

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

**C.R.R. 3794 of 2013
With
CRAN 12 of 2022**

**Aashish Jhunjhunwala
Vs
Shri Kamal Dihidar**

For the Petitioner : Mr. Ayan Bhattacharjee
Mr. Pawan Kumar Gupta
Ms. Rita Das

For the State : Mr. Narayan Prasad Agarwalla
Mr. Pratick Bose

Heard on : 13.02.2023

Judgment on : 03.07.2023

Ananya Bandyopadhyay, J.:-

1. The instant criminal revision is preferred by the petitioner against an Order dated 31.05.2013 passed by Learned Judicial Magistrate, 6th Court, Paschim Midnapore, seeking quashing of the proceedings of Case C.R. No. C/405 of 2013 of the Negotiable Instruments Act, 1881 pending before the Learned Judicial Magistrate, 6th Court, Paschim Midnapore.
2. On or about 06.05.2013 the opposite party filed a petition under Section 138 of the said Act in the Court of Learned Chief Judicial Magistrate at Paschim Midnapore against the present petitioner alleging as follows:

- (a) The opposite party happened to be the representative as well as the authorised agent of one M/s Wellman Carbo Metalick (India) Ltd., a company dealing in production of coke.
- (b) The petitioner herein being the Managing Director/Authorized Signatory of M/s Ramsarup Lohh Udyog dealt in production of Pig Iron, sponge iron and various types of wire etc. and had business transaction with the opposite party and purchased coke from the same. The petitioner in order to reimburse the dues executed an agreement with the opposite party on 17.09.2011 wherein the petitioner handed over four post dated cheques dated 14.09.2012 towards discharge of the legal debts and/or liabilities. It was agreed between the parties that in the event the petitioner failed to arrange funds for the opposite party, the validity of the encashment of those cheques would be extended.
- (c) As per the aforesaid agreement the petitioner could not arrange the said fund within the stipulated period and consequently on 14.09.2012 one agreement was again executed in between the parties as the addendum to the main agreement wherein the petitioner acknowledged his liability declaring that Rs. 8,53,29,725.52/- was the outstanding and further 6 months time was granted to the petitioner for payment.
- (d) In terms of the addendum agreement the petitioner in order to discharge his liability delivered four post dated cheques to the opposite party. The opposite party duly presented the above

mentioned cheques for encashment through its banker. However the said cheques returned to the opposite party along with the cheque return memo dated 14.03.2013 with the remarks 'Funds Insufficient'.

(e) The opposite party issued legal notice through its advocate dated 26.03.2013 under section 138(b) of the said Act. The notice was received by the petitioner on 01.04.2013. However, despite service of notice the petitioner did not pay the demanded amount, which called for initiation of the instant proceedings.

3. Vide Order dated 05.06.2013 the Learned Chief Judicial Magistrate, Paschim Midnapore was pleased to take purported cognizance and transferred the case to the Court of Learned Judicial Magistrate, 6th Court at Paschim Medinipore (herein after referred to as 'the Learned Trial Court' for inquiry and disposal.
4. On 31.05.2013 the opposite party was examined on dock under Section 200 of the Procedure Code and vide Order dated 31.05.2013 the Learned Trial Court was pleased to find prima facie case under Section 138 of the said Act and issued process against the present petitioner under Section 138 of the said Act directing him to appear on 22.07.2013.
5. On 22.07.2013 the case was adjourned to 16.09.2013 and further adjourned to 01.10.2013 for service return. After receiving the summons of the Court the petitioner surrendered and filed an application under Section 205 of the said Code when vide Order dated 01.10.2013 the Learned Trial Court was

pleased to release the petitioner on bail and fixed the next date on 25.11.2013 for appearance and hearing of the said application.

6. The Learned Advocate for the petitioner submitted the petitioner to be completely innocent and in no way connected with any offence as alleged in the instant case. From a bare perusal of the petition of complaint it is evident that the allegations as made therein are so absurd and inherently improbable that on the basis of those allegations no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the present petitioner.
7. It has been further contended it is apparent from the petition of complaint that the petitioner is the permanent resident of a place lying outside the territorial jurisdiction of the Learned Trial Court. The amended provisions of Section 202 of the said Code mandates that any Magistrate, on receipt of a complaint, shall in case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, postpone the issuance of process against the accused person and either inquire 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 any sufficient ground for proceeding. It is thus apparent where the accused resides beyond the territorial jurisdiction of the Court of the Magistrate, the Learned Magistrate is required to either inquire himself or direct investigation by a police officer or other person deemed fit by the Magistrate. The said requirement of law needs to be complied with great care and caution and not to be treated as an empty formality. From a perusal of the order dated

31.05.2013, it is crystal clear that no such inquiry or investigation has been either made by the Learned Trial Court or by anybody else at the behest of the Learned Trial Court. The Learned Trial Court was under the strictest obligation to comply with the mandate of Section 202 of the said Code, which was not complied with.

