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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 1112 OF 2001

Mrs. Carmel Peter Prabhu, | ... Applicant.
Aged 51 yrs., Indian Inhabitant,
permanently r/a. 80, Lavellle Rd., |
Bangalore-500 025, Karnataka.

V/s.

1. State of Maharashtra (through | ... Respondents.
   public prosecutor,High Court,B'bay.
2. Shri Manohar M. Khatri, |
3. Shri Rajesh M. Khatri,
   both adults, Indian Inhabitant, |
   R/at. 13, Jalpanki, Vikas Park,
   Juhu Tara Road, Mumbai-400 049 |

Mr. Subhash Jha a/with Rushita Jain, Sunny Punamiya, Ashish Shukla, Shreenath Srinivas i/by M/s. Law Global for the Applicant.
Mr. Jatin P. Shah, Advocate for the Respondent No.2 and 3.
Mrs. P. P. Bhosale, APP for the State.

CORAM : M.L.TAHALIYANI,J.
DATE : 18th MARCH, 2015

ORAL JUDGMENT :

1 Heard learned counsel for the Applicant, learned counsel for the Respondent Nos.2 and 3 and and leaned APP for Respondent No.1 - State.

2 The Applicant is accused no. 3 in Criminal Case No. 4507 of 2000 pending in the court of Judicial Magistrate, First Class, Thane and he is facing trial for the offence punishable under section 138 read with section 141 of the Negotiable Instruments Act, 1881. Accused No.1 before the trial court is a private limited company by name M/s. Skyline Construction Limited. Accused no.2 is the husband of the Applicant (accused no.3).

3 The learned counsel for the applicant has submitted that the complaint is absolutely silent as to what role the applicant had played in the alleged offence. It is further submitted that the complaint no where mentions as to how and in what manner the applicant was responsible for conduct of the business of the company i.e. accused no.1.

4 Learned counsel Mr. Subhash Jha appearing on behalf of the applicant has relied upon four judgments of the Hon'ble Supreme Court. First judgment relied upon by Mr. Jha is in the case of **K.Srikanth Singh** vs. **North East Securities Ltd., & Anr.**, reported in (2007) 12 Supreme Court Cases 788. Para 4 of the said judgment reads as under :

> "4. It is not in dispute that for showing a vicarious liability of a Director of a Company, upon the complaint it is incumbent to plead that the accused was responsible to the Company for the conduct of the business of the Company. No such allegation

having been made in the complaint petition, in our opinion, the High Court was not correct in passing the impugned judgment. The allegation contained in the complaint petition was that all the accused Directors participated in the negotiations for obtaining financial help for the accused No. 1, which in our opinion, would not give rise to an inference that the appellant was responsible for day-to-day affairs of the Company. An offence envisaged under Section 138 of the Negotiable Instruments Act contains several ingredients as has been held by a Three-Judge Bench of this Court in S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr. , in the following terms :(SCC pp 98-99, para10)

> "10. ...... What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of 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. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a director or manager or secretary was enough to cast criminal liability, the section would have said so. Instead of "every person" the section would have said "every director, manager or secretary in a company is liable"... etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned.

> Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action."

Second judgment relied on by Mr. Jha is in the case of **S.M.S.Pharmaceuticals Ltd.,** vs. **Neeta Bhalla & Anr.** , reported in (2005) 8 Supreme Court Cases 89. Reliance is placed on para 19 (a), which reads as under :

> "19. In view of the above discussion, our answers to the questions posed in the Reference are as under:
>
> (a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

Third judgment relied upon by Mr. Jha is in the case of **Saroj Kumar Poddar** vs. **State (NCT of Delhi) & Anr.** , reported in (2007) 3 Supreme Court Cases 693. Mr. Jha has invited my attention to para 14 of the said judgment, which reads as under :

> "14. Apart from the Company and the appellant, as noticed hereinbefore, the Managing Director and all other Directors were also made accused. The appellant did not issue any cheque. He, as noticed hereinbefore, had resigned from the Directorship of the Company. It may be true that as to exactly on what date the said resignation was accepted by the Company is not known, but, even otherwise, there is no averment in the complaint petitions as to how and in what manner the appellant was responsible for the

> conduct of the business of the Company or otherwise responsible to it in regard to its functioning. He had not issued any cheque. How he is responsible for dishonour of the cheque has not been stated. The allegations made in paragraph 3, thus, in our opinion do not satisfy the requirements of Section 141 of the Act.

My attention was also invited to the judgment of the Supreme Court in the case of **Sabitha Ramamurthy & Anr.** vs. **R.B.S. Channabasavaradhya**, reported in (2006) 10 Supreme Court Cases 581. Reliance is placed on part of the paragraph 7 of the said judgment. The relevant portion can be reproduced as under :

> "7. .... Not only the averments made in para 7 of the complaint petitions does not meet the said statutory requirements, the sworn statement of the witness made by the son of Respondent herein, does not contain any statement that Appellants were in charge of the business of the company. In a case where the court is required to issue summons which would put the accused to some sort of harassment, the court should insist strict compliance of the statutory requirements. In terms of Section 200 of the Code of Criminal procedure, the complainant is bound to make statements on oath as to how the offence has been committed and how the accused persons are responsible therefore. In the event, ultimately, the prosecution is found to be frivolous or otherwise mala fide, the court may direct registration of case against the complainant for mala fide prosecution of the accused. The accused would also be entitled to file a suit for damages. The relevant provisions of the Code of Criminal Procedure are required to be construed from the aforementioned point of view.

