

Mr N R Rayalu Chairman vs M/S Habitat Micro Build India Housing ... on 1 June, 2022

Author: M. Nagaprasanna

Bench: M. Nagaprasanna

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 01ST DAY OF JUNE, 2022

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

CRIMINAL PETITION No.5749 OF 2021

BETWEEN:

1. MR.N.R.RAYALU
CHAIRMAN
M/S SHIKHAR MICROFINANCE (P) LIMITED
AGED ABOUT 73 YEARS,
RESIDING AT: A 3/1, YARROWS
APARTMENTS, PLOT NO.C 58/5,
SECTOR-62, NOIDA,
UTTAR PRADESH - UP

ALSO AT:
PLOT NO.42
BLOCK NO.B/10
POCKET 2, NEAR ISKON TEMPLE
SECTOR-13, DWARKA
NEW DELHI - 110 078.
2. MR. ANIL VIDYARTHI
DIRECTOR,
M/S SHIKHAR MICROFINANCE (P) LIMITED
AGED ABOUT 74 YEARS,
RESIDING AT: NO.831, NEW MILLENIUM APT.,
PLOT NO.2, SECTOR-23, DWARKA,
SOUTH WEST DELHI - 110 075.

ALSO AT:
PLOT NO.42, BLOCK NO.B/10
POCKET 2, NEAR ISKON TEMPLE

NEW DELHI - 110 078.

... PETITIONERS

(BY SMT.KAVERI THIMMAIAH, ADVOCATE)

AND:

M/S HABITAT MICRO BUILD INDIA
HOUSING FINANCE COMPANY
PRIVATE LIMITED
REPRESENTED BY ITS CONSTITUTED
ATTORNEY MR. SAMEERA B,
HAVING ITS REGISTERED OFFICE AT:
1ST FLOOR, RRK JAYAM, NO.20,
28TH MAIN, 37TH CROSS,
JAYANAGAR, 9TH BLOCK,
BENGALURU - 560 041.

... RESPONDENT

(BY SRI MANU KULKARNI, ADVOCATE))

THIS CRIMINAL PETITION IS FILED UNDER SECTION
482 OF CR.P.C., PRAYING TO QUASH THE PROCEEDINGS
IN C.C.NO.6087/2021 ON THE FILE OF XXV ADDL.C.M.M.,
BENGALURU IN SO FAR AS THE PETITIONERS ARE
CONCERNED.

THIS CRIMINAL PETITION HAVING BEEN HEARD
AND RESERVED FOR ORDERS ON 04.03.2022, COMING

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ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE
THE FOLLOWING:-

ORDER

The petitioners are before this Court calling in question proceedings in C.C.No.6087 of 2021 registered for offence punishable under the Negotiable Instruments Act, 1881 ('the Act' for short).

2. Brief facts leading to the filing present petition, as borne out from the pleadings, are as follows:-

The petitioners claim to be non-executive Directors of M/s.Shikhar Microfinance (P) Limited ('the Company' for short) and are accused Nos. 2 and 6 in a case registered by the respondent / complainant. The 1st accused in the said complaint is a Non-banking Financial Company registered under the Companies Act, 2013 and also Microfinance Company registered with the Reserve Bank of India. 3rd, 4th and 5th accused on behalf of the 1st accused approached the respondent for a loan of Rs.2/- crores. Acceding to the request, the respondent agreed to lend Rs.2/- crores on execution of certain loan agreement and in furtherance of the said loan agreement, cheques appear to have been exchanged between accused Nos.4 and 5 and the respondent. A cheque bearing No.124755 which was issued in favour of the respondent having been presented, is dishonoured on account of want of sufficient funds on 04-01-2020. The complainant on the cheque getting dishonoured, registered a private complaint invoking Section 200 of the Cr.P.C. arraying the petitioners as accused Nos.2 and 6 along with others. The Court having taken cognizance punishable under Section 138 of the Act, the petitioners/accused Nos.2 and 6 have knocked the doors of this Court in the subject petition.

3. Heard Smt. Kaveri Thimmaiah, learned counsel for the petitioners and Sri Manu Kulkarni, learned counsel for the respondent.

