

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRR 3527 of 2019

Mr.Vivek Bhaskaran

-vs.-

State of West Bengal & Anr.

For the petitioner : Mr. Abhirup Chakraborty.

For the Opposite Party no. 2 : Mr. Ayan Bhattacharjee,
Mr. Karan Dudhwewala,
Mr. Anil Choudhury.

Heard on : 24.08.2021, 27.01.2022 & 03.02.2022

Judgment on : 18.02.2022

Tirthankar Ghosh, J:-

The present revisional application has been preferred by the petitioner challenging the proceedings being Case No. CS-27140 of 2017 under Sections 138/141 of the Negotiable Instruments Act, 1881, pending before the learned Metropolitan Magistrate, 15th Court, Calcutta.

The allegations made in the petition of complaint as made by the complainant are as follows:-

- a) M/s. Bengal Nestor's Industries Ltd. (hereinafter referred to as the complainant company) has its registered office at 53-B, Mirza Ghalib Street, 4th Floor, Kolkata-700016 and is represented by its authorized representative Mr. Pradip Bhattacharjee.
- b) The accused No. 1, M/s. Otto Projects Pvt. Ltd. is a company having its registered office at 4, Bishop Lefroy Road, Flat No. 4, Calcutta Mansion, Kolkata-700020 and the accused No. 2 to 5 are the Directors, accused No. 6 is the Managing Director and accused No. 7 is whole-time Director of accused No. 1 company, they are responsible for the day to day affairs of the company that is the accused No. 1.
- c) The accused persons in order to liquidate their liabilities towards the complainant issued two cheques in favour of the complainant company aggregating to a sum of Rs. 45,94,000/- (Rupees Forty Five Lakh Ninety Four Thousand only). The said cheques were presented for encashment with the complainant's bankers but the same were dishonoured and after complying with all the formalities the complainant company filed a complaint case under Section 200 of the Code of Criminal Procedure for offences under Section 138/141 of the Negotiable Instruments Act being Case No. CS/54931/2016 before the Learned Chief Metropolitan Magistrate,

Calcutta. The Learned Metropolitan Magistrate was pleased to take cognizance of the offences and transferred the case to the Learned Metropolitan Magistrate, 15th Court, Calcutta, for enquiry, trial and disposal of the same. In course of the proceeding, the accused persons appeared before the learned Court and were represented under Sections 205 and 305 of the Code of Criminal Procedure respectively. On 28.10.2016 a terms of settlement was filed in the complaint case along with a petition under Section 257 of the Code of Criminal Procedure by the complainant for withdrawal of the complaint. That in terms of said settlement the accused persons issued several cheques and pay order for repayment of their legal debts and existing liabilities. To that effect the complainant has enclosed the Photostat copies of the terms of settlement along with the Court's order dated 28.10.2016. The accused persons issued cheque No. 667029 dated 30.11.2016 amounting to Rs. 5,14,000/- (Rupees Five Lakh Fourteen Thousand only) drawn on Syndicate Bank, Kolkata as part of the said settlement.

- d) The complainant presented the said cheque with its bankers namely, Vijaya Bank, New Market Branch, P.S.- New Market on 30.11.2016 for encashment within its validity period but the same was dishonoured by the bankers of the accused persons with an endorsement "Funds Insufficient". The said information of dishonour was received by the complainant on 01.12.2016 and

pursuant to the request made by the accused persons the complainant again presented the cheque on 31.01.2017 for encashment and the cheque was again dishonoured with the same endorsement. The complainant company lastly on 21.02.2017 presented the cheque with its banker on the verbal assurance of the accused persons but the same was again dishonoured with the same endorsement of 'Funds Insufficient'. The complainant company through its advocate issued a demand notice dated 20th March, 2017, thereby demanding the amount covered by the dishonoured cheque i.e. Rs.5,14,000/- (Rupees Five Lakh Fourteen Thousand only) within 15 days from the date of receipt of the notice. The said notice was received by the accused no.2 on 23rd March, 2017 and by all the accused persons on 21st March, 2017. It has been alleged that in spite of receipt of demand notice the accused persons did not pay any amount towards the dishonoured cheque, as such according to the complainant company the accused persons have committed offences punishable under Section 138 of the Negotiable Instruments Act read with Section 141 of the Negotiable Instruments Act.