8. The Learned Advocate for the petitioner further submitted that in the case of ***Aneeta Hada Vs. Godfather Travels And Tours***¹ the Hon'ble Supreme Court observed as follows:

"58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.

59. 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 categories 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. We say so on the basis of the ratio laid down in C.V. Parekh which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada is overruled

¹ (2012) 5 SCC 661

with the qualifier as stated in para 51. The decision in Modi Distillery has to be treated to be restricted to its own facts as has been explained by us hereinabove.”

9. In the case of **Himanshu Vs. B.Shivamurthy & Anr.**² the Hon’ble Supreme Court observed as follows:

“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 ad 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. In the case of **Pawan Kumar Goel Vs. State of U.P. & Anr.**³ the Hon’ble Supreme Court observed as follows:

“17. The scope of Section 141 of NI Act was again exhaustively considered by this Court in S.M.S Pharmaceuticals (Supra):

*“10.What is required is that the persons who are sought to be made criminally liable under Section 141 should be at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. **Every person***

² (2019)3 SCC 797

³ 2022 (16) SCALE 747

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 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 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 conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of "every person" the section would have said "every Director, Manager or Secretary in a Company is liable"..etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. **Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to actio...**

18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. **A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the**

person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. **A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process.** We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial."

.....

19. This Court has been firm with the stand that if the complainant fails to make specific averments against the company in the complaint for the commission of an offence under Section 138 of NI Act, the same cannot be rectified by taking recourse to general principles of criminal jurisprudence. Needless to say, the provisions of Section 141 impose vicarious liability by deeming fiction which pre-supposes and requires the commission of the offence by the company or firm. Therefore, unless the company or firm has committed the offence as a principal accused, the persons mentioned in sub-Section (1) and (2) would not be liable to be convicted on the basis of the principles of vicarious liability.

....

21. This issue stands concluded by a decision of three-Judge Bench of this Court in the case of *Aneeta Hada Vs. Godfather Travels & Tours (P) Ltd.* (Supra), wherein it has been held that for maintaining the prosecution under Section 141 of NI Act, arraigning of the

company as an accused is imperative and non-impleadment of the company would be fatal for the complaint. It may be relevant to extract the following from the said judgment:-

*“58. Applying the doctrine of strict construction, we are of the considered opinion **that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words “as well as the company” appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted.**”*

11. It was ultimately submitted that the company was not arraigned as a party and for the absence of any incriminating materials against the present petitioner the proceedings pending before the Learned Trial Court must be quashed.
12. The Learned Advocate for the State submits presence of incriminating materials in the Case Diary to indict the petitioner and at such a preliminary stage to quash the proceedings will result in the process of abuse of law, accordingly the revisional application should be dismissed.
13. The Learned Advocate for the petitioner had argued that the complaint was not filed by the payee or holder of the cheque but by one, Sri Kamal Dihidar. Under such score the complaint cannot be sustained according to law. From the Lower Court record it transpired that the Managing Director of Wellman Carbo

Metalicks (India) Ltd. Sri Buddhadeb Chattopadhyay had authorised Sri Kamal Dihidar, an employee of his company to file the case against the present petitioner i.e. Aashish Jhunjhunwala by dint of Letter of Authority issued on 2nd May, 2013 which considered by the Learned Trial Court and the same was mentioned in the affidavit-in-chief filed in 6th Court, Judicial Magistrate Sadar, Paschim Medinipore without any objection. The authority of present complainant to file the complaint being authorised by the concerned authority is acceptable.

14. According to Sub-Section 2 of Section 142 of the Negotiable Instruments Act, the jurisdiction of the Court has been specifically categorised as follows:

“142. Cognizance of offences

[(1)] Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138: [PROVIDED that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period;]

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.

(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,-

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation: For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.]”

15. The Learned Trial Court in the instant case under Section 138 of the Negotiable Instruments Act, is to verify the provisions as enumerated above in the context of this case and the provisions of Section 202 of the Criminal Procedure Code is not applicable in view of the specifications mentioned in Section 142 of the Negotiable Instruments Act as far as cognizance to be taken by the Court is concerned.

