

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

**CRIMINAL WRIT PETITION NO. 4320 OF 2016
WITH
CRIMINAL WRIT PETITION NO. 4321 OF 2016**

Vasundhara Ajay Govil ...Petitioner

Versus

M/s. Kaynet Capital Ltd And Anr ...Respondents

**WITH
CRIMINAL WRIT PETITION NO. 4322 OF 2016
WITH
CRIMINAL WRIT PETITION NO. 4323 OF 2016**

Pradeep Kumar Mishra ...Petitioner

Versus

M/s. Kaynet Capital Ltd And Anr ...Respondents

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Mr. Kuldeep U. Nikam, Advocate for the Petitioners.

Mr. Ashok T. Gade a/w Riya John & Navin Rathod advocate for respondent No.1 in all matters.

Mr. S. R. Agarkar, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 22nd AUGUST, 2022

PC :

. The Petitioners in Criminal Writ Petition No.4320 of 2016 and Criminal Writ Petition No.4323 of 2016 are aggrieved by the

order dated 30.04.2014 passed by the learned J.M.F.C. Pune in S.C.C. No.8312 of 2014 and order dated 29.08.2016 passed by the learned Sessions Judge, Pune in Criminal Revision Application No.130 of 2016 and order dated 29.08.2016 passed by the learned Sessions Judge, Pune in Criminal Revision Application No.132 of 2016.

2. The Petitioner in Criminal Writ Petition No.4321 of 2016 and Criminal Writ Petition No.4322 of 2016 are aggrieved by the order dated 30.04.2014 passed by the learned J.M.F.C., Pune in SCC No.8313 of 2014 and order dated 29.08.2016 passed by the learned Sessions Judge, Pune in Criminal Revision Application Nos.129 of 2016 and Criminal Revision Application No.131 of 2016.

3. S.C.C No. 8312 of 2014 was filed before the Court of learned J.M.F.C. Pune for offence under Section 138 of Negotiable Instruments Act, 1881 (for short 'NI Act). The Petitioner in Criminal Writ Petition No.4320 of 2016 and Criminal Writ Petition No. 4323 of 2016 were arraigned as accused Nos.2 & 3 in the said complaint. The grievance of the complainant M/s. Kaynet Finance Ltd. is that the accused No.1 Pensive Agencies Pvt. Ltd. is a company and accused Nos.2 to 5 are its directors. Accused No.5 is authorized signatory for all the accused. Accused Nos.2 to 5 are in

charge and responsible for day to day affairs of accused No.1-company. The accused represented that, they are dealing in securities and/or F40 and/or derivatives, contracts in BSE and therefore the accused entered into an agreement dated 02.05.2011 and trading ID was allotted to accused. The complainant had maintained account of the accused being a client and all the amounts payable by accused has been debited in the said account of accused and the amount paid were credited in the said account as and when the transactions had taken place. The complainant took review of the said account and it was observed that the amount of Rs.1,32,57,764/- was due and outstanding from accused. The liability was accepted by the accused and they agreed to pay the same in installments. The accused issued three post dated cheques in favour of the complainant. For the payment of first three installments of Rs.5,00,000/- each, the accused issued cheques dated 11.12.2013 bearing No.284421 for Rs.5,00,000/-, Cheque No.284423 dated 11.02.2014 for Rs.5,00,000/- and Cheque No.284425 dated 11.04.2014 for an amount of Rs.5,00,000/-. At the time of issuance of cheques accused had promised complainant that the cheques would be honoured. The accused No.5 requested the complainant to deposit first two cheques. The cheques were deposited. Vide return memo dated

25.02.2014, the cheques were returned unpaid with remark “funds insufficient”. The complainant made a demand for the amount of dishonoured cheques vide notice dated 08.03.2014. It was served upon the accused. Payment was not made. The complaint was filed on 19.04.2014. Vide order dated 30.04.2014, process was issued against the accused for offence under Section 138 of the NI Act.

4. The Petitioner in Criminal Writ Petition No.4320 of 2016 and 4323 of 2013 preferred revision applications before the Sessions Court challenging the order issuing process. Both the revision applications were rejected vide order dated 29.08.2016.

5. S.C.C. No.8313 of 2014 was filed by the complainant M/s. Kaynet Finance Ltd. for offence under Section 138 of the NI Act. The Petitioner in Criminal Writ Petition No.4321 of 2016 and 4322 of 2016 were arraigned as accused Nos.2 & 3. The allegations in this complaint are similar to SCC No.8312/2014. Towards the payment of liability, the accused issued Cheque No.284420 dated 11.11.2013 for an amount of Rs.5,00,000/-, Cheque No.284422 dated 11.01.2014 for an amount of Rs.5,00,000/- and Cheque No.284424 dated 11.03.2014 for an amount of Rs.5,00,000/-. The first cheque was deposited and it was encashed. The accused No. 5 has requested the complainant to deposit the second cheque

bearing No.284422. It was deposited by the complainant with his banker. The cheque was returned with remarks “funds insufficient” vide return memo dated 25.02.2014. Demand notice was sent to the accused on 08.03.2014. It was served upon the accused. Complaint was filed on 19.04.2014. Vide order dated 30.04.2014 process was issued against the accused for offence under Section 138 of the NI Act. The Petitioners in Criminal Writ Petition No.4321 of 2016, 4322 of 2016 had preferred revision applications before the Court of Sessions challenging the order issuing process. Both the revision applications were rejected by order dated 29.08.2016.

