

(2023) 01 GAU CK 0012

Gauhati High Court

Case No: Criminal Petition No. 742 Of 2022

Siddarth Mundra And
Anr

APPELLANT

Vs

Steel Traders

RESPONDENT

Date of Decision: Jan. 3, 2023

Acts Referred:

- Code Of Criminal Procedure, 1973 - Section 482
- Negotiable Instruments Act, 1881 - Section 138, 141

Hon'ble Judges: Robin Phukan, J

Bench: Single Bench

Advocate: R Hussain, D Chakrabarty

Final Decision: Allowed

Judgement

1. Heard Mr. R. Hussain, learned counsel for the petitioners. Also heard Mr. D. Chakravarty, learned counsel for the sole respondent.

2. In this petition, under Section 482 of the Cr.P.C., the two petitioners have prayed for quashing of the order, dated 16.03.2020, and all subsequent

orders, passed by the learned Chief Judicial Magistrate, Cachar, Silchar in N.I. Case No.39 of 2020. It is to be mentioned here that vide the impugned

orders, the learned Court below has taken cognizance upon the complaint lodged by the respondent under Section 138 of the N.I. Act, and issued

process against present petitioners.

3. The factual background, leading to filing of the present petition, is briefly stated as under:

On 01.04.2019, the petitioner No.2, being the Director of Durga Krishna Store Pvt. Ltd, a company incorporated under the Companies Act 1956,

had purchased some goods and as payment security he had given one undated Account Payee Cheque No. 511915, for a sum of Rs. 27,54,000/ of

Vijaya Bank, in the purchase order. The respondent Firm has issued two Tax Invoices, dated 01.04.2019, for a sum of Rs. 13,85,064/ and 09.04.2019

for a sum of Rs. 13,62,354/ (All total Rs. 27,47,418/) against the said purchase order. The petitioners have paid the said amount to the

complainant's account, on 29.05.2019 and 03.06.2019, and the amounts were debited from his account and the concerned bank has issued one

statement under their seal to that effect. But, suppressing the said facts the complainant has, with ulterior motive, served demand notice upon him,

asking for payment of the check amount of Rs.27,54,000/, which was given as a security, and the petitioners have given reply to the said notices. But,

inspite of payment of the cheque amount, the complainant has instituted the case under section 138 NI Act, with ulterior motive.

4. Being highly aggrieved, the petitioner approached this court for quashing the proceeding on the following grounds, that :-

(i) The learned court below has erred in law and in facts while passing the impugned order, resulting abuse of the law and miscarriage of justice;

(ii) The learned court below, without complying the mandate under section 138 read with 141 of the NI Act took cognizance of the offence;

(iii) The cheque in question was issued by the director of the company, but the company has not been arrayed as an accused in the case by the

complainant, and as such the case is not maintainable;

(iv) The complaint is not maintainable as no demand notice was issued to the company and that the petitioner No. 1 is not the director of the company;

(v) The company ought to have been prosecuted and the persons mentioned in the other category, could have been made vicariously liable for the

offence under section 138 NI Act, and as the complainant has failed to implead the company as party, the petitioners cannot be made liable for the

offence under section 138 NI Act;

(vi) The company is a necessary party to the proceeding and without the company being arrayed as party to the proceeding, the liability towards the

petitioners did not arise;

(vii) The cheque in question, since been issued as security cheque, not in discharge of legally enforceable debt, and as such presentation of the said

cheque without notice to the company, would not attract the liability under section 138 NI Act;

(viii) The complainant has never made any averment in the complainant against the petitioner No.2, and as such, issuance of process, under section

138 of the NI Act is nothing but an abuse of the process of the court;

(ix) The petitioner No.1 is neither the director of the company, nor he has issued any cheque, nor he has any authority to act on behalf of the company

and the complainant has not filed any document to show that in what capacity he was responsible for the day to day affairs of the company;

(x) The complaint petition is not supported by any document like goods forwarding note, ledger Account as well as any audited balance sheet.

5. The respondent side has not filed any affidavit in opposition here in this case.

6. Mr. R. Hussain, the learned counsel for the petitioners submits that the petitioner No.1 has issued signed blank cheque as security, but, the

respondent has presented the same without the knowledge of the petitioners. Mr. Hussain further submits that there was no legally enforceable debt

between the petitioners and the respondent, on the date of presentation of the cheque in question in the bank on 13.01.2020, for encashment and as on

the date of issuance of legal notice on 27.01.2020, to the petitioners, since in view of Annexure-V, the petitioners have already paid a sum of Rs.

