

HIGH COURT OF CALCUTTA**Bench: The Hon'ble Justice Shampa Dutt (Paul)****Date of Decision: 09.04.2024**

Case Number: CRR 1358 of 2019 with CRAN 1 of 2019 (Old No. CRAN 2069 of 2019) and CRAN 2 of 2019 (Old No. CRAN 3150 of 2019)

Madhusudan Chakraborty.Petitioner**Vs****The State of West Bengal & Anr.Respondents****Legislation and Rules:**

Section 138 of the Negotiable Instrument Act, 1881

Subject:

Criminal revision against conviction under Section 138 of the Negotiable Instruments Act, involving dishonor of cheque due to insufficient funds.

Headnotes:

Cheque Dishonor – Section 138 of NI Act - Conviction and Sentence Set aside - Criminal Revision against lower court's conviction and sentence under Section 138 of Negotiable Instruments Act, 1881 - Petitioner convicted for dishonoring cheque issued as security - Petitioner contends cheque issued as security for another person's liability, not his own - Defense argues cheque issued with conditions, not presented without consent - Allegations against petitioner and company, but company not made party - Supreme Court precedent cited for necessity of company being arraigned as accused - Judgment setting aside conviction and sentence on grounds of procedural irregularity and abuse of process of law - Conviction and sentence set aside, petitioner acquitted and discharged. [Paras 1-23]

Referred Cases:

- Sharad Kumar Sanghi Vs Sangita Rane, (2015) 12 SCC 781
- Siby Thomas vs M/s. Somany Ceramics Ltd., Criminal Appeal No. of 2023 (@ SLP (Crl.) No. 12 of 2020)
- Himanshu vs B. Shivamurthy & Anr., AIR 2019 SC 3052

Representing Advocates:

For the Petitioner: Mr. Saryati Datta (from High Court legal aid counsel)

For the State: None

For the Opposite Party No. 2: None

Shampa Dutt (Paul), J.:

1. The present revision is against an Order No. 12 dated 29.05.2019 in the Criminal Revision No. 125 of 2018 passed by the Learned Addl. District & Session Judge (F.T.C. No. I) at Calcutta confirming the order of conviction and sentence dated 30.01.2018 passed by the Learned 17th M.M. in case no. C-24 of 2006 under Section 138 of Negotiable Instrument Act, 1881, in which the revisionist has been convicted and sentenced to pay compensation of Rs. 5,00,000/- (Five Lacs) to the complainant within two months I/D. suffer simple imprisonment for two months.
2. **The complaint case in a nut-shell is that:-**

—The accused person/petitioner issued a cheque of Rs. 4,00,000/- being no. 197890 dated 31.11.2005 drawn on UTI bank, Saltlake City Branch, Kolkata – 700 064 in discharge of existing financial liability. Subsequently the said cheque was dishonored with the remarks —insufficient Fundll when the said cheque was deposited in the bank for encashment. Subsequently the complainant herein i.e. the opposite party No.1 sent a demand notice dated 12.12.2005 by registered post with A/D through her learned advocate and the said letter was duly received by the accused/revisionist. But in spite of said knowledge, the

accused/petitioner did not pay the said dishonoured cheque amount within the stipulated period and hence the case. ||

