

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO. 2548 OF 2024

Tarun Agarwal
Indian Inhabitant aged around 53 years,
residing at 1801, Krypton Towers,
New Prabhadevi Road,
New Prabhadevi Temple, Prabhadevi,
Mumbai-400025.

.... Petitioner

vs.

- 1) M/s. DMSONS Metal Private Limited,
A Private Limited Company incorporated
under the provisions of Companies
Act, 1956 having its registered office at 502,
Peninsula Heights, Juhu Lane, Near BMW
Show Room, Andheri (W),
Mumbai – 400058.

- 2) State of Maharashtra

.... Respondents

Mr. Jayesh Bhosale for the Petitioner.

Ms. Chhaya More i/b. Mr. Anil Agarwal for the Respondent No.1.

Ms. R.V. Newton, APP for the Respondent No.2 - State.

CORAM : SHYAM C. CHANDAK, J.

RESERVED ON : 29th JULY, 2024

PRONOUNCED ON : 20th SEPTEMBER, 2024

JUDGMENT:-

. Present Petition is seeking for quashing and setting aside of

an Order dated 11th March 2019 passed in C.C.No.2473/SS/2018, by the 28th Court of learned Metropolitan Magistrate, at Esplanade, Mumbai thereby process has been issued against the Petitioner for the alleged offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (*'N.I.Act'*, for short). The Petition is also seeking for quashing and setting aside of a Judgment and Order dated 4th August, 2023 passed by the Court of learned Additional Sessions Judge, Greater Mumbai thereby said learned Judge dismissed the Criminal Revision Application No.215 of 2023, impugning the said 'Order of issue process'.

2) Heard Mr. Bhosale, learned counsel for Petitioner, Ms. More, learned counsel for Respondent No.1 and learned A.P.P. Ms. Newton for Respondent No.2-State. Perused the record.

3) Rule. Rule is made returnable forthwith. By consent of the parties, heard finally.

4) Respondent No.1 has filed said C.C.No.2473/SS/2018 wherein it is stated that, the Accused No.1 M/s. Capacite Structures Limited is a private Company. The Accused No.2 is a Managing Director plus signatory to the cheque and Accused Nos.3 to 6 are Directors of Accused No.1 Company. The Petitioner is the Accused No.3.

4.1) It is alleged that, from 21st July 2017 to 15th November 2017, Respondent No.1 had sold, supplied and delivered the goods being iron and steel goods of various descriptions under its distinguished invoices to Accused No.1. The goods along with its invoices was received by the accused from time to time in good condition. The Accused No.1 has furnished the “*Letter of Credit*” for some invoices. Yet, the Accused No.1 did not make the payment of the invoices as stated in paragraph 13 of the complaint. As requested by the accused, the Respondent No.1 furnished the confirmation letter dated 1st April, 2018 which was confirmed by the Accused No.1, admitting its liability for the sum of Rs.77,51,937/-. Further, to discharge the said legal debt and liability, as per the instructions of Accused Nos.2 to 6, the Accused No.1 issued and handed over to Respondent No.1 a cheque dated 30th June 2018, for a sum of Rs.57,51,937/-. The Respondent No.1 presented that cheque for encashment, however, it returned dishonoured for the reason “*Exceeds Arrangement*”, by the banker of the accused along with a memo. Therefore, Respondent No.1 issued a demand notice to all the accused persons through RPAD on 3rd September, 2018. However, the notice returned undelivered by the Postal Authority with a remark “*Addressee*

Not Known". It is alleged that, said remark was dishonestly managed by the accused persons. However, the said notice was delivered to the Accused Nos.2, 4 and 5 on 4th September, 2018.

5) On considering the complaint, the documents enclosed and the verification statement, the learned Magistrate held that there is a *prima facie* case against all the accused. Hence, the learned Magistrate passed the impugned Order of issue process dated 11th March 2019. The Petitioner assailed the said Order of issue process in a Criminal Revision Application No.215 of 2023. However, the learned Additional Sessions Judge, at Greater Mumbai held the Order of issue process correct and legal, hence, dismissed the Revision by the impugned Order dated 4th August, 2023.

