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

PRESENT:

**THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE**

**C.R.R. 3094 of 2017**

**Brajesh Kr. Agarwal**
**Versus**
**Shantinath Comercial Services Pvt.**

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| For the Petitioner | : | Mr. Pinak Mitra<br>Ms. Rittwika banerjee |
| For the Respondent | : | Mr. K.C. Garg<br>Ms. Sunita Agarwal |
| Heard on | : | 12.12.2024 |
| Judgment on | : | 18.12.2024 |

**Dr. Ajoy Kumar Mukherjee , J.:**

**1.** Petitioner's case is that he was employed at DS Metals Pvt. Ltd. for several years and subsequently appointed as Non-executive director though he was not in charge of day to day affairs of the company, nor he was authorized to sign any cheque on behalf of the company. Petitioner's further case is that he had resigned from his post of employee director with effect from 18.05.2015 by submitting a letter of resignation and the same has been accepted by the Registrar of Companies West Bengal, which is statutory authority governing companies.

**2.** Petitioner states that the opposite party herein initiated a proceeding under section 138 read with section 141 of the Negotiable Instrument Act 1881( in short NI Act) before the Court below which was registered as complaint case no. C/39232/2015 wherein the petitioner has been arraigned as one of the accused persons. The allegation made out in the written complainant is that the said company namely DS Metals Pvt. Ltd. issued a cheque dated 29th May, 2015 for a sum of Rs. 25 laksh in favour of the complainant and the same returned unpaid on 22.08.2015 with the endorsement "fund insufficient". Thereafter the complainant issued a notice on 8th September, 2015 which was received by accused no.1/ company on 11.09.2015 and the other two accused persons on 09.09.2015 and despite receipt of the same, the accused persons have willfully neglected to make the payment in discharge of their debt or their liability.

**3.** Learned court below after taking cognizance has been pleased to issue process against the company/accused and other accused persons including the present petitioner.

**4.** Being aggrieved by the said proceeding Mr. Mitra, learned counsel appearing on behalf of the petitioner submits that he has not signed the cheque which alleged to have been dishonored and the petitioner was neither managing the company nor is in charge of the day to day affairs of the company. He further submits that the allegations made in the complaint are out and out false and do not constitute the ingredients of the alleged offence, so far as present petitioner is concerned.

**5.** Mr. Mitra further argued that no specific averment has been made against the petitioner and as such it does not fulfill the essential ingredients of Section 141 of the NI Act. The petition of complaint has failed to mention the specific role of the petitioner in order to link him to the offence as alleged in the complaint. He has been arraigned as an accused merely because he was an erstwhile director of the company. He further submits that the court below mechanically issued process against the petitioner, without considering that the complaint does not make out any case, much less prima facie case against the petitioner, which is a condition precedent to set criminal law in motion. In the said complaint there is no specific averments/allegation which constitute any nexus between the petitioner and the alleged offence and /or connects the petitioner with the alleged offence in any way, so as to justify the process issued against him.

**6.** Mr. Mitra further argued that judicial process should not be an instrument of oppression or needless harassment. The complaint was filed by the opposite party herein impleading an employee director who has resigned from the post before issuance of cheque and was not in charge of the day to day affairs of the company. Accordingly further continuance of the present proceeding will be abuse of the process of the court, so far as present petitioner is concerned and accordingly he prayed for quashing of the impugned proceeding.

**7.** Mr. Garg learned counsel appearing on behalf of the opposite party complainant denied the legality and validity of form no. DIR 11. His contention is that form No. DIR 12 is to be submitted by the company but since no form No. DIR 12 has been submitted disclosing acceptance of resignation by the company, the petitioner is still director of the company namely DS Metals Pvt. Ltd. and in this context relying upon the balance sheet, directors report and form No. AOC 4 obtained from the office of the Registrar of Companies, West Bengal he pointed out that the petitioner was/is director of the company. He further contended that petitioner being director of the company looking after day to day affairs and business management of the company and therefore, responsible for every act done by the company. In the petition of complaint specific role has been attributed against the petitioner.

