

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

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

CRR 3398 of 2022

**Subhash Kedia
Vs.
The State of West Bengal & Anr.**

For the Petitioner : Mr. Pratim Priya Das Gupta
Mr. Aasish Choudhary
Ms. Meera Agarwal

For the Opposite Party No.2 : Mr. Ritzu Ghosal
Mr. Chandan Banerjee
Mr. Abhra Jena
Mr. Anirban Ghosh

Heard on : 30.08.2024

Judgement on : 10.09.2024

Ajoy Kumar Mukherjee, J.

1. This an application wherein petitioner has prayed for setting aside order dated 25th July 2022 passed by learned Additional Session Judge, 1st track court, Durgapur in Criminal Revision no. 17 of 2021, whereby the court below had affirmed the order passed by learned judicial Magistrate 3rd court Durgapur, in C.R case no. 258 of 2020.

2. The brief background in the present case is that a complaint proceeding being aforesaid C.R case no. 258 of 2020 was initiated by opposite party no. 2 herein under section 138 of the Negotiable Instrument

Act, 1881 (in short N.I Act), with the allegations that as per work order being no. ETPTUL/OE/18-19/01 dated 9th may 2018 as offered by the petitioner herein for execution and erection of 33 KV DVC transmission line, the opposite party no. 2 herein completed the assigned work and raised a bill amounting to Rs. 1,02,75,792/- and for which six post dated cheques were issued. Further allegation made by opposite party 2 is that the opposite party no.2 presented the said cheques with its banker wherein all the cheques returned unpaid with the remark “payments stopped”. Thereafter opposite party no. 2 sent demand notice but despite receipt of notice, the petitioner did not pay the dishonoured cheque amount within 15 days and for which the aforesaid impugned proceeding was initiated by opposite party no. 2 herein.

3. The filing court took cognizance upon the alleged offence and thereafter transferred the same to Judicial Magistrate 3rd court, Durgapur, for inquiry. The transferee court after examining opposite party no 2 was pleased to dismiss the said complaint under section 203 of the Code of Criminal Procedure with the observation that the expression “as well as the company” used in section 141 of the N.I Act implies that if the company has not been made an accused, then such complaint would not be maintainable. In other words statutory prescription under the said provision is mandatory in nature.

4. Being aggrieved by the said order the complainant preferred a Revisional Application before Additional Session Judge being aforesaid Criminal Revision no. 17 of 2021 and the Revisional Court vide impugned order dated 25th July 2022, set aside the order dated 26th March 2021

passed by the Trial Court and directed the Trial Court to dispose of the matter *denovo* with the observation that Director can be held vicariously liable for a company's criminal offence, if there are specific averment to that effect made in the petition of complaint and secondly technicality should not be relied upon for the purpose of defeating legitimate claim of the citizen.

5. Being aggrieved by and dissatisfied with the said observation of the court below accused person has preferred the present Application contending that the order impugned has been passed without adhering to the law as laid down by the Apex Court and also the statutory provision. It is further argued that on bare perusal of the order impugned, it is evident that the petitioner herein was not made a party to the said proceeding and no opportunity of hearing was afforded to the petitioner. Referring section 401(2) of the code he submits that no order under that section shall be made to the prejudice of the accused or other person, unless he had an opportunity of being heard.

6. It is further argued that from the complaint it is evident that there is no specific averment as to the fact that the petitioners are in charge of or responsible for day to day business. In catena of decisions it has been settled that in order to make a Director liable for commission of offence under section 138 of the N.I Act, it is mandatory that the complaint must reflect specific averment that said Director was in charge of and was responsible to the company for the conduct of its business and in absence of such averment, the proceeding is liable to be quashed

7. The next limb of argument advanced on behalf of petitioner is that where the offence under section 138 of N.I Act has been committed by a

company, the company must be made an accused in order to continue the proceeding and unless the company has been made an accused, the Director of said company cannot be prosecuted even if said Director was in charge of company at the time of the offence. Therefore making the company as an accused in the petition of complain is a sine quo non to prosecute a director of said company and learned Court below wrongly observed that it was merely procedural defect. Accordingly the petitioner prayed for setting aside the order impugned Petitioners in this context relied upon following judgments

(a) *Siby Thomas Vs. Somany Ceramics Limited* reported in (2024) 1 SCC 348

(b) *Himanshu Vs. B. Shivamurthy & Anr* reported in (2019) 3 SCC 797

(c) *AneetaHada Vs. Godfather Travels & Tours (p) Ltd.* Reported in (2012) 5 SCC 661.

