IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

CRR 3682 of 2016

Anil Bhutoria
Vs.
The State of West Bengal & Another

For the Petitioner	:	Mr. Sabyasachi Banerjee Mr. Ayan Bhattacharya Mr. Anirban Dutta Mr. Nikunj Belia Mr. Mosarat Reyaz
For the Opposite Party No.2	:	Mr. Meghajit Mukherjee Ms. Srijeeta Gupta Ms. Sonia Das
Heard on	:	05.02.2025
Judgment on	:	14.02.2025

Dr. Ajoy Kumar Mukherjee , J.:

1. Petitioner herein has prayed for quashing of the proceeding being case no. C/47790/13 under section 138 read with section 141 of the Negotiable Instrument Act 1881 (in sought NI Act) pending before learned Magistrate 13th Court, Calcutta. The case made out in the complaint by the opposite party no. 2/complainant herein is that on 22.06.2022 the petitioner was inducted as a director of the companies, namely Leonine estate Pvt. Ltd. and Leonine Abode Pvt. Ltd.. It is alleged that on the request of the accused persons a total sum of Rs. 99 lakh was provided to them in-between 29.5.2012 and 15.6.2012. The accused persons in discharge of balance legal liabilities along with other dues issued two cheques being no. 087316 and 087317 both dated 20.7.2013. When the complainant placed the said two cheques to his banker for encashment, it were dishonored on the ground of "exceeds arrangement". The said complainant/company thereafter issued statutory demand notice on 1st November 2013 and the accused person inspite of receipt of the said notice, failed to pay the amount mentioned in the cheque and as such the present proceeding has been initiated on the ground of dishonor of cheques.

2. Mr. Banerjee, learned senior counsel appearing on behalf of the petitioner submits that the petitioner herein resigned from both the companies on 5.11.2013. He further submits that although petitioner was appointed as a director but he was neither a signatory nor was ever authorized to sign to any cheque on behalf of the company. He further submits no notice of the meeting of the Board of Director of the company was ever served upon the petitioner. Infact he had himself invested huge sum of money in the said company and he yet to get returns on his investments.

3. He further submits that in the complaint it has only been mentioned that the accused no. 1 mentioned in para 3 of the complaint that the accused no.1 is a company and accused no. 2 and 3 are acting directors of the said company and they are responsible for the conduct of day to day business of accused company being accused no.1 and there are no other averments in respect of the petitioner nor in the initial deposition recorded by the magistrate. Accordingly the complaint lacked basic averments which are required to attract the provisions of section 141 of the N.I. Act for implicating the present petitioner under section 138 of the N.I. Act. In this context he relied upon judgment of ***S.M.S Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another,*** **(2005) 8 SCC 89**. Referring another judgment reported in **(2023) 8 SCC 473,** ***Ashoke Shewakramani and Others Vs. State of Andhra Pradesh and Another*** petitioners contended that the words "was in charge of and" "was responsible in the company in the conduct of business of the company" cannot be read disjunctively and the same must be read conjunctively. Accordingly he submits that in view of latest findings of the Hon'ble Apex Court, the averment made in the petition of complaint is insufficient for the purpose of taking cognizance upon the impugned complaint. Except bald allegation made in paragraph 3, there is no averment regarding specific role played by the petitioner in committing the alleged offence.

