IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Ajay Kumar Gupta

C.R.R. 1752 of 2017

Nirmala Devi Tibrewal
Versus
The State of West Bengal & Another

For the Petitioner	:	Mr. Shounak Mondal, Adv. Ms. Sutapa Mitra, Adv.
For the Opposite Party No. 2	:	Mr. M. K. Surana, Adv. Ms. P. Manot, Adv.
For the State	:	Ms. Faria Hossain, Adv. Ms. Suparna Chatterjee, Adv.
Heard on	:	07.10.2024
Judgment on	:	13.11.2024

Ajay Kumar Gupta, J:

1. By filing this Criminal Revisional application, the petitioner/accused has prayed for quashing of the proceedings being Complaint Case No. C/98169 of 2016 filed under Sections 138/141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'N.I. Act') pending before the Court of the Learned Metropolitan Magistrate, 15th Court at Calcutta against the accused persons including the Petitioner herein.

2. The brief facts, leading to filing of this instant Criminal Revisional application, are as under:

2a. The Opposite Party No. 2 herein has filed a complaint case before the Court of the Learned Additional Chief Metropolitan Magistrate at Calcutta alleging therein that the four accused persons including the present Petitioner have committed offence punishable under Sections 138/141 of the Negotiable Instruments Act, 1881.

2b. On the basis of the aforesaid complaint, vide order dated 14.07.2016, the Learned Magistrate took cognizance and transferred the case to the Court of the Learned Metropolitan Magistrate, 15th Court at Calcutta for its inquiry and disposal.

2c. After examining the Opposite Party No. 2 under Section 200 of the CrPC vide order dated 20.08.2016, the Learned Magistrate issued summons to the accused persons including the present Petitioner. She appeared before the Learned Trial Court and filed an application under Section 205 of the CrPC seeking exemption from personal appearance.

2d. According to the Petitioner, she is innocent and in no way connected with any offence as alleged. Actually, she was a Non-Executive Director of M/s. Tulsyan Papers Products Ltd. She was never in charge or responsibility to any day to day's affairs of the Accused No. 1 Company or ever taken any remuneration for such directorship. She was neither authorised signatory nor operating any bank account of the accused company.

2e. It is further contention of the Petitioner that she had resigned from the Board of Directors of the accused company on and from 2nd September, 2015 and said resignation was accepted by the Board of Directors of the Company on the same date and to that effect the Board of Directors of the accused Company intimated the factum of acceptance of resignation to the Registrar of Companies on 1st April, 2016. Despite the aforesaid facts, the Learned Magistrate was pleased to issue summons in a mechanical manner against the Petitioner. She is no way connected either directly or indirectly in the alleged offence. Consequently, the proceeding against the Petitioner is bad in law, which is required to be quashed for securing the ends of justice otherwise petitioner would be highly prejudiced.

SUBMISSIONS ON BEHALF OF THE PETITIONER:

3. Mr. Mondal along with Ms. Mitra, learned counsels appearing on behalf of the Petitioner submitted that the Opposite Party No. 2 has lodged a false and fabricated complaint against the Petitioner. She is no way connected with any of the alleged offences punishable under Sections 138/141 of the Negotiable Instruments Act, 1881. Petitioner has neither issued any cheque in question nor guilty of vicarious liability since she was not the Director of the Company during such period when alleged cheque was issued as such the instant proceeding is not at all maintainable against the Petitioner.

3a. It is further submitted that time and again the Hon'ble Supreme Court in number of decisions has laid down criteria under which High Courts may exercise its inherent power in order to quash the proceeding pending before any Court of law. The Hon'ble Supreme Court has held that 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 the same would amount to sheer abuse of process of the Court then High Courts can quash the proceeding without any delay.

3b. It is further submitted that the Learned Magistrate has failed to appreciate that that the Petitioner herein had resigned from the Company prior to commission of offences as alleged.

