CALCUTTA HIGH COURT

IN THE CIRCUIT BENCH AT JALPAIGURI

CRIMINAL REVISIONAL JURISDICTION

PRESENT:

THE HON'BLE JUSTICE BIVAS PATTANAYAK

CRR 91 of 2022

Chandi Prasad Poddar

versus

Manoj Kumar Agarwala

For the petitioner: Mr Sachit Talukdar, Advocate.

For the Opposite party: Mr Milindo Paul, Advocate.

Mr Nabankur Paul, Advocate.

Heard on: 5th August, 2022.

Judgment on: 11th August, 2022.

JUDGMENT

Bivas Pattanayak, J:-

1.The petitioner has preferred the present revisional application under Section 482 of the Code of Criminal Procedure, 1973, for quashing of proceeding being CR case No.559 of 2021 under Section 138 of the Negotiable Instruments Act, 1881(hereinafter referred to as the 'Act') presently pending before the learned Judicial Magistrate, 4th Court, Siliguri.

2. The brief facts of the case are as follows:

(i) The complainant supplied 88,732 kg of tea to the accused parties for a total consideration of Rs.86,13,026/-.

(ii) The accused parties thereafter for satisfying the aforementioned amount made payment and Rs.37, 23,185/- remained due.

(iii) The accused parties in discharge of such alleged debt issued nine post-dated cheques in favour of the complainant. Three cheques bearing nos. 000585 dated 27.04.2021, 000586 dated 25.03.2021 and 000590 dated 27.05.2021 amounting to Rs.3,50,000/-, Rs. 3,45,737/- and Rs.4,00,000/- respectively were drawn on Kotak Mahindra Bank, Dalhousie Branch, Kolkata, West Bengal.

(iv)The aforesaid cheques were deposited by the complainant at ICICI Bank, S.F Road Branch, Siliguri for encashment. However, all the aforesaid cheques were returned dishonoured with remarks *'funds insufficient'* vide returned memo dated 17.06.2021 and 19.06.2021.

(v) The complainant thereafter sent a demand notice to the accused claiming payment of those cheque amounts within a period of 15 days on receipt of the notice. On the failure of the accused parties to comply with the aforesaid demand notice the complainant instituted the present complaint.

(vi) The learned Magistrate vide order dated 11.11.2021 issued process against the petitioner (Accused no.5) and other accused persons.

3. Being aggrieved by and dissatisfied with the aforesaid proceeding the petitioner has preferred the present revisional application.

4. Mr. Sachit Talukdar, learned advocate appearing on behalf of the petitioner submitted that the petitioner has tendered resignation from the Directorship of the company (accused no. 1) on 13th March, 2020, which will be evident from the Form no. DIR 12 annexed with the petition, and cheques in question has been issued after tendering of such resignation by the petitioner and hence, in view of Section 141 of the Act there cannot be any vicarious liability of the petitioner. Further the petitioner at the relevant time of issuance of those cheques was in no manner responsible for conduct of the business of the company or was in charge of any day to day affairs of the company and thus cannot be fastened with any liability with regard to the cheques issued. He further submitted that the complaint is bereft of averment specifying any role played by the petitioner in the day to day affairs of the company or been responsible towards the company. Furthermore it is submitted that although the petitioner tendered resignation on 13th March, 2020, and the company in its meeting of Board of directors took the decision on 22nd November, 2021 yet such aspect is inconsequential in view of the fact that Form no. DIR-12 as well as the documents issued by the Ministry of Corporate Affairs clearly shows that the petitioner resigned from the Directorship of the company on 13th March 2020 which is to be considered as relevant date for considering whether the petitioner has any vicarious liability or not. In support of his contention he relied on the decision of the Hon'ble Supreme Court passed in ***Harshendra Kumar D. versus Rebatilata Koley and Others*** reported in ***(2011) 3 SCC 351; Pooja Ravinder Devidasani versus State of Maharashtra and Another*** reported in ***(2014) 16 SCC 1; Ashoke Mal Bafna versus Upper India Steel Manufacturing and Engineering Company Limited*** reported in ***(2018) 14 SCC 202*** and the decision of this Court passed **in *D.M Kulkarni* @ *Dilip M. Kulkarni versus The State of West Bengal and Another*** reported in ***(2014) 1 CLJ Cal 102***. He has also relied on the decision of the Hon'ble Supreme Court passed in ***Mahesh Prasad Mehrotra versus M/s SREI Equipment Finance Pvt Ltd*** in ***Criminal Appeal no. 1734 of 2017.*** He also placed the decision of a Co-ordinate Bench of this court passed in CRR 80 of 2022 quashing the proceeding in respect of the petitioner in another case of similar nature on identical ground. Further in terms of Section 168 of the Companies Act, the petitioner sent his resignation to the company in writing, which has been taken note of and his resignation has been accepted giving effect from 13th March, 2020 and thus the petitioner cannot be held liable and/or responsible for the cheques issued after such date. In view of his aforesaid submissions he prayed for quashing of the instant proceeding.