16. The agreement dated 17th September, 2011, between the parties, inter alia, states as follows:

“WHEREAS against Purchase Orders from RAMSARUP, WELLMAN sold LAM Coke to RAMSARUP in financial Year 2009-10 and an outstanding of Rs.33068184.52 is lying due to WELLMAN from RAMSARUP, as on 31.03.2010 as confirmed by exchange of Ledger Account between the two companies;

WHEREAS by an agreement dated 17th September, 2010, hereinafter referred to as the said agreement, WELLMAN committed to supply and RAMSARUP agreed to accept 6000 MT of Coke Per month for to months, i.e. October 2010 and November 2010 for RAMSARUP to recommence production of Pig Iron at their plant;

AND WHEREAS WELLMAN supplied first lot of 2998.13 MT of LAM Coke to RAMSARUP during the period from 18th September, 2010 to 10th October, 2010 by mutual consent.

AND WHEREAS due to non availability of raw material RAMSARUP had to close down its factory at Kharagpur;

AND WHEREAS RAMSARUP could not supply Foundry Grade Pig Iron to WELLMAN as per the terms of the said agreement nor pay for the coke supplied to them by WELLMAN;

AND WHEREAS WELLMAN filed a complaint before the Judicial Magistrate, 4th Court, Paschim Medinipur being C.R Case No. 720/2011;

AND WHEREAS RAMSARUP and WELLMAN have agreed to settle the disputes amongst themselves amicably on the following terms and conditions;

NOW THIS AGREEMENT WITNESSTH as follows:-

- 1. RAMSARUP hereby agrees, undertakes, confirms and declare that Rs. 33068185/- is outstanding to WELLMAN against their supply of LAM Coke to RAMSARUP in the Financial Year 2009-10 for which RAMSARUP did not pay to WELLMAN. Now RAMSARUP agrees to pay and WELLMAN agrees to allow RAMSARUP a period of within twelve (12) months for making payment from the date of this agreement. Interest @ 9,50 % will be charged from 01.04.2010 to 31.03.2012. No Interest be charged after the above date.*

2. *RAMSARUP agrees to pay and WELLMAN agrees to accept a sum of Rs. 40534718/- being the amount towards the supply of 2998.13 MT of LAM Coke during September - October 2010. Wellman agrees to allow RAMSARUP a period of within twelve (12) months for making payment of the said sum of Rs. 40534718/-. Rate being Rs. 13000/- per MT plus 4% VAT.*
3. *RAMSARUP agrees to pay and WELLMAN agrees to accept interest @ 9.50 % p.a. on Rs. 40534718/- being the amount towards the supply of 2998.13 MT of LAM Coke during September-October 2010 from 01.11.2010 to 31.03.2012. No interest will be charged after the above date.*
4. *It is agreed that WELLMAN will raise invoice of current date upon RAMSARUP for the quantity of 2998.13 MT of LAM Coke delivered to RAMSARUP in September - October 2010 as per terms and conditions of the Agreement dated 17.09.2010.*
5. *Wellman shall sign and execute all such papers and documents and shall do all such acts and/or deeds as may be required by RAMSARUP in furtherance any of the objects herein sought to be achieved.*
6. *RAMSARUP has made Four (4) post dated cheques as per the following details in order to discharge its liability towards WELLMAN:*
 - i. *Post dated cheque dated 14th September, 2012 amounting to Rs. 30,68,184.52 towards outstanding as on 31.03.2020, for encashment on 14 September 2012. Cheque No.583996 Dated 14.09.2012 of United Bank of India, Old Court House Street Branch, Kolkata.*
 - ii. *Post dated cheque dated 14 September, 2012 amounting Rs.62,82,955/- towards interest @ 9.50 % on outstanding as on 31.03.2010 from 01.04.2010 to 31.03.2012 for encashment on 14th September, 2012.*

Cheque No.583997 Dated 14.09.2012 of United Bank of India, Old Court House Street Branch Kolkata.

- iii. *Post dated cheque dated 14th September, 2012 amounting to Rs. 4,05,34,718/- towards supply as per Agreement dated 17.09.2010 for encashment on 14th September, 2012.*

Cheque No.583999 Dated 14.09.2012 of United Bank of India, Old Court House Street Branch, Kolkata.

- iv. *Post dated cheque dated 14th September, 2012 amounting to Rs.54,43,868/- towards interest @ 9.5 % on towards supply as per Agreement dated 17.09.2010.From 01.11.2010 to 31.03,2012, for encashment on 14th September, 2012.*

Cheque No.584000 Dated 14.09.2012 of United Bank of India, Old Court House Street Branch, Kolkata.