4. He further submits that the date of dishonour of cheque as appearing in the complaint is 17^{th} October, 2013 and the demand notice regarding dishonour of cheque was received by the company on November, 6^{th} , 2013. The petitioner herein resigned from the said company on 5th November, 2013, a day prior to even the issuance of notice by the complainant/ company. Accordingly Mr. Banerjee argued that commission of offence under section 138 of N.I. Act does not occur merely on dishonour of cheque but it occurs when there is failure to pay within 15 days from the receipt of notice demanding such payment and if the payment is made during the interregnum period from the 15 days of receipt of notice, no offence under section 138 is said to have committed. Accordingly on 16th Day after the date of service of notice the cause of action arose for the present complaint but the petitioner resigned from the company on 5th November, 2013. Form 32 clearly demonstrates that the petitioner was not a director when the alleged offence was committed nor he had any responsibility as a director even under vicarious capacity when the alleged offence was committed. He further contended that from the complaint it is clear that there was 6 (six) directors of the accused/company but it appears that complainant company had filed the case against the present petitioner and one Mr. Ghanashyam Das Sharma out of said six directors. Accordingly the complainant has made a biased attempt to prosecute the petitioner maliciously, which is reflected from his picking and choosing of an accused which is impermissible in law. He further contended that the said act of complainant in picking and choosing accused had been deprecated by the Apex Court in ***Sital Sahay Case*** reported in **(2009) 8 SCC 617.**

5. He further contended that the order of taking cognizance by the Magistrate which forms the basis of the proceeding has been acted herein in a mechanical manner. In fact the order of taking cognizance by the Magistrate concerned shows complete non application of mind, as he did not make any inquiry under section 202 of Cr.P.C. recording his satisfaction regarding truth or falsity of the allegation, far less the process how the satisfaction was arrived at. In the instant case the order dated 8th September, 2015 by which the Trial Court issued process against the petitioners does not meet the criteria. Accordingly petitioner has prayed for quashing the proceeding.

6. Mr. Mukherjee ld. counsel appearing on behalf of the opposite party no.2 submits that in the petition of complaint in para 3, it has been specially averred that the accused no.2/present petitioner was an active director of the accused no.1 /company and was responsible for the conduct of the day to day business of the accused no.1/company. In fact the petitioner acted as the negotiator between the parties for development of the land and the impugned cheque had been issued by the company in course of such negotiation and transaction. He further submits that although that words *'in charge of'* is missing from the petition of complaint but the averments made in para 3 of the complaint read with para 10 of the present application is sufficient to implicate the present petitioner. He further argued that in any event the role in the entire transaction which has been played by the present petitioner can only be determined after adducing evidence and not to be determined by this Court. In this context Mr. Mukherjee relied upon the judgment of ***A.K. Singhania Vs. Gujarat State fertilizer Company Limited and Another*** reported in **(2013) 16 SCC 630**.

7. Mr. Mukherjee further argued that from affidavit in opposition, it is clear that as on November 9, 2013 the present petitioner was still a director and signatory as on the said date contrary to his contention of having resigned on November 5, 2013. He further contended that the question as to whether the petitioner had resigned as director for the company on November, 5 2013 is a question of disputed fact and can only be decided at the time of trial and after leading proper evidence thereto. Mr. Mukherjee strenuously argued that the petitioner was a director when the cheque in question was dishonoured and the petitioner had admittedly retired between the stage of dishnour of cheque and issuance of demand notice and accordingly he cannot absolve his responsibility in connection with the impugned cheques. In this context he relied upon judgment of ***Rallis India Ltd. Vs. Poduru Vidya Busahn and Others,*** reported in **(2011) 13 SCC 88** and ***S.P. Mani and Mohan Dairy Vs. Dr. Snehalatha Elangovans, (2023) 10 SCC 685***.

8. He further contended that under section 168(2) of the Companies Act, the director even if retired can still be held responsible for the offence which occurred during his tenure. He also contended that it would be wrong interpretation of law, if it is said that the said provision of section 168 (2) is applicable only in case of offence committed under the Companies Act.

9. Mr. Mukherjee also distinguished the judgments relied by the petitioner being CRR 975 of 2017 (Salin Khemani and others Vs. State of West Bengal and another) contending that the facts pleaded in the petition of complaint in the said proceeding lacked the basic averments that the accused is in the charge of and responsible for the day to day conduct of the business of the company at the time of commission of offence. But in the present context a conjoint reading of para 3 of the complaint read with para 10 with the Revisional Application, it suitably demonstrate the role of the present petitioner in the entire transaction. Accordingly he submits that this is not a fit case where the proceeding can be quashed invoking jurisdiction under section 482 of the Code and as such the petitioner's prayer for quashment is liable to be dismissed.

