IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.R. 865 of 2011

Polar Industries Ltd. & Ors.
-Vs-
The State of West Bengal & Anr.

For the Petitioners (Amicus Curiae)	: Mr. Apalok Basu
For the Opposite Party No.2	: Mr. Dwaipayan Basu Mallick Ms. Sweta Chakraborty
Heard on	: 15.04.2024, 15.05.2024
Judgment on	: 06.05.2025

Ananya Bandyopadhyay, J.:-

1. The instant revisional application has been filed by the petitioner praying for quashing of the proceedings in connection with the complaint case no. C-30925 of 2010 (T.R. No.1291 of 2018) under Sections 138/141 of the Negotiable Instrument Act, 1881, as amended upto date pending before the Learned 14th Metropolitan Magistrate, Calcutta and all the orders passed therein including the order dated October 27, 2008 thereby taking cognizance and order dated November 18, 2008 thereby issuing process against the petitioners.

2. The grievance of the petitioners' is succinctly expressed as follows:-

3. The petitioner no.1 had been a company duly registered under the Companies Act 1956 having its registered office at 51, Ezra Street, 2nd Floor, Kolkata – 700001 (hereinafter referred to as the said company).
4. The petitioner nos. 2 and 3 were the Directors of the petitioner no.1 company administered and supervised the policy decisions of the said company in connection to and relate with the daily functioning of the same.
5. The petitioner no.4 was the Vice President of the company and had resigned with effect from 30th October, 2009.
6. The petitioner no.5 was the General Manager of Accounts & Finance, (Sumach Division) of the said company and had resigned with effect from 30th September, 2009.
7. The opposite party no.2 had been a company incorporated under the provisions of the Companies Act, 1956 having its registered office at 23A, Netaji Subhas Road, 10th Floor, Kolkata-700001 represented by one Ashok Kumar Chokhani claiming to be the Director of the complainant-company.
8. The opposite party no.2 had initiated the instant case being complaint case no. C-30925/2008 under Sections 138/141 of the Negotiable Instruments Act 1881 as amended upto date against the petitioners before the Court of the Learned Chief Judicial Magistrate, Calcutta.
9. Allegedly an advance of Rs.20 lakhs banning payment of interest was accepted by the said company from the opposite party no.2 on 20th January, 2005 as recorded in the accounts of Polar Industries Limited (Sumach Division). An amount of Rs.10 lakhs was paid vide cheque no.207774 dated

27.10.2007 drawn on HDFC Bank by the said company to the opposite party no.2 against duly acknowledged receipt.

10. Another cheque being cheque no.336321 dated 31st July 2008 valued Rs.10 lakhs drawn on ICICI Bank, Rasoi Court Branch, Kolkata – 700001 (hereinafter referred to as 'the said cheque') was also allegedly issued by the said company.

11. Allegedly the said cheque was presented by the opposite party no.2 for encashing the same on 31st July 2008 with the banker of the opposite party no.2 being United Bank of India, Royal Exchange Branch, which returned with the endorsement "not arranged" as per memo dated 31st July, 2008.

12. The opposite no. 2 issued a backdated notice of 31st July 2008 under Section 138 of the Negotiable Instruments Act 1981 by fax, which was received by the petitioner no. 1 on 2nd August, 2008 from the Fax No. +91 33 2210 2734 at 4:00 p.m. thereby demanding payment of the said amount as in cheque no.336321 dated 31st July 2008 for a sum of Rs.10 lakhs drawn on ICICI Bank, Rasoi Court Branch, Kolkata – 700001.

13. By cheque no.367464 dated 29th August 2008 drawn on ICICI Bank, Rasoi Court Branch, Kolkata – 700001 towards part payment of the remaining Rs.10 lakhs, an amount of Rs.1 lakh was paid to the opposite party no.2 as per mutual discussions and understanding.

