

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

CRIMINAL APPLICATION NO.74 OF 2021

- 1) Mr.Satvinder Jeet Singh Sodhi; and
- 2) Mr.Sakti Kumar Banerjee Anr. .. Applicants

Versus

State of Maharashtra and Anr. .. Respondents

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Mr.Abhijeet Desai a/w. Ms.Karan Gajra i/b. M/s. Desai Legal,
Advocate for the Applicants.

Mr.A.R. Patil, APP for the Respondent No.1-State.

Mr.Deepak Rane, Advocate for Respondent No.2.

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CORAM : PRAKASH D. NAIK J.

DATED : JULY 01, 2022.

P.C. :

The applicants are aggrieved by order issuing process in CC.No.3461 of 2013, passed by the Metropolitan Magistrate 7th Court at Dadar, Mumbai.

2 The complaint was filed for offence under Section 138 of Negotiable Instruments Act (“NI Act”, for short) alleging that, the complainant company is engaged in business of various types of material handling equipments. The accused no.1 is a

company. Accused no.10 is its secretary. Accused Nos.11 and 12 are authorised signatory of accused no.1. Accused nos.2 to 9 are Directors of accused no.1 company. Accused nos.2 to 12 are responsible for day to day affairs of accused no.1 company and they are responsible for transactions of this case. Accused no.1 is the customer of complainant company. Directors of accused no.1 had placed orders with the complainant for Electromagnetic Oil Cooled Overband Magnetics Separator on behalf of accused no.1. As per requirement of accused no.1 company, the complainant company delivered the material to consignee at their instance. There was no objection from accused regarding quality and quantity of the goods. In discharge of the liability, the accused no.1 issued a cheque signed by accused nos.11 and 12. The cheque was for an amount of Rs.29,31,849.30. The cheque was presented by complainant with their banker. It was dishonoured with reasons "Funds insufficient". Notice was duly served on accused nos.1, 2, 3, 6, 9, 11 and 12 on 17th August, 2013 and envelope returned to advocate with remark, "Not claimed" regarding accused no.5 and 8. Regarding accused nos.4, 7 and 10, complainant did not receive any postal acknowledgment. Complaint was filed on 30th September, 2013, for the offence punishable under Section 138

of Negotiable Instruments Act (“NI Act”, for short). Process was issued.

3 Learned advocate for applicants submitted as follows:

- (a) The applicants are not responsible for day to day affairs of accused no.1 company as they are non executive independent Directors of the accused no.1 company. The said fact is evident from the documents annexed to this application.
- (b) The applicants have no knowledge or information about the transactions of this case. As per Section 149(12) of the Companies Act an independent director or non executive director shall be held liable only in respect of such acts of omissions or commission by a company which had occurred with his knowledge, attributable through Board processes and with his consent or connivance or where he had not acted diligently.
- (c) The applicant no.1 was not served legal notice demanding cheque amount;

- (d) To prosecute the accused by invoking Section 141 of the Act, the person must be in charge of day to day activities and responsible for the conduct of business of the company.
- (e) An independent director is a member of the board of Directors who (i) does not have a material relationship with the company; (ii) is not part of company's executive team and (iii) is not involved with day to day operation of the company.
- (f) To be able to list on certain exchanges, there are requirements for the member of independent Directors of the Board.
- (g) A material relationship is a relationship that can interfere with the exercise of a director's independent judgment.
- (h) The corporate Governance Report for the year 2013 - 14 refers to composition of Board of Directors. It is mentioned that applicants are independent non-executive Directors, Form 32 of applicant no.1 describes him, as independent director.
- (i) Being independent Directors and lack of averments in complaint, the applicants cannot be prosecuted for the

offence under Section 138 of NI Act.

(j) Reliance is placed on following decisions:

(a) *Pooja Ravinder Devidasani Vs. State of Maharashtra*¹.