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

11. At the outset it is to be made clear that since order relating to issuance of process under section 204 of the Cr.P.C. is the basis of asking the accused person to face the trial, the magistrate requires great exercise of judicial mind and not to act like a post office. He is not supposed to issue process without determining whether prima facie case exists or not and exercise of judicial mind is a sine qua non and the same cannot be surrogated to a mechanical process.

12. Before going to further details let me reproduce section 200 of the Code of criminal Procedure :-

> *200- Examination of complainant - A magistrate taking cognizance of an offence on complaint shall, examine upon oath the complainant and witnesses present, if any and the substance of such examination shall be reduced into writing and shall be signed by the complainant and witnesses and also by the magistrate.*

13. Rule 89 (3) of the Calcutta High Court criminal (subordinate Courts) Rules 1985 reads as follow:-

> *89(3): The examination of the complainant and his witnesses shall not be taken to be a mere formality and they shall be examined intelligently and in such manner as to enable the Magistrate to determine whether there is prima facie sufficient ground for proceeding.*

14. When I read both the provisions it made me clear that while examining complainant and or his witnesses, learned Magistrate's role is not that of a silent spectator before summoning the accused. Both the above quoted provisions makes it specific that the Magistrate concerned has to carefully scrutinise the evidence brought on record and Rule 89 is very distinct that he may even himself put questions to the complainant and his witnesses to elicit answers to find out truthfulness of the allegations to determine, if any offence is *prima facie* committed by the accused person or not. It is not that the complainant is to place his evidence by filing affidavit-in-chief in support of his allegation in the complaint and the Magistrate is duty bound to have the criminal law set into motion. It is settled principle of law that the order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of the allegation made in the complaint and the evidence both oral and documentary in support thereof to come to a finding as to whether the complainant has been succeeded in bringing charge of the accused.

15. In this context it is also required to be mentioned that section 202 of the Cr.P.C. specifically provides that when the magistrate received the complaint of an offence of which he is authorized to take cognizance may also postpone the issue of the process against the accused in appropriate cases and either enquire into the case himself or direct an investigation. Now since no particular form of inquiry has been prescribed in section 202, the Magistrate can very well make the inquiry by putting relevant questions to the complainant's witnesses to come to a conclusion whether there are sufficient grounds to proceed against the accused or not.

16. Coming back to the case in hand, I find that the complainant himself appeared before the court during initial deposition and he filed an affidavit disclosing the summary of what he has stated in the written complaint and thereafter oath was administered to him by the court below on 8th September, 2015, when he made the following statement.

> *"I am the complainant of this case. I have filed this case against accused m/S Leonine Estates Pvt. Ltd., Anil Bhutoria & Ghanashaym Das Sharma on behalf my company by a Board resolution by the Directors issued to me by my company on 16.12.13. I have filed my initial deposition u/s 200 Cr.P.C. by affidavit duly signed by me. I have submitted all the Xerox of the relevant documents and I shall file the original documents regarding the same at the time of evidence. Today I have brought the original documents in court. I am praying for relief as per my complaint against the said accused persons."*

17. It further appears from the record that on the basis of said initial deposition the trial court had issued summons upon the three accused persons for committing offence punishable under section 138 of the N.I. Act, invoking his jurisdiction under section 204 of Cr.P.C. It would not be out of context to quote the relevant order dated 08.09.2005 which runs as follows:-

> *"Today is fixed for S/A complainant is present along with his Ld. Advocate. Today complainant has filed initial deposition u/s 200 Cr.P.C. by affidavit today in court. The same accepted and kept with the record. Complainant also brought the original documents today in court in respect of Xerox copy of relevant documents filed in this court. The record is taken up for further initial deposition of the complainant. He is examined on oath on dock u/s 200 Cr.P.C. original documents compared with the Xerox and return back to the complainant today.*
> *Perused the initial deposition by way of affidavit filed by the complainant and produced and deposited on dock, the relevant documents filed in this case and heard submissions of Ld. Advocate for the complainant.*
> *Conserving the same it appears that the complaint has been able to establish a prima facie case against all the accused persons for the offences punishable u/s 138/141 of N.I. Act.*
> *Accordingly issue summons upon all the accused persons for the offences punishable u/s 138/141 of N.I. Act, u/s 204 of Cr.P.C.*
>
> *To..1-10-15 for S/R and appearance.*
>
> *Complainant to file requisite at once."*