Records reflect that the learned Magistrate was pleased to take cognizance of the offence on 04.05.2017 and transferred the case to the learned Metropolitan Magistrate, 15th Court, Calcutta for enquiry and disposal according to law. On 02.08.2017 the learned Magistrate after perusing the

affidavit under Section 145 of the Negotiable Instruments Act along with the original documents and other papers was pleased to issue summons against the accused persons fixing 06.09.2017 for service return and appearance. The order dated 06.09.2017 reflects that some of the accused persons physically appeared and they were granted bail. The present petitioner (being the accused no.4 as per complaint) filed an application before the learned Magistrate for discharging him from the case. The main thrust of contention of the present petitioner is that since he has resigned from the company he cannot be made liable for the dishonoured cheque. Learned Magistrate after considering the materials appearing against him refused to discharge him and dismiss the petition which was filed on 06.09.2017.

Mr. Abhirup Chakraborty, learned advocate appearing for the petitioner submits that the petitioner is not a signatory to the subject cheque dated 30.11.2016. Learned Advocate further submits that the averments in the petition of complaint would reflect that the signatory to the cheque happens to be accused No. 2 (Muzaffar Shah) and not the petitioner. There is no specific allegation and averment in the petition of complaint i.e. how and in what manner the petitioner was in-charge of the company and/or was involved in the day to day affairs of the company during commission of the alleged offences by the company. It is emphasised that the petitioner was a director of the accused/company till 29th September, 2015, the petitioner submitted his resignation from the Board of Directors by letter dated 29th September, 2015 and on 30th September, 2016 the company accepted the resignation of the

petitioner with effect from 29th September, 2015 (attention has been drawn to pages 32 and 33 of the revisional application) for comparing name of the petitioner being deleted from the list of Directors. The petitioner has also drawn the attention of this Court to the certified true copies of statutory form No.11 and 12 which was obtained from the Office of the Registrar of Companies which would reflect that the resignation of the petitioner was available in the public domain. Additionally, it has been submitted that the petitioner cannot be made vicariously liable by invoking the provisions of Section 141 of the Negotiable Instruments Act which makes a director liable and as the petitioner was never director of the company at the relevant period of time, he cannot be made liable as the cause of action of the instant case arose after 20th February, 2017. In order to substantiate his arguments following authorities have been relied upon by the Rajasekar –Vs.- U.M.S. Radio Factory Limited, (2011) 1 MWN (Cri) DCC 36; Harshendra Kumar D. –Vs.- Rebatilata Koley & Ors., (2011)3 SCC 351; K. Srikanth Singh –Vs.- North East Securities Ltd. & Anr., (2007)12 SCC 788; Ashoke Mal Bafna –Vs.- Upper India Steel Manufacturing and Engineering Company Limited, (2018) 14 SCC 202; Anil Khadkiwala –Vs.- State (Government of NCT of Delhi) & Anr., (2019) 17 SCC 294; Saroj Kumar Poddar –Vs.- State (NCT of Delhi) & Anr., (2007) 3 SCC 693; DCM Financial Services Limited –Vs.- J.N. Sareen & Anr., (2008) 8 SCC 1.