**8.** Mr. Garg further submitted that the learned Magistrate had carefully scrutinized the materials brought on record and find out the truthfulness of the statement and came to a conclusion that prima facie it has been established that the accused has committed the offence and the court below after applying his judicial mind to the facts and circumstances of the case and materials on record came to a conclusion that the case is maintainable against the accused and thereafter he issued process. Mr. Garg streusnously argued that petitioner was /is director of the company, when the aforesaid cheque was issued. Accordingly he prayed for dismissal of the present application.

**9.** I have considered submissions made by the parties.

**10.** On perusal of form no DIR-11, it appears that the appointment of the petitioner Brajesh Kumar Agarwal in the said company was on 16.08.2012 and from Colum no. 4, it further appears that date of his filing resignation with the company is on 18.05.2015 and the effective date of resignation specified in the notice of resignation is also 18.5.2015, though no conformation was received form the company. The impugned cheque admittedly is dated 29.5.2015 i.e. almost after 11 days after the aforesaid date of resignation Mr. Gorg in this context strenuously argued that he might have sent resignation on 18.5.2015 but there is nothing to show that the company has accepted such resignation or the company has taken any resolution in its annual general meeting, accepting such resignation. On the contrary it appears from director's report dated 31st August 2015 that the petitioner's name is appearing as director as on the date. Auditor's report also suggest that the written representation received from the directors discloses that none of the directors including the present petitioner is disqualified as on 31 march 2016.

**11.** In reply learned counsel appearing on behalf of the petitioner submits that Form 32 clearly suggest that the petitioner was posted as Non-executive director of the said company who sent his resignation on 18.05.2015 and the company received such resignation on 19.05.2015 as appearing form the track report. In this context he referred Section 168(2) of the Companies Act which states that the resignation of a director shall take effect from the date on which the notice is received by the company or the date if any specified by the director in the notice, whichever is later and in the proviso it is also being made clear that the director who has resigned, shall be liable even after his resignation, for the offences which occurred during his tenure. In this context he further contended that Rule 16 of Companies (appointment and qualification of director) rules 2014 states where a director has resigned from his offence shall within a period of 30 days from the date of resignation, forward to the Registrar a copy of the resignation along with reason for the resignation in DIR-11 along with the fees as provided in the Companies (registration offices and fees) Rules 2014 and Rule-15 provides, the company shall within 30 days from the date of receipt of notice of resignation from a director intimate the Registrar in form DIR -12 and will post the information on its Website. Petitioner showing annexed documents submits that in his resignation letter, he has clearly mentioned that the resignation has been made with immediate effect and he has also paid the requisite fees as prescribed in Rule 14 and as such he cannot be held responsible for the offence, if any, in respect of the impugned cheque dated 29.5.2015.

**12.** On perusal of the written complain it further appears that it has only been averred in paragraph 2 of the complaint that accused no. 1 is a company dealing in metals and other article and accused no. 2 and 3 are the directors of accused no. 1 company and at all material time they were looking after the day to day affairs of accused no. 1. No specific averments has been attributed against the present petitioner in the complaint that petitioner was in charge of the company's business at the time of the offence or is liable for guilty of committing the offence. It further appears from Form No. 32 that the petitioner so long was in the company, was posted as Non-executive director. Section 141(1) of the N.I Act used the words "every person, who at the time the offence was committed" which is significant and it clearly indicates that the criminal liability of the offender must be determined on the date, the offence is alleged to have been committed.

**13.** Liability of a Non-executive director has also been discussed by the Apex Court in **Sunita Palita and others Vs. Panchami Stone Quarry, (2022) 10 SCC 152** wherein it has been specifically held that three categories of persons are covered by section 141 of the N.I Act, firstly the company who committed the offence as alleged, secondly everyone who was in charge of or was responsible for the business of the company and thirdly any other person who was a director or a manager or a secretary or officer of the company with whose convenience or due to whose neglect the company had committed the offence. Paragraph 42 of the said judgment runs as follows :-

