AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRMP No. 462 of 2015

1. Jaidev Guha @ Rahul Guha S/o Govind Guha, aged about 28 years, R/o Qr. No. B-36, M.P. Housing Board, Near Cricket Ground, Industrial Estate, Bhilai, Tahsil & District Durg Chhattisgarh.

---- Petitioner

Versus

1. Ramesh Agarwal S/o Sohan Lal Agrawal, aged about 57 years, General Power of Attorney Holder, Ganga Iron & Steel Trading Company Ltd. 156, Light Industrial Area Bhilai, P.S. Jamul, Tahsil & District Durg Chhattisgarh

---- Respondent

For Petitioner – Shri M.P.S. Bhatia, Advocate.
For Respondent – Shri Chandresh Shrivastava, Advocate.

Hon'ble Shri Justice Chandra Bhushan Bajpai

Order On Board

02/02/2016

1. Heard on admission.

2. Brief facts of the case are that the respondent/complainant filed a complaint case against the applicant under Section 138 of the Negotiable Instruments Act, 1881 (in brevity 'the Act, 1881'). The trial Court has taken cognizance and registered the case under 138 of the Act, 1881 against the applicant and issued summons on 01-03-2013 for appearance of the applicant/accused. On 05-07-2013 after hearing both the parties, particulars of the offence under Section 138 of the Act, 1881 were stated to the applicant/petitioner, the applicant/accused denied, the same was recorded and trial commenced. On 03-06-2015 the applicant filed an application under Section 245 of the Cr.P.C. and prayed that as the complainant failed to prove relation of the accused with Bina Engineering and the authority of the accused giving cheque to the complainant, and also since no notice had been served at the address of the accused. After hearing both the parties, the Court below has

dismissed the application filed under Section 245 of the Cr.P.C. holding that the present complaint is triable as summon case for which procedure has been mentioned in Cr.P.C. under Section 251 to Section 259 whereas the application filed by the accused/applicant is under Section 245 of the Cr.P.C. which is applicable in warrant triable cases. Against these three orders dated 01-03-2013, 05-07-2013 and 03-06-2015 the accused/applicant has filed the instant Cr.M.P. under Section 482 of the Cr.P.C. invoking inherent jurisdiction of this Court to quash all the above three orders in the interest of justice.

3. Heard learned counsel for the applicant on admission.

4. It is submitted on behalf of the applicant that complainant is Ramesh Agrawal, he is not Ganga Iron & Steel Trading Company. He alleged to be general power of attorney holder. Accused is also not Bina Engineering Company. As per the cause title, accused is made party through Bina Engineering. The complainant and the accused arrayed in the complaint case is not in accordance with law. In para 2 of the complaint, mode and other facts regarding transaction is mentioned. The photocopy of the cheque filed in the complaint goes to show that they are in the name of Ganga Iron & Steel Trading Co.Ltd., they are not for Ramesh Agrawal thereby the complaint as filed is not strictly under the provisions of Section 138 of the Act, 1881. Learned counsel further submitted that provisions of Section 141 of the Act, 1881 is not complied with. If at all in event of prosecution, Bina Engineering and Ganga Iron & Steel Trading Company Limited should also have been made party in the complaint case. Hence, it is submitted that taking cognizance on 01-03-2013, explaining the particulars of offence to the accused/applicant on 05-07-2013 and also order dated 03-06-2015 dismissing the application under Section 245 of the Cr.P.C. are improper and illegal. Learned counsel for the applicant prayed that all the above three orders passed by the trial Court be set aside. In support of the case, learned counsel for the applicant placed

reliance on the matter of **Aneeta Hada Vs. M/s. Godfather Travels & Tours Pvt. Ltd.**[1] wherein in criminal appeal referred to Hon'ble Bench of the Apex Court, Hon'ble the Apex Court held in para 48 that :-

> "48. Keeping in view the anatomy of the aforesaid provision, our analysis pertaining to Section 141 of the Act would squarely apply to the 2000 enactment. Thus adjudged, the director could not have been held liable for the offence under Section 85 of the 2000 Act. Resultantly, the Criminal Appeal No.1483 of 2009 is allowed and the proceeding against the appellant is quashed. As far as the company is concerned, it was not arraigned as an accused. Ergo, the proceeding as initiated in the existing incarnation is not maintainable either against the company or against the director. As a logical sequeter, the appeals are allowed and the proceedings initiated against Avnish Bajaj as well as the company in the present form are quashed."

