

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL MISC.APPLICATION NO. 17470 of 2013**

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HETAL MAHENDRA THAKKAR

Versus

STATE OF GUJARAT & 1 other(s)

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Appearance:

MR. BHADRISH S RAJU(6676) for the Applicant(s) No. 1

MR BM MANGUKIYA(437) for the Respondent(s) No. 2

MS BELA A PRAJAPATI(1946) for the Respondent(s) No. 2

MR LB DABHI, APP for the Respondent(s) No. 1

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CORAM:HONOURABLE MR. JUSTICE HASMUKH D. SUTHAR

Date : 30/06/2023

ORAL ORDER

1. By this application under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C. for short), the applicant seeks to invoke the inherent powers of this Court, praying for quashing of Criminal Case No.928/2013 pending before the learned Metropolitan Magistrate (Negotiable Instruments Act), Court No.30, Ahmedabad and all other consequential proceedings arising therefrom.

2. Learned advocate for the applicant has submitted that the present applicant is not a signatory to the cheque nor the cheque has been issued on behalf of any company or association. Even the applicant is not a drawer of the cheque and therefore, he cannot be made vicariously liable as the cheque was not issued towards any legally enforceable debt.

Even the present applicant is not an account holder and the cheque is issued by accused No.1 - Ritesh Dilipbhai Kotak, who is account holder and he maintains account with the bank. Hence, impugned complaint under Section 138 of the Negotiable Instruments Act against the applicant is not maintainable and therefore, he has requested to quash and set aside the proceedings.

3. Learned advocate appearing for the opponent while opposing the application has stated that, while the cheque was issued, at that time, the applicant was present and both the accused have issued cheque in connivance with each other and no reply of the notice is given by the present applicant. Hence, he submitted that present application does not deserve any consideration.

4. I have given thoughtful consideration qua the arguments canvassed by learned counsel by both the sides.

5. The cursory facts necessary for disposal of the application are as under:-

5.1 The impugned complaint is filed by power of attorney holder of the complainant. The original complainant knew original accused No.1 through one Dharmendrabhai Gandhi of Ahmedabad, who is financial advisor and accused No.1 gave proposal to purchase part shares of M/s. Viva Dehydrate Marketing Pvt. Ltd., a company owned by the complainant, which shares were in

the name of the original complainant. It is further alleged in the complaint that, for the said purpose, a meeting dated 14.01.2012 was convened between the accused No.1, complainant and Dharmendrabhai Gandhi at the office of accused No.1 and in the said meeting, accused No.1 gave proposal to purchase part shares worth of Rs.250 lacs of the company, out of which the complainant accepted the proposal of part shares of Rs.50 lacs owned by the original complainant and as per the said proposal, accused Nos.1 and 2 became Directors of the company from 17.01.2012 and they have also filed Form No.32 before the Registrar of Companies in this regard.

5.2 Thereafter, the complainant gave contract note, delivery note and sale bill to the accused on 24.02.2012 and accused No.1 receiving the same had sold the said shares. It is further alleged in the complaint that the accused No.1 in presence of original accused No.2 had given account payee cheque No.951205 dated 10.03.2012 for Rs.50 lacs drawn on HDFC Bank Ltd, Vastrapur Branch, Ahmedabad towards payment of above stated part shares of Rs.50 lacs.

5.3. The cheque signed by accused No.1 and at that time, both the accused had given assurance to the complainant that the cheque would be honored when it is presented in the bank. Thereafter, when the said cheque was presented on 21.05.2012, the same was dishonoured

on 22.05.2012 with return memo having endorsement “Funds Insufficient” and “Drawer Signature differs”. Hence, the complainant issued a statutory notice on 21.06.2012, which was returned as unclaimed. Hence, the complaint came to be filed against the present applicant and one Riteshbhai Dilipbhai Kotak (accused No.1). Present applicant has been joined as accused No.2. The complaint is produced at Annexure-A. Cheque is produced at Annexure-B and return memo is produced at Annexure-D.

6. Thus, on bare perusal of the complaint, it appears that accused No.1 – Ritesh Dilipbhai Kotak had issued cheque in presence of present petitioner (accused No.2) and it is clearly stated in the complaint that accused No.1 has put his signature on the cheque and except the presence of petitioner (accused No.2) while execution of the cheque by accused No.1, no any averment being made against present petitioner. Now, in the aforesaid background, only a short question that would fall for consideration of this Court is, whether the applicant is liable for the offence under Section 138 of the Negotiable Instruments Act ?

7.1 To answer this question, let us refer the Section 141 of the N.I.Act, which says “*every person who was in charge of and was responsible to the company for the conduct of the companies*”. Section 141 of the Negotiable Instruments Act,

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 in charge 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: 22 [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.”

