

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 1750 of 2020

Surendra Kumar Singhi

Vs

Registrar of Companies, West Bengal & Anr.

For the Petitioner : Mr. Sandipan Ganguly.

For the Opposite Parties : Mr. Dipankar Dandapath.

Heard on : 04.01.2023

Judgment on : 20.01.2023

Shampa Dutt (Paul), J.:

The revision has been preferred praying for quashing of proceedings in Case No. **CS/0108645/2016** now pending before the Learned Metropolitan Magistrate, 10th Court at Kolkata under Section 217(5) of Companies Act, 1956 and all orders passed there in including the orders dated 06.09.2016, 21.12.2016 and 13.03.2020.

The petitioner's case is that the opposite party/complainant has filed a complaint (CS-0108645/2016) before the learned Chief Metropolitan Magistrate, Kolkata against the petitioner stating there in that, M/s Mani Square Limited was incorporated on 30th October, 1959 under the Companies Act, 1956 with paid up share capital of Rs. 66,28,000/- and according to the provisions of Section 217(3) of the Companies Act, 1956, the Board of the company was bound to give fullest information and explanation in its report on every reservation, qualification or adverse remark contained in Auditor's report. That, upon scrutiny of the Balance-sheet and other documents as on 31st March, 2014 it was found that the Board of Directors did not furnish fullest information and explanation in their Director's report with respect to the Auditors in their report on Balance Sheet for the year ending on 31st March, 2014. In the Auditor's Report for the year ending on 31st March, 2014, the auditor has mentioned that there are no dues of Service Tax, VAT, Provident Fund, ESIC which had been deposited on

account of any dispute except disputed amount of WBST/VAT of Rs 49.24 Lakhs under the Commercial Tax Party and Revision Board and CST 11.13 Lakhs. This has resulted in violation of provisions of Section 217(3) of the Companies Act, 1956 and the said violation was pointed out to the Directors of the company vide Show Cause dated 30th May, 2016. However, the reply which has been received was not satisfactory and hence, the competent authority has issued instruction to launch prosecution for the aforesaid violation vide their letter dated 28th March, 2016.

The petitioner herein has been arraigned along with others as a director of Mani Square Limited. But the opposite party deliberately chose to overlook the fact that the purported violation is in respect of the financial year ending on 31st March, 2014 and not the periods subsequent thereto when the petitioner was appointed as an independent director of M/s Mani Square Limited **with effect from 2nd June, 2014** and therefore, the liability which was attempted to be thrust on the petitioner by the opposite party is totally untenable inasmuch as the petitioner did not have any connection with the said Mani Square Limited prior to 2nd June, 2014.

Based on the complaint of the opposite parties, the learned Chief Metropolitan Magistrate, Kolkata by his order dated 6th September, 2016 was pleased to take cognizance.

On 21st December, 2016, after receiving the file of the case, the learned Metropolitan Magistrate, 10th Court, Kolkata was pleased to issue summons against the petitioner and other accused persons.

That the rest of the accused persons on 10th October, 2017 filed an application under Section 205 of the Code of Criminal Procedure through their Learned Advocate and recorded a plea of guilty before the Learned Magistrate and were convicted and sentenced to pay a fine of Rs. 10,000/- only each, in default they were directed to undergo simple imprisonment for fifteen days. The fine amount as directed by the Learned Magistrate was paid by the rest of the accused persons.

However, the petitioner being absolutely innocent and having no connection with the alleged circumstances of the instant case, chose not to take the course adopted by the rest of the accused persons and prayed for discharge by filing a petition before the Learned Metropolitan Magistrate, 10th Court at Kolkata but by the impugned order dated 13th March, 2020, the Learned Magistrate was pleased to **reject the prayer of the petitioner for discharge**, inter alia, on the ground that the proceedings being Summons triable he is not empowered to direct discharge of the accused persons **(relying upon the judgment of the**

Supreme Court in Amit Sibal vs Arvind Kejriwal and Ors. (reported in (2018) 12 SCC 165).

The petitioner has been highly aggrieved by the initiation and continuation of the impugned proceedings and the Learned Magistrate also refused to direct discharge of the petitioner from the case.