4. The learned counsel appearing for the petitioners would vehemently argue and contend that the petitioners are Non-executive Directors of the Company and being Non-executive Directors they are not involved in the day-to-day affairs of the Company; they are not the signatories to the cheques for Rs.2/- crores issued in favour of the complainant. The cheques are signed by accused Nos.4 and 5, who are the Managing Directors of the Company. If proceedings are permitted to be continued, it would become an abuse of the process of the law, is the submission of the learned counsel. She would seek quashment of entire proceedings insofar as it concerns the petitioners.

5. On the other hand, the learned counsel appearing for the respondent would vehemently refute the submissions and contend that the petitioners are not Non-executive Directors but regular Directors of the Company, who are on the Board of the Company and are involved in day-to-day affairs of the Company. Several documents produced along with the petition or the objections would clearly demonstrate that the petitioners are not Non-executive Independent Directors of the Company and would, therefore, submit that it is a matter of trial for the petitioners to come out clean.

6. I have given my anxious consideration to the submissions made by the respective learned counsel and perused the material on record. In furtherance whereof, the only issue that falls for my consideration is, "Whether the petitioners can be proceeded against in the impugned criminal case?"

7. The afore-narrated brief facts of the transaction between the Company and the respondent is not in dispute and are therefore, not reiterated as the issue that has fallen for consideration is entirely different. The Company is the one that borrowed loan and issued cheques in furtherance of the said loan in favour of the respondent. M/s. Shikhar Microfinance (P) Limited is a Company incorporated under the provisions of the Companies Act, 2013. The agreement is entered into between the respondent and the Company. The clause 'Representations and Warranties' in the agreement reads as follows:

"8. REPRESENTATIONS AND WARRANTIES 8.1. The Borrower represents and warrants that:

(a) The Borrower is a (i) non-banking financial company-micro finance institution duly registered with the Reserve Bank of India and incorporated under the provisions of the (Indian) Companies Act, 1956, or (ii) company duly incorporated and registered under the provisions of the (Indian) Companies Act, 1956; or (iii) Partnership Firm/Proprietorship concern/Society/Trust and existing under the laws of India, and has the power and authority to carry on its business as it is now being carried on and to own and create security over its property and assets.

(b) The borrower has all permissions required under law to borrow money from MBIND and has the power and authority to carry on its business.

It has obtained all approval and sanction from its board of directors to execute this agreement. The officers and employees and agents of the Borrower executing this Agreement and the documents to be executed in pursuance hereof, are duly and properly in office and fully and duly authorized to execute the same, and MBIND shall have no cause to make enquiry or satisfy itself independently in this regard;"

(Emphasis added) The agreement narrates that it has obtained all approvals and sanction from its Board of Directors to execute this agreement. The signatories to the agreement are not the petitioners as the agreement is entered into between accused Nos.4 and 5 and the respondent. It is in furtherance of this agreement that cheques are issued in favour of the respondent. The cheque, which is also appended to the petition does not bear the signature of the petitioners but bear the signatures of accused Nos.4 and 5. Form DIR-12, which depicts details of Managing Director and Directors of the Company, the 1st petitioner is a Non-

executive Director and Chairman. Minutes of 65th meeting of the Board of Directors held on 16th September, 2019, reads as follows:

"MINUTES OF THE 65TH MEETING OF THE BOARD OF DIRECTORS OF SHIKHAR MICROFINANCE PRIVATE LIMITED HELD ON MONDAY, THE 16TH SEPTEMBER, 2019 AT CORPORATE OFFICE OF THE COMPANY B-15, SECTOR-2 NOIDA, AT 10.30 A.M. Directors Present:

1.Mr. N.R.Rayalu -Chairman.

2.Mr. Anil Vidyarthi -Independent Director.

3.Mr. Saurabh Baroi -Nominee Director, Dia Vikas Capital Private Limited.

4.Mr.Satyavir Chakrapani-Managing Director & CEO

5.Mr. Vijay Pandey -Joint Managing Director.

6.Mr. Thomas Vinoy -Director & CFO In Attendance Ms. Aakansha Negi -Company Secretary.

Special invitee:

Mr. Ravi Shankar SMPL/BD/65/16-09/1: Welcome remarks Mr. N.R.Rayalu presented the welcome remarks. He was unanimously elected to act as the chairman of the meeting.

..."

