IN THE HIGH COURT AT CALCUTTA

CRIMINAL REVISIONAL JURISDICTION

APPELLATE SIDE

PRESENT:
THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

CRR 1276 of 2015

Eman Kalyan Ghosh & Anr.
Vs.
Goutam Mukherjee

For the petitioners	:	Mr. Aanindya Sundar Das, Mr. Soumyajit Das Mahapatra, Mr. Md. Sohail, Mr. Madhunai Sinha,
For the opposite party	:	Mr. Md. Sabir Ahmed, Mr. Bhaskar Hutait, Mr. Dhiman Banerjee,
Heard on	:	07.08.2024
Judgment on	:	03.09.2024

Ajoy Kumar Mukherjee, J.

1. Being aggrieved by the proceeding being C.R Case no. 329 of 2014 pending before learned Additional Chief Judicial Magistrate, Lalbagh, Murshidabad present application has been preferred with a prayer for quashing of the said proceeding.

2. Complainant Goutam Mukherjee lodged a written complain before the Magistrate alleging *inter alia* that the petitioners are the authorized signatory of the AIMCO Trustee Ltd. On 21.02.2014 the complainant received a cheque amounting to Rs. 10,00,000/- and when the said cheque was presented with the banker of the complainant, it was dishonoured on the ground *'fund insufficient'*. Thereafter complainant sent a notice to the said two accused persons who are the petitioners herein on 13.03.2014 asking them to pay the said amount, but they did not give any response and finding no other alternative the complainant lodged said written complaint.

3. The petitioners herein contended that due to some unavoidable reason the petitioners could not appear before the court on a particular date and for which the court issued warrant of arrest. It is further case of the petitioners that on 29.01.2014 at about 10.30 a.m., some rowdy persons ransacked the whole office and compel management to sign on more than 50 cheques and then fled away. Said incident was reported to the local police station and opposite party herein had presented one of the said cheques with his banker and for which the case lodged against the petitioner is not sustainable.

4. In this context Mr. Das further argued that complainant himself admitted in his complaint while arraigning the petitioners that they are the authorized signatories of AIMCO Trustees Ltd. The term "Limited" shows that the entity is an incorporated company, limited by shares. In this context Mr. Das submits that unless the company itself is made an accused, there cannot be prosecution against the signatory of the cheque alone. He further submits referring case laws that the words "as well as the company" appearing in section 141 (1) of the Negotiable instrument Act 1881 (in short N.I. Act) makes it 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.

5. Per contra Mr. Shabir Ahmed learned counsel appearing on behalf of the opposite party submits that the petitioners had allured the complainant in investing money to a chit fund and thereafter the petitioners in order to pay back the money issued the impugned cheque in their individual capacity to return the money to avoid further legal consequence for commission of criminal act punishable under the law. Mr. Ahmed relied upon the judgment delivered by the Apex Court in **Aneeta Hada Case** reported in **(2012) 5 SCC 661**and contended that at the time of investment of money the petitioners received the money and principally and factually the petitioners were responsible to pay the amount.

6. Mr. Ahmed further submits that complaint has not yet been decidedfinally and only summoning order has been issued on examination of complainant. The scope for amendment of the complaint in order to implead the company is still subsisting and relying upon the case of ***S.P. Sukumar Vs. S. Sunad Raghava*** reported in **(2015) 9 SCC 609**, he argued that the amendment can be incorporated during the pendency of the application and the technicalities is not *pari materia* and does not take away the right to claim and liability of the company and its directors even though the company is a juristic person and runs through its directors. He further argued that the directors are individually and severally liable to debts of the company and that the legal infirmity which has cropped up during the course of hearing of this Revisional Application is curable in nature.

7. He further argued that it may be that as the drafting of the complainant was made hurriedly, the company has not been arrayed but that does not take away the complainants right to prosecute the petitioners. He further argued that the basic essence of role and responsibility under section 141 of N.I. Act is that the director was in charge and responsible for the affairs of the company for commission of the offence and such issue is the subject matter of the trial and there are sufficient pleadings that the petitioners were responsible and in discharge of legal existing debts andhas issued the cheque. In this context Mr. Ahmed also relied upon judgment delivered by a co-ordinate bench of this court in ***Jhantu Mahapatra Vs. Nirnajan Dev and others*** reported in **(2023) 0 Supreme (Cal) 826** where the court discussed the legal parameters as decided in **Aneeta Hada's Case (supra)** and decided if the company has not been made an accused in the complaint, the company can be made an accused at a subsequent stage by way of amending the complaint. He also argued that the issuance of impugned cheques is in discharge of legal debts and as such mere technicality in the legal proceeding will not jeopardise the right of claim of the complainant and such technicality can be avoided and complaint can be amended accordingly.

8. From the aforesaid arguments advanced by both the parties the short point to be adjudicated in the present context is whether a complaint under section 138 of the N.I. Act is maintainable, against authorised signatories of the company without arraigning the principle accused i.e. the company.