Mr. Sandipan Ganguly, Learned Advocate for the petitioner has submitted that:-

- (a) The petitioner was requested to join the Board of Directors of M/s. Mani Square Limited as an “independent director” on 2nd May, 2014.
- (b) The petitioner gave his consent to join as an “independent director” of the said company on 6th May, 2014 and the formal consent in prescribed form, DIR-2 was given to act as an independent director on 17th May, 2014.
- (c) The said consent was acted upon by the company and the petitioner joined as an independent director on the Board of the said company since 2nd June, 2014 and **prescribed Form DIR-12 was duly filed with the Registrar of Companies on 8th June, 2014.**
- (d) The petitioner resigned from the Board of the said company on 31st December, 2016 by submitting Form DIR-11 evidencing such resignation.

Mr. Ganguly, has further submitted that the alleged violation mentioned in the impugned petition of complaint pertained to the financial year ending on 31st March, 2014 and the petitioner was not director of the company as on 31st March, 2014 and therefore, under no stretch of imagination, the prosecution could be allowed to be continued against the petitioner.

That according to the General Circular No. 1/2020-F.No.16/1/2020/Legal, Government of India, Ministry of Corporate Affairs dated 2nd March, 2020 wherein it has been categorically directed by the appropriate authority of the Government of India that unnecessary Criminal Proceedings should not be initiated against the independent directors and non-executive directors, Non-KMP (Non-Key Managerial Personnel) and non-promoters.

The Learned Magistrate failed to consider the aforesaid submissions in proper perspective and rejected the petition mechanically by simply stating that he has no authority to direct discharge of the petitioner.

That in the light of the facts and circumstances of the case and the legal submissions made the impugned prosecution against the petitioner cannot be allowed to continue any further and is liable to be quashed.

The initiation and/or continuation of the impugned proceedings, has amounted to gross abuse of process of Court and as such is liable to be quashed.

It is further submitted that it has been held by the Hon'ble Supreme Court of India by interpreting provisions of other statutes which are pari material to the penal provisions for which the petitioner is being prosecuted, that liability is attracted against a person/director for any violation committed by a company until such person is conclusively found to be a director on the date of offence.

A director of a company does not ipso facto by holding position of director become responsible for the conduct of the business of the company or any commission or omission of the company; before or after the date on which the said director, was inducted into or had resigned from the company.

The complaint has been mechanically filed against all directors picking up the list from the website of MCA on the date of filing of the complaint including the petitioner.

All the persons including the company secretary and managing directors who are involved in day to day affairs of the company and responsible for violations have pleaded guilty and were convicted and sentenced.

The impugned orders are absolutely untenable in law and are liable to be quashed.

The proceeding is otherwise bad in law and is also liable to be set aside and/or quashed.

Mr. Dipankar Dandapath, learned advocate for the opposite party has brought the notice of this court to the petition of complaint filed before the Magistrate wherein it has been categorically stated that upon scrutiny of Balance Sheet and other related documents in the XBRL format as at 31.03.2014, it was found that Board of Directors did not furnish fullest information and explanation in the Directors' report with respect to the Auditors in their report on Balance Sheet for the year ending 31.03.2014 have raised the following reservations/qualification/adverse remark :-

“In the Author's Report for the year ended 31.03.2014, the auditor has mentioned that “on the basis of out examination of records and according to the explanations given to us, there are no dues in respect of Service Tax, VAT, Provident Fund, ESIC etc which have not been deposited on account of any dispute except disputed amount WBST/VAT of Rs. 49.24 lacs under commercial Taxes Appellate and Revision Board and CST of Rs 11.13 lacs.”

This resulted in violation of Section 217(3) of the Companies Act, 1956.

On hearing the learned Advocates for both the parties and considering the materials on record including the documents relied upon it is seen that the invitation to the petitioner dated 02.05.2014 clearly shows that **the petitioner was invited to join the board of directors of the company Mani Square Limited as a Director and his consent was solicited (Annexure 'B').**

Annexure 'C' is the petitioner's reply dated 6th May, 2014 there to stating that he has **given his consent to act as an Independent Director** on the board of the company.

Form DIR 12 shows that the petitioner has been holding the designation of "Additional Director" and category "independent".

The designated partner details in the Ministry of Corporate Affairs shows the petitioner as a "Director" of Mani Square Limited.

Form no. DIR-11 is notice of resignation of a director to the registrar and it is shown in the said form that **the petitioner was a "director" of Mani Square Limited from 30th September, 2014 to 31st December, 2016.**

Annexure G is a notification of the Government of India, Ministry of Corporate Affairs regarding clarification on prosecutions filed or internal adjudication proceedings initiated against independent directors, non promoters and non-KMP non-Executive Directors-reg.

