ABC 2019 (II) 284 BOM
ACQUITTAL & BAIL CASES

HIGH COURT OF BOMBAY

(S. S. Shinde, J.)

Criminal Writ Petition No 4470 of 2017

Decided on 21 June, 2019

MR. SAHADU DAGADU SATAV & ORS ***- Petitioner(s).***

Versus

STATE OF MAHARASHTRA & ANR. ***- Respondent(s).***

Law Covered:- ***Negotiable Instruments Act, 1881 — Sections 138 & 141 — Director of company — Vicarious liability — Not stated in the petition that petitioners were not Directors of the company during the relevant period — No evidence to clearly indicate that they were not concerned with the issuance of cheques — Held, the petitioners were directors on the date of commission of alleged offence & were responsible for the business of the said company as averred in the complaint— Petition rejected. (Para 18)***

Held:- In the present case, as already observed the petitioners were directors on the date of commission of alleged offence and were responsible for the business of the said company as averred in the complaint. The petitioners have not brought on record unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the petitioners could not have been concerned with the issuance of cheques and asking them to stand the trial would be abuse of process of Court. Therefore, prayer of the petitioners to cause interference in the impugned order deserves no consideration. The writ petition is devoid of any merits and stands rejected accordingly. Rule stands discharged. (Para-18)

Counsel:- ***For Applicant(s):*** *Mr. Samsher Garud,Mr. Santosh Avhad, Advs.*

For Respondent(s): *Mr. Parvez Rustomkhan, Ms. Anuja Jhunjhunwala, Ms. Rukshin Ghiaha, Mr. N.B. Patil, Advs.*

Cases Referred:-

1. *Sunil Bharti Mittal Vs. CBI (2015) 4 Supreme Court Cases 609, (Para-11)*
2. *Gunmala Sales Pvt. Ltd. Versus Anu Mehta & Ors, (2015) 1 SCC 103, (Para-12)*
3. *Standard Chartered Bank Versus State of Maharashtra, (2016) 6 SCC 62, (Para-12)*
4. *Tamil Nadu News Print and Papers Ltd. Versus D. Karunakar & Ors., (2016) 6 SCC 78, (Para-12)*

5. *S.M.S. Pharmaceuticals Ltd. Versus Neeta Bhalla & Ors, (2005) 8 SCC 89, (Para-12)*
6. *Gunmala Sales Pvt. Ltd. Versus Anu Mehta & Ors. (2015) 1 SCC 103, (Para-16)*
7. *K.K. Ahuja Vs. V.K. Vora & Anr. (2009) 10 Supreme Court Cases 48, (Para-17)*

JUDGMENT

S. S. SHINDE, J.: - 1. Rule, Rule with the consent of learned counsel for the parties made returnable forthwith and heard.

2. This petition is filed with following substantive prayer:

> *a. to call for the records of the proceedings of Complaint No. 360// SS/2016 pending before the Ld. Metropolitan Magistrate's 14th Court, at Girgaon, Mumbai and after considering the legality of the impugned order of issuance of process dated 27/10/2016 (Exhibit6 hereto) be pleased to quashed and set aside the same and thereby quash the complaint against the applicant.*

3. The complainant's case in brief is as follows:

The petitioners herein are original accused No. 4, 5, 6, 8 & 9 in Criminal Case No. 3608/SS/2016. They are the directors of the Accused No. 1 i.e. Shri. Saikrupa Sugar & Allied Industries Ltd. (for short "the said company"). The Respondent No. 2 (original complainant) is a company registered under the Indian Companies Act, 1956, engaged in the manufacture, marketing and sale of alcoholic beverages in India. The Respondent No. 2 is the original complainant who has initiated prosecution under Section 138 of Negotiable Instrument Act (for short 'the said Act') against the said company and petitioners alongwith other directors of the company. Shree Saikrupa Sugar & Allied Industries Ltd. is engaged in the business of manufacturing of grain/molasses and rectified spirits. The said company had represented to the Respondent No. 2 that, they had necessary facilities and requisite permissions to manufacture and supply rectified spirits as per the quality, specifications laid down by the Respondent No. 2. On 05.10.2015 agreement to supply rectified spirits was executed between the Respondent No. 2 and the said company. It was agreed that the said company would supply a total of 40,00,000/bulk liters of rectified spirits to the Respondent No. 2. As per the supply agreement the Respondent No. 2 had provided to the said company an interest free trade advance of Rs. 7,50,00,000/.