(b) *Sunita Palta & Ors. Vs. M/s. Kit Marketing Pvt. Ltd., decided by Delhi High Court vide Criminal M.C.1410 of 2018.*

4 Learned counsel for respondent has submitted that there are sufficient averments in the complaint to indicate the role of the applicants. The grounds urged by the applicants that they are independent non executive Directors or that there are no averments to satisfy the requirements of Section 141 of NI Act is required to be appreciated during the trial. On the basis of the facts stated in the complaint that Court took cognizance of the complaint. It is submitted that the applicants have not brought any unimpeachable evidence which leads to conclusion that the applicants were not in-charge and responsible for the conduct of business of the accused company, at the time of commission of offence. The documents relied upon by the applicant cannot be considered at this stage. Statutory notices were dispatched to applicants on last known address. The postal

1 AIR 2015 SC 675

envelopes returned with remarks not claimed. It is not incumbent upon the complainant to elaborate in the complaint, role played by each Directors in the transaction forming the subject matter of the complaint. Reliance is placed on the decision of the Supreme Court in the case of ***Ashutosh Ashok Parasrampuriya and Anr. Vs. M/s.Gharrkul Industries Pvt. Ltd. And Ors.***²

5 The applicants are arrayed as accused nos.5 and 8 in the complaint. The Corporate Governance Report for the year 2013 - 14 refers to composition of Board of Directors as on 31st March,2014 and describes applicants as independent non executive director. The complaint for offence under Section 138 of NI Act was filed on 30th September, 2013. In the complaint, it is averred that, accused no.1 company. Accused nos.11 and 12 are authorised signatory of accused no.1. Accused nos.2 to 12 are responsible for day to day affairs of accused no.1 company and responsible for transactions in this case. The transaction referred to in the complaint is delivery of material as per requirement of accused no.1 company and issuance of cheque signed by accused nos.11 and 12 towards discharge of liability and dishonour of said cheque. Beyond the aforesaid averment,

no overtact is attributed to the applicant.

6 Section 149 (6)(9) and (12) of the Companies Act reads as follows:

“149(6) An Independent director in relation to a company, means a director other than a managing director or a whole time director or a nominee director -*(a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;*

(b) (i) who is or was not a promoter of the company or its holding, subsidiary or associate company;

(ii) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;

(c) who has or had no pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year;

(d) none of whose relatives has or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or other promoters, or directors, amounting to two percent or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be

prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;

- (e) who, neither himself nor any of his relatives—*
 - (i) holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed;*
 - (ii) is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of—*
 - (A) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or*
 - (B) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to ten per cent. or more of the gross turnover of such firm;*
 - (iii) holds together with his relatives two per cent. or more of the total voting power of the company; or*

(iv) *is a Chief Executive or director, by whatever name called, of any nonprofit organisation that receives twenty-five per cent. or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds two per cent. or more of the total voting power of the company; or*

(f) *who possesses such other qualifications as may be prescribed.*

(7) *.....*

(8) *.....*

(9) *Notwithstanding anything contained in any other provision of this Act, but subject to the provisions of sections 197 and 198, an independent director shall not be entitled to any stock option and may receive remuneration by way of fee provided under sub-section (5) of section 197, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members.*

(10) *.....*

(11) *.....*

(12) *Notwithstanding anything contained in this Act—*

(i) an independent director;

(ii) a non-executive director not being promoter or key managerial personnel, shall be held liable, only in respect of such acts of omission or commission by a company which had occurred

with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.”

7 The aforesaid provision indicate that the independent director or non executive director not being a promoter of or key managerial persons shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

8 In the case of *Pooja Ravinder Devidasani Vs. State of Maharashtra (Supra)*, the Supreme Court has observed that the appellant therein was a non executive director of the company. Non-executive director is no doubt a custodian of the governance of the company but does not involve in the day to day affairs of the company for running of its business and observing/monitoring the activities. 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. Every person connected with the company will not fall within ambit of the provision. Simply because a person is director of company does not make him liable under the NI Act. Only those persons who are incharge and responsible for the conduct of business of the company at the time of commission of the 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 offence by invoking Section 141 of NI Act.