Learned Advocate for the opposite party has submitted a **written note** stating therein that as per records from MCA portal, **date of signing of board report for financial year 2013-2014 was 5th September 2014**. This falls well **within the period of directorship of the petitioner** being from 2nd June, 2014 till 31st December, 2016.

It is further submitted that the petitioner was an additional director from 2nd June, 2014 to 30th September, 2014 and was a director from 30th September, 2014 to 31st December, 2016 and as such being an Additional Director on record he is liable as stated in the petition of complaint.

In reply there to the petitioner has stated that he was an independent director and that he had given his consent to only act as an independent director of the board.

Section 161 (1) of the Companies Act 1956 governs appointment of additional director, alternate director and nominee director. The above provision clearly states that any person appointed by the Board of Directors should always be appointed as an additional director. It is only the shareholders in the general meeting who can appoint a regular director irrespective of the director being an independent director/alternate director/any other Director, the appointment can only be as additional director.

Hence the interpretation of the RoC that the petitioner was additional and not Independent Director is wrong and misinterpreted.

The said DIR 12 on page 23 under the column designation it is stated "Additional Director" because this is the requirement of the Act that any director appointed by the Board has to be appointed as Additional Director, however the next column below the said column designation i.e. category, states in the said form DIR 12 as "independent". The RoC has deliberately suppressed to mention in its report the second column category which establishes the fact that the petitioner has been appointed as Independent Director only.

The petitioner has never attended any board meeting nor was present during the meeting in which the report of the Board was considered and are in dispute. The petitioner has also not signed the said report, hence he was not the part of the board which considered approval of the report, hence cannot be held liable for any shortcomings of disclosure in the said report.

The Director's signing the report clearly states that the signatory to the report were Mr. Sanjay Jhunjhunwala and Mr. Srikant Jhunjhunwala and the petitioner had never signed any such report.

Counter to the reply has been filed by the opposite party.

That the attachment to the DIR 12 Form on behalf of Company- Mani Square Limited where petitioner joined as director, clearly states in its resolution dated 2nd June, 2014 that petitioner was appointed as an Additional Director and not as Independent Director.

As per Board's Report along with balance sheet for financial year 2013-2014, it has been mentioned that the petitioner has been appointed as Additional Director with effect from 2nd June, 2014.

Therefore at time of scrutiny of Balance Sheet of the company, the petitioner's name was reflected as additional director of the company as per records fetched from MCA portal website.

That for prosecution under Section 217(3) of Companies Act, 1956, all members of the Board at that point of time ought to have exercised due diligence when the balance sheet was approved. Whether absence of the petitioner from Board's meeting would be falling within the exceptions provided in Section 217(5) of 1956 Act or whether his case is covered under exceptions as mentioned in General Circular 1 of 2020 is essentially a mixed question of fact and law which requires judicial decision by the Trial Court.

Now the main points to be decided in this case are:-

1. What post was being held by the petitioner on the date of filing the report.

2. Whether the petitioner is responsible/liable for the offence alleged.

Point No. 1.

Form No. DIR – 11 clearly shows that on the date of resignation (30.12.2016) the petitioner was the **“Director”** of the Company.

The said form also shows that the petitioner was with the company **as “director” on and from 30.09.2014 to 30.12.2016.**

As seen from the portal, the petitioner was an “Additional Director” from 02.06.2014 to 30.09.2014.

Inspite of being shown on the portal as “Additional Director /Director” the petitioner did not lodge any complaint with the Ministry about the alleged wrong information. There is no case that the petitioner had filed any objection to the said wrong information (as alleged) on the portal.

Point No. 2.

The board report for the financial year 2013-2014 was filed on 5th September, 2014. From the records it is seen that the petitioner was then an “Additional Director” of the Company. Admittedly the other accused persons have pleaded guilty.

The main contention of the petitioner is that he was not attached to the company in the financial year 2013-2014 and as such he is not liable in any manner what so ever.

The case of the opposite party is that the **board report of the financial year 2013-2014 was filed on 5th September 2014** when the petitioner was an “Additional Director” and as such prima facie becomes liable for the said offences, **as filed in this case.**

The difference between Directors and Additional directors:-

Basis	Director	Additional Director
Section	A director is appointed as per provisions of Section 152 of the Companies Act, 2013.	Section 161 contains the provisions for appointment of an additional director.
Power to Appoint	Members of a company appoint a director.	Additional director is appointed by the Board of the Company
Resolution	Ordinary Resolution	Board Resolution
Term of Office	Generally 5 years unless the contrary is provided.	Up to the date of the Annual General Meeting or the Last date upto which AGM should have been held.

