



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.348 OF 2023**

Asharam Mundra and Anr.	...	Applicants
versus		
State of Maharashtra and Anr.	...	Respondents

Mr. Subodh Desai, with Ms. Dipti Das, Mr. Sunil Vyas, Ms. S. Punamiya i/by Fox Mandal and Associates LLP for Applicant.
Mrs. Geeta P. Mulekar, ,APP for State.
Mr. Surin Usgaonkar, for Respondent No.2.

CORAM: N.J.JAMADAR, J.

DATE : 9 JANUARY 2024

JUDGMENT :

1. This application under Section 482 of the Code of Criminal Procedure, 1973 calls in question the legality, propriety and correctness of the order of issue of process against the applicants – original Accused Nos.4 and 5 for an offence punishable under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881.

2. Bombay Rayon Fashions Ltd. - Accused No.1 is a Limited Company incorporated under the provisions of the Companies Act, 1956. Meera Cotton & Synthetic Mills Pvt. Ltd. - Respondent No.2 – complainant – lodged a complaint before the learned Magistrate with the allegations that it had sold and delivered fabrics and material under several invoices to Bombay Rayon Fashions Ltd. and the total principal amount of Rs.4,68,87,567/- was outstanding. Towards the discharge of the

said liability, accused No.1 had drawn 21 subject cheques aggregating to Rs.4,68,87,567/-. Upon presentment, all those cheques were returned unencashed ascribing various reasons, on 4 November 2020. Despite service of the statutory notice, Bombay Rayon Fashions Ltd. and the applicants who were in-charge of and responsible to the affairs of the business of Bombay Rayon Fashions Ltd. failed and neglected to pay the amount covered by the dishonoured cheques. Hence, the complaint.

3. The applicants assert that the applicant No.1 – original accused No.4 was appointed as an Executive Director of the accused No.1 Company and was designated as a executive director – Finance. The applicant No.1 has not been involved in the day to day business of the accused No.1 company. Applicant No.1 was working with the accused No.1 company in a professional capacity. In fact, Applicant No.1 resigned from the directorship of the company with effect from 31 December 2021.

4. The applicant No.2 was appointed as a director cum Secretary (Corporate Affairs) of the accused No.1 company on 1 June 2015. The applicant No.2 had not been involved in the day to day business of the accused No.1 company. The applicant No.2 is a Company Secretary by profession and has been working with the accused No.1 Company in the said capacity. Thus, the applicants assert, they have been unjustifiably dragged into the proceedings, though they were not involved in the

day to day management and the affairs of the accused No.1 company, nor in charge of and responsible to the business of the accused No.1 company.

5. I have heard Mr. Subodh Desai, learned Counsel for the Applicants, Mrs. Geeta Mulekar, learned APP for State and Mr. Usgaonkar, learned Counsel for Respondent No.2. Perused the material on record.

6. Mr. Desai, learned Counsel for the Applicants submitted that the prosecution of the applicants is wholly unjustifiable and unwarranted. Taking the court through the averments in the complaint, Mr. Desai would urge that the complaint singularly lacks averments that Applicants i.e. accused Nos.4 and 5 were the directors or other officers responsible for the affairs of the accused No.1 company. There is a bald and omnibus assertion in the complaint that accused Nos.2 and 9 were taking all the decisions with regard to the transactions in question, including the payment of the price of the goods sold and delivered and the accused Nos.2 and 9 had deliberately withheld the amount legally due to the complainant, and, therefore, accused Nos.2 and 9 are jointly and severally liable for the acts done by them and in the name of accused No.1 company. These averments, according to Mr. Desai, clearly fall short of the statutory requirements envisaged by Section 141 of the Act, to prosecute the directors or other officers of the corporate entity where the offence is alleged to have been committed by such entity.

7. Mr. Usgaonkar, learned Counsel for the complainant, controverted the

submissions on behalf of the applicants. It was urged that on the own showing of the applicants, it becomes abundantly clear that the applicants were in the day to day management of the affairs of the accused No.1 company. Applicant No.1 being the Executive Director – Finance, of the accused No.1 Company, cannot feign ignorance of the affairs of the company. Non-payment of the outstanding amount and the dishonour of the subject cheques upon presentment, and even the consequent default despite service of the demand notice, were squarely within the knowledge of the applicant No.1.

