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Crl.O.P.Nos.5428 & 8790 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.08.2023

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THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

Crl.O.P.Nos.5428 & 8790 of 2022

and

Crl.M.P.Nos.2958 & 5113 of 2022

Mahalinga Narayanan

... Petitioner in Crl.O.P.No.5428/2022

Pesi Sevak Patel

... Petitioner in Crl.O.P.No.8790/2022

Vs.

Kotak Mahindra Bank Limited,
5th Floor, Samson Towers, 4021,
Pantheon Road, Egmore,
Chennai - 600 008.

represented by its authorised representative

Mr.Ragothaman

... Respondent in both Crl.O.Ps.

PRAYER : Criminal Original Petitions filed under Section 482 of the Code of Criminal Procedure praying to call for the entire records in C.C.No.2337 of 2019 pending on the file of FTC-IV, Metropolitan Magistrate, George Town, Chennai and quash the same as against the petitioners.

For Petitioners : Mr.H.Siddharth
[in both petitions]

For Respondent : Mr.E.Om Prakash, Senior Counsel
[in both petitions] for Mr.M.Arunachalam



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COMMON ORDER

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These Criminal Original Petitions have been filed to quash the proceedings in C.C.No.2337 of 2019 pending on the file of FTC-IV, Metropolitan Magistrate, George Town, Chennai.

2. The respondent has filed a complaint u/s.138 of the Negotiable Instruments Act against the company and its directors. The petitioners have been arrayed as A4 and A6 respectively in the complaint. According to the petitioners, they are non-executive directors and they are not involved in the day-to-day affairs of the company and in spite of the same, they have been added as accused in the complaint. Aggrieved by the same, the present petitions have been filed before this Court under Section 482 of the Code of Criminal Procedure, 1973.

3. Heard Mr.H.Siddharth, learned counsel appearing for petitioners and Mr.E.Om Prakash, learned Senior Counsel appearing for respondent.



4. The allegations made against the accused persons in the complaint are extracted hereunder:

"3. That the cheque which is the subject matter of this complaint is signed and issued by Accused No.8 and Accused No.9 as the Authorized Signatories of Accused No.1, with the consent and knowledge of the Board of Directors of Accused No.1 of which Accused No.2 to Accused No.7, were a part at all relevant times, and even during the issuance of the cheque which is the subject matter of this complaint, the persons in charge of and responsible for conducting the day-to-day affairs, management, activities and functioning of Accused No.1. Thus, Accused No.2 to Accused No.7 are also responsible for the acts of omission committed by Accused No.1.

4. It is hereby stated that, at all relevant times, Accused No.1 have represented that Accused No.2 to Accused No.7 are the Directors of Accused No.1; Accused No.8 to Accused No.9 are the Authorised Signatories of Accused No.1, having their address mentioned hereinabove.

11. The Accused No.1 being the Borrower, from whom the amounts are payable had issued the abovementioned cheque. The Accused No.8 and Accused No.9 had signed the abovementioned cheque in their capacity as Authorised Signatory of Accused No.1. The Accused No.2 to Accused No.7, were a part at all relevant times, and even during the issuance of the cheque which is the subject matter of this notice, the persons in charge of and responsible for conducting the day-to-day affairs, management activities and functioning of Accused No.1 and are hence liable to be prosecuted under Section 138 to 142 of the Negotiable Instruments Act, 1881."

5. Learned counsel for petitioners brought to the notice of this Court Form-32 that was issued by the Registrar of Companies. On going through the same, it is seen that the petitioners are non-executive directors in A1



company. This is the position of the petitioners right from the year 2007 onwards. In view of the same, by definition, a non-executive director cannot be assumed to be in charge and involved in the day-to-day affairs of the company. The document in question viz., Form-32 issued by the Registrar of Companies is a document, which is of sterling quality and beyond suspicion or doubt.

