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## Shree Shri Krishna Khaitan and Others Vs Additional Registrar of Companies

**C.R.R. No. 3806 of 2005**

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**Court:** Calcutta High Court

**Date of Decision:** March 20, 2008

**Acts Referred:**

Companies Act, 1956 " Section 209A, 215, 215(1)(ii), 5, 628#Criminal Procedure Code, 1973 (CrPC) " Section 482#Penal Code, 1860 (IPC) " Section 11

**Citation:** 113 CWN 442

**Hon'ble Judges:** Partha Sakha Datta, J

**Bench:** Single Bench

**Advocate:** S. Basu, J. Bagchi, Imtiaz Ahmed and S. Bhagat, for the Appellant; Molay Singh, for the Respondent

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### Judgement

Partha Sakha Datta, J.

By this application dated 20th December, 2005 u/s 482 of the Code of Criminal Procedure, prayer has been made

for quashing of proceedings in Complaint Case No. C-1143 of 1998 pending before the learned Metropolitan Magistrate, 14th Court Calcutta u/s

628 of the Companies Act. Also is challenged the order passed by the learned Magistrate dated 26-07-2005 in connection with the proceeding.

2. The Additional Registrar of Companies lodged petition of complaint against ten persons who are the petitioners herein alleging that the

petitioners who are the directors/officers of M/S. Khaitan Electricals Limited deliberately gave wrong statement in the balance sheet as at 31st

March, 1995 in violation of the provision of Section 628 of the Companies Act. During inspection of Books of Accounts and other records of the

company carried out by an officer authorised by the Central Government u/s 209A of the Companies Act, 1956, it was observed that the

company has shown a sum of Rs. 922.78 lacs as secured loan in the balance sheet of the company as at 31st March, 1995, although the sanction

limit as on that day was Rs. 345 lacs and accordingly a deliberate and false statement was made which is punishable u/s 628 of the Companies

Act. This contravention of the provision was brought to the notice of the accused persons by the complainant by the letter dated 25th September,

1997 to which reply was made by the accused company on 6th October, 1997 but the reply was not found to be satisfactory. The offence

complained of came to the knowledge of the complainant for the first time from a letter dated 4th September, 1997 received from the office of the

Regional Director, Department of Company Affairs, Eastern Region, Calcutta.

3. It is submitted by the learned counsel for the petitioners that allegations in the petition of complaint do not disclose the essential ingredients of the

offence, that the expression ""any person"" in Section 628 of the Companies Act, (for short the Act) would mean the company only and not its

directors and in view thereof no prosecution could be launched against the directors/petitioners, and that the prosecution has been launched against

the petitioners on an inferential basis and do not connect the petitioners with the alleged offence. It has further been submitted by the learned

advocate for the petitioner that Section 628 of the Act makes that person liable who makes a false statement in any material particular knowing it

to be false or which omits any material fact knowing it to be material. Understandably, the false statement in any material particular has to be in

connection with any return, report, certificate, balance sheet, prospectus, statement or other document required by or for the purpose of any of the

provision of the Act. Therefore, it is that person who makes allegedly a false statement in material particular knowing it to be false or omits any

material fact knowing it to be material that can be charged with criminal liability and not all the persons who are on the Board of Directors of the

company. Therefore, it is the identification of a person making false statement upon which a complaint can be lodged because all the directors are

not responsible for any wrong or misleading statement in the balance sheet and they do not have any mens rea in commission of the alleged

offence. It is the director who signed the statement can be held responsible for such alleged misleading statement with culpable intention. Thus,

culpable intention of making a false statement is the gist of the offence. In the petition of complaint it has not been alleged as to how in the matter of

submission of alleged false statement in the balance sheet all the petitioners who are said to be the directors of the company are liable. Argument

was also to the effect that wrong balance sheet is not necessarily a false balance sheet and cannot invite the penal offence of Section 628 of the

Act. There cannot be, argument runs, any vicarious liability in the commission of the alleged offence.

4. It is submitted by Mr. Molay Singh, learned advocate appearing for the opposite party i.e. Additional Registrar of Companies, that if the

argument of the learned advocates for the petitioners to the effect that it is only the person who signed the statement in the balance sheet who can

be proceeded with u/s 628 of the Act then none of the directors nor even the company can be proceeded with because balance sheet is signed by

the Secretary of a company. The matter of the fact is that the secretary who is an office bearer of a company and holds responsible position therein

cannot without approval of Board of Directors make any statement in the balance sheet or sign the same or dispatch the same. Therefore unless

the balance sheet containing false statement was approved of by the Board of Directors of the company it could not have been submitted by the

secretary and if the argument of the learned advocate for the petitioner is accepted then no complaint can be lodged against the company or any

director of the company. The word person as it appears in Section 11 of the Indian Penal Code included any company or association or body of

persons whether incorporated or not. Therefore, when the offence was detected complaint was lodged against the directors of company including

the Chairman of the company who (the petitioner No. 1) is also comprised in the Board of Directors.

