IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1986 OF 2017

Sailendra Narain …Petitioner
V/s.
State of Maharashtra & Anr. …Respondents

WITH
CRIMINAL WRIT PETITION NO.1987 OF 2017
WITH
CRIMINAL WRIT PETITION NO.1988 OF 2017

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Mr. Rohan Kelkar a/w Mr. Chirag Bhatia, Mr. K. G. Mhatre and Ms. Shivani Trivedi i/by Mhatre & Associates for the Petitioner.

Ms. G. P. Mulekar, APP for the Respondent No.1 (State).

Mr. Pranav Badheka, Counsel a/w Mr. Prashant Pawar for Respondent No.2.

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CORAM : AMIT BORKAR, J.

DATE : OCTOBER 12, 2022

P.C.:

1. The petitioner who claims to be independent director of accused No.1 has filed this Petition challenging order of Sessions Judge rejecting challenge to order of issuance of process. The learned Sessions Judge rejected the Revision Application mainly on three following grounds:

(i). The petitioner attended 5 out of 11 meetings.

(ii). The petitioner was member of the audit committee.

(iii). The accused attended meeting of audit committee.

2. The Sessions Court though, *prima facie*, accepted the fact that the petitioner was independent director of accused No.1-company, however based on aforesaid three circumstances, the learned Sessions Judge recorded a finding that the petitioner actively participated in day-to-day activity of accused No.1-company.

3. Learned advocate for the petitioner invited my attention to the Judgment of Single Judge of this Court in the case of **Ram kishore Mangal & Ors. Vs. State of Maharashtra & Anr.,** 2015 SCC Online Bom 7406. He invited my attention to paragraph 14 of the said decision. Learned Single Judge in the said paragraph observed that as under:

> *"14. 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."

4. A careful reading of the said paragraph shows that it does not lay down any precedent or statement of law which would bind this Court. . Learned Single Judge in the facts of the case held that considering the peculiar facts of the case, the petitioner therein was not incharge or was not responsible for day-to-day affairs of the company.

5. The law on the point of ratio has been already settled in view of the decision in the case of **Quinn Vs. Leathem [(1901) AC 495]** that the ratio of any decision must be understood in the background of the facts of that case. A case is only an authority for what it actually decides, and not what logically follows from it. In that view of the matter, in my opinion, the Judgment cited by the learned advocate for the petitioner will be of no help to him.

6. He next relied upon the Judgment in the case of **Sunita Palita V/s. Panchami Stone Quarry** in Criminal Appeal No.1105 of 2022 decided on 1st August 2022. In the facts of the said case, the Apex Court was dealing with a case where the contention was raised by appellants therein that the non-executive directors who had no role to apply day-to-day affairs of the company were proceeded against in a complaint filed under Section 138. The Apex Court in paragraph 43 of the said Judgment held that the liability of a director depends on the role one plays in the affairs of the company and not on the designation or status of the company.

7. In the case of **S.P. Mani and Mohan Dairy V/s Dr. Snehalatha Elangovan** reported in 2022 SCC OnLine SC 1238 it is held paragraphs 47 as under:

> **"47.**Our final conclusions may be summarised as under:-
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> a.) The primary responsibility of the complainant is to make specific averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no legal requirement for the complainant to show that the accused partner of the firm was aware about each and every transaction. On the other hand, the first proviso to sub-section (1) of Section 141 of the Act clearly lays down that if the accused is able to prove to the satisfaction of the Court that the offence was committed without his/her knowledge or he/she had exercised due diligence to prevent the commission of such offence, he/she will not be liable of punishment.
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> b.) <u>The complainant is supposed to know only generally as to who were in charge of the affairs of the company or firm, as the case may be. The other administrative matters would be within the special knowledge of the company or the firm and those who are in charge of it. In such circumstances, the complainant is expected to allege that the persons named in the complaint are in charge of the affairs of the company/firm. It is only the Directors of the company or the partners of the firm, as the case may be, who have the special knowledge about the role they had played in the company or the partners in a firm to show before the court that at the</u>

relevant point of time they were not in charge of the affairs of the company. Advertence to Sections 138 and Section 141 respectively of the NI Act shows that on the other elements of an offence under Section 138 being satisfied, the burden is on the Board of Directors or the officers in charge of the affairs of the company/partners of a firm to show that they were not liable to be convicted. The existence of any special circumstance that makes them not liable is something that is peculiarly within their knowledge and it is for them to establish at the trial to show that at the relevant time they were not in charge of the affairs of the company or the firm.

c.) Needless to say, the final judgment and order would depend on the evidence adduced. Criminal liability is attracted only on those, who at the time of commission of the offence, were in charge of and were responsible for the conduct of the business of the firm. But vicarious criminal liability can be inferred against the partners of a firm when it is specifically averred in the complaint about the status of the partners 'qua' the firm. This would make them liable to face the prosecution but it does not lead to automatic conviction. Hence, they are not adversely prejudiced if they are eventually found to be not guilty, as a necessary consequence thereof would be acquittal.

d.) If any Director wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he/she is really not concerned with the issuance of the cheque, he/she must in order to persuade the High Court to quash the process either furnish some sterling incontrovertible material or acceptable circumstances to substantiate his/her contention. He/she must make out a case that making him/her stand the trial would be an abuse of process of Court."

8. Learned advocate at this stage is not in a position to controvert findings of fact recorded by the Revisional Court based on the material before it. In the absence of some sterling incontrovertible material or acceptable circumstances to substantiate his contention that petitioner was not in charge or responsible for day today activities, at the material time or anything shown that the findings recorded by the learned Sessions Judge are perverse, no interference under Article 227 of the Constitution of India is called for.

9. *In that view of the matter, there is no merit in the Petitions, therefore, Petitions are disposed of.*

(AMIT BORKAR, J.)

(The order is modified as per order dated 22nd November, 2022. The corrections in the paragraph no.9 of the order are shown in italics)