> "*42. Liability depends on the role one plays in the affairs of a company and not on designation or status alone as held by this Court in S.M.S. Pharmaceuticals [S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89 : 2005 SCC (Cri) 1975] . The materials on record clearly show that these appellants were independent, non-executive Directors of the company. As held by this Court in Pooja Ravinder Devidasani v. State of Maharashtra [Pooja Ravinder Devidasani v. State of Maharashtra, (2014) 16 SCC 1 : (2015) 3 SCC (Civ) 384 : (2015) 3 SCC (Cri) 378] a non-executive Director is not involved in the day-to-day affairs of the company or in the running of its business. Such Director is in no way responsible for the day-to-day running of the accused Company. Moreover, when a complaint is filed against a Director of the company, who is not the signatory of the dishonoured cheque, specific averments have to be made in the pleadings to substantiate the contention in the complaint, that such Director was in charge of and responsible for conduct of the business of the Company or the Company, unless such Director is the designated Managing Director or Joint Managing Director who would obviously be responsible for the company and/or its business and affairs."* (emphasis added)

**14.** In the present context apart from the fact that the petitioner herein is a Non-executive director and he is also not the signatory of the cheque and that he had tendered his resignation 11 days before the commission of alleged offence and that his letter of resignation was received by the company on very next day, if I look to the averments and allegation in the complaint I do not find any specific allegation with respect to the role played by the petitioner in his capacity as non executive director in committing the alleged offence.

**15.** In **SMS Pharmaceuticals Ltd. Vs. Neeta Bhalla, (2005) 8 SCC 89**, Supreme Court pointed out that the requirement of Section 141 of N.I. Act is that there must be specific averment in the complaint that the person sought to be made liable was in charge of and responsible for the conduct of the business of the company at the relevant time. Para 19 reads as follows:-

> *"**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 question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under* Section 141 *of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of* Section 141 *is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.*
>
> *(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under* Section 141 *of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under* Section 141. *So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of* Section 141.*"*

**16.** Same view reiterated in Second SMS Pharmaceuticals Ltd. Case reported in (2007) 4 SCC 70 wherein Paragraph 16 runs as follows:-

> *"**16.** Section 141 of the Act does not say that a Director of a company shall automatically be vicariously liable for commission of an offence on behalf of the Company. What is necessary is that sufficient averments should be made to show that the person who is sought to be proceeded against on the premise of his being vicariously liable for commission of an offence by the Company must be in charge and shall also be responsible to the Company for the conduct of its business."*

**17.** In **Siby Thomas Vs. Somany Ceramics Limited (2024) 1 SCC 348**, relying upon ratio laid down in *Ashok Shewakramani Vs. State of AP, (2023) 8 SCC 473* held that in a proceeding under Section 138 of N.I. Act vicarious liability would be attracted only when the ingredients of Section 141 (1) of the N.I. Act are satisfied. Relevant Paragraph 18 is quoted below:-

> *"**18.** Thus, in the light of the dictum laid down in Ashok Shewakramani case [Ashok Shewakramani v. State of A.P., (2023) 8 SCC 473 : (2023) 4 SCC (Civ) 116 : (2023) 3 SCC (Cri) 568 : 2023 INSC 692] , it is evident that a vicarious liability would be attracted only when the ingredients of Section 141(1) of the NI Act, are satisfied. It would also reveal that merely because somebody is managing the affairs of the company, per se, he would not become in charge of the conduct of the business of the company or the person responsible to the company for the conduct of the business of the company. A bare perusal of Section 141(1) of the NI Act, would reveal that only that 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 alone shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished."*

**18.** Therefore it is settled law that without any specific role attributed and the role played by the petitioner and in the absence of specific averment made in the complaint that such director was in charge of and responsible for conduct of the business of the company at the time offence was committed, he cannot even be held vicariously liable for the offence committed by the company.

**19.** In view of above discussion, the complaint case no. C 39232 of 2015 as against the present petitioner namely Brajesh Kumar Agarwal, stands quashed.

**20.** CRR 3094 of 2017 thus stands allowed.

**21.** Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

**(Dr. AJOY KUMAR MUKHERJEE, J.)**