The said cheques shall be signed by Mr. Ashish Jhunjunwala, the Managing Director of RAMSARUP for encashment by WELLMAN on due dates. In the event RAMSARUP can not arrange funds for encashment of cheques (all or its part), the validity for encashment of cheques shall be extended by RAMSARUP and will be accepted by WELLMAN for further period of six (6) months by replacing with fresh cheques. However extension beyond six (6) months will be at the sole discretion of WELLMAN.

7. *Wellman hereby agrees, undertakes, confirms and declares that Wellman has no objection if Ramsarup sells the said 2998.13 MTs of LAM coke and appropriates the proceeds thereof."*

17. The addendum to the agreement dated 17th September, 2011 signed between Ramsarup Lohh Udyog and Wellman Carbo Metalicks (India) Ltd. dated 14th September, 2012 inter alia stated:

“WHEREAS against Purchase Orders of RAMSARUP WELLMAN sold LAM Coke to RAMSARUP in financial Year 2009-10 and an outstanding of Rs. 85,329,725.52 is lying due to WELLMAN from RAMSARUP as on 14.09.2012 confirmed by RAMSARUP by on Agreement Dated 17.9.2011;

AND WHEREAS RAMSARUP issued four post dated cheques all dated 14th September, 2012 amounting a total Rs. 85,329,725.52 for encashment of 14th September, 2012.

AND WHEREAS Sub clause IV of Clause 6 of the Agreement between RAMSARUP and WELLMAN dated 17 September 2011, it is stated that "in the event RAMSARUP can not arrange funds for encashment of (cheques all or its part), the validity for encashment of cheques shall be extended by RAMSARUP and will be accepted by WELLMAN for further period of six (6) months by replacing with fresh cheques. However extension beyond six (6) months will be at the sole discretion of WELLMAN.”

AND WHEREAS RAMSARUP has written to WELLMAN that they could not arrange funds for encashment of cheques on 14th September 2012 and requested extension of the validity for encashment of the four (4) cheques for further period of six (6) months by replacing with fresh cheques and WELLMAN has accepted the request of RAMSARUP as per Sub clause IV of clause 6 of the Agreement between RAMSARUP and WELLMAN dated 17 September, 2011:

NOW THIS ADDENDUM to the AGREEMENT DATED 17th SEPTEMBER, 2011 as follows:

- 1. RAMSARUP hereby agrees, undertakes, confirms and declare that Rs. 85,329,725.52 is outstanding to WELLMAN against their supply of LAM COKE to RAMSARUP in the Financial Year 2009-10 for which RAMSARUP did not pay to WELLMAN.*
- 2. Now RAMSARUP agrees to pay and WELLMAN agrees to allow RAMSARUP an extension of the validity for payment for a period of six (6) months from the date of this Agreement.*

3. RAMSARUP has made Four (4) post dated Cheques as per the following details in order to discharge its liability towards WELLMAN:

SL. No	Date	Ch. No.	Amount	Bank
1	14.03.2013	684903	33068184.52	United Bank of India
2	14.03.2013	684904	6282955.00	United Bank of India
3	14.03.2013	684905	40534718.00	United Bank of India
4	14.03.2013	684906	5443868.00	United Bank of India
			8,53,29,725.52	

The said cheques shall be signed by Mr. Ashish Jhunjhunwala, the Managing Director of RAMSARUP for encashment by WELLMAN on due dates.

4. *Save and except as stated herein, WELLMAN has no claim whatsoever against RAMSARUP for above supply.*
5. *RAMSARUP confirms that RAMSARUP has no claim against WELLMAN for above purchase.*
6. *Besides what is written in the addendum on this day the 4th September of Two thousand band Twelve all other terms and conditions and other writings written in the Agreement dated 17th day of September two thousand and Eleven between RAMSARUP and WELLMAN will remain unchanged and as it is.*

This agreement is made in duplicate, one has been printed on a stamp paper bearing number 2228 dated 14.09.2012 and the other is a photocopy and manually signed by both the parties.”

18. It was further submitted that in the case of **Pawan Kumar Goel (Supra)**, the Hon’ble Supreme Court observed as follows:

“59. 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 categories of offenders can

only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself.”

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.”

.....

26. The question whether it is 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, was subject matter of reference by a two-Judge Bench of this Court along with other questions to be adjudicated by a larger Bench.

The following questions were referred for consideration :-

“(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 fulfill 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 proved 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.”

