

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.R. 123 of 2012

Mrs. Rekha Malhotra & Ors.

-Vs-

The State of West Bengal and Anr.

For the Petitioners : Mr. Anirban Dutta
No. 1 & 2

For the Petitioners : Mr. Amartya Ghosh
No. 3 & 4 (Amicus Curiae)

Heard on : 03.04.2024

Judgment on : 16.07.2024

Ananya Bandyopadhyay, J.:-

1. The instant revisional application has been filed by the petitioners praying for quashing of the proceedings being Complaint Case No. C-2250 of 2010 pending before the Learned 10th Judicial Magistrate at Alipore under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (as amended till date) and all orders passed thereunder.
2. None appeared to represent the opposite parties.
3. The petition before the Court of Learned 10th Additional Chief Judicial Magistrate at Alipore states as follows:-

“3. That in the course of business, your petitioner has discounted a number of Bills of Exchange duly accepted and passed by the accused company through the directors, against which the accused person issued post dated cheques on account of the bill of exchange (principal amount) and bill discounting charges respectively.

4. That in course of such business, the accused persons on behalf of the company issued cheques amounting to Rs.5,00,000/- (rupees Five Lakhs) drawn on SBI Kalighat Branch, being cheque No. 221994 dated 10.3.2010 on putting the signatures of the accused persons with company seal, towards discharge of the legal and lawful liability and charges on account of consideration of legal service charges and principal amount to the accused company and/or directors.

5. That accused persons, in course of business, dealt in various investments to different companies on the basis of taking service charge from your petitioner a sum of Rs.5,00,000/- was due to the accused company and Directors for which the accused company and their directors issued A/c. Payee cheque in the name of complainant drawn on State Bank of India, Kalighat Branch being cheque No 221994 dated 10.3.2010.

6 That the complainant deposited the said account payee cheque, being cheque No 221994 dated 10.3.2010 amounting to Rs.5,00,000 and the cheque was drawn on State Bank of India, Kalighat Branch was deposited with the complainant's banker, Bank of Baroda, Prince Anwar Shah Branch on 06.09.2010 and the said cheque was returned with a remark: "Not Arranged For" and the matter was intimated by the banker on 8.9.10 and same was handed over to my client to your petitioner on 9.9.10.

7. That thereafter the complainant sent a notice under Section 138 of N.I. Act, through his Ld. Advocate Md. Abed Ali Laskar through Regd. Speed Post with A/D on 10th September, 2010 demanding of payment of the said amount within 15 days from the receipt of the said notices and the said notice was duly received by the accused company and directors No. 2 & 3 on putting their signatures and 4 & 5 of which were returned with the

Postal Remark unclaimed. (The Accused persons intentionally avoided the notice, knowing fully well the facts.) which is good service.

8. That thereafter the accused persons sent reply of the notice to their Ld. Advocate Krishnendu Bhattacharya on 20.09.2010 in the name of your petitioner's advocate Md. Abed Ali Laskar acknowledging the receipt of the notice but till date no payment was made.

9. That your petitioner respectfully submits that the accused persons issued the said cheque in favour of your petitioner in discharge of their existing liabilities as mentioned hereinabove, and the said cheque being presented for encashment through the Banker which was returning being dishonored.

10. That the accused persons have committed offences punishable under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 as amended up to date."

4. The Learned Advocate for the petitioners submitted that the petitioner nos.1 and 3 ceased to be the Directors of the Company having resigned from the post. The complainant in accordance to the provisions under Section 141 of the Negotiable Instruments Act did not specifically mention at the relevant time the accused – petitioners were the Directors of the Company, namely, Sumosons Exports Private Limited, being in-charge of and responsible for the day to day conduct of the business of the company. It was further submitted that the petitioners had filed a supplementary affidavit dated 13th September, 2021 whereby this Court vide Order dated 08.09.2021 had granted leave to file original Form 32 in the form of an affidavit.

5. Perusal of Form 32 as duly filed before the Registrars of Companies in respect of petitioner no.1 and petitioner no.4 justify the claim of the

petitioners to have been in cessation of rendering service as Directors of the Company on resignation prior to the date of issuance of the cheques.

