2024:BHC-AUG:30101

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

901 CRIMINAL APPLICATION NO. 1239 OF 2023

MONIKA W/O. AJIT MULEY
VERSUS
M/S. AMAN INDUSTRIES, AURANGABAD THROUGH ITS PROPRIETOR NERMALL S/O. SHAMLAL PATNI AND OTHERS
....
Mr. Santosh S. Naik, Advocate for the Applicant
Mr. Yogesh Somani, Advocate for Respondent No.1
....

CORAM : Y. G. KHOBRAGADE, J.

DATE : 14.12.2024

PER COURT :-

1. Heard both the sides at length.

2. The Applicant has filed the present Application under Section 482 of the Code of Criminal Procedure, 1973 seeking quashment of order of issuance of process dated 03.01.2019 passed by the learned J.M.F.C., Court No.19, Aurangabad, as well as prayed to quash the complaint bearing S.C.C. No. 10866 of 2018.

3. The learned Counsel for the Applicant canvassed that Respondent No.1/original complainant filed a complaint S.C.C.

No. 10866 of 2018 under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'N.I. Act'), alleging that on 30.09.2018, the Respondent No. 1/accused No. 2 company through its Director accused No. 4 Shri Bhushan Pundlikrao Patil, issued Cheque No. 102809 for an amount of Rs. 6,36,435/-, drawn on Abhudaya Co-operative Bank Ltd., Gulmandi Market, Aurangabad Branch, for discharging its legal liabilities. However, the said cheque was returned unpaid with bank return memo dated 04.10.2018. Accordingly, Respondent No.1 / complainant company issued a mandatory notice under Section 138 of the N.I. Act, which was served upon the Respondent No. 2 company as well as to all its Directors but the said notice did not comply with the statutory period. Therefore, Respondent No. 1/complainant filed the complaint and prayed for penal action against the present Respondent as well as other Respondents including all the Directors of Respondent No.2/company. After service of summons, the present Applicant appeared in the matter and filed an application for stay to the issuance of warrant on the ground that she is no more the Director of Respondent No.2 company with effect from 01.09.2016, as she submitted resignation under Section 168 of the Companies Act, 1956. The further changes in the particular form of the Directorship of the company has been effected vide letter dated 18.01.2023 issued by the Ministry of Corporate Affairs.

4. The learned Counsel for the Applicant submits that the alleged offence under Section 138 of the N.I. Act was allegedly committed on 16.11.2018 and the present Applicant / original accused No. 3 resigned from the post of Directorship w.e.f. 01.09.2016. Therefore, on the day of commission of the offence, the present Applicant / original accused No.3 was not the Director of Respondent No.2 company, so also, the Applicant was not responsible for day to day affairs of the Respondent No.2 / Company. Therefore, the Applicant is not liable to be prosecuted, so also, continuance of proceeding as against the present Applicant is abuse of process of law. Hence prayed for quashing of the complaint, ultimately seeking quashment of issuance of order of process. In support of these submissions, the learned for the Applicant placed reliance on the case of ***Rajesh Viren Shah Vs. Radington (India) Ltd., 2024 AIR (SCW) 1047; 2024 (3) Mh.L.J. 650,*** wherein it has been held that since the cheque was issued after acceptance of the resignation of the Appellant Director and no allegation is levelled against the Appellants, so

merely being a Director of Company, the Appellant cannot be prosecuted for the offence under Section 138 /141 of the N.I. Act, and observed in paragraph Nos. 5, 6, 7 and 8 as under:-

> "*5. Coming to the judicial position, we notice a judgment of this Court in* ***Monaben Ketanbhai Shah v. State of Gujarat, (2004) 7 SCC 15*** *wherein it was observed that:-*
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>> *"The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when the complainant makes necessary averments in the complaint and establishes that fact..."*
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> *6. A Bench of three learned Judges in* ***S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr., (2005) 8 SCC 89*** *observed:-*
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>> *"18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A clear case should be spelled out in the complaint made against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out..."*
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> *7. We also notice this Court to have observed, in regards to the exercise of the inherent powers under Section 482, CrPC, in*

cases involving negotiable instruments that interference would not be called for, in the absence of "some unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of process of Court." This principle as held in ***S.M.S. Pharmaceuticals*** *(supra) was followed in* ***Ashutosh Ashok Parasampuriya and Anr. V. Gharrkul Industries Pvt. Ltd. And Others, 2021 SCC OnLine SC 915****.*

8. We find the High Court, in the impugned order to have elaborately discussed the principles of law in regard to the quashing of such proceedings but, however, not dealt with the factual matrix. Ex facie, we find that the complainant has not placed any materials on record indicating complicity of the present appellant(s) in the alleged crime. Particularly, when the appellant(s) had no role in the issuance of the instrument, which is evident from Form 32 (Exh.P.59) issued much prior to the date on which the cheque was drawn and presented for realisation."