6) Learned counsel Mr. Bhosale for the Petitioner submitted that only general allegations have been made in the complaint, that the Accused Nos.2 to 6 were responsible for the affairs and conduct of the business of Accused No.1. That, no specific role has been attributed to the Petitioner in the said complaint to show as to how the Petitioner was responsible for the affairs and conduct of the business of the Accused No.1. He submits that, at the relevant time the Petitioner was only an

Independent Director of the Accused No.1. As provided under Section 149 (6) of the Indian Companies Act, only for those act and omissions that occurs with the knowledge of such an Independent Director, attributable through board process, and with his consent or connivance or where he had not acted diligently, the Independent Director will be responsible for the act of the Company. However, such is not the case here. Therefore, merely because the Petitioner was an Independent Director of the Accused No.1 at the relevant time, he cannot be held liable for the alleged offence of Section 138. However, the learned trial Court and the learned Additional Sessions Judge failed to consider the above. As such both the impugned Orders are illegal and liable to be quashed and set aside.

7) Controverting the aforestated averments made by learned counsel for the Petitioner, the learned counsel Ms. More for Respondent No.1 vehemently submitted that there are sufficient allegations in the complaint that the Accused Nos.2 to 6 including the Petitioner along with other Directors and Officers of Accused No.1 were in-charge and control of the day-to-day affairs, management and responsible for the conduct of the business of Accused No.1. The order of appointment

produced by the Petitioner would show that, he was an Independent Director of the Company, is not a reliable document but it is an antedated document. That apart, the said document rather supports the case of Respondent No.1. Lastly, she submitted that there is sufficient material against the Petitioner to prosecute him for the alleged offence. As such, the trial Court was correct in issuing the process against the Petitioner. Further, the conclusion arrived at by the learned Additional Sessions Judge to reject the Revision Petition is free from error. As such there is no substance in the Petition and it may be dismissed.

8) Considering the allegations in the subject complaint and the rival submissions, first it is necessary to refer the reported decisions cited by learned counsel Mr. Bhosale. The said decisions pertain to the question as to what shall be the essential and/or specific averments in a complaint seeking for issuance of process and prosecution of a Director etc. of a Company for the alleged offence of Section 138 of the N.I. Act.

9) In ***Anita Malhotra Vs. Apparel Export Promotion Council & Anr¹***, the Hon'ble Supreme Court enunciated that, in case of a Director, the complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the Accused

1. (2012) 1 SCC 520

company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient.

10) In ***S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla & Anr²*** and ***Susela Padmavathy Amma Vs. Bharti Airtel Limited³***, the Hon'ble Supreme Court observed that merely because a person is a director of a company, it is not necessary that he is aware about the day-to-day functioning of the company. That there is no universal rule that a Director of a Company is in charge of its everyday affairs. It is, therefore, necessary, to aver as to how the director of the company was in charge of day-to-day affairs of the company or responsible to the affairs of the company.

11) On the similar line, in ***Ashok Shewakramani & Ors. Vs. State of Andhra Pradesh & Anr⁴***, the Hon'ble Supreme Court held that, in a given case, a manager of a Company may be managing the business of the Company, but only on the ground that he is managing the business of the Company, he cannot be roped in based on Section 141 (1).

2. (2007) 4 SCC 70

3. 2024 SCC Online SC 311

4. (2023) 8 SCC 473

12) After considering the relevant Sections and other provisions, in ***K.K. Ahuja Vs. V.K. Vora and Anr***⁵, in paragraph 9, 10, 11 and 12 the Hon'ble Supreme Court held as under :

“9. ... The prevailing trend appears to require the complainant to state how a Director who is sought to be made an Accused, was in charge of the business of the company, as every director need not be and is not in charge of the business of the company. If that is the position in regard to a director, it is needless to emphasise that in the case of non-director officers, there is all the more the need to state what his part is with regard to conduct of business of the company and how and in what manner he is liable.

10. Having regard to Section 141, when a cheque issued by a company (incorporated under the Companies Act, 1956) is dishonoured, in addition to the company, the following persons are deemed to be guilty of the offence and shall be liable to be proceeded against and punished: (i) 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; (ii) any Director, Manager, Secretary or other officer of the company with whose consent and connivance, the offence under Section 138 has been committed; and (iii) any Director, Manager, Secretary or other officer of the company whose negligence resulted in the offence under Section 138 of the Act, being committed by the company. While liability of persons in the first category arises

5. (2009) 10 SCC 48

under Sub-section (1) of Section 141, the liability of persons mentioned in categories (ii) and (iii) arises under Sub section (2). The scheme of the Act, therefore is, that a person who is responsible to the company for the conduct of the business of the company and who is in charge of business of the company is vicariously liable by reason only of his fulfilling the requirements of Sub-section (1). But if the person responsible to the company for the conduct of business of the company, was not in charge of the conduct of the business of the company, then he can be made liable only if the offence was committed with his consent or connivance or as a result of his negligence.

