

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.4451 OF 2021

1. Chirag Janardan Doshi
(Director of Manpasand Beverages
Limited) (Resigned as Director w.e.f.
29-05-2019) Aged: 44 years, Male,
Hindu, R/o-86, Royal Acres, Near
Billabong High International School,
Vadsar, Vadodara – 390 010.
 2. Dhruv Kanahiyalal Agrawal
(Director of Manpasand Beverages
Limited) (Resigned as Director w.e.f.
26-05-2019) Aged: 46 years, Male,
Hindu, R/o-A-103, Fortune Heights
Mangal Pandey Road, Sama, Nr.
Navrachna School, GIPCL Circle,
Vadodara – 390 002
State: Gujarat.
 3. Milindkumar Vasantrao Babar
(Director of Manpasand Beverages
Limited) (Resigned as Director w.e.f.
27-05-2019) Aged: 70 years, Male,
Hindu, R/o-22-A, Amin Park, Nr.
Avdhut Society, Vishvamitri,
Manjalpur, Vadodara – 390 011. .. Petitioners
(Original Accused Nos.2, 7 & 8)
- v/s.
1. The State of Maharashtra
Notice to be served through,
Learned Public Prosecutor,

High Court of Mumbai.

2. Oriental Containers,
A division of Oricon Enterprises
Limited, Registered under the
Companies Act, 1956,
Having its registered office at
1076, Dr. E. Moses Road, Worli,
Mumbai 400 018
Through Mr. Sanjay Jain,
authorized representative
of the Company

.. Respondent
(Original Complainant)

3. Manpasand Beverages Limited
A Company incorporated under
the provisions of Companies Act,
1956 having its registered
address at-
Survey No.1768 & 1774/1.
Village: Manjusar, Savli Road,
Taluka: Savli, District: Vadodara,
State: Gujarat.
4. Abhishek Dhirendra Singh,
Aged:46 years, Male, Hindu,
(Wholetime Director of
Manpasand Beverages Limited)
R/o-402W,Rio Vista, Behind
Gajanand Complex, Opp. Tube
Company, Old Padra Road,
Vadodara – 390 020.
5. Dhirendra Hansraj Singh,
Aged:49 Adult, Male, Hindu,
(Wholetime Director of
Manpasand Beverages Limited)

R/o-13, Sangeet Society,
Near Dmart Vasna Road,
Racecourse,
Vadodara – 390 007.

6. Paresh Chimanlal Thakkar,
Aged:48 years, Male, Hindu,
(CFO of Manpasand Beverages
Limited),R/o-A-14, Manasvi
Society, Nr. Poonam Complex,
Waghodia Road,
Vadodara – 390 025.
7. Mrs. Bharti Pratish Naik,
Aged:47 years, Female, Hindu,
(Director of Manpasand
Beverages Limited)
R/o-403, Sundaram Tower,
S-Cube Residency,
B/h. Reliance Mall,
Old Padra Road,
Vadodara – 390 030.
8. Bharatkumar Mahendrabhai Vyas,
Aged:52 years, Male, Hindu,
(Director of Manpasand Beverages
Limited), R/o-05, Tulsi Shyam,
B/h. Sardar Patel Society,
Vallabh Vidhya Nagar,
Anand – 388 120.
9. Bhavesh P. Jingar,
Aged:49 years, Male, Hindu,
(Director of Manpasand
Beverages Limited)
1768 & 1774, Patki-1,

Village Manjusar, Tal: Savli,
Vadodara,
Gujrat- 391 775.

.. Respondents

....

Mr. Ram Upadhyay, for the Petitioners.

Mr. A.R. Patil, APP, for State.

Mr. Pradeep J. Thorat, a/w. Ms. Aditi S. Naikare, for Respondent No.2.

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CORAM : R.G. AVACHAT, J.

RESERVED ON : 25 JANUARY 2023.

PRONOUNCED ON : 7 FEBRUARY 2023.

JUDGMENT:-

The challenge in this petition, under Article 227 of the Constitution of India, is to the orders of issuance of process against the Petitioners herein in proceedings/prosecutions instituted under Section 138 r/w. 141 of the Negotiable Instruments Act (for short N.I. Act).

2. Heard. The Petitioners 1 to 3 are original accused nos. 2, 7 and 8, respectively, in the criminal complaints, the details whereof have been given in para 1 of this petition. The complaints have been instituted by Respondent No.2-Oriental Containers, against the Petitioners herein and Respondent Nos. 3 to 9.