14. The opposite party no.2 with mala fide intention and with ulterior motive again presented the said cheque being cheque no.336321 dated 31st July 2008 for the sum of Rs.10 lakhs drawn on ICICI Bank, Rasoi Court Branch,

Kolkata – 700001 on 2nd September, 2008 which was returned unpaid by the said bank due to "insufficiency of funds".

15. A subsequent notice under Section 138 of the Negotiable Instruments Act 1881 dated 18th September 2008 was issued by the opposite party and the same was received by the petitioners on 23rd September 2008.

16. A letter dated 1st October 2008 addressed to the Ld. Advocate for the opposite party no.2 was issued by the advocates of the petitioners wherein it was clearly stated that a sum of Rs.1 lakh had already been paid and hence the outstanding amount was less than Rs.10 lakhs. It had also been categorically stated that no proceeding could be drawn up on the basis of a second demand notice under Section 138 of the Negotiable Instruments Act 1881 as amended upto date.

17. In spite of the said letter dated 1st October 2008, the opposite party no.2 in a mala fide manner had filed the instant petition of complaint in the Court of the Learned Additional Chief Judicial Magistrate, Calcutta which was taken cognizance of.

18. The Learned 14th Metropolitan Magistrate issued process against the petitioners.

19. The Learned Amicus Curiae representing the petitioners submitted as follows:-

    i. The cause of action in case of an office under Sections 138/141 of the Negotiable Instruments Act 1881 arose after issuance of a notice as envisaged in the statue and no prosecution could be initiated on the basis of a second notice.

ii. A notice of demand as envisaged under Section 138 of the Negotiable Instruments Act was first sent on 31st July 2008 and thereafter no prosecution under Section 138 of the Negotiable Instruments Act 1881 was initiated within the statutory period.

iii. Mere mentioning of a time period shorter than the one envisaged under Section 138 of the Negotiable Instruments Act 1881 could not render the notice invalid in the eye of law.

iv. Since an amount of Rs.1 lakh had admittedly been paid by the petitioners to the opposite party no.2, no proceeding could lie for the entire amount of Rs.10 lakhs.

20. The Ld. Advocate for the petitioners relied on the following judgements:-

a. The Hon'ble Supreme Court held the following in ***Ashok Shewakramani v. State of A.P.,***[1]

14. The present appellants are Accused 5 to 7. In two places in the complaint in Paras 2 and 4, the second respondent complainant has averred that Accused 2 is the Managing Director of Accused 1 Company and Accused 3 and 9 are the Directors of Accused 1 Company. Therefore, the present appellants are not even described as the Directors of the first accused Company. Moreover, we find that the averments in terms of Section 141(1) of the NI Act are not found at all in the entire complaint. These facts were not noticed by the High Court. Hence, the appeals must succeed and the impugned judgment [Ashok Shewakramani v. State of A.P., 2017 SCC OnLine Hyd 900] insofar as the appellants are concerned is set aside. Complaints Nos. 963 and 692 of 2011 pending in the Court of Judicial Magistrate First Class, Nandyal is quashed so far as the present appellants are concerned.
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[1] **(2023) 8 SCC 473**

20. *After having considered the submissions, we are of the view that there is non-compliance on the part of the second respondent with the requirements of sub-section (1) of Section 141 of the NI Act. We may note here that we are dealing with the appellants who have been alleged to be the Directors of Accused 1 Company. We are not dealing with the cases of a Managing Director or a whole-time Director. The appellants Have not signed the cheques. In the facts of these three cases, the cheques have been signed by the Managing Director and not by any of the appellants.*

21. *Section 141 is an exception to the normal rule that there cannot be any vicarious liability when it comes to a penal provision. The vicarious liability is attracted when the ingredients of sub-section (1) of Section 141 are satisfied. The section provides that every person who at the time the offence was committed was in charge of, and was responsible to the Company for the conduct of business of the Company, as well as the Company shall be deemed to be guilty of the offence under Section 138 of the NI Act.*

