

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION

Present:

THE HON'BLE JUSTICE JAY SENGUPTA

C.R.R. 2295 Of 2019
Sheetal Amit Patil & Anr.
Versus
The State of West Bengal

For the Petitioners : Mr. Ujjwal Gandhi
Mr. Rishi Bhuta
Mr. Gunjan Thakkar

For the Opposite Party No. 2 : Mr. Dipanjan Dutt
Ms. Trini Joarder

Lastly heard on : 17.03.2021

Judgment on : 11.06.2021

JAY SENGUPTA, J:

1. This is an application praying for quashing of a proceeding in a complaint case being Case No. CC-3444 of 2016 under Section 138 read with Section 141 of the Negotiable Instruments Act presently pending before the learned Judicial Magistrate, 4th Court, Alipore, South 24 Parganas.

2. The petitioner nos. 1 and 2 are the accused nos. 8 and 9, respectively before the learned Trial Court while the opposite party is the complainant in this case. On 19.08.2016 the opposite party filed a petition of complaint

against the petitioners and other co-accused including the partnership firm in which the present petitioners were also partners. On 09.09.2016, process was issued against the present petitioners and the other co-accused.

3. Learned counsel appearing on behalf of the petitioners submitted as follows. First, the petitioners were neither signatories to the cheque nor parties to the agreements in question. Secondly, there were incomplete averments in the petition of complaint so far as the roles of the present petitioners were concerned. In the petition of complaint it was merely averred that all the accused were the partners at the accused partnership firm looking after its day to day business affairs and responsible for each and every business conduct at the relevant time when the offence was committed. However, this fell sort of the specific averments about the role of the accused that had to be made in a petition of complaint as per the ratio of the Hon'ble Apex Court as laid down in *S.M.S. Pharmaceuticals Limited vs. Neeta Bhalla & Anr.*, (2005) 8 SCC 89. Merely being a partner in a firm would not make the petitioners accused in this case. On this, reliance was further placed on the decisions of the Hon'ble Apex Court in *National Small Industries Corporation Limited vs. Harmeet Singh Paintal & Anr.*, (2010) 3 SCC 330, *Pooja Ravindra Devidasani vs. State of Maharashtra*, (2014) 16 SCC 1 and *Saroj Kumar Poddar vs. State (NCT of Delhi) & Anr.*, 2007 Cr.L.J. 1419. On this point, reliance was also placed on the decisions of the Hon'ble Delhi High Court in *Shivam Minerals Limited vs. State*, AIR Online 2019 DEL 1257, *Shyam Narayan Mishra & Ors. vs. State*, 2014 (1) ADR 750, the Hon'ble Calcutta High Court in *Srabonti Ganguli vs. IDBI*, 2014 ACD 629 (Cal), the Hon'ble Chhattisgarh High Court in *Gita Singh & Ors. vs.*

Jaiprakash, CDJ 2019 CH 8C100, the Hon'ble Jharkhand High Court in Puranmal Agarwal & Ors. vs. State of Jharkhand & Anr. in CRMP No. 804 of 2012, the Hon'ble Gujarat High Court in Anil Kumar vs. Abhisekh Enterprise & Anr., 2018 ACD 121 (Guj) and the Hon'ble Kerala High Court in P. Rajagopalan vs. P.C. Jose & Anr., 2017 ACD 59 (KER). Lastly, it was contended that there was complete non-compliance of Section 202 of the Code inasmuch as no enquiry was undertaken despite the fact that the accused petitioners were admittedly staying beyond the territorial jurisdiction of the learned Trial Court. The learned Trial Court only examined the complainant under Section 200 of the Code and did not direct an enquiry as contemplated under the amended provision of Section 202 of the Code. The enquiry as contemplated under Section 202 of the Code was mandatory. On this, reliance was placed on the decisions of the Hon'ble Apex Court in the cases of K.T. Joseph vs. State of Kerala & Anr, (2009) 15 SCC 199, National Bank of Oman vs. Barakara Abdul Aziz & Anr, (2013) 2 SCC 488, Abhijit Pawar vs. Hemant Madhukar Nimbalkar, AIR 2017 SC 267 and Birla Corporation Limited vs. Adventz Investments and Holdings Limited, 2019 SCC On-Line SC 682. It was contended that Section 202 was not only mandatory in respect of Penal Code offences, but also in respect of offences under Section 138 of the Negotiable Instruments Act. Disputing the ratio laid down by the Division Bench of the Hon'ble High Court at Calcutta in S.S. Binu vs. State of West Bengal, 2018 SCC On-Line (Cal) 1741, it was contended that the affidavit of evidence, as contemplated under Section 145 of the Negotiable Instruments Act could not be a surrogate for an enquiry under Section 202 of the Code. Reliance was further placed on the decision

