

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRR 1956 of 2013

With

CRR 1957 of 2013

With

CRR 1958 of 2013

With

CRR 2010 of 2013

With

CRR 2592 of 2013

With

CRR 2593 of 2013

With

CRR 2865 of 2013

With

CRR 3157 of 2013

With

CRR 3158 of 2013

Pawan Kumar Agarwal

-Vs-

The State of West Bengal & Anr.

For the Petitioner:- Mr. Ayan Bhattacharjee,
Mr. Amitabha Roy,
Mr. Aditya R. Tiwary,
Mr. Amitabrata Hait,
Mr. Subhajit Manna,
Ms. Ritu Das.

For the complainant/Opposite Party:-
Mr. Phiroze Edulji,
Ms. R. Mukherjee,
Mr. Koushik Kundu.

Heard on: 01 September, 2023.

Judgment on: 12 September, 2023.

BIBEK CHAUDHURI, J. : –

1. These bunches of criminal revisions have been assigned by the Hon'ble Chief Justice for determination of a common question as to whether an inquiry under Section 202 of the Code of Criminal Procedure is mandatory before issuance of process in a complaint under Section 138 read with Section 141 of the Negotiable Instruments Act when the accused resides outside the territorial jurisdiction of the learned Chief Judicial Magistrate at Kolkata.

2. The following are the facts of the case:-

C/22365/2011

3. The opposite party No.2 as complainant filed a complaint under Section 138/141 of the Negotiable Instruments Act alleging, inter alia, that in discharge of existing debt and liability the accused No.2 to 4 issued two account payee cheques being No.045737 dated 1st June, 2011 and 045738 dated 16th June, 2011 for Rs. 65 lakhs each, total being Rs.1,30,00,000/- drawn on Punjab and Sind Bank, 8 Old Court House Street, Kol-700001. The complainant/company deposited the said cheques to its banker within its validity period on 21st June, 2011. However, the said cheques were dishonoured on the ground that payments were stopped by the drawer. Dishonour of cheque was followed by a demand notice issued by the complainant/company requiring the petitioner and others to repay the cheque amount within statutory period of time. As the accused persons failed to make payment of the said sum,

the petitioner/company lodged the aforesaid complaint before the learned Chief Metropolitan Magistrate, Kolkata. The Chief Metropolitan Magistrate transferred the case to the Metropolitan Magistrate, 16th Court, Kolkata who issued process against the accused persons under Section 200 of the Cr.P.C without making any inquiry under Section 202 of the Cr.P.C though the petitioner is a permanent resident of Ahmedabad in the State of Gujarat.

C/35317/2010

4. The opposite party No.2 as complainant filed a complaint under Section 138/141 of the Negotiable Instruments Act alleging, inter alia, that in discharge of existing debt and liability the accused No.2 to 4 issued two account payee cheque being No.045720 dated 22nd September, 2010 for Rs. 65 lakhs drawn on Punjab and Sind Bank, 8 Old Court House Street, Kol-700001. The complainant/company deposited the said cheques to its banker within its validity period on 27th September, 2010. However, the said cheques were dishonoured on the ground that payments were stopped by the drawer. Dishonour of cheque was followed by a demand notice issued by the complainant/company requiring the petitioner and others to repay the cheque amount within statutory period of time. As the accused persons failed to make payment of the said sum, the petitioner/company lodged the aforesaid complaint before the learned Chief Metropolitan Magistrate, Kolkata. The Chief Metropolitan Magistrate transferred the case to the Metropolitan Magistrate, 16th Court, Kolkata who issued process against the accused persons under Section 200 of the

Cr.P.C without making any inquiry under Section 202 of the Cr.P.C though the petitioner is a permanent resident of Ahmedabad in the State of Gujarat.