1st petitioner is shown as the Chairman and the 2nd petitioner is shown as an independent Director. The 1st petitioner is unanimously elected to act as the Chairman of the meeting. The petitioners have also placed annual return report of the Company which in the column reading details of Directors and key managerial personnel, reads as follows:

"(B) (i) *Details of directors and Key managerial personnel as on the closure of financial year Name DIN/PAN Designati Number Date of on of equity cessation (after Share(s) closure of held financial year: If any) N R RAYALU 07304106 Additional o director ANIL 01226257 Director o VIDYARTHI VIJAY PANDEY 01301383 Managing 24,242 Director SATYAVIR 02422305 Managing 24,600 CHAKRAPANI Director THOMAS 02571265 Whole-time 20,600 VINOY director THOMAS The 1st petitioner is shown as Additional Director and the 2nd petitioner is shown as Director. They are accused Nos.2 and 6 in the subject case. The column 'attendance of Directors' depicts both the petitioners as participating in the meeting of the Company as Directors.

8. One fact that can be gathered from what is extracted hereinabove, is that the petitioners are nowhere described as Non-executive Independent Directors. In the light of the aforesaid documents, what is required to be noticed is the averments in the complaint with regard to the petitioners. The complaint insofar as it concerns the petitioners reads as follows:

"5. The accused Nos. 2 and 6 are responsible for the day-to-day affairs of accused No.1` and are also in-charge of and responsible for the conduct of the business of accused No.1. The accused No.1 being a de jure entity is operated on the instructions of accused Nos.2 and 6. Accused Nos. 3 and 4 are the Joint Managing Directors of accused No.1. Accused Nos. 4 and 5 signed the cheque which was dishonoured. Accused No.2 to 6 are the brain and soul of the Company and are responsible for all the acts and omissions of the Company and are also responsible to the Company for the conduct of the business of the Company. Accused Nos. 2 to 6 were in-charge of and responsible for the conduct of Accused No.1 at the time when the offence for which the present complaint is filed was committed. The offence for which the instant complaint is filed has been committed with full knowledge, in consonance with and in furtherance of common intention by all the Accused persons named in the captioned case. It is submitted that none of the accused individuals, acting in their official capacity have exercised any due diligence to prevent the commission of the offence under the Act."

(Emphasis added) What is narrated is, accused Nos.2 to 6 are responsible for day-to-day affairs of accused No.1/Company. Accused Nos.2 to 6 are the brain and soul of the Company and are responsible for all the acts and omissions of the Company. With this note the entire narration is against accused Nos.3, 4 and 5 as they are Managing Directors and Joint Managing Directors of the Company. The accused Nos.4 and 5 are also signatories to the cheque.

9. Sworn statement of the complainant is recorded before the learned Magistrate. The sworn statement insofar as it concerns the role of the petitioners, reads as follows:

"3. The accused Nos. 2 to 6 are responsible for the day-to-day affairs of accused No.1 and are also in-charge of and responsible for the conduct of the business of accused No.1. The accused No.1 being a de jure entity is operated on the instructions of accused Nos. 2 to 6. Accused Nos. 3 and 4 are the Joint Managing Directors of accused No.1. Accused Nos. 4 and 5 signed the cheque which was dishonoured. Accused Nos. 2 to 6 are the brain and soul of the company and are responsible for all the acts and omissions of the Company and are also responsible to the Company for the conduct of the business of the Company. Accused Nos. 2 to 6 were in-charge of and responsible for the conduct of accused No.1 at the time when the offence for which the present complaint is filed was committed. The offence for which the instant complaint is filed has been committed with full knowledge, in consonance with and in furtherance of common intention by all the accused persons named in the captioned case. It is submitted that none of the accused individuals, acting in their official capacity have exercised any due diligence to prevent the commission of the offence under the Act."

(Emphasis added) Here again there is narration with regard to the petitioners being responsible for the affairs of the Company. The description is that, they are brain and soul of the Company. On a coalesce of the afore-quoted extracts from the documents appended to the petition, the complaint

and the sworn statement of the complainant what can be gathered is that the petitioners were aware of the day-to-day affairs of the Company. The petitioners are nowhere described, in any of the documents that they are the Non-executive Independent Directors. In every document they are shown with different designations - at one place as Chairman, in the next as Executive Director and in the other Chairman of the particular meeting of the Board. There is no whisper in any of the documents depicting the petitioners to be Non-executive Independent Directors. Therefore, if the haze has to be warded off, it is necessary for the petitioners to participate in the trial and demonstrate that they have no role to play in the day-to-day affairs of the Company and that they are not even aware of the borrowing.