7.2. In this regard, it is profitable to refer the judgment delivered by the Apex Court in case of **S.P.Mani and Mohan Dairy Vs. Dr. Snehlatha Elangovan**, reported in AIR 2022

SC 4883, wherein, the Hon'ble Apex Court has been pleased to hold as under:-

“36. Now, the logical question that would follow is who would be liable through the company for this offence? Can the company itself be prosecuted for this offence? Answering this question, the [Section 141](#) says, ‘every person who was in charge of’ and ‘was responsible to the company for the conduct of the business’ shall be deemed to be guilty of the offence. This concept of vicarious liability has been explained by this Court in [Sabhitha Ramamurthy v. RBS Channabasavaradhya](#), AIR (2006) SC 3086, as: “[Section 141](#) raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the [Companies Act](#), 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance with the statutory requirements would be insisted.” [Emphasis supplied].”

7.3. Further, it would be profitable to refer the decision of the Hon'ble Apex Court in case of **K. K. Ahuja Vs. V.K. Vora, [(2009) 10 SCC 48]**, wherein, the Hon'ble Apex Court has been pleased to discuss the principles of vicarious liability of the officers of a company in respect of dishonour of a cheque and held as under:-

(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 allegation 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 clauses (e) and (f) of [section 5](#) of 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 be 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 sub section.

(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.” [Emphasis supplied].”

7.4 Even, in a case of **Sunita Palita Vs. M/s. Panchami Stone Quarry, reported in 2022 SCC Online Page 945**, wherein, the Hon'ble Apex Court held as under:-

“When the accused is the Managing Director or a Joint Managing Director of a company, 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. This is because the prefix “Managing” to the word “Director” makes it clear that the

Director was in charge of and responsible to the company, for the conduct of the business of the company. A Director or an Officer of the company who signed the cheque renders himself liable in case of dishonour. Other officers of a company can be made liable only under subsection (2) of [Section 141](#) of the NI Act 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.”

7.5 Further, the law laid down by the Hon'ble Apex Court in the case of **Alka Khandu Avhad Vs. Amar Syamprasad Mishra [(2021) SCC-4-675]**, in para 8.1 as under:-

“8.1 [Section 141](#) of the NI Act is relating to the offence by companies and it cannot be made applicable to the individuals. Learned counsel appearing on behalf of the original complainant has submitted that “Company” means any body corporate and includes, a firm or other association of individuals and therefore in case of a joint liability of two or more persons it will fall within “other association of individuals” and therefore with the aid of [Section 141](#) of the NI Act, the appellant who is jointly liable to pay the debt, can be prosecuted. The aforesaid cannot be accepted. Two private individuals cannot be said to be “other association of individuals”. Therefore, there is no question of invoking [Section 141](#) of the NI Act against the appellant, as the liability is the individual liability (may be a joint liabilities), but cannot be said to be the offence committed by a company or by it corporate or firm or other associations of individuals. The appellant herein is neither a Director nor a partner in any firm who has issued the cheque. Therefore, even the appellant cannot be convicted with the aid of [Section 141](#) of the NI Act. Therefore, the High Court has committed a grave error in not quashing the

complaint against the appellant for the offence punishable under Section 138 r/w Section 141 of the NI Act. The criminal complaint filed against the appellant for the offence punishable under Section 138 r/w Section 141 of the NI Act, therefore, can be said to be abuse of process of law and therefore the same is required to be quashed and set aside.”

7.6. In view of the above, present applicant – accused No.2 is neither signatory to the cheque nor the cheque was drawn from his bank account or the account maintained by him. Further, the account in question was not a joint account nor cheque has been issued by a Company, Association or any Firm, in fact, accused No.1 Ritesh Kotak has issued a cheque in his personal capacity. Even in the complaint produced at Exh:A, no any Firm, Company or Association is joined as party in the complaint.

8. In view of the above, there is no any whisper about the role of the applicant that how the applicant is connected with the alleged offence. Even remotely, there is no any evidence or averment, which holds the applicant vicariously liable for the alleged offence and in absence of any evidence, how the present applicant has been jointly or vicariously liable to pay the debt or in connivance with accused No.1, he has issued a cheque. The Section 138 of the N.I.Act does not speak about the joint liability. It appears that the cheque is issued in individual capacity as person, accused No.2 (petitioner herein) cannot be prosecuted for the offence under Section 138 of the

N.I. Act. Therefore, the complaint filed under Section 138 of the Act against the applicant can be said to be an abuse of process of law and it is a fit case to invoke the power under Section 482 of the Cr.P.C and therefore, the impugned proceeding is required to be quashed and set aside.

9. For the foregoing reasons, present application is allowed. The proceedings of Criminal Case No.928/2013 and order issuing process passed by the Court of learned Metropolitan Magistrate (Negotiable Instruments Act), Court No.30, Ahmedabad as well as all other consequential proceedings, if any, arising thereof are hereby quashed and set aside qua the applicant. Rule is made absolute.

(HASMUKH D. SUTHAR,J)

SUCHIT