

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Ajay Kumar Gupta

C.R.R. 878 of 2022

Premlata Mago and Another
Versus
The State of West Bengal

For the Petitioners : Mr. Utpal Majumdar, Adv.
Mr. Abhidipto Tarafdar, Adv.
Ms. Anyapurba Banerjee, Adv.

For the KMC : Mr. Goutam Dinda, Adv.
Mr. Anindya Sundar Chatterjee, Adv.

For the State : Mr. Rudradipta Nandy, Adv.
Mr. Iqbal Kabir, Adv.

Heard on : 28.02.2024

Judgment on : 03.05.2024

Ajay Kumar Gupta, J:

1. This instant Criminal Revisional application has been filed by the petitioners seeking quashing of FIR being Entally P.S. Case No. 615 dated 21st December, 2015 registered under Section 401A of the Kolkata Municipal Corporation Act, 1980 and Charge-Sheet No. 132/2021 dated 17th July, 2021 filed under Section 401A of Kolkata Municipal Corporation Act, 1980 only with regards to the petitioners herein.

2. The factual matrix of the instant case leading to filing of this application is as under: -

2a. A sanction plan for construction of a G+IV residential building at Premises No. 67, Dr. Suresh Sarkar Road, Kolkata-700014 was sanctioned by the Kolkata Municipal Corporation (in short KMC) being B.S. Permit No. 2005060020 (B-VI) dated 17th May, 2005. After completion of the said building, KMC also issued a completion certificate on 23rd April, 2008 in terms of Section 403 of the KMC Act, 1980. Even after issuing completion certificate by the appropriate authority i.e. KMC, a letter being Bldg-Br-VI/11(II)/2011-12 dated 30.01.2012 was issued, as per direction of W.B.C.S. (Ex) Jt. Secretary to the Government of West Bengal and Municipal Commissioner, by the Ex. Engineer (Bldg) Br-VI, Building

Department to one Sri Mohan Mall, Constituted Power of Attorney Holder of Standard Pharmaceuticals Limited, 27, Mirza Galib Street, Kolkata, 700014 to stop the construction work at 5th Floor immediately unless and until obtaining clearance from Fire Safety Audit Committee. There was no specific allegation against the unauthorized construction or even no allegation of any deviation or construction in the said building beyond sanction plan as the 5th Floor plan was also sanctioned by the KMC being Building Permit No. 2011060034 and the same was valid up to 24.08.2016.

2b. The petitioners had obtained No Objection Certificate of Fire Safety clearance for additional and alteration of proposed construction of 5th Floor area of G+IV storied under group residential building at Premises No. 67, Dr. Suresh Sarkar Road, Ward No. 55, Borough No. VI, Kolkata 700014. The said no objection certificate was issued by the Director General, West Bengal Fire and Emergency Services vide Memo No. WBFES/2580/09/Kol-RB/74/04(88/04) dated 11.08.2009. But in spite of such fact, the Joint Secretary has illegally asked to stop the construction work.

2c. The present petitioners/ accused persons contended that petitioners were not the active Director or General Director or managing Director or Secretary of the company. The petitioner no. 1

was appointed as a Director under the category of professional Director on 15th January, 2014 and he resigned from the said Company on 25th May, 2016. At the same time, the petitioner no. 2 was appointed as an Additional Director under the category of professional Director of the said company on 23rd April, 2013 and he resigned on 22nd February, 2019 from the said company. When the stop work notice was issued, they were never in the company. As such they are not at liable for alleged offence as levelled by the Kolkata Municipal Corporation. They were not at all responsible persons. However, only to harass with ulterior motive, FIR was lodged in the year 2015 alleging that the Construction has been made without a Sanction Plan resulting in FIR being Entally P.S. Case No. 615 dated 21.12.2015 under Section 401A of the K.M.C. Act, 1980. Investigating Officer of this case submitted charge sheet in the year 2021 after conclusion of Investigation i.e. almost expiry of six years against the present petitioners and others under Section 401A of the K.M.C. Act, 1980. Be that as it may, only present petitioners came before this court for seeking reliefs as sought for. Hence, the instant revisional application has come up before this Bench for disposal.

