount of Rs.4,25,000/- was not cleared by accused. Complaint was filed for offence u/s.138 of Negotiable Instruments Act (N.I.Act) before the Court of learned Metropolitan Magistrate, 63rd Court, Andheri, Mumbai on 18th January 2019.

3. Verification statement of complainant was recorded. Vide order dated 29th March 2019 process was issued against accused nos.1 to 5 for the offence punishable u/s.138 r/w 141 of N.I.Act.

4. Learned advocate for Petitioners submitted as under :-

(a) Petitioners were impleaded in the complaint as Directors of accused no.1 company.

(b) There was no material before the Court for issuing process against Petitioners u/s.138 r/w 141 of N.I.Act;

(c) The complaint does not specify role of Petitioners being Directors of accused no.1 for invoking vicarious liability u/s.141 of N.I.Act;

(d) Petitioners are not signatories to the disputes cheques and cannot be prosecuted for the offence u/s.138 of N.I.Act by invoking Section 141 of N.I.Act;

(e) At the time of dishonour of cheques and cause of action to file the complaint for offence u/s.138 of N.I.Act, Petitioners had ceased to be the Directors of accused no.1;

(f) Learned Magistrate had issued order of process mechanically and proceeded on the basis that Petitioners were the Directors of accused no.1 company and therefore liable to be prosecuted for dishonour of cheques;

(g) Petitioners had resigned from accused no.1 company on 29th March 2017. The Petitioners are relying upon resignation letters forwarded to Board of Directors of respondent no.1;

(h) Pursuant to resignation, Petitioners had intimated the said fact to Registrar of Companies by tendering DIR-12 Forms, which indicate that Petitioners ceased to be the Directors of accused no.1 company from 29th March 2017;

(i) The resignation of Petitioners was accepted by Board of Directors by passing requisite resolutions. Petitioners rely upon DIR-12 Forms and resolutions passed by accused no.1 company accepting their resignations;

(j) The disputed cheques were issued and dishonoured after Petitioners had resigned from accused no.1 company. Hence, they cannot be held responsible for commission of offence u/s.138 r/w 141 of N.I.Act;

(k) Petitioners are relying on authenticated documents which can be accepted by this Court for quashing the proceedings against them.

(l) The Petitioners had responded to the legal notice of complainant and stated that they have resigned from accused No.1 company and their name has been deleted by ROC Department, Gwalior. Cheques were issued by new Directors. Hence, they are not liable for dishonour of cheques.

(m) Vide agreement dated 10th March 2017, executed at Indore, the petitioners among others sold their rights and shares to the purchasing party and thus on the terms and conditions mentioned therein, the petitioners were absolved of the rights from the accused No.1 company.

(n) This Court by exercising inherent powers under Section 482 of Cr.P.C. and supervisory jurisdiction under Article 227 of Constitution of India can quash the impugned proceedings.

5. Learned Advocate for Respondent no.1 submitted as under :-

(i) Petition is not maintainable. Petitioners have alternate remedy of revision u/s.397 of Cr.P.C. Writ jurisdiction of this Court cannot be invoked to challenge summons issued by Trial Court;

(ii) The grounds urged by Petitioners need to be decided by Trial Court after allowing parties, inter alia, to lead oral evidence of witnesses;

(iii) Petitioners are trying to mislead this Court with false and baseless assertions. Petitioners have suppressed vital facts;

(iv) Petitioner no.1 and another had issued two cheques in favour of respondent no.1 in 2016 for consideration of goods sold and delivered by respondent no.1 to accused no.1 in 2016. Those cheques were dishonoured in 2016. Statutory notice was issued to Petitioners in 2016. Complaint was filed against Petitioners in 2016. Bailable warrants were issued against Petitioners in 2018. Respondent no.1 was persuaded to settle and withdraw earlier complaint. Two cheques were issued in consideration of withdrawal and settlement which are subject matter of current criminal complaint. Petitioner no.1 and another accused signed the application for withdrawal of earlier complaint filed by respondent no.1. Petitioners were Directors of accused no.1 in the year 2016 when the earlier offence was committed. They were in-charge and responsible to accused no.1 for the conduct of its business. Relevant averments are made in the agreement annexed to the petition. While persuading respondent no.1 to withdraw earlier complaint in 2018, Petitioners had suppressed from respondent no.1 that they had resigned from respondent no.1 company in 2017;