22. *In the light of sub-section (1) of Section 141, we have perused the averments made in the complaints subject-matter of these three appeals. The allegation in Para 1 of the complaints is that the appellants are managing the Company and are busy with day-to-day affairs of the Company. It is further averred that they are also in charge of the Company and are jointly and severally liable for the acts of Accused 1 Company. The requirement of sub-section (1) of Section 141 of the NI Act is something different and higher. Every person who is sought to be roped in by virtue of sub-section (1) of Section 141 of the NI Act must be a 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. Merely because somebody is managing the affairs of the Company, per se, he does not become in charge of the conduct of the business of the Company or the person responsible for the Company for the conduct of the business of the Company. For example, in a given case, a manager of a Company may be managing the business of the Company. Only on the ground that he is managing the business of the*

Company, he cannot be roped in based on sub-section (1) of Section 141 of the NI Act.

23. *The second allegation in the complaint is that the appellants are busy with the day-to-day affairs of the Company. This is hardly relevant in the context of sub-section (1) of Section 141 of the NI Act. The allegation that they are in charge of the Company is neither here nor there and by no stretch of the imagination, on the basis of such averment, one cannot conclude that the allegation of the second respondent is that the appellants were also responsible to the Company for the conduct of the business. Only by saying that a person was in charge of the Company at the time when the offence was committed is not sufficient to attract sub-section (1) of Section 141 of the NI Act.*

24. *Sub-section 1 of Section 141 reads thus:*

*"**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.]"

(emphasis supplied)

On a plain reading, it is apparent that the words "was in charge of" and "was responsible to the Company for the conduct of the business of the

Company" cannot be read disjunctively and the same ought be read conjunctively in view of use of the word "and" in between.

***25.** Therefore, even by giving a liberal construction to what is averred in Para 1 of the complaints, we are unable to accept the submission made by the learned counsel appearing for the second respondent that these averments substantially comply with sub-section (1) of Section 141 of the NI Act.*

b. The Hon'ble Supreme Court held the following in ***Susela Padmavathy Amma v. Bharti Airtel Ltd***.[2]

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

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

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

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

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

*"**9.** To fasten vicarious liability under Section 141 of the Act on a person, the law is well settled by this Court in a catena of cases that the complainant*

[2] 2024 SCC OnLine SC 311

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

10. In other words, the law laid down by this Court is that for making a Director of a Company liable for the offences committed by the Company under Section 141 of the Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company."

***27.** A similar view has been taken by this Court in the case of Lalankumar Singh v. State of Maharashtra[10] to which one of us (B.R. Gavai, J.) was a party.*

21. Considered the rival submissions of the Learned Amicus Curiae as well as the Learned Advocate representing the opposite party no. 2 along with the written notes submitted on behalf of the opposite party no. 2.

22. The accused no. 1 is the company i.e. M/s. Polar Industries Limited at 113 Park Street, Kolkata 700 017 and accused no. 2 to 3 are the Director of the said accused company and accused no. 4 to 5 are the Executive and authorized signatory of the said company.

23. In the course of time as when required by the accused company, the complainant had provided loan and advances to the above named accused company.

24. The Ld. Advocate representing the opposite party No. 2 relied on the following decisions:-

a. The following was held by the Hon'ble Supreme Court in ***MSR Leathers v. S. Palaniappan***[3]

> ***24.*** *That brings us to the question whether an offence punishable under Section 138 can be committed only once as held by this Court in Sadanandan case [(1998) 6 SCC 514 : 1998 SCC (Cri) 1471] . The holder of a cheque as seen earlier can present it before a bank any number of times within the period of six months or during the period of its validity, whichever is earlier. This right of the holder to present the cheque for encashment carries with it a corresponding obligation on the part of the drawer to ensure that the cheque drawn by him is honoured by the bank who stands in the capacity of an agent of the drawer vis-à-vis the holder of the cheque. If the holder of the cheque has a right, as indeed is in the unanimous opinion expressed in the decisions on the subject, there is no reason why the corresponding obligation of the drawer should also not continue every time the cheque is presented for encashment if it satisfies the requirements stipulated in clause (a) of the proviso to Section 138. There is nothing in that proviso to even remotely suggest that clause (a) would have no application to a cheque presented for the second time if the same has already been dishonoured once. Indeed if the legislative intent was to restrict prosecution only to cases arising out of the first dishonour of a cheque nothing prevented it from stipulating so in clause (a) itself. In the absence of any such provision a dishonour whether based on a second or any successive presentation of a cheque for encashment would be a dishonour within the meaning of Section 138 and clause (a) of the proviso thereto. We have, therefore, no manner of doubt that so long as the cheque remains unpaid it is the continuing obligation of the drawer to make good the same by either arranging the funds in the account on which the cheque*