of the Hon'ble Bombay High Court in Parth Bhadresh Mehta vs. State of Maharashtra, 2019 SCC OnLine Bom 405, the Hon'ble Calcutta High Court in Anu Mehta vs. Gunmala Sales Private Limited, 2013 ACD 1113 (Cal), the Hon'ble Karnataka High Court in Babu Rao Chinchasur vs. Anjana Shathaveer in Criminal Petition No. 7269 of 2015 and of the Hon'ble Gujarat High Court in Vir Retail Pvt. Ltd. vs. State of Gujarat & Anr., 2014 ACD 537 (GUJ). In view of these, the impugned proceeding ought to be quashed so far as the present petitioners were concerned.

4. Learned counsel appearing on behalf of the complainant/opposite party no. 2 submitted as follows. The case arose out of the dishonour of a cheque for a sum of Rs. 3 Crores issued by the accused towards part discharge of their liability to the complainant company. There was a clear averment made at paragraph 3 of the petition of complaint that all the accused including the present petitioners were partners of the said firm and were looking after its day-to-day business for each and every business conduct at the relevant time when the offence was committed. As such, it satisfied the requirement of the decisions of the Hon'ble Apex Court that in order to arraign the directors of an accused company or the partners of an accused firm as accused in a case for dishonour of a cheque, it had to be averred that the said persons were in charge of and responsible for the concerned for the day-to-day running of its business. There were no magic words which were to be used in showing the involvement of the partners or directors. In the facts of the present case, sufficient averments were made in the petition of complaint to warrant the addition of the petitioners as accused. Looking after its day-to-day business affairs was equivalent to the

phrase “in charge of”. On the point that no magic words were required for satisfying the requirement, reliance was placed on the decisions of the Hon’ble Apex Court in K.P.G. Nair vs. Jindal Menthol India Limited (2001) 10 SCC 218, Monaben Ketanbhai Shah vs. State of Gujarat (2004) 7 SCC 15. On the question that averments made in the petition of complaint in the present case constituted requisite averments, reliance was placed on the decisions of the Hon’ble Apex Court in Paresh P. Rajda vs. State of Maharashtra, (2008) 7 SCC 442, Rallis India Limited vs. Poduru Vidya Bhusan, (2011) 13 SCC 88, T.N. News Print and Papers Ltd. vs. D. Karunakar, (2016) 6 SCC 78, A.R. Radha Krishna vs. Dasari Deepthi (2019) 15 SCC 550. On this, reliance was also placed on the decision of the Hon’ble Calcutta High Court in Ashwini Kumar Singh vs. Panchami Stone Quarry, (2019), SCC OnLine Cal 4491 and Sharad Madhav Kulkarni vs. Midaas Construction Company Private Limited, 2019 SCC OnLine Cal 4492. On the question that the decision in S.M.S. Pharmaceuticals Limited (supra) did not prescribe any specific form of the basic averments, reliance was placed on the decision of the Hon’ble Apex Court in the case of A.K. Singhania vs. Gujarat State Fertilizer Company limited, (2013) 16 SCC 630. Now, on the question of compliance of Section 202 of the Code, the authoritative pronouncement by an Hon’ble Division Bench of this Court in S.S. Binu vs. State of West Bengal, (2018) SCC OnLine Cal 1741, *inter alia*, laid down that in cases falling under Section 138 read with Section 141 of the Negotiable Instruments Act, the learned Magistrate was not mandatorily required to comply with provisions of Section 202(1) before issuing summons to an accused residing outside the territorial jurisdiction of the Learned