8. Attention of the Court was invited to Form DIR-12 (Exhibit C) which indicates that the Applicant No.1 was the whole time director of accused No.1 company. Mr. Usgaonkar would urge a whole time director can hardly be urged to say that he was not in-charge of and responsible to the affairs of the company. Likewise, Mr. Usgaonkar, banking upon Form DIR-12 (Exhibit E) in respect of Applicant No.2, submitted that the applicant No.2 has been working as an executive director under the professional category, and, therefore, cannot be permitted to wriggle out of the liability by raising technical contentions.

9. Mr. Desai joined the issue by canvassing a submission that the legal position has been settled by a catena of decisions that the necessary averments to bring a person within the dragnet of Section 141 of the Act, must be made in the complaint. In the absence thereof, the prosecution of such person becomes wholly unsustainable.

To lend support to this submission, Mr. Desai placed a strong reliance on the decision of the Supreme Court in the case of **Pooja Ravinder Devidasani V/s. State of Maharashtra and Anr.**¹

10. I have given anxious consideration to the rival submissions. The liability under Section 141 of the Act, 1881 for commission of the offence punishable under Section 138 of the Act, is in the nature of a vicarious liability. It is trite vicarious liability for an offence is required to be strictly construed. From the text of Section 141 of the Act, it becomes evident that the liability is incurred not on account of the position a person holds, but by reason of the role such person plays in the management of the affairs of the company. Liability does not depend upon the designation or status of the person sought to be roped in. Conversely, it could be shown that though a person does not hold a particular designation, yet he was in-charge of and responsible to the affairs of the company, and, therefore, liable to be prosecuted by invoking the constructive criminality under Section 141 of the Act.

11. A three Judge Bench of the Supreme Court in the case of **S.M.S. Pharmaceuticals Ltd. V/s. Neeta Bhalla**² expounded the nature of the liability and the necessity of the averments in the complaint, as under :

“10..... 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

1 (2014) 16 SCC 1

2 (2005) 8 SCC 89

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 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 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 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.

.....

18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a persons can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under

the said provision. That respondent falls within parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141 he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.”

12. The Supreme Court went on to classify the persons who can be in charge of and responsible to the company by their designation / position and the role the persons holding those positions ordinarily play and the necessity of averments in the complaint qua such persons, as under :

“(i) Managing Director/Joint Managing Director – By virtue of the office they hold, these persons are in charge of and responsible for the conduct of the business of the company. Therefore, they would fall under Section 141(1), even though there is no specific averment against them.

(ii) Person signing the cheque – The signatory of a cheque which is dishonoured, is clearly responsible for the act and will be covered under sub-section (2) of Section 141. Therefore, no special averment would be necessary to make him liable.

(iii) Director – The fact that a person is a Director of a company is not by itself sufficient to make him liable under Section 141 of the Act. A Director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant

time. This has to be averred, as there is no deemed liability upon a director.”

13. In the case of **Pooja Ravinder Devidasani (supra)**, on which reliance was placed by Mr. Desai, it was enunciated as under :

“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.*” (emphasis supplied)

14. The aforesaid judgments were followed by the Supreme Court in the recent pronouncement in the case of **Sunita Palita and Ors. V/s. Panchami Stone Quarry**³. It was enunciated as under :

“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 (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 (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

3 (2022) 10 SCC 152

Managing Director who would obviously be responsible for the company and/or its business and affairs.

45. As held by this Court in **National Small Industries Corpn. Ltd. V/s. Harmeet Singh Paintal**⁴ quoted with approval in the subsequent decision of this Court in Pooja Ravinder Devidasani (supra) the impleadment of all Directors of an accused Company 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, does not fulfil the requirements of Section 141 of the NI Act.”

15. On the aforesaid touchstone, reverting to the facts of the case, it may be expedient to extract the relevant averments in the complaint :

“2. It is further submitted that Accused No.(1) is the limited company and Accused Nos.(2) & (9) are its directors and having their respective addresses as mentioned in the clause title of present complaint. Accused No.(1) company is duly incorporated in the office of Registrar of Companies, Bombay and having its certificate of Incorporation No.L17120MH1992PLC066880. Print out copy of registration details obtained from the official website of Ministry of Corporate Affairs is annexed herewith separate list. It is marked as Annexure 3/3.

3. Accused Nos.2 and 9 are taking all the decision of placing orders and purchasing the materials from complainant and also in respect of the payment to be made to complainant against the said purchases on behalf of accused No.1. As Accused Nos.2 and 9 have deliberately withheld the legal dues of complainant and therefore, complainant has filed the present complaint making accused Nos.2 and 9 jointly and severally liable for the acts done by them in the name and on behalf of accused No.1.”