11. The criminal liability for the offence by a company under Section 138, is fastened vicariously on the persons referred to in Sub-section (1) of Section 141 by virtue of a legal fiction. Penal statutes are to be construed strictly. Penal statutes providing constructive vicarious liability should be construed much more strictly. When conditions are prescribed for extending such constructive criminal liability to others, courts will insist upon strict literal compliance. There is no question of inferential or implied compliance. Therefore, a specific averment complying with the requirements of Section 141 is imperative. As pointed out in *K. Srikanth Singh v. North East Securities Ltd.* 2007 (12) SCC 788, the mere fact that at some point of time, an officer of a company had played some role in the financial affairs of the company, will not be sufficient to attract the constructive liability under Section 141 of the Act.

12. Sub-section (2) of Section 141 provides that a Director, Manager, Secretary or other officer, though not in charge of the conduct of the business of the company will be liable if the offence had been committed with his consent or connivance or if the offence was a result of any negligence on his part. The liability of persons mentioned in Sub-section (2) is not on account of any legal fiction but on account of the specific part played- consent and connivance or negligence. If a person is to be made liable under Sub-section (2) of Section 141, then it is necessary to aver consent and connivance, or negligence on his part.”

13) In the case of ***Preeti Vs. State and Anr***⁶, it is observed that, mere allegations or bald assertion may be sufficient to implicate the Managing Directors as well as those who are signatories to the cheque, but not the other Directors or persons, especially independent or non-executive Directors.

14) As regards the position of an Independent Non-executive Director, in ***Pooja Ravinder Devidasani Vs. State of Maharashtra & Anr***⁷, in paragraph 17, the Hon’ble Supreme Court clarified that, “...Non-executive Director is no doubt a custodian of the governance of the Company but does not involve in the day-to-day

6. 2022 SCC OnLine Del 3612

7. (2014) 16 SCC 1

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 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 N.I.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 N.I. Act.

15) In ***Satvinder Jeet Singh Sodhi and Anr. Vs. State of Maharashtra and Anr⁸*** and ***Sunita Patla & Ors Vs. M/s. Kit Marketing Pvt. Ltd.⁹***, the Applicants/Petitioners were Independent

8. 2022 SCC OnLine Bom 2298

9. CRL.M.C. 1410/2018 (Del)

Non-Executive Directors. However, except bald statement and general allegations, the role attributed to them was not sufficient to prosecute them for the alleged offence of Section 138 of N.I.Act. Hence, the proceedings against them were quashed and set aside.

16) Now turning to the facts of the case in hand. In the subject complaint The Respondent No.1 has specifically stated that, the Accused Nos.2 to 6 including the Petitioner along with other Directors and Officers of Accused No.1 were in-charge and control of the day-to-day affairs, management and responsible for the conduct of the business of Accused No.1. Further, it is alleged that Accused Nos.2 to 6 had stated that they have invested good amounts in the share capital of Accused No.1; that, they are actively looking after the sales and purchase of the Accused No.1; and that, they are actively involved in looking after activities of Accused No.1. It is alleged that, the accused Nos.2 to 6 had stated that they along with other Directors and Officers of Accused No.1 govern the Board of Directors of the Accused No.1. Further, it is alleged that the Accused Nos.2 to 6 and others used to take decisions about the administration of financial management of the Accused No.1. It is alleged that, the Accused Nos.2 to 6 were responsible for day-to-day

affairs and management of the Accused No.1, when the dishonoured cheque was presented for encashment and the cause of action arose. However, the Accused persons failed to comply with the demand notice and pay the dishonoured cheque amount within the stipulated period from the service of the notice.

17) On careful consideration of the aforesaid allegations, it seems that, first, the Accused Nos.2 to 6 impressed upon the Respondent No.1 that, the Accused No.1 is financially sound as it is backed by their investments; and that, they have administrative control over Accused No.1. Therefore, the Respondent No.1 was convinced to rely upon the representation by the Accused Nos.2 to 6 that they are actively looking after the sales and purchase of the Accused No.1 and become ready to sale the subject goods to Accused No.1. Therefore, the assertion in the complaint that the Petitioner along with other Directors and Officers of Accused No.1 were in-charge and control of the day-to-day affairs, management and responsible for the conduct of the business of Accused No.1, cannot be termed as vague or mere bald assertions.