3. It is the case of the Respondent/complainant that it is

engaged in the business of manufacturing, selling and buying of packaging products, such as collapsible tubes crown caps, plastic closures, etc. Respondent No.3 (original accused no.1) is in the business of bottling and selling aerated and other beverages. It has, therefore, plants at some places in India. The original accused nos. 2 to 10, including the Petitioners herein, at the relevant time, were in charge of day-to-day management and business affairs of the accused Company. It is also the case of the complainant Company that accused no.1 placed purchase orders for supply of various quantity of bottle closures. The goods, namely, bottle closures, were supplied to the accused Company as per its requirement and in terms of the purchase orders. Various cheques, the details whereof have been given in para 3 of this petition, were issued towards price of goods purchased. The complainant Company presented the cheques for encashment. The cheques returned unpaid with remarks, "payment stopped". Statutory demand notices were, therefore, issued to the accused Company. Since there was no compliance of the demand notices, complaints for offence punishable under Section 138 r/w. 141 of N.I. Act came to be instituted. Learned Metropolitan Magistrate took cognizance of the offence/s and issued process against the accused Company and its directors, including the Petitioners herein.

4. Quashment of orders of issuance of process is asked for mainly on the following grounds:

- (i) The Petitioners were neither whole-time directors/managing directors, nor authorised personal signatories of the original accused no.1 Company;
- (ii) The Petitioners were not signatories of the cheques, allegedly bounced;
- (iii) There are no specific averments in the complaints and no specific role has been attributed qua the Petitioners herein and in what manner they have participated in the day-to-day business affairs of the accused Company;
- (iv) The Petitioners were the non-executive /independent directors;
- (v) The Petitioners do not come under the purview of Section 141 of the N.I. Act and the principle of vicarious liability shall not be applicable to them in view of various judgments of the Apex Court;
- (vi) The Petitioners have resigned as directors of the accused Company soon after the cheques in question were issued.

Learned Advocate for the Petitioners, in his arguments, reiterated the aforesaid grounds. He has relied on judgments of the Apex Court in case of *Sunita Palita & Ors. vs. M/s. Panchami Stone Quarry*¹ and ultimately, urged for allowing the petition.

¹ *Criminal Appeal No. of 2022 Arising out of SLP (Cri.) No.10396 of 2019, Supreme Court of India* New Delhi dated 1 August 2022

5. Learned Advocate for the complainant Company would, on the other hand, submit that in para 4 of the complaint, specific averments have been made to the effect that the accused nos. 2 to 10, including the Petitioners herein, were the directors at the relevant time and were in charge of the day-to-day management and business affairs of the accused no.1 Company. As such, the accused nos.2 to 10 were responsible for all the acts and actions of accused no.1 Company and liable for the same. According to learned Advocate, the Petitioners appear to have put in their papers post issuance of the cheques. The grounds, on which orders of issuance of processes are sought to be quashed, are all matters of facts. Those need to be answered by the trial court on appreciation of the evidence in the cases. Learned Advocate relied on the judgment of the Apex Court in case of *S.P. Mani and Mohan Dairy vs. Dr. Snehalatha Elangovan*².

6. Considered the submissions advanced. Perused averments in the complaints and the documents relied on. Also gone through the authorities placed into service.

Admittedly, the Petitioners 1 to 3 are original accused nos. 2, 7, 8 in the complaints.

7. The cheques issued by the Company returned unpaid. Statutory demand notice/s were, therefore, issued. Since there was no

² [2022] 0 Supreme (SC) 921

compliance of statutory demand notice/s, the complaints came to be filed. In para 4 and para 7A of the respective complaints, there are averments, as under:-

“4. The accused 2 to 10 are directors and at the relevant time were in charge of the day to day management and business and affairs of the no.1 herein. As such Accused no.2 to 10 are responsible for all the acts and actions of the no.1 herein and liable for the same.

7(a) Complainant states that the Accused No.2 and 10 are also liable as directors of the Company in charge of day to day business of Accused No.1 and have in active connivance, mischievously and intentionally issued the cheque to mislead the Complainant to provide credit to Accused No.1 when there was never any intention to honour the cheque on presentment and therefore liable under sections 138 read with section 141 and 142 of Negotiable Instrument Act, 1881.”

8. In view of the aforesaid averments in the complaint, learned Advocate for the Petitioners could not be heard to say that there are no specific averments in the complaint.

9. The Petitioners resigned/put in papers post issuance of cheques. Since they resigned post issuance of cheques, they cannot claim relief of quashment of proceedings in exercise of jurisdiction under Section 482 of Code of Criminal Procedure.

10. In para 47 of the judgment of Apex Court in case of *S.P. Mani* (supra), final conclusion was summarised as under:

“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.

b.) 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 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 judgement 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."