4 (2010) 3 SCC 330

16. First and foremost, it is imperative to note that there is no averment in the complaint as such that applicant Nos.1 and 2 (accused Nos.4 and 5) are the directors of the accused No.1 company. The allegations in the complaint are primarily made against accused Nos.2 and 9. At more than one places, the complainant has asserted that accused Nos.2 and 9 were taking all the decisions, and, therefore, accused Nos.2 and 9 are prosecuted as they are jointly and severally liable for the acts done by them in the name and on behalf of accused No.1 company. There are no averments in the complaint to show that applicant Nos.1 and 2 (accused Nos.4 and 5) were the directors of the company, much less, were in charge of and responsible for the affairs of the accused No.1 company. The complaint also lacks necessary particulars about the role played by the applicant Nos.1 and 2 in the management of the affairs of the accused No.1 company.

17. In the backdrop of the aforesaid nature of the averments in the complaint, the endeavour of Mr. Usgaonkar to salvage the position by asserting that the applicant No.1 being the whole-time director and the applicant No.2 being the Executive Director, cannot be absolved from the liability, deserves consideration.

18. What is the position held by the Applicant Nos.1 and 2 in the accused No.1 Company assumes significance. The applicant No.1 - Asharam Mundra, on the own showing of the applicants, was a whole-time director. He claimed to have resigned from the accused No.1 company with effect from 31 December 2021. The

letter of resignation (page 24 of the Petition) indicates that he professed to resign as a whole time director, designated as Executive Director – Finance of accused No.1 company. Evidently, the applicant No.1 was holding the said position when the subject cheques were drawn, presented for encashment and dishonoured as well as on the date of the accrual of the cause of action to lodge the complaint. Applicant No.2 – Prachi Deshpande, as is evident from the Form DIR-12, was the Executive Director under the professional category.

19. The distinction between the positions occupied by Applicant Nos.1 and 2 is self-evident. The Applicant No.1 was the whole-time director of the accused No.1 Company. Does that make any difference in the matter of fastening the liability for the commission of the offence punishable under Section 138 read with Section 141 of the Negotiable Instruments Act, 1888 ?

20. Under Section 5 of the Companies Act, 1956, meaning of ‘Officer who is in default’, was provided as under :

“5.Meaning of “officer who is in default” – For the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise, the expression “officer who is in default” means all the following officers of the company, namely -

- (a) the managing director or managing directors;
- (b) the whole-time director or whole-time directors;
- (c) the Manager;
- (d) the Secretary;

(e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act;

(f) any person charged by the Board with the responsibility of complying with that provision;

Provided that the person so charged has given his consent in this behalf to the Board.

(g) where any company does not have any of the officer specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors;

Provided that where the Board exercises any power under clause (f) or clause (g), it shall, within thirty days of the exercise of such powers, file with the Registrar a return in the prescribed form.”

21. Under the Companies Act, 2013, ‘the Officer who is in default’ is defined as under :

“2(60) : “Officer who is in default”, for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means any of the following officers of a company, namely -

(i) whole-time director;

(ii) key managerial personnel;

(iii) where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;

(iv) any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to make active steps to prevent, any default;

(v) any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity;

(vi) every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance;

(vii) in respect of the issue or transfer of any shares of a company, the share transfer agents, registrars and merchant bankers to the issue or transfer.”

22. The Companies Act, 1956, did not define the term ‘whole-time director’.

The Companies Act, 2013, however, defines the whole-time director under sub-Section (94) of Section 2, as under :

“(94) Whole-time director includes a director in the whole-time employment of the company;”

23. At this juncture, a useful reference can be made to the decision of the Supreme Court in the case of **K.K.Ahuja V/s. V.K.Vora and Anr.**⁵ wherein the Supreme Court after adverting to the provisions contained in the Companies Act, 1956, identified the categories of the person who can be held responsible for the conduct of the business of the Company, as under :

“21. A combined reading of Sections 5 and 291 of the Companies Act, 1956 with the definitions in clauses (24), (26), (30), (31), (45) of Section 2 of

5 (2009) 10 SCC 48

that Act would show that the following persons are considered to be the persons who are responsible to the company for the conduct of the business of the company :

- (a) the Managing Director(s);
- (b) the whole-time Director(s);
- (c) the Manager;
- (d) the Secretary;
- (e) any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act;
- (f) any person charged by the Board with the responsibility of complying with that provision (and who has given his consent in that behalf to the Board); and
- (g) where any company does not have any of the officers specified in clauses (a) to (c), any Director or Directors who may be specified by the Board in this behalf of where no Director is so specified, all the Directors.