5. He further relied on the case of ***Sunita Palita and Others Vs. Panchami Stone Quarry, AIR 2022 SC 3548; 2022 (10) SCC 152,*** wherein it has been held that for Director of a company, who was not In-charge or responsible for the conduct of the business of the company at the relevant time, will not be liable under those provisos. As per the decision of the SMS Pharmaceuticals Limited cited (supra), the liability 138/141 of the N.I. Act arises from being In-charge of

and responsible for the conduct of the business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. It would be a travesty of justice to drag Directors, who may not be even be connected with the issuance of a cheque or dishonour thereof, such as Director, (Personnel), Director (Human Resources Development) etc., into criminal proceedings under the N.I. Act, only because of their designation.

6. He further relied on the case of ***Ajay Rampal Sarda Vs. Pankaj Ravilal Shah and another, 2021 All M.R. (Cri) 284: 2021 (3) Mh.L.J.(Cri) 50,*** wherein it has been held that in absence of averments in the complaint under Section 138 that at the time of commission of offence, the person accused was in-charge of the conduct of business of the firm and responsible for issuance of cheque. Merely because, the applicant was the partner in the partnership firm is not sufficient to make him liable for offence u/s. 141 of the N.I. Act, particularly, when no specific role is attributed to the applicant in the complaint. The applicant cannot be deemed to be in-charge of and responsible for the conduct of the day to day affairs of the business. The requirement is that the person sought to be

liable, should be in charge of and responsible for the conduct of the business of the firm at the relevant time.

7. Per contra, the learned Counsel for the Respondent vehemently canvassed that as per the information available at the website of the Ministry of Co operate Affairs, as on 18.01.2023, the present Applicant Mrs. Monika Ajit Muley, was shown as a Director of Respondent No.2 company (accused) and on the basis of said information, soon after dishonour of the cheque, the Respondent No.1 company/complainant issued a mandatory notice under Section 138 of the N.I. Act including the company as well as all the Directors of the accused company including the present Applicant (accused No.3). Though, the present Applicant was served with the mandatory notice, but she has not replied to the said notice stating that she was not Director of the company on the day of committing the offence under Section 138 of the N.I. Act. It is further canvassed that the Non-Applicant No.1 /complainant has made specific allegation in the complaint that Non-Applicant No.2 is the registered company and the other accused Nos. 2 to 5 including the present Applicant, are the Directors of Accused No.1 company. Therefore, the present Applicant / accused is also liable for the prosecution. In support of

these submissions, the learned Counsel for the Non-Applicant No.1/original complainant placed reliance on the case of ***Kirshna Texport & Capital Markets Ltd. Vs. Ila A. Agrawal & Ors, 2015 AIR SCW 2951**,* wherein the Hon'ble Apex Court in paragraph Nos. 14 and 15, held thus;

> *"14. Section 141 states that if the person committing an offence under Section 138 is a Company, every director of such Company who was in charge of and responsible to that Company for conduct of its business shall also be deemed to be guilty. The reason for creating vicarious liability is plainly that a juristic entity i.e. a Company would be run by living persons who are in charge of its affairs and who guide the actions of that Company and that if such juristic entity is guilty, those who were so responsible for its affairs and who guided actions of such juristic entity must be held responsible and ought to be proceeded against. Section 141 again does not lay down any requirement that in such eventuality the directors must individually be issued separate notices under Section 138. The persons who are in charge of the affairs of the Company and running its affairs must naturally be aware of the notice of demand under Section 138 of the Act issued to such Company. It is precisely for this reason that no notice is additionally contemplated to be given to such directors. The opportunity to the 'drawer' Company is considered good enough for those who are in charge of the affairs of such Company. If it is their case that the offence was committed without their knowledge or that they had exercised due diligence to prevent such commission, it would be a matter of defence to be considered at the appropriate stage in the trial and certainly not at the stage of notice under Section 138.*

