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HIGH COURT OF CHHATTISGARH, BILASPUR

WPCR No. 129 of 2013

1. M/s Binco Constructions Pvt. Ltd. 4 Neeladari Plaza 6th Floor, Rajaram Mohan Roy Road, Near Richmond Circle Bangalore-560025.

2. Bamdev Nayak Managing Director- M/s Binco Constructions Pvt. Ltd 4, Neeladari Plaza 6th Floor, Rajaram Mohan Roy Road, Near Richmond Circle Bangalore 560025.

3. Mr. Manoj Kumar Nayak M/s Binco Constructions Pvt. Ltd, R/o Neeladari Plaza 8th Floor, Rajaram Mohan Roy Road Nagar, Richmond Circle, Bangalore Karnataka 560025.

---- Petitioners

Versus

1. R.R.Industrial Corporation (I) Private Ltd. A Company Incorporated Under The Provisions Of The Companies Act, Having Its Registered Office At Telghani Naka Station Road, Raipur and Its Represented Through Its Power Of Attorney Holder at Relevant Times at Present Presented Through Dinesh Agrawal.

2. State of Chhattisgarh, through District Magistrate, District Raipur, C.G.

---- Respondents

<u>WPCR No. 154 of 2013</u>

1. M/s Binco Constructions Pvt. Ltd. 4, Neeladri Plaza 6th Floor, Rajaram Mohan Roy Road Near Richmond Circle, Tehsil, P.S. & Distt. Banglore 560025.

2. Mr. Bamdev Nayak Managing Director M/s Binco Construction Pvt. Ltd. 4, Rajaram Mohan Roy Road Near Richmond Circle, Banglore 560025 R/o No. 225/16 18th Cross, 8th Main Sadashivanagar, Tehsil, P.S. & Distt. Banglore 560080, Karnataka.

3. Mr. Manoj Kumar Nayak Director M/s Binco Constructions Pvt. Ltd. 4, Neeladari Plaza 8th Floor, Rajaram Mohan Roy Road Near Richmond Circle, Tehsil, P.S. & Distt. Banglore 560025 Karnataka R/o No 255/16 18th Cross, 8th Main Sadashivnagar, Tehsil, P.S. & Distt. Banglore 560080 Karnataka.

---- Petitioners

Versus

1. State of Chhattisgarh S/o Through Distt. Magistrate, Distt. Raipur C.G.

2. R.R. Industrial Corporation (I) Pvt. Ltd. A Company incorporated under the provisions of the Companies Act, having Its Regd. Office at Telghani Naka Station Road, Raipur C.G.

and Its Represented Through Its Power Of Attorney Holder at Relevant Time at Present Represented Through Dinesh Agrawal, Telghani Naka Station Road, Tehsil P.S. and Distt. Raipur C.G.

---- Respondents

For Petitioners :- Mr. Anup Majumdar & Mr. Saket Pandey, Advocate.
For Respondent/complainant No. Mr. Sharad Mishra, Advocate.
For State/Respondent :- Mr. Suyash Dhar, PL.

Hon'ble Shri Justice Sanjay K. Agrawal
Order On Board

05/02/2021

1. Since common question of law and fact is involved in these two writ petitions, they were heard together and are being disposed of by this common order.

   (For the sake of convenience, facts of the case are taken from WPCR No.129/2013 being lead case.)

2. Petitioner No.1, M/s Binco Constructions Pvt. Ltd., is a company incorporated under the provisions of the Companies Act, 1956 petitioner No.2, Bamdev Nayak, was Managing

Director of the company (petitioner No.1) at the relevant point of time and petitioner No.3, Mr. Manoj Kumar Nayak, was Director of the company (petitioner No.1) at the relevant point of time.

3. On account of some business transaction petitioner No.2, on behalf of the company, issued two cheques to respondent No.1/complainant, R.R. Industrial Corporation (I) Private Ltd., towards its liability but the cheque was dishonored against which complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter called as "the N.I. Act") was preferred before the jurisdictional Court. The said Court by order dated 07.08.2013 took cognizance of the offence under Section 138 of the N.I. Act and issued summons to the petitioners and other Directors, who have not challenged the proceedings.

4. The petitioners herein, petitioner No.1,

Company, Petitioner No.2, Managing Director and Petitioner No.3, Director, have called in question the registration of criminal complaint under Section 138 of the N.I. Act on the ground that there is no outstanding amount and it is the amount in question which has already been paid to the respondent No.1/complainant-company and, as such, it is also their case and they have already filed complaint against the respondent/complainant-company for the offence under Section 420 of the IPC. It has also been stated that petitioner No.2 and petitioner No.3, are not responsible for day-to-day affairs of the company and in dishonor of cheque as they are not directly in-charge or responsible for transaction in question on behalf of the company, as such, issuance of process against the petitioners is liable to be and deserves to be quashed.