5. Whether the statements were false to the knowledge of the petitioners or not or whether the statements were simply wrong, not amounting to

falsehood or whether there was any material omission to the knowledge of the petitioners is a question of fact that can be gone through only at the

trial. Whether the Additional Registrar of Companies was justified in not finding the reply of the company to be satisfactory or not is again a

question of fact that can rightly be agitated at the trial. Institution of the criminal case u/s 628 of the Act against the directors of the company is not

necessarily therefore illegal because Section 628 is comprehensive enough to include "any person" which includes the officers and the directors of

the company. The word "any person" as it occurs in the Section may not be construed as singular because here the word person includes persons

and it may be that more than one person was responsible for making alleged false statement. The learned Magistrate rightly observed that mens rea

is the essence of the offence because to punish one under this Section it has to be proved that the statement was false to the knowledge of the

maker of the statement. Therefore, the only question is whether the petitioners are responsible for making the alleged false statement. Of the eleven

petitioners, petitioner No. 1 is the Chairman, petitioner No. 2 is the Managing Director, petitioner No. 9 and 10 are the whole-time directors and

petitioner No. 11 is the Finance Director of M/s. Khaitan Electricals Limited, while petitioners No. 3 to 8 are Directors of the company. The

question naturally would arise as to which of the directors was responsible for making the alleged false statement in the balance sheet.

Unquestionably Section 628 of the Act does not speak of vicarious liability because it does not say that the company or the officers of the

company who are in-charge of the company and responsible for day-to-day conduct and affairs of the business of the company are liable for the

offence. A person or a director who is in-charge of the company and responsible for conduct and affairs of the business of the company may be

appropriately a person to make a false statement punishable under the Act if he has participated in making false statement. Conversely, a person or

director not in-charge of the company or responsible for the day-to-day affairs of the business of the company may also be responsible for making

alleged false statement in the balance sheet provided he makes a statement which is false to his knowledge. Thus, it is the person or persons who

make false statement that comes within the ambit of Section 628. The question therefore, is who could be "any person" as is mentioned in Section

628 of the Act.

6. It is in the petition of complaint that the alleged false statement was made in the balance sheet as at 31st March, 1995. In this respect, though

provision of Section 5 of the Act may not be wholly applicable, some assistance can be derived from that Section. An "officer who is in default"

has been said to comprise managing director or managing directors, whole time director or whole-time directors, the manager, the secretary, any

person, in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act and any person charged

by the Board with the responsibility of complying with provision and where a company does not have any managing director or whole-time

director or manager any director or directors who may be specified by all the directors will comprise within the term "officer who is in default". In

the instant case manager or secretary of the company has not been made accused. Chairman, Managing Director, Whole-time Directors, one

Financial Director and six Directors have been made accused. The question therefore is as to which of the above persons can be "any person" for

the purpose of Section 628 of the Act. Since false statement is alleged to have been made in the balance sheet as at 31st March, 1995, let us see

who could be under the law the persons responsible for submission of balance sheet. Section 215 deals with the manner of authentication of

balance sheet and profit and loss account. Clause II of sub-section (1) of Section 215 provides that in case of a company other than the banking

company every balance sheet and every profit and loss account of a company shall be signed on behalf of the Board of Directors by the manager

or secretary, if any, and by not less than two directors of the company one of whom shall be a Managing Director where there is one. Sub-section

(2) of that section provides that when only one of the directors is for the time being in India the balance sheet and the profit and loss account shall

be signed by such director. Sub-section (3) of Section 215 provides that the balance sheet and profit and loss account shall be approved by the

Board of Directors they are signed on behalf of the Board in accordance with the provisions and before they are submitted to the auditor for the

report thereon. Thus in case of a company other than the banking company the balance sheet is to be signed compulsorily by not less than two

directors one of whom shall be a Managing Director if there is one such. There is a Managing Director who is the petitioner No. 2 herein.

Therefore since secretary or the manager of the company has not been made accused in the case Managing Director of the company cannot

escape liability from the mischief of Section 628 read with Section 215(1)(ii) of the Act. The Section clearly implies that all the directors may not

be criminally liable for the offence alleged. Therefore the question is which other director among the Board of Directors signed the balance sheet

along with the Managing Director. The law does not prohibit signing balance sheet by more than two directors apart from Manager of Secretary.

This cannot be decided here in this revisional application. It can only be decided upon inspection of the original balance sheet by the learned

Magistrate. It has been submitted that the accused No. 5 Nirendranath Lahiri is already dead and rightly his name has not been figured as one of

the petitioners. It has been contended in the revisional application that the petitioners were at any material point of time not in-charge and/or

responsible to the company for the running of his day-to-day business of the company and they were only involved in framing policy matters of the

company. Learned Magistrate has correctly observed that the case cannot brought under the general penumbra of officers in default or officer who

is in default within the meaning of Section 5 of the Companies Act. For the purpose of Section 628 of the Act it is, "any person" who makes false

statement that can be fastened with criminal liability and in the matter of submission of balance sheet it is the manager, secretary or the Managing

Director or any director who can sign the balance sheet. The question as to "any person" who is liable for making alleged false statement in the

balance sheet is a question of fact. In view of the question as to which of the directors along with the Managing Director was responsible to make

alleged false statement reference has to be made to the balance sheet. Being a question of fact the matter has to go back to the learned Magistrate

for determination with reference to the balance sheet as at 31st March, 1995 as to the person responsible for making false statement.

7. In the circumstances, I dispose of this revisional application with the direction to the learned Magistrate to determine as to the liability of the

petitioners or otherwise with reference to the balance sheet and proceed according to the law.

8. A copy of this order shall be sent to the learned Metropolitan Magistrate, 14th Court, Calcutta for information and necessary action.

9. Urgent Xerox certified copy of this order if applied for, be given to the learned advocates for the parties on the usual undertaking.