Lastly, Mr. Jha has relied upon the judgment of the Supreme Court in the case of **N.K. Wahi** vs. **Shekhar Singh & Ors.,** reported in (2007) 9 Supreme Court Cases 481. Mr. Jha has particularly invited my attention to para 8 of the said judgment, which can be reproduced as under :

> "8. To launch a prosecution, therefore, against the alleged Directors there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are incharge and responsible for the conduct of the business of the company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and the court can always come to a conclusion in facts of each case. But still in the absence of any averment or specific evidence the net result would be that complaint would not be entertainable.

5 No doubt, the law on the point is well settled that the complainant has to make averments in the complaint, defining the role of the each director, particularly the director who was incharge and was responsible for the conduct of the business of the company or a partnership firm, as the case may be. The judgments cited by Mr. Jha are more or less on the same law point. However, one thing is very pertinent in the judgment of His Lordship, Justice Dr. Arijit Pasayat in the case of **N.K.Wahi** vs. **Shekhar Singh & Anr**. (cited supra), which can be seen from para 8 of the judgment. The relevant portion of para 8 can be

reproduced again as under :

> "8. .... It is true that precise words from the provisions of the Act need not be reproduced and the court can always come to a conclusion in facts of each case. But still in the absence of any averment or specific evidence the net result would be that complaint would not be entertainable."

6 It is thus clear that it is not necessary for the complainant to use precise words used in section 141 of the Negotiable Instruments Act. What the complainant is required to aver is as to what role the particular director or partner had played in the transaction in question. The court can gather from the complaint and evidence, if any, produced by the complainant before issuance of a process as to whether the material is sufficient to issue a process under section 203 of the Cr. P. C.. Section 203 of Cr.P.C. runs as under :

> "203. Dismissal of complaint.--If, after considering the statements on oath (if any) of teh complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing."

As such, if one goes through the provisions of section 203, it would be clear that an opinion of the Magistrate is to be formed on the basis of the averments in the complaint and the statement of witnesses, if any, and that words used and statement of witnesses includes the documentary evidence which might have been produced at the time of the filing of the complaint and before issuance of the process.

7 The learned counsel Mr. Jatin Shah has submitted that when the respondent nos. 2 and 3 (complainants) referred to the accused, they meant to say that the accused nos. 1, 2 and 3 which included the applicant also. Para nos. 3, 4, 5 and 6 of the complaint indicate that respondent nos. 2 and 3 had made the allegations against the petitioner and her husband, both. My attention was also invited to the copy of the notice issued to the applicant and her husband as well as to the Company by the respondent nos. 2 and 3. In the said notice also the allegations have been made against the applicant and her husband who is accused no.2 in the complaint. It was further submitted by Mr. Jatin Shah that the agreement in respect of the flat, which was to be handed over to respondent nos. 2 and 3 by the applicant and her husband, was signed by the applicant. At this stage, it may be mentioned here that the applicant and her husband were directors of M/s. Skyline Constructions Pvt. Ltd., and being the builders and developers, they had agreed to sale the flat to respondent nos. 2 and 3. A part payment towards the consideration of the flat was made by respondent nos. 2 and 3.

A sum of Rs. 10,34,175/- was paid by the resondent nos. 2 and 3 to the applicant and her husband. The construction could not be completed as there were some problems. It is in these circumstances, that the applicant and her husband had allegedly agreed to pay a sum of Rs. 35,00,000/- to respondent nos. 2 and 3. A cheque in question, worth of Rs.35,00,000/- drawn on Canara Bank, Sheadripuram Branch, Bangalore, signed by the accused no.2 (husband of the applicant) was issued in favour of the respondent nos. 2 and 3. It is this cheque, which was dishonoured and ultimately led to the filing of a criminal complaint by the respondent nos. 2 and 3 against the applicant, her husband and the company, accused no.1.

8 The learned counsel Mr. Jatin Shah has invited my attention to the copy of the agreement in respect of the flat, which is signed by the applicant on behalf of accused no. 1 i.e. the Company. In brief, it is submitted by Mr. Jatin Shah that the averments in the complaint, notice and copy of the agreement clearly indicte that the applicant was incharge and responsible for the conduct of the business of the company alognwith her husband accused no.2. It is submitted by Mr. Jatin Shah that at this stage for proceedings against the accused, the material placed by the respondent nos. 2 and 3 before the trial court in the matter was sufficinet and no case is made out by the applicant for quashing the complaint.

9 I have considered the arguments submitted on behalf

of both the sides and particularly, the observations made by the Hon'ble Supreme Court in the judgment reported in 2007 (9) SCC 481 in N.K.Wahi's case (supra), where it is mentioend that it is not necessary for the complainant to use the precise words from the provisions of the Act and the requirement of the law is that there should be sufficient material in the complaint in the nature of averemnts and specific evidence, the net result of which could be an issuance of process. After having examined the complaint and copy of the agreement, prima facie, it appears that the applicant alongwith her husband was equally involved, incharge and responsible for the conduct of the business of the company, the accused no.1. It therefore, follows that the criminal application needs to be dismissed.

10 The criminal application is dismissed. Rule is discharged. No order as to costs.

11 Obesrvations made in this judgment are of prima facie nature and are only for the sake of deciding the present application and shall not influence the trial court in any manner during the course of the trial.

(JUDGE)

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