3c. It was further failed to appreciate the Section 141 of the Negotiable Instruments Act, 1881 incorporated for punishing those accused, who is guilty of 'Vicarious Liability'. The officers of a Company, who are engaged in the day-to-day affairs of the Company and when Company becomes an accused, it is important criteria that such officers need to be officers of the offending Company at the time of commission of the offence and such officer must also be factually involved in the day-to-day function of the Company. Here, in the instant case, the Petitioner has played no role during alleged commission of offence. Thus, Complaint lacks basic averments to attract the legal fiction infused under Section 141 of the N.I. Act. The Opposite Party No. 2, with the ulterior motive to malign the petitioner, has impleaded in the instant case. This principle has been propounded both by the Hon'ble High Court as well as Hon'ble Apex Court. In such view of the matter, continuance of the instant proceeding is a sheer abuse of the process of Court which should not be allowed to continue for a single day and same is liable to be quashed.

3d. The learned counsels further submitted that the Learned Trial Magistrate has also failed to consider that the Petitioner had never transacted with the Opposite Party No. 2 at any point of time as such continuation of the impugned proceeding qua the Petitioner is a clear abuse of the process of Court inasmuch as the Petitioner herein had resigned from the Directorship of the accused No. 1 Company prior to alleged commission of offence as such proceeding pending before the Learned Magistrate is liable to be quashed.

3e. Learned counsel appearing on behalf of the Petitioner has placed reliance of the following judgments to support his contention for quashing of the proceedings as follows:

1. ***S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another[1];***
2. ***K. K. Ahuja Vs. V. K. Vora and Another[2];***
3. ***Ashok Shewakramani and Others Vs. State of Andhra Pradesh and Another[3];***

[1] (2005) 8 SCC 89;
[2] (2009) 10 SCC 48;
[3] (2023) 8 SCC 473;

4. Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another[4];

5. National Small Industries Corporation Limited Vs. Harmeet Singh Paintal and Another[5];

6. Harshendra Kumar D. Vs. Rebatilata Koley and Others[6];

7. Anita Malhotra Vs. Apparel Exports Promotion Council and Another[7];

8. Ashoke Mal Bafna Vs. Upper India Steel Manufacturing and Engineering Company Limited[8];

SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTY NO. 2.

4. On the other hand, Mr. Surana along with Ms. Manot, learned counsels representing the Opposite Party No. 2 vehemently opposed the prayer of the Petitioner and further submitted that the Petitioner/accused No. 3 is one of the Directors of accused No. 1 Company, namely, M/s. Tulsyan Papers Products Ltd. She controlled and managed the Company along with other co-accused. The Opposite Party No. 2 also filed written notes of argument.

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[4] (2007) 3 SCC 693;
[5] (2010) 3 SCC 330;
[6] (2011) 3 SCC 351;
[7] (2012) 1 SCC 520;
[8] (2018) 14 SCC 202.

4a On or about 21.06.2012, the accused No. 1 Company had taken a loan of Rs. 5,00,000/= (Rupees Five Lakhs) only from Complainant/Opposite Party No. 2 upon proper receipt on the company letter head and under the Company's common seal.

4b. To discharge such existing legal debts/liabilities arising out of the aforesaid loan, accused No. 1 Company has issued an A/C Payee Cheque dated 02.06.2016 in favour of the Opposite Party No. 2 for a sum of Rs. 5,00,000/= (Rupees Five Lakhs) only drawn on Axis Bank, Burrabazar Branch. The said cheque was presented to its banker for encashment within the valid period but the same was returned with endorsement 'Insufficient Funds'. Despite issuing demand notice, accused persons failed to discharge their liability. Having no alternative, Opposite Party No. 2 had compelled to initiate proceeding against the accused persons. They are liable for commission of offences punishable under Sections 138/141 of the N.I. Act. Therefore, the instant Criminal Revisional application is liable to be dismissed.

4c. Learned counsel for the opposite party no. 2 has placed reliance of a judgment passed in the case of ***S.M.S. Pharmaceuticals Ltd v. Neeta Bhalla and Another*** to bolster his contention that liability arises from being a charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a Company. Conversely, a person, not holding any office or designation in a company, may be liable if he satisfies the main requirement of being in-charge of and responsible for the conduct of business of a company at the relevant time.