3. The defence case is that the Petitioner/accused person issued the disputed cheque which was post dated, for the purpose of security for future but not in discharge of any self existing debt or liability but was issued for liability of another person. Actually one Gopal Chandra Biswas contracted with the financier Bhagirath Samanta for purchase of land and construction and Bhagirath Samanta gave to Gopal Chandra Biswas a sum of Rs. 1100000/- and the land was purchased. Thereafter Gopal Chandra Biswas and other landowners approached the petitioner/accused person to take up the job of construction work of the building over the land and accordingly the accused invested huge amount and started construction and completed up to maximum level. In the mean time the dispute arose between Gopal Chandra Biswas and financier Bhagirath Samanta for the monetary issue. And the accused intervened in the matter and issued the cheque being no. 197890 dated 30.11.2005 drawn on UTI bank, Saltlake in favour of financier Bhagirath Samanta with instruction that cheque should be presented for encashment when the accused person gives consent or permission but will not present the same without any notice to the accused person. But the complainant under conspiracy used the said cheque and filed this false case.
4. The petitioner states that he has explained all true facts and reason for issuance of cheques and its reason for dishonor before the trial court but Learned Court did not consider the submission of the petitioner/accused and giving the benefit of presumption under Section 139 of the N.I. Act 1881 convicted the petitioner and passed judgment/order which is nothing but full of errors and defective in the eye of law.
5. The petitioner against the order of conviction and sentence dated 30.01.2018 passed by the Learned 17th M.M. in connection with case no. C-24 of 2006, preferred one criminal revision, being CrI. Rev No. 125 of 2018.
6. The Learned Addl. District & Session Judge (F.T.C. No. I) at Calcutta on dated 29.05.2019 passed an order dismissing the revision application and affirmed the order of conviction.
7. Hence the revision.
8. The petitioner having not responded to the administrative notice, the learned legal aid counsel was appointed from the panel of the High Court Legal Service Committee.

9. In spite of due service of notice upon the opposite party/complainant there is no representation.
10. From the Judgment under revision, it is seen that the Learned Additional Session Judge has noted as follows:-

“Criminal Revision No. 125 of 2018

Order No. 12

Dated 29.05.2019

..... Upon perusal of evidence on record it reveals that one Bhagirath Samanta now deceased husband of respondent No. 1 and M/s. ASCO Enterprises represented by revisionist Madhusudan Chakraborty entered into an agreement on 28th day of August, 2005 (Exhibit-8). Revisionist issued a cheque of Rs. 4,00,000/- to the husband of respondent No. 2 on the basis of this Exhibit-8. The liability of revisionist to issue cheque in question (Exhibit-2) arises from this agreement dated

28.08.2005. Revisionist being Promoter and the representative of M/s. ASCO Enterprises entered into this agreement by and between himself and one Gurudas Biswas and others as land owners who took loan of Rs. 11,00,000/- from the husband of respondent No. 1.....

Sd/-

**Addl. District & Sessions Judge,
Fast Track Court-1
City Sessions Court, Calcutta.”**

11. The petitioner has relied upon the judgment in **Sharad Kumar Sanghi Vs Sangita Rane, (2015) 12 SCC 781, decided on February 10, 2015**, wherein the Supreme Court held:-

—11. In the case at hand as the complainant's initial statement would reflect, the allegations are against the Company, the Company has not been made a party and, therefore, the allegations are restricted to the Managing Director. As we have noted earlier, allegations are vague and in fact, principally the allegations are against the Company.

*There is no specific allegation against the Managing Director. **When a company has not been arrayed as a party, no proceeding can be initiated against it even where vicarious liability is fastened under certain statutes.** It has been so held by a three Judge Bench in *Aneeta Hada v. Godfather Travels and Tours (P) Ltd.* [*Aneeta Hada v. Godfather Travels and Tours (P) Ltd.*, (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241] in the context of the Negotiable Instruments Act, 1881.*

13. When the company has not been arraigned as an accused, such an order could not have been passed. We have said so for the sake of completeness. In the ultimate analysis, we are of the considered opinion that the **High Court should have been well advised to quash the criminal proceedings initiated against the appellant** and that having not been done, the order is sensitively vulnerable and accordingly we set aside the same and quash the criminal proceedings initiated by the respondent against the appellant. ||