C/7331/2012

5. The opposite party No.2 as complainant filed a complaint under Section 138/141 of the Negotiable Instruments Act alleging, inter alia, that in discharge of existing debt and liability the accused No.2 to 4 issued account payee cheque being No.045754 dated 31.01.2012 for Rs.49,88,360/- drawn on Punjab and Sind Bank, 8 Old Court House Street, Kol-700001. The complainant/company deposited the said cheques to its banker within its validity period on 23.02.2012. However, the said cheques were dishonoured on the ground that payments were stopped by the drawer. Dishonour of cheque was followed by a demand notice issued by the complainant/company requiring the petitioner and others to repay the cheque amount within statutory period of time. As the accused persons failed to make payment of the said sum, the petitioner/company lodged the aforesaid complaint before the learned Chief Metropolitan Magistrate, Kolkata. The Chief Metropolitan Magistrate transferred the case to the Metropolitan Magistrate, 16th Court, Kolkata who issued process against the accused persons under Section 200 of the Cr.P.C without making any inquiry under Section 202 of the Cr.P.C though the petitioner is a permanent resident of Ahmedabad in the State of Gujarat.

C/32561/2010

6. The opposite party No.2 as complainant filed a complaint under Section 138/141 of the Negotiable Instruments Act alleging, inter alia, that in discharge of existing debt and liability the accused No.2 to 4 issued five account payee cheques being No.760913 dated 30.04.2010 for Rs.50 lakhs; No.760914 dated 30.04.2010 for Rs.50 lakhs; No.760915 dated 30.04.2010 for Rs.60 lakhs; No.760916 dated 05.05.2010 for Rs.50 lakhs and No.760917 dated 07.05.2010 for Rs. 50 lakhs, total being Rs.2,60,00,000/- drawn on Punjab and Sind Bank, 8 Old Court House Street, Kol-700001. The complainant/company deposited the said cheques to its banker within its validity period on 31.07.2016. However, the said cheques were dishonoured on the ground that payments were stopped by the drawer. Dishonour of cheque was followed by a demand notice issued by the complainant/company requiring the petitioner and others to repay the cheque amount within statutory period of time. As the accused persons failed to make payment of the said sum, the petitioner/company lodged the aforesaid complaint before the learned Chief Metropolitan Magistrate, Kolkata. The Chief Metropolitan Magistrate transferred the case to the Metropolitan Magistrate, 16th Court, Kolkata who issued process against the accused persons under Section 200 of the Cr.P.C without making any inquiry under Section 202 of the Cr.P.C though the petitioner is a permanent resident of Ahmedabad in the State of Gujarat.

C/11259/2011

7. The opposite party No.2 as complainant filed a complaint under Section 138/141 of the Negotiable Instruments Act alleging, inter alia, that in discharge of existing date and liability the accused No.2 to 4 issued two account payee cheque being No.045729 dated 03.02.2011 for Rs. 65 lakhs drawn on Punjab and Sind Bank, 8 Old Court House Street, Kol-700001. The complainant/company deposited the said cheques to its banker within its validity period on 10.02.2011. However, the said cheques were dishonoured on the ground that payments were stopped by the drawer. Dishonour of cheque was followed by a demand notice issued by the complainant/company requiring the petitioner and others to repay the cheque amount within statutory period of time. As the accused persons failed to make payment of the said sum, the petitioner/company lodged the aforesaid complaint before the learned Chief Metropolitan Magistrate, Kolkata. The Chief Metropolitan Magistrate transferred the case to the Metropolitan Magistrate, 16th Court, Kolkata who issued process against the accused persons under Section 200 of the Cr.P.C without making any inquiry under Section 202 of the Cr.P.C though the petitioner is a permanent resident of Ahmedabad in the State of Gujarat.

C/8595/2011

8. The opposite party No.2 as complainant filed a complaint under Section 138/141 of the Negotiable Instruments Act alleging, inter alia, that in discharge of existing date and liability the accused No.2 to 4 issued two account payee cheque being No.045727 dated 04.01.2011 for Rs. 65 lakhs drawn on Punjab and Sind Bank, 8 Old Court House Street,

Kol-700001. The complainant/company deposited the said cheques to its banker within its validity period on 05.01.2011. However, the said cheques were dishonoured on the ground that payments were stopped by the drawer. Dishonour of cheque was followed by a demand notice issued by the complainant/company requiring the petitioner and others to repay the cheque amount within statutory period of time. As the accused persons failed to make payment of the said sum, the petitioner/company lodged the aforesaid complaint before the learned Chief Metropolitan Magistrate, Kolkata. The Chief Metropolitan Magistrate transferred the case to the Metropolitan Magistrate, 16th Court, Kolkata who issued process against the accused persons under Section 200 of the Cr.P.C without making any inquiry under Section 202 of the Cr.P.C though the petitioner is a permanent resident of Ahmedabad in the State of Gujarat.