6. The Hon'ble Supreme Court in the following decisions specifically stated in attributing the Directors to be in-charge of and responsible for the conduct of the business of the company at the relevant time when the offences alleged to have been committed under Section 138 and Section 141 of the Negotiable Instruments Act, the complainant is under bounden duty to describe the mode and manner in which the Director exercised or discharged the respective function being in-charge of and responsible for day to day conduct of the business of the company.

7. In **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla**¹ the following was held:-

“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

¹(2005) 8 SCC 89

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. *In view of the above discussion, our answers to the questions posed in the reference are as under:*

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

8. In the case of **Ashutosh Ashok Parasrampuriya v. Gharrkul Industries**

(P) Ltd², the Hon’ble Supreme Court held the following:-

“26. *This averment assumes importance because it is the basic and essential averment which persuades the Magistrate to issue process against the Director. That is why this Court in S.M.S.*

²2021 SCC OnLine SC 915

Pharmaceuticals Ltd. (supra) observed that the question of requirement of averments in a complaint has to be considered on the basis of provisions contained in Sections 138 and 141 of the NI Act read in the light of the powers of a Magistrate referred to in Sections 200 to 204 CrPC which recognise the Magistrate's discretion to take action in accordance with law. Thus, it is imperative that if this basic averment is missing, the Magistrate is legally justified in not issuing process."

9. The Hon'ble Supreme Court in **National Small Industries Corpn. Ltd. v.**

Harmeet Singh Paintal³ held the following:-

"38. But if the accused is not one of the persons who falls under the category of "persons who are responsible to the company for the conduct of the business of the company" then merely by stating that "he was in charge of the business of the company" or by stating that "he was in charge of the day-to-day management of the company" or by stating that "he was in charge of, and was responsible to the company for the conduct of the business of the company", he cannot be made vicariously liable under Section 141(1) of the Act. To put it clear that for making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act."

10. In **Susela Padmavathy Amma v. Bharti Airtel Ltd.**⁴ the following was held by the Hon'ble Supreme Court:-

³(2010) 3 SCC 330

⁴2024 SCC OnLine SC 311

“21. It was held that merely because a person is a director of a company, it is not necessary that he is aware about the day-today functioning of the company. This Court held that there is no universal rule that a director of a company is in charge of its everyday affairs. It was, therefore, necessary, to aver as to how the director of the company was in charge of day-to-day affairs of the company or responsible to the affairs of the company. This Court, however, clarified that the position of a managing director or a joint managing director in a company may be different. This Court further held that 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. To escape liability, 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.

22. In the case of *Pooja Ravinder Devidasani v. State of Maharashtra*⁷ this Court observed thus:

“17. Every person connected with the Company will not fall into the ambit of the provision. Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, 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 for an offence under Section 141 of the NI Act. In *National Small Industries Corpn. [National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal, (2010) 3 SCC 330 : (2010) 1 SCC (Civ) 677 : (2010) 2 SCC (Cri) 1113]* this Court observed : (SCC p. 336, paras 13-14)

“13. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore,

not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

14. A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely 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 is not a sufficient or adequate fulfilment of the requirements under Section 141.”

(emphasis in original)

18. In Girdhari Lal Gupta v. D.H. Mehta [Girdhari Lal Gupta v. D.H. Mehta, (1971) 3 SCC 189 : 1971 SCC (Cri) 279 : AIR 1971 SC 2162], this Court observed that a person “in charge of a business” means that the person should be in overall control of the day-to-day business of the Company.

19. A Director of a company is liable to be convicted for an offence committed by the company if he/she was in charge of and was responsible to the company for the conduct of its business or if it is proved that the offence was committed with the consent or connivance of, or was attributable to any negligence on the part of the Director concerned (see State of Karnataka v. Pratap Chand [State of Karnataka v. Pratap Chand, (1981) 2 SCC 335 : 1981 SCC (Cri) 453]).

20. In other words, the law laid down by this Court is that for making a Director of a company liable for the offences committed by

the company under Section 141 of the NI Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the company.

21. In Sabitha Ramamurthy v. R.B.S. Channabasavaradhya [Sabitha Ramamurthy v. R.B.S. Channabasavaradhya, (2006) 10 SCC 581 : (2007) 1 SCC (Cri) 621], it was held by this Court that : (SCC pp. 584-85, para 7)

“7. ... it is not necessary for the complainant to specifically reproduce the wordings of the section but what is required is a clear statement of fact so as to enable the court to arrive at a prima facie opinion that the accused is vicariously liable. Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company.”

