

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRMP No. 168 of 2019**

- S.M. Enterprises Through Its Proprietor Mr. Satpal Singh Gandhi, S/o Shri Arjun Singh Gandhi, Aged About 65 Years R/o Hotel Kaniska Building, Station Road Raipur Chhattisgarh

---- Petitioner**Versus**

1. Ms. Leena Gadit Alias Leena Rajendra Thakkar Aged About 42 Years R/o A-1005, New Adarsh Regal CHS Ltd., Adarsh Nagar, Malad (West) Mumbai Maharashtra 400064
2. State Of Chhattisgarh Through Collector Raipur

---- Respondent

For Petitioner
For Respondent /State

Mr. Mayank Kumar, Advocate
Mr. Anant Bajpai, Panel Lawyer

Order On Board By**Hon'ble Mr. Justice Goutam Bhaduri****1/2/2019**

1. Heard.
2. The present petition is against the order dated 15.5.2018 passed by the First Additional Judge to the Court of First Additional Sessions Judge, Raipur in Criminal Revision No.75/2018. Vide the said order, the Revisional Court has set-aside the order dated 8.9.2017, whereby, notice under Section 138 of the Negotiable Instruments Act, 1881 (in short "the Act, 1881"), was issued to the private respondent-non applicant.

3. The short facts of the case are that a complaint was preferred by SM Enterprises-the petitioner herein against Sajel Glass Limited- A Company and its six Directors. The complaint *inter alia* was for the reason that Sajel Glass Limited had given a cheque on 16.1.2017 of Rs. 5 lakhs to the complainant, which was deposited in its account in Indian Bank, Raipur. The said cheque was not honoured and a notice of dishonour was received by the petitioner on 17.1.2017. Subsequently, a mandatory notice under Section 138 of the Act, 1881 was sent to the accused on 31.1.2017. The summons were received by the accused on 6.2.2017 and despite the statutory period, the payment was not received and as such, a complaint was filed. The Judicial Magistrate on filing of such complaint under Section 138 of the Act, 1881 issued notice to the Company and its Directors. It is one of the Directors, arrayed as respondent No.6 in the complaint namely Smt. Leena Gadit, who has challenged such issuance of notice before the Revisional Court. It was stated that the Director, who was arrayed as respondent No.6, was not in any way involved in issuance of cheque. The Revisional Court set-aside such order of issuance of notice on the ground as to how the said Director was responsible for issuance of cheque on behalf of the Company. The said order is under challenge before this Court.
4. Learned counsel for the petitioner would submit that the Revisional Court failed to take into account the averments made in the revision so as to consider the same at the time of evidence/defence of the respondent. The argument was

advanced with the analogy laid down in the matter of **Krishna Texport and Capital Markets Limited Vs. Ila A. Agrawal and others, (2015) 8 SCC 28**. He would submit that in the said case, the Supreme Court has held that individual notice to the Directors is not necessary as mandatory notice under Section 138 of the Act, 1881 to the Company itself would suffice. It was stated that the Director-respondent can be presumed to be in the known affairs of the Company. He would submit that the ratio which has been laid in **Krishna Texport and Capital Markets Limited (supra)** would clearly be applicable to the facts of the present case. He submits that if it is the case of the Directors that the offence was committed without their knowledge or they have exercised their due diligence to prevent such commission of offence, it would be a matter of defence, which would be considered at the time of evidence.

5. It may be noted that though it is a private complaint, the State is a party.
6. Learned counsel for the State opposes the arguments of learned counsel for the petitioner and submits that the order is well merited and do not call for any interference. He relied on the judgment in the matter of **Ashoke Mal Bafna Vs. Upper India Steel Manufacturing and Engineering Company Limited, (2018) 14 SCC 202**, and would submit that in the absence of averments in the complaint against the Director, the Director cannot be prosecuted.
7. I have heard learned counsel for the parties at length.

8. The short question, which is involved in this petition, is as to whether a Director of the Company can challenge issuance of notice at the threshold or it would be available to him/her at the time of his/her defence.
9. A perusal of the complaint which is connected to the petition would purport that the complaint is completely silent except it has described the names of the accused and the complainant. Therefore, *prima facie*, it appears that except the description in cryptic manner, nothing is averred in the complaint under Section 138 of the Act, 1881.
10. The Supreme Court in the case of **Gunmala Sales Private Limited Vs. Anu Mehta and others and other connected matters, (2015) 1 SCC 103**, has laid down a ratio that in a case falling under Section 138 read with Section 141 of the Act, 1881, the basic averments are required to be made against the Director that he was incharge and responsible for the conduct of the business of the Company at the relevant time, when the offence was committed. The Supreme Court further held that if the challenge is made on the ground that such averments have not been made, the Court can very well go into this issue.
11. Reliance placed by the petitioner on **Krishna Texport and Capital Markets Limited (supra)** would not be of much help to the petitioner if it is compared to the averments in the complaint. The Supreme Court in such case held that if the person committing an offence under Section 138 of the Act, 1881 is a Company, every Director of such company who was

incharge of and responsible to that Company for conduct of its business shall be deemed to be guilty and vicarious liability would be on the juristic entity as the Company is run by living person. It however does not dilute the ratio that the averments to the effect that the Directors how are responsible have to be made. It was further held that if the mandatory notice is issued to the Company when the cheque is bounced, then, in such case, every notice to the Directors would not be necessary as it would be cumbersome and defeat the very purpose of the Act, 1881.

12. Very recently, the Supreme Court in the matter of **Ashoke Mal Bafna (Supra)** again has occasioned to analyse the pleading qua the liability to hold a Director of a Company guilty. The Supreme Court has held hat for making Director of a Company liable for specific offence committed by the Company under Section 141 of the Act, 1881, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company. It was held that the Magistrate before summoning the accused under Section 148 of the Act, 1881 is expected to examine the nature of allegations made in the complaint and evidence both oral and documentary in support thereof and then to proceed further .

13. In the case at hand, on perusal of the complaint, it appears that in para 1, only the particulars of the complainant and the accused have been made, which reads as under :

“1. यह कि परिवादी एवं अभियुक्तगण का नाम व पता परिवाद पत्र के शीर्ष में दर्शाये अनुसार है । ”

14. Thus, it is clear that in the above complaint, only the names of the Directors are shown and except that nothing has been averred. Therefore, in what capacity the Director could be held responsible is completely vague, which do not conform to the law laid by the Supreme Court in the matters of **Gunmala Sales Private Limited (supra)** and **Ashoke Mal Bafna (Supra)**.

15. In the result, the petition has no merit and the same deserves to be and is hereby dismissed.

Sd/-

(Goutam Bhaduri)

Judge

Shyna