SUBMISSION ON BEHALF OF THE PETITIONERS:

3. Learned Advocate appearing on behalf of the Petitioners submitted that due to ill motive and to harass the present petitioners, the Kolkata Municipal Corporation has initiated a false and fabricated proceeding under Section 401A of the KMC Act, 1980 though the company i.e. Standard Pharmaceuticals Limited being the owner/developer, completed G+IV storied building and obtained the clearance/completion certificate from the KMC. The question of illegal construction or deviation from the building sanction plan does not arise at all. Accusation against the company was that the Fire Certificate was not obtained for construction of 5th Floor though NOC for Fire Security was obtained in the year 2009 from the concerned Department.

3a. Under such circumstances, nowhere it is mentioned specifically or clearly which portion of the building, the company has constructed illegally. Furthermore, the present petitioners were only professional directors of the said company, they were no way connected with the construction work. Their works was only to assist the company towards marketing of the production and others related affairs in the company. They were appointed on 15th January, 2014 and 23rd April, 2013 and resigned from the company on 25th May,

2016 and 22nd February, 2019 respectively. Petitioners were no way connected in the instant case as such they are liable to be discharged from this case after quashing the case against them. Learned Counsel has placed reliance of four judgments as under:

i. Sunita Palita and Others Vs. Panchami Stone Quarry¹

ii. CRR No. 232 of 2017 with CRAN 3721 of 2017 (Amar Nath Sadhu V. The State of West Bengal and Anr.) And CRR No. 428 of 2017 with CRAN 3543 of 2017 (Shishir Kumar Bajoria V. The State of West Bengal and Anr.)²

iii. Shri Willingdon Christian Vs. State of Gujarat & Two³

iv. Neha Nilesh Patil vs. Securities and Exchange Board of India⁴

To bolster his contentions that:-

1. Director who is not involved in day-to-day affairs of the company for construction work is no way responsible for the allegations of illegal construction;
2. The Kolkata Municipal Corporation also did not specify in the alleged FIR or in the notice as to who was

¹ (2022) 10 Supreme Court Cases 152;

² 2018 SCC OnLine Cal 158;

³ 2012 SCC OnLine Guj 1606;

⁴ 2022 SCC OnLine SAT 232.

in-charge of the company and who was responsible for conducting the day-to-day business of the company and if such facts have not been disclosed only on such score the notice under Section 401 appears to be vague as such criminal proceeding thereof cannot be permitted to continue against the petitioners. Investigating officer simply collected the name of the Petitioners from the Assistant Registrar of companies, West Bengal and only on the basis of supplying name of the Petitioners, in mechanically manner submitted charge sheet without attributing their specific role as such proceeding against the present petitioners is an abuse of process of law as such it is liable and deserved to be quashed.

SUBMISSION ON BEHALF OF THE KOLKATA MUNICIPAL CORPORATION:

4. Learned counsel appearing on behalf of the Kolkata Municipal Corporation submitted that the owner of the land/developer made an illegal construction in the ground floor and 1st Floor and changed both the flats into duplex flat. As such, a notice was issued under Section 401 for such illegal construction. The name

of the Director/Directors was obtained from the Assistant Register of companies, West Bengal. As such, they were made accused for such illegal construction. After investigation, sufficient materials were collected by the Investigating Officer against the present petitioners. Accordingly, question of quashing of FIR and Charge-Sheet does not arise at all. Therefore, the instant criminal revisional application is liable to be dismissed.

SUBMISSION ON BEHALF OF THE STATE:

5. Learned counsel appearing on behalf of the State submitted that earlier a plan was sanctioned for G+IV in the year 2005 and after completion, a completion certificate was issued by the Kolkata Municipal Corporation in the year 2008 but the company has further started illegal construction after getting completion certificate. As such, a notice was issued upon the directors of the company to stop the illegal construction. Their names have been collected from the Assistant Registrar of companies, West Bengal and they were Directors of M/s. Standard Pharmaceuticals Limited. They were present during the period of construction and initiation of the proceeding by the Corporation. As such, they are liable. The owner of the land M/s. Standard Pharmaceuticals Limited and its Directors are liable for such illegal construction. During investigation, sufficient

materials collected against them. Accordingly, there is no question of quashing of the FIR and Charge-Sheet. The owner/developer of the company was very well aware about the illegal construction as such the company and its directors are responsible for such illegal construction. Accordingly, the instant revisional application is liable to be dismissed.