[3] **(2013) 1 SCC 177**

is drawn or liquidating the liability otherwise. It is true that a dishonour of the cheque can be made a basis for prosecution of the offender but once, but that is far from saying that the holder of the cheque does not have the discretion to choose out of several such defaults, one default, on which to launch such a prosecution. The omission or the failure of the holder to institute prosecution does not, therefore, give any immunity to the drawer so long as the cheque is dishonoured within its validity period and the conditions precedent for prosecution in terms of the proviso to Section 138 are satisfied.

b. The Hon'ble Supreme Court held the following in ***Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari***[4]**:-**

15. *This Court has consistently held that the court cannot go beyond the pleadings of the parties. The parties have to take proper pleadings and establish by adducing evidence that by a particular irregularity/illegality, the result of the election has been "materially affected". There can be no dispute to the settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". Thus, a decision of the case should not be based on grounds outside the pleadings of the parties. In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering re-counting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to*

[4] **(2014) 5 SCC 312**

fish material for declaring the election to be void. The order of re-counting can be passed only if the petitioner sets out his case with precision supported by averments of material facts. (Vide Ram Sewak Yadav v. Hussain Kamil Kidwai [AIR 1964 SC 1249] , Bhabhi v. Sheo Govind [(1976) 1 SCC 687 : AIR 1975 SC 2117] and M. Chinnasamy v. K.C. Palanisamy [(2004) 6 SCC 341] .)

25. The complaint filed by the opposite party No. 2 did not specifically elicit the role of the erstwhile directors of the petitioner No. 1/Company. Petitioner No. 4 had resigned, and Petitioner No. 5 had expired.

26. The Ld. Advocate representing the petitioner claimed the issuance of the second notice to be impermissible according to the law which could not be accepted. Section 138 of the NI Act did not stipulate any "number of times" with specific restrictions. Therefore, in view of the aforesaid provisions as well as the decisions cited above in ***MSR Leathers v. S. Palaniappan*** (*supra),* the legality of issuance of the second notice is justified.

27. The liability of the petitioner no. 1 Company cannot be denied at this stage without oral and documentary evidence on record which necessitate the proceedings to continue with trial. Since prima facie case has been established on the part of the petitioner to an extent of part payment.

28. In view of the above discussions, the instant criminal revisional application being C.R.R. 865 of 2011 is allowed in part. The proceedings in connection with the Complaint Case No. C-30925 of 2010 (T.R. No. 1291 of 2018 and the subsequent orders dated 27th October, 2008 and 18th November, 2008 is quashed against petitioner nos. 2 to 4. The proceedings stand abated against

the petitioner no. 5/ Shiv Kumar Daga as the petitioner no. 5 expired on 05.01.2022.

29. Accordingly, the instant criminal revisional application being CRR 865 of 2011 stands disposed of.
30. There is no order as to costs.
31. Case diary, if any, be returned forthwith.
32. I record my appreciation for the able assistance rendered by the Learned Advocate Mr. Apalok Basu, as Amicus Curiae representing the petitioners, in disposing of the instant criminal revisional application.
33. Let the copy of this judgment be sent to the Learned Trial Court as well as the police station concerned for necessary information and compliance.
34. All parties shall act on the server copy of this judgment duly downloaded from the official website of this court.

(Ananya Bandyopadhyay, J.)