GRM

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 651 OF 2022
WITH
CRIMINAL APPLICATION NO. 652 OF 2022
WITH
CRIMINAL APPLICATION NO. 653 OF 2022
WITH
CRIMINAL APPLICATION NO. 654 OF 2022
WITH
CRIMINAL APPLICATION NO. 655 OF 2022
WITH
CRIMINAL APPLICATION NO. 656 OF 2022
WITH
CRIMINAL APPLICATION NO. 657 OF 2022
WITH
CRIMINAL APPLICATION NO. 658 OF 2022

Pashupathy Puthuseri Veedu … Applicant
V/s.
The State of Maharashtra & Anr. … Respondents

Mr. Sachin Ramrao Pawar, Adv. for the Applicant.

Ms. Anamika Malhotra, APP for the State/Respondent.

Mr. Niranjan Kandade a/w Pradip Zende a/w Nikhil Wadikar i/b Nandu Pawar, Adv. for Respondent no. 2.

CORAM : R. G. AVACHAT, J.

DATED : FEBRUARY 8, 2023

P.C. :

Heard.

2. This group of eight applications, under Section 482 of the Code of Criminal Procedure, 1973 (for short "**Cr.P.C.**"), is being decided by this common order, since common questions of facts

and law arise therein. Moreover, the parties thereto are same.

3. The applicant in all these applications is one of the accused in the prosecution/complaints instituted under Section 138 of the Negotiable Instruments Act, 1881 (for short "**NI Act**").

4. The gist of allegations in all the complaints, is as under :-

a. M/s. Savair Energy Limited (accused no. 1) is a limited company. The applicant and two others (co-accused), are the Directors of accused no. 1 company. All the accused were in need of finance. The original accused no. 2 had friendly relations with the complainant/respondent no. 2. On his request, the complainant advanced them a sum of Rs. 5,00,000/- in seven applications and Rs. 45,00,000/- in one application, as friendly loan. The original accused no. 2 had executed a separate Bill of Exchange. He even issued various cheques. The details thereof have been given in the respective complaint. The cheques were presented for encashment, but returned unpaid. Statutory Demand Notice/s was therefore issued to accused no. 1 company and its Directors including the applicant herein. Since there was no compliance of the Statutory Demand Notice, the complaints came to be instituted against the company and its Directors including the applicant herein. Learned Metropolitan Magistrate issued the process against the applicant and others. The applicant is therefore before this Court.

5. The orders of issuance of process against the applicant

herein, are sought to be quashed mainly on the ground of there being no averments in the complaints making out a case against him of vicarious liability in terms of Section 141 of NI Act.

6. It is also the case of applicant that he was disqualified to be a Director of any of the companies, before the cheques in question were issued. As such, the applicant was not a Director of accused no. 1 company at the relevant time and his prosecution therefore is bad-in-law.

7. Learned Advocate for the applicant made submissions consistent with the averments in the application. The same are therefore not adverted to.

8. Learned Advocate for respondent/complainant company would, on the other hand, submit that there are averments in the complaint to make out a case for proceeding against the applicant under Section 138 read with Section 141 of NI Act.

a. Learned Advocate has relied on the judgment of Hon'ble Apex Court in the case of **N. Rangachari vs. Bharat Sanchar Nigam Ltd.** reported in **Criminal Appeal No. 592 of 2007 (arising out of SLP (Cri.) No. 1844 of 2006)**.

b. Learned Advocate would further submit that so far as regards the applicant's case that he was disqualified to be a Director of any of the companies, is a question of fact and that could only be decided by the Trial Court on appreciation of evidence that may be adduced in support of the defence. Learned Advocate therefore urged for dismissal of the applications.

9. Considered the submissions advanced. Perused the complaint and the authorities relied on.

10. For better appreciation, Section 141 of NI Act is reproduced, which reads as under :-

> "**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 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:
>
> 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:
>
> [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."