That an Additional Director is a director having the same powers, responsibilities and duties as other directors. The only difference between them is regards to their appointing authority and their term of office.

Powers and obligations

Though appointed on a temporary basis, an additional director is vested with the same powers of a director. Moreover, they are subject to all obligations and limitations of a director. They are also entitled to seek appointment as a permanent director at the Annual General Meeting. The additional director must utilize his/her powers in the best interest of the company and the shareholders.

Additional Director-Section 161

Section 161(1) provides that **the articles of a company may confer on its Board of Directors the power to appoint any person, other than a person who fails to get appointed as a director in a general meeting, as an additional director at any time who shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.**

For Regularization of Additional Director

Many people claim that the ROC knows about this director, as the company had already filed DIR 12 at the time of his appointment as additional director. So, following regularization DIR 12 is not required to be filed, which is absolutely a wrong understanding. Since he is now a director, and not an additional director. Therefore, ROC must be informed by filing a new DIR 12 that the additional director has been regularized as a director in the Company.

Moreover, additional directors are on equal footing, in terms of, of power, rights, duties, and responsibilities, as other directors are. Yet, tenure of additional director is up to the date of forthcoming AGM unlike directors which are duly appointed by shareholders in the general meeting. If the company wishes to continue with an additional director beyond the AGM, then it will have to go for his/her regularization.

The Supreme Court in **Shiv Kumar Jatia vs. State of NCT of Delhi, Criminal Appeal nos. 1263, 1264 and 1265-1267 of 2019**, held:-

*“27. The liability of the Directors /the controlling authorities of company, in a corporate criminal liability is elaborately considered by this Court in the case of **Sunil Bharti Mittal**. In the aforesaid case, while considering the circumstances when Director/person in charge of the affairs of the company can also be prosecuted, when the company is an accused person, this Court has held, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. At the same time it is observed that it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless **the Statute specifically provides for**. It is further held by this Court, an individual who has perpetrated the commission of an offence on behalf of the company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Further it is also held that an individual can be implicated in*

those cases where statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

29. *By applying the ratio laid down by this Court in the case of **Sunil Bharti Mittal** it is clear that an individual either as a Director or a Managing Director or Chairman of the company can be made an accused, along with the company, only if there is sufficient material to prove his active role coupled with the criminal intent. Further the criminal intent alleged must have direct nexus with the accused. Further in the case of **Maksud Saiyed vs. State of Gujarat & Ors.** this Court has examined the vicarious liability of Directors for the charges levelled against the Company. In the aforesaid judgment this Court has held that, the Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company, when the accused is a Company. **It is held that vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the Statute.** It is further held that Statutes indisputably must provide fixing such vicarious liability. It is also held that, even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.*

30. *In the judgment of this Court in the case of **Sharad Kumar Sanghi vs. Sangita Rane** while examining the allegations made against the Managing Director of a Company, in which, company was not made a party, this Court has held that when the allegations made against the Managing Director are vague in nature, same can be the ground for quashing the proceedings under Section 482 of Cr.P.C. In the case on hand principally the allegations are made against the first accused-company which runs Hotel Hyatt Regency. At the same time, the Managing Director of such company who is accused no.2 is a party by making vague allegations that he was attending all the meetings of the company and various decisions were being taken under his signatures. **Applying the ratio***

laid down in the aforesaid cases, it is clear that principally the allegations are made only against the company and other staff members who are incharge of day to day affairs of the company. In absence of specific allegations against the Managing Director of the company and having regard to nature of allegations made which are vague in nature, we are of the view that it is a fit case for quashing the proceedings, so far as the Managing Director is concerned.”

In the present case the petitioner as seen from the documents was an Additional Director on the date the board report was filed. To counter the same **evidence is required to be adduced during trial** so also to decide as to whether the petitioner at the relevant time of filing the report was a Director, Additional Director or an Independent Director. The responsibility of an Additional Director being the same as that of a director (but difficult from an independent director) they remain responsible, as the statute provides for the same.

Thus to quash the proceedings by exercising this Courts inherent powers would amount to an abuse of the process of Court and would also amount to serious miscarriage of justice.

CRR 1750 of 2020 is thus dismissed.

There will be no order as to costs.

All connected Application stand disposed of.

Interim order if any stands vacated.

Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.

Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)