6. If the petitioners are to be roped in as accused persons in spite of the fact that they are non-executive directors, the complaint must make it clear as to how and in what manner they are in charge or responsible for the day-to-day affairs of the company. This Court had an occasion to consider the entire law on the issue in ***Anil Pathak and another v. Larsen and Toubro Limited [2019 (1) MLJ (Crl.) 385]*** and the relevant portions are extracted hereunder:

"12. From the above said judgments, it is very clear that it is not enough if the words used under Section 141 of the Negotiable Instruments Act, is merely extracted. In order to make a Director of a Company is liable for the offence committed by the Company under Section 141 of the Negotiable Instruments Act, there must be a specific averment against the Director to show as to how and in what manner the Director was responsible for the conduct of the business of the Company. This composition has been reiterated by the Hon'ble Supreme Court consistently.



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13.The learned counsel for the respondent by relying upon the judgment of the Hon'ble Supreme Court in ***Gunmala Sales Private Limited .Vs. Anu Mehta and Others*** reported in [2015 1 SCC 103], would submit that it is enough if the basic requirement under Section 141 of the Negotiable Instruments Act, is alleged in the Complaint and nothing more is required. For this purpose, the learned counsel specifically relied upon the following relevant portions of the judgment which is extracted hereunder:

"28.We are concerned in this case with Directors who are not signatories to the cheques. So far as Directors who are not signatories to the cheques or who are not Managing Directors or Joint Managing Directors are concerned, it is clear from the conclusions drawn in the above- mentioned cases that it is necessary to aver in the complaint filed under [Section 138](#) read with [Section 141](#) of the NI Act that at the relevant time when the offence was committed, the Directors were in charge of and were responsible for the conduct of the business of the company. This is a basic requirement. There is no deemed liability of such Directors. This averment assumes importance because it is the basic and essential averment which persuades the Magistrate to issue process against the Director. That is why this Court in SMS Pharma-(1) observed that the question of requirement of averments in a complaint has to be considered on the basis of provisions contained in [Sections 138](#) and [141](#) of the NI Act read in the light of the powers of a Magistrate referred to in [Sections 200](#) to [204](#) of the Code which recognize the Magistrate's discretion to reject the complaint at the threshold if he finds that there is no sufficient ground for proceeding. Thus, if this basic averment is missing the Magistrate is legally justified in not issuing process. But here we are concerned with the question as to what should be the approach of a High Court when it is dealing with a petition filed under [Section 482](#) of the Code for quashing such a complaint against a Director. If this averment is there, must the High Court dismiss the petition as a rule observing that the trial must go on? Is the High Court precluded from looking into other circumstances if any? Inherent power under [Section 482](#) of the Code is to be invoked to prevent abuse of the process of any court or otherwise to secure ends of justice. Can such fetters be put on the High Court's inherent powers? We do not think so.



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29. SMS Pharma-(1), undoubtedly, says that it is necessary to specifically aver in the complaint that the Director was in charge of and responsible for the conduct of the company's business at the relevant time when the offence was committed. It says that this is a basic requirement. And as we have already noted, this averment is for the purpose of persuading the Magistrate to issue process. If we revisit SMS Pharma-(1), we find that after referring to the various provisions of the Companies Act it is observed that those provisions show that what a Board of Directors is empowered to do in relation to a particular company depends upon the roles and functions assigned to Directors as per the memorandum and articles of association of the company. There is nothing which suggests that simply by being a Director in a company, one is supposed to discharge particular functions on behalf of a company. As a Director he may be attending meetings of the Board of Directors of the company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint sub-committees consisting of one or two Directors out of the Board of the company who may be made responsible for the day-to-day functions of the company. This Court further observed that what emerges from this is that the role of a Director in a company is a question of fact depending on the peculiar facts in each case and that there is no universal rule that a Director of a company is in charge of its everyday affairs. What follows from this is that it cannot be concluded from SMS Pharma-(1) that the basic requirement stated therein is sufficient in all cases and whenever such an averment is there, the High Court must dismiss the petition filed praying for quashing the process. It must be remembered that the core of a criminal case are its facts and in factual matters there are no fixed formulae required to be followed by a court unless it is dealing with an entirely procedural matter. We do not want to discuss 'the doctrine of Indoor Management' on which submissions have been advanced. Suffice it to say, that just as the complainant is entitled to presume in view of provisions of the Companies Act that the Director was concerned with the issuance of the cheque, the Director is entitled to contend that he was not concerned with the issuance of cheque for a