Mr. Ayan Bhattacharjee, learned Advocate appearing for the complainant/opposite party refuted the contentions advanced by the learned Advocate for the petitioner and submitted that it has been categorically averred

in the petition of complain that prior to the initiation of the present complaint case the accused persons in order to liquidate their part liabilities towards the complainant issued two cheques aggregating to Rs. 45,94,000/- (Rupees Forty Five Lakh Ninety Four Thousand only). The present petitioner (Accused No.4 in the petition of complaint) was the signatory to the said two cheques. The present complainant initiated a complaint case being C.S. Case No. 54931/2016 under Sections 138/141 of the Negotiable Instruments Act for dishonour of the said two cheques before the Learned Chief Metropolitan Magistrate, Calcutta against the petitioner and other accused persons. Subsequently, a term of settlement was executed by and between the parties wherein it was agreed that the complainant/opposite party No.2 would withdraw the complaint case against the petitioner and other accused persons and in return the petitioner and other accused persons would issue cheque for liquidating their liabilities towards the complainant company. It has been emphasised that the present petitioner had duly signed the said terms of settlement and the seal of the accused/company would ratify the signature of the petitioner. When the present cheque which was issued was presented for encashment within its validity period, and the same was dishonoured with endorsement "Funds Insufficient", the case being CS-27140/2017 was filed under Sections 138/141 of the Negotiable Instruments Act. Learned Advocate relied upon Lalit Kumar Sharma & Anr. -Vs.- State of Uttar Pradesh & Anr., (2008) 5 SCC 638; NEPC MICON Ltd. & Ors -Vs.- Magma Leasing Ltd., (1999) 4 SCC 253; K.K. Ahuja -Vs.- V.K. Vora & Anr., (2009) 10 SCC 48.

In this case the petitioner has relied upon authorities to stress on the issue that if the person has resigned as director he/she cannot be construed to come within the meaning of Section 141 of the Negotiable Instruments Act.

Learned advocate for the petitioner relied upon the following paragraphs of *Rajasekar –Vs.- U.M.S. Radio Factory Limited (supra)*:

“11. *Therefore, 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. The above provision makes it clear that the persons who are sought to be made vicariously liable for Criminal offence should be 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.*

13. *It is well settled that the liability of a Director of a Company arises when he is in-charge of and responsible for the conduct of the 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. Section 141 of the Act provides for a constructive liability. Therefore, it requires strict compliance of the provision. In the matters of post dated cheques which were presented on later dates, the relevant time, of the Commission of the offence is very important. For constituting an offence under Section 138 of the Act, the following ingredients are to be satisfied:*

- (a) a cheque must be drawn;*
- (b) it must be presented and returned un-paid with a remark “insufficient fund”;*
- (c) a notice for payment shall be served on the Accused;*

(d) the Accused has failed to make the payment of the said amount to the payee within 15 days from the date of receipt of notice.

15. *Therefore, in the case of post dated cheques, the relevant time of commission of an offence is the date of presentation and dishonour of the cheque. Any person in-charge of and responsible for the conduct of the business of the Company at this point of time alone are vicariously liable and the person who had resigned from the Directorship of the Company cannot be held responsible unless specific allegations are made that the said person was incharge of and responsible for the conduct of the business of the company even after resignation. In DCM Financial Services Limited v. J.S. Sareen, 2008 (2) MWN (Cr.) DCC 1 (SC) : 2008 (3) SCC (Cr) 401 in a similar situation, it is held “he had no say in the matter seeing that the cheque is honoured he could not ask the company to pay the amount”. It is also pertinent to note that the Petitioner was not the signatory of the cheques. Therefore, I am of the considered view that the Petitioner cannot be held liable for the dishonour of the cheque.”*

Reliance was also placed by the petitioner in respect of the following paragraphs in Harshendra Kumar D. –Vs. – Rebatilata Koley (supra):

“17. *In this view of the matter, in our opinion, it must be held that a Director, whose resignation has been accepted by the company and that has been duly notified to the Registrar of Companies, cannot be made accountable and fastened with liability for anything done by the company after the acceptance of his resignation. The words “every person who, at the time the offence was committed”, occurring in Section 141(1) of the NI Act are not without significance and these words indicate that criminal liability of a Director must be determined on the date the offence is alleged to have been committed.*

18. On 2-3-2004, the appellant sent a letter of resignation to the Managing Director of the Company, the relevant part of which reads as follows:

“Subject: Resignation from the post of Director.

