

Nikita

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

WRIT PETITION NO.1158 OF 2015

Starwing Developers Private Ltd,
through Its Director Jitendra N. Vora ... Petitioner

V/s.

The State of Maharashtra & Anr. ... Respondents

WITH

WRIT PETITION NO.1159 OF 2015

Starwing Developers Private Ltd. ... Petitioner

V/s.

The State of Maharashtra & Anr. ... Respondents

WITH

INTERIM APPLICATION NO.3968 OF 2022

IN

WRIT PETITION NO.1159 OF 2015

Starwing Developers Private Ltd.
Through Its Director Rajeev Dube ... Applicant

V/s.

The State of Maharashtra & Anr. ... Respondent

WITH

WRIT PETITION NO.1160 OF 2015

Starwing Developers Private Ltd through
Its Director Jitendra N. Vora ... Petitioner

V/s.

The State of Maharashtra & Anr. ... Respondent

WITH

INTERIM APPLICATION NO.3970 OF 2022

IN

WRIT PETITION NO.1160 OF 2015

Starwing Developers Private Ltd.
Through Its Director Rajeev Dube ... Applicant
V/s.
The State of Maharashtra & Anr. ... Respondent

**WITH
WRIT PETITION NO.1161 OF 2015**

Starwing Developers Private Ltd through
Its Director Jitendra N. Vora ...
V/s.
The State of Maharashtra & Anr. ... Respondent

**WITH
INTERIM APPLICATION NO.3969 OF 2022
IN
WRIT PETITION NO.1161 OF 2015**

Starwing Developers Private Ltd.
Through Its Director Rajeev Dube ... Applicant
V/s.
The State of Maharashtra & Anr. ... Respondent

Mr. Ujjawal Gandhi a/w Neha Patil a/w Mr. Ashish
Debey a/w K.R. Shah a/w Gunjan Thakkar a/w Anurag
Ghag a/w Saakshi Jha for the petitioners.

Mr. P. Ranjan i/b Halai and Co. for respondent No.2

Mr. M.G. Patil, APP for the State.

CORAM : AMIT BORKAR, J.

DATED : MARCH 16, 2023

P.C.:

1. These petitions are directed against the order of the
Revisional Court, setting aside the order of issuance of process in a

complaint under Section 138 of the Negotiable Instruments Act, 1881. The order of issuance of the process has been set aside mainly on the following grounds:

- I) The complainant has failed to explain who amongst the accused company directors took an active role in the matter;
- II) The revision applicant is a permanent resident of Pune. However, the accused No.1 is being functioning from New Delhi.
- III) Brother of the revision applicant is dealing with day to day affairs of the company. The brother of the applicant signed the cheques in question. Therefore, there is every possibility that the brother is in charge of day-to-day affairs.
- IV) The Revision applicant is the formal director of the accused No. 1/company.

2. The scope of inquiry in revision challenging order of issuance of process is to consider based on material available with the Magistrate on the date of issuance of process to ascertain whether the material along with the averments in the complaint is sufficient prima facie to attract ingredient of offences under Section 138, read with Section 141 of Negotiable Instruments Act, 1881. In the facts of the case, the accused No. 1/company is the drawer of the cheque, and the rest of the accused, i.e., accused No. 2 and 3, are liable under Section 141(1) of Negotiable Instrument Act 1881, subject to making specific averments in the complaint as mandated and interpreted by the Apex Court in the case of **SMS Pharmaceuticals V. Neeta Bhalla**, reported in AIR (2005) SC

3512.

3. Averments in the complaint made against the accused No. 2 and 3 (including revision applicant) are as under:

“The Accused No.2 and 3 are the Directors of the accused No.1 company, and are in charge of and responsible to the day to day affairs, management and business conduct of the accused No.1 company. The complainant states that at the relevant point when the offence was committed each of the accused No.2 and accused No.3 were in charge of the affairs of the accused No.1 company and are liable and responsible for all the decisions and conduct of the business of the accused No. 1 company.”

4. The averments quoted above, in my opinion, at the stage of the issuance of process, are sufficient to proceed with the complaint against accused Nos.2 and 3. Whether the revision applicant took an active role in the affairs of the company and whether the brother of the revision applicant was only in-charge director of the company needs to be adjudicated during the trial.

5. The revisional Court states that the complaint has failed to explain who took an active role amongst the directors. In my opinion, once the necessary averments are made in the complaint, the case for issuance of process under Section 138 of the Negotiable Instruments Act, 1881 has been made out. The order of issuance of process cannot be interfered with in revision based on the possibility that the brother of the revision applicant is dealing with day-to-day affairs. It is well settled that if there is an unimpeachable document produced on record to show that the director of a company against whom specific averments are made

in the complaint as required under Section 141 is not in-charge and responsible for the day-to-day affairs of the company, he needs to be proceeded with in a complaint under Section 138 of Negotiable Instruments Act 1881. The finding of the revisional court is based on *ipse dixit* that since the revisional applicant is permanently residing in Pune, she cannot attend day-to-day functioning and affairs in Delhi. Such interference is not legally permissible at the stage of the issuance of process.

6. The concept of the formal director is alien to the jurisprudence of company law. The director can be either executive or non-executive. However, he can be an independent director subject to furnishing such proof. The Revisional Court can adjudicate upon such issue; however, in the absence of the concept of a formal director, the Revisional Court on that ground could not have interfered with the order of issuance of process.

7. Therefore, in my opinion, the Revisional Court has exercised its jurisdiction with material irregularity resulting in miscarriage of justice. The petitioner has made out a case for setting aside the order.

8. The writ petitions, therefore, deserve to be allowed.

9. Rule is made absolute in terms of prayer clause (c) in all the writ petitions. No costs.

10. In view of the disposal of the writ petitions, all interlocutory applications do not survive and are disposed of accordingly.

(AMIT BORKAR, J.)