DISCUSSIONS AND ANALYSIS BY THIS COURT:

6. Heard the rival submissions of the parties and on perusal of the materials available on the record and CD, this Court takes note of the following points:

I. Notice was served on 30th January, 2012 by Executive Engineer (Building)/Borough VI Building Department to Sree Mohan Mall, Constituted power of attorney holder of Standard Pharmaceuticals Limited asking him to stop the construction work at 5th Floor immediately until and unless obtaining clearance from Fire Safety Audit Committee without prior giving notice or giving opportunity of hearing to Sree Mohan Mall.

II. A notice under Section 401 of the KMC Act, 1980 dated 21.12.2015 has been issued alleging therein that the premises in reference was inspected by the department and found the RCC

framed Structure erected at Single Storied structure at ground floor though the KMC had already given completion certificate on 23rd April, 2008. The Company had obtained building sanction plan vide BS Permit No. 20050-60020 for construction of G+IV residential building on 17th May, 2005 and another sanction plan no. 2011060034 dated 16.06.2011 for construction of 5th Floor at Premises No. 67, Dr Suresh Sarkar Road, Ward No. 55, Borough No. VI, Kolkata 700014.

III. A Provisional NOC for addition and alteration of proposed construction of 5th Floor area under Group residential building at Premises No. 67, Dr Suresh Sarkar Road, Ward No. 55, Borough No. VI, Kolkata 700014 was given by the Director General, Fire and Emergency Services vide Memo No. WBFES/2580/09/Kol-RB/74/04(88/04) dated 11.08.2009. FIR lodged by the Assistant Engineer (Civil) (Building), Borough VII to the Officer-in-Charge, Entally Police Station, Kolkata on 21.12.2015. On the basis of enquiry report submitted by Sub-Assistant Engineer (Civil) (Building) Mr. Kousik alleging therein that Mr. Vinod Kanti Dami, Sushanta Nayek and others were making construction of a building in the abovementioned address i.e. Premises No. 67, Dr Suresh Sarkar

Road, Ward No. 55, Borough No. VI, Kolkata 700014 without any sanction plan.

IV. A charge sheet No. 132/2021 dated 17.07.2021 under Section 401(A) of KMC Act, 1980 was filed against Mr. Vinod Kanti Dami, Sushanta Nayek, Tarun Mall Kumar, Omesh Kumar Sethi, Lalit Kumar Sethi and Prem Late Mago, under Section 401 (A) of the KMC Act.

V. The present petitioner no. 1, namely, Prem Late Mago appointed as professional director on 15.01.2014 and resigned with effect from 25.05.2016 under Section 168 of the Companies Act. The petitioner no. 2, namely, Lalit Kumar Sethi was appointed as an additional Director (professional) on 23.04.2013 and resigned from the said company with effect from 22.02.2019 under Section 168 of the Companies Act.

7. While considering the above points, this Court finds from the Form 32, the present petitioners were the director and additional director appointed as profession director/professional additional director of company on 15.01.2014 and 23.04.2013 respectively i.e. after the period of construction and they were not as designated managing director or joint director or active director or secretary to deal with day to day affairs of the company for construction work and

they were not involved in the day to day affairs of the company for construction work. Their duties were only to assist the company with regards to the marketing of production.

8. This Court also finds that the judgment referred by the petitioners reported in **SUNITA PALITA & OTHERS versus M/S PANCHAMI STONE QUARRY**⁵ is squarely applicable where petitioners were profession directors, dealing with marketing of the production and other related affairs in the company and they were obviously not responsible for illegal construction as alleged. The Hon'ble Supreme Court has held as under:

“37. The High Court, however, failed to appreciate that none of these Appellants were Managing Director or Joint Managing Director of the Accused Company. Nor were they signatories of the cheque which was dishonoured.