It has further been observed

"29. The seminal issue raised and requires to be settled in the present case is one relating to a person liable to be proceeded against under the provisions of sub-section (1) of Section 141 for being in-charge of and responsible to the company "at the time the offence was committed." It would, therefore, be important to find out the "time" when the offence under Section 138 can be said to have been committed by the company. It is common place that an offence means an aggregate of facts or omissions which are

punishable by law and, therefore, can consist of several parts, each part being committed at different time and place involving different persons. The provisions of Section 138 would require a series of acts of commission and omission to happen before the offence of, what may be loosely called “dishonour of cheque” can be constituted for the purpose of prosecution and punishment. It is held by the Supreme Court in *K. Bhaskaran v. Sankaran Vaidhyan Balan*, (1999) 7 SCC 510, that:

“14. The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence: (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice.”

30. Different persons can be in charge of the company when each of the series of acts of commission and omission essential to complete the commission of offence by the company were being committed. To take an example, in the case of a company, “A” might be in charge of the company at the time of drawing the cheque, “B” might be in charge of the company at the time of dishonour of cheque and “C” might be in charge of the company at the time of failure to pay within 15 days of the receipt of the demand notice. In such a case, the permissibility of prosecution of A, B and C reply or any of them would advance the purpose of the provision and, if none can be prosecuted or punished, it would frustrate the purpose of the provisions of Section 138 as well as Section 141. The key to this interpretation lies in the use of the phrase: “every person shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly” as it occurs in sub-section

(1) of Section 141 and the use of the phrase “provided that nothing contained in this sub-section shall render any person liable to punishment if he proves...” that occurs in the first proviso. Every person who was in charge of and was responsible to the company for the conduct of its business at the time any of the components necessary for the commission of the offence occurred may be “proceeded against”, but may not be “punished” if he succeeds in proving that the offence was committed without his knowledge and despite his due diligence; the burden of proving that remaining on him. Therefore, it also has to be held that the time of commission of the offence of dishonour of cheque cannot be on the stroke of a clock or during 15 days after the demand notice has to be construed as the time when each of the acts of commission and omission essential to constitute the offence was committed. The word “every” points to the possibility of plurality of responsible persons at the same point of time as also to the possibility of a series of persons being in charge when the sequence of events culminating into the commission of offence by the company were taking place. As to what this ‘relevant time’ is, was a question that this Court was called to answer, inter alia, in *N Rangachari v. Bharati Sanchar Nigam Limited*, AIR (2007) SC 1682. In this case, Data Access, a company had issued two cheques to the BSNL, which were duly presented, but were dishonoured for insufficiency of funds. A complaint under Section 138 of the NI Act was filed. While the BSNL held the directors liable, the appellant, a chairman in the company contended that he being a nominated chairman and holding an Honorary post in the Company, was never assigned with any of the company’s financial or other business activities. He was the Chairman for name sake and was never entrusted with any job or business or constituted a signing authority. Resolving the issue of when the liability could be fastened, this Court said:-

“In the case on hand, reading the complaint as a whole,

it is clear that the allegations in the complaint are that at the time at which the two dishonoured cheques were issued by the company, the appellant and another were the Directors of the company and were in charge of the affairs of the company. It is not proper to split hairs in reading the complaint so as to come to a conclusion that the allegations as a whole are not sufficient to show that at the relevant point of time the appellant and the other are not alleged to be persons incharge of the affairs of the company. Obviously, the complaint refers to the point of time when the two cheques were issued, their presentment, dishonour and failure to pay in spite of notice of dishonour.”

[Emphasis supplied]

31. As held by this Court in *Anil Hada v. Indian Acrylic Ltd.*, (2000) 1 SCC 1, the phrase “as well as” used in sub-section (1) of Section 141 of the NI Act would embroil the persons mentioned therein within the tentacles of the offence on par with the offending company. Therefore, when the company or firm is the drawee of the cheque, such company or firm is the principal offender and the fiction created by the legislature. When the offence is attributed to a juristic person or a body made up of several individuals and the liability to be prosecuted and punished is extended to embroil by legal fiction certain human beings, that legal fiction has to be so interpreted and applied that the individuals intended to be embroiled may not escape the liability by mere fact of having not been in charge at the time when one of the other of the events essential to complete the offence by the company happened. Borrowing again from *K. Bhaskaran* (supra), the court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure.”

11. Now the question remains as to whether the Petitioners could succeed on the ground of having been non-executive directors of the Company. Admittedly, the Petitioners are not the signatories of the cheques in question nor did they hold a position of a managing or executive director of the Company when the cheques in question were issued.

12. Section 2(47) defines the term “independent director” to mean an independent director referred to in sub-section (6) of Section 149 of the Companies Act, 2013.

Section 149 of the Companies Act, 2013, is reproduced, thus:

“149. Company to have Board of Directors.—

.....