11. The Hon'ble Apex Court recently in the case of **S. P. Mani and Mohan Dairy vs. Dr. Snehalatha Elangovan** reported in **2022 SCC OnLine SC 1238** has observed that,

"33. Thus, the legal principles discernible from the aforesaid decision of this Court may be summarised as under :-

(a) Vicarious liability can be fastened on those who are in-charge of and responsible to the company or firm for the conduct of its business. For the purpose of Section 141, the firm comes within the ambit of a company;

(b) It is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole;

(c) If the substance of the allegations made in the complaint fulfil the requirements of Section 141, the complaint has to proceed in regards the law;

(d) In construing a complaint a hyper-technical approach should not be adopted so as to quash the same;

(e) The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in the enactment of Sections 138 and 141 respectively should be kept in mind by the Court concerned;

(f) These provisions create a statutory presumption of dishonesty exposing a person to criminal liability if payment is not made within the statutory period even after the issue of notice;

(g) The power of quashing should be exercised very sparingly and where, read as a whole, the factual foundation for the offence has been laid in the complaint, it should not be quashed;

(h) The Court concerned would owe a duty to discharge the accused if taking everything stated in the complaint is correct and construing the allegations made therein liberally in favour of the complainant, the ingredients of the offence are altogether lacking."

12. It has further been observed in paragraph 47 that,

"47. Our final conclusions may be summarised as under :-

a) The primary responsibility of the complainant is to make specific averments in the complaint so as to make the accused vicariously 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 of 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 circumstances, 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 or the partners of the firm, as the case may be, who have the special knowledge about the role they had played in 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 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."

13. There can be no two views on what has been submitted by the learned Advocate for complainant upon relying on the judgment of Hon'ble Apex Court in **N. Rangachari vs. Bharat Sanchar Nigam Ltd.** (*supra*). To decide the question raised by the applicant herein, one has necessarily to advert to the averments in the complaints. This Court has perused all the complaints. The averments in all the complaints are similar.

14. To address the issue raised in these applications, it is necessary to reproduce all the averments in one of the complaints. The same are therefore reproduced below :-

> "That complainant - Mr. Gaurav Dilip Podar is a KARTA of firm GAURAV PODAR HUF, got acquainted to Accused No. 2 through their common friends and as Accused No. 2 are/were dealing in the similar business, wherein Accused No. 2 are/were in work circle with, him since many years, whereby Accused No. 2 were conversant with and gradually developed the good and friendly relations.
>
> The Complainant is filing the present Complaint against the Accused under the provisions of Section 138 of the Negotiable Instruments Act. The subject matter of the present Complaint is dishonored cheque bearing No. 883696 dated 01/10/2018 drawn on Indian Overseas Bank, Thane of Rs. 5,00,000/- (Rupees Five Lakhs Only). Hereto annexed and marked as **<u>Exhibit-"A"</u>** is copy of the dishonored cheque.
>
> That, somewhere in 1st week of September, 2010 Accused

Nos. 1 to 4 were huge financial crises in accused business and therefore Accused Nos. 1 to 4 were in need of financial assistance and therefore Accused No. 2 approached Complainant and requested him to forward financial assistance of Rs. 5,00,000/- (Rupees Five Lakhs Only). That, as Accused No. 2 shared the long time relations with proprietor of the said Firm, there remained no scope of apprehending deceit and accordingly he acceded accused request and paid Rs. 5,00,000/- (Rupees Five Lakhs Only) by way of cash on various occasions in varying small amounts between the year 2015 to 2017, as and by way of friendly loan to Accused. Thereby Accused Nos. 1 to 4 are in debt of complainant for sum of Rs. 5,00,000/- (Rupees Five Lakhs Only).

Accordingly Accused No. 2 on behalf of Accused No. 1 acting as director of Accused No. 1 have executed separate Bill of Exchange dated 28/10/2017 for the sum of Rs. 5,00,000/- (Rupees Five Lakhs Only). Hereto annexed and marked as **Exhibit-"B"** is copy of separate Bills of Exchange dated 28/10/2017. Same is executed between Accused No. 2 on behalf of Accused No. 1 in the capacity of director of Accused No. 1 and complainant against the said pending amount of friendly loan of Rs. 5,00,000/- (Rupees Five Lakhs Only). Moreover Accused No. 2 have also issued an acknowledgment for receipt of Rs. 5,00,000/- (Rupees Five Lakhs Only). Hereto annexed and marked as **Exhibit-"C"** is the letter dated 28/10/2017, and also issued Cheque No. 883696 dated 01/10/2018 for Rs. 5,00,000/- (Rupees Five Lakhs Only), drawn on Indian Overseas Bank, Thane, towards re-payment of the amount from Bill of Exchange document.

