IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 303 OF 2023

Naresh Dutta Sharma
Independent Director of
Mittal Pigments Pvt Ltd & Anr. …Applicants

Versus

The State Of Maharashtra & Ors. …Respondents

Mr. Karan Bhosale a/w Mr. Mittal Munoth for the Applicants.

Mr. A.R. Patil, APP for the State-Respondent No.1.

Mr. Prashant Pandey a/w Ms. Prajakta Pawar i/by AVC and Associates for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 21st JUNE, 2023.

P.C. :

1. Heard Mr.Karan Bhosale, learned counsel for the Applicants, Mr.A.R. Patil, APP for the State-Respondent No.1, Mr.Prashant Pandey, learned counsel for the Respondent No.2.

2. Rule. Rule is made returnable forthwith by the consent of the parties.

3. The Applicants have challenged the order dated 8th December, 2022 passed by the Metropolitan Magistrate, 28th Court, Esplanade, Mumbai in CC No. 2800823/SUM/2022.

4. The Applicants are the original accused Nos. 3 and 5 in the complaint filed by the Respondent No.2 (the original complainant). The case of the complainant is that he was a proprietor of M/s. G. P. Metal Industries. The accused No.1-Company i.e. Mittal Pigments was a private limited company. It is his case that, the original accused Nos. 2 to 5 were its Directors and were in-charge of the business of the company. They looked after the routine affairs and the management of the accused No.1-Company. The accused No.1-Company requested the complainant to supply Lead Scrap Anode. According to him, the goods worth Rs.24,40,00,000/- were ordered. The complainant supplied the material worth Rs.18,71,83,648/-. The accused No.1 paid the amount of Rs.8,98,47,023.80 and the outstanding amount was Rs.9,73,36,624.20. In discharge of that liability, the accused No.1 issued the cheque bearing No.997398 drawn on HDFC Bank, Kota, Rajasthan for the amount of Rs.2,00,00,000/-. That cheque, on presentation, was dishonored and after following the statutory requirements, the complaint was filed.

5. Learned counsel for the Applicants submitted that the Applicants were the non-executive independent directors of the Company. He relied on record of the Registrar of Companies, annexed to this Application, which clearly mentions that both the Applicants

were the non-executive Directors. He further submitted that the complaint does not specify as to what roles these two Applicants have played in the transaction and as to how they were responsible for the day to day affairs of the company. He relied on the observations of the Hon'ble Supreme Court in the case of ***Sunita Palita and Others versus M/s. Panchami Stone Quarry*** arising out of ***SLP (Cri.) No. 10396 of 2019 dated 1st August, 2022***. He submitted that as per that judgment, the independent Directors can not be prosecuted by taking recourse to Section 141 of the Negotiable Instruments Act, 1881 (for short 'the N.I. Act'). He submitted that the averments in the complaint fall short of the requirement of Section 141 of the N.I. Act.

This is the only submission made by learned counsel for the Applicants.

6. Learned counsel for the Respondent No.2 submitted that the facts of Sunita Palita's case are entirely different. The cheque in question in that case was issued on 15th March, 2017 and was deposited in the bank on 10th April, 2017. In the meantime, on 30th March, 2017, the National Company Law Tribunal (for short 'the NCLT') had appointed an Interim Resolution Professional (IRP) to administer the Accused-Company. The cheque was dishonored after

such appointment; and therefore, the facts of that judgment are entirely different.

7. I have considered these submissions. The record of the Registrar of Companies does show that both the Applicants were the non-executive Directors of the accused No.1-Company. Therefore, the averments in the complaint are important. There is a reference to the Applicants in para Nos. 3, 13 and 16; they are as follows :

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> 3. The Complainant stated that Accused No.1, Mittal Pigments is a Private Limited Company incorporated under the provisions of Indian Companies Act, 1956 and Accused No. 2 to 5 are its Directors and in-charge of the business. They look after the routine affairs and management of Accused No.1.
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> 13. The Complainant states that it was the liability and responsibility of the Accused No. 2 to 5 to pay their legal dues to the Complainant. The accused with malafied intention issued a cheque of such a huge amount to the complainant with false assurance of cheque getting honored and at the same time got their bank account blocked. Therefore, the Accused have committed the criminal offence U/s. 138 r/w Section 141 of the Negotiable Instruments Act, 1881 (As amended till date).
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> xxxx

