**IN THE HIGH COURT AT CALCUTTA**

**Criminal Revisional Jurisdiction**

**APPELLATE SIDE**

**Present:**

**The Hon'ble Justice Shampa Dutt (Paul)**

**CRR 107 of 2022**

**Mr. Gosu Maheswara Reddy**

**Vs.**

**State of West Bengal & Anr.**

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| **For the Petitioner** | : | Mr. Muhammad Obaid. |
| **For the State** | : | Ms. Manisha Sharma. |
| **Hearing concluded on** | : | 05.11.2024 |
| **Judgment on** | : | 07.11.2024 |

**Shampa Dutt (Paul), J.:**

1. The present revision has been preferred praying for quashing of the order dated 18.01.2021 passed by the learned Chief Metropolitan Magistrate, Calcutta and the subsequent orders passed by the learned Metropolitan Magistrate, 12th Court, Calcutta under Section 138 of the Negotiable Instrument Act, 1981 as amended up to date in connection with Case No.CS/2923/2021(TR-591 of 2021), now pending before the learned 12th Metropolitan Magistrate, Calcutta.
2. The petitioner's case is that, the petitioner is the accused no.3 in the above complaint case lodged by the opposite party no.2 on 18.01.2021 before the learned Chief Metropolitan Magistrate, Calcutta under Section 138 of the N.I. Act and the learned Magistrate took cognizance of the offence and transferred the case to the file of the learned Metropolitan Magistrate, 12th Court, for enquiry and disposal according to law.
3. On 20.01.2021, the learned Metropolitan Magistrate, 12th Court, Calcutta directed issuance of summons against the accused person.
4. The opposite party no.2 filed the said complaint against the company, Freshk Ka and one Rahul Karanam being the authorized signatory of the dishonoured cheque and arrayed them as accused no.1 and 2 respectively and averred that the accused no.2 is the proprietor of the accused no.1.
5. It is the case of the petitioner that there is no specific allegation against him in the said complaint. The petitioner is neither the proprietor of the said Freshk Ka nor the signatory of the said dishonored cheque.
6. That the petitioner neither issued any cheque on behalf of the accused no.1 nor was he responsible for any decision connected with the issuance

of such cheque on behalf of the said proprietary business of the accused no.1.

7. It is further submitted by the petitioner that the opposite party no.2 falsely implicated the petitioner in the said proceeding and the petitioner was and/or no way connected with the business of the accused no.1, the said Freshk Ka as it is proprietary concern under the accused no.2.
8. That there is nothing to show in the complaint that the petitioner is any way liable for day-to-day business of the accused no.1.
9. Hence, the prayer for quashing
10. Perused the materials on record including the petition of complaint and heard the learned counsel appearing for both the parties.
11. On perusal of the petition of complaint, it appears that the relevant allegation in the petition of complaint made by the complainant company is that:-

> *"the accused no.1 is a proprietorship firm having its office at mentioned in the cause title. Accused no.2 is the proprietor of the accused no.1 and have full dominion and control over accused no.1 at the time of taking loan and even at the time of issuance of the cheques and are also incharge and responsible for the day to day affairs of the accused no.1."*

12. It is stated by the complainant, that in pursuance of the loan facility vide no.1047225 (hereinafter referred to as the "LOAN") entered into between the complainant and the accused person as mentioned in the agreement, the complainant sanctioned and disbursed the loan of Rs.20,00,000/- to the accused persons and there was no dispute about the repayment terms and conditions of the agreement entered into between the complainant and the accused person.

13. It has been further stated in the written complaint that on the cheque being placed for encashment, the same was dishonoured and in spite of proper notice the cheque amount has not been paid by the accused persons and accordingly, proceeding under Section 138 of the NI Act has been initiated.

14. On perusal of the contents of the petition of the complaint, which has been reproduced above, it appears that the petition of complaint does not even mention the official position (if any) of the accused no.3/petitioner herein neither in the cause title nor in the body of the petition. In the said petition of complaint there is absolutely no allegation of any overtact against the petitioner herein being accused no.3.