4. As per clause 9 of the Supply Agreement "if the said company i.e. Saikrupa fails to supply 40 Lacs BL of RS or part thereof within the period as mentioned in iterm no. 1, the said company i.e. Saikrupa

agrees to refund the advance against the balance supplies. ABD i.e. the Respondent No. 2 also reserves its right to deposit the cheques furnished by the said company i.e. Saikrupa to secure the advance. Saikrupa shall be liable for pay interest @ 24% p.a. against which supplies have not bee made." Accordingly the said company i.e. Accused No. 1 issued 8 undated cheques bearing nos. 186307, 186308, 186309, 186310, 186311, 186312, 186313, 186314, each of Rs. 1 Crore to secure the advance provided by the Respondent No. 2 under the supply agreement. The said company failed to commence supply of rectified spirits in terms of supply Agreement, the Respondent No. 2 requested the said company to replace the above mentioned cheques with fresh cheques towards the amount of the advance alongwith interest of Rs. 64,62,000/. Accordingly, Accused No. 1 issued the following fresh cheques towards advance amount and the interest aggregating to Rs. 8,14,62,000/.

Sr.No.	Date	Cheque No.	Amount (Rs.)
1	15/03/2016	642902	62,62,000/
2	15/03/2016	642903	2,00,00,000/
3	15/03/2016	642904	3,00,00,000/
4	15/03/2016	642905	2,50,00,000/
		Total	**8,14,62,000/**

5. On 22.03.2016 and thereafter time to time the accused no. 2 requested the Respondent No. 2 for additional time to repay the advance amount with interest through email. Since the aforesaid 4 postdated cheques dated 15th march 2016, were to expire in June, 2016, at the request of Respondent No. 2, Respondent No. 1 issued fresh 4 undated cheques in replacement of the aforesaid 4 postdated cheques towards repayment of the advance amount alongwith the interest.

Sr. No	Cheque No.	Amount (Rs.)
1	186246	3,00,00,000/
2	186247	2,00,00,000/
3	186248	2,50,00,000/
4	186249	1,00,00,000/
	Total	**8,50,00,000/**

6. On 16.08.2016 by email addressed by Accused No. 2 to Respondent No. 2 was also offered a security in the form of mortgage on 106 acres of land situated at Shirur, Maharashtra.

On 16.08.2016, the Respondent No. 2 deposited the aforesaid 4 undated cheques with its bankers i.e. Punjab National Bank, Opera House Branch, Mumbai, which were dishonoured with the remarks "Funds Insufficient" vide memo of dishonor dated 17th August 2017. On 09.09.2016, Respondent No. 2 therefore, sent a legal notice to the company and its director through its advocate under Speed Post A.D. calling upon the said company to pay the amount of aforesaid cheques within the stipulated period of 15 days.

7. It is the case of the petitioners that, the said notice was received by the said company and other accused no. 2, 5 & 8 and the acknowledgment card of the packet sent to accused no. 3 was not yet received by them. The notice addressed to accused no. 4 the envelopes returned with the postal remark "Refused to accept the delivery" and accused no. 6, 7, & 9 the envelope returned with the postal remark "Shifted". Respondent no. 2 filed the complaint under section 138 r/w. 141 of the said Act before the Ld. Metropolitan Magistrate, 14th Court, at Girgaon, Mumbai. The Learned Magistrate was pleased to issue process against the petitioners. Hence, the present petition.

8. Learned counsel appearing for petitioners submit that, plain reading and bare perusal of the complaint as well as the verification statement of Shri. Ritesh Shah recorded therein, nowhere alleged and averred in the complaint as to how the present petitioners are responsible for conducting day to day affairs of the said company. Further, the Respondent No. 2 nowhere alleged or averred in the complaint that the alleged offence had been committed either with the consent or connivance of the petitioners or that the same was attributable to any neglect on the part of the petitioners. Respondent No. 2 nowhere alleged or averred in the complaint that the said company has committed the alleged offence with the knowledge of the petitioners or that the petitioners had failed to exercise any due diligence to prevent the commission of the said offence.

9. It is submitted that, even in the verification on oath of the said Ritesh Shah, which is recorded under Section 200 of Cr.P.C., the said Ritesh Shah has not been able to lead any evidence to show the role or part (if any) played by the petitioners in the commission of the

alleged offence. The said Ritesh Shah has not led any evidence before the Ld. Magistrate to substantiate as to how the alleged offence came to be committed, and in what way the petitioners are responsible for the commission of the alleged offence. The said Ritesh Shah never alleged either in the complaint or in his verification statement that, cheques were signed or drawn by the petitioners, on a bank account maintained by the said company with Bank of India, Srigonda Branch, Ahmednagar. As there was/is no evidence or material produced on record by the respondent No. 2 to satisfy the mandatory requirements envisaged under section 141 of the said Act, the Ld. Magistrate was not authorized in law to issue any process against the petitioners.