(v) There are specific averments about offence committed by Petitioners and their liability in the complaint. Learned Magistrate has passed order issuing process with application of mind after relying upon documents on record.

6. Learned Advocate for respondent no.1 has relied upon following decisions :-

(a) Sudhanshu Bhusan Pal Vs. State of West Bengal
AIR-1963-Cal-61;

(b) Kunji Lal @ Pappu Vs. Smt.Guddi
1996-ALL.L.J.21;

(c) G.Balraj Vs. The Director of Police, Chennai
(2005)2-Mh.L.J.-7;

(d) Ashok Mehta Vs. State of Maharashtra
2005-Cri.L.J.-3321;

(e) Rajan Kinnerkar V. Eric Cordeiro
1994(3)-Bom.C.R.634;

(f) Khacheru Singh Vs. State of U.P.
(1982)3-SCC-218;

(g) Rajendra Kumar Sitaram Pande Vs. Uttam
(1999)3-SCC-134;

(h) Shriniwas Mulchand Ladniya Vs. Laxminarayan J. Rathi
2003-Cr.L.J.-3795 (3798) (Bom);

(i) Appollo Tyres Ltd. Vs. Shashitai Bhagwan Ahire
2008-Cri.L.J.-3758 (3760);

(j) State of Madhya Pradesh Vs. Awadh Kishore Gupta
AIR-2004-SC-517;

(k) S.V.Muzumdar Vs. Gujarat State Fertilizer
(2005)4-SCC-173;

(l) N.Rangachari Vs. Bharat Sanchar Nigam Ltd.
(2007)5-SCC-108;

(m) Paresh P. Rajda Vs. State of Maharashtra
AIR-2008-SC-2357;

(n) Malwa Cotton & Spinning Mills Ltd. Vs. Virsa Singh Sidhu
AIR-2008-SC-3273.

7. From the complaint it is apparent that Petitioners were arraigned as accused nos.3 and 5 being Directors of accused no.1 company. The disputed cheques which are subject matter of complaint were dated 4th September 2018 and 4th November 2018. These cheqeus were signed by accused no.4. Cheques were dishonoured vide memo dated 28th November 2018 with an endorsement "exceeds arrangement". Complainant issued demand notice dated 24th December 2018. The notice was replied on behalf of petitioners and it was stated that petitioners had resigned from accused No.1 company and their names were deleted by ROC. I have perused the resignation letters, Resolutions of acceptance of resignation and from DIR-12 indicating that, petitioners had ceased to be directors of accused No.1 company from 29th March 2021. The cheques were dishonoured vide return memo dated 28th November 2018. On the date of cause of action the petitioners were not directors of accused No.1 company. There is no reason to discard the documents in support of resignation relief upon by the petitioners.

8. The respondent no.1 has contended that, the petitioner No.1 was signatory to the previous cheques issued in the year 2016 and that complaint was filed in relation to the said cheques which was withdrawn on account of settlement and fresh cheques which are subject matter of present complaint were issued. The complaint is silent with regards to the said fact. The offence u/s.138 of N.I.Act is complete when cheques are dishonoured, demand notice is issued within stipulated period and complaint is filed on non-payment of amount. Petitioners had not issued the disputed cheques which are subject matter of present complaint nor they were Directors of company at the time of action in current complaint. Section 141 of N.I.Act stipulates that if the person committing an offence u/s.138 is a company, every person who at the time the offence was committed, was incharge 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. Considering the factum of resignation of Petitioners, it cannot be said that Petitioners were in-charge and responsible to the company at the time the offence was committed. Even otherwise, the role attributed to petitioners to invoke section 141 of the N.I. Act is vague.