15. **i)** In ***Pawan Kumar Goel v. State of U.P & Anr.*** reported in **2022 (16) SCALE,** the Supreme Court has held:-

> ***"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):-*
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> *"26. The scheme of the prosecution in punishing under Section 138 of the Act is different from the scheme of CrPC. Section 138 creates an offence and prescribes punishment. No procedure for the investigation of the offence is contemplated. The prosecution is initiated on the basis of a written complaint made by the payee of a cheque. Obviously such complaints must contain the factual allegations constituting each of the ingredients of the offence under Section 138. Those ingredients are: (1) that a person drew a cheque on an account maintained by him with the banker; (2) that such cheque when presented to the bank is returned by the bank unpaid; (3) that such a*

*cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity whichever is earlier; (4) that the payee demanded in writing from the drawer of the cheque the payment of the amount of money due under the cheque to payee; and (5) such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid. It is obvious from the scheme of Section 138 that each one of the ingredients flows from a document which evidences the existence of such an ingredient. The only other ingredient which is required to be proved to establish the commission of an offence under Section 138 is that in spite of the demand notice referred to above, the drawer of the cheque failed to make the payment within a period of 15 days from the date of the receipt of the demand. A fact which the complainant can only assert but not prove, the burden would essentially be on the drawer of the cheque to prove that he had in fact made the payment pursuant to the demand.*

*27. By the nature of the offence under Section 138 of the Act, the first ingredient constituting the offence is the fact that a person drew a cheque. The identity of the drawer of the cheque is necessarily required to be known to the complainant (payee) and needs investigation and would not normally be in dispute unless the person who is alleged to have drawn a cheque disputes that very fact. The other facts required to be proved for securing the punishment of the person who drew a cheque that eventually got dishonoured is that the payee of the cheque did in fact comply with each one of the steps contemplated under Section 138 of the Act before initiating prosecution. Because it is already held by this Court that failure to comply with any one of the steps contemplated under Section 138 would not provide "cause of action for prosecution". Therefore, in the context of a prosecution under Section 138, the concept of taking cognizance of the offence but not the offender is not appropriate. Unless the complaint contains all the necessary factual allegations constituting each of the ingredients of the offence under Section 138, the Court cannot take cognizance of the offence. Disclosure of the name of the person drawing the cheque is one of the factual allegations which a complaint is required to contain. Otherwise in the absence of any authority of law to investigate the offence under Section 138, there would be no person against whom a court can proceed. There cannot be a prosecution without an accused. The offence under Section 138 is person specific.*

*Therefore, Parliament declared under Section 142 that the provisions dealing with taking cognizance contained in the CrPC should give way to the procedure prescribed under Section 142. Hence the opening of non obstante clause under Section 142. It must also be remembered that Section 142 does not either contemplate a report to the police or authorise the Court taking cognizance to direct the police to investigate into the complaint.*

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

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

*"19. (a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.*

*(b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.*

*(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint*

*Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub- section (2) of Section 141."*

**ii)** In ***Shaleen Khemani & Ors. Vs. The State of West Bengal & Anr.*** reported in **(2018) 1 C Cr. LR (Cal) 515,** the Calcutta High Court has held:-

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

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

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

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

*"43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be*

*made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.*
*44. When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In Aneeta Hada [Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241] , the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company."*

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

**In the present case there is no sufficient averments nor a prima facie case against the Petitioner/Accused no.3.**

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

*"**36.** The High Court rightly held that when a complaint was filed against the Director of a company, a specific averment that such person was in charge of and responsible for the conduct of business of the company was an essential requirement of Section 141 of the NI Act. The High Court also rightly held that merely being a Director of the company is not sufficient to make the person liable under Section 141 of the NI Act. The requirement of Section 141 of the NI Act was that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company. This has to be averred as a fact.*

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

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

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

***46.*** *As held by this Court in National Small Industries Corporation Ltd. v. Harmeet Singh Paintal4 quoted with approval in the subsequent decision of this Court in Pooja Ravinder Devidasani v. State of Maharashtra and Anr. (supra) the impleadment of all Directors of an Accused Company on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company, without anything more, does not fulfil the requirements of Section 141 of the NI Act."*

17. From the petition of complaint it is clear that the requirements under Section 141 of the Negotiable Instruments Act as laid down by the Supreme Court in ***Pawan Kumar Goel v. State of U.P & Anr. (Supra) (para 31)*** are totally absent in this case and allowing the proceedings to continue in respect of the petitioner in such circumstances, would clearly amount to abuse of the process of law.

18. **The revisional application being CRR 107 of 2022 is thus allowed.**

19. The order dated 18.01.2021 passed by the learned Chief Metropolitan Magistrate, Calcutta, and the proceedings in connection with Case No.CS/2923/2021(TR-591 of 2021), pending before the learned 12th Metropolitan Magistrate, Calcutta **is quashed in respect of the petitioner namely Gosu Maheswara Reddy.**

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

**(Shampa Dutt (Paul), J.)**