18) The complaint specifically claimed that, the Petitioner was one of the Directors of the Accused No.1 at the relevant time. However,

pointing the Forms No.12 and his Letter of Appointment, issued in accordance of the Code of Independent Directors contained in the Companies Act, 2013 the Petitioner has claimed that he was merely an Independent Non-executive Director of the Accused No.1.

19) In this regard it is pertinent to note that, as mentioned in the Letter of Appointment, in the Annual General Meeting (AGM) dated 22nd August, 2015 the shareholders of the Accused No.1 Company had approved the Petitioner's appointment as an Independent Director but the Letter of Appointment was issued on 16th February, 2015 i.e. much prior to the said AGM. That apart, the Petitioner accepted the Letter of Appointment on 16th May 2015, thus, said acceptance was also prior to the said AGM. Therefore, at this stage it is difficult to rely upon the Letter of Appointment.

20) In so far as the Form No.12 (Exhibit 'E') is concerned, in the said document the Petitioner's designation is shown as Additional Director and the box is marked with sign 'X' (cross) against the 'category' Non-executive Director. Thus, said form indicates that the Petitioner was a Non-executive Director at the relevant time. However, from this Form it is not clear as to when the said Form was uploaded on

the official website of the office of the concerned authority, functional under the Companies Act. Secondly, the same is not a certified copy so as to safely rely upon.

21) Be that as it may, in the Letter of Appointment, under the title 'Role and Duties', it was the duty of the Petitioner to act in good faith in order to promote object of the Company for the benefit of its members and in the best interest of the company. The Petitioner was duty bound to discharge his duties with due and reasonable care, skill and diligence. The Petitioner was duty bound to satisfy himself on the integrity of financial information and that financial controls and systems of risk management are effective and defensible. However, the facts of the case indicate that, the Petitioner has not acted diligently when the accused persons convinced the Respondent No.1 that it would be safe to enter into the business transactions with the Accused No.1.

22) No doubt, the Form No.12 (Exhibit 'F') shows that, the Petitioner resigned from the Company but with the designation as Director. The said Form indicates that, the relevant declaration therein was made on 23rd August, 2018 by the Director-Accused No.5 and the resignation of the Petitioner was effective from 12th October, 2018. The

subject cheque was dated 30th June, 2018 and it dishonoured on 13th August, 2018. Thus, it is evident that, the Petitioner's connection with the Accused No.1 was not severed prior to the dishonour of the cheque and the cause of action for the subject criminal case.

23) The Petitioner also claimed that, he did not get the registered statutory notice of the dishonoured cheque but the record indicates that, the postal envelope containing the said notice was addressed to the Petitioner and it was sent at the postal address of the Accused No.1. However, said envelope returned to the sender with a remark '*Addressee Not known*'. Said remark was dated 4th September 2018, which is prior to 12th October, 2018 when the Petitioner's resignation become effective. Secondly, certain Directors i.e. Accused Nos. 2,4 and 5 were duly served with the said notice. As such, bare plea that the Petitioner did not receive the said notice is of no avail and thus, said aspect is also a question of trial.

24) In view of the above discussion, I find it difficult to hold that at the relevant time the Petitioner was an Independent Non-executive Director of the Accused No.1 Company. In fact, it is a question of fact as to whether the Petitioner was a Director or an Independent Non-

executive Director of the Accused No.1 Company. Considering the facts of the case, I deem it appropriate that said question is answered based on the trial of the alleged offence. Additionally, looking at the dates of the cheque in question, its dishonour, the statutory notice, the postal remark on the envelope of the registered notice sent to the Petitioner and the Petitioner's resignation, it is evident that there is proximity in said dates. As such it can be safely inferred that, immediately after the said cheque dishonoured, the Petitioner came to know the said fact and hence, he resigned from the Accused No.1 Company so as to save him from the prosecution of the alleged offence.

25) Upshot of the above discussion is that, there is a *prima facie* case against the Petitioner of having committed the alleged offence along with the rest accused. As such, there is no merit in the Petition so as to quash and set aside the impugned Orders. Petition thus, failed and is liable to be dismissed. Petition is dismissed, accordingly.

JYOTI
RAJESH
MANE

Digitally signed
by JYOTI RAJESH
MANE
Date: 2024.09.24
18:21:17 +0530

(SHYAM C. CHANDAK, J.)