(d) *Manish Kumar Gupta Vs. Mittal Trading Company* reported in 2024 SCC Online Sc 1732.

(e) *HarikisanVithaldasjiChandak& Ors Vs. Syed Mazaruddin Syed Sghabuddin& Ors* reported in 2023 SCC Online BOM 955.

8. Mr. Ritju Ghosal learned counsel appearing on behalf of the opposite party submits that in the instant application petitioner has intentionally prevented himself from annexing the agreement between the parties which is the inception and primary document corroborating the liability of petitioner, who is the signatory of the said agreement. In the said agreement it was undertaken that all the six post-dated cheques as stated in the

agreement are genuine and would be encashed only after confirmation from Director of Easter Track Udyog, through WhatsApp message or SMS. All the six cheques got bounced even after successful start of DVC connection. Thus the liability of petitioner cannot be waved. Furthermore the work in terms of work order had already been concluded and the work order dated 09.05.2018 contains the signature of the petitioner which established the fact that the petitioner herein being the Director of the accused/company was involved in day to day business of the accused company. Furthermore on perusal of letter dated 3rd September 2019, it can be seen that the petitioner herein has addressed the said letter to Deputy Chief Engineer, DVC intimating about the completion of the transmission line and terminal equipment of the accused company done, by the complainant company herein.

9. Mr. Ghoshal accordingly submits that on the anvil of the above-mentioned circumstances, it is evident that the ground taken by the petitioner at the instant application stating that the complain does not have any averment against the petitioner or that he was not in charge of and was not responsible to the company for the conduct of the business is absolutely baseless and frivolous.

10. He further submits that in regard to the dishonoured cheque the petitioner herein was served with a demand notice under section 138 of the N.I Act, and it was served in the office of the accused/company and for non-payment of the cheque amount, the present proceeding has been initiated. The Director of the company and the sole company conductor of the business company was made party in the instant case as the liability solely

falls upon of the petitioner herein. The accused company was not made a party in the instant complaint due to mere clerical error but that does not take away the vicarious liability of the Director herein and the same was appreciated by the Court below in the impugned order, which is also well reasoned and it is established procedure that the exercise of court's power cannot be defeated by technical conciliation of form and procedure. Present application has been filed only to cause prejudice to the petitioner.

11. Mr. Ghosal further submits that though the accused company has not been made an accused in the complaint but such defect is a curable defect and he seeks liberty from this court for impleading company/accused in the complaint by way of suitable amendment in the cause title of the complaint. Accordingly Mr. Ghosal concluded by saying that the order impugned does not suffer from any illegality or impropriety and as such it does not call for interference by this court. In support of his argument Mr. Ghosal relied upon following judgment:-

a) Appaji Krishnaji Kulkarni Vs. Bhimappa Tippanna Paramagouda and others reported in **1958 SCC OnLine Kar 157**

b) Rajeshbhai Muljibhai Patel and others Vs. State of Gujarat and Another reported in **(2020) 3 SCC 794.**

c) Abraham Memorial Educational Trust Vs. C. Suresh Babu reported in **2012 (5) CTC 203.**

12. I have considered submissions made by both the parties.

13. In the present context, on bare perusal of the complaint it appears that complainant in paragraph 4 has clearly admitted that the

accused/company above named had issued six post-dated cheques for payment with date of presentation to the complainant Banker. It is not in dispute in the present context that no demand notice in compliance with section 138 of N.I Act was given to the accused/company.

14. 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.

15. 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.”

“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.”

16. 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.”

“12. The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.”

“13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company 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.”

17. 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.

18. 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.

19. 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 was only given to the petitioner herein though the cheques were admittedly issued by accused/company. It is one of the basic requirements as 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 discloses that the cheques were issued by the said company through its authorized signatory no process could have been issued against the present petitioner, only because he had signed on behalf of the said company as its authorized signatory.

20. 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 or not. Law in this context is no more *res integra*. 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)**.

21. 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.

22. In view of aforesaid settled proposition of law and also in view of the fact that the petitioner had issued the cheque as authorized signatory of the company, the present proceeding under section 138 is not maintainable 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.

23. In such view of the matter **CRR 3398 of 2022** is allowed. The impugned proceeding being C.R. Case no. 258 of 2020 presently pending before learned Judicial Magistrate, 3rd Court, Durgapur 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.)