IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 3520 OF 2022

Mr. Sayed Mustafa Javied ... Petitioner
V/s.
State of Maharashtra And Others ... Respondents

WITH

CRIMINAL WRIT PETITION NO. 3522 OF 2022

Mr. Sayed Mustafa Javied ... Petitioner
V/s.
State of Maharashtra And Others ... Respondents

Mr. Pranav Badheka a/w Mr. Rutvij Solanki i/by Mr. Rohit Sawant, Advocate for the Petitioner in W.P. No.3520/2022.
Mr. Mr. Javied B Allana, Adv. Advocate for the Petitioner in W.P. No.3522/2022.
Mr. S.S. Pednekar, APP for the State.

CORAM : AMIT BORKAR, J.

DATED : 06th OCTOBER, 2022.

P.C:-

1. Since both the Writ Petitions arise out of similar facts and circumstances and a common question of law, both petitions deciding by a common judgment. These petitions have been filed under Article 227 of the Constitution of India challenging the order of issuance of process under Section 138 of Negotiable Instrument Act, 1881.

2. Respondent No.2 filed a complaint under Section 138 of Negotiable Instrument Act, 1881, alleging that, in pursuance of the joint development agreement executed with accused No.1 firm on 03rd August 2019, the complainant provided a sum of Rs. 20,89,25,064/- to the accused. It is alleged that since the accused failed to fulfil their commitments, the accused requested the complainant to cancel and terminate the agreement. Consequently, a Memorandum of Understanding was executed between the parties, wherein the accused agreed to pay a sum of Rs. 39,12,43,595/-. Towards part consideration of the said liability, the accused No.1 allegedly issued two cheques bearing No.100289 dated 15th September, 2021 and 100290 dated 30th September, 2021 to the tune of Rs.10,00,00,000/- each. On 17th September, 2021, the cheques were returned with the remark "Funds Insufficient". The complainant again deposited the said cheques with their bankers, which were also dishonoured. Therefore the complainant issued notice on 19th October 2021, which according to the complainant, was served on the accused. On failure to repay the amount within 15 days from the date of receipt of the notice, both complaints were filed.

3. The learned Magistrate, on 09th December 2021, issued a process against the petitioner under Section 138 of Negotiable Instrument Act, 1881. The said order of issuance of process is the subject matter of the present writ petition.

4. On behalf of the petitioner following submissions are made.

A. No sufficient averments are made in the complaint.

B. On the date of the commission of the offence, the petitioner was not a partner of the firm as he retired on 23rd April 2009.

C. The petitioner did not sign the cheque in question.

D. The learned Magistrate had not issued process under Section 141 of Negotiable Instrument Act, 1881.

5. In so far as the contentions of the petitioner that the averments in the complaint are insufficient to attract Section 141 of Negotiable Instrument Act, 1881 is concerned, it is necessary to consider the averments in the complaint. The relevant paragraph of the complaint is as under:-

> "2. The Complainant submits that, he knows the Accused Nos. 2 to 6 (hereinafter referred to as the **"Accused"**) being the partners of M/s. Primeland Constructions (hereinafter referred to as the **"Accused firm"**,), having its registered office as mentioned in the cause title. It is being made abundantly clear that the Accused Nos. 2 to 6 were the partners of the Accused firm and were personally and jointly liable and responsible for the working, operation, management and day-to-day affairs of the Accursed Firm and were also responsible for accepting payments and making payments on behalf of the Accused Firm and the Accused No.2 is the signatory on behalf of the other Accused on the Cheques, Memorandum of Understanding, and Joint Development Agreement which were entered into and between the Accused No.1 and the Complainant and forms part of the matter in the present complaint."

> "12. The Complainant submits that the Third Cheque bears the signature of Accused No.2. However, it is pertinent to note that the Accused being Accused Nos. 3 to 6 were aware of the fact that the Accused No.2 provided the Third Cheque to the present complainant for discharging their collective legal liability."

6. On careful reading of the paragraphs quoted above, in my opinion, the averments in the complaint are prima-facie sufficient for the issuance of process; the complainant specifically stated in his complaint that Accused No.2 to 6 were personally and jointly liable and responsible for working, operation, management and day-to-day affairs of accused firm and were responsible for making payment on behalf of the accused firm. Furthermore, in paragraph No.12, it is stated that accused No.3 to 6 were aware of the facts that accused No.2 provided the third cheque for discharging their collective legal liability.

7. The Apex Court, in the case of **S.M.S. Pharmaceutical LTD v. Neetal Bhalla and Another,** reported in (2005) 8 SCC 89, held that, under Section 141, what is required is that the persons who are sought to be made criminally liable should be at the time of the offence was committed, in charge of an responsible to the Company for conduct of the business of the Company. Every person connected with the company shall not fall within the ambit of the provisions. Only those persons in charge of and responsible for the conduct of the Company's business at the time of the commission of an offence will be liable for criminal action. The liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an offence or a position in a Company. Therefore, to bring a case within Section 141 of the Act, the complainant must disclose the necessary facts which make a person liable. Consequently, it is necessary to specifically aver in a complaint that at the time the offence was committed, the person accused was in charge of and responsible for the conduct of the business of the Company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in the complaint, the requirements of Section 141 cannot be said to be satisfied.

