

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 977 of 2020

Rahul Tantia

Vs.

The State of West Bengal & Anr.

For the petitioner : Mr. Ayan Bhattacharjee,
Mr. Aditya Ratan Tiwary,
Mr. Suman Majumder.

For the Opposite Party : Mr. K. C. Garg,
Ms. Sumita Agarwal.

Hearing concluded on : 07.08.2023

Judgment on : 04.09.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of the proceedings of Case No. CS/104729 of 2018 under Sections 138/141 of the Negotiable Instruments Act, 1881, pending before the Court of the learned Metropolitan Magistrate, 15th Court at Calcutta, including the orders dated December 18, 2018, February 01, 2019 and August 14, 2019 passed in connection therewith.
2. On December 18, 2018, the opposite party no.2 herein filed a petition of complaint along with the pre-summoning evidence in the Court of

learned Chief Metropolitan Magistrate at Calcutta being Case No. CS/104729 of 2018 under Sections 138/141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the NI Act') against M/s. Tantia Constructions Ltd. Of Block-DD 30, Sector-I, Salt Lake City, Salt Lake, Police Station Bidhannagar, Kolkata-700 064 and others including the present petitioner who was arraigned as accused no.2 therein with a prayer for issuance of process.

3. After receipt of the complaint and the affidavit under Section 145 of the NI Act, vide Order dated December 18, 2018 the learned Chief Metropolitan Magistrate at Calcutta was pleased to take cognizance and transferred the case to the Court of the learned Metropolitan Magistrate, 15th Court, Calcutta (hereinafter referred to as the 'learned Trial Magistrate').
4. After receipt of the case record, vide order dated February 1, 2019, the learned Trial Magistrate was pleased to issue process.
5. From the petition of complaint it would be evident that the cheque in question issued by M/s. Tantia Construction Ltd. was signed by the accused no.3 viz. Ishwari Prasad Tantia. **Neither has the petitioner herein signed the said cheque nor had he any transaction with the opposite party no.2.**
6. **Mr. Ayan Bhattacharjee, learned counsel for the petitioner** has submitted that Section 141 of the NI Act incorporates the concept of 'vicarious liability' in respect of officers of a company who are engaged in the day to day affairs of the company when the company becomes an accused. It is thus apparent that such officers need to be officers

of the offending company at the time of commission of the offence and such officer must also be factually involved in the day to day functioning of the company. It is only if such preconditions are complied with that the offence under Section 138 of the NI Act can be said to be committed by such officers.

7. **It is further stated that in the instant case the petition of complaint lacks basic averments to attract the legal fiction infused under Section 141 of the NI Act qua the petitioner herein.** The law laid down by the Hon'ble Supreme Court in upteen number of cases has consistently laid down while considering the question of vicarious liability of a Director of a Company that merely being a Director would not make a person liable for an offence that may have been committed by the Company.
8. For launching a prosecution against the Directors of a Company under Section 138 read with Section 141 of the NI Act, there had to be a specific allegation in the complaint in regard to the part played by them in the transaction in question. It is also laid down that the allegations has to be clear and unambiguous showing that the Directors were in charge of and responsible for the business of the Company. This was done to discourage frivolous litigation and to prevent abuse of the process of law.
9. It is further submitted that it is trite law that in a petition of complaint, the complainant is required to aver as to how and in what manner a director was in charge of the business of the accused company and was responsible for the conduct of the accused

company's business. Every Director need not be and is not in fact, in charge of the business of the accused company. In absence of the specific role qua the participation of a director in the alleged transaction with the complainant, no director can be implicated by virtue of Section 141 of the NI Act.

10. From the impugned complaint and the pre-summoning evidence filed by the opposite party no.2, it would be evident that there is no averment regarding the personal knowledge of the representative of the opposite party no.2 regarding the facts and circumstances of the instant case. In order to file a complaint under Section 138 of the NI Act, the representative of the complainant has to have his personal/direct knowledge.
11. In view of the fact that no such statement regarding the personal and/or direct knowledge of the representative of the opposite party no.2 is either forthcoming from the petition of complaint nor from the exhibits, the learned Trial Magistrate ought not to have taken cognizance of the petition of complaint and therefore, the entire proceeding is an abuse of the process of law and thus liable to be quashed.
12. **Mr. Bhattacharya** has relied upon the following judgments:-
 - i) **Pawan Kumar Goel v. State of U.P & Anr.** reported in **2022 (16) SCALE.**

“22. The observations made in the aforesaid judgment is also a complete answer to the arguments advanced by learned counsel for the appellant that in the absence of any prohibition under the NI Act, the amendment in the

complaint is permissible and the impleadment of an additional accused subsequent to filing of the complaint, would not be barred. At this juncture, we may also refer to the following observations made in the case of N. Harihara Krishnan Vs. J. Thomas (Supra):-