Further reliance is placed on the matter of **Anil Gupta Vs. Star India Pvt. Ltd. & Anr.**[2] wherein at para 15 it is held that :-

> **15.** In the present case, the High Court by impugned judgment dated 13th August, 2007 held that the complaint against respondent No.2-Company was not maintainable and quashed the summon issued by the Trial Court against respondent No.2-Company. Thereby, the Company being not a party to the proceedings under Section 138 read with Section 141 of the Act and in view of the fact that part of the judgment referred to by the High Court in Anil Hada (supra) has been overruled by three Judge Bench of this Court in Aneeta Hada (supra), we have no other option but to set aside the rest part of the impugned judgment whereby the High Court held that the proceedings against the appellant can be continued even in absence of the Company. We, accordingly, set aside that part of the impugned judgment dated 13th August, 2007 passed by the High Court so far as it relates to appellant and quash the summon and proceeding pursuant to complaint case No.698 of 2001 qua the appellant."

Further reliance is placed on the matter of **Duncan Industries Ltd. Vs. T.G.Srinivas and Anr.**[3] wherein it is held that :-

> Held: As observed earlier, a company can be represented by an employee or even by a non-employee authorized and empowered to represent the company either by resolution or by a power of attorney. No resolution of the Board is placed on record to show that the said G.Bala Krishna was authorized by the Board to file this complaint or that P.R.Neelakjntam was given authority to delegate the power to G.Bala Krishna to file a complaint. Under those circumstances it can safely be held that the complaint was filed by a person not duly authorized to file the complaint and the trial (sic appellate) Court has rightly acquitted the accused In view of the above finding, it may not be necessary for this Court to go into other aspects of the matter namely with regard to

[1] 2012(III) L.S.C.T. 212
[2] 2014 CRI.L.J. 3884
[3] 2015 (2) Crimes 353 (A.P.)

issuance of notice and the existence of a legally enforceable debt. For the aforesaid reasons, I am of the view that there are no merits in the appeal and the same is liable to be dismissed. Accordingly, the appeal dismissed."

Further reliance is placed by learned counsel for the applicant on the matter of **Director, Maruti Foods and Farms Pvt. Ltd. Vs. Basanna Pattekar**[4] wherein the Karnataka High Court held in para 3 of the said judgment that:

"3. I have considered the contentions of learned counsel with reference to the material on record. It is not disputed that the complainant is a company registered under the Companies Act and P.W. 1 apart from his own self serving statement that he is the Director who is authorised to depose on behalf of the company, has not produced any documentary evidence to show that he is the Director and he has been authorised by the company to depose on behalf of the company. The resolution of the company is not produced and he has pleaded his ignorance in the cross -examination about the resolution passed by the Board of Directors. Since the company is a juristic person, any person on behalf of the Company has to be authorised by the company under the Articles of Association or by a separate resolution to depose on behalf of the company and therefore, finding of the trial Court is justified and it is unnecessary to go into the other reasons recorded by the Trial Court in dismissing the complaint and acquitting the accused. I do not find any ground to interfere with the judgment of acquittal passed by the trial Court. However, acquittal of the accused on the ground that P.W.1 has failed to prove that he was authorised by the company to depose on its behalf would not preclude the appellant to work out the remedy in accordance with law as other contentions are not gone into while confirming the judgment of acquittal passed by the trial Court."

Learned counsel for the applicant further placed reliance on the matter of **Ramesh Versus Ganeshchandra & Others**[5] wherein in para 3, it is held by the High Court of M.P. that:-

"3. Having heard the learned counsel for the parties this Court is of the view that in view of the provisions of Power of Attorney Act, the complaint can be presented by the holder of Power of Attorney, but for the purpose of further prosecution i.e. under Section 200 and 202, the presence of the complainant is essential and if he appears and gives statement before the Court, then there is no defect in filing the complaint and the same shall be treated as cured."

Reliance is also placed on behalf of the applicant on the matter of **M/s. Janak Intermediates Ltd. and Another Versus M/s. Sonic Fiscal Services Pvt. Ltd. and Another**[6] wherein at para 27, it is held that:-

[4] 2008 CRI. L. J. 157
[5] 2005 (III) MANISA 36 (M.P.)
[6] 2007 (I) MANISA 92 (M.P.)

> "27. In view of that, on perusal of the facts of the present case, it is apparent that Pankaj Bhatnagar said to be the power of attorney holder on behalf of the complainant company may file the complaint on his own signature, but he has no right to depose on behalf of the company. In the present complainant, unfortunately none of the Directors has been examined on behalf of the complainant to prove the facts, which are in their personal knowledge. Therefore, on this sole ground, the complaint is liable to be dismissed as has not been proved properly by the Director of the complainant company itself. Secondly, the authorization by the company concerned in favour of the Managing Director has also not been proved and filed on behalf of the complainant till today, therefore, non-filing of the proper authorization by the Board of Directors of the company in favour of the Managing Director as well as in favour of the so-called Sales Executive Pankaj Bhatnagar to act on behalf of the company also substantially affect the maintainability of the complaint. On this legal ground also complaint is liable to be dismissed."