- 12. This Court's relies** upon the judgment in ***Siby Thomas vs M/s. Somany Ceramics Ltd., in Criminal Appeal No. of 2023 (@ SLP (Cri.) No. 12 of 2020), decided on October 10, 2023***, wherein the Supreme Court held:-
- 8. As noticed hereinbefore, the parties are at issue over the question as to whether the averments in the complaint satisfy the requirements under Section 141 (1) of the N.I. Act. True that in paragraph 3 it is stated that **accused No.1 is a partnership firm and accused Nos.2 to 6 are the partners of accused No.1 and they, being the partners, are responsible for the day-to-day contact and business of accused No.1.** In paragraph 4 what is stated is that accused No.1 through its partners i.e., accused Nos. 2 to 6, on the basis of the authority vested in them approached the complainant for purchasing the ceramic tiles, sanitary-wares and bath fittings from the complainant on credit basis. Indubitably, besides the aforesaid averments no other averments are made in the complaint in regard to the appellant's role. Therefore, the question is whether the averments referred to hereinbefore are sufficient to prosecute the appellant under Section 138 of the NI Act, on the afore-extracted averments. We are not oblivious of the fact that the appellant has also got a contention that he retired from the partnership firm much

prior to the issuance of the cheque in question. It is only proper and profitable to refer to sub-section (1) of Section 141 of the N.I. Act in view of the rival contentions. It reads thus:-

—(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 accordingly: Provided and that punished 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: 22 [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.]

14. *In view of the factual position relating the averments revealed from the complaint as aforesaid it is relevant to refer to the decisions relied on by the learned counsel appearing for the appellant. In the decision in **Anita Malhotra's case** (supra) in paragraph 22 it was held thus:-*

—22. This Court has repeatedly held that in case of a Director, the complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the accused company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient. (Vide National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal). In the case on hand, particularly, in Para 4 of the complaint, except the mere bald and cursory statement with regard to the appellant, the complainant has not specified her role in the day-to-day affairs of the Company. We have verified the averments as regards to the same and we

agree with the contention of Mr. Akhil Sibal that except reproduction of the statutory requirements the complainant has not specified or elaborated the role of the appellant in the day-to-day affairs of the Company. On this ground also, the appellant is entitled to succeed.]]

15. *Paragraph 19 of the **Ashok Shewakramani's case** (supra) is also relevant for the purpose of the case and it, in so far as relevant, reads thus:*

*—19. 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 subsection 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. 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 paragraph 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 the accused No.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 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. 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 subsection 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.¶

16. *Thus, in the light of the dictum laid down in **Ashok Shewakramani's case** (supra), 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. In such circumstances, paragraph 20 in **Ashok Shewakramani's case** (supra) is also relevant. After referring to the Section 141(1) of NI Act, in paragraph 20 it was further held thus:*

—20. 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.¶

13. In the petition of Complaint the allegations in respect of the offence alleged are in respect of the petitioner and **the company**, and acts done on behalf of the Company. **But the Company/Firm has not been made a party.**

14. Section 138 N.I. Act, lays down:-

—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 provision of this Act, **be punished with imprisonment for a term which may extend 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.¶*

15. In *Himanshu vs B. Shivamurthy & Anr.*, AIR 2019 SC 3052, decided on 17 January, 2019, the Supreme Court held:-

—..... 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.....||

- 16. Thus in view of the said judgment,** the company could now, not be arraigned as an accused at this stage and without the company as party in this case the proceedings is clearly an abuse of the process of law/Court being not maintainable and the proceedings thus being not in accordance with law, the judgment under revision and the judgment under conviction are liable to be set aside.
- 17. Accordingly, the judgment and order dated 29.05.2019 passed by the learned Addl. District & Sessions Judge, (F.T.C. No. I), Calcutta, in Criminal Revision No. 125 of 2018 and the judgment and order of conviction and sentence passed by the learned 17th M.M. Court, Calcutta, in connection with Case No. C-24 of 2006, convicting the petitioner, being not in accordance with law is hereby set aside.**
- 18. CRR 1358 of 2019 is allowed.**
- 19. Accused is acquitted and discharged and released from his bail bonds.**
- 20. All connected applications, if any, stand disposed of.**
- 21. Interim order, if any, stands vacated.**
- 22. Copy of this judgment be sent to the Court of the Additional District & Sessions Judge, (F.T.C. No. I), Calcutta and 17th M.M. Court, Calcutta, at once.**
- 23. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.**

© All Rights Reserved @ LAWYER E NEWS

**Disclaimer: Always compare with the original copy of judgment from the official website.*