Magistrate concerned. This decision of a Division Bench being binding on this Court, the revisional application of the petitioner was sure to fail. On the question of binding nature of precedents, reliance was placed on *Tribhuvandas Purshottamdas Thakur vs. Ratilal Motilal Patel*, (1968) 1 SCC 455 and *Commissioner of Income Tax vs. Thana Electricity Supply Limited*, (1993) SCC OnLine Bom 591. The decisions relied upon by the petitioner in *Udai Shankar Awasthi* (supra), *Abhijit Pawar* (supra), *National Bank of Oman* (supra) had all been considered in *S.S. Binu* (supra). So far as the ratio laid down in the case of *K.T. Joseph* was concerned, there was nothing to indicate its applicability to a proceeding under the Negotiable Instruments Act. Similarly, the decision in *Birla Corporation Ltd.* (supra) was also distinguishable on facts as the same concerned Penal Code offences. The decision in *K.S. Joseph* (supra) too did not pronounce as to whether Section 202 of the Code was mandatory or not. Being partners of the accused firm, in charge of and responsible its business at the material point, the petitioners would have to face the impugned proceeding under Section 138 read with Section 141 of the Negotiable Instruments Act.

5. I heard the submissions of the learned counsels appearing on behalf of the accused petitioners and the complainant/opposite party no.2 and perused the revision petition, the affidavits and the written notes filed.

6. First, it is an admitted position that the petitioners were not the signatories to the cheque in question. However, they were the partners in the co-accused partnership firm.

Whether the averments made in the petition of complaint are sufficient to arraign the present petitioners as accused:

7. It is trite law that merely being a partner in a firm would not make the petitioners accused in a case for dishonour of cheque issued by the said firm. In view of the decision of the Hon'ble Apex Court in SMS Pharmaceuticals Limited (supra) and the subsequent decisions pronounced in this regard, necessary averments are to be made in the petition of complaint that the petitioners were in charge of and responsible to the concerned artificial entity for the daily running of its business.

8. In SMS Pharmaceuticals Case (supra), a Three Judges' Bench of the Hon'ble Apex Court laid down as under-

“19. In view of the above discussion, our answers to the questions posed in the reference are as under:

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the

company for the conduct of its business. The requirement of Section 141 is that 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.

(c) The answer to Question (c) has to be in the affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141.”

9. However, it has also been made sufficiently clear by the Hon’ble Supreme Court in A.K. Singhania (supra) that no specific form of the required averments is prescribed. There is no necessity to reproduce the exact words ‘in charge of’ and ‘responsible to’. Actually, it has to be seen whether in the facts of a particular case, sufficient averments of facts were made in the petition of complaint so as to warrant arraignment of the partners, being in charge of or responsible to the firm, as accused in a proceeding against a partnership firm.

10. In this regard, the expression used in SMS Pharmaceuticals Ltd. Case (supra) at para 19(b) that “This has to be averred as a fact.....” assumes immense significance.