9 Learned Advocate for Respondent No.1 has placed reliance on several decisions referred to hereinabove. The decision in the case of Sudhanshu Bhushan Pal (supra) delivered by High Court of Calcutta, holds that, remedy under Article 226 of Constitution of India not to be used to subvert ordinary process of law. In the case of Kunjilal alias Pappu (supra) the Allahabad High Court observed that, order issuing process is an interim order and not a judgment and that order can be varied or recalled by Magistrate. Writ jurisdiction cannot be

exercised and accused must be relegated to his remedy before Magistrate. The High Court of Madras in the case of G. Balraj Vs. Director of Police (supra) held that, no writ lies against mere charge-sheet as no cause of action arises. In the case of Ashok Mehta Vs. State of Maharashtra (supra) it was observed by this court that, order issuing process is not an interlocutory order. Accused has efficacious alternate remedy of preferring revision against it. Writ Petition is not maintainable. In Rajan Kinnerkar V. Eric Cordeiro and anr. (supra) it is held that, contention that signatory was not in-charge of the company and left the service by the time of dishonour can be proved in trial. In Khacheru Singh Vs. State of U.P. (supra) it is held that summons could not have been quashed, Magistrate could discharge or acquit if no offence is made out. In Rajendra Kumar Sitaram Pande and Ors. (supra) it was held that order issuing process is not interlocutory order and therefore, amenable to revisional jurisdiction. Similar view was followed in Shriniwas Ladniya Vs. Laxminarayan Rathi (supra). In the case of Appollo Tyres Ltd. Vs. Dr. Shashitai Bhagwan Ahire (supra) it is observed that process cannot be recalled when it would amount to stifling of the criminal prosecution at premature stage. In state of M.P. Vs. Awadh Kishor Gupta (supra) it was held that, High Court cannot appreciate evidence to conclude whether material produced are sufficient or not for convicting accused. In S.V. Muzumdar and Ors. Vs. Gujarat Fertilizers Co. Ltd. and Anr. (supra) it is held that, under the scheme of the Act, if the person committing an offence under Section 138 of the Act is company, by application of section 141 it is deemed that every person who is in-charge of and responsible to the company for the conduct of the business of the company as well as the company are guilty of the offence. A person who proves that the offence was committed without his knowledge or that he had exercised all the diligence is exempted from becoming liable by operation of the proviso to section 141(1). Whether or not the evidence led would establish the accusations, is a matter of trial. In N.Rangachari Vs. Bharat Sanchar Nigam Ltd. (supra) it is held that, questions whether the accused at the relevant time were not in-charge of the affairs of the company or any restriction on their power or existence of any special circumstances made them not liable to be convicted, could be considered during trial. In the case of Paresh P. Rajda Vs. State of Maharashtra (supra) it is observed that, clear allegations against the accused to the effect that they were officers and responsible for affairs of company would be sufficient to reject the prayer for quashing. In Malwa Cotton & Spinning Mills Ltd. Vs. Virsa Singh Sidhu (supra) it was held that, in case of prosecution of Directors of a company for dishonour of cheque the plea raised by one of the Director that he had intimated the company of his desire to resign much before the cheque was issued, cannot be ground to quash the proceedings initiated against him. The plea raised, gives rise to questions of facts, such as, whether the accused-Director had intimated the company and whether there was any resolution accepting his desire and what was the effect of delay by company in submitting requisite from before Registrar of Companies. Resolution of such questions require leading of evidence and can only be decided in trial. It is apparent that this decision was delivered in the fact of that case.