4d. It has further placed reliance of a judgment passed in the case of ***Krishna Murarai Poddar v. The State of West Bengal & Anr.*** in ***CRR No. 30 of 2016*** to support his contention that being Director of the Company and having taken part in the affairs of the Company, its management and policy making cannot simply shrug off his liability in commission of the contravention of law as alleged as such proceedings should be continued to unearth the truth.

4e. It has further placed reliance of a judgment passed in the case of ***Gunmala Sales Private Ltd v. Anu Mehta***[9] to support his contention that once a complaint is filed under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881, the basic averment is made that the Director was in charge or and responsible for the conduct of business of the Company at the relevant time when the offence was committed, the Magistrate can issue process against such Director and if the specific averment made against the Petitioner stating that she was very much involved in the day to day activity of

[9] **(2002) 1 SCC 234**

the Company and was involved in issuing the post-dated cheque, question of quashing of proceeding on the ground that she resigned from the Company does not arise. Therefore, the revisional application filed with mala fide intention to frustrate the claim of the Opposite Party No. 2 is required to be dismissed.

SUBMISSIONS ON BEHALF OF THE STATE:

5. Learned counsel appearing on behalf of the State has supported the contention of the Opposite Party No. 2 and further submitted that the Criminal Revisional application has no merit as such it is required to be dismissed.

DISCUSSIONS, ANALYSIS AND CONCLUSION OF THIS COURT:

6. Heard the rival arguments and submissions made on behalf of the parties and on perusal of the record as well as judgments referred by the parties, this Court finds it is admitted fact that the Petitioner was a Director of the accused No. 1 company till 1st September, 2015. She had resigned from the Board of Directors of the accused company on and from 2nd September, 2015 and said resignation was accepted by the Board of Directors of the Company on the same date and to that effect the Board of Directors of the accused Company intimated the factum of acceptance of resignation to the Registrar of Companies on 1st April, 2016. The said fact is confirmed with a Form DIR 12 annexed to the application. On the other hand, it is the allegation of the Opposite Party No. 2 that the Company has taken a loan of Rs. 5,00,000/= (Rupees Five Lakhs) only from Complainant/Opposite Party No. 2 upon proper receipt on the company letter head and under the Company's common seal on or about 21.06.2012. At that point of time, the present petitioner was Director of the Company and She was very much involved in day-to-day affairs of the Company. She knows about the loan taken by the Company and if the Company fails to repay the loan amount, being the Director of the Company, she is also liable for commission of such offence as alleged.

7. It is further case of the Opposite Party No. 2 that there were dues of the loan amount. Owing to such dues, the accused Company had issued post-dated cheque amounting to Rs. 5,00,000/= in favour of the Opposite Party No. 2 but that cheque was returned unpaid upon presentation. As such, proceedings under the Negotiable Instruments Act have been initiated against the accused persons including the present Petitioner.

8. Now, the question emerges whether the Petitioner herein is liable for commission of offence punishable under Sections 138/141 of the N.I. Act even admitted facts that she has resigned from the Company on or about 1st September, 2015?

9. The date of taken alleged loan amounting to Rs. 5,00,000/= by the Company is on 21.06.2012, when the Petitioner was a Director of the Company. An A/C Payee Cheque dated 02.06.2016 was issued by the Company in favour of the Opposite Party No. 2 for a sum of Rs. 5,00,000/= (Rupees Five Lakhs) only drawn on Axis Bank, Burrabazar Branch. The said cheque was presented to its banker for encashment within the valid period but the same was returned with endorsement 'Insufficient Funds'. Despite issuing demand notice, accused persons failed to discharge their liability. It reveals from the documents placed before this Court that the Petitioner was not a Director at the time of issuing cheque by the Company.

