

**(2007) 10 CAL CK 0028**

**Calcutta High Court**

**Case No:** CRR No. 1222 of 2007

Sone P. Walvekar

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

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**Date of Decision:** Oct. 16, 2007

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 311, 482
- Negotiable Instruments Act, 1881 (NI) - Section 138, 141

**Citation:** (2008) 1 CHN 493

**Hon'ble Judges:** Partha Sakha Datta, J

**Bench:** Single Bench

**Advocate:** Joymalya Begchi and Kausik Chatterjee, for the Appellant; Amit Bhattacharjee, Sonali Wachel and Ayan Bhattacharjee for O.P. No. 2 and Kashem Ali Ahmed, for O.P. No. 1, for the Respondent

**Final Decision:** Dismissed

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**Judgement**

Partha Sakha Datta, J.

By this revisional application dated 29.3.2007 u/s 482 of the Cr. PC, prayer has been made for quashing of a proceeding being case No. C-296 of 1996 pending before the learned Metropolitan Magistrate, 8th Court, Calcutta on the grounds inter alia that the learned Magistrate without application of judicial mind took cognizance of offence u/s 141 of N.I. Act which makes it a mandate that in order to bring an accusation against the company or a firm or its Directors, it is necessary to aver and prove that any Director was in-charge or responsible for day-to-day running of the business of the company and in what manner the said Director was responsible for the conduct of business of the company or otherwise responsible to it in regard to its findings and in absence of such pleading no prosecution can lie under the said section of the law.

2. The opposite party No. 2 lodged a complaint with the learned Metropolitan Magistrate, 8th Court, Calcutta against M/s. Decal Aluminium Industries & Exports Pvt. Ltd., Mr. Pradip Shankarrao Walvekar, Managing Director of the said company and Mrs. Sone P. Walvekar, Director of said company alleging that the accused No. 1 towards discharge of legal liability issued two cheques being number 230463 dated 30.4.1996 for Rs. 25 lakh drawn on Rupees Cooperative Bank Ltd., Premnagar Branch, Pime and cheque No. 224554 dated 30th April, 1996 for Rs. 5 lakh only drawn on State Bank of Hyderabad, Pune Branch in favour of the complainant. Both the cheques were signed by the accused No. 2 and delivered by him also to the complainant at his office at 163, Mukhtaram Babu Street, Calcutta - 700 007. The complainant deposited on 21.5.1996 the two cheques with the bank namely The Federal Bank Ltd., Burrabazar Branch, Calcutta which on 31st May, 1996 informed the complainant that both cheques had been dishonoured for insufficiency of fund vide memo No. dated 24.5.1996. Then followed statutory notice dated 5.6.1996 demanding payment of the amount covered under the bounced cheques. The notice was duly received by the accused No. 1 on 16.6.1996, while accused Nos. 2 and 3 refused to receive and acknowledge the notice and the notice was returned back to the complainant's Counsel with the remark "refused" made by the postal peon on 10.6.1996. However on 16.6.1996 the accused persons paid back Rs. 5 lakh by a demand draft dated 11.6.1996 drawn in favour of the complainant payable at Bank of Maharashtra, Calcutta but no payment was made in respect of the other cheque being No. 230463 dated 30, April, 1996 to the complainant within 15 days of the receipt of the notice and hence the prosecution.

3. In the midst of the trial of the case, the accused No. 2 Mrs. Sone P. Walvekar said to be Director of the accused No. 1 company took out the revisional application to challenge the proceeding against her on the sole ground that vicarious liability cannot be fastened against her unless in terms of Section 141 of the N.I. Act there is clear averment in the petition of complaint that the petitioner was in charge and/or responsible for the day-to-day running of the business of the company and further it is averred as to in what manner the petitioner was responsible for the conduct of the business of the company or otherwise responsible to it in regard to its functioning; and as in the instant petition of complainant such pleading is totally absent, and as therein no specific overt act has been attributed to the petitioner regarding involvement of the petitioner in the commission of the alleged offence the continuance of the proceeding before the learned Magistrate would be an abuse of the process of Court. This is the only ground canvassed in the revisional application.

4. I have heard Mr. Joymalya Bagchi and Mr. Kausik Chatterjee, learned Advocates for the petitioners, Mr. Amit Bhattacharjee, learned Advocate appearing with Ms. Sonali Wachal and Mr. Ayan Bhattacharjee, learned Advocates for the opposite party No. 2 and Mr. Kashem Ali Ahmed learned Advocate appearing for the State of West Bengal.

5. Mr. Bagchi submitted that the accused No. 3 who is the petitioner herein was never in-charge of the company and was not responsible for the day-to-day conduct of the business of the company and in the petition of complainant, no averment has been made that the said accused No. 3 was really in charge of the business of the company or responsible for conduct of day-to-day business of the company. It is submitted further by Mr. Bagchi that a bare averment that a certain person was Director of the company and responsible for conduct of the business of the company would not do because in addition to such averment it is also necessary to aver as to in what manner a certain Director was responsible for conduct of business of the company or otherwise responsible for it in regard to its functioning. Reference has been made to the decision in Saroj Kumar Poddar v. State (NCT of Delhi) and Anr. as reported in 2007 (1) SC 239. Another decision in N.K. Wahi v. Shekhar Singh and Ors. 2007 (2) SC 811, has been cited. In the former decision it has been held that there has to be an averment in the complaint as to how and in what manner the appellant was responsible for the conduct of the business of the company or otherwise responsible to it in regard to its functioning, while in the second decision it has been held that there must be a specific allegation as to the "part played by them in the transaction". Thus it is submitted, as the criteria laid down in the two decisions as above have not been satisfied the proceeding should be quashed.