10. It is no doubt settled principle of law that if the accused in a proceeding under Section 138 of the Act who are not signatories to the instrument are hauled into those proceedings and if they are Non-executive Independent Directors, who have no role to play in any affairs of the Company, they cannot be prosecuted. It is in those cases the Apex Court or the constitutional Courts have quashed such proceedings in favour of those Non-executive Independent Directors. The phrase "non-executive independent director" is not even shown to exist in any of the documents appended by the petitioners. The respondent has demonstrated varied nomenclature of the petitioners in several documents. Therefore, it becomes a matter of trial. Reference being made to the judgment of the Apex Court in the case of *ASHUTOSH ASHOK PARASRAMPURIYA v. GHARRKUL INDUSTRIES (PRIVATE) LIMITED AND OTHERS* - 2021 SCC OnLine SC 915, in the circumstances is apposite. The Apex Court while considering earlier judgments on the issue holds as follows:

"23. In the light of the ratio in *S.M.S. Pharmaceuticals Ltd.* (supra) and later judgments of which a reference has been made what is to be looked into is whether in the complaint, in addition to asserting that the appellants are the Directors of the Company and they are incharge of and responsible to the Company for the conduct of the business of the Company and if statutory compliance of Section 141 of the NI Act has been made, it may not open for the High Court to interfere under Section 482 CrPC unless it comes across some unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of process of Court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the particular Director for which there could be various reasons.

24. The issue for determination before us is whether the role of the appellants in the capacity of the Director of the defaulter company makes them vicariously liable for the activities of the defaulter Company as defined under Section 141 of the NI Act? In that perception, whether the appellant had committed the offence chargeable under Section 138 of the NI Act?

25. We are concerned in this case with Directors who are not signatories to the cheques. So far as Directors who are not the signatories to the cheques or who are not Managing Directors or Joint Managing Directors are concerned, it is clear from the

conclusions drawn in the afore-stated judgment that it is necessary to aver in the complaint filed under Section 138 read with Section 141 of the NI Act that at the relevant time when the offence was committed, the Directors were in charge of and were responsible for the conduct of the business of the company.

26. This averment assumes importance because it is the basic and essential averment which persuades the Magistrate to issue process against the Director. That is why this Court in *S.M.S. Pharmaceuticals Ltd. (supra)* observed that the question of requirement of averments in a complaint has to be considered on the basis of provisions contained in Sections 138 and 141 of the NI Act read in the light of the powers of a Magistrate referred to in Sections 200 to 204 CrPC which recognise the Magistrate's discretion to take action in accordance with law. Thus, it is imperative that if this basic averment is missing, the Magistrate is legally justified in not issuing process.

27. In the case on hand, reading the complaint as a whole, it is clear that the allegations in the complaint are that at the time at which the cheques were issued by the Company and dishonoured by the Bank, the appellants were the Directors of the Company and were responsible for its business and all the appellants were involved in the business of the Company and were responsible for all the affairs of the Company. It may not be proper to split while reading the complaint so as to come to a conclusion that the allegations as a whole are not sufficient to fulfil the requirement of Section 141 of the NI Act. The complaint specifically refers to the point of time when the cheques were issued, their presentment, dishonour and failure to pay in spite of notice of dishonour. In the given circumstances, we have no hesitation in overruling the argument made by the learned counsel for the appellants.

28. Indisputedly, on the presentation of the cheque of Rs. 10,00,000/- (Rupees Ten Lakhs only) dated 2nd June 2012, the cheque was dishonoured due to "funds insufficient" in the account and after making due compliance, complaint was filed and after recording the statement of the complainant, proceedings were initiated by the learned Magistrate and no error has been committed by the High Court in dismissing the petition filed under Section 482 CrPC under the impugned judgment.

29. The submission of learned counsel for the appellants that they are the non-

executive Directors in the light of the documentary evidence placed on record by Form No. 32 issued by the Registrar of Companies, both the appellants are shown to be the Directors of the Company, still open for the appellants to justify during course of the trial.

30. In our considered view, the High Court has rightly not interfered in exercise of its jurisdiction under Section 482 CrPC for quashing of the complaint."