With reference to the above subject I hereby resign to the post of Director in your company (sic) immediate effect as I am preoccupied with my other business activities and unable to concentrate, participate in the affairs of the company.

Therefore it is kind request with you to accept my resignation and intimate the ROC by filing necessary applications to comply with the legal formality.”

19. The Board of Directors held the meeting on 2-3-2004 and accepted the appellant's resignation on that day itself. The extract of resolution to that effect reads as follows:

“Mr Harshendra Kumar D., s/o Rathnavarma Hegde residing at No. 55, Vittal Mallya Road, Bangalore, due to his personal inconveniences (sic) he requested to accept his resignation for the Director, and the Board accepted the resignation and it will be effected immediately on the date of resignation.”

20. On 4-3-2004, the Company informed the Registrar of Companies in the prescribed form (Form 32) about the resignation of the appellant from the post of Director of the Company and, thus, the change among Directors.

26. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In our opinion, the High Court fell into grave error in not taking into consideration the uncontroverted documents relating to the appellant's resignation from the post of Director of the Company. Had these documents been considered by the

High Court, it would have been apparent that the appellant has resigned much before the cheques were issued by the Company.

27. *As noticed above, the appellant resigned from the post of Director on 2-3-2004. The dishonoured cheques were issued by the Company on 30-4-2004 i.e. much after the appellant had resigned from the post of Director of the Company. The acceptance of the appellant's resignation is duly reflected in the Resolution dated 2-3-2004. Then in the prescribed form (Form 32), the Company informed to the Registrar of Companies on 4-3-2004 about the appellant's resignation. It is not even the case of the complainants that the dishonoured cheques were issued by the appellant. These facts leave no manner of doubt that on the date the offence was committed by the Company, the appellant was not the Director; he had nothing to do with the affairs of the Company. In this view of the matter, if the criminal complaints are allowed to proceed against the appellant, it would result in gross injustice to the appellant and tantamount to an abuse of process of the court.”*

In case of *K. Srikanth Singh v. North East Securities Ltd.*, (supra) emphasis was made on the following paragraphs by the petitioners:

“4. *It is not in dispute that for showing a vicarious liability of a Director of a company upon the complaint it is incumbent to plead that the accused was responsible to the company for the conduct of the business of the company. No such allegation having been made in the complaint petition, in our opinion, the High Court was not correct in passing the impugned judgment. The allegation contained in the complaint petition was that all the accused Directors participated in the negotiations for obtaining financial help for Accused 1, which in our opinion, would not give rise to an inference that the appellant was responsible for day-to-day affairs of the company. An offence envisaged under Section 138 of the Negotiable Instruments Act contains several*

ingredients as has been held by a three-Judge Bench of this Court in S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla [(2005) 8 SCC 89 : 2005 SCC (Cri) 1975] in the following terms: (SCC pp. 98-99, para 10)

“10. ... 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 the 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 the 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 the 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.”

5. Negotiation for obtaining financial assistance on behalf of the company by its Directors itself is not an ingredient for the purpose of constituting an offence under Section 138 of the Negotiable Instruments Act. Furthermore, a vicarious liability on the part of a person must be pleaded and proved. It cannot be a subject-matter of mere inference.”

In Ashoke Mal Bafna –Vs.– Upper India Steel Mfg. & Engg. Co. Ltd., (supra) the attention of the Court was drawn to the following paragraphs:

“7. In Girdhari Lal Gupta v. D.H. Mehta [Girdhari Lal Gupta v. D.H. Mehta, (1971) 3 SCC 189 : 1971 SCC (Cri) 279] , this Court observed that a person “in charge of a business” means that the person should be in overall control of the day-to-day business of the Company.