13,85,064/ by NEFT on 29.05.2019, and another sum of Rs. 13,62,354/ by NEFT on 03.06.2019, as such no ingredients of the offence under section

138 N.I. Act is made out against the petitioners. Further Mr. Hussain pointed out that the respondent has failed to spell out in what capacity the

petitioner No.1 has been arraigned as party in the N.I. Act as he is neither director of the company nor he is responsible for the conduct of the

business of the company in view of Annexure-I, the Memorandum of Association and Article of Association of the company, i.e. Durga Kishor Store

Private Limited, and that the respondent has also failed to made the company as party in the proceeding and as such the proceeding is not

maintainable, and it is nothing but an abuse of the process of the court and therefore, Mr. Hussain contended to allow the petition. Mr. Hussain also

referred following case laws in support of his submission:-

- (i) Aneeta Hada vs. Godfather Travel and Tours Pvt. Ltd., reported in 2012 5 SCJ 661,
- (ii) Himanshu vs. B. Shivamurthy & another in Criminal Appeal No.1465/2009;
- (iii) Dasarathbhai Trikambhai Patel vs. Hitesh Mahendrabhai Patel and Another, in Criminal Appeal No. 1497 of 2022.

7. On the other hand, Mr. D. Chakravarty, the learned counsel for the sole respondent, submits that admittedly the Company has not been arrayed as party in the N.I. Act case. But, the Directors of the company have been made parties in the said case. And the Director has signed the cheque as

authorized signatory and the signatory of the cheque is liable for prosecution for dishonor of the cheque and as such the Directors have been arraigned

as party in the case, and that there is no merit in this petition, and therefore, it is contended to dismiss the same. Mr. Chakravarty has also relied upon

paragraph No.21 of the decision of Honâ€™ble Supreme Court in Ashutosh Asok Parasrampuriya and Another vs. M/s Gharkul Industries Pvt. Ltd.

and Ors, reported in AIR 2021 SC 4898, to bolster his submission.

8. Having heard the submission of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on the record

and also gone through the case laws referred by Mr. Hussain, learned counsel for the petitioners and also the case law referred by Mr. D.

Chakravarty, learned counsel for the respondent.

9. It appears from the complaint-Annexure-VIII, that there was business transaction between the petitioners and the sole respondent and allegedly the

petitioners have purchased goods on credit and as per ledger account of the respondent, total outstanding, with interest came to an amount of Rs.

27,54,000/ and in discharge of the said debt the petitioner No.1, being the Director of Durga Krishna Store Pvt. Ltd. has issued a cheque, No. 511915,

Annexure-IV, dated 13.01.2020, of Vijoya Bank, Silchar, which was dishonored on presentation for encashment on the ground of â€™insufficiency of

fundâ€™. Further, it appears that thereafter, the respondent issued legal notice to the petitioners, which is enclosed with the petition as Annexure-VI.

But, despite receipt of notice, the petitioners have failed to make the payment of the amount so demanded within the stipulated time for which the

respondent has approached the Court of learned CJM, Cachar, Silchar by filing a complaint- Annexure-VIII, under Section 138 of the N.I. Act.

10. A careful perusal of the said complaint reveals that Durga Krishna Store Pvt. Ltd., in whose name the cheque was issued has not been made a

party in the said complaint. Rather, the petitioner No.1 Sri Sidhartha Munda and petitioner No.2, Shri Govind Mundra, have been made as accused

No.1 and accused No.2 respectively, for being the Directors of the company. It also appears from the complaint, specially paragraph No.3, where in it

is averred that the accused No.1 as Director of Durga Krishna Store Pvt. Ltd, has issued the cheque in question for Durga Krishna Store Pvt. Ltd.

11. But, it appears that the respondent has not enclosed any supporting documents to that effect to show that the petitioner No.1 is the Directors of

the company. Whereas, the Annexure-I, the Memorandum of Association and Article of Association of the company, i.e. Durga Kishor Store Private

Limited, enclosed with the petition, reveals that the petitioner No.1 is not the director of the company. He is arraigned as an accused for being the

signatory of the cheque. Moreover, it has also not been averred in the complaint as to whether on the relevant date of issuance of the cheque in

question, he was responsible for the conduct of the business of the company or not.

12. As per the averments made in the complaint, Durga Krishna Store Pvt. Ltd, is a company and admittedly, it has not been made as an accused in

the complaint i.e. Annexure-VIII, and also admittedly, no notice was also issued to it. And as such, there is substance in the submission of Mr.

Hussain, learned counsel for the petitioners that as because the cheque was issued in the name of Durga Krishna Store Pvt. Ltd, which was allegedly

signed by the petitioner No.1, the said company i.e. Durga Krishna Store Pvt. Ltd, was not made a party, the petitioner No.1 and petitioner No.2

cannot be prosecuted without invoking Section 141 of the N.I. Act, and the case law, Aneeta Hada (Supra) referred by Mr. Hussain also to lend

support to his version.

