IN THE HIGH COURT AT CALCUTTA

Criminal Revisional Jurisdiction

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 3638 of 2022

Kali Kishore Bagchi

Vs

Security and Exchange Board of India & Ors.

For the Petitioner	:	Mr. Jayanta Narayan Chatterjee, Mr. Mrinal Das, Mr. Raja Adhikary.
For the SEBI/ Opposite Party	:	Mr. Sandipan Ganguly, ld. Sr. Adv. Mr. Sudip Kr. Dutta.
Hearing concluded on	:	07.11.2024
Judgment on	:	12.11.2024

Shampa Dutt (Paul), J.:

1. The present revisional application has been preferred by the petitioner against an order dated 22.04.2022 passed by the learned Judge, 5th Special Court, Kolkata, in the proceeding being Special Case No. SEBI/39/2018.

2. The petitioner's case is that **the petitioner had joined in Amrit Bio Energy and Industries Limited as an executive director on 27.04.2004,** for the erection and commissioning of renewal energy power project. The said Amrit Bio Energy and Industries Limited is a group of companies under Amrit Projects Ltd. a company incorporated under the provisions of the companies Act, 1956. After being satisfied with the performance of the petitioner, Kailash Chand Dujari, the Managing Director of Amrit Projects Ltd. and its group of companies had offered the petitioner to become director of several other group companies of Amrit Projects Ltd. After joining the said Amrit Group the petitioner was to look into the development and set up of a power project of 10 M.W. in the District of Bankura, West Bengal. The said project was successfully completed under the supervision of the petitioner. The said Amrit Project Limited had started a business receiving deposits from the public at large without consulting with the petitioner. The petitioner had tendered resignation and **resigned** from the said Amrit Projects Limited and all its group of companies in the **year 2013**.

3. On 4th June, 2018, a show cause notice was issued to the petitioner.

4. It is stated that in terms of the said notice, the authority of SEBI did not take any steps. The petitioner contested the said proceeding by filing reply to the show cause notice and also got opportunity of hearing.

5. The whole time member SEBI passed a final order on 24th November 2020, with the following directions:-

> *a) Amrit Projects Ltd. i.e. Notice No.1, shall cease to mobilize fresh funds from investors through the offer and allotment of any securities, to the public and/or invite subscription, in any manner whatsoever, either directly or indirectly.*
>
> *b) Amrit Projects Ltd. (Noticee No.1) and its managing director i.e. Noticee No.2 shall not dispose of, alienate or encumber any of its/his assets or divert any funds raised from public either through the offer and allotment of Deep Discount Bonds.*
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> *c) The Company namely Amrit Projects Limited (Noticee No.1) and its Managing Director Shri Kailash Chand Dujari (Noticee No.2) shall jointly and severally refund the money collected by the Company through the offer and allotment of Deep Discount Bonds (Infra Bonds as well as Power Bonds), including the application money collected from investors, pending allotment of securities, if any, with an interest of 15% per annum (the interest being calculated from the date when the repayments became due in terms of section 73(2)*

of the Companies Act, 1956 till the date of actual payment) within a period of 180 days from the date of this order. It is clarified that the restraint imposed on the sale of assets at para (b) above, shall not operate if the sale of assets is made for the sole purpose of making refund to the investors by depositing the proceeds of sale in an Escrow Account with a nationalized bank. It is further clarified that the present directors of APL shall ensure and facilitate the compliance of this direction by APL.

d) The repayments including interest, being made to the investors shall be effected only through Bank Demand Draft or Pay order.

e) After completing the aforesaid repayments, Amrit Projects Limited (Noticee No.1), shall file a report of such completion of repayment with SEBI, within a period of 180 days from the date of this order, certified by two independent peer reviewed Chartered Accountants.

f) Amrit Projects Limited (Noticee No.1) and its Managing Director Shri Kailash Chand Dujari (Noticee No.2) shall be refrained/prohibited from accessing the securities market by issue of prospectus/offer document/advertisement soliciting money from the public and also prohibited from buying, selling or otherwise dealing in securities in any manner whatsoever, directly or *indirectly, from the date of this order, till the expiry of a period of four years from the date of effecting the refund as directed in para (c) above.*

g) Noticee No.3, 4, 10 and 14 shall be refrained/prohibited from accessing the securities market by issue of prospectus/offer document/advertisement soliciting money from the public and also prohibited from buying, selling or otherwise dealing in securities in any manner whatsoever, directly or indirectly for a period of four years. The period of restraint/prohibition as already undergone by the said notices since the date of the interim order shall be set-off against the restraint/prohibition of four years imposed hereunder this order;

h) Shri Kailash Chand Dujari (noticee No.2) shall also be restrained from associating himself with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI from the date of this order till the expiry of a period of four years from the date of completion of refunds to investors as directed at para (c) above;

i) Notice No. 1 and 2 shall furnish an inventory of their assets to SEBI, within 21 days from the date of receipt of this order, and

j) The directors against Notice No. 5,8,9,11 and 13 as stipulated in para 4.2 of the interim order, shall stand rescinded.