10. It is submitted that, the learned Magistrate erred in law in taking cognizance of alleged offence against petitioners in issuing process, in spite of Respondent No. 2 having failed to describe/show petitioners as persons being in charge of and responsible for conducting business of the said company, at the time of commission of alleged offence.

It is further submitted that, neither in the complaint nor in the verification statement of complainant, petitioners were described or shown as the persons being in charge of and responsible of conducting business of the said company at the time of commission of alleged offence. Nothing has been brought on record to show that the petitioners were actual in charge and responsible for the day to day affairs of the company. It is the primary responsibility of the complainant to make specific averments in the complaint, the provisions of Section 141 of the said Act, were not applicable against the petitioners. In view of vague averments made in the complaint and in absence of necessary evidence in the verification statement, the petitioners are not liable to be summoned, prosecuted and tried for the alleged offence. Respondent No. 2 has miserably failed to make out any case for exercise of jurisdiction of learned Magistrate under Section 204 of Cr.P.C. for issuing process against the petitioners. There are no specific allegations made by Respondent No. 2 in the notice issued to the petitioners.

11. Learned counsel appearing for petitioners in support of aforesaid statements relied upon the ratio laid down by the Hon'ble Supreme Court in the case of ***Sunil Bharti Mittal V. CBI*** reported in ***(2015) 4 Supreme Court Cases 609***. It is submitted that, *Sine qua non* for taking cognizance of the offence is the application of mind by the

Magistrate and his satisfaction that the allegations, if proved, would constitute an offence. It is submitted that, in the impugned order no reasons are assigned before issuing the process against the petitioners.

12. On the other hand learned counsel appearing for Respondent No. 2 relying upon the averments in the complaint and the reasons assigned in the impugned order submits that, Respondent No. 2 has followed the proper procedure, in as much as, notice contemplated in the procedure under the said Act was given to the petitioners and thereafter complaint was filed before the Magistrate. The averments in the said complaint would clearly indicate that there is full compliance of mandate of Section 138 & 141 of the said Act, and also other procedure prescribed. It is submitted that there are specific averments in the complaint that at the relevant time of alleged act, petitioners were in charge of and responsible for conducting of business of Respondent No. 1 at the relevant time. Learned counsel invites attention of this Court to the avernments in the complaint and submits that there is full compliance of mandate of Section 141 of the said Act. In support of aforesaid contentions he relied upon the exposition of law by Hon'ble Supreme Court in cases of ***Gunmala Sales Pvt. Ltd. Versus Anu Mehta & Ors, (2015) 1 SCC 103, Standard Chartered Bank Versus State of Maharashtra, (2016) 6 SCC 62, Tamil Nadu News Print and Papers Ltd. Versus D. Karunakar & Ors., (2016) 6 SCC 78, S.M.S. Pharmaceuticals Ltd. Versus Neeta Bhalla & Ors, (2005) 8 SCC 89***.

13. Heard learned counsel appearing for petitioners and learned counsel appearing for Respondent No. 2 at length, with their able assistance perused the avernments in the complaint filed by Respondent No. 2 and also grounds taken in the petition and annexures thereto. It appears that the learned Magistrate perused the complaint and also verification statement (Exhibit6) and documents on record and after hearing the counsel for the complainant and after satisfying himself observed that the complainant has made out prima facie case against accused no. 2 to 9 for the offence punishable under section 138 of the said Act, and accordingly process has been issued against the petitioners. In nutshell averments in the complaint, in brief are as under:

22. The complainant respectfully says and submits that:

(a) that at the time the offence was committed, Accused Nos. 2 to 9 were the Directors and were in charge of and responsible for

the day to day affairs and management for Accused No. 1 and, therefore, they are liable for prosecution. The Cheques bearing Nos. 186246,186247, 186248 and 186249 all dated 16th August, 2016, drawn in favour of the complainant were signed by Accused No. 7;

(b) that the cheques bearing Nos. 186246,186247, 186248 and 186249 all dated 16th August 2016, in question were issued by the Accused in discharge of their liability to the complainant.