10 In the case of National Small Industries Corporation Limited Vs. Harmeet Singh Paintal and Anr. (2010) 3 SCC 330, the apex Court had summorised law on section 141 of Negotiable Instruments Act. Paragraph 13, 14, 15 and 39 of the decision reads as follows:

“13. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent No.1 was in-charge of or was responsible to the accused company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

14. A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in-charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfillment of the requirements under Section 141.

15. In a catena of decisions, this Court has held that for making Directors liable for the offences committed by the company under Section 141 of the Act, there must be specific averments against the Directors, showing as to how and in what manner the Directors were responsible for the conduct of the business of the company.

39. From the above discussion, the following principles emerge :

(i) The 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.

(ii) 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.

(iii) 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 accused therein vicariously liable for offence committed by company along with averments in the petition containing that accused were in-charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If accused is a Managing Director or a Joint Managing Director

> then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.
>
> (vi) If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint.
>
> (vii) The person 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.

11. In Pooja Ravinder Devidasani Vs. State of Maharashtra and Anr. (2014) 16 SCC 1 it is observed that to fasten Vicarious liability under section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the company, one who actively looks after the day to day activities of the company and is particularly responsible for the conduct of its business. Simply because a person is a director of a company, does not make him liable under N.I. Act. Every person connected with the company will not fall into the ambit of the provision. Time and again, it has been asserted by this Court that only those persons who were in-charge of and responsible for the conduct of the business of the company at the time of commission of an offence will be liable for criminal action. A Director, who was not in-charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable for an offence under section 141 of the N.I. Act. For making a Director of a company liable for the offence committed by the company under Section 141 of the N.I. Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the company. Before a Magistrate taking cognizance of an offence under Section 138 read with Section 141 of the N.I. Act making a person vicariously liable has to ensurer strict compliance with the statutory requirements. The Superior Courts should maintain purity

in the administration of justice and should not allow abuse of the process of the court. As a matter of fact, the appellant in this case had resigned as the Director much before the issuance of the cheques in question, her resignation was approved by the board of Directors and the resignation was informed to the Registrar of Companies. Despite having knowledge of resignation of appellant as Director of company and that she had no role in issuance of cheque in question, yet as an arm twisting measure, appellant was arrayed as accused.

12. In Harshendra Kumar D. Vs. Rebatilata Koley Etc.and Ors. (2011) SCC 351, the contention of appellant before apex Court, was that he had resigned from directorship, which was accepted by the board and factum of his resignation was recorded in Form 32 filed by the company with Registrar of Companies. The cheques were issued on behalf of company after his resignation. It was observed by the Court that, every company is required to keep at its registered office a register of its Directors, managing Director, manager and secretary containing the particulars with respect to each of them as set out in clause (a) to (e) of sub-section (1) of Section 303 of the companies Act, 1956. Sub-section (2) of section 303 mandates every company to send to Registrar return in duplicate containing the particulars specified in the register. Any change among its Directors, managing Directors, managers or secretaries specifying the date od change is also required to be furnished to the Registrar of companies in the prescribed form within 30 days of such change. There is thus statutory requirement of informing the Registrar of Companies about change among Director of the company. A Director whose resignation has been accepted by the company and that has been duly notified to the Registrar of Companies, cannot be made accountable and fastened with liability for anything done by the company after the

acceptance of his resignation. The words "every person who, at the time offence was committed", occurring in section 141(1) of the N.I. Act are not without significance and these words indicate that criminal liability of a Director must be determined on the date the offence is alleged to have been committed. At the stage of issuance of summons or taking cognizance, material relied upon by the accused which are in the nature of public documents or the material which are beyond suspicion or doubt can be looked into by High Court in exercise of its jurisdiction under Section 482 or revisional jurisdiction under section 397 of the Code. It is fairly settled that while exercising inherent jurisdiction under section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defense of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the fact of documents which are beyond suspicion or doubt, placed by accused, the accusations against him cannot stand. It would be travesty of justice if the accused is relegated to trial and he is asked to prove his defense before the trial Court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the material which have significant bearing on the matter at prima facie stage. Criminal prosecution is a serious matter. It affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case.