6. In the year 2018, a complaint was lodged by the Securities and Exchange Board of India against the petitioner herein and also against three other accused, namely Amrit Projects Ltd., Mr. Kailash Chand Dujari and Mr. Sasanka Roy Sarkar under Section 26(1) read with Sections 24(1)/27 of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the "SEBI Act") read with regulation 3 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to securities Market) Regulation, 2003 read with 55A/56/60/67/68/70/2 (36)/73 of the Companies Act, 1956 along with section 621 of the Companies Act, 1956 read with Section 436/439 of the Companies Act, 2013 read with Section 6 of the General Clauses Act 1897 read with Section 193 of the Code of Criminal Procedure, 1973 before the learned 5th Special Court, SEBI, Calcutta and the same was registered as Special Case No. SEBI/39/2018.

7. The learned Special Judge in her order dated 22.04.2022 (under revision) held:-

> *"……….From the order of the WTM it is reflected that the petitioner was appointed as director on*

27.04.2004 and ceased to be Director on and from 08.10.2013 which is indeed a long span of about more than 9 years and the period of alleged offence is during the financial year 2007-2008-2009-2010-2011-which is well within the tenure of directorship of the petitioner. Thus prima facie it cannot be presumed that the petitioner as a director did not have any knowledge about the course of business affairs of the company during his long tenure of office.

Moreover a company being a juristic persons, all its deeds and function are the result of acts of others. Therefore officers of a company who are responsible for acts done in the name of the company are sought to be made personally liable for acts which result in criminal action being taken against the company. It makes every person who, at the time of 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, liable for the offence. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding the designation or office in a company.

Going back to the point whether there was consent of the petitioner or whether he had any knowledge or whether there was connivance on his part have now become a mixed question of law and fact, and the rice and chaff can only be separated by way of adducing of evidence of the parties. Documents and other evidences are yet to be furnished before the court and witnesses are yet to be examined and cross-examined.

For the present, there transpires a prima facie case of the prosecution to go ahead with the proceedings considering the long tenure of holding of office of the petitioner in the company…………..”

8. In the case of ***Sunita Palita & Ors. Vs M/S Panchami Stone Quarry., Criminal Appeal No. …….. Of 2022 [Arising Out Of SLP (Crl.) No. 10396 Of 2019], on 1st August, 2022,*** the Supreme Court held:-

*"**23.** In **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89**, cited by Mr. Luthra, this Court held:*
"10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words:

"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, etc."

What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of 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. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a director or manager or secretary was enough to cast criminal liability, the section would have said so. Instead of "every person" the section would have said "every *director, manager or secretary in a company is liable"..., etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action."*

24. *Mr. Luthra emphatically argued that the Appellants are independent, non-executive Directors of the Accused Company and in no way responsible for the day-to-day affairs of the Accused Company. Such Directors are inducted in the company for their expertise or special knowledge in any particular discipline. They are not in charge of the management of the company.*

28. *In K.K. Ahuja v. V.K. Vora, (2009) 10 SCC 48, this Court discussed the principles of the vicarious liability of the officers of a company in respect of dishonour of a cheque and held: -*

"27. The position under Section 141 of the Act can be summarised thus:
(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix "Managing" to the word "Director" makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.
(ii) In the case of a Director or an officer of the companywho signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible 2 (2009) 10 SCC 48 8 to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141.

(iii) In the case of a Director, secretary or manager [asdefined in Section 2(24) of the Companies Act] or a person referred to in clauses (e) and (f) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 141(1) of the Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.
(iv) Other officers of a company cannot be made liableunder sub-section (1) of Section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence."