> 16. The Complainant states that the Accused No. 2 to 5 being in charge of and responsible for the day to day affairs and management of Accused No.1, are severally liable under the provisions of the Negotiable Instruments Act, 1881 (As amended till date). The Complainant states that in deception a fraudulent representation of facts is made directly with the intent to commit the offence of cheating. The Accused had done an act knowingly and intentionally in order to induce the Complainant and the Accused are liable for criminal liability."

8. In this context, the observations of the Hon'ble Supreme Court in Sunita Palita's case are important; and in particular, the reliance on the earlier Judgment of the Hon'ble Supreme Court in the case of ***National Small Industries Corporation Ltd. Versus Harmeet Singh Paintal*** as reported in ***(2010) 3 SCC 330*** is important. The relevant portion of that judgment is reproduced in Sunita Palita's case with approval, in Paragraph No.29. There was also a reference to another judgment of the Hon'ble Supreme Court in the case of ***Pooja Ravinder Devidasani Versus State of Maharashtra and Anr.*** as reported in ***(2014) 16 SCC 1.***

9. In the judgment of Pooja Devidasani, it was observed that the non-executive Director was the custodian of the governance of the Company but was not involved in the day to day affairs of the running of its business and only monitors the executive activity. 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.

10. In the judgment of National Small Industries Corporation, it was observed that the complaint should spell out as to how and in what manner the accused was in-charge of or was responsible to the accused-Company for the conduct of its business. This is in consonance with the strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

11. In Paragraph No. 46 of Sunita Palita's case, after referring to both these judgments of National Small Industries Corporation and Pooja Devidasani, the Hon'ble Supreme Court held that impleadment of all the Directors of accused No.1-Company 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, does not fulfill the requirements of Section 141 of the N.I. Act.

12. Thus, it is quite clear that the observations in Sunita Palita's case are squarely applicable to the averments made in the complaint, as far as the present Applicants are concerned. The averments definitely fall short of the requirements of Section 141 of

the N.I. Act, as is observed by the Hon'ble Supreme Court in the Sunita Palita's case.

13. Shri. Pandey submitted that in Sunita Palita's case the accused-company was governed by IRP, and hence those facts make that judgment inapplicable in the facts of this case. I am unable to agree with these submissions of Shri. Pandey. In Sunita Palita's case, the Hon'ble Supreme Court had interpreted Section 141 read with Section 138 of the N.I. Act. In the present case, there is absolutely no material mentioned in the complaint to show as to how the Applicants were in-charge of and were responsible for the day to day affairs of the accused No.1-Company. As pointed out by the learned counsel for the Applicants, both the Applicants are the non-executive Directors; and therefore, the complainant was required to show how they could be brought within the purview of Section 141 of the N.I. Act to fasten vicarious liability on these accused persons. Observations in Sunita Palita's case are squarely applicable to the present case.

14. Considering this discussion, the Application deserves to succeed and the order of issuance of process against the present Applicants is required to be set aside. Hence, the following order :

ORDER

i. Rule is made absolute qua the Applicants only in terms of prayer clause (a), which reads thus :

> "***(a)*** *that this Hon'ble Court be pleased to call for the papers and proceedings of the Applicants' case pending before the Learned Metropolitan Magistrate, 28th Court at Esplanade, Mumbai being C.C. No. 2800823/SUM/2022 and after considering the facts and veracity of the Impugned Order dated 8th December, 2022, passed by the Learned Metropolitan Magistrate, 28th Court at Esplanade, Mumbai, this Hon'ble Court be pleased to quash and set aside the Complaint being C.C. No.2800823/SUM/2022 (Exhibit 'B' hereto) and also the Impugned Order dated 8th December, 2022 (Exhibit 'C' hereto);*"

ii. Criminal Application is disposed of accordingly.

(SARANG V. KOTWAL, J.)