38. The High Court proceeded to hold that, in construing a complaint, a hyper technical approach should not be adopted, to quash the same. The High Court observed rightly that the laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions, resulting in enactment of Sections 138 and 141 of the NI Act has to be borne in mind. A complaint should also not be read

⁵ (2022) 10 SCC 152.

with a pedantically hyper technical approach to deny relief under Section 482 of the Cr.P.C. to those impleaded as accused, who do not have any criminal liability in respect of the offence alleged in the complaint. As observed by the High Court, the provisions of Section 138/141 of the NI Act create a statutory presumption of dishonesty, against those covered by Section 138/141 of the NI Act and expose them to criminal liability, if payment is not made within the statutory period, even after issue of notice.

39. The High Court further held that the power of quashing is required to be exercised sparingly. The High Court, in effect, found that even though, on perusal of the complaint, it appeared that the exact words used in Section 141 of the NI Act had not been used in the complaint, the essential pleadings were there in the complaint.

40. There can be no doubt that in deciding a Criminal Revisional Application under Section 482 of the Cr.P.C. for quashing a proceeding under Section 138/141 of the NI Act, the laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of the said Sections has to be borne in mind. The provisions of Section 138/141 of the NI Act create a statutory presumption of dishonesty on the part of the signatory of the cheque, and when the cheque is issued on behalf of a company, also those persons in charge of or

responsible for the company or the business of the company. Every person connected with the company does not fall within the ambit of Section 141 of the NI Act.

41. A Director of a company who was not in charge or responsible for the conduct of the business of the company at the relevant time, will not be liable under those provisions. As held by this Court in, *inter alia*, *S.M.S. Pharmaceuticals Ltd. (supra)*, the liability under Section 138/141 of the NI Act arises from being in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, and not on the basis of merely holding a designation or office in a company. It would be a travesty of justice to drag Directors, who may not even be connected with the issuance of a cheque or dishonour thereof, such as Director (Personnel), Director (Human Resources Development) etc. into criminal proceedings under the NI Act, only because of their designation.

42. Liability depends on the role one plays in the affairs of a company and not on designation or status alone as held by this Court in **S.M.S. Pharmaceuticals Ltd. (supra)**. The materials on record clearly show that these Appellants were independent, non-executive Directors of the company. As held by this Court in **Pooja Ravinder Devidasani v. State of Maharashtra and Anr. (supra)** a non-Executive Director is not

involved in the day-to-day affairs of the company or in the running of its business. Such Director is in no way responsible for the day-to-day running of the Accused Company. Moreover, when a complaint is filed against a Director of the company, who is not the signatory of the dishonoured cheque, specific averments have to be made in the pleadings to substantiate the contention in the complaint, that such Director was in charge of and responsible for conduct of the business of the Company or the Company, unless such Director is the designated Managing Director or Joint Managing Director who would obviously be responsible for the company and/or its business and affairs.

43. The High Court correctly observed that three categories of persons were covered by Section 141 of the NI Act – the company who committed the offence as alleged; everyone who was in-charge of or was responsible for the business of the company and any other person who was a Director or a Manager or a Secretary or Officer of the Company with whose connivance or due to whose neglect the company had committed the offence.

44. Even though the High Court deprecated the adoption of a hyper technical approach in construing pleadings, to quash criminal proceedings, the High Court adopted a hyper technical approach in rejecting the application under Section 482 of the Cr.P.C., on a cursory reading of the formalistic pleadings in the

complaint, endorsing the contents of Section 141 of the NI Act, without any particulars. What the High Court overlooked was, the contention of these Appellants that they were non-Executive Independent Directors of the Accused Company, based on unimpeachable materials on record. The High Court observed that in the petition it had specifically been averred that all the accused persons were responsible and liable for the whole business management of the Accused Company, and took the view that the averments in the complaint were sufficient to meet the requirements of Section 141 of the NI Act.”