29. *In* ***Pooja Ravinder Devidasani v. State of Maharashtra and Anr.****,* ***(2014) 16 SCC 1*** *this Court held as under:-*
"17. ... Non-executive Director is no doubt a custodian of the governance of the company but is not involved in the dayto-day affairs of the running of its business and only monitors the executive activity. To fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the company, one who actively looks after the day-to-day activities of the company and is particularly responsible for the conduct of its business. Simply because a person is a Director of a company, does not make him liable under the NI Act. Every person connected with the Company will not fall into the ambit of the provision. Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, who was not in charge of and was not responsible for the conduct of the business of the Company at the relevant time, will not be liable for an offence under Section 141 of the NI Act.

In National Small Industries Corpn. [National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal, (2010) 3 SCC 330 : (2010) 1 SCC (Civ) 677 : (2010) 2 SCC (Cri) 1113] this Court observed: (SCC p. 336, paras 13-14)

"13. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

14. A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfilment of the requirements under Section 141."

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*18. **In Girdhari Lal Gupta v. D.H. Mehta [Girdhari Lal Gupta v. D.H. Mehta, (1971) 3 SCC 189 : 1971 SCC (Cri) 279 : AIR 1971 SC 2162]** , this Court observed that a person "in charge of a 3 (2014) 16 SCC 1 9 business" means that the person should be in overall control of the day-to-day business of the Company.*

19. A Director of a company is liable to be convicted for an offence committed by the company if he/she was in charge of and was responsible to the company for the conduct of its business or if it is proved that the offence was committed with the consent or connivance of, or was attributable to any negligence on the part of the Director concerned (see State of Karnataka v. Pratap Chand [State of Karnataka v. Pratap Chand, (1981) 2 SCC 335 : 1981 SCC (Cri) 453]).

20. In other words, the law laid down by this Court is that for making a Director of a company liable for the offences committed by the company under Section 141 of the NI Act, there must be specific averments against the Director showing as to how *and in what manner the Director was responsible for the conduct of the business of the company."*

30. *As held in* ***K.K. Ahuja v. V.K. Vora (supra)*** *when the accused is the Managing Director or a Joint Managing Director of a company, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company for the conduct of the business of the company. This is because the prefix "Managing" to the word "Director" makes it clear that the Director was in charge of and responsible to the company, for the conduct of the business of the company. A Director or an Officer of the company who signed the cheque renders himself liable in case of dishonour. Other officers of a company can be made liable only under sub-section (2) of Section 141 of the NI Act by averring in the complaint, their position and duties in the company, and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence.*

44. *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.*

45. *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. Section 2(10) of the Companies Act, 2013, lays down:-

> *"(10) "**Board of Directors**" or "**Board**", in relation to a company, means the collective body of the directors of the company;"*

10. An executive director is a senior-level executive responsible for the overall management and leadership of an organization. The executive director reports to the board of directors and is responsible for setting the strategic direction for the organization, **overseeing day-to-day operations,** and ensuring the organization's goals and objectives are met.

Executive directors are appointed by the board and in this case as submitted by Mr. Ganguly, appearing for the SEBI, that the petitioner herein was also a member of the Board of Directors.

11. The learned counsel appearing for the petitioner submits that the petitioner was only an executive director and received only a salary of Rs.25,000/- and he was not involved in any of the day-to-day affairs of the company and he has, thus, prayed for quashing of the proceedings against him.

12. It is not denied by the petitioner that he was an executive director of the company herein and a member of the Board of Directors as stated by the opposite party during the period of the alleged offence in the present case. A prima facie case has also been made out before the whole time member of the SEBI against the petitioner and others.

13. On hearing the learned counsel for the petitioner, the learned counsel appearing for SEBI, the well reasoned order under revision and on careful perusal of the materials on record, it is prima facie evident that the petitioner was prima facie a member of the Board of Directors (subject to being proved otherwise during trial), during the period of alleged offence and a prima facie case against him was also found, as held by the whole time member of the Securities and Exchange Board of India.

14. Considering the fact that there is a prima facie case against the petitioner, it will be a clear abuse of the process of law, if this Court interferes in the proceedings before the trial Court against the petitioner herein.

15. On perusal of the order of the learned Special Judge, the learned Judge has rightly applied the appropriate provisions of law in deciding the prayer for discharge and the said order being in accordance with law requires no interference by this Court.

16. The trial before the Special Judge is at the **stage of evidence** and one witness has already been examined, wherein the petitioner has also participated.

17. Accordingly, the present revisional application being CRR 3638 of 2022 stands dismissed. Learned Special Judge, to proceed expeditiously with the trial.

18. Pending applications stand disposed of.

19. Interim order, if any, stands vacated.

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

21. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties expeditiously after due compliance.

(Shampa Dutt (Paul), J.)