11. It is evidently pertinent to refer to the relevant portions of the decision in A.K. Singhania’s Case (supra), as quoted below-

“**14.** From a plain reading of the aforesaid provision it is evident that every person who at the time the offence was committed was in charge of and responsible to the company shall be deemed to be guilty of the offence under Section 138 of the Act. In the face of it, will it be necessary to specifically state in the complaint that the person accused was in charge of and responsible for the conduct of the business of the company? In our opinion, in the case of offence by the company, to bring its Directors within the mischief of Section 138 of the Act, it shall be necessary to allege that they were in charge of and responsible to the conduct of the business of the company. It is a necessary ingredient which would be sufficient to proceed against such Directors. However, we may add that as no particular form is prescribed, it may not be necessary to reproduce the words of the section. If reading of the complaint shows and the substance of accusation discloses necessary averments, that would be sufficient to proceed against such of the Directors and no particular form is necessary. However, it may not be necessary to allege and prove that, in fact, such of the Directors have any specific role in respect of the transaction leading to issuance of cheque. Section 141 of the Act makes the Directors in charge of and responsible to the company “for

the conduct of the business of the company” within the mischief of Section 138 of the Act and not particular business for which the cheque was issued. We cannot read more than what has been mandated in Section 141 of the Act.”

12. In the present case, averments were made at paragraph 3 of the petition of complaint that all the accused including the present petitioners were partners of the said firm looking after its day to day business affairs and responsible for each and every business conducts at the relevant time when the offence was committed. Looking after its day to day business affairs as partners and responsible for each and every business conducts of the firm at the relevant time are clearly equivalent to being in charge of and responsible to the concern for the conduct of its business.

13. Therefore, after going through the petition of complaint and reading it as a whole, this Court is of the view that sufficient averments of facts were made in the instant petition of complaint so as to arraign the present petitioners as accused in this case.

Compliance of Section 202 of the Code of Criminal Procedure:

14. It appears that no enquiry, in clear terms, was undertaken by the learned Trial Court as per the amended provision of Section 202 of the Code despite the fact that the accused petitioners were admittedly staying beyond the territorial jurisdiction of the learned Trial Court.

15. The question whether Section 202 of the Code is mandatory in respect of a proceeding under Section 138 of the Negotiable Instruments Act or not is now well settled. In Re: Expeditious trial of cases under Section 138 of

N.I. Act, 1881, reported in 2021 SCC Online SC 325, a Constitution Bench of the Hon'ble Apex Court, *inter alia*, held as follows:

“24. The upshot of the above discussion leads us to the following conclusions:

.....

2) Inquiry shall be conducted on receipt of complaints under Section 138 of the Act to arrive at sufficient grounds to proceed against the accused, when such accused resides beyond the territorial jurisdiction of the Court.

3) For the conduct of inquiry under Section 202 of the Code, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses.

.....”

16. Therefore, as the law requires that an enquiry be held under Section 202 of the Code if the accused stayed outside the Court's jurisdiction, such enquiry has to be undertaken in clear terms and the Learned Trial Court, after making such enquiry whether by taking evidence on affidavit or by restricting the enquiry to examination of documents or not, is required to decide whether there are sufficient grounds to issue process against the accused. In the present case, the learned Trial Court did not do so. In view of the same, the order issuing process and the subsequent orders passed by

the learned Trial Court in the present case ought to be set aside and the matter remanded back so that the learned Trial Court can proceed afresh from the stage of enquiry under Section 202 of the Code.

17. For the reasons recorded earlier regarding the averments made in the petition of complaint for arraigning the present petitioners as accused, this Court is satisfied with the said averments. Therefore, the prayer of the petitioners for quashing of the proceeding is refused.

18. However, since no mandatory enquiry was undertaken in clear terms under Section 202 of the Code even though the accused resided beyond the territorial jurisdiction of the learned Trial Court, the order issuing process and the subsequent orders passed by the learned Trial Court are set aside and the matter is remanded back to the learned Trial Court for proceeding afresh from the stage of enquiry as contemplated under Section 202 of the Code.

19. As the proceeding has remained pending for quite long, the learned Trial Court is requested to conclude the proceeding as expeditiously as possible without granting any unnecessary adjournment to any of the parties.

20. With these observations, the revisional application is disposed of.

21. However, there shall be no order as to costs.

22. Urgent Photostat certified copies of this judgment may be delivered to the learned Advocates for the parties, if applied for, upon compliance of all formalities.

(Jay Sengupta, J)

P. Adak