C/23841/2011

9. The opposite party No.2 as complainant filed a complaint under Section 138/141 of the Negotiable Instruments Act alleging, inter alia, that in discharge of existing debt and liability the accused No.2 to 4 issued two account payee cheque being No.045719 dated 07.09.2010 for Rs. 65 lakhs drawn on Punjab and Sind Bank, 8 Old Court House Street, Kol-700001. The complainant/company deposited the said cheques to its banker within its validity period on 07.09.2010. However, the said cheques were dishonoured on the ground that payments were stopped by the drawer. Dishonour of cheque was followed by a demand notice issued by the complainant/company requiring the petitioner and others to repay

the cheque amount within statutory period of time. As the accused persons failed to make payment of the said sum, the petitioner/company lodged the aforesaid complaint before the learned Chief Metropolitan Magistrate, Kolkata. The Chief Metropolitan Magistrate transferred the case to the Metropolitan Magistrate, 16th Court, Kolkata who issued process against the accused persons under Section 200 of the Cr.P.C without making any inquiry under Section 202 of the Cr.P.C though the petitioner is a permanent resident of Ahmedabad in the State of Gujarat.

C/29617/2011

10. The opposite party No.2 as complainant filed a complaint under Section 138/141 of the Negotiable Instruments Act alleging, inter alia, that in discharge of existing debt and liability the accused No.2 to 4 issued three account payee cheques being No.045744 dated 16.09.2011, 045745 dated 01.10.2011 and 045746 dated 16.10.2011 for Rs. 65 lakhs each, total being Rs.1,95,00,000/- drawn on Punjab and Sind Bank, 8 Old Court House Street, Kol-700001. The complainant/company deposited the said cheques to its banker within its validity period on 22.10.2011. However, the said cheques were dishonoured on the ground payments stopped by the drawer. Dishonour of cheque was followed by a demand notice issued by the complainant/company requiring the petitioner and others to repay the cheque amount within statutory period of time. As the accused persons failed to make payment of the said sum, the petitioner/company lodged the aforesaid complaint before the learned Chief Metropolitan Magistrate, Kolkata. The Chief Metropolitan Magistrate

transferred the case to the Metropolitan Magistrate, 16th Court, Kolkata who issued process against the accused persons under Section 200 of the Cr.P.C without making any inquiry under Section 202 of the Cr.P.C though the petitioner is a permanent resident of Ahmedabad in the State of Gujarat.

C/5072/2012

11. The opposite party No.2 as complainant filed a complaint under Section 138/141 of the Negotiable Instruments Act alleging, inter alia, that in discharge of existing debt and liability the accused No.2 to 4 issued four account payee cheques being No.045749 dated 01.12.2011 for Rs.65 lakhs, cheque being No.045750 dated 16.12.2011 for Rs.65 lakhs, cheque being No.045751 dated 31.12.2011 for Rs.65 lakhs, cheque being No.045752 dated 15.01.2012 for Rs.65 lakhs total being Rs.2,60,00,000/- drawn on Punjab and Sind Bank, 8 Old Court House Street, Kol-700001. The complainant/company deposited the said cheques to its banker within its validity period on 17.01.2012. However, the said cheques were dishonoured on the ground payments were stopped by the drawer. Dishonour of cheque was followed by a demand notice issued by the complainant/company requiring the petitioner and others to repay the cheque amount within statutory period of time. As the accused persons failed to make payment of the said sum, the petitioner/company lodged the aforesaid complaint before the learned Chief Metropolitan Magistrate, Kolkata. The Chief Metropolitan Magistrate transferred the case to the Metropolitan Magistrate, 16th Court, Kolkata who issued process against

the accused persons under Section 200 of the Cr.P.C without making any inquiry under Section 202 of the Cr.P.C though the petitioner is a permanent resident of Ahmedabad in the State of Gujarat.

12. Thus, in all the above mentioned cases the common question is as to whether process under Section 138 of the Negotiable Instruments Act can be issued without making any inquiry under Section 202 of the Code of Criminal Procedure or not.

