

(2017) 08 BOM CK 0106
In the Bombay High Court
Case No : 123 of 2017

Nurallah Veljee Son of late Kamruddin Veljee

APPELLANT

Vs

Mr. Thomas F. S. Machado

RESPONDENT

Date of Decision : 09-08-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 482](#) - Saving of inherent powers of High Court
[Negotiable Instruments Act, 1881](#), [Section 138](#), [Section 138\(b\)](#)

Citation : (2017) 08 BOM CK 0106

Hon'ble Judges : C. V. Bhadang

Bench : SINGLE BENCH

Advocate : Kaif Noorani, S. P. Munj

Final Decision : Allowed

Judgement

1. On 19/07/2017, a notice for final disposal was issued. Accordingly, the matter is heard finally.
2. The challenge in this petition under Section 482 of the Code of Criminal Procedure (Code, for short) is to the order dated 10/05/2017, passed by the learned Judicial Magistrate, First Class at Panaji in Criminal Case No.91/OA/17/C. By the impugned order, the learned Magistrate has issued process against the petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act (Act, for short).
3. The brief facts are that the respondent has filed the aforesaid complaint under Section 138 of the Act for dishonour of three cheques viz. dated 22/09/2016, 03/10/2016 and 10/10/2016. A perusal of the said cheques clearly brings out that the cheques are signed by the petitioner as an authorised signatory on behalf of "Space Deal Pvt. Ltd", which is a Private Limited Company. Indisputably, the notice under Section 138(b) of the Act pursuant to the dishonour of cheques was issued by the respondent to the petitioner in his

capacity as the Director of M/s. Space Deal Pvt Ltd. A perusal of the complaint further shows that the petitioner, in his capacity as the director of the said Company, is arrayed as the sole accused. It is, thus, clear that the Company as such or any other director/s have not been arrayed as the accused.

4. The learned Magistrate, by the impugned order dated 10/05/2017, has issued process against the petitioner. The said order reads thus :

"I have perused the complaint, affidavit in verification and the documents produced on record by the complainant.

From the above I am satisfied that the prima facie case is made out against the accused satisfying all the ingredients of provision of Section 138 of Negotiable Instrument Act.

Hence, issue process against the accused for appearance under section 138 of Negotiable Instrument Act."

5. The only contention raised on behalf of the petitioner is that under Section 141(2) of the Act, unless and until the Company is arrayed as the accused, no vicarious liability can be fastened on the Director. Strong reliance, in this regard, is placed on the decision of the Supreme Court in the case of Aneeta Hada Vs. Godfather Travels and Tours; (2012)5 SCC 661. It is submitted that the notice under Section 138(b) of the Act was also not issued to the Company and as such, the order of issuance of process is bad in law.

6. The learned Counsel for the respondent submits that at the stage of issuance of process, the defence of the accused is not required to be considered.

7. I have carefully considered the rival circumstances and the submissions made.

8. There cannot be any manner of dispute that at the stage of issuance of process, the learned Magistrate is required to look into the complaint and the verification and the plausible defence is not required to be considered. However, here is a case, where there is a statutory bar, in as much as, no vicarious liability can arise against the Directors, in the absence of the Company, which is an independent entity being arrayed as an accused. The Hon"ble Supreme Court in the case of Anita Hada has held thus:

"58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in *State of Madras Vs. C.V. Parekh*; 1971 SCC (Cri.)97, which is a three-Judge Bench decision. Thus, the view expressed in *Sheoratan Agarwal Vs. State of M.P.*; (1984)4 SCC 352 does not correctly lay down the law and, accordingly, is hereby overruled. The decision in *Anil Hada Vs. Indian Acrylic Ltd.*; (2000)1 SCC 1 is overruled with the qualifier as stated in paragraph 51. The decision in *U.P. Pollution Control Board V. Modi Distillery*; (1987)3 SCC 684 has to be treated to be restricted to its own facts as has been explained by us hereinabove."

9. It can, thus, be seen that there is a clear statutory interdict in entertaining the complaint, which the learned Magistrate was required to look into. Thus, this Court can exercise jurisdiction under Section 482 of Cr.P.C. as the complaint would inherently be not maintainable. In that view of the matter, the petition is allowed in terms of prayer clause (a).