HIGH COURT OF CHHATTISGARH, BILASPUR

CRMP No. 1571 of 2018

Narendra Dev Mishra S/o Late Keshav Prasad Mishra Aged About 66 Years R/o- Mishra Bada, Tatyapara Chowk, Police Station Azad Chowk, Raipur, District : Raipur, Chhattisgarh **--- Petitioner**

Versus

1. State of Chhattisgarh through Collector, Raipur, District : Raipur, Chhattisgarh
2. Cholamandlam Investment & Finance Company Limited through- Branch Office No. 506-509, 5th Floor, National Corporate Park, G.E. Road, Raipur, Tahsil & District- Raipur, Chhattisgarh through- Power of Attorney of Company Shri Yadav Kamble, Aged About 35 Years, S/o Shri Sarje Rao Kamble, R/o 506-509 5th Floor, National Corporate Park G.E. Road, Raipur, Police Station Sarswati Nagar, Raipur, District : Raipur, Chhattisgarh
3. Sourabh Mishra President, Sahayata Samajik Sewa Sansthan R/o Mishra Bada, Tatypara Chowk Raipur, Police Station Ajad Chowk, Tahsil & District Raipur, Chhattisgarh. **--- Respondents**

For the applicant : Mr. Ajay Kumar Chandra, Advocate

For the State : Mr. Vaibhav A. Goverdhan, P.L.

For Respondent No.2 : Mr. Mukesh Sharma, Advocate

Hon'ble Shri Justice Goutam Bhaduri

Order on Board

25.01.2019

1. The challenge made in this petition is to the orders dated 31.05.2018 and 21.12.2017 passed by both the courts below whereby cognizance was taken pursuant to complaint filed u/s 138 of the Negotiable Instruments Act on behalf of respondent No.2 Chola Mandalam Investment & Finance Company Ltd.
2. The petitioner contends that at the time when the Cheque was issued, the petitioner was not involved in any capacity in the affairs of the *Sahyata Samajik Sewa Sansthan* to which the alleged vehicle was financed and also the

petitioner was not at all holding any post of such organization. It is, therefore, submitted that the petitioner cannot be held vicariously liable unless specific allegations are made by the complainant and only on presumption the petitioner has been roped in. Learned counsel placed reliance on decisions of the supreme Court in *2007(1) Supreme 230* and *2012 CJ(SC) 666.*

3. Counsel for the respondent submits that this fact can only be appreciated by the Court below which is trying the offence u/s 138 N.I. Act and it would not be appropriate for this Court to give a fact finding whether the petitioner was in any way responsible at the time of issuance of cheque to issue such cheque.

4. A perusal of contents of the petition would show that the petitioner was not at all holder of any post in *Sahyata Samajik Sewa Sansthan* while the cheque was bounced.

5. In AIR *2007 SC 912 - Saroj Kumar Potdar v. State (NCT of Delhi)* the Supreme held that in case of dishonour of cheques issued by Company, it is obligatory on the part of complainant to make specific allegations as are required by law to make Director vicariously liable. Paras 16 & 17 are relevant here and quoted below:

> 16. The question came up for consideration before a 3-Judge Bench of this Court in S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Another [(2005) 8 SCC 89] wherein upon consideration of a large number of decisions this Court opined:
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> > "While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the Section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words " 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, as well as the company, shall be deemed to be guilty of the offence etc." What is required is that the persons who are sought to be made criminally liable under Section 141 should be at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a Company 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 under the provision. The liability arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of "every person" the section would have said "every Director, Manager or Secretary in a Company is liable"....etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

A reference to Sub-section (2) of Section 141 fortifies the above reasoning because Sub-section (2) envisages direct involvement of any Director, Manager, Secretary or other officer of a company in commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these offices in a company. In such a case, such persons are to be held liable. Provision has been made for Directors, Managers, Secretaries and other officers of a company to cover them in cases of their proved involvement."

It was further opined:

> *"To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a persons can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That respondent tails within parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141 he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial."*

This aspect of the matter has also been considered recently by this Court in Sabitha Ramamurthy & Anr. v. R.B.S. Channabasavaradhya [2006 (9) SCALE 212] stating:

> "Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance of the statutory requirements would be insisted"
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> For the reasons aforementioned, we have no other option but to hold that the allegations made in the complaint petitions even if are taken to be correct in their entirety do not disclose any offence as against the appellant herein. The proceedings against him, thus, should have been quashed by the High Court. The impugned judgment, therefore, cannot be sustained which is set aside accordingly. The appeal is allowed."

6. The Supreme Court has further laid down the principles in *(2012) 5 SCC 661 Aneeta Hada V/s. Godfather Travels & Tours Pvt. Ltd.,* and held that criminal liability on account of dishonour of cheque primarily falls on drawer company and extends to its officers only when conditions incorporated in Section 141 stand satisfied. Paras 17, 18, 19, 59 & 64 are relevant and quoted here-in-below:

> 17. The gravamen of the controversy is whether any person who has been mentioned in Sections 141(1) and 141(2) of the Act can be prosecuted without the company being impleaded as an accused. To appreciate the controversy, certain provisions need to be referred to.
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> 18. Section 138 of the Act, which deals with the ingredients of the offence for dishonour of the cheque and the consequent non-payment of the amount due thereon, reads as follows: -
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> > "138. **Dishonour of cheque for insufficiency, etc, of funds in the account** – Where any cheque drawn by a person on account maintained by him with a banker for the payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an arrangement made with the bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with a fine which may extend to twice the amount of the cheque, or with both:
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> Provided that nothing contained in this section shall apply unless –
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> > (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier,
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> > (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the

cheque as unpaid, and

(c) the drawer of such cheque fails to make the payment of said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.”

19. The main part of the provision can be segregated into three compartments, namely, (i) the cheque is drawn by a person, (ii) the cheque drawn on an account maintained by him with the banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of a debt or other liability, is returned unpaid, either because the amount of money standing to the credit of that account is insufficient to honour the cheque or it exceeds the amount arranged to be paid from that account by an arrangement made with the bank and (iii) such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of the Act, be punished with imprisonment for a term which may extend to two years or with fine which may extend to twice the amount of the cheque or with both. The proviso to the said section postulates under what circumstances the section shall not apply. In the case at hand, we are not concerned with the said aspect. It will not be out of place to state that the main part of the provision deals with the basic ingredients and the proviso deals with certain circumstances and lays certain conditions where it will not be applicable. The emphasis has been laid on the factum that the cheque has to be drawn by a person on the account maintained by him and he must have issued the cheque in discharge of any debt or other liability. Section 7 of the Act defines ‘drawer’ to mean the maker of a bill of exchange or a cheque. An authorised signatory of a company becomes a drawer as he has been authorised to do so in respect of the account maintained by the company.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh (supra) which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal (supra) does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada (supra) is overruled with the qualifier as stated in paragraph.

64. 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 sequitur, the appeals are allowed and the proceedings initiated against Avnish Bajaj as well as the company in the present form are quashed."

7. In view of the limited question involved in this case and the principles laid down by the Supreme Court in *AIR 2007 SC 912* and *(2012) 5 SCC 661*, the petitioner shall be at liberty to move a suitable application before the Court below to show that he was not vicariously liable for dishonour of cheque at the relevant time and further was not in hold of any post of Sahyata Samajik Sewa Sanstha when the cheque was issued on 30.06.2017. If such application is preferred, the trial Court shall instead of going into complete trial of the case of complaint shall decide the same as a preliminary objection.

8. With the above observations, this petition is disposed of.

Sd/-
GOUTAM BHADURI
JUDGE

Rao