

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 1107 of 2020

Abdul Mannan

Vs.

Md. Mobarak & Anr.

For the petitioner : Mr. Debojyoti Deb,
Mr. Avishek Roy Chowdhury,
Ms. Somdyuti Parekh.

For the State : Ms. Rita Datta.

Hearing concluded on : 07.08.2023

Judgment on : 01.09.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of proceedings in connection with complaint case No. C/752 of 2019 (corresponding to T.R. No.169/2019) under Section 138 of the Negotiable Instruments Act, 1881, currently pending before the Court of the learned Judicial Magistrate, 5th Court at Alipore, South 24 Parganas.
2. The petitioner is one of the Directors of M/s. Ashika Infra Projects Private Limited, a registered private limited company.

3. In course of business dealings, the opposite party had approached the petitioner's company M/s. Ashika Infra Projects Private Limited for some business ventures and the company had decided to enter into some dealings with the opposite party. Accordingly, the opposite party had made some investments with the company although, as in business dealings, there was no guarantee of any specified profits.
4. In course of such business dealings, an undated account payee cheque was issued by the petitioner on behalf of the company. The cheque in issue, naturally, contained the stamp and seal of the company. Since the company had no immediate obligation to repay any invested amount, the complainant was simply handed a security cheque.
5. The complainant's/opposite party's case in a nutshell is to the effect:-
That he had invested a sum of Rs.5.5 lacs (in three installments) in the company of the petitioner on the assurance of getting lucrative returns towards share of profits. It was further alleged in the petition of complaint that in order to liquidate the liabilities, the petitioner had handed over an account payee cheque bearing number 386692 drawn on Industrial India Bank, Kolkata Branch dated 10.12.2018 and the said cheque contained the signature of the petitioner and the seal of the company. The cheque, on being presented, was returned with the endorsement 'Funds Insufficient' and in spite of sending a legal notice to the petitioner to repay, the petitioner did not pay the opposite party/complainant.

6. The petitioner states that the allegations in the complaint are totally false and were leveled simply to extract money from the petitioner. The petitioner is one of the Directors of the company and business decisions are taken by the company and not the petitioner unilaterally. A decision to hand over a security cheque, to the complainant was issued on the advice of the company and the petitioner had no individual interest in the same. The petitioner had signed as a mere signatory without any special interest in the affairs of the company which was not made a party to the proceedings.
7. That although the cheque was issued by the petitioner on behalf of the company namely M/s. Ashika Infra Projects Private Limited, 'demand notice' under the provisions of Section 138 of Negotiable Instruments Act, 1881 (hereinafter referred to as the said Act) was not issued to the Company. The petitioner was stunned and taken aback to receive copy of the complaint (without annexure) from which it transpired that the proceeding under the Act of 1881 was initiated only against the petitioner and the company was left out. It is relevant to mention that the cheque in question was issued by the petitioner signing as the Director of the company.
8. The petitioner states that the demand notice dated 27.12.2018 issued by the opposite party would reveal that the petitioner was referred to as one of the Directors and it was admitted on behalf of the opposite party that the account payee cheque in question contained the seal of the company. The petitioner states that the complainant/opposite party could not have come up with the proceedings without

incorporating the petitioner's company name M/s. Ashika Infra Projects Private Limited as an accused person. It appears that the opposite party has failed to implead the company as a party in the proceedings which is mandatory, even though the complainant has specifically reflected in his complaint that the cheque in question contained the stamp of the company and the petitioner was one of its Director. The petitioner states that the proceedings initiated by the complainant is not maintainable since the company has not been made a party.

9. The petitioner states that the Hon'ble Supreme Court of India in ***Himanshu -versus- B. Shivamurthy & Another, (2019) 3 SCC 797, on January 17, 2019,*** has laid down that:-

“In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.”