“26. The scheme of the prosecution in punishing under Section 138 of the Act is different from the scheme of CrPC. Section 138 creates an offence and prescribes punishment. No procedure for the investigation of the offence is contemplated. The prosecution is initiated on the basis of a written complaint made by the payee of a cheque. Obviously such complaints must contain the factual allegations constituting each of the ingredients of the offence under Section 138. Those ingredients are: (1) that a person drew a cheque on an account maintained by him with the banker; (2) that such cheque when presented to the bank is returned by the bank unpaid; (3) that such a cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity whichever is earlier; (4) that the payee demanded in writing from the drawer of the cheque the payment of the amount of money due under the cheque to payee; and (5) such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid. It is obvious from the scheme of Section 138 that each one of the ingredients flows from a document which evidences the existence of such an ingredient. The only other ingredient which is required to be proved to establish the commission of an offence under Section 138 is that in spite of the demand notice referred to above, the drawer of the cheque failed to make the payment within a period of 15 days from the date of the receipt of the demand. A fact which the complainant can only assert but not prove, the burden would essentially be on the drawer of the cheque to prove that he had in fact made the payment pursuant to the demand.

27. By the nature of the offence under Section 138 of the Act, the first ingredient constituting the offence is the fact that a person drew a cheque. The identity of the drawer of the cheque is necessarily required to be known to the complainant (payee) and needs investigation and would not normally be in dispute unless the person who is alleged to have drawn a cheque disputes that very fact. The other facts required to be proved for securing the

punishment of the person who drew a cheque that eventually got dishonoured is that the payee of the cheque did in fact comply with each one of the steps contemplated under Section 138 of the Act before initiating prosecution. Because it is already held by this Court that failure to comply with any one of the steps contemplated under Section 138 would not provide “cause of action for prosecution”. Therefore, in the context of a prosecution under Section 138, the concept of taking cognizance of the offence but not the offender is not appropriate. Unless the complaint contains all the necessary factual allegations constituting each of the ingredients of the offence under Section 138, the Court cannot take cognizance of the offence. Disclosure of the name of the person drawing the cheque is one of the factual allegations which a complaint is required to contain. Otherwise in the absence of any authority of law to investigate the offence under Section 138, there would be no person against whom a court can proceed. There cannot be a prosecution without an accused. The offence under Section 138 is person specific. Therefore, Parliament declared under Section 142 that the provisions dealing with taking cognizance contained in the CrPC should give way to the procedure prescribed under Section 142. Hence the opening of non obstante clause under Section 142. It must also be remembered that Section 142 does not either contemplate a report to the police or authorise the Court taking cognizance to direct the police to investigate into the complaint.

28. The question whether the respondent had sufficient cause for not filing the complaint against Dakshin within the period prescribed under the Act is not examined by either of the courts below. As rightly pointed out, the application, which is the subject-matter of the instant appeal purportedly filed invoking Section 319 CrPC, is only a device by which the respondent seeks to initiate prosecution against Dakshin beyond the period of limitation stipulated under the Act.”

31. *The Bench answered the questions posed in the reference as under:-*

“19. (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 question posed in sub-para (b) has to be in 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 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 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 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 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.”

ii) Shaleen Khemani & Ors. Vs. The State of West Bengal &

Anr. reported in (2018) 1 C Cr. LR (Cal) 515.

“13. In view of the aforesaid discussion, I am unable to accept the contentions of the learned Counsel for the opposite party no. 2 that merely because the petitioners were directors/additional directors of the company it has to be inferred that they were in-charge of the affairs of the company. It is also pertinent to note that specific overt acts of the petitioners have also not been articulated in the petition of complaint so as to establish the extent of their involvement in the affairs of the said company.”

13. **Mr. K. C. Garg, learned counsel for the opposite party no.2** on filing the affidavit of opposition has submitted that the averments made in the petition are complete and as such the complaint case should be permitted to proceed towards trial. **A reply** to the said affidavit has been filed by the petitioner, denying all the statements made in the affidavit in opposition, **wherein it appears that the opposite party has tried to fill in the lacuna in the complaint petition, by making clear and specific averments against the petitioner, which are totally absent in the petition of complaint.**

The relevant part in the petition of complaint is:-

- i) *That the accused no.1 is a Limited by Public Share Company and accused no.2 to 3 are the Directors of accused no.1. **At all material time they were looking after the day to day affairs of accused no.1 and actively participated in its functioning.***
- ii) ***That the accused persons took accommodation loan of Rs.1,00,00,000/-(One Crore Only) from the complainant Company in the name of accused no.1 @10% interest per annum and in discharge of their legal existing liabilities towards refund of principal amount, they issued one A/c Payee Cheque in favour of the complainant. The particular of cheque is given below:-***