- (6) An independent director in relation to a company, means a director other than a managing director or a whole-time director or a nominee director,—
- (a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;
 - (b) (i) who is or was not a promoter of the company or its holding, subsidiary or associate company;
(ii) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;
 - (c) who has or had no pecuniary relationship with the

company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year;

(d) none of whose relatives--

(i) is holding any security of or interest in the company, its holding, subsidiary or associate company during the two immediately preceding financial years or during the current financial year:

PROVIDED that the relative may hold security or interest in the company of face value not exceeding fifty lakh rupees or two per cent. of the paid-up capital of the company, its holding, subsidiary or associate company or such higher sum as may be prescribed;

(ii) is indebted to the company, its holding, subsidiary or associate company or their promoters, or directors, in excess of such amount as may be prescribed during the two immediately preceding financial years or during the current financial year;

(ii) has given guarantee or provided any security in connection with the indebtedness of any third person to the company, its holding, subsidiary or associate company or their promoters, or directors of such holding company, for such amount as may be prescribed during the two immediately preceding financial years or during the current financial year; or

(iv) has any other pecuniary transaction or relationship with the company, or its subsidiary, or its holding or associate company amounting to two per cent. Or more of its gross turnover or total income singly or in combination with the transactions referred to in sub-clause (i), (ii) or (iii);

- (e) who, neither himself nor any of his relatives—
 - (i) holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed:

PROVIDED that in case of a relative who is an employee, the restriction under this clause shall not apply for his employment during preceding three financial years;

- (ii) is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of—
 - (A) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or
 - (B) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to ten per cent. or more of the gross turnover of such firm;
 - (iii) holds together with his relatives two per cent. or more of the total voting power of the company; or
 - (iv) is a Chief Executive or director, by whatever name called, of any nonprofit organisation that receives twenty-five per cent. or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds two per cent. or more of the

total voting power of the company; or

(f) who possesses such other qualifications as may be prescribed.

(7) Every independent director shall at the first meeting of the Board in which he participates as a director and thereafter at the first meeting of the Board in every financial year or whenever there is any change in the circumstances which may affect his status as an independent director, give a declaration that he meets the criteria of independence as provided in sub-section (6).

Explanation: For the purposes of this section, “nominee director” means a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests.

(8) The company and independent directors shall abide by the provisions specified in Schedule IV.

(9) Notwithstanding anything contained in any other provision of this Act, but subject to the provisions of sections 197 and 198, an independent director shall not be entitled to any stock option and may receive remuneration by way of fee provided under sub-section (5) of section 197, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members.

PROVIDED that if a company has no profits or its profits are inadequate, an independent director may receive remuneration, exclusive of any fees payable under sub-section (5) of section 197, in accordance with the provisions of Schedule V.

(10) Subject to the provisions of section 152, an

independent director shall hold office for a term up to five consecutive years on the Board of a company, but shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.

(11) Notwithstanding anything contained in sub-section (10), no independent director shall hold office for more than two consecutive terms, but such independent director shall be eligible for appointment after the expiration of three years of ceasing to become an independent director: Provided that an independent director shall not, during the said period of three years, be appointed in or be associated with the company in any other capacity, either directly or indirectly. Explanation: For the purposes of sub-sections (10) and (11), any tenure of an independent director on the date of commencement of this Act shall not be counted as a term under those sub-sections.

(12) Notwithstanding anything contained in this Act,—

- (i) an independent director;**
- (ii) a non-executive director not being promoter or key managerial personnel, shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.**

(13) The provisions of sub-sections (6) and (7) of section 152 in respect of retirement of directors by rotation shall not be applicable to appointment of independent directors.”

13. The Petitioners have placed on record a copy of minutes of

the third annual general meeting of the members of the Company held on 14 August 2014. The resolutions passed in the said meeting indicate the Petitioners were appointed as independent directors of the Company for a period of 5 years. Petitioner No.2 Dhru Agrawal was additionally appointed as a professional director. Copies of Form No.DIR-11, said to have been downloaded from website of Registrar of Companies, have been placed on record. These forms indicate the Petitioners were independent directors of the accused Company. The Petitioners, being independent/professional directors, could not be said to have been in charge of, and were responsible to the Company for the conduct of the business of the Company when the cheques in question were issued. The documents, in the nature of minutes of the annual general meeting of the Company and the copies of Form No.DIR-II, being sterling incontrovertible material or acceptable circumstances to substantiate their claim, this Court finds the continuation of the proceedings, under Section 138 N.I. Act against the Petitioners to be an abuse of process of Court. The Court, is therefore, inclined to allow the writ petition.

14. The petition is, thus, allowed in terms of prayer clause (a).

(R.G. AVACHAT, J.)