13. Section 202 of the Cr.P.C states as follows:

“Postponement of issue of process - (1) Any Magistrate, on receipt of a complaint of an offence which he is authorised to take cognizance of or which has been made over to him under section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by, a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made, –

(a) Where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions or

(b) Where the complaint has not been made by a court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Court on an

offer in charge of a police station except the power to arrest without warrant.”

14. The plain but close reading of Section 202 of the Code of Criminal Procedure suggests that a Magistrate upon receipt of a complaint of an offence of which he/she is authorized to take cognizance is empowered to postpone the issuance of process against the accused and either (a) inquire into the case, or (b) direct an investigation to be made by a police officer or by such other person as he thinks fit. The purpose of postponing the issuance of process for the purposes of an enquiry or an investigation is to determine whether or not there is sufficient ground for proceeding. Sub-Section (1) of Section 202 further states that it is obligatory for the Magistrate to conduct an inquiry or direct an investigation in a case where the accused resides at a place beyond the area in which the Magistrate exercises jurisdiction. In such case, the Magistrate was duty bound to postpone the issuance of process. Section 203 stipulates that if the Magistrate is of the opinion on considering the statement on oath, if any, of the complainant and all the witnesses and the result of the enquiry or investigation, if, any under Section 202 that there is no sufficient ground for proceeding, he shall dismiss the complaint recording briefly his reasons for doing so. The requirement of recording reasons which is specifically incorporated in Section 203 does not find place in Section 202. Section 204 which deals with the issuance of process stipulates that if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, he may issue (a) in a

summons case, a summons for attendance of the accused; (b) in a warrant case, a warrant or if he thinks fit a summons for the appearance of the accused.

15. On the requirement of inquiry under Section 202 of the Cr.P.C in relation to an application under Section 138/141 of the N.I Act the Constitution Bench of the Hon'ble Supreme Court in Re: Expeditious trial under Section 138 of the N.I Act, 1881, **Suo Motu Writ Petition (Crl No.2 of 2020)** reported in **2021 SCC Online SC 325** has been pleased to hold that in a case where the accused resides beyond the territorial jurisdiction of the court, it is mandatory for the Magistrate to cause an inquiry under Section 202 of the Cr.P.C. It is held by the Hon'ble Supreme Court in Vijay Dhanuka, Abhijit Pawar and Birla Corporation, that the inquiry to be held by the Magistrate before issuance of summons to the accused residing outside the jurisdiction of the court cannot be dispensed with. It is incumbent upon the Magistrate to come to a conclusion after holding an inquiry that there are sufficient grounds to proceed against the accused. In the aforesaid decision, the Hon'ble Supreme Court also held that Section 145 of the N.I Act proceeds that the evidence of the complainant may be given by him on affidavit, which shall be read with evidence in any inquiry, trial or other proceeding, notwithstanding anything contained in the Code. It is held by the Hon'ble Supreme Court that for the purpose of conducting inquiry under Section 202 of the Code the Magistrate may permit examination of witnesses on affidavit in a case under Section 138 of the N.I Act on the strength of its power conferred

under Section 145 of the said Act. Section 145 of the N.I Act is an exception to Section 202 in respect of examination of the complainant by way of an affidavit. If the evidence of the complainant may be given by him on affidavit, the Magistrate can taken into account such affidavit for the purpose of inquiry under Section 202. On this logic the Constitutional Bench in Suo Motu writ petition was pleased to hold that Section 202(2) of the Code is inapplicable to complaints under Section 138 in respect of examination of witnesses on oath. The evidence of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses. In suitable cases, the Magistrate can examine documents for satisfaction as to the sufficiency of the grounds for proceeding under Section 202.