Sl No.	Date	Cheque No.	Drawn on	Amount
1	01.08.2018	007720	Allahabad Bank P-214 C.I.T. Road, Scheme No.IV Beliaghata Branch Kolkata-WB	1,00,00,000.00

- iii) *That the accused no.1 to 2 received the said demand notice on 19.11.2018 and accused no.3 received the said demand notice on 20.11.2018.*
- iv) *That in spite of receiving the said demand notice the accused persons have intentionally, deliberately and willfully failed and neglected to pay the aforesaid amount covered with the said dishonoured cheque.*
- v) *That the accused persons have thus committed the offences punishable under Section 138 read with Section 141 Negotiable Instruments Act as amended up to date.*

14. **This Court relies upon the judgment of the Supreme Court:-**

- (i) In **Sunil Todi & Ors. V. State of Gujarat & Anr.** reported in **2021(14) SCALE**, wherein the Court held:-

*“42. Section 141 of the NI Act stipulates that if a company is alleged to have committed an offence under Section 138, then every person who ‘was in charge of, and responsible to, the company for the conduct of the business of the company’ shall also be deemed guilty of the offence. The proviso provides an exception if she proves that the offence was committed without her knowledge or that she had exercised due diligence. In **Sunil Bharati Mittal v. CBI, (2015) 4 SCC 609**, a three judge Bench of this Court observed that the general rule is that criminal intent of a group of people who undertake business can be imputed to the Company but not the other way around. Only two exceptions were provided to this general rule: (i) when the individual has perpetuated the commission of offence and there is sufficient evidence on the active role of the individual; and (ii) the statute expressly incorporates the principle of vicarious liability. Justice Sikri writing for a three-judge Bench observed:*

“43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision. 44. When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141

of the Negotiable Instruments Act, 1881. In Aneeta Hada [Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241], the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of “alter ego”, was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company.”

44. *The test to determine if the Managing Director or a Director must be charged for the offence committed by the Company is to determine if the conditions in Section 141 of the NI Act have been fulfilled i.e., whether the individual was in-charge of and responsible for the affairs of the company during the commission of the offence. However, the determination of whether the conditions stipulated in Section 141 of the MMDR Act have been fulfilled is a matter of trial. There are sufficient averments in the complaint to raise a prima facie case against them. It is only at the trial that they could take recourse to the proviso to Section 141 and not at the stage of issuance of process.”*

In the present case there is no sufficient averments nor a prima facie case against the accused person.

- (ii) In **Sunita Palita vs M/s. Panchami Stone Quarry, Criminal Appeal No.....of 2022 (arising out of SLP (Crl.) No. 10396 of 2019) on 1 August, 2022**, the Supreme Court held:-

“36. *The High Court rightly held that when a complaint was filed against the Director of a company, a specific averment that such person was in charge of and responsible for the conduct of business of the company was an essential requirement of Section 141 of the NI Act. The High Court also rightly held that merely being a*

Director of the company is not sufficient to make the person liable under Section 141 of the NI Act. The requirement of Section 141 of the NI Act was that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company. This has to be averred as a fact.

37. *The High Court also rightly held that the Managing Director or Joint Managing Director would admittedly be in charge of the company and responsible to the company for the conduct of its business 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 the business of the company and they get covered under Section 141 of the NI Act. A signatory of a cheque is clearly liable under Section 138/141 of the NI Act.*

41. *There can be no doubt that in deciding a Criminal Revisional Application under Section 482 of the Cr.P.C. for quashing a proceeding under Section 138/141 of the NI Act, the laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of the said Sections has to be borne in mind. The provisions of Section 138/141 of the NI Act create a statutory presumption of dishonesty on the part of the signatory of the cheque, and when the cheque is issued on behalf of a company, also those persons in charge of or responsible for the company or the business of the company. Every person connected with the company does not fall within the ambit of Section 141 of the NI Act.*

43. *Liability depends on the role one plays in the affairs of a company and not on designation or status alone as held by this Court in S.M.S. Pharmaceuticals Ltd. (supra). The materials on record clearly show that these Appellants were independent, non-executive Directors of the company. As held by this Court in Pooja Ravinder Devidasani v. State of Maharashtra and Anr. (supra) a non-Executive Director is not involved in the day-to-day affairs of the company or in the running of its business. Such Director is in no way responsible for the day-to-day running of the Accused Company. Moreover, when a complaint is filed against a Director of the company, who is not the signatory of the dishonoured cheque, specific averments have to be made in the pleadings to substantiate the contention in the complaint, that such Director was in charge of and responsible for conduct of*

the business of the Company or the Company, unless such Director is the designated Managing Director or Joint Managing Director who would obviously be responsible for the company and/or its business and affairs.