6. Learned Advocate for the Petitioners submitted that the Petitioner in Criminal Writ Petition No.4320 of 2016 and 4321 of 2016 was the director of accused No.1-company during the period from 11.04.2008 and 10.08.2009. At the time of dishonour of cheques she was not the director of accused No.1- company. She has resigned from the accused No.1-company from 10.08.2009. The resignation was accepted with effect from 10.08.2009. Form No.32 reflects that the Petitioner had resigned from the post of director with effect from 10.08.2009. Even otherwise no role has been assigned to the said Petitioner in the complaint. The learned Sessions Judge has rejected the revision application without taking

into consideration the fact that, at the time of dishonour of cheque the said Petitioner was not the director of accused No.1- company.

7. The Petitioner in Criminal Writ Petition No.4323 of 2016 and 4322 of 2016 was the director of accused No.1- company from 11.04.2008 and 28.02.2009. He had resigned as a director on 28.02.2009. His resignation was accepted by the accused No.1- company with effect from 28.02.2009. Form No.32 reflects that the Petitioner had resigned from the post of director of accused No.1- company from 28.02.2009. The learned Sessions Judge has failed to appreciate the fact that, at the time of cause of action to initiate the proceedings under Section 138 of NI Act, the Petitioner was not the director of Accused No.1-company. There is no material to invoke Section 141 of NI Act. Reliance is placed on decision of this Court in case of *Satvinder Jeet Singh Sodhi and Anr. Vs. The State of Maharashtra and Anr.* in Criminal Application No.74 of 2021.

8. Learned Advocate for Respondent No.1 in all the Petitions submitted that, the documents relied upon by the Petitioners cannot be accepted at this Stage. The trial is pending since 2014. The fact of resignation will have to be considered during the trial. Specific role has been assigned to the Petitioners in the complaint. They were directors of accused No.1 - company.

9. I have perused the documents on record. The Petitioner were directors of Accused No.1 - Company. They are not signatories to the cheques. They had resigned from the company, which prior to the cause of action. The cheques were dishonoured after the Petitioner ceased to be the directors of the accused No.1- company in both the complaints. There is no doubt the veracity of the documents relied upon by the Petitioners.

10. In the case of *Harshendra Kumar D. Vs. Rebatilata Koley and Others*¹ it was observed 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 clauses (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 sent to the Registrar a return in duplicate containing the particulars specified in the register. Any change among its Directors, Managing Directors, managers or secretaries specifying the date of 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 amongst Directors of the company. A Director, whose resignation

1 (2011) 3 SCC 351

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 the company after the acceptance of his resignation. The words every person who, at the time the offence was committed, occurring in Section 141 of the NI Act are not without significance and these words indicate that criminal liability of a Director must be determined on the date of the offence is alleged to have been committed. If on the face of the documents which are beyond suspicion or doubt placed by the accused, and 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 defence 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 materials 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. In the case of *Dushyant D. Anjaria Vs. M/s. Wall Street Finance Ltd*² it was observed that, Once the petitioner resigned as additional director is ceased to have any control or access to the first accuse

² 2001 (1) Mh.L.J. 701

company and could not have furnished explanation on behalf of the first accused company for not filing the resignation tendered by the petitioner before the office of Registrar of Companies immediately. In Form No.32 it is clearly recorded that, the petitioner resigned as Director and there is no reason to disbelieve the said form No.32. In the case of *Saumil Dilip Mehta Vs. State of Maharashtra and others*³ it was observed that, the director of the public limited company or private company can tender his resignation unilaterally and without filing Form No.32 and sending a notice to the Registrar of Companies. The filing in the said form and giving due intimation and information to Registrar of Companies is the duty of the Company Secretary and not of an individual Director what he has to do is to send in writing in letter informing either the Chairman or the Secretary of the Company, as the case may be, his intention to resign from the post of the Director of the said Company. Thereafter the said letter has to be moved in the meeting of the Directors of the company.

11. Section 141 of the NI 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

3 AIR 2002 BOMBAY 194

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: 22 [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.]

(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. Explanation.— For the purposes of this section,—

(a) “company” means any body corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.”

12. In the case of *National Small Industries Corporation Ltd. V. Harmeet Singh Paintla*⁴, after survey of earlier decisions wherein legal position concerning Section 138 and Section 141 of the NI Act was considered, this Court culled out the following principles :-

⁴ 7(2010) 3 SCC 330

“ (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 the company along with averments in the petition containing that the 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 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.”

13. There is no reason to doubt the genuineness of the documents relied upon by the Petitioners. Hence, the order issuing

process and the order passed by the Sessions Court is required to be set aside. Hence, I pass the following order :

ORDER

(i) Writ Petition Nos. 4320, 4321, 4322, 4323 of 2016 are allowed.

(ii) Order issuing process dated 30.04.2014 passed by learned JMFC, Pune in SCC No. 8312 of 2014 and 8313 of 2014, order dated 29.08.2016 passed by Sessions Court, Pune in Criminal Revision Application No. 130 of 2016, 129 of 2016, 132 of 2016 and 131 of 2016 proceedings in SCC No. 8312 of 2014 and 8313 of 2014 pending before Court of JMFC, Pune are quashed and set aside qua petitioners.

(iii) Trial is expedited.

(iv) The trial Court is requested to make an endeavour to complete the proceedings pending before the trial Court in C.C. No. 8312 and 8313 of 2014 against other accused by giving priority within six months from date of receipt of order.

(v) Writ Petitions are disposed of.

(PRAKASH D. NAIK, J.)