18. It is true that section 141 of the N.I. Act mandates that when the person committing an offence under section 138 is a company every person who at the time of offence 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 deemed to be guilty of the offence and in the present context in the averments made in the complaint, the words 'in charge of' as required under section 141 of the N.I. Act is missing from the petition of complaint and in respect of which the learned counsel strenuously argued that the petition of complaint is not maintainable. However it is settled law that reproduction of section 141 in verbatim in the complaint is not necessary, if the substance of the allegations made in the complaint fulfils requirements of section 141 and in such cases even if in the absence of verbatim reproduction of the language of section 141, the complaint has to proceed and is required to be tried **(Monaben Ketanbhai Shah & Another Vs. State of Gujarat and Others,** reported in **(2004) 7 SCC 15).** Accordingly, even if verbatim reproduction of the language of section 141 is missing either in the complaint or in the initial deposition, but if it is distinct that the allegations made in the complaint and corroborated by initial deposition fulfils the condition that the concerned accused was in charge of and was responsible to the company for the conduct of the business of the company, the complaint has to proceed.

19. On perusal of the allegation and counter allegation made before me, it is apparent that there are several disputed facts involved in the present proceeding in respect of the present complaint, for instance:-

(a) The petitioner's specific case is that he was neither signatory nor was authorised to sign any cheque on behalf of the accused/ company, but he has been implicated.

(b) It is also apparent from the averment made in the complaint that no specific role has been attributed against the present petitioner.

(c) The petitioner's specific case is that he had resigned from the company on 5th November, 2013, which is also apparent from

Form 32 and the cause of action of the present offence allegedly arose after 15 days from the receipt of the notice by the company on 6th November, 2013.

(d) The opposite party in their affidavit in opposition stated that there were six directors of the complainant/company and therefore, the petitioners alleged that going against the settled law that there cannot be discrimination in the prosecution to pick and choose a particular accused person among other directors, he has been implicated.

20. In my considered view, before issuing process against the present petitioner Anil Bhutoria, the court below ought to have made an inquiry *inter alia* to get answer to the aforesaid questions either from the materials available from the record or even putting questions to the complainant by himself to elicit answers to the aforesaid questions, to find out whether there are grounds for proceeding against the present petitioner or not. As I have quoted above neither the initial deposition nor the order issuing process dated 08.09.2015 reflects that the magistrate on being prima facie satisfied about the questions raised herein came to a finding that there are reasons to believe that the petitioner has committed the alleged offence.

21. In such view of the matter I have no other option but to come to a conclusion that the order of issuance of process against the present petitioner on 08.09.2015 has not been made in compliance with either chapter XV or chapter XVI of the Code of Criminal Procedure.

22. In view of above the issuance of process by the court below under section 204 of Cr.P.C. against the present petitioner Anil Bhutoria by the order dated 08.09.2015 is not sustainable in the eye of law and therefore, set aside. However, ld. Trial court is directed to make inquiry by putting aforesaid questions or any other questions to the complainant witness or by adopting any other mode of inquiry to come to a conclusion as to whether, their exists prima facie cases against the present petitioner and after such inquiry and/or examination, the court below will proceed under relevant provisions of law either under chapter XV or under chapter XVI of Cr.P.C in respect of present petitioner, without being influenced by any observation made herein. Since the matter is pending for a considerable period of time the trial court is requested to conclude the aforesaid process of inquiry preferably within a period of 30 days from the date of the communication of the order.

23. **CRR 3682 of 2016** thus stands disposed of.

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.)