13. In the case of Adalat Prasad Vs. Ruplal Jindal and Ors. AIR 2004 SC 4674, appellant therein had approached the High Court challenging the order of issuing process and the High Court directed the appellant to file an application under Section 203 of Cr.P.C.

before the trial Court. The application preferred before the trial Court was allowed and the summons was recalled. The order recalling summons was challenged before the High Court on the ground that Magistrate has no jurisdiction to recall summons under Section 204 of the Code. The High Court allowed the petition, holding that the court of Magistrate could not have recalled the summons as said court did not have the power to review its own order. The Apex Court held that after taking cognizance of complaint and examining complainant and witnesses if court is satisfied that there is sufficient ground to proceed with the complaint, he can issued process by way of summons under section 204 of the Code. Therefore, what is necessary of condition precedent for issuing process under section 204 is the satisfaction of Magistrate either by examination of complainant and witnesses or by the inquiry under Section 202 that there is sufficient ground for proceeding with the complaint, hence issued process under section 204 of the code. None of these stages the code has provided for hearing the accused. In absence of any review power or inherent power with the subordinate Criminal Court, the remedy lies invoking section 482 of the Criminal Procedure Code. In the case of Dhariwal Tobacco Products Ltd. and Ors. Vs. State of Maharashtra and Anr. 2009 SCC (Cri.) 806, the issue which fell for consideration before the Hon'ble Supreme Court was whether an application under Section 482 of Code of Criminal Procedure can be dismissed only on the premise that an alternative remedy of filing revision application under Section 397 of the Code is available. It was observed that issuance of summons is not an interlocutory order within the meaning of section 397 of the Code. The Apex Court in large number of decisions beginning from R.P. Kapoor Vs. State of Punjab, AIR 1960 SC 866 to Som Mittal Vs.

Government of Karnataka, (2008) 3 SCC 574 has laid down the criteria for entertaining an application under Section 482 only because a revision petition is maintainable the same by itself would not constitute a bar for entertaining an application under Section 482 of the code. The power of the High Court can be exercised not only in terms of section 482 of the Code but also in terms of section 483 thereof. The inherent power of the High Court is not conferred by statutes but has merely been saved thereunder. It is thus difficult to conceived that the the jurisdiction of the High Court would be held to be barred only because revisional jurisdiction could also be availed of. The Apex Court referred to several decisions and observed that in large number of decisions it was opined that whenever the High Court comes to the conclusion that allowing the proceeding to continue would be an abuse of process of Court and that ends of justice require that the proceedings should quashed, it would not hesitate to do so. The Court took note of the fact that the decision of Bombay High Court in the case of V. K. Jain Vs. Pratap V. Padode, 30 Mh.L.J. 778, wherein it was observed that the jurisdiction under Section 482 of the code will not be exercised if recourse can be taken by accused to the remedy of filing revision application under section 397 of the code and it was held that the said decision does not lay down the good law and it is overruled.

14. Thus, in the light of the documents relied upon by the petitioners in support of their claim that they had resigned from the accused No.1 company before the cause of action to constitute the offence under Section 138 of the N.I. Act had arisen can be considered and in exercise of power under Section 482 of Cr.P.C. or Article 227 of the Constitution of India the order issuance process and the impugned proceedings can be quashed against the

petitioners. In the circumstances, impugned order issuing process and proceedings emanating therefrom are required to be quashed and set aside.

ORDER

(i) Writ Petition is allowed and disposed off;

(ii) The order dated 29th March 2019 passed in C.C No.217/SS/2019 pending before the Court of Metropolitan Magistrate, 63rd Court, Andheri, Mumbai and the said proceedings as against petitioners are quashed and set aside;

(iii) Trial to proceed against other accused expeditiously.

(PRAKASH D. NAIK, J.)

MST