9. This Court would also like to refer the provision of Sections 401A and 619 of the KMC Act, 1980 for better understanding and for the sake of ready reference as under:

401A. Construction of building in contravention of the provisions of the Act or the rules made thereunder.- (1) Notwithstanding anything contained in this Act or the rules made thereunder or in any other law for the time being in force, any person, who, being responsible by himself or by any other person on his behalf, so constructs or attempts to so construct or conspires to so construct any new building or additional floor or floors of any building in contravention of the provisions of this Act, or the rules

made thereunder as endangers or is likely to endanger human life, or any property of the Corporation whereupon the water-supply, drainage or sewerage or the road traffic is disrupted or is likely to be disrupted or is likely to cause a fire hazard, shall be punishable with imprisonment of either description for a term which may extend to five years and also with fine which may extend to fifty thousand rupees.

Explanation.- “Person” shall include an owner, occupier, lessee, mortgagee, consultant, promoter or financier, or a servant or agent of an owner, occupier, lessee, mortgagee, consultant, promoter or financier, who supervises or causes the construction of any new building or additional floor or floors of any building as aforesaid.

(2) The offence under sub-section (1) shall be cognizable and non-bailable, within the meaning of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) Where an offence under sub-section (1) has been committed by a company, the provisions of section 619 shall apply to such company.

Explanation.- “Company” shall have the same meaning as in the *Explanation* to section 619.

619. Offences by companies.- (1) Where an offence under this Act has been committed by 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 :

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an 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 purposes of this section,—

(a)"company" means a body corporate, and includes a firm or other association of individuals; and

(b)"director" in relation to a firm means a partner in the firm.

10. In the instant case, professional directors were also entangled though they were dealing with marketing of the production and other related affairs in the company, they were no way connected with the construction work of the Company. Apart from that, they have not given an opportunity to explain their contention under Section 41A CrPC. One of the directors resides in Mumbai and another director resides in Farizpur, Haryana. Both should not have implicated in this case without mentioning their specific role in alleged unauthorised construction. They were not an active director or a manager or a secretary or in-charge of the Company. They were no way connected with alleged construction works. They were only professional Directors of the Company. Professional Directors are non-executive directors enlisted by the company due to their expertise in various fields. Both were dealing with marketing of the production of the company.

11. Earlier, a sanction plan was issued by the KMC for construction of G+IV and after completion of four storied building, the KMC has given completion certificate in the year 2008 and furthermore, the KMC further sanctioned a building plan for construction of 5th floor building. So, it cannot be declared that the building was constructed without sanction plan. Provisionally no-

objection certificate for addition and alteration of provisional construction of 5th floor of the residential building at Premises No. 67, Dr. Suresh Sarkar Road, Kolkata- 700014 was obtained by the company on 11.08.2009 for fire safety and security. Subsequently, No- Objection Certificate was further issued by the Director General, West Bengal Fire and Emergency Services on 28.09.2010.

12. In addition, no sufficient material found against the present petitioners regarding their role to meet the requirements or ingredients of the offence of unauthorised construction without sanction plan as alleged. A director or additional director appointed as professional directors of the company, were not in charge or responsible for the conduct of illegal construction as alleged at the relevant point of time, will not be held liable for an offence under Section 401A of the K.M.C. Act, 1980.

13. The Hon'ble Supreme Court time and again has held in several judgments that if there is no specific allegations about the role played by the Director sought to be held vicariously liable, then prosecution of such Director is not maintainable being abuse of process of law.

14. Accordingly, **CRR 878 of 2022** is, thus, allowed without order as to costs. Connected applications, if any, are also, thus, disposed of.

15. FIR being Entally P.S. Case No. 615 dated 21st December, 2015 registered under Section 401A of the Kolkata Municipal Corporation Act, 1980 and Charge-Sheet No. 132/2021 dated 17th July, 2021 filed under Section 401A of Kolkata Municipal Corporation Act, 1980 and subsequent proceedings are hereby quashed only in respect of present two petitioners herein.

16. Let a copy of this judgment be sent to the learned Court below for information and taking necessary action in accordance with law.

17. Case Diary, if any, is to be returned to the learned counsel for the State.

18. Interim order, if any, stands vacated.

19. Parties shall act on the server copies of this order uploaded on the website of this Court.

20. Urgent photostat certified copy of this judgment, if applied for, is to be given as expeditiously to the parties on compliance of all formalities.

(Ajay Kumar Gupta, J)

P. Adak (P.A.)