16. The Hon'ble Supreme Court had got the scope to further elaborate the issue as to why the inquiry under Section 202 of the Code is required to be held in a proceeding under Section 138 of the N.I Act in **Sunil Todi & Ors. vs. State of Gujarat & Anr.** reported in **2021 (14) SCALE 486**. It is observed in Sunil Todi that Section 202 was introduced by Act 25 of 2005 with effect from 23rd June, 2006 the rational for amendment is based on the recognition by parliament that false complaints are filed against the persons residing at far off places as an instrument of harassment. In **Birla Corporation Limited vs. Advent Investments and Holdings** reported in **(2019) 16 SCC 610**, the scope of inquiry under Section 202 of the Cr.P.C is held to be extremely restricted onto finding out the truth or otherwise of the allegations made in the complaint in

order to determine whether process should be issued or not under Section 204 Cr.P.C or whether the complaint should be dismissed by resorting to Section 203 Cr.P.C on the footing that there is no sufficient ground for proceeding on the basis of the statement of the complainant and of his witnesses, if any. At the stage of inquiry under Section 202 Cr.P.C the Magistrate is only concerned with the allegations made in the complaint or the evidence in support of the averments in complaint to satisfy himself that there is sufficient ground for proceeding against the accused.

17. Interlink between Section 145 of the N.I Act and Section 202 Cr.P.C is discussed in Sunil Todi in the following words:-

“Consequently it was held that Section 202(2) Cr.P.C is inapplicable to complaints under Section 138 in respect of the examination of witnesses on oath. The court held that the evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses and in suitable cases Magistrate can examine documents to be satisfied that there are sufficient grounds for proceedings under Section 202 of the Cr.P.C.”

18. The Division Bench of this Court in **S.S Binu vs. State of West Bengal & Anr.** reported in **2018 CRI. L.J 3769**, held that in inquiry under Section 202, examination of witnesses person would be necessary, for purpose of deciding existence of sufficient ground, for proceeding against the accused who resides outside the territorial jurisdiction of the learned Magistrate because the Magistrate requires to ward of false complaints against the persons, residing at far places with view to save

them from unnecessary harassment. Thus, Magistrate is under obligation to conduct inquiry for examining the complainant and witnesses produced by the complainant or to direct investigation by police officer for finding out if sufficient ground is made out for proceeding against the accused.

19. Relying on the aforesaid decisions by the Hon'ble Supreme Court as well as this Court, Mr. Ayan Bhattacharjee, learned Advocate for the petitioner submits that in the instant case the petitioner resides in Ahmedabad in the State of Gujarat. The learned Magistrate issued process against him without making any inquiry under Section 202 of the Cr.P.C which happens to be mandatory in view of the decision by the Hon'ble Supreme Court in *Suo Motu Writ Petition and Sunil Todi's case* (supra). It is further submitted by Mr. Bhattacharjee that relying on paragraph 60 of the decision of the Hon'ble Supreme Court in **State of Haryana & Ors. vs. Ch. Bhajan Lal & Ors.** reported in **AIR 1992 SC 604**, the history of personal liberty is largely the history of insistence on observance of procedure. Observance of procedure has been the bastion against wanton assaults on personal liberty over the years. Under our Constitution, the only guarantee of the personal liberty for a person is that he shall not be deprived of it except in accordance with the procedure established by law. Thus, it is contended by Mr. Bhattacharjee on behalf of the petitioner that the learned Magistrate failed to conduct inquiry under Section 202 of the Cr.P.C. Such an inquiry is mandatory in

connection with the said complaint case as the petitioner resides outside the territorial jurisdiction of the learned Magistrate.

20. Mr. Phiroze Edulji, learned Advocate on behalf of the opposite party, on the other hand submits that for the conduct of inquiry under Section 202 of the Cr.P.C, evidence of witnesses on behalf of the complainant is permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses. The above observation was made by the Hon'ble Supreme Court in **Suo Motu Writ Petition (Crl. 2 of 2020)** reported in **2021 SCC OnLine SC 325**.

21. The decision of the Constitution Bench was further elaborated in Sunil Todi (supra) where the Hon'ble Supreme Court in Sunil Todi after making elaborate discussion on the scope of Section 202 the mandatory requirement of the Magistrate to either inquire or cause investigation by police regarding the veracity of the complaint where the accused resides outside the jurisdiction of the learned Magistrate, applicability of Section 145 of the N.I Act held as hereunder:-

“47. In the present case, the Magistrate has adverted to

- “(i) The complaint;
- (ii) The affidavit filed by the complainant;
- (iii) The evidence as per evidence list and; and
- (iv) The submissions of the complainant.”

48. The order passed by the Magistrate cannot be held to be invalid as betraying a non-application of mind. In **Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal** reported in **(2003) 4 SCC 139**, this Court has held that in determining the question as

to whether process is to be issued, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can only be determined at the trial.