46. *As held by this Court in National Small Industries Corporation Ltd. v. Harmeet Singh Paintal⁴ quoted with approval in the subsequent decision of this Court in Pooja Ravinder Devidasani v. State of Maharashtra and Anr. (supra) the impleadment of all Directors of an Accused Company 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, does not fulfil the requirements of Section 141 of the NI Act.”*

15. Thus, it is clear from the materials on record, that the statements in the petition of complaint **are only general in nature. It has also not been stated as who/which of the accuseds signed the cheque in this case. Disclosure of the name of the person drawing the cheque is one of the factual allegations which a complaint is required to contain (N. Harihara Krishnan vs. J. Thomas, (2018) 13 SCC 663).**
16. The petitioner has also relied upon the judgment in **Ashok Shewakramani & Ors. vs. State of Andhra Pradesh & Anr.** reported in **2023 INSC 692.**

“19. *Section 141 is an exception to the normal rule that there cannot be any vicarious liability when it comes to a penal provision. The vicarious liability is attracted when the ingredients of sub-section 1 of Section 141 are satisfied. The Section provides that every person who at the time the offence was committed was in charge of, and was responsible to the Company for the conduct of business of the company, as well as the company shall be deemed to be guilty of the offence under Section 138 of the NI Act. In the light of sub-section 1 of Section 141, we have perused the averments made in the complaints subject matter of these three appeals. The allegation in paragraph 1 of the complaints is that the appellants are managing the company and are busy with day to day*

affairs of the company. It is further averred that they are also in charge of the company and are jointly and severally liable for the acts of the accused No.1 company. The requirement of sub-section 1 of Section 141 of the NI Act is something different and higher. Every person who is sought to be roped in by virtue of sub-section 1 of Section 141 NI Act must be a 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. Merely because somebody is managing the affairs of the company, per se, he does not become in charge of the conduct of the business of the company or the person responsible for the company for the conduct of the business of the company. For example, in a given case, a manager of a company may be managing the business of the company. Only on the ground that he is managing the business of the company, he cannot be roped in based on sub-section 1 of Section 141 of the NI Act. The second allegation in the complaint is that the appellants are busy with the day-to-day affairs of the company. This is hardly relevant in the context of subsection 1 of Section 141 of the NI Act. The allegation that they are in charge of the company is neither here nor there and by no stretch of the imagination, on the basis of such averment, one cannot conclude that the allegation of the second respondent is that the appellants were also responsible to the company for the conduct of the business. Only by saying that a person was in charge of the company at the time when the offence was committed is not sufficient to attract sub-section 1 of Section 141 of the NI Act. Sub-section 1 of Section 141 reads thus:

"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.]"

20. *On a plain reading, it is apparent that the words "was in charge of" and "was responsible to the company for the conduct of the business of the company" cannot be read disjunctively and the same ought be read conjunctively in view of use of the word "and" in between.*

21. *Therefore, even by giving a liberal construction to what is averred in paragraph 1 of the complaints, we are unable to accept the submission made by the learned counsel appearing for the second respondent that these averments substantially comply with sub-section (1) of Section 141 of the NI Act."*

Wherein the court has once again cleared the position and the requirements under Section 141 of the N.I. Act.

17. From the petition of complaint it is clear that the requirements under Section 141 of the Negotiable Instruments Act as laid down by the Supreme Court in ***Pawan Kumar Goel v. State of U.P & Anr. (Supra) (para 31)*** are totally absent in this case and allowing the proceedings to continue in respect of the petitioner in such circumstances, would clearly amount to abuse of the process of law.
18. **The revisional application being CRR 977 of 2020 is allowed.**
19. The proceedings of Case No.CS/104729 of 2018 under Sections 138/141 of the Negotiable Instruments Act, 1881, pending before the Court of the learned Metropolitan Magistrate, 15th Court at Calcutta, including the orders dated December 18, 2018, February 01, 2019 and August 14, 2019 **is quashed.**
20. The trial in respect of the other accused persons shall proceed in accordance with law, expeditiously.

21. The learned Magistrate shall be at liberty to invoke the provision of Section 319 of Cr.P.C. in accordance with law among others, during trial if deemed necessary in respect of the petitioner.
22. All connected applications, if any, stands disposed of.
23. Interim order, if any, stands vacated.
24. Copy of this judgment be sent to the learned Trial Court for necessary compliance.
25. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)