27. A three-Judge Bench in the case of S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla (Supra), considering the aforesaid questions after analysing the provisions of Section 141 of the Act and specially the words “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, etc.” used in the said Section, observed as under :-

“While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the Section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words :

“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 etc.”

What is required is that the persons who are sought to be made criminally liable under Section 141 should be at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for 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 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 conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of "every person" the section would have said "every Director, Manager or Secretary in a Company is liable"..etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

11. A reference to sub-section (2) of Section 141 fortifies the above reasoning because sub-section (2) envisages direct involvement of any Director, Manager, Secretary or other officer of a company in commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these offices in a company. In such a case, such persons are to be held liable. Provision has been made for Directors, Managers, Secretaries and other officers of a company to cover them in cases of their proved involvement.

12. The conclusion is inevitable that the liability arises on account of conduct , act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable."

28. The three-Judge Bench also took note of the earlier pronouncements of this Court in the case of State of Haryana Vs. Brij Lal Mittal & Ors. 8, wherein it was held that vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in charge of and

was also responsible to the company for the conduct of its business. Simply because a person is a director of a company, it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without being a director a person can be in charge of and responsible to the company for the conduct of its business.

29. The Bench also considered the dictum of this Court in the case of K.P.GNair Vs. Jindal Menthol India Ltd., which was also a case under the Negotiable Instruments Act. In the said case, it was found that the allegations in the complaint did not in express words or with reference to the allegations contained therein make out a case that at the time of commission of the offence, the appellant was in charge of and was responsible to the company for the conduct of its business. It was held that requirement of Section 141 was not met and the complaint against the accused was quashed.

30. After analyzing the aforesaid and various other pronouncements, the three-Judge Bench in paragraph 18 of the reports, observed as under :-

“18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a persons can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That respondent falls within parameters of Section 141 has to be spelled out. A complaint has to be examined by

the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141 he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.”

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.”

19. The complaint dated 6.5.2013 filed by the opposite party before the Court of Chief Judicial Magistrate, Paschim Medinipore narrated the role of the petitioner in paragraph no. 3, 4 and 5 respectively replicated as follows:

“3. That the accused Shri Ashish Jhunhunwala is the Managing Director/Authorised signatory of RAMSARUP LOHH UDYOG who is also a businessman and deals in business of Production of Pig Iron, sponge iron and various types of wire etc.

4. That the accused had/has business transaction with the complainant and the accused sometimes used to take Coke from the complainant by paying cash or cheque and sometimes he used to take such goods on credit and thereby one acquaintancy and good business relation was formed in between the complainant and the accused and on good faith in believing the words and version of the

accused the complainant used to deliver Coke on credit to the accused on assurance to pay its consideration within stipulated period.

5. That in this way the accused had/has the dues to the complainant for the value of goods and articles which were delivered by him to the accused and it became his liability. That's why the complainant requested the accused to pay due amount to him but he did not pay the same."

20. The agreement between the parties as stated above mandated the petitioner to have been liable to sign the cheques, which he actually did sign and cannot abdicate or deny being a signatory to the said cheques apparently, whereby the provision under Section 141(2) of the Cr.P.C. cannot be disregarded, and he fell within the purview of the same.
21. The opposite party has complied with the necessary provisions dictated under Section 138 of the Negotiable Instruments Act as narrated in the complaint.
22. The Learned Trial Court if necessary can invoke the provision enshrined in Section 319 of the Criminal Procedure Code if so required, to arraign the company as a party.
29. In the case of ***State of Haryana and Others v. Bhajan Lal and Others*** the Hon'ble Supreme Court has held in para 102 in as under :

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we

give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

. (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non- cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

*The principles as laid down above have consistently been followed, as well as in the recent judgment of three Judge judgment of the Hon’ble Supreme Court in **Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra and Others**⁴.”*

23. At a premature stage with sufficient materials on record to constitute a prima facie case against the petitioner the Learned Trial Court must conduct the trial to adjudicate the dispute in question.
24. This Court does not find any illegality or impropriety with the impugned Order and does not want to interfere with the same.
25. Accordingly, the instant criminal revisional application being CRR 3794 of 2013 is dismissed and disposed of.
26. Connected application being CRAN 12 of 2022 is also disposed of accordingly.
27. There is no order as to cost.
28. Let the copy of this judgment be sent to the Learned Trial Court as well as the police station concerned for necessary information and compliance.

⁴ AIR 2021 SC 1918

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

(Ananya Bandyopadhyay, J.)