8. In a recent Judgment, the Apex Court, after considering Judgment in the case of **S.C. Mani and Mohan Dairy V. Dr. Snehalatha Elangovan** reported in 2022 SCC Online SC 1238 summarized the responsibility of the complainant in the Complaint as under:-

> "a.) The primary responsibility of the complainant is to make a specific averments in the complaint so as to make the accused vicarious liable. For fastening the criminal liability, there is no legal requirement for the complainant to show that the accused partner of the firm was aware about each and every transaction. On the other hand, the first proviso to sub-section (1) of Section 141 of the Act clearly lays down that if the accused is able to prove to the satisfaction of the Court that the offence was committed without his/her knowledge or he/she had exercised due diligence to prevent the commission of such offence, he/she will not be liable to punishment."

"b.) The complainant is supposed to know only generally as to who were in charge of the affairs of the company or firm, as the case may be. The other administrative matters would be within the special knowledge of the company or the firm and those who are in charge of it. In such circumstance, the complainant is expected to allege that the persons named in the complaint are in charge of the affairs of the company/firm. It is only the Directors of the Company of the partners of the firm, as the case may, who have th special knowledge about the role they had played in the company or the partners in a firm to show before the court they had played tin the company or the partners in a firm to show before the court that at the relevant point of time they were not in charge of the affairs of the company. Advertence to Section 138 and Section 141 respectively of the NI Act shows that on the other elements of an offence under Section 141 respectively of the NI Act shows that on the other elements of an offence under Section 138/ being satisfied, the burden is on the Board of Directors or the officers in charge of the affairs of the company/partners of a firm to show that they were not liable to be convicted. The existence of any special circumstance that makes them not liable is something that is peculiarly within their knowledge and it is for them to establish at the trial to show that at the relevant time they were not in charge of the affairs of the company or the firm."

"c.) Needless to say, the final judgment and order would depend on the evidence adduced. Criminal liability is attracted only on those, who at the time of commission of the offence, were in charge of and were responsible for the conduct of the business of the firm. But vicarious criminal liability can be inferred against the partners of a firm when it is specifically averred in the complaint about the status of the partners 'qua, the firm. This would make them liable to face the prosecution but it does not lead to automatic conviction. Hence, they are not adversely prejudiced if they are eventually found to be not guilty, as a necessary consequence thereof would be acquittal".

"d.) If any Director wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he/she is really not concerned with the issuance of the cheque, he/she must in order to persuade the High Court to quash the process either furnish some sterling incontrovertible material or acceptable circumstances to substantiate his/her contention. He/She must make out a case that making him/her stand the trial would be an abuse of process of Court."

9. In view of the authoritative pronouncement by the Apex Court in the case of S.M.S. Pharmaceutical (supra), in my considered opinion, the complainant has made necessary averment to attract ingredients of Section 141 to make the petitioner vicariously liable for an offence under Section 138 of Negotiable Instrument Act, 1881 for issuance of process. Petitioner has failed to place on record sterling incontrovertible material or acceptable circumstances to substantiate his contention that he is not in charge or responsible for the day-to-day affairs of the firm.

10. The next submission on behalf of the petitioner to the fact that on the date of offence, the petitioner was not a partner and the working partners of accused No.1 were accused No. 2 and 3 cannot be considered at this stage unless there is incontrovertible material or acceptable circumstances to substantiate the said contention. At this stage, there is no document on record to show that the fact of resignation was brought to the notice of the registrar of the firms, nor is any document placed on record which is issued by statutory authorities to support the contention of the petitioner that he retired from the service at the time of the commission of the offence.

11. Merely because the petitioner did not sign the cheque is not sufficient to set aside the order of issuance of process against the petitioner in view of the fact that necessary averments in the complaint are sufficient to attract Section 141 of the Negotiable Instrument Act, 1881 for issuance of process.

12. The Last submission made on behalf of the petitioner is that the Magistrate had not taken cognizance under Section 141 of the Negotiable Instrument Act, 1881, the order of issuance of process cannot be sustained. As held by the Apex Court in the case of S.M.S. Pharmaceutical (supra), Section 141 of Negotiable Instrument Act, 1881 deeming provision, what is required are the basic averments which would lay the foundation for attracting vicarious liability created under Section 141 of said act. Section 141 is not punishing Section; it is not necessary for the Magistrate to issue process under Section 141 of Negotiable Instrument Act, 1881. In that view of the matter, in my opinion, neither there is an error of jurisdiction nor miscarriage of justice while issuing process against the petitioner. There is no merit in the petition. Petitions are therefore dismissed. No Costs.

(AMIT BORKAR, J.)