13. It is to be noted here that in the said case, Honâ€™ble Supreme Court has held 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 dragnet on the touchstone of

vicarious liability as the same has been stipulated in the provision itself.

14. The said decision in Aneeta Hada (Supra), has also been followed consistently in the case of Himanshu vs. B. Shivamurthy & another in Criminal

Appeal No.1465/2009 and also in the case of Hindustan Unilever Ltd. vs. State of Madhya Pradesh, in Criminal Appeal No.715/2020 (arising out of

SLP Criminal No.578/2020), which is quoted here-in-below for ready reference:

“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.” In

similar terms, the Court further held:

“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”.

“ The judgment of the three Judge Bench has since been followed by a two Judge Bench of this Court in Charanjit Pal Jindal vs.

L.N. Metalics². There is merit in the second submission which has been urged on behalf of the appellant as well. The proviso to

Section 138 contains the pre-conditions which must be fulfilled before an offence under the provision is made out. These conditions

are; (i) presentation of the cheque to the bank within six months from the date on which it is drawn or within the period of its validity,

whichever is earlier; (ii) a demand being made in writing by the payee or holder in due course by the issuance of a notice in writing to

the drawer of the cheque within thirty days of the receipt of information from the bank of the return of the cheques;â€

15. Since Durga Krishna Store Pvt. Ltd, the company has not been made an accused here in this case, and since no legal notice has also been issued

to it, the complaint under Section 138 of the N.I. Act, to the considered opinion of this court, cannot be maintained against the present petitioners,

without invoking the provision of Section 141 of the N.I. Act and as such the complaint lodged before the Court of learned CJM, Cachar, Silchar is

nothing but an abuse of the process of Court and the impugned order of taking cognizance, dated 16.03.2020, suffers from manifest illegality and thus,

failed to withstand the test of legality, propriety and correctness.

16. Further, it appears that in the complainant petition, the respondent has not specifically stated as to how the petitioners are responsible for the

conduct of the business of the company i.e. Durga Krishna Store Pvt. Ltd. Merely because the petitioner No.1 is the signatory of the cheque in

question, is not at all sufficient to arraign him as an accused. Moreover, the respondent has never made any averment in the complaint against the

petitioner No.2 as to how he is responsible for the conduct of the business of the company, though he appears to be the director of the company, in

view of Annexure Annexure-I. Honâ€™ble Supreme Court in the case of S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla and others reported in

(2005) 8 SCC 89; held as under:-

â€œWhat is required is that the persons who are sought to be made criminally liable under Section 141 should be at the time the

offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person

connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and

responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It

follows from this that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the

company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for

conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a

designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies

the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability

depends on the role one plays in the affairs of a Company and not on designation or status.â€

It has been further held that :-

â€œThe conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on

account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint

must disclose the necessary facts which make a person liable.â€

17. In the case of *Sabitha Rammurthy and Another vs. R.B.S. Channabasavaradhya*, reported in (2006) 10 SCC 581, it has been held that -

Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an

offence would be vicariously liable there for. Such vicarious liability can be inferred so far as a company registered or incorporated

under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint

petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can

be made vicariously liable, strict compliance of the statutory requirements would be insisted.

18. In the case of *Saroj Kumar Podder vs. State NCT of Delhi and Another*, reported in (2007) 3 SCC 693, Honâ€™ble Supreme Court has held

that:-

â€œAllegations to satisfy the requirements of Section 138 of the Act might have been made in the complaint petition, but the same

principally relate to the purported offence made by the Company. With a view to make a Director of a Company vicariously liable for

the acts of the Company, it was obligatory on the part of the complainant to make specific allegations as are required in law.â€

19. In National Small Industries Corporation Limited v. Harmeet Singh Paintal and Another reported in (2010) 3 SCC 330: the summarization of law

on Section 141 N.I. Act is made as under:-

â€œ39. From the above discussion, the following principles emerge:

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to

make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the

transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the

time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite

statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable

for offence committed by the company along with averments in the petition containing that the accused were in charge of and

responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

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(vii) 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.