The complainant states that thereafter as agreed by accused, Accused No. 2 intimated complainant to deposit the said Cheque No. 883696 dated 01/10/2018 for Rs. 5,00,000/- (Rupees Five Lakhs Only), drawn on Indian Overseas Bank, Thane, in favour of complainant towards the discharge of accused liability.

The complainant states thereafter that on 05/10/2018, complainant deposited the said cheque with his banker viz. State Bank of India, Wadala Branch, Mumbai. However to the shock and surprise to complainant said Cheque No. 883696 dated 01/10/2018 for Rs. 5,00,000/- (Rupees Five Lakhs Only), was dishonored and returned without payment to complainant with memo of the bank for the reasons "Exceeds Arrangements". The complainant has received the said dishonored cheque and memo from his bankers on 6th October, 2018. Hereto annexed and marked as **Exhibit-"D"** is copy of the dishonored cheque Memo dated 5th October, 2018.

The complainant states that this conduct on accused part shows that Accused No. 2 have issued the said cheque in favour complainant, however with dishonest and malafide intention Accused Nos. 1 to 4 have failed and neglected to honour the said cheque. The complainant further states that by giving false assurances Accused No. 2 have cheated complainant and by this fraudulent and dishonest conduct on accused part.

The complainant states that the said cheque was issued and handed over by the accused in favour of the complainant willingly, voluntarily and in discharge of the accused's legally enforceable liability towards the complainant.

The complainant states that the accused was aware that the liability under the dishonored cheque is presumed to be admitted and inevitable & despite that the accused has chosen to get the said cheque dishonored deliberately, intentionally, dishonestly with malafide intentions and also with the intent to cheat the complainant and the accused was knowing very well that the said cheque was going to be dishonored and despite it, issued the same and hence the accused has committed an offence punishable under Section 138 of the Negotiable Instruments Act.

The complainant further states that to record the above said facts, the complainant through his advocate sent statutory notice dated 31/10/2018 by Speed Post on 31/10/2018 to demand Rs. 5,00,000/- (Rupees Five Lakhs Only) being the amount of the dishonoured cheques within 15 days from the receipt of the said notice at the address of the all accused. Hereto annexed and marked as **Exhibit-"E"** is the copy of Statutory Notice dated 31/10/2018.

The accused was served the Statutory Notice on 02/11/2018. Hereto annexed and marked as **Exhibit-"F"** are the copies of the postal receipt in proof (receipt) of dispatching the said Demand Notice RPAD and hereto annexed and marked as **Exhibit-"G"** is Acknowledgement Card and **Exhibit-"H"** is online track report.

The accused despite of statutory notice served to accused, have not paid any amounts towards repayment of the aforesaid dishonoured cheque amount and hence the accused have committed offence u/s. 138 of Negotiable Instruments Act.

The complainant received the said Cheque Return Memo dated 06/10/2018 from the Complainant Banker on 06/10/2018. The complainant had sent statutory demand notice dated 31/10/2018 i.e. within one month from the date of receipt of the Cheque Return Memo. The said demand notice dated 31/10/2018 was received by the accused on 02/11/2018. Thus, the fifteen (15) days demand period for making the payment by the accused commences from 03/11/2018 and ends on 17/11/2018 and the period for filing this complaint starts from 18/11/2018 and ends on 17/12/2018 and therefore, complaint is within the period of limitation.

The cause of action arose on the expiry of 15 days demand period from the date of receipt of the said demand notice by the accused and the said accused not making the payment of money mentioned in the said demand notice and therefore, the accused have committed an offence under Section 138 r/w Sec. 141 of the Negotiable Instruments Act, 1881.

> It is submitted that the complainant has deposited cheque in his bank viz. State Bank of India, Wadala Branch, Mumbai and has received Cheque Dishonor Memo through its State Bank of India, Wadala Branch, Mumbai, which is under the jurisdiction of this Hon'ble Court to entertain, try and dispose of the present complaint.
>
> The complainant craves leaves to add, alter, substitute, amend, delete or all the forgoing paragraphs if and when found necessary with the permission of this Hon’ble Court.
>
> The complainant relies upon the list of witnesses and documents as annexed to the complaint.
>
> That the necessary court fee is Rs. 10,000/- paid herewith.”

