IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO.4679 OF 2015

Ram Kishore Mangal & 4 Ors. .... Petitioners
Vs.
State of Maharashtra & Anr. .... Respondents

Mr. J.S. Kini i/b Mr. Suresh Dubey for the Petitioners.
Mr. S.H. Yadav, APP, for Respondent No.1-State.
Mr. Kezer Kharawala i/b M/s. Lex Juris for Respondent No.2.

CORAM: A.V. NIRGUDE, J.

DATED: DECEMBER 15, 2015

P.C:

1. The learned counsel for respondent No.2-complainant undertakes to file Vakalatnama within two days.

2. Issue notice to the respondents. The learned APP and Mr. Kezer Kharawala i/b M/s. Lex Juris waive service of notice for and on behalf of respondent No.1-State and respondent No.2, respectively. Notice is made returnable forthwith. By consent, the petition is taken up for hearing.

3. This petition challenges an order issuing process against some of the accused in Criminal Case No.3244/SS of 2014, pending before the Metropolitan Magistrate, 6th Court, Mumbai.

4. Facts leading to this litigation are as under:-

Respondent No.2-complainant is a Limited Company and the case pertains to bouncing of cheques and prosecution under Section 138 of the Negotiable Instruments Act, 1881 (for short, "the N.I. Act"). Accused No.1 is also a Company. The other applicants are Chairman and Non-Executive and Executive Directors of said Company. It is the case of the complainant that certain cheques dated 18-10-2013 were issued by accused No.1-company for discharge of its legal liability. The said cheques, on presentation for payment on 19-10-2013, bounced. Soon thereafter, a statutory notice was given on 25-1-2014 to all the accused including accused No.1-company and its Managing Director who is accused No.3. Despite giving notice, no reply was given or payment made to the complainant and, therefore, on 7-3-2014 the complainant came before the Court and upon verification of the complainant, process was issued against all the 13 accused on 19-6-2014. Soon thereafter, some of the accused including -the present petitioners-challenged the issuance of process by filing a Criminal Revision Application before the learned Sessions Judge.

5. On 20-10-2015 the revision was partly allowed. Accused Nos.11 to 13, who are wives of three other accused stood discharged. The learned Sessions Judge upheld their contention that they were not concerned with the offence that was apparently committed by accused No.1-company.

The contention of the present applicants that they were not concerned with the commission of the offence was rejected by the learned Sessions Judge. Therefore, the question before me is, <u>whether -on facts alleged in the complaint- the applicants were 'connected' or 'concerned' with the commission of the offence alleged against accused No.1?</u> It is a common ground that the main accused is accused No.1-company.

6. Section 141 of the N.I. Act deals with the procedure when offences are committed by companies. Section 141 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:
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> **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.
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> (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 purpose of this section
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> (a) "company" means any body corporate and includes a firm or other association of individuals; and
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> (b) "director", in relating to a firm, means a partner in the firm."

7. Accused No.1-company has a peculiar composition for management. It has a Non-Executive Chairman, who is accused No.2 (applicant No.2 herein). This company has three Executive Directors, who are accused Nos.3, 5 and 6, <u>who are not</u> before the Court. Accused No.5 has, admittedly, put his signature on the cheques in question. Other applicants are non-executive directors.

If we go by the provisions of sub-section (1) of Section 141 of the N.I. Act, it is required to be deemed that in case an offence under Section 138 of the N.I. Act is committed by a Company, every person who was in-charge of and was responsible for the Company's conduct of business as well as the Company were deemed to be guilty of the offence and should be liable for prosecution. Sub-section (2) enlarges the scope of sub-section (1). It says, that in addition to persons named in sub-section (1), if any other officer of the accused Company has, by way of consent or connivance or neglect attributable to him abated the commission of offence, such persons would also be liable for prosecution.

8. In the light of these provisions, we must go to the averments in the complaint. The complainant-company stated that they advanced certain loan to accused No.1-company. The accused assured and guaranteed them repayment of the loan amount with interest. Some amount was recovered and for recovery of the remaining amount, the cheques in question were issued by accused No.1-company. The complainant stated that all the accused were responsible for day-to-day business of the accused company (this included the discharged accused). This clearly indicates that the allegation that all accused were responsible for day-to-day business was an omnibus and rather irresponsible statement.

In my view, in a case of this nature, the persons who are covered by sub-section (1) of Section 141 are the Managing Directors and signatories of the cheques. The underlined part of ss.(1) clearly indicates that those who are <u>in charge of the company</u> and <u>are responsible to the company for the conduct of the business of the company</u> would share vicarious liability of the company. Such persons are generally called Managing Director/s or executive directors. Word "executive" is usually used for indicating "responsible for day to day happenings in the a company. Non-Executive Directors are not generally in-charge of the company. It cannot be assumed that they are responsible to the company for the conduct of the company's business unless specific role is attributed to them. Those Officers and Directors who are not looking after the day-to-day business of the company are not vicariously liable to be prosecuted.

Sub-section (2) makes an exception to the above mentioned rule. It says that in addition to the Executives of the accused company, if the complainant knows that other Officers or Directors, Managers, Secretary, etc., of such company had given their consent or had connived with the Executives for commission of the offence or due to negligence on their part the offence was committed, such persons/Officers, Managers, Secretary, etc., could also be prosecuted. When a complaint is drafted, in my view, names of "Executive"s of the accused-company should be mentioned. Besides, details of role of the other Officers, Directors, Managers, etc., who could be prosecuted utilizing the provisions of sub-section (2) should be mentioned separately. In other words, as of rule, the "Executive"s of the company are liable to be prosecuted in a cheque bouncing case, but others could be prosecuted only if a specific role is attributed to them. Such persons cannot be prosecuted by making an omnibus statement that they were in-charge of the company or that they were responsible to the company or that they were responsible for the conduct of business of the company, etc..

In this case, from the narration in the complaint, I could see that the Executive Director of the company, signatories of the cheques and the company itself are liable to be prosecuted and none else. The other accused apparently did not play any role and therefore no process could have been issued against them.

9. In order to indicate what role the petitioners played in commission of the offence, the learned counsel for the complainant placed reliance on the accused-company's audited balance-sheet, in which the names of the petitioners are shown as Non-Executive Directors. They are, of course, members of various committees such as the audit committee, share-holders' grievance committee, etc.. The balance-sheet also indicated the number of meetings the petitioners attended during the relevant time. From this information, the learned counsel for the complainant tried to convince me that being the Directors, the petitioners were responsible to the company for the conduct of its business. I am afraid, the Directors do participate in the conduct of business of the company, they attend meetings and participate in taking decisions, etc.. But what is pertinent to note in this case is that the cheques issued by the company bounced

and despite service of notice, no payments were made. Who could be responsible for this failure? As indicated, in sub-section (1) of Section 141 of the N.I. Act only the Executives of the Company who look after the day-to-day business of the company would be held liable for the failure. It was their duty to attend to the discomfiture of failure of the cheques and receipt of notice under Section 138 of the N.I. Act. If we go by the submissions made by the learned counsel for the respondent-complainant, in a company if there are 21 Directors, all 21 Directors would be liable to be prosecuted. This will not help the complainant in the longer run. His case would become bulky and would get delayed. A complainant should not also forget that if a complaint is made against a company, it is the company which is the principal accused. The Executive Directors can be penalized for the failure of the company. The other Directors who are not related to the day-to-day business of the company should not be bothered.

10. In view of the above, the petition is allowed. The

process issued against the petitioners stands set aside. The petition is disposed of.

(A.V. NIRGUDE, J.)

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