5. Mr. Milindo Paul alongwith Mr Nabankur Paul, learned advocates for the opposite party-complainant, in reply to the contention raised on behalf of the petitioner, submitted that the Form no. DIR-12 has been generated on 8th December, 2021, and as such the petitioner at that point of time was the

Director of the company and accordingly he has been arrayed as a party in the petition of complaint. Although he was an erstwhile Director of the company yet he was vicariously liable for the act of the company as the cheques were issued prior to the date of generation of Form no. DIR-12 and during his tenure of Directorship. However, learned advocates for opposite party-complainant in usual fairness submitted that the cheques in question were not issued by the petitioner. In light of their above submissions it is prayed that the revisional application is liable to be dismissed.

6. Having heard the learned advocates for both the sides the question which falls for consideration in the present revisional application is whether the petitioner was in any way connected with the affairs of the company when the cheques were issued or whether he was continuing as a Director of the company when the cheques were issued. At the very outset from the petition of complaint it is found that only at paragraph no.17 it has been stated that at the time the offence was committed accused person no. 2, 3, 4, 5 (petitioner) and 6 were directors of the company (accused no.1) and were in charge of the day to day activities of the company. Save and except the aforesaid statement there are no other averments as to the precise role played by the petitioner in conduct of the day to day affairs of the company. At this juncture it will be proficient to reproduce Section 141 of the Act. Section 141 were brought in the Act by the Banking, Public Financial Institutions and Negotiable Instruments

Laws (Amendment) Act,1988 (66 of 1988) with effect from 1.4.1989. The provisions as amended from time to time read as under:-

> *"**141 Offences by companies**. —*
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> *(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."*

6.1. On bare reading of the aforesaid provision it is found that a prosecution under Section 138 of the Act could be launched not only against the company on behalf of which the cheque has been dishonoured but it could also be initiated against every person who at the time the offence was committed, was in charge of and was responsible for the conduct of the business of the company. In fact, Section 141 of the Act deems such persons to be guilty of such offence, liable to be proceeded against and punished for the offence, leaving it to the person concerned to prove that the offence was committed by the company without his knowledge or that he has exercised due diligence to prevent commission of such offence. To fasten vicarious liability under section 141 of the Act on a person, the law is well settled by the Hon'ble Supreme Court in catena of decisions that the complainant should specifically state as to how and in what manner the accused was responsible. A bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible for the conduct of the business of the company without anything more as to the role of the Director is not sufficient to make him liable. The complaint should spell out as to how and in what manner the petitioner was in charge of or was responsible to the accused-company for the conduct of its business. It would be profitable to refer to the observation of the Hon'ble Supreme Court made in ***Harshendra Kumar D (supra)*** and ***Pooja Ravinder Devidasani (supra)*** relied upon on behalf of the petitioner which is reproduced hereunder.

6.2. In ***Harshendra Kumar D (supra)*** the Hon'ble Supreme Court has observed as follows:

“ 10. The legal position concerning the vicarious liability of a Director in a company which is being prosecuted for the offence under Section 138, of the NI Act has come up for consideration before this Court on more than one occasion. In the case of S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, the following questions were referred to a three-Judge Bench for determination :

"(a) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfil the requirements of the said section and it is not necessary to specifically state in the complaint that the person accused was in charge of, or responsible for, the conduct of the business of the company.

b) Whether a Director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

(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."

10. The three-Judge Bench of this Court answered the aforesaid questions thus:

"(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."