10. Whether counting of the date of commission of offence either from the date of taking loan or non-payment cheque amount after expiry of demand notice for payment is required to be ascertained. This Court is of the view that the date of counting commission of offence started from the expiry of 15 days from the receipt of demand notice for payment of cheque amount. This proposition can be ascertained from the Sections itself. This Court would like to refer the Sections 138/141 of the N.I. Act for ready reference and better understanding the legal position. The relevant part of the provisions is quoted as under:-

“**Section 138 of the N.I. Act reads as under: —**

138. Dishonour of cheque for insufficiency, etc., of funds in the account. *—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both :*

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a

notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation. — For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

11. Considering the aforesaid provision, it is clear that commission of offence and punishment shall apply only after satisfaction of three conditions as stipulated in Sub Sections (a) (b) and (c) of Section 138 of the N.I. Act, 1881. Section 138 is the Charging section creating criminal liability in case of dishonour of a cheque and its main ingredients are:

i) Issuance of a cheque,

ii) Presentation of the cheque,

iii) Dishonour of the cheque,

iv) Service of statutory notice on the person sought to be made liable and

v) Non-compliance or non-payment in pursuance of the notice within 15 days of the receipt of the notice.

12. It has been further seen from the above provision that Section 138 of the N.I. Act casts criminal liability punishable with imprisonment or fine or with both on a person who issues a cheque towards discharge of a debt or liability as a whole or in part and the cheque is dishonoured by the bank on presentation.

13. Section 141 of the N.I. Act reads as under:

> *"**S. 141. Offences by companies. —***
>
> *(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:*
>
> *Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:*
>
> *Provided further that where a person is nominated as a Director of a company by virtue of his holding any*

office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

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

Explanation.—For the purposes of this section,—

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

14. Similarly, Section 141 of the N.I. Act extends such criminal liability of a company to every person who at the time of the offence, was in charge of, and was responsible for the conduct of the business of the company. By a deeming provision contained in Section 141 of the Act, such a person is vicariously liable to be held guilty for the offence under Section 138 and should be punished accordingly.

15. Sections 138 and 141 of the said Act form part of Chapter XVII introduced in the Act by way of an amendment carried out by virtue of Act 66 of 1988 effective from 01.04.1989. These provisions were introduced with a view to encourage the culture of use of cheques and enhancing the credibility of the instruments. The Legislature has sought to inculcate faith in the efficacy of banking operations and use of negotiable instruments in business transactions. The penal provision is meant to discourage people from not honouring their commitments by way of payment through cheques. Section 139, occurring in the same chapter of the Act creates a presumption that the holder of a cheque receives the cheque in discharge, in whole or in part of any debt or other liability.

16. The words **Director, Manager, Secretary or other officer** of the company and **every person** as mentioned in Section 141 of the N.I. Act have well discussed by the Hon'ble Supreme Court in the case of ***S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla*** referred by both the parties herein. The Hon'ble Supreme Court held in Paragraphs 8 to 12 as under:

> *"8. The officers responsible for conducting the affairs of companies are generally referred to as directors,*

managers, secretaries, managing directors, etc. What is required to be considered is: Is it sufficient to simply state in a complaint that a particular person was a director of the company at the time the offence was committed and nothing more is required to be said. For this, it may be worthwhile to notice the role of a director in a company. The word "director" is defined in Section 2(13) of the Companies Act, 1956 as under:

"2. (13) 'director' includes any person occupying the position of director, by whatever name called;"

There is a whole chapter in the Companies Act on directors, which is Chapter II. Sections 291 to 293 refer to the powers of the Board of Directors. A perusal of these provisions shows that what a Board of Directors is empowered to do in relation to a particular company depends upon the roles and functions assigned to directors as per the memorandum and articles of association of the company. There is nothing which suggests that simply by being a director in a company, one is supposed to discharge particular functions on behalf of a company. It happens that a person may be a director in a company but he may not know anything about the day-to-day functioning of the company. As a director he may be attending meetings of the Board of Directors of the company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint sub-committees consisting of one or two directors out of the Board of the company who may be *made responsible for the day-to-day functions of the company. These are matters which form part of resolutions of the Board of Directors of a company. Nothing is oral. What emerges from this is that the role of a director in a company is a question of fact depending on the peculiar facts in each case. There is no universal rule that a director of a company is in charge of its everyday affairs. We have discussed about the position of a director in a company in order to illustrate the point that there is no magic as such in a particular word, be it director, manager or secretary. It all depends upon the respective roles assigned to the officers in a company. A company may have managers or secretaries for different departments, which means, it may have more than one manager or secretary. These officers may also be authorised to issue cheques under their signatures with respect to affairs of their respective departments. Will it be possible to prosecute a secretary of Department B regarding a cheque issued by the secretary of Department A which is dishonoured? The secretary of Department B may not be knowing anything about issuance of the cheque in question. Therefore, mere use of a particular designation of an officer without more, may not be enough by way of an averment in a complaint. When the requirement in Section 141, which extends the liability to officers of a company, is that such a person should be in charge of and responsible to the company for conduct of business of the company, how can a person be subjected to liability of criminal prosecution without it being averred* *in the complaint that he satisfies those requirements. Not every person connected with a company is made liable under Section 141. Liability is cast on persons who may have something to do with the transaction complained of. A person who is in charge of and responsible for conduct of business of a company would naturally know why the cheque in question was issued and why it got dishonoured.*