Learned counsel for the applicant also placed reliance on the matter of **National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal & Anr.**[7] wherein in paras 24, 25, 26 and 27, it is held that :

> "24. Section 291 of the Companies Act provides that subject to the provisions of that Act, the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorized to exercise and do. A company, though a legal entity, can act only through its Board of Directors. The settled position is that a Managing Director is prima facie in-charge of and responsible for the company's business and affairs and can be prosecuted for offences by the company. But insofar as other Directors are concerned, they can be prosecuted only if they were in-charge of and responsible for the conduct of the business of the company. A combined reading of Sections 5 and 291 of Companies Act, 1956 with the definitions in clauses 24, 26, 30, 31 and 45 of Section 2 of that Act would show that the following persons are considered to be the persons who are responsible to the company for the conduct of the business of the company:
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> (a) the Managing Director/s;
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> (b) the whole-time Director/s;
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> (c) the Manager;
>
> (d) the Secretary;
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> (e) any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act;
>
> (f) any person charged by the Board of Directors with the responsibility of complying with that provision; Provided that the person so charged has given his consent in this behalf to the Board;
>
> (g) where any company does not have any of the officers specified in Clauses (a) to (c), any director or directors who may be specified by

[7] 2010 (1) DCR 353

the Board in this behalf or where no director is so specified, all the directors:

Provided that where the Board exercises any power under Clause (f) or Clause (g), it shall, within thirty days of the exercise of such powers, file with the Registrar a return in the prescribed form. But if the accused is not one of the persons who falls under the category of "persons who are responsible to the company for the conduct of the business of the company" then merely by stating that "he was in-charge of the business of the company" or by stating that "he was in-charge of the day-to-day management of the company" or by stating that "he was in-charge of, and was responsible to the company for the conduct of the business of the company", he cannot be made vicariously liable under Section 141(1) of the Act. To put it clear that for making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under Sub-section (2) of Section 141 of the Act.

25. From the above discussion, the following principles emerge:

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make accused therein vicariously liable for offence committed by company along with averments in the petition containing that accused were in-charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If accused is Managing Director or Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

(vi) If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint.

(vii) 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 a fact as there is no deemed liability of a Director in such cases.

26. Apart from the legal position with regard to compliance of Section 141 of the Act, in the appeals of National Small Industries Corporation, respondent No.1- Harmeet Singh Paintal was no more a Director of the company when the cheques alleged in the complaint were signed and the same is evidenced from the Sixth Annual Report for the year 1996-97 of the accused company. The said report is of dated 30.08.1997 and the same was submitted with the Registrar of Companies on 05.12.1997 and assigned as document No. 42 dated 09.03.1998 by the Department. Those documents have been placed before this Court by respondent No. 1 as an additional document. In view of these particulars and in addition to the interpretation relating to Section 141 which we arrived at, no liability could be fastened on respondent No. 1. Further, it was pointed out that though he was an authorized signatory in the earlier transactions, after settlement and in respect of the present cause of action, admittedly fresh cheques were not signed by the first respondent. In the same way, in the appeal of the DCM Financial Services, the respondent therein, namely, Dev Sarin also filed additional documents to show that on the relevant date, namely the date of issuance of cheque he had no connection with the affairs of the company.

27. In the light of the above discussion and legal principles, we are in agreement with the conclusion arrived at by the High Court and in the absence of specific averment as to the role of the respondents and particularly in view of the acceptable materials that at the relevant time they were in no way connected with the affairs of the company, we reject all the contentions raised by learned counsel for the appellants. Consequently, all the appeals fail and are accordingly dismissed."

Learned counsel for the applicant further placed reliance on the matter of **Tamil Nadu News Print & Papers Limited v. D. Karunakar & others**[8] wherein in paras 16 and 17, it is held that:-

"16. it is also pertinent to note that on behalf of the accused company notice was refused and whereabouts of all the Directors are not known. Notices served upon them in normal course could not be served and therefore, by way of substituted service, a paper publication was made and an affidavit giving details about the publication has been placed on record of this Court. In spite of the said fact, no body has appeared on behalf of the respondents. This fact also indicates the intention of the accused.

17. For the reasons stated hereinabove, in our opinion, as there was an allegation to the effect that Accused Nos. 2 to 10 were involved in day-to-day business of Accused No. 1-company, we see no reason for sparing them by the High Court."

Learned counsel for the applicant further placed reliance on the matter of **A.C.Narayanan v. State of Maharashtra & Anr.**[9] wherein at paras 18 and 20, it is held that :-

[8] 2015 CRI. L. J. 4521
[9] 2015 CRI. L. J. 1434

18. The appellant has stated that his Advocate conducted search and inspection of the papers and proceedings of the criminal complaint and found that no Power of Attorney was found to be a part of that record. This has not been disputed by the respondents. In that view of the matter and in light of decision of the larger Bench, as referred above, we hold that the Magistrate wrongly took cognizance in the matter and the Court below erred in putting the onus on the appellant rather than the complainant. The aforesaid fact has also been overlooked by the High Court while passing the impugned judgment dated 12th August, 2005.