Decision

9. In the present context on bare perusal of the complaint it appears that the accused persons/petitioners herein have been described in the complaint as authorized signatories of AIMCO Trustee Ltd. In the demand notice dated 13.03.2014 it has been stated in para 1 as follows:-

> ***"(1)** **That** both of you being authorized signatories of AIMCO TRUSTEE LIMITED issued cheque amounting of Rs. 10,00,000/-(Ten Lacs) only on 21/02/2014 vide cheque no. 000413-742240000-30n in favour of my client.**"***

10. In the present Application and in all other places the specific case of the complainant is that the petitioner/accused persons are the authorized signatories of the company and thereby they had issued the cheque.

11. According to section 141 of the N.I. Act when the drawer of the cheque is a company every person in charge of company over and above the company is also responsible for the offence and such person and company are deemed to be liable to be proceeded against and punished, unless it is proved that the offence was committed without such persons knowledge or that such person exercised all due diligence to prevent the commission of such offence.

12. In this context the law laid down in **Aneeta Hada's case (supra)** may be extracted below. In paragraph 58 and 59 it was held.

> *"**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."*
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> *"**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 [(1970) 3 SCC 491 : 1971 SCC (Cri) 97] which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal [(1984) 4 SCC 352 : 1984 SCC (Cri) 620] does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada [(2000) 1 SCC 1 : 2001 SCC (Cri) 174] is overruled with the qualifier as stated in para 51. The decision in Modi Distillery [(1987) 3 SCC 684 : 1987 SCC (Cri) 632] has to be treated to be restricted to its own facts as has been explained by us hereinabove."*

13. The decision of **Aneeta Hada (supra)** has been considered by the Supreme court in ***Himangshu Vs. B. Shivamurthy and another*** reported in **(2012) 3 SCC 797**and it was held as follows:-

> *"**11.** In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. The complaint was lodged only against the appellant without arraigning the company as an accused."*
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> *"**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."*
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> *"**13.** In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused."*

14. In ***Pawan Kumar Goel Vs. State of U.P in Criminal Appeal No. 1999 of 2022*** decided on 17.11.2022, the court held if the complainant fails to make specific averments against the company in the complaint for commission of an offence under section 138 of N.I Act, the same cannot be rectified by taking recourse to general principles of criminal jurisprudence. It is held that since the provisions of section 141 of N.I Act imposes vicarious liability by deeming fiction which pre-suppose and require the commission of the offence by the company, therefore unless the company has committed the offence as a principal accused, the petitioners herein would not be liable to be convicted on the basis of principles of vicarious liability.

15. There is no quarrel with the proposition of law that while exercising inherent jurisdiction under section 482 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the acquisitions. Accordingly though it is not proper for High court at this stage to conduct a roving enquiry in respect of merit of the acquisition but if on the face of the document which is beyond suspicion or doubt, it appears that the accusation cannot stand, in order to prevent justice or abuse of process, it is incumbent upon the High court to look into those issues which have a bearing on the matter even at the initial stage.

16. In the present case it is not in dispute that the demand notice which were supposed to be given to the accused company within thirty days from the date of receipt of information by the complainant from the bank, has not been given and the demand notice dated 13th March, 2014 was only given to the petitioners herein who are authorized signatory of the company and they had issued the cheque being authorized by the company. It is one of thebasic requirementsas laid down in proviso to section 138 of the N.I. Act. for successful prosecution is that a notice in writing is to be given to the drawer of the cheque i.e. the accused company within thirty days from the date of receipt of the information. In the present case no notice was given to the company and the company was not sought to be made an accused. Since the complaint on the very face of it disclosed that the cheque was issued by the said company through its authorized signatories, no process could have been issued against the present petitioners only because they had signed on behalf of the said company as its authorized signatory.

17. The other question therefore, automatically comes is whether the defect of not impleading the company as an accused in the complaint is a curable defect which can be cured by way of making amendment in the complaint.

Law in this context is no more *res integra.* As quoted above in **Himangshu Vs. B. Shibamurthy & another** reported in **(2019) 3 SCC 797** the Apex Court clearly held that in the absence in the company being arraigned as an accused a complaint against the appellant is not maintainable. This is mainly because in the absence of a notice of demand being served on the company and without compliance with the proviso to section 138 the company cannot be subsequently arraigned as an accused by way of amendment.In the said judgment Supreme Court also considered the judgment of **Aneeta Hada's Case (supra)**. A co-ordinate Bench of this court in a subsequent judgment in ***Paresh Manna Vs. The State of West Bengal*** reported in **2024 SCC Online Cal 2748** was pleased to set aside conviction order passed by the Trial Court for non-compliance of section 141 of the N.I. Act. In the said case also the cheque was issued by the accused/petitioner as a director of company and not under his personal capacity but the notice under section 138 of N.I. was issued only to the petitioner.

18. In view of aforesaid settled proposition of law and also in view of the fact that the petitioners had issued the cheque as authorized signatories of the company, the present proceeding under section 138 is not maintainable against the petitioners as the company has not be arrayed as an accused in the complaint and also because such defect is incurable in nature since no demand notice was served upon the company within thirty days from the date of receipt of information from bank about return of the cheque, in compliance with section 138 of the N.I. Act.

19. In such view of the matter **CRR 1276 of 2015** is allowed. The impugned proceeding being CR. Case no. 329 of 2014 presently pending before learned Additional Chief Judicial Magistrate Lalbagh, Murshidabad is hereby quashed.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(AJOY KUMAR MUKHERJEE, J.)