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

10. 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 the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a company at the relevant time. 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 the 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."*

17. The Hon'ble Supreme Court further analysed in the aforesaid referred case that the question of what should be the averments in a criminal complaint for consideration by the Learned Magistrate before issuing the process for vicarious or criminal liability of the officer of the company. While analysis the aforesaid question, the Hon'ble Supreme Court gone through various judgments of the Hon'ble Supreme Court and High Courts on the issue are discussed in Paragraphs No. 13 to 18.

> *"13. The question of what should be the averments in a criminal complaint has come up for consideration before various High Courts in the country as also before this Court.* ***Secunderabad Health Care Ltd. v. Secunderabad Hospitals (P) Ltd. [(1999) 96 Comp Cas 106 (AP)]*** *was a case under the Negotiable Instruments Act specifically dealing with Sections 138 and 141 thereof. The Andhra Pradesh High Court held that every director of a company is not automatically vicariously liable for the offence committed by the company. Only such director or directors who were in charge of or responsible to the company for the conduct of business of the company at the material time when the offence was committed alone shall be deemed to be*

guilty of the offence. Further it was observed that the requirement of law is that: (Comp Cas p. 112)

"[T]here must be clear, unambiguous and specific allegations against the persons who are impleaded as accused that they were in charge of and responsible to the company in the conduct of its business at the material time when the offence was committed."

14. The same High Court in ***V. Sudheer Reddy v. State of A.P. [(2000) 107 Comp Cas 107 (AP)]*** *held that: (Comp Cas p. 110)*

"The purpose of Section 141 of the Negotiable Instruments Act would appear to be that a person [who appears to be] merely a director of the company cannot be fastened with criminal liability for an offence under Section 138 of the Negotiable Instruments Act unless it is shown that he was involved in the day-to-day affairs of the company and was responsible to the company."

Further, it was held that allegations in this behalf have to be made in a complaint before process can be issued against a person in a complaint. To the same effect is the judgment of the Madras High Court in ***R. Kannan v. Kotak Mahindra Finance Ltd. [(2003) 115 Comp Cas 321 (Mad)] In Lok Housing and Constructions Ltd. v. Raghupati Leasing and Finance Ltd. [(2003) 115 Comp Cas 957 (Del)]*** *the Delhi High Court noticed that there were clear averments about the fact that Accused 2 to 12 were officers in charge of and responsible to the company in* *the conduct of the day-to-day business at the time of commission of the offence. Therefore, the Court refused to quash the complaint. In* ***Sunil Kumar Chhaparia v. Dakka Eshwaraiah [(2002) 108 Comp Cas 687 (AP)]*** *the Andhra Pradesh High Court noted that there was a consensus of judicial opinion that: (Comp Cas p. 691)*

"[A] director of a company cannot be prosecuted for an offence under Section 138 of the Act in the absence of a specific allegation in the complaint that he was in charge of and responsible to the company in the conduct of its business at the relevant time or that the offence was committed with his consent or connivance."

The Court has quoted several judgments of various High Courts in support of this proposition. We do not feel it necessary to recount them all.