15. The gist of averments in the complaint is that the company and its Directors were in huge financial crises. They were in need of financial assistance. The original accused no. 2 requested the complainant/respondent to extend financial assistance. In response to the request, financial assistance was extended. It was the original accused no. 2, who executed the separate Bill of Exchange on 28/10/2017 and issued Cheque Nos. 883690, 883691, 883692, 883693, 883694, 883695, 883696 and 883682 to 883689 dated 01/10/2018 for Rs. 5,00,000/- (Rupees Five Lakhs Only) each, drawn on Indian Overseas Bank, Thane, towards re-payment of the amount from Bill of Exchange document.

16. It is true that the Statutory Demand Notice was also issued to

the applicant herein. Non-response on his part thereto, would be of little consequence in view of lack of necessary averments in the complaint. In none of the paragraph of the complaint, it has been averred that at the time of offence was committed, the applicant was the in-charge of and was responsible to the company for conduct of the business of company, as well as the company. The averments in complaint no way even impliedly suggest that the applicant was in-charge of day to day affairs of the company at the relevant time. For lack of necessary averments to make out a case of vicarious liability of the applicant herein, the order of issuance of process *qua* the applicant, is liable to be set aside.

17. There is one more reason to allow the applications i.e. the applicant was one of the Directors of company viz. Bekandze Healthcare Private Limited.

18. An order issued by the Registrar of Companies, Maharashtra, Mumbai dated 07/09/2017 is placed on record. It is a public document. The order records,

> "Reference : In the matter of Disqualification of directors u/s. 164(2)(a) of the Companies Act, 2013 as per the list attached as (Annexure A) from the register of Companies of ROC-Mumbai.
>
> Pursuant to section 164(2)(a) of the Companies Act, 2013, the directors of the Companies which have not filed financial statements or annual returns for any continuous period of three financial years, in this case 2014, 2015 and 2016 have been hereby declared disqualified.

> Accordingly, Directors enlisted in Annexure A attached herewith stand disqualified upto 31/10/2021."

19. The another document on record to indicate the applicant was the Director of company viz. Bekandze Healthcare Private Limited from the date of 16/09/2010. It is true that in the said document, there is no date indicating duration of his position as a Director. At serial no. 4626 in list of companies, the Directors of which have been held to be disqualified, the name of company "Bekandze Healthcare Private Limited" is appearing. The Directors of said company have been declared disqualified for a period from 01/11/2016 to 31/10/2021. The applicant being one of the Directors of said company, necessarily stood disqualified to be Director.

20. Section 164 of the Companies Act, 2013 speaks of 'disqualifications for appointment of the Director'. Sub-section (2) thereof reads thus,

> "(2) No person who is or has been a director of a company which -
>
> (a) has not filed financial statements or annual returns for any continuous period of three financial years; or
>
> (b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,
>
> shall be eligible to be re-appointed as a director of that

company or appointed in other company for a period of five years from the date on which the said company fails to do so :

[PROVIDED that where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of six months from the date of his appointment.]"

21. While Section 167 of the Act speaks of 'vacation of office of Director'. Section 167(1) reads thus,

"(1) The office of a Director shall become vacant in case -

(a) he incurs any of the disqualifications specified in Section 164 :

[PROVIDED that where he incurs disqualification under sub-section (2) of Section 164, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section;]

(b) …..;

(c) …..;

(d) …..;

(e) he becomes disqualified by an order of a Court or the Tribunal;

(f) he is convicted by a Court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months:

[PROVIDED that the office shall not be vacated by the director in case of orders referred to in clauses (e) and (f) -

(i) …..;

(ii) …..; or

(iii) …..;

(g) …..;

(h) ……"

22. By the fact of all the Directors of company viz. Bekandze Healthcare Private Limited have been declared to be disqualified and the applicant being one of them, the officee held by him as the Director of accused no. 1 company became vacant. This has so happened in respect of the applicant on 07/09/2017. Admittedly the cheques in question were issued, post the applicant's position as a Director became vacant. He would therefore not be liable for prosecution in view of the principle of 'Vicarious Liability', in terms of Section 141 of NI Act. All the applications therefore deserve to be allowed. The applications thus succeed in terms of prayer clause (a) respectively, *qua* the applicant.

(R. G. AVACHAT, J.)