It follows that other employees of the company, cannot be said to be persons who are responsible to the company, for the conduct of the business of the company.”

24. After analysis of the provisions and the previous judgments, the Supreme Court culled out the propositions as under :

“27. The position under Section 141 of the Act can be summarized 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 company who 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 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 (as defined in Section 2(24) of the Companies Act) or a person referred to in clauses (e) and (f) of Section 5 of 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 can not be made liable under sub-section (1) of Section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, be 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.”

(emphasis supplied)

25. In the light of the enunciation in the case of **S.M.S.Pharmaceuticals Ltd. (Supra)**, and further exposition in the case of **K.K.Ahuja (Supra)**, the question that comes to the fore is, in which of the aforesaid clauses the applicants fall.

26. Whether the applicants fall in clause (i) of para 27 of **K.K.Ahuja (supra)**, extracted above. Since Applicant No.2 Prachi Deshpande is the Executive

Director of accused No.1 Company, her case does not fall in clause (i) above. Her liability is required to be judged on the touchstone of the requirements postulated in clause (iii). Being the director of accused No.1, to implicate her with the aid of Section 141 of the Act, the averments in the complaint that she was in charge of and responsible to the company for the conduct of the business of the company is indispensable to bring her case under Section 141(1) of the Act. Invoking sub-Section (2) of Section 141 of the Act is out of question as there are no averments in the complaint with regard to the role, acts, connivance or negligence on the part of the directors and officers of the company, except accused Nos.2 and 9. Thus, process could not have been issued against Applicant No.2 – Prachi Deshpande.

27. As regards the applicant No.1, in my considered view, different considerations come into play. It is true, under clause (i) extracted above, the reference is to Managing or Joint Managing Director of the Company. It does not specifically refer to a whole-time director. However, the said aspect does not appear to be of decisive significance. The emphasis is on the role of the person occupying such positions which make them in charge of and responsible to the company for the conduct of the business of the company.

28. The applicant No.1 was indubitably the whole-time director of the company and also Executive Director – Finance. I find substance in the submission of Mr. Usgaonkar that the applicant No.1 being the whole time director and also the

Executive Director – Finance, cannot be heard to urge that he was unaware of the transaction in question and was not responsible for the acts of the company, leading to the commission of the offences.

29. I am conscious that it could be urged that the definition of ‘Officer who is in default’, is for the purpose of the provisions of the Companies Act, and the liability cannot be fastened on the person holding the position named therein, for the offences under the Negotiable Instruments Act, 1888. However, in the case at hand, the factual position seems to be rather incontrovertible.

30. It is trite, a complaint is required to be read as a whole. Complaint ought to be read in a meaningful manner. The Court should avoid a formalistic and hyper-technical approach. The applicant No.1 was holding the position of whole time director as well as was the Executive Director – Finance. In the circumstances, the fact that there is no assertion in the complaint that the applicant No.1 was the director of accused No.1 company as accused Nos.2 and 9 were stated to be the directors of the company would be taking a very constricted and technical approach. One gets an impression that the complainant, for all intent and purpose, meant to aver that accused Nos.2 to 9 were the directors of the accused No.1 company.

31. Once it is held that the case of the applicant No.1 falls within the ambit of clause (i) of para 27 of the decision in the case of **K.K.Ahuja (Supra)**, in the backdrop of the uncontroverted factual position, in my view, it may be appropriate to

allow the complaint qua applicant No.1 - Asharam Mundra to proceed to trial.

32. Resultantly, the application deserves to be partly allowed qua applicant No.2 - Prachi Deshpande and the application deserves to be dismissed qua applicant No.1 - Asharam Mundra.

33. Hence, the following order :

ORDER

(i) The Application stands partly allowed.

(ii) Criminal Proceedings in SCC No.91 of 2021 and the order of issue of process dated 29 January 2021 passed by the Judicial Magistrate, First Class, Dadra and Nagar Haveli, Silvassa, for the offence punishable under Section 138 read with Section 141 of the Act, stand quashed and set aside qua applicant No.2 - Original Accused No.5 - Prachi Deshpande.

(iii) The application stands dismissed qua Applicant No.1 - Asharam Mundra (original Accused No.4).

(iv) No costs.

(N.J.JAMADAR, J.)