9 In the case of ***Ashutosh Ashok Parasrampuriya and Anr. Vs. M/s.Gharrkul Industries Pvt. Ltd. And Ors. (Supra)***, relied upon by learned advocate for respondent/complainant the factual matrix was that, according to complainant, the accused-appellants therein had agreed that the amount received from complainant would be returned within a specified time as agreed in memorandum of undertaking and accordingly payments were made by respondent/complainant as and when demanded by various cheques. Letter was issued to the said appellants demanding balance-sheet of the company, which was supplied and accordingly accounts were confirmed by the appellants and they issued a letter admitting the outstanding balance of

complainant. According to complainant, the appellants were Directors of accused company and were responsible for conduct of their business for the affairs of the company. The financial assistance was provided to accused by executing MOU, which was signed by one of the appellant with consent of all the other appellants in the presence of two witnesses. All the appellants had agreed that amount would be refunded within stipulated time. The contention of the appellants was that there are no sufficient averments in the complaint against the appellants to make them vicariously liable. It is also contended that the appellants were non-executive Directors. However, the complainants counsel had urged that, although some of the appellants claimed themselves to be a non-executive director, the record indicate that, they are Directors of the company and in support thereof, Form 32, which was obtained from the Registrar of company was relied upon, which clearly indicated that they are Directors of company. Apparently, in the light of facts of the case, it was observed that the submission that the appellants are non-executive Directors, considering the documentary evidence placed on record viz. Form 32 issued by the Registrar of Companies, wherein the said appellants were shown to be Directors of the company, it would be open for the

appellants to justify their claim during course of trial. The facts referred to in complaint also attributes role to the accused therein. The Supreme Court held that there were sufficient averments against the appellants/accused. In the complaint under challenge before this Court, the facts would differ and the appellants submission is that they were independent non executive Directors. There is no reason to discard the documents relied by applicants. Role of independent director is reflected in the provisions of Companies Act quoted hereinabove.

10 Learned counsel for the petitioner has also relied upon the decision of the Delhi High Court passed in Cri.M.C.No.1410 of 2018 dated 3rd March, 2020, in the case of ***Sunita Palta & Ors. Vs. M/s. Kit Marketing Pvt. Ltd.*** , the submission of the petitioners in the said case was that they are independent non executive Directors and were not involved in the day to day affairs of the company at any point of time. They were not Managing Directors nor signatories to the cheque. Form No.32 showed that they were independent non executive additional director and independent non executive director. The objection of the complainant was that the said issue can be decided during the trial. The Delhi High Court relied upon the

decision of Supreme Court in the case of *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla*³ and *Pooja Ravinder Devidasani Vs. State of Maharashtra (Supra)*, and *K.K. Ahuja Vs. V.K. Vora*⁴ and *Chitalapati Srinivasa Raju Vs. Securities and Exchange Board of India*⁵. It was observed that the petitioner therein were neither Managing Directors nor authorised signatories of the accused company. Except the general allegations, no specific role was attributed to them.

11 In the case of Chitalapati Srinivasa Raju Vs. Securities and Exchange Board of India (Supra) it is held as follows:

“23 Non executive directors are, therefore, persons who are not involved in the day to day affairs of the running of the company and are not in charge and not responsible for the conduct of the business of the company.”

12 The documents on record indicate that the the applicants are independent non executive Directors. In the light of the averments made in the complaint, role of independent

3 (2005) 8 SCC 89

4 (2009)10 SCC 48

5 (2018) 7 SCC 443

Directors, documents on record, petitioners cannot be prosecuted for the offences punishable under Section 138 of NI Act by invoking Section 141 of the said Act.

13 The applicants were independent non executive Directors of accused no.1 company. Considering the facts of this case, in exercise of inherent powers of this Court under Section 482 of Cr.P.C., the proceedings against them are required to be quashed. Learned counsel for the respondent-complainant submitted that the trial as against the other accused may be expedited.

14 Hence, I pass the following order:

:: ORDER ::

- (i) Criminal Application No.74 of 2021, is allowed;
- (ii) Criminal proceedings along with the order issuing process passed in CC.No.3461 of 2013, pending before the Court of Metropolitan Magistrate 7th Court at Dadar, Mumbai, against the applicants, are quashed and set aside;

(iii) Trial against the other accused is expedited;

(iv) Criminal Application stands disposed of accordingly.

(PRAKASH D. NAIK, J.)