20. In this case it is not in dispute that the complaint was filed by one Shri V. Shankar Prasad claiming to be General Power of Attorney of the complainant company. Subsequently PW-1 Shri Ravinder Singh gave the evidence on behalf of the Company under the General Power of Attorney given by the complainant Company. The complaint was not signed either by Managing Director or Director of the Company. It is also not in dispute that PW-1 is only the employee of the Company. As per Resolution of the Company i.e. Ex. P3 under first part Managing Director and Director are authorized to file suits and criminal complaints against the debtors for recovery of money and for prosecution. Under third part of the said Resolution they were authorized to appoint or nominate any other person to appear on their behalf in the Court and engage lawyer etc. But nothing on the record suggest that an employee is empowered to file the complaint on behalf of the Company. This apart, Managing Director and Director are authorized persons of the Company to file the complaint by signing and by giving evidence. At best the said persons can nominate any person to represent themselves or the Company before the Court. In the present case one Shri Shankar Prasad employee of the Company signed the complaint and the Deputy General Manager of the Company i.e. PW-1 gave evidence as if he knows everything though he does not know anything. There is nothing on the record to suggest that he was authorized by the Managing Director or any Director. Therefore, Magistrate by judgment dated 30th October, 2001 rightly acquitted the Appellant. In such a situation, the case of the Appellant is fully covered by decision by the larger bench of this Court passed in the present appeal. We have no other option but to set aside the impugned judgment dated 19th September, 2007 passed by the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No. 578 of 2002. The judgment and order dated 30th October, 2001 passed by the Court of XVIII Metropolitan Magistrate, Hyderabad in C.C. No. 18 of 2000 is upheld.

5. Learned counsel for the applicant submits that as all the above case laws are applicable in the instant Cr.M.P. and prays that by invoking the jurisdiction of Section 482 of the Cr.P.C., all the above three orders may be quashed.

6. For the purpose of appreciation regarding admission of the present Cr.M.P. and for hearing of the instant petition, copy of all the above thee orders are perused.

7. As per settled law, inherent jurisdiction of the Court can only be invoked when there is no forum to challenge the impugned order. In the present case, there is no explanation on behalf of the applicant as to why within given time from the date of order i.e. 01-03-2013, 05-07-2013 and 03-06-2015 criminal revision had not been preferred. Why the applicant chosen straightway to file the instant Cr.M.P. under Section 482 of the Cr.P.C.? This Court is hot hearing the matter in criminal appeal. The case laws **Aneeta Hada Vs. M/s. Godfather Travels & Tours Pvt. Ltd.** (supra), **Anil Gupta Vs. Star India Pvt. Ltd. & Anr.** (supra), **Duncan Industries Ltd. Vs. T.G.Srinivas and Anr.** (supra), **Director**, **Maruti Foods and Farms Pvt. Ltd. Vs. Basanna Pattekar** (supra)**, National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal & Anr.** (supra)**, Tamil Nadu News Print & Papers Limited v. D. Karunakar & others** (supra)**, A.C.Narayanan v. State of Maharashtra & Anr.** (supra) are in the matter in relation with arising out in appeal. The present one is a petition under Section 482 of the Cr.P.C. Therefore, the above cited case laws of no help to the applicant. No any reason is shown for not challenging all these three orders within limitation by way of revision. **Ramesh Versus Ganeshchandra & Others** (supra) is a judgment passed by the single Bench of M.P. High Court is under the provision of Section 482 of the Cr.P.C. is against the maintainability of the complaint as the said complaint was filed by the power of attorney holder, but, in the present case, on 01-03-2013 the Court has already taken cognizance, summons were issued to the applicant/accused under the same order. Also statement of offence explained on 05-07-2013. There is no reason shown as to why the same were not challenged and why the applicant/accused waited till the orders passed by the trial Court on application under Section 245 of the Cr.P.C. As per facts of the case, on 03-06-2015, the matter was fixed for evidence to be produced by the accused thereby the evidence of the

complainant were over and there was no any challenge for all the above three stages and trial from cognizance upto the defence stage.

8. On due consideration, the instant Cr.M.P. is not maintainable at the motion stage itself since without going to the forum available to the applicant within limitation as discussed above the applicant filed the instant Cr.M.P. at very belated stage. Consequently, in the considered view of this Court, the instant Cr.M.P. is not maintainable, hence, the same is dismissed at the motion stage itself.

Sd/-
(Chandra Bhushan Bajpai)
JUDGE

Aadil