9. To fasten vicarious liability under Section 141 of the Act on a person, the law is well settled by this Court in a catena of cases that the complainant should specifically show as to how and in what manner the accused was responsible. Simply because a person is a Director of a defaulter Company, does not make him liable under the Act. Time and again, it has been asserted by this Court that only the person who was at the helm of affairs of the Company and in charge of and responsible for the conduct of the business at the time of commission of an offence will be liable for criminal action. (See Pooja Ravinder Devidasani v. State of Maharashtra [Pooja Ravinder Devidasani v. State of Maharashtra, (2014) 16 SCC 1 : (2015) 3 SCC (Civ) 384 : (2015) 3 SCC (Cri) 378 : AIR 2015 SC 675] .)”

In Anil Khadkiwala –Vs. – State (NCT of Delhi), (supra) petitioner referred to the following paragraphs:

“7. The complaint filed by Respondent 2 alleges issuance of the cheques by the appellant as Director on 15-2-2001 and 28-2-2001. The

appellant in his reply dated 31-8-2001, to the statutory notice, had denied answerability in view of his resignation on 20-1-2001. This fact does not find mention in the complaint. There is no allegation in the complaint that the cheques were post-dated. Even otherwise, the appellant had taken a specific objection in his earlier application under Section 482 CrPC that he had resigned from the Company on 20-1-2001 and which had been accepted. From the tenor of the order of the High Court on the earlier occasion it does not appear that Form 32 issued by the Registrar of Companies was brought on record in support of the resignation. The High Court dismissed the quashing application without considering the contention of the appellant that he had resigned from the post of the Director of the Company prior to the issuance of the cheques and the effect thereof in the facts and circumstances of the case. The High Court in the fresh application under Section 482 CrPC initially was therefore satisfied to issue notice in the matter after noticing the Form 32 certificate. Naturally there was a difference between the earlier application and the subsequent one, inasmuch as the statutory Form 32 did not fall for consideration by the Court earlier. The factum of resignation is not in dispute between the parties. The subsequent application, strictly speaking, therefore cannot be said to a repeat application squarely on the same facts and circumstances.

9. In *Harshendra Kumar D. v. Rebatilata Koley* [*Harshendra Kumar D. v. Rebatilata Koley*, (2011) 3 SCC 351 : (2011) 1 SCC (Civ) 717 : (2011) 1 SCC (Cri) 1139 : 2011 Cri LJ 1626] , this Court held : (SCC p. 362, paras 26-27)

“26. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In our opinion, the High Court fell into grave error in not taking into consideration the uncontroverted documents relating to the appellant's resignation from the post of

Director of the Company. Had these documents been considered by the High Court, it would have been apparent that the appellant has resigned much before the cheques were issued by the Company.

27. As noticed above, the appellant resigned from the post of Director on 2-3-2004. The dishonoured cheques were issued by the Company on 30-4-2004 i.e. much after the appellant had resigned from the post of Director of the Company. The acceptance of the appellant's resignation is duly reflected in the Resolution dated 2-3-2004. Then in the prescribed form (Form 32), the Company informed to the Registrar of Companies on 4-3-2004 about the appellant's resignation. It is not even the case of the complainants that the dishonoured cheques were issued by the appellant. These facts leave no manner of doubt that on the date the offence was committed by the Company, the appellant was not the Director; he had nothing to do with the affairs of the Company. In this view of the matter, if the criminal complaints are allowed to proceed against the appellant, it would result in gross injustice to the appellant and tantamount to an abuse of process of the court.”

In *Saroj Kumar Poddar –Vs. – State (NCT of Delhi)* (supra) petitioner stressed on the following paragraph:

“14. Apart from the Company and the appellant, as noticed hereinbefore, the Managing Director and all other Directors were also made accused. The appellant did not issue any cheque. He, as noticed hereinbefore, had resigned from the directorship of the Company. It may be true that as to exactly on what date the said resignation was accepted by the Company is not known, but, even otherwise, there is no averment in the complaint petitions as to how and in what manner the appellant was responsible for the conduct of the business of the Company or otherwise responsible to it in regard to its functioning. He had not issued any cheque. How he is responsible for dishonour of the

cheque has not been stated. The allegations made in para 3, thus, in our opinion do not satisfy the requirements of Section 141 of the Act.”