10. It is further stated that the Hon'ble Apex Court similarly in ***Aneeta Hada -versus- Godfather Travels And Tours Private Limited, (2012) 5 SCC 661,*** has laid down that **“in view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categorories of offenders can only be brought in the drag-net on**

the touchstone of vicarious liability as the same has been stipulated in the provision itself.”

11. **In the instant case**, notice under the provisions of Section 138 of the Act of 1881 was never sent to the company. Accordingly, proceedings were also never initiated against the company M/s. Ashika Infra Projects Private Limited, though the petitioner has admittedly issued the cheque on behalf of the company.
12. The petitioner states that the learned Judicial Magistrate, 5th Court at Alipore, South 24 Parganas (hereinafter referred to as the learned Magistrate) caused grave miscarriage of justice in taking cognizance and issuing summons against the petitioner. The learned Magistrate miserably failed to appreciate that, proceedings under Section 138 of the Act of 1881 could not have been initiated solely against the petitioner. The learned Magistrate further failed to appreciate, that in view of the decisions of the Hon’ble Apex Court, the proceedings in this case will not be maintainable since notice under Section 138 of the Act of 1881 was not sent to the company and the company was also not impleaded as a party to the proceedings.
13. **Mr. Debojyoti Deb, learned counsel for the petitioner** has submitted that ‘Notice’ under Section 138 of the Act of 1881 was never issued to the company.
14. The company was not made a party to the proceedings under Section 138/141 of the Act of 1881 which itself makes the proceedings non-maintainable.

15. It is further submitted that it would clearly transpire from the contents of the cheque, as well as the complaint that the opposite party/complainant was in a business relationship with the company namely M/s. Ashika Infra Projects Private Limited and the petitioner was one of its Director.

16. It is also stated that the continuance of the instant proceedings would be serious misuse and abuse of the process of law and hence, the same is liable to be quashed for the ends of justice.

17. **As service could not be effected upon the opposite party/complainant the State was directed to do the same through the local Police Station.**

18. **Ms. Rita Datta, learned counsel for the State has placed the report. As per the report, it appears that the opposite party/complainant left the address on record about 7-8 years ago and his present whereabouts are not known.**

19. On perusal of the materials on record, it appears from the petition of complaint that in paragraph 3 it has been stated as follows:-

“That the accused person is a Director of M/s. Ashika Infra Projects Pvt. Ltd. and has office at 55/3, Kayesta Para Main Road, P.S. Garfa, Kolkata-700 078, and running his business.”

But the said company has not been made an accused in the complaint case nor was any notice served upon the company under Section 138 of the N.I. Act.

20. The petitioner is the sole accused/opposite party in the complaint case, having signed the cheque as Director of the company and for and on its behalf.

21. Paragraph 11, 12 & 13 of the judgment of the Supreme Court in ***Himanshu vs. B. Shivamurthy & Anr. (Supra)*** has been relied upon on behalf of the petitioner, where the Court held:-

“11. In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. The complaint was lodged only against the appellant without arraigning the company as an accused.

12. The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or 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.

13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.”

22. **The facts in the present case** is very similar to the case, in ***Himanshu vs. B. Shivamurthy & Anr. (Supra)***.

23. **In the present case:-**

- a) The company has not been made an accused nor was any notice served upon the company.

- b) The petitioner has been made an accused as the Director of the company, who signed and issued the cheque for and on behalf of the company.
24. Therefore, in the absence of the company being arraigned as an accused, a complaint against the petitioner is not maintainable ***Himanshu vs. B. Shivamurthy & Anr. (Supra).***
25. **CRR 1107 of 2020 is thus allowed.**
26. The proceedings in connection with complaint case No. C/752 of 2019 (corresponding to T.R. No.169/2019) under Section 138 of the Negotiable Instruments Act, 1881, currently pending before the Court of the learned Judicial Magistrate, 5th Court at Alipore, South 24 Parganas **is hereby quashed.**
27. All connected applications, if any, stands disposed of.
28. Interim order, if any, stands vacated.
29. Copy of this judgment be sent to the learned Trial Court for necessary compliance.
30. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)