15. If the requirement that such individual notices to the directors must additionally be given is read into the concerned provisions, it will not only be against the plain meaning and construction of the provision but will make the remedy under Section 138 wholly cumbersome. In a given case the ordinary lapse or negligence on part of the Company could easily be rectified and amends could be made upon receipt of a notice under Section 138 by the Company. It would be unnecessary at that point to issue notices to all the directors, whose names the payee may not even be aware of at that stage. Under Second proviso to Section 138, the notice of demand has to be made within 30 days of the dishonour of cheque and the third proviso gives 15 days time to the drawer to make the payment of the amount and escape the penal consequences. Under clause (a) of Section 142, the complaint must be filed within one month of the date on which the cause of action arises under the third proviso to Section 138. Thus a complaint can be filed within the aggregate period of seventy five days from the dishonour, by which time a complainant can gather requisite information as regards names and other details as to who were in charge of and how they were responsible for the affairs of the Company. But if we accept the logic that has weighed with the High Court in the present case, such period gets reduced to 30 days only. Furthermore, unlike proviso to clause (b) of Section 142 of the Act, such period is non-extendable. The summary remedy created for the benefit of a drawee of a dishonoured cheque will thus be rendered completely cumbersome and capable of getting frustrated."

8. In the case in hand, the cheque in question dated 30.09.2018, issued by the Director of the present accused No.2 company to discharge the legal liabilities. However, the said cheque

has been dishonoured on 04.10.2018 with an endorsement "Exceed arrangement". It is not in dispute that on 23.10.2018, the present Applicant No.1 / complainant issued a mandatory notice under Section 138 of N.I. Act to the company as well as to all its Directors including the present Applicant / original accused No.3. It is an admitted fact that the said notice was served upon all the Directors of the company including the accused company on 01.11.2018. Since the Non-Applicant No.2 company and its Directors failed to comply with the said notice within a period of 15 days, therefore, the alleged offence under Section 138 of the N.I. Act has allegedly been committed on 16.11.2018. Thereafter, the Non-Applicant No.1 complainant company filed the complaint SCC No.10866 of 2018.

9. On perusal of complaint, it appears that the Non-Applicant No.1 made the averments in paragraph No.1 that the Non-Applicant No.2 accused is a registered company and the present Applicant (Accused No.3) and others are the Directors of the Non-Applicant No.2 company. There is no statement in the complaint that the present Applicant was responsible for day to day affairs of the Non-Applicant No.2 accused company. Nonetheless, the information on the website of the Ministry of Corporate Affairs, the Government

of India, which was produced and relied by the Non-Applicant No.1 complainant company, wherein one of the Director was shown as complainant- Mrs. Monika Ajeet Mulay for the Non-Applicant No.2 accused company "Nirmangold Alloys Private Limited", appointed on 30.08.2010 and cessation of directorship w.e.f. 01.09.2016. However, in the case in hand, the cheque in question bearing No.10289 was issued on 03.09.2018 for an amount of Rs.6,36,435/-, which certainly appears subsequent to cessation of the Applicant being a Director of Non-Applicant No.2 accused company.

10. During the course of argument, the learned Counsel for the Applicant has produced details i.e. website information of the status of the Non-Applicant No.2 accused company, which shows that the present Applicant / original accused No.3 ceased from Directorship w.e.f. 01.09.216, which has not been disputed by the Non-Applicant No.1 / complainant company. Since the present Applicant / accused has already ceased from the Directorship of Non-Applicant No.2 accused company prior to issuance of the cheque in question, therefore, to my mind, the issuance of process as against the present Applicant is illegal, bad in law, so also, the present Applicant / accused is not liable for prosecution for the offence

committed by Non-Applicant No.2/ Company subsequent to cessation from the post of Directorship of the Non-Applicant No.2 company as per the ratios laid down in the cases cited (supra).

11. In view of above, I am inclined to grant the present Application and proceed to pass the following order:-

O R D E R

(i) The Criminal Application is hereby allowed.

(ii) The complaint S.C.C. No.10866 of 2018 pending on the file of the learned J.M.F.C. Court No.19, Aurangabad, is hereby quashed and set aside to the extent of the present Applicant. Ultimately, the order of issuance of process dated 03.01.2019 is hereby quashed and set aside to the extent of the present Applicant.

(iii) The Criminal Application is accordingly disposed of.

[Y. G. KHOBRAGADE, J.]

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