15. Cases have arisen under other Acts where similar provisions are contained creating vicarious liability for officers of a company in cases where primary liability is that of a company. ***State of Karnataka v. Pratap Chand [(1981) 2 SCC 335 : 1981 SCC (Cri) 453]*** *was a case under the Drugs and Cosmetics Act, 1940. Section 34 contains a similar provision making every person in charge of and responsible to the company for the conduct of its business liable for offence committed by a company. It was held that a person liable for criminal action under that provision should be a person in overall control of the day-to-day affairs of the* *company or a firm. This was a case of a partner in a firm and it was held that a partner who was not in such overall control of the firm could not be held liable. In* ***Municipal Corpn. of Delhi v. Ram Kishan Rohtagi [(1983) 1 SCC 1 : 1983 SCC (Cri) 115]*** *the case was under the Prevention of Food Adulteration Act. It was first noticed that under Section 482 of the Criminal Procedure Code in a complaint, the order of a Magistrate issuing process against the accused can be quashed or set aside in a case where the allegation made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which are arrived at against the accused. This emphasises the need for proper averments in a complaint before a person can be tried for the offence alleged in the complaint.*

16. In ***State of Haryana v. Brij Lal Mittal [(1998) 5 SCC 343 : 1998 SCC (Cri) 1315]*** *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.*

17. ***K.P.G. Nair v. Jindal Menthol India Ltd. [(2001) 10 SCC 218 : 2002 SCC (Cri) 1038]*** *was a case under the Negotiable Instruments Act. 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 the requirement of Section 141 was not met and the complaint against the accused was quashed. Similar was the position in* ***Katta Sujatha v. Fertilizers & Chemicals Travancore Ltd. [(2002) 7 SCC 655 : 2003 SCC (Cri) 151]*** *This was a case of a partnership. It was found that no allegations were contained in the complaint regarding the fact that the accused was a partner in charge of and was responsible to the firm for the conduct of business of the firm nor was there any allegation that the offence was made with the consent and connivance or that it was attributable to any neglect on the part of the accused. It was held that no case was made out against the accused who was a partner and the complaint was quashed. The latest in the line is the judgment of this Court in* ***Monaben Ketanbhai Shah v. State of Gujarat [(2004) 7 SCC 15 : 2004 SCC (Cri) 1857]****. It was observed as under: (SCC p. 17, para 4)*

"4. It is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole. If the substance of the allegations made in the complaint fulfil the requirements of Section 141, the complaint has to proceed and is required to be tried with. It is also true that in construing a complaint a hypertechnical approach should not be adopted so as to quash the same. The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind. These provisions create a statutory presumption of dishonesty, exposing a person to criminal liability if payment is not made within the statutory period even after issue of notice. It is also true that the power of quashing is required to be exercised very sparingly and where, read as a whole, factual foundation for the offence has been laid in the complaint, it should not be quashed. All the same, it is also to be remembered that it is the duty of the court to discharge the accused if taking everything stated in the complaint as correct and construing the allegations made therein liberally in favour of the complainant, the ingredients of the offence are altogether lacking. The present case falls in this category as would be evident from the facts noticed hereinafter."

> *It was further observed: (SCC pp. 18-19, para 6)*
>
> *"6. … The criminal liability has been fastened on those who, at the time of the commission of the offence, were in charge of and were responsible to the firm for the conduct of the business of the firm. These may be sleeping partners who are not required to take any part in the business of the firm; they may be ladies and others who may not know anything about the business of the firm. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and establishes that fact. The present case is of total absence of requisite averments in the complaint."*

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."*

18. The averments made in the petition of complaint particularly in Paragraph Nos. 3 and 4 are, *inter alia*, as under:

> 3. That the Accused No. 2 is the Signatory of the Cheque of the Accused No. 1 and is the person who at the time of offence was committed was in charge of and was responsible to the affairs and management and for

> the conduct of the business of the Accused No. 1 Company. The said Accused Nos. 2 and 4 were in charge of management of day to day affairs of the Accused No. 1 of the company. The said Accused No. 1 company is being controlled and managed by the Accused Nos. 2, 3 and 4.
>
> 4. That on 21.06.2012, the accused persons have taken a loan of Rs. 5,00,000/- (Rupees Five Lakh) only upon the proper receipt on the letter head of the company, the accused No. 1, and under the company's common seal and in discharge of their existing legal debts and/or liabilities arising out of the above referred loan, they had issued and made over the complainant an A/c payee cheque in their favour.