(c) that the cheques were dishonoured as there was insufficient funds in the bank account;

(d) that the complainant has sent the notice of demand dated 9th September, 2016, to all the Accused within 30 days of the receipt of the intimation of dishonor of the aforesaid cheques from the bank;

(e) that the Accused have failed to comply with the notice dated 9th September 2016, by not paying the amount of Rs. 8,50,00,000/ (Rupees eight crores fifty lakhs only) to the complainant within 15 days of the receipt of the complainant's Attorney's letter dated 9th September, 2016. The Accused have, therefore, committed an offence under Section 138 r/w. Section 141 of the Negotiable Instruments Act and are liable to be prosecuted and convicted for the same.

14. Aforesaid averments are reproduced in brief and not in detailed as stated in the complaint by Respondent No. 2.

15. I have carefully perused an averments in the complaint, so as to find out correctness of the order of an issuance of process passed by the learned Magistrate. Upon careful perusal of the averments in the complaint and in particular para no. 22 there of, there are specific averments wherein it is stated that at the time the offence was committed accused no. 2 to 9 i.e. present petitioners were Directors and were in charge of and responsible for day to day affairs and management of accused no. 1 and therefore, they are liable for prosecution.

16. The petitioners have no where stated in the petition that they were not Directors of Respondent No. 1 on the date of commission of an alleged offence nor they brought on record unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the petitioners though Director's could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of process of Court. The Hon'ble Supreme Court in the case of ***Gunmala Sales Pvt. Ltd. Versus Anu Mehta & Ors.***

Reported in ***(2015) 1 SCC 103,*** while explaining the ambit, scope and purport of Section 138 and Section 141 in para 34 held thus:

34. We may summarise our conclusions as follows:

34.1. Once in a complaint filed under Section 138 read with Section 141 of the NI Act the basic averment is made that the Director was in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, the Magistrate can issue process against such Director.

34.2 If a petition is filed under Section 482 of the Code for quashing of such a complaint by the Director, the High Court may, in the facts of a particular case, on an overall reading of the complaint, refuse to quash the complaint because the complaint contains the basic averment which is sufficient to make out a case against the Director.

34.3. In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about the role of the Director in the complaint. It may do so having come across 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. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an armtwisting tactics, the High Court may quash the proceedings. It bears repetition to state that no establish such case unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out. In the absence of such evidence or circumstances, compliant cannot be quashed.

34.4. No restriction can be placed on the High Court's powers under Section 482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of court. There are no fixed

formulae to be followed by the High Court in this regard and the exercise of this power depends upon the facts and circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but nothing prevents it from taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director.

17. As already observed, the averments in the complaint fulfills the mandate of provisions of the said Act. The Hon'ble Supreme Court in the aforesaid judgment in para 34.2 has clearly held that on an over all reading of the complaint, the High Court can refuse to quash the complaint because the complaint contains the basic averments which is sufficient to make out a case against the Director. The Supreme Court in the case of ***K.K. Ahuja Vs. V.K. Vora & Anr. Reported in (2009) 10 Supreme Court Cases 48*** in para 27 held as under:

27. The position under Section 141 of the Act can be summarised thus:

(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix "Managing" to the word "Director" makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii) In the case of a Director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegations about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under subsection (2) of Section 141.

(iii) In the case of a Director, secretary or manager [as defined in Section 2(24) of the Companies Act] or a person referred to in clause (e) and (f) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 141(1) of the

Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also made liable under Section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that subsection.

(iv) Other officers of a company cannot be made liable under subsection (1) of Section 141. Other officers of a company can be made liable only under subsection (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence.

18. In the present case, as already observed the petitioners were directors on the date of commission of alleged offence and were responsible for the business of the said company as averred in the complaint. The petitioners have not brought on record unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the petitioners could not have been concerned with the issuance of cheques and asking them to stand the trial would be abuse of process of Court. Therefore, prayer of the petitioners to cause interference in the impugned order deserves no consideration. The writ petition is devoid of any merits and stands rejected accordingly. Rule stands discharged.

***Result*:-** Petitions rejected.

ABC 2019 (II) 293 BOM
ACQUITTAL & BAIL CASES

HIGH COURT OF BOMBAY

(S. S. Shinde, J.)
Criminal Writ Petition No 1062 of 2019
Decided on 11 July, 2019

MR. AKHILESH S/o. SURYABALI SINGH - Petitioner(s).

Versus

MR.HARIKESH S/o. CHANDRABALI SINGH & ANR.- Respondent(s).

Law Covered*:-** ***(A) Negotiable Instruments Act, 1881 — Section 138 — Code of Criminal Procedure, 1973 — Section 91 — Cheque in question in the custody of IO in a case under IPC — request for production before court in case under NI Act — Direction by trial Court to produce the cheque & bank memo for the purpose of