20. Moreover, it appears from the Annexure -V, at page No. 43 of the petition that the petitioners have paid a sum of Rs. 13,85,064/ on 29.05.2019, by

NEFT and 03.06.2019, paid a sum of Rs. 13,62,354/ by NEFT to the account of Steel Traders, the firm of the respondent. Having not been disputed

by the respondent, the same goes a long way to show that on the date of issuance of the cheque in question i.e. Annexure-IV, on 13.01.2020, and on

the date of issuance of the demand notice-Annexure-VI, on 27.01.2020, there was no legally enforceable debt and the cheque in question does not

represent the correct amount of debt also. Mr. Hussain, the learned counsel for the petitioners have rightly pointed this out in his argument and the

case law i.e. Dasarathbhai Trikambhai Patel (supra), also strengthen his submission. It is to be noted here that in the said case Honâ€™ble Supreme

Court has held that:-

â€™25. Section 138 creates a deeming offence. The provisos prescribe stipulations to safeguard the drawer of the cheque by providing

them the opportunity of responding to the notice and an opportunity to repay the cheque amount. The conditions stipulated in the

provisos need to be fulfilled in addition to the ingredients in the main provision of Section 138. It has already been concluded above

that the offence under Section 138 arises only when a cheque that represents a part or whole of the legally enforceable debt at the time

of encashment is returned by the bank unpaid. Since the cheque did not represent the legally enforceable debt at the time of

encashment, the offence under Section 138 is not made out.â€™

21. Honâ€™ble Supreme Court in the said case has summarized the finding as under:-

â€™30. In view of the discussion above, we summarize our findings below:

(i) For the commission of an offence under Section 138, the cheque that is dishonoured must represent a legally enforceable debt on

the date of maturity or presentation;

(ii) If the drawer of the cheque pays a part or whole of the sum between the period when the cheque is drawn and when it is encashed

upon maturity, then the legally enforceable debt on the date of maturity would not be the sum represented on the cheque;

(iii) When a part or whole of the sum represented on the cheque is paid by the drawer of the cheque, it must be endorsed on the

cheque as prescribed in Section 56 of the Act. The cheque endorsed with the payment made may be used to negotiate the balance, if

any. If the cheque that is endorsed is dishonoured when it is sought to be encashed upon maturity, then the offence under Section 138

will stand attracted;

(iv) The first respondent has made part-payments after the debt was incurred and before the cheque was encashed upon maturity. The

sum of rupees twenty lakhs represented on the cheque was not the "legally enforceable debt" on the date of maturity. Thus, the

first respondent cannot be deemed to have committed an offence under Section 138 of the Act when the cheque was dishonoured for

insufficient funds; and

(v) The notice demanding the payment of the "said amount of money" has been interpreted by judgments of this Court to mean

the cheque amount. The conditions stipulated in the provisos to Section 138 need to be fulfilled in addition to the ingredients in the

substantive part of Section 138. Since in this case, the first respondent has not committed an offence under Section 138, the validity of

the form of the notice need not be decided.

22. I have carefully considered the submission of Mr. Chakravarty, the learned counsel for the respondent and also carefully gone through the

paragraph No.21 of the decision of Hon^{ble} Supreme Court in Ashutosh Asok Parasrampuriya (supra), referred by him. In fact, in the paragraph

No.21 of the said decision, Hon^{ble} Supreme Court has discussed the law laid down by it in the case of S.M.S. Pharmaceuticals Ltd. (supra). But,

in view of above discussion and finding, I am unable to record concurrence with the submission of Mr. Chakravarty because of the following reasons

:-

(a) in the present case, the Company has not been arraigned as a party, and no legal notice was issued to it, which is imperative on the part of the

respondent/complainant, as held by Hon^{ble} Supreme Court in the case of Aneeta Hada (Supra),

(b) the petitioners herein have made payment of the cheque amount and as such the dishonored cheque, does not represent the legally enforceable

debt between the petitioner and the respondent, as held by Honâ€™ble Supreme Court in the case of Dasarathbhai Trikambhai Patel (supra),

(c) there are no specific averments in the complaint as to how and in what manner the petitioners are responsible for conduct of the business of the

company, as held by Honâ€™ble Supreme Court in the case of Sabitha Rammurthy (supra), S.M.S. Pharmaceuticals Ltd. (supra), Saroj Kumar

Podder (supra) and National Small Industries Corporation Limited (supra).

(d) the petitioner No.1 though allegedly issued the cheque in question, he is not the director of the company in view of Annexure-I.

23. Under the facts and circumstances discussed herein above, I find sufficient merit in this petition, and accordingly, the same stands allowed. The

impugned order, dated 16.03.2020 and all other subsequent orders, passed by the learned Addl. Chief Judicial Magistrate, Cachar, Silchar in N.I. Case

No.39/2020 stands set aside and quashed, as it is a case of clear abuse of the process of the court and failed to withstand the test of legality, propriety

and correctness. Stay, if any, granted earlier stands vacated. The parties have to bear their own cost.