(emphasis supplied)

By verbatim reproducing the words of the section without a clear statement of fact supported by proper evidence, so as to make the accused vicariously liable, is a ground for quashing proceedings initiated against such person under Section 141 of the NI Act.”

23. *It could thus clearly be seen that this Court has held that merely reproducing the words of the section without a clear statement of fact as to how and in what manner a director of the company was responsible for the conduct of the business of the company, would not ipso facto make the director vicariously liable.*

24. A similar view has previously been taken by this Court in the case of *K.K. Ahuja v. V.K. Vora*⁸.

25. In the case of *State of NCT of Delhi through Prosecuting Officer, Insecticides, Government of NCT, Delhi v. Rajiv Khurana*⁹, this Court reiterated the position thus:

“17. The ratio of all these cases is that the complainant is required to state in the complaint how a Director who is sought to be made an accused, was in charge of the business of the company or responsible for the conduct of the company's business. Every Director need not be and is not in charge of the business of the company. If that is the position with regard to a Director, it is needless to emphasise that in the case of non-Director officers, it is all the more necessary to state what were his duties and responsibilities in the conduct of business of the company and how and in what manner he is responsible or liable.”

26. In the case of *Ashoke Mal Bafna* (supra), this Court observed thus:

“9. To fasten vicarious liability under Section 141 of the Act on a person, the law is well settled by this Court in a catena of cases that the complainant should specifically show as to how and in what manner the accused was responsible. Simply because a person is a Director of a defaulter Company, does not make him liable under the Act. Time and again, it has been asserted by this Court that only the person who was at the helm of affairs of the Company and in charge of and responsible for the conduct of the business at the time of commission of an offence will be liable for criminal action. (See *Pooja Ravinder Devidasani v. State of Maharashtra* [*Pooja Ravinder Devidasani v. State of Maharashtra*, (2014) 16 SCC 1 : (2015) 3 SCC (Civ) 384 : (2015) 3 SCC (Cri) 378 : AIR 2015 SC 675].)

10. In other words, the law laid down by this Court is that for making a Director of a Company liable for the offences committed by

the Company under Section 141 of the Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company.”

31. *It can thus be clearly seen that there is no averment to the effect that the present appellant is in-charge of and responsible for the day-to-day affairs of the Company. It is also not the case of the respondent that the appellant is either the Managing Director or the Joint Managing Director of the Company.*

32. *It can thus clearly be seen that the averments made are not sufficient to invoke the provisions of Section 141 of the N.I. Act qua the appellant.”*

11. In the instant case, the complainant did not categorically stipulate in the averments of the complaint as to the specific role played by the petitioners in functioning as a Director of the company being in-charge of and responsible for the day to day conduct of the business of the company. Mere statement of the petitioners being the Director of the Company being in-charge of and responsible for the day to day conduct of the business of the company absolved them from criminal liability of being vicariously liable under Section 141 of the Negotiable Instruments Act. Moreover, the declaration in Form 32 filed before the Registrar of Companies being a certified copy endorsed the fact that petitioner nos.1 and 4 had resigned from the post prior to the issuance of the cheques in question.
12. Under the facts and circumstances of the case, the present petitioners cannot be allowed to undergo rigour and hardship of trial which would result into the abuse of the process of law and accordingly the instant

revisional application is allowed and the proceedings being Complaint Case No. C-2250 of 2010 pending before the Learned 10th Judicial Magistrate at Alipore under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (as amended till date) and all orders passed thereunder are quashed.

13. The instant criminal revisional application being no. CRR 123 of 2012 is allowed.
14. Accordingly, CRR 123 of 2012 stands disposed of. Connected application, if there be any, also stands disposed of,
15. There is no order as to costs.
16. I record my appreciation for the able assistance rendered by Mr. Amartya Ghosh, Learned Advocate as Amicus Curiae in disposing of the appeal.
17. 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.
18. All parties shall act on the server copy of this judgment duly downloaded from the official website of this court.

(Ananya Bandyopadhyay, J.)