6.3. The Hon'ble Supreme Court in ***Pooja Ravinder Devidasani (supra)*** has observed as follows:

"17. There is no dispute that the appellant, who was wife of the Managing Director, was appointed as a Director of the Company-M/S Elite International Pvt. Ltd. on 1st July, 2004 and had also executed a Letter of Guarantee on 19th January, 2005. The cheques in question were issued during April, 2008 to September, 2008. So far as the dishonor of Cheques is concerned, admittedly the cheques were not signed by the appellant. There is also no dispute that the appellant was not the Managing Director but only a non-executive Director of the Company. Non-executive Director is no doubt a custodian of the governance of the Company but does not involved in the day-to-day affairs of the running of its business and only monitors the executive activity. To fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the Company, one who actively looks after the day-to-day activities of the Company and particularly responsible for the conduct of its business. Simply because a person is a Director of a Company, does not make him liable under the N.I. Act. Every person

> *connected with the Company will not fall into the ambit of the provision. Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, 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 for an offence under Section 141 of the N.I. Act. In National Small Industries Corporation (supra) this Court observed:*
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> *13."Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.*
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> *14. A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfillment of the requirements under Section 141."*

The decision in ***Pooja Ravinder Devidasani (supra)*** has been relied on in the decision of ***Ashoke Mal Bafna (supra).***

6.4. Bearing in mind the aforesaid decision of Hon'ble Court, now I revert back to the facts of the case to ascertain whether the petitioner at the material time of offence was in charge of the affairs of the company and responsible for the conduct of the business of the company. It is found from the documents appended to the petition that the petitioner sent an application (Annexure P1 at page 13 of the petition) to the Board of Directors of *M/s Arcuttipore Tea Company Ltd.* tendering resignation from the Directorship on 13th March, 2020. The extracts of the minutes of the Board of Directors dated 22nd November 2021 (at page 20 of the petition) shows that it was resolved that the resignation of the petitioner from the Directorship of the company is accepted with effect from 13th March, 2020. On perusal of Form no. DIR 12, clause no.17 (at page no.16 of the petition) it is found that the petitioner has been confirmed that he is no longer associated with the company as a Director with effect from 13.03.2020 due to resignation under Section 168 of Companies Act. This Court concur with the submissions made on behalf of the petitioner placing reliance on decision of Hon'ble Supreme court in ***Mahesh Prasad Mehrotra (supra),*** that the aforesaid date of resignation appearing in Form no.DIR 12 is relevant for consideration. The documents of Ministry of Corporate Affairs (annexure P3 at page 22 of the petition) also shows that the petitioner resigned as a Director of the company with effect from 13.03.2020.Thus it goes without saying that all the documents indicated above clearly shows that the petitioner resigned from the post of Director of the company with effect from 13th March 2020. The dishonoured cheques in question were issued on 25.03.2021, 27.04.2021 and 27.05.2021 i.e much after the petitioner has resigned from the post of director of the company. At the time of hearing learned advocate for the opposite party-complainant fairly submitted that the petitioner is not the drawer/signatory of the cheques that were dishonoured. These facts leave no manner of doubt that on the date of offence the petitioner was not a Director of the company and he had nothing to do with the affairs of the company. Therefore the petitioner being the erstwhile Director of the company , who was not in charge of affairs of the company and was not responsible for the conduct of the business of the Company at the relevant time, cannot be held liable for an offence under Section 138 of the Act.

7. In ***D.M Kulkarni @ Dilip M. Kulkarni (supra)*** a Co-ordinate Bench of this Court in similar circumstance allowed the application for quashing as the accused resigned from his Directorship prior to issuance of the cheque. Further a Co-ordinate Bench in CRR 80 of 2022 has quashed proceeding against the present petitioner in another case of similar nature under section 138/141 of the Act on the ground that the petitioner tendered his resignation on 13th March, 2020 prior to issuance of the cheque involved in the said proceeding.

8. In view of the above and the materials discussed the accusation against the petitioner cannot stand and it would be travesty of justice if the petitioner is relegated to trial and is asked to prove his defence before the trial court. Therefore for promotion of justice or to prevent the injustice or abuse of process it would be proficient to exercise jurisdiction under Section 482 of the Code of Criminal Procedure.

9. In the light of above discussion, the present criminal revision being no. **CRR 91 of 2022** is hereby allowed on contest. The criminal proceeding being CR case no.559 of 2021 under section 138 of the Negotiable Instruments Act, pending before the learned Judicial Magistrate, 4^{th} Court, Siliguri stands quashed so far as the present petitioner (Accused no.5) is concerned.

10. All connected applications, if any, stand disposed of.

11. Interim orders, if any, stand vacated.

12. Urgent Photostat Certified copy of this judgment, if applied for, be supplied to the parties expeditiously after complying with all necessary legal formalities.

13. Let a copy of this judgment be sent to learned trial court for information.

(Bivas Pattanayak,J)