(Emphasis supplied) It is also germane to notice a judgment earlier to the one referred to supra in the case of N.RANGACHARI v. BSNL - (2007) 5 SCC 108, wherein the Apex Court holds as follows:

"21. A person normally having business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its memorandum or articles of association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. Therefore, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are in charge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of it. So, all that a payee of a cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in charge of its affairs. The Directors are prima facie in that position.

22. In fact, in an earlier decision in Monaben Ketanbhai Shah v. State of Gujarat [(2004) 7 SCC 15 : 2004 SCC (Cri) 1857] two learned Judges of this Court noticed that: (SCC p. 17, para 4) "The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind."

23. In the light of the ratio in S.M.S. Pharmaceuticals Ltd. [(2005) 8 SCC 89 : 2005 SCC (Cri) 1975] what is to be looked into is whether in the complaint, in addition to asserting that the appellant and another are the Directors of the company, it is further alleged that they are in charge of and responsible to the company for the conduct of the business of the company. We find that such an allegation is clearly made in the complaint which we have quoted above. Learned Senior Counsel for the appellant argued that in Saroj Kumar Poddar case [(2007) 3 SCC 693 :

(2007) 2 SCC (Cri) 135 : (2007) 2 Scale 36] this Court had found the complaint unsustainable only for the reason that there was no specific averment that at the time of issuance of the cheque that was dishonoured, the persons named in the complaint were in charge of the affairs of the company. With great respect, we see no warrant for assuming such a position in the context of the binding ratio in S.M.S. Pharmaceuticals Ltd. [(2005) 8 SCC 89 :

2005 SCC (Cri) 1975] and in view of the position of the Directors in a company as explained above.

24. In Rajesh Bajaj v. State (NCT of Delhi) [(1999) 3 SCC 259 : 1999 SCC (Cri) 401 : AIR 1999 SC 1216] , two learned Judges of this Court stated:

(SCC p. 262, para 9) "For quashing an FIR (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence."

25. In *Bilakchand Gyanchand Co. v. A. Chinnaswami* [(1999) 5 SCC 693 : 1999 SCC (Cri) 1034 : AIR 1999 SC 2182] this Court held that a complaint under Section 138 of the Act was not liable to be quashed on the ground that the notice as contemplated by Section 138 of the Act was addressed to the Director of the company at its office address and not to the company itself. The view was reiterated in *Rajneesh Aggarwal v. Amit J. Bhalla* [(2001) 1 SCC 631 : 2001 SCC (Cri) 229 : AIR 2001 SC 518]. These decisions indicate that too technical an approach on the sufficiency of notice and the contents of the complaint is not warranted in the context of the purpose sought to be achieved by the introduction of Sections 138 and 141 of the Act.

26. In the case on hand, reading the complaint as a whole, it is clear that the allegations in the complaint are that at the time at which the two dishonoured cheques were issued by the Company, the appellant and another were the Directors of the Company and were in charge of the affairs of the Company. It is not proper to split hairs in reading the complaint so as to come to a conclusion that the allegations as a whole are not sufficient to show that at the relevant point of time the appellant and the other are not alleged to be persons in charge of the affairs of the Company. Obviously, the complaint refers to the point of time when the two cheques were issued, their presentment, dishonour and failure to pay in spite of notice of dishonour. We have no hesitation in overruling the argument in that behalf by the learned Senior Counsel for the appellant."

(Emphasis supplied) In the light of what is held by the Apex Court in the aforesaid judgments, the complaint (supra) clearly narrates that the petitioners were also in-charge of the affairs of the Company, they are the brain and soul of the Company and at the time when they borrowed the loan, the agreement clearly stipulated that with their permission, including others the said loan was borrowed and the cheque was issued and no where the petitioners are described as Non-executive Independent Directors. This being the factual scenario, exercise of jurisdiction under Section 482 of the Cr.P.C. in favour of the petitioners is declined.

11. The contention of the learned counsel for the petitioners that the complaint nor the sworn statement anywhere attributes any role of the petitioners is unacceptable as the complaint or the sworn statement cannot be read splitting hairs as it has to be read as a whole and if it is so read, it does attribute the role played by the petitioners.

12. For the aforesaid reasons, I pass the following:

ORDER

(i) The Criminal Petition lacks merit and is dismissed.

(ii) It is made clear that the observations made supra are limited to the issue whether the complaint or the proceedings should be quashed or not.

Sd/-

JUDGE nvj CT:MJ