49. The High Court did not quash the complaint against the appellants since it was *prima facie* established that they were triable for dishonour of cheque. Section 141 of the NI Act provides:

141. Offences by companies.—(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

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

[Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section, — (a) “company” means anybody corporate and includes a firm or

other association of individuals; and (b) “director”, in relation to a firm, means a partner in the firm.”

50. 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*²⁹, 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.”

51. In *SMS Pharmaceuticals v. Neeta Bhalla*³⁰, a three judge Bench while construing the provisions of Section 141 of the Negotiable Instruments Act 1881, has noted that the position of a Managing Director or a Joint Managing Director of a company is distinct since persons occupying that position are in charge of and responsible for the conduct of the business. It was observed that though there is a general presumption that the Managing Director and Joint Managing Director are responsible for the criminal act of the company, the director will not be held liable if he was not responsible for the conduct of the company at the time of the commission of the offence. The Court observed:

“9. The position of a managing director or a joint managing director in a company may be different. These persons, as the designation of their office suggests, are in charge of a company and are responsible for the conduct of the business of the company. In order to escape liability such persons may have to bring their case within the proviso to Section 141(1), that is, they will have to prove that when the offence was committed they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence.

[...]

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.”

(emphasis supplied)

52. The same principle has been followed by a Bench of two judges in Mainuddin Abdul Sattar Shaikh v. Vijay D Salvi:

“12. The respondent has adduced the argument that in the complaint the appellant has not taken the averment that the accused was the person in charge of and responsible for the affairs of the Company. However, as the respondent was the Managing Director of M/s Salvi Infrastructure (P) Ltd. and sole proprietor of M/s Salvi Builders and Developers, there is no need of specific averment on the point. This Court has held in National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal [(2010) 3 SCC 330 : (2010) 1 SCC (Civ) 677 : (2010) 2 SCC (Cri) 1113] , as follows : (SCC p. 346, para 39)

“39. (v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.”

53. 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.

54. In the present case, it is evident that the principal grounds of challenge which have been set up on behalf of the appellants are all matters of defence at the trial. The Magistrate having exercised his discretion, it was not open to the High Court to substitute its discretion. The High Court has in a carefully considered judgment, analysed the submissions of the appellants and for justifiable

reasons has come to the conclusion that they are lacking in substance.”

22. Mr. Edulji also refers to an unreported decision of the Hon’ble Supreme Court in **Vishwakalyan Multistate Credit Co. Op. Society Ltd. vs. Oneup Entertainment Pvt. Ltd. (Criminal Appeal No.2484 of 2023)** wherein the Hon’ble Supreme Court was pleased to modify the judgment passed by the High Court and directed the trial court to proceed from the stage of Section 202 of the Cr.P.C. While doing so, the learned Magistrate is directed to be guided by the direction issued by the Constitution Bench in *Suo Motu Writ Petition (Crl.) 2 of 2020*

23. Mr. Edulji further submits that the complaints were lodged in the year 2011. The learned Magistrate passed the impugned order on 29th October, 2011. While passing the order the learned Magistrate examined the complaint under Section 138/141 of the N.I Act. The evidence of the complainant was affirmed on affidavit in terms of Section 145(1) of the said Act and also the documents filed by the complainant. Thus, it is contended by Mr. Edulji that the learned Magistrate substantially complied with the requirement of inquiry under Section 202 of the Cr.P.C. Obviously in the impugned order it is not stated like magic words that “inquiry was held under Section 202 of the Cr.P.C on examination of the averment made in the complaint, affidavit affirmed by the complainant under Section 145(1) and documents filed by the complainant were perused for the purpose of Section 202. But in substance the learned Magistrate held an inquiry under Section 202 of the Cr.P.C and issued

process against the accused persons including the petitioner. Therefore, the impugned order cannot be held to be illegal and liable to be set aside.