5. Return has been filed by the respondent/complainant opposing the writ

petitions and stating that petitioner No.1, company, petitioner No.2, Managing Director, who has issued cheque on behalf of the company and petitioner No.3, Director, who was responsible for day to day affairs of the company, as stated in the complaint.

6. Mr. Anup Majumdar, learned counsel for the petitioners, would submit that no offence under Section 138 of the N.I. Act has been made out against the petitioners as the amount in question has already been paid to the respondent/complainant and for fraudulent transaction made by respondent/complainant, complaint has already been filed in the Court, situated at Bangalore, which is pending consideration and even otherwise there is no ingredients for non-compliance of Section 141 of the N.I. Act and, as such, the criminal complaint deserves to be quashed. He relied upon the judgments of the Supreme Court **Indus Airways Private Limited and Others v.**

Magnum Aviation Private Limited and Another[1]., **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Another**[2], **National Small Industries Corporation Limited v. Harmeet Singh Paintal and Another**[3] **Ashoke Mal Bafna v. Upper India Steel Manufacturing and Engineering Company Limited**[4] **Rajiv Thapar and Others v. Madal Lal Kapoor**[5] and **Gunmala Sales Private Limited v. Anu Mehta and Others**[6] in support of his contentions.

7. Mr. Sharad Mishra, learned counsel for respondent No.1/complainant, would submit that petitioner No.2, Managing Director had issued two cheques, admittedly on behalf of the company, therefore, he would be liable for prosecution for dishonor of the cheque and so also petitioner No.3, Director of the company, who is responsible for day-to-day affairs of the company. There is sufficient

1 (2014) 12 SCC 539
2 (2005) 8 SCC 89
3 (2010) 3 SCC 330
4 (2018) 14 SCC 202
5 (2013) AIR SCW 784
6 (2015) 1 SCC 103

and clear averments in paragraphs No.2 & 4 of the complaint and, as such, he relied upon the judgment of the Supreme Court in the case of **A.R. Radha Krishna vs. Dasari Deepthi and Others**[7].

8. I have heard learned counsel for the parties, considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

9. Admittedly, respondent No.1/complainant has filed complaint under Section 138 of the N.I. Act against arraying petitioner No.1, company, petitioner No.2, Managing Director and petitioner No.3, Director and other directors, in which, on 07.08.2013 learned JMFC has taken cognizance for offence under Section 138 of the N.I. Act and issued process against the petitioners/accused persons on the same day.

10. The question for consideration would be, whether the averments made as noticed hereinabove would constitute the necessary

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7 (2019) 15 SCC 550

ingredients for offence against company and the petitioners under Section 138 read with Section 141 of the NI Act?

11. Section 138 of the NI Act states as under:-

> "**138. Dishonour of cheque for insufficiency, etc., of funds in the account.**— Where any cheque drawn by a person on an account maintained by him with a 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 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 agreement made with that 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 fine which may extend to twice the amount of the cheque, or with both:
>
> Provided that nothing contained in this section shall apply unless—
>
> (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;
>
> (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 the 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.

Explanation.– For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

Section 141 of the NI Act states as under:-

"141. Offences by companies. –(1) If the person committing an offence under section 138 is a company, every person 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 and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may

> be, he shall not be liable for prosecution under this Chapter.
>
> (2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
> Explanation.— For the purposes of this section,—
>
> (a) "company" means any body corporate and includes a firm or other association of individuals; and
>
> (b) "director", in relation to a firm, means a partner in the firm."

12. The Supreme Court in the matter of **S.M.S. Pharmaceuticals Ltd.** (supra) referred the following question to the larger Bench qua the liability of the company's officials as under:-

> "1(c) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the managing directors or joint managing director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be

proceeded against.”

Their Lordships answered the question as under:-

> “19(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."

13. Similarly, in the matter of **National Small Industries Corporation Limited** (supra) the following principle of law has been laid down by the Supreme Court qua Section 141 of the NI Act, which states as under:-

> “39. 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 the 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."

14. Similarly, in the matter of **Standard Chartered Bank v. State of Maharashtra & Others**[8] the Supreme Court has held as under:-

"32. The aforesaid averments, as we find, clearly meet the requisite test. It is apt to mention here that there are seven accused persons. Accused No.1 is the Company, accused Nos.2 and 3 are the Chairman and Managing Director respectively and accused Nos.6 and 7 were signatory to the cheques. As far as the accused Nos.4 and 5 were concerned, they were whole-time Directors and the assertion is that they were in charge of day to day business of the Company and all of them had with active connivance, mischievously and intentionally issued the cheques in question.

