



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO.3065 OF 2021**

Tilak Raj Bajalia and Anr. ... Petitioners
versus
Kaybee Foundry Services Pvt. Ltd. & Anr. ... Respondent
WITH
WRIT PETITION NO.3067 OF 2021

Tilak Raj Bajalia and Anr. ... Petitioners
versus
Nirmal Manoharlal Daga and Anr. ... Respondents
WITH
WRIT PETITION NO.3066 OF 2021

Tilak Raj Bajalia and Anr. ... Petitioners
versus
Nirmal Manoharlal Daga and Anr. ... Respondents

Ms. Poonam Ankleshwaria with Mr. Hrsh Dattani for Petitioners.
Mr. Nigam C. Kumar with Mrs. Shilpa D. More i/by N.K.Juris, for Respondent No.1.
Mr. S.R.Agarkar, APP for State.

CORAM: N.J.JAMADAR, J.

DATE : 12 MARCH 2024

JUDGMENT :

1. Rule. Rule made returnable forthwith. With the consent of the parties, heard finally.
2. These Petitions take exception to the orders passed by the learned Magistrate of issue of process against the Petitioners for an offence punishable under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (the Act).

In the backdrop of an almost identical fact situation, these Petitions are being decided by this common judgment.

3. Kaybee Foundry Services Pvt. Ltd. - complainant in CC No.811/SS/2020 and Respondent No.1 in WP No.3065 of 2021 had sold, supplied and delivered goods to the tune of Rs.1,33,32,154/- to the Isinox Ltd. - accused No.1. Petitioner Nos.1 and 2 (accused Nos.2 and 4) in WP No.3065 of 2021, claim to be independent directors of Isinox Ltd. - accused No.1.

4. Nirmal Manoharlal Daga (complainant in 5696/SS/2019 and 5695/SS/2019) the proprietor of M/s. Ishita Metals, had sold and delivered SS Metals under various bills to Isinox Ltd. - accused No.1, of which Petitioners in WP No.3067 of 2021 and 3066 of 2021 (accused Nos.2 and 5 in complainants in 5696/SS/2019 and 5695/SS/2019) claim to be independent directors.

5. The complainant in CC No.811/SS/2020 alleged, in discharge of the liability allegedly incurred by Isinox Ltd., the accused No.1 had drawn 13 cheques on Indian Bank, Nariman Point Branch in favour of Kaybee Foundry Services Pvt. Ltd., for varying amounts. All the 13 cheques were returned unencashed on presentment. Despite service of the statutory demand notice, Isinox Ltd. and its directors, including the Petitioners, committed default in payment of the amounts covered by the dishonoured cheques. Kaybee Foundry Services Pvt. Ltd., thus, lodged a complaint for an offence punishable under Section 138 read with Section 141 of the Act, against

Isinox Ltd., its directors and authorized signatories – accused Nos.2 to 7. By an order dated 24 December 2020, learned Metropolitan Magistrate was persuaded to take cognizance and issued process against accused Nos.1 to 6 only.

6. In Complaint No.5696/SS/2019, Isinox Ltd. had drawn three cheques aggregating to Rs.44,39,645/- respectively. In Complaint No.5695/SS/2019, Isinox Ltd. had drawn a cheque in the sum of Rs.11,97,996/-. All the cheques were dishonoured on presentment during the period 27 August 2019 to 29 August 2019. Despite service of the statutory demand notice dated 19 September 2019, Isinox Ltd. and accused Nos.2 to 6 allegedly committed defaults in payment of the amounts covered by the those cheques. Learned Metropolitan Magistrate was persuaded to issue process against Isinox Ltd., as well as accused Nos.2 to 6 opining, inter alia, that there were sufficient averments to issue process against the directors, including the Petitioners.

7. Being aggrieved, the Petitioners have invoked the writ jurisdiction.

8. An affidavit in reply is filed on behalf of Kaybee Foundry Services Pvt. Ltd. - Respondent No.1 in WP 3065 of 2021.

9. I have heard Ms. Poonam Ankleshwaria, learned Counsel for the Petitioners, Mr. Nigam C. Kumar, learned Counsel for Respondent No.1 – complainant and Mr. Aagarkar, learned APP for the State at some length.

10. Ms. Ankleshwaria submitted that the impugned orders of issuance of

process suffer from non-application of mind. Ms. Ankleshwaria would urge that the Petitioners are indisputably independent directors of Isinox Ltd. Thus, they cannot be said to be in-charge of and responsible for the day to day affairs of Isinox. Resultantly, they could not have been prosecuted by invoking the vicarious liability envisaged by sub-Section (1) of Section 141 of the Act.

11. Secondly, taking the court through the averments in each of the complaints, Ms. Ankleshwaria made an endeavour to draw home the point that none of the complaints contain sufficient averments to justify the prosecution of the Petitioners by resorting to sub-Section (2) of Section 141 of the Act on the premise that the offence was committed due to negligence or connivance on the part of the Petitioners.

12. Ms. Ankleshwaria invited the attention of the Court to Form No.DIR 12, which indicates that Tilak Raj Bajalia and Kanta Raju Joshi, the Petitioners, came to be appointed as independent and non-executive directors of Isinox Ltd., with effect from 30 September 2016. It was urged that it is well neigh settled by a long line of decisions that an independent director cannot be roped in by invoking provisions contained in Section 141 of the Act, 1881.