24. Mr. Edulji further submits that the decisions by the Hon'ble Supreme Court referred to above is not applicable in the instant case because of the fact that the ratio laid down by the Hon'ble Supreme Court is always prospective in nature. Having heard the learned Advocates for the parties and on careful perusal of the entire materials on record I like to mention at the outset that the contention raised by Mr. Edulji to the effect that the decision of the Hon'ble Supreme Court would apply prospectively has no substance at all. Law is well settled that ruling of a Court which has the effect of a binding precedent of any other court inferior thereto or all coordinate strength would apply retrospectively. The position would be otherwise in the event of the decision explicitly made, the law laid down to be applicable prospectively. The decision of the Hon'ble Supreme Court in **Sarwan Kumar & Anr. vs. Madan Lal Aggarwal** reported in **(2003) 4 SCC 174** and **Lily Thomas & Ors. vs. Union of India & Ors.** reported in **(2000) 6 SCC 224** may be relied on in this regard.

25. Now coming to the question as to whether the learned Magistrate conducted inquiry under Section 202 of the Cr.P.C before issuance of process, it is already recorded that the impugned order does not contain any statement to the effect that the learned Magistrate perused the complaint under Section 138/141 of the N.I Act, considered the affidavit of the complainant under Section 145(1) of the N.I Act and examined the

documents. Thereafter, he issued process against the accused persons including the petitioner.

26. This Court has already held that Section 202 of the Cr.P.C was introduced in the statute book in order to prevent lodging of false complaint only to cause harassment of innocent persons who reside outside the jurisdiction of the court of the learned Magistrate. When the learned Magistrate on scrutiny of record prima facie came to a decision that process ought to have been issued even against a person who resides outside the jurisdiction of the court of the learned Magistrate and passed an order under Section 204 of the Cr.P.C, it is obvious that the learned Magistrate also took into account the provision under Section 202 of the Cr.P.C.

27. There is another aspect of the matter which this Court is inclined to record. In the petition of complaint the address of the petitioner was stated as –

Pawan Kumar Agarwal, Managing Director of Fair Deal Supplies Ltd. 4, B.B.D Bag (East), Room No.5, 1st Floor, Stephen House, Kolkata-700001.

The address of the accused No.4/petitioner recorded in the complaint is within the jurisdiction of learned Metropolitan Magistrate, Kolkata. Therefore, when the case was initially taken up for examination of the complainant and issuance of process the learned Magistrate had no scope to

known that the petitioner resides outside the jurisdiction of the learned Magistrate.

28. Last but not the least, in **S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla** reported in **(2005) 8 SCC 89**, the Hon'ble Supreme Court while construing the provision of Section 141 of the N.I Act, 1881, has noted that the position of a Managing Director or a Joint Managing Director of the company is distinct since persons occupying that position are in charge of and responsible for the conduct of the day to day business of the company. It was observed that though there is a general presumption that the Managing Director and Joint Managing Director are responsible for the act of the company, the director will not be held liable if he was not responsible for the criminal conduct of the company at the time of the commission of offence. In paragraph 9 of *S.M.S. Pharmaceuticals Ltd.* (supra) the Hon'ble Supreme Court observed.

“9. The position of a Managing Director or a Joint Managing Director in a company may be different. These persons, as the designation of their office suggests, are in charge of a company and are responsible for the conduct of the business of the company. In order to escape liability such persons may have to bring their case within the proviso to Section 141 (1), that is, they will have to prove that when the offence was committed they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence.”

29. Now to conclude, it is found from the record that the petitioner was arraigned as an accused in the aforementioned cases under Section 138 read with Section 141 of the N.I Act on the ground that he at the relevant point of time was the Managing Director of the company. Secondly, in the

petition of complaint it was not stated that the petitioner resides outside the jurisdiction of the learned Magistrate. Thirdly, while issuing process the learned Magistrate adverted to the petition of complaint, evidence of the complainant affirmed under Section 145(1) of the N.I Act and the documents filed by the complainant. Thus, before issuance of process, the learned Magistrate obviously came to the conclusion that there are prima facie reasons to issue process against the petitioner and lastly, if the impugned order prima facie proves application of mind by the learned Magistrate in respect of compliance of mandatory provision under Section 202 of the Cr.P.C, the order cannot be set aside only on technical ground for absence of the magic words that inquiry under Section 202 was held and the learned Magistrate was satisfied that process should be issued against the accused.

30. For the reasons stated above, I do not find any merit in these bunches of criminal revision and accordingly the revisional applications are set aside.

(Bibek Chaudhuri, J.)