19. On the given facts and circumstances, it reveals Cheque dated 02.06.2016 amounting to Rs. 5,00,000/= was issued by the Company. Accused No. 2 is the Signatory of the cheque of Accused No. 1 and is the person who at the time of offence was committed was in charge of and was responsible to the affairs and management and for the conduct of the business of the accused No. 1 company. Furthermore, complainant presented the Cheque dated 02.06.2016 to its banker, namely, Central Bank of India, Brabourne Road Branch, P.S. - Burabazar, Kolkata - 700007 for encashment within the validity period but the same was returned with endorsement 'Insufficient Funds' on 03.06.2016.

20. A demand notice dated 13.06.2016 was issued through its Advocate, Mr. Dhiraj Kumar Pandey upon the accused persons demanding payment of the entire amount of Rs. 5,00,000/= only within 15 days from the date of receipt of the notice. It is contended by the Opposite Party No. 2/Complainant that the said notice was received by the accused persons on 15.06.2016. It was ascertained from Speed Post Article tracking result. In spite of receipt of notice, the accused failed to make any payment till filing of the complaint.

21. The period between date of cheque dated 02.06.2016 to receipt of demand notice by the accused persons on 15.06.2016, the accused No. 3, Smt. Nirmala Devi Tibrewal was not a Director of the Company, namely, M/s. Tulsyan Papers Products Pvt. Ltd. as reveals from a Form DIR 12 of the Companies Act, 2013. It is confirmed that the Director, Smt. Nirmala Devi Tibrewal is not associated with the Company with effect from 02.09.2015 due to resignation under Section 168 of the Companies Act, 2013. It was the contention of the complainant that a post-dated cheque was issued by the accused persons is also not averted in the complaint or corroborated by the complainant in the instant case. Therefore, no ingredients for the offence as alleged have been fulfilled against the present Petitioner in any manner to constitute offence punishable under Sections 138/141 of the N.I. Act, 1881.

22. The requirement of Section 141 is that the person sought to be made liable should be in charge or and responsible for the conduct of the business of the company at the relevant time of commission of offence but here the present petitioner was not a Director of the company, when the offence committed i.e. between the period i.e. date of cheque dated 02.06.2016 to receipt of demand notice by the accused persons on 15.06.2016 and non-payment of alleged cheque amount of Rs. 5,00,000/= (Rupees Five Lakh) only.

23. This case squarely falls in Categories 1 and 5 mentioned in the celebrated judgment of Hon'ble Supreme Court passed in the case of ***State of Haryana and Others Vs. Bhajan Lal and Others***[10] in Paragraph 102 as under:

> *"102. This Court in the backdrop of interpretation of various relevant provisions of CrPC 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 of the Constitution of India or the inherent powers under*

[10] AIR 1992 SUPREME COURT 604;

Section 482 CrPC gave the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of the court or otherwise to secure the ends of justice. Thus, this Court made it clear that 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 to 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 Act concerned (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 Act concerned, 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."

24. Accordingly, this Court can exercise its inherent power under Section 482 of the Cr.PC to prevent the abuse of the process of Court or otherwise to secure the end of justice.

25. In the light of aforesaid discussion and judgments referred by the Parties, this Court is of the view that the proceedings being Complaint Case No. C/98169 of 2016 filed under Sections 138/141 of the Negotiable Instruments Act, 1881 pending before the Court of the Learned Metropolitan Magistrate, 15th Court at Calcutta should not be continued insofar as the Petitioner is concerned and, accordingly, the same stands quashed.

26. Consequently, **CRR 1752 of 2017** is, thus, **allowed**. Connected applications, if any, are also, thus, disposed of with aforesaid terms.

27. Case Diary, if any, is to be returned to the learned Advocate for the State.

28. Let a copy of this judgment and order be sent to the Learned Court below for information and taking necessary action.

29. Interim order, if any, stands vacated.

30. Parties shall act on the server copies of this Judgment uploaded on the official website of this Court.

31. Urgent photostat certified copy of this judgment, if applied for, is to be given as expeditiously to the parties on compliance of all legal formalities.

(Ajay Kumar Gupta, J)

P. Adak (P.A.)