

Section 138 The Negotiable Instruments Act, 1881- Bombay High Court reiterates position as set out by the Supreme Court regarding prosecution of Directors.

INTRODUCTION:

While dealing with a writ petition for setting aside an order of the Metropolitan Magistrate Court for issuance of process against the directors of a company, the Hon'ble Bombay High Court in the case of Mr. Sahadu Dagadu Satav v/s. State of Maharashtra & Ors. (Criminal Writ Petition No. 4470 of 2017) held that in absence of a record or an evidence which may clearly indicate that the directors of the company could not have been concerned with the issuance of cheques, the Metropolitan Magistrate Court was right in passing an order for issuance of process against such directors.

FACTS:

The Petitioners were the Original Accused No. 4, 5, 6, 8 and 9 in Criminal Case No. 3608/SS/2016, being the directors of the Accused No. 1 (**"the Company"**). The Respondent No. 2 - (**"Original Complainant"**), had initiated proceedings under Section 138 of the Negotiable Instrument Act (**'the said Act'**) against the Company and the Petitioners who were the directors of the Company at the time when the offence under Section 138 of the said Act was committed. A Supply Agreement was executed by and between the Company and the Original Complainant wherein it was agreed that the Original Complainant had provided to the said Company an interest free trade advance of Rs. 7,50,00,000/- . The Supply Agreement provided that if the Company failed to supply the agreed bulk litres of rectified spirits to the Original Complainant then in that case the Company agreed to refund the advance. It was agreed that the Original Complainant reserved its right to deposit the cheques furnished by the Company to secure the advance. The Company issued 8 undated cheques to secure the advance provided by the Original Complainant under the Supply Agreement. The Company failed to commence supply of rectified spirits in terms of

the Supply Agreement. The Original Complainant requested the Company to replace the above cheques with fresh cheques towards the amount of the advance along with interest of Rs. 64,62,000/- Accordingly, the Company issued fresh cheques on 15th March, 2016 for an amount of Rs. 8,14,62,000/-. Thereafter, on various occasions the Accused No. 2 requested for additional time to repay the advance amount with interest. Ultimately, the Original Complainant deposited the fresh cheques with its bankers. The Cheques got dishonoured with the remarks "Funds Insufficient" on 17th August, 2017. Therefore, on 9th September, 2017 the Original Complainant addressed a legal notice to the Company. The Original Complainant then filed a Complaint under Section 138 read with Section 141 of the said Act before the Metropolitan Magistrates Court. The Metropolitan Magistrate was pleased to issue process against the Petitioners. Aggrieved by the said order passed by the Metropolitan Magistrate the Petitioners being the Original Accused No. 4, 5, 6, 8 and 9 filed the Criminal Writ Petition in the Bombay High Court.

ISSUE FOR CONSIDERATION:

The issue for consideration before the Hon'ble

Court was whether the impugned order of issuance of process passed by the Metropolitan Magistrate against the Petitioners was illegal and ex-facie bad in law and was required to be quashed and set aside as the Company had not made detailed averments on the role of each director.

SUBMISSIONS ON BEHALF OF THE PETITIONERS:

The Contention of the Petitioner was that the verification statement of the authorized representative of the Original Complainant, nowhere alleged and averred in the complaint as to how the Petitioners were responsible for conducting the day to day affairs of the Company. The Petitioners submitted that it was not averred or alleged in the Complaint that the alleged offence was 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. In the verification on oath recorded under Section 200 of the Code of Criminal Procedure, 1973 the Original Complainant had not been able to lead any evidence to show the role or part played by the Petitioners in the commission of the alleged offence or prove that the cheques were signed or drawn by the Petitioners. Nothing had been brought on record to show that the Petitioners were actually in charge and responsible for the day to day affairs of the Company. Reliance was placed on the case of **Sunil Bharti Mittal v. CBI.**¹ Since, the Respondent No. 2 could not substantiate that the alleged offence was

committed by the Petitioners the Metropolitan Magistrate was not authorised in law to issue any process against the Petitioners.

SUBMISSIONS ON BEHALF OF THE ORIGINAL COMPLAINANT:

The Respondent No. 2 relying on the averments in the Complaint and the reasons assigned in the impugned order submitted that, the Original Complainant had followed the proper procedure in as much as notice contemplated in the procedure under the Act was given to the Petitioners and thereafter the Complaint was filed before the Magistrate. The averments in the Complaint clearly indicated full compliance of the mandate of Section 138 and 141 of the said Act and there were specific averments in the Complaint that at the relevant time of the alleged act, Petitioners were in charge of and responsible for conducting the day to day business of the Company. Reliance was placed on the cases of **Gunmala Sales Pvt. Ltd. v/s Anu Mehta & Ors**², **Standard Chartered Bank Versus State of Maharashtra**³, **Tamil Nadu News Print and Papers Ltd. v/s. D Karunakar & Ors.**⁴, **S.M.S. Pharmaceuticals Ltd. v/s. Neeta Bhalla & Ors.**⁵.

HELD:

On a perusal of the averments in the Complaint the High Court held that there were in fact averments wherein it was stated that at the time the offence was committed the Petitioners were the directors of the Company and were

¹ (2015) 4 SCC 609

² (2015) 1 SCC 103

³ (2016) 6 SCC 62

⁴ (2016) 16 SCC 78

⁵ (2005) 8 SCC 89

responsible for the day to day affairs and management of the Company, therefore liable for prosecution. The Court made observations by placing reliance on the case of Gunmala Sales Pvt. Ltd. (supra) in which it was held that on a basic averment made that a director was in charge and responsible for the day to day management of the Company when the offence was committed, the Magistrate can issue process against such Director. The High Court can refuse to quash a complaint because the complaint contains the basic averments which is sufficient to make out a case against the director. The High Court also placed reliance on the Judgment of the Supreme Court in the case of **K.K. Ahuja V/s. V.K. Vora & Anr⁶**. The Court observed that the Petitioners were directors on the date of commission of the alleged offence and were responsible for the business of the Company. The Court held that since, the

Petitioners had not brought on record unimpeachable, incontrovertible evidence which was beyond suspicion and doubt which would 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, the Writ Petition was rejected.

Aggrieved by the Order of the Bombay High Court, the Petitioners preferred a Special Leave Petition before the Supreme Court, which was dismissed by the Supreme Court. M Mulla Associates advised the Original Complainant.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

⁶ (2009)10 SCC 48