13. Mr. Nigam Kumar, learned Counsel for Respondent No.1 – complainant resisted the submissions on behalf of the Petitioners. It was urged that there are adequate averments in the complaints which bring the acts of the Petitioners within the ambit of the provisions contained in Section 141 of the Act. Moreover, according

to Mr. Kumar, the claim of the Petitioners that they are independent and non-executive directors of Isinox Ltd., is a matter which warrants determination at the trial. At this stage, according to Mr. Kumar, the Court cannot proceed on the basis of the information furnished in Form DIR 12 alone.

14. Inviting attention of the Court to the information disclosed in the audit report of Isinox Ltd. (R-7 colly), annexed to the affidavit in reply, Mr Kumar strenuously submitted that the Petitioner Nos.1 and 2 were principal officers and also looking after the day to day business affairs of Isinox Ltd. Special emphasis was laid on the annual financial statement for the period 1 April 2019 to 31 March 2020, to the effect that the Petitioner Nos.1 and 2 were members of the audit and corporate social responsibility committee of Isinox. The contention that the Petitioners were mere independent directors without any role in the management of the affairs of Isinox Ltd. is, thus, a subterfuge, urged Mr. Kumar.

15. 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 that 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.

16. A three Judge Bench of the Supreme Court in the case of **S.M.S. Pharmaceuticals Ltd. V/s. Neeta Bhalla**¹ 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 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

1 (2005) 8 SCC 89

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."

17. 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.”

18. In the case of **Pooja Ravinder Devidasani V/s. State of Maharashtra and Anr.**², the Supreme Court enunciated that the law laid down by the Supreme Court is that for making a director of a company liable for the offence committed by the company under Section 141 of the Act, there must be specific averments against the director showing as to how and in what manner, such director was responsible for the conduct of the business of the company.

19. In a recent pronouncement in the case of **Sunita Palita and Ors. V/s. Panchami Stone Quarry**³ the Supreme Court followed the judgments in the cases of

² (2014) 16 SCC 1

³ (2022) 10 SCC 152

S.M.S. Pharmaceuticals Ltd. V/s. Neeta Bhalla⁴ and Pooja Ravinder Devidasani

(supra), and enunciated the legal position 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 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 Paintal⁵** 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.”

20. The facts in the case of **Sunita Palita and Ors. (supra)**, appear to be on all four with the case at hand, as the Appellants therein were also shown to be independent and non-executive directors of the company. Non-executive directors are

4 (2005) 8 SCC 89

5 (2010) 3 SCC 330

not involved in the day to day affairs of the company or in running of its business. The endeavour of Mr. Kumar to bank upon the information disclosed in the annual statement of account does not advance the cause of the Respondent No.1 – complainant. The very fact that the Petitioners were made members of the audit and corporate social responsibility committee appears to be in consonance with the role of the Petitioners as independent non-executive directors of Isinox Ltd.

20. The situation which thus obtains is that the Petitioners being the independent non-executive directors cannot be roped in by invoking the provisions contained in sub-Section (1) of Section 141 of the Act. Can the Petitioners be prosecuted by taking recourse to the provisions contained in sub-Section (2) of Section 141 of the Act ?

21. As postulated in the case of **K.K.Ahuja V/s. V.K.Vora and Anr.**⁶ the officers of the company who cannot be made liable under sub-Section (1) of Section 141 of the Act, can still be made liable under Section 141(2) of the Act by making averments in the complaint about their position and duties in the company and their role in regard to the issuance of the dishonoured cheques, disclosing the consent, connivance or negligence.

21. To this end, recourse to the averments in the complaint is indispensable. I have perused the averments in the complaint carefully. There are but omnibus

6 (2009) 10 SCC 48

allegations that accused Nos.2 to 6 are the directors of the accused No.1 company. They are principal officers and looking after the day to day affairs and management of the company as of the date of the offence, prior and subsequent thereto. The complaints singularly lack any averment that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, the Petitioners. In the absence of such averments, the prosecution of the Petitioners by invoking the provisions contained in Section 141(2) of the Act also, would be legally impermissible.

22. The conspectus of aforesaid discussion is that the prosecution of the Petitioners who are the independent non-executive directors of Isinox Ltd. for an offence punishable under Section 138 read with Section 141 of the Act, 1881 would amount to abuse of the process of the court and wholly unjustifiable.

23. Hence, the following order :

ORDER

- (i) The Writ Petitions stand allowed.
- (ii) The orders of issue of process dated 24 December 2020, 4 January 2020 and 4 January 2020 in Complaint Nos.811/SS/2020, 5696/SS/2019 and 5695/SS/2019, qua Petitioner Nos.1 and 2, stand quashed and set aside.
- (iii) Complaint Nos. Complaint Nos.811/SS/2020, 5696/SS/2019 and 5695/SS/2019 to proceed against rest of the accused in accordance with law.

- (iv) Rule made absolute to the aforesaid extent.
- (v) No order as to costs.

(N.J.JAMADAR, J.)