variety of reasons. It is for the High Court to consider these submissions. The High Court may in a given case on an overall reading of a complaint and having come across some unimpeachable evidence or glaring circumstances come to a conclusion that the petition deserves to be allowed despite the presence of the basic averment. That is the reason why in some cases, after referring to SMS Pharma-(1), but considering overall circumstances of the case, this Court has found that the basic averment was insufficient, that something more was needed and has quashed the complaint.

30. When a petition is filed for quashing the process, in a given case, on an overall reading of the complaint, the High Court may find that the basic averment is sufficient, that it makes out a case against the Director; that there is nothing to suggest that the substratum of the allegation against the Director is destroyed rendering the basic averment insufficient and that since offence is made out against him, his further role can be brought out in the trial. In another case, the High Court may quash the complaint despite the basic averment. It may come across some unimpeachable evidence or acceptable circumstances which may in its opinion lead to a conclusion that the Director could never have been in charge of and responsible for the conduct of the business of the company at the relevant time and therefore making him stand the trial would be abuse of the process of court as no offence is made out against him.

34. We may summarize our conclusions as follows:

34.1. Once in a complaint filed under [Section 138](#) read with [Section 141](#) of the NI Act the basic averment is made that the Director was in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, the Magistrate can issue process against such Director;

34.2. If a petition is filed under [Section 482](#) of the Code for quashing of such a complaint by the Director, the High Court may, in the facts of a particular case, on an overall reading of the complaint, refuse to quash the complaint because the complaint contains the basic averment which is sufficient to make out a case against the Director.

34.3. In the facts of a given case, on an overall



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reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about role of the Director in the complaint. It may do so having come across some unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of the process of the court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an arm-twisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out. In the absence of such evidence or circumstances, complaint cannot be quashed;

34.4. No restriction can be placed on the High Court's powers under Section 482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of the Court. There are no fixed formulae to be followed by the High Court in this regard and the exercise of this power depends upon the facts and circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but, nothing prevents it from taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director.

14. The other judgments which have been cited by the learned counsel for the respondent, also more or less borders, around the same conclusion arrived at by the Hon'ble Supreme Court in *Gunmala Sales Private Limited v. Anu Mehta and Others*



referred supra."

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7. It is clear from the above that where a non-executive director is sought to be made as an accused in the criminal complaint, there must be necessary averments to show as to how and in what manner they were in charge and responsible for the affairs of the company and for the conduct of the business. A mere bald statement to the effect that they are in charge and responsible for the day-to-day affairs of the company is not sufficient.

8. In view of the same, this Court is convinced that the complaint does not satisfy the requirements u/s.141 of the Negotiable Instruments Act and the petitioners, being non-executive directors, cannot be roped in as accused persons without there being a specific plea as to how and in what manner they were in charge and responsible for the conduct of the business of the company. Hence, the continuation of the proceedings as against the petitioners will only result in abuse of process of Court, which requires the interference of this Court in exercise of its jurisdiction u/s.482 Cr.P.C.

In the result, these Criminal Original Petitions are allowed and the



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proceedings in C.C.No.2337 of 2019 pending on the file of FTC-IV,
Metropolitan Magistrate, George Town, Chennai, is quashed insofar as the

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gm

petitioners herein are concerned. The Court below is directed to proceed further with the complaint and complete the proceedings within a period of six (6) months from the date of receipt of a copy of this order. Consequently, connected miscellaneous petitions are closed.

02.08.2023

Index : Yes/No
Speaking order: Yes/No
Neutral citation: Yes/No
gm

To
The FTC-IV,
Metropolitan Magistrate,
George Town, Chennai.

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