Attention of the Court was also drawn to the following paragraphs of DCM Financial Services Ltd. –Vs. - J.N. Sareen, (supra):

“14. *The complaint petition did not disclose as to who had signed the cheque on behalf of the Company. Involvement of the first respondent in commission of the offence as signatory was neither averred nor stated by the authorised representative of the complainant. Even the complaint petition proceeded on the basis that the averments contained in the complaint petition were sufficient to enable the learned Magistrate to summon the accused. Even before the High Court such a contention has not been raised, as noticed hereinbefore. We may notice the concession made by Mr Patwalia in this behalf that such a contention has been raised before us for the first time. This itself indicates the manner in which the complaint proceeded. Fairness on the part of the complainant is also expected in such a matter. It is now not in dispute that the first respondent had intimated the complainant as regards his resignation from the Company.*

21. *The cheque in question was admittedly a post-dated one. It was signed on 3-4-1995. It was presented only sometime in June 1998. In the meantime the first respondent had resigned from the directorship of the Company. The complaint petition was filed on or about 20-8-1998. Intimation about his resignation was given to the complainant in writing by the first respondent on several occasions. The appellant was, therefore, aware thereof. Despite having the knowledge, the first respondent was impleaded as one of the accused in the complaint as a Director in charge of the affairs of the Company on the date of commission of the offence, which he was not. If he was proceeded against as a signatory to the cheques, it should have been disclosed*

before the learned Judge as also the High Court so as to enable him to apply his mind in that behalf. It was not done. Although, therefore, it may be that as an authorised signatory he will be deemed to be person in-charge, in the facts and circumstances of the case, we are of the opinion that the said contention should not be permitted to be raised for the first time before us. A person who had resigned with the knowledge of the complainant in 1996 could not be a person in charge of the Company in 1998 when the cheque was dishonoured. He had no say in the matter of seeing that the cheque is honoured. He could not ask the Company to pay the amount. He as a Director or otherwise could not have been made responsible for payment of the cheque on behalf of the Company or otherwise. [See also Saroj Kumar Poddar v. State (NCT of Delhi) [(2007) 3 SCC 693 : (2007) 2 SCC (Cri) 135] , Everest Advertising (P) Ltd. v. State, Govt. of NCT of Delhi [(2007) 5 SCC 54 : (2007) 2 SCC (Cri) 444] and Raghu Lakshminarayanan v. Fine Tubes [(2007) 5 SCC 103 : (2007) 2 SCC (Cri) 455] .]

22. *Mr Patwalia, however, submitted that a situation may arise where change in the management is effected only to avoid such constructive liability. Firstly, we are not concerned with such a hypothetical case. Secondly, as noticed by this Court in Rangachari case [(2007) 5 SCC 108 : (2007) 2 SCC (Cri) 460] a person normally having business or commercial dealings with a company would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its memorandum or articles of association.”*

On the other hand Mr. Bhattacharjee, learned advocate appearing for the complainant/opposite party relied upon paragraph 15 of Lalit Kumar Sharma – Vs. – State of U.P. (supra):

“15. *Evidently, therefore, the second cheque was issued in terms of the compromise. It did not create a new liability. As the compromise did not fructify, the same cannot be said to have been issued towards payment of debt.”*

Learned Advocate for the opposite party emphasized on the following paragraphs of NEPC Micon Ltd. –Vs. – Magma Leasing Ltd. (supra):

“9. *Learned counsel for the appellants, however, submitted that Section 138 being a penal provision, it should be strictly interpreted and if there is any omission by the legislature, a wider meaning should not be given to the words than what is used in the section. In our view even with regard to penal provision, any interpretation, which withdraws the life and blood of the provision and makes it ineffective and a dead letter should be averted. If the interpretation, which is sought for, were given, then it would only encourage dishonest persons to issue cheques and before presentation of the cheque close “that account” and thereby escape from the penal consequences of Section 138.*