33. Thus, considering the totality of assertions made in the complaint and also taking note of the averments put forth relating to the respondent Nos. 2 and 3 herein that they are whole-time Director and Executive Director and they were in charge of day to day affairs of the Company, we are of the considered opinion that the High Court has fallen into grave error by coming to the conclusion that there are no specific averments in the complaint for issuance of summons against the said accused

8 2016 (6) SCC 62

> persons. We unhesitatingly hold so as the asseverations made in the complaint meet the test laid down in Gunmala Sales Pvt. Ltd. (supra)."

15. Similarly, decision of the three judges Bench of the Supreme Court in the case of **A.R. Radha Krishna** (supra) has held that the question whether the averment is sufficient to attract Section 141 of the N.I. Act is the question of fact. Para 7 of the judgment has held as under:-

> "7.Having heard the learned counsel for the parties and carefully scrutinising the record, we are of the considered opinion that the High Court was not justified in allowing the quashing petitions by invoking its power under Section 482 CrPC. In a case pertaining to an offence under Section 138 and Section 141 of the Act, the law requires that the complaint must contain a specific averment that the Director was in charge of, and responsible for, the conduct of the company's business at the time when the offence was committed. The High Court, in deciding a quashing petition under Section 482 CrPC must consider whether the averment made in the complaint is sufficient or if some unimpeachable evidence has been brought on record which

> leads to the conclusion that the Director could never have been in charge of and responsible for the conduct of the business of the company at the relevant time. While the role of a Director in a company is ultimately a question of fact, and no fixed formula can be fixed for the same, the High Court must exercise its power under Section 482 CrPC when it is convinced, from the material on record, that allowing the proceedings to continue would be an abuse of process of the Court.”

16. Following the principle of law laid down by the Supreme Court in the above stated judgments (supra) governing Section 141 of the N.I. Act, it is quite vivid that the Managing Director and Director who issued the cheque would be accused for offence under Section 138 of the N.I. Act in case offence committed by the company. It is not necessary to make specific averments in the complaint and by virtue of Section 141 of the N.I. Act they are liable to be proceeded in accordance with law. It is not in dispute that petitioner No.2 has issued cheque on behalf of the company as Managing Director

to the respondent/complainant as stated in para 4 of the complaint and following the principle of law laid down by the Supreme Court in **S.M.S. Pharmaceuticals Ltd.** (supra), **National Small Industries Corporation Limited** (supra) and **Standard Chartered Bank** (supra), it is quite clear that petitioner No.2 has issued cheque on behalf of the company holding the post of Managing Director and thus, he would fall within the person mentioned under Section 141 of the N.I. Act and cannot avoid its constructive liability for conduct of offence and can be proceeded against.

17. At this stage it would be appropriate to notice para Nos.2 & 4 of the complaint, which state as under:-

> "2. That, the Accused No.1 is a Registered Company having place of business at 4, Neeladrri Plaza, 6th Floor, Rajaram Mohan Roy Road, Near Richmond Circle, Bangalore -560025. The Accused No.2 to 7 are the Directors of the Accused No.1 Company and besides being Directors are in charge of and responsible to the Accused No.1 company for the conduct of its business.

4. That, towards discharge of accused liability, against price of TMT Steel Rod sold and dispatched by complainant company Accused No.2 in discharge of the Accused No.1's antecedent liability towards the Complainant and with the consent of the Accused No.3 to 7 issued cheque with an assurance that it will be honoured on presentation. Copies of the aforesaid cheque is filed with this complaint. The relevant details of the cheque issued by accused to our client are as detailed hereunder:

S. No.	Name of the Bank	Cheque No.	Date	Amount
1.	State Bank of India, Bangalore	362662	22/06/2012	Rs.49,90,000/-

18. A careful perusal of the aforesaid paragraphs of the complaint would show that petitioner No.3, Director of the company is responsible for conduct of business of the company as stated in paragraphs No.2 & 4 of the complaint noticed hereinabove as specific averment has been made by the complainant in his complaint and even otherwise the plea of the petitioners that they are not responsible for day to day affairs is a question of fact which has to be determined during the course of trial as

held by the Supreme Court in the matter of **A.R. Radha Krishna** (supra) and on that basis, prosecution against him cannot be quashed at this stage in this petition.

19. Next submission of the petitioner is that they have already paid amount in question and filed documents before this Court but this plea also cannot be considered at this stage. It is for the petitioners to establish the said plea before the trial Court during the course of trial as the issue cannot be adjudicated in this petition at this stage. As such, learned JMFC is absolutely justified in issuing process after taking cognizance of offence under Section 138 of the N.I. Act. I do not find any perversity or illegality in order taking cognizance for the aforesaid offence. Petitioners are at liberty to raise all the grounds before the trial Court during the course of trial. It is made clear that this Court has not expressed any opinion on the merits of the matter.

20. Consequently, the petitions being devoid of merit are liable to be and are hereby dismissed.

21. Copy of the order be sent to the trial Court for expediting the trial.

Sd/-
(Sanjay K. Agrawal)
Judge

Ankit