15. *In view of the aforesaid discussion we are of the opinion that even though Section 138 is a penal statute, it is the duty of the court to interpret it consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. As stated above, Section 138 of the Act has created a contractual breach as an offence and the legislative purpose is to promote efficacy of banking and of ensuring that in commercial or contractual transactions cheques are not dishonoured and credibility in transacting business through cheques is maintained. The above interpretation would be in accordance with the principle of interpretation quoted above “brush away the cobweb varnish, and shew the transactions in their true light” (Wilmot, C.J.) or (by Maxwell) “to carry out effectively the breach of the statute, it must*

be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited". Hence, when the cheque is returned by a bank with an endorsement "account closed", it would amount to returning the cheque unpaid because "the amount of money standing to the credit of that account is insufficient to honour the cheque" as envisaged in Section 138 of the Act."

Section 141 of the Negotiable Instruments Act states as follows:-

"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:

⁶⁰*[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.”

Learned Advocate for the petitioner by relying upon the aforesaid observation and the factual circumstance of the case submitted that the present petitioner resigned as director of the company on 30th September, 2015. The complaint is based on the foundation that for dishonour of the cheque on 21st February, 2017, the demand notice was issued and consequently the cause of action arose in the year 2017 itself, at the relevant period of time in the year 2017 the present petitioner cannot be said to be a director or a person in-charge of the company since he had resigned much earlier in the year 2015. The authorities so relied upon by the petitioner on the basis of the documents of the Registrar of Company do support such contention. There is no dispute regarding the authorities placed by the petitioner so far as a director who has resigned from the company is concerned when the cause of action arose. However, each case is based on its distinctive feature and characteristic. To that effect the submission of the learned Advocate appearing for the complainant/opposite party cannot be ruled out. The submission of the learned Advocate for the opposite party is that they initiated a complaint case under Section 138 of the Negotiable Instruments Act and the subject matter of the said cheque was signed by the present petitioner.

The said case was compromised and terms of settlement were prepared and the petitioner happened to be a signatory of the terms of settlement also which was the foundation for withdrawal of the case and the terms of settlement also incorporated, the issuance of certain post dated cheque which included amongst others the present cheque. On such assurance the earlier complaint case was withdrawn. No information at any point of time was communicated to the complainant company regarding the resignation of the present petitioner. As such there may be some difficulty in describing the petitioner in the petition of complaint but the document relied upon and contentions so advanced in the petition of complaint would go to show the involvement of the present petitioner.

The contention advanced by the petitioner, prima facie, reflects a design in view of the documents enclosed along with the revisional application as the petitioner has tendered his resignation on September 29, 2015 and subsequently signed the terms of settlement using the office seal of the company in October, 2016. There was no reason for the petitioner to use the seal of the company on October, 2016 if at all he has tendered his resignation in September, 2015.

Having regard to the factual background of the present case and the law laid down in the case of Lalit Kumar Sharma (supra) that the second complaint do not create any new debt or liability the provisions of Section 141 of the Negotiable Instruments Act which refers "every person" and consent and

connivance attributable on the part of “any director” should be extended to the present petitioner as liability depends on the role played by a person and not on his designation.

The case is at the initial stage any further interpretation regarding the conduct of the present petitioner as also the manner of application of precedents would encourage defaulters to enter into compromise and thereafter resign from the Company.

On an appreciation of the factual aspect it is reiterated that this opinion is expressed by this Court as the petitioner has challenged the proceedings at the very inception regarding the maintainability of the proceedings against him. However, if in course of proceedings the petitioner is able to rebut the presumptions so far as the proviso clause of Sub-section 1 is concerned i.e. “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” he would be entitled to an order of acquittal. The stage at which petitioner has approached this Court is premature and as such this Court finds no reason to interfere with the proceedings.

Accordingly, the revisional application being CRR 3527 of 2019 is dismissed.

Pending application, if any, is consequently disposed of.

Interim order, if any, is hereby vacated.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)