6. Mr. Amit Bhattacharjee, learned Counsel appearing for the opposite party No. 2, the complainant submitted that Section 141 of the N.I. Act deals with vicarious liability by virtue of which a Director of a company is held liable who was in charge and responsible for the conduct of business of the company at the relevant point of time when the alleged offence took place. It is further submitted that what is the requisite averment to attract a Director criminally liable was dealt with in a three-Judge Bench decision of the Supreme Court in S.M.S. Pharmaceuticals Ltd. 2005 SCC 1975 (Paras 8/17/18/19) wherein it has been observed that it is necessary to specifically aver in a complaint u/s 141 of the Act that at the time offence was committed the person accused was in charge and responsible for the conduct of business of the company and in absence of this averment the requirement of Section 141 cannot be said to be satisfied. It is submitted that the decision in N.K. Wahi (supra) does not lay down at all that an averment is a must as to how and in what manner a certain person was responsible for conduct of business of the company or otherwise responsible to it in regard to its functioning.

7. It has further been submitted that the accused has made suppression of the fact that the case was at the end of trial in the learned Trial Court and the decisions in Aswani Kumar 2002 (3) RCR (Cri) 450, Tajinder Pal Bedi 2001 (1) RCR (Cri) 220 (P&H), have been relied in.

8. In S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla 2005 SCC 1975, it has been held as follows:

To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subject to criminal process. A liability u/s 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a Director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable u/s 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

9. In the second *S.M.S. Pharmaceuticals Ltd.* decision 2007 (2) SC 459, the same principle has been reiterated and it was held that 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 and what is necessary is that sufficient averment 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 alleged offence by the company must be in charge and shall also be responsible to the company in the conduct of its business. The decision in *Saroj Kumar Poddar* (supra) which is banked upon by the petitioner has been referred to in second SMS case wherein the same Hon"ble Judge who spoke in *Saroj Kr. Poddar* case wrote the following lines:

A faint suggestion was made that this Court in *Saroj Kumar Poddar* (supra) has laid down the law that the complaint petition not only must contain averments satisfying the requirements of Section 141 of the Act but must also show as to how and in what manner the appellant was responsible for the conduct of the business of the company or otherwise responsible to it in regard to its functioning. A plain reading of the said judgment would show that no such general law was laid down therein. The observations were made in the context of the said case as it was dealing with a contention that although no direct averment was made as against the appellant of the said case fulfilling the requirements of Section 141 of the Act but there were other averments which would show that the appellant therein was liable therefor.

10. In [Monaben Ketanbhai Shah and Another Vs. State of Gujarat and Others](#), it has been held as follows:

It is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole. If the substance of

the allegations made in the complaint fulfil the requirements of the Section 141, the complaint has to be proceeded and is required to be tried with. It is also true that in construing a complaint a hypertechnical approach should not be adopted so as to quash the same. The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind. These provisions create a statutory presumption of dishonesty, exposing a person to criminal liability if payment is not made within the statutory period even after issue of notice. It is also true that the power of quashing is required to be exercised very sparingly and where, read as a whole, factual foundation for the offence has been laid in the complaint, it should not be quashed. All the same, it is also to be remembered that it is the duty of the Court to discharge the accused if taking everything stated in the complaint as correct and construing the allegations made therein liberally in favour of the complainant, the ingredients of the offence are altogether lacking. The present case falls in this category as would be evident from the facts noticed hereinafter.

11. In *N. Rangachari v. Bharat Sanchar Nigam Ltd.* 2007 (2) Law Herald (SC) 1379, Their Lordships while relying on the decision in first SMS case made certain observations which are pertinent:

A person normally having a business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its Memorandum or Article of Association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. Therefore, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are in charge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of it. So, all that a payee of cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in charge of its affairs. The Directors are *prima facie* in that position.

12. In the instant case in the petition of complaint it has been averred as follows:

The accused Nos. 2 and 3 are the Managing Director and Director respectively of the said M/s. Decal Aluminium Industries and Exports Pvt. Ltd. and they were in charge of, and responsible to, the said company for the conduct of the day-to-day business and affairs of the company.

13. I think in view of the decisions as reproduced above this averment is sufficient for the purpose of commencement of trial and the accused would be in law to plead his defence at the trial.

14. Secondly, it has been submitted by the learned Counsel for the opposite party No. 2 that between 4.8.1997 and 29.7.2000, three witnesses were examined, cross-examined and discharged. Cognizance was taken as far back as 9.7.1996. On 29.7.2000 the defense filed an application u/s 311 Cr. PC for re-examination of PW2 and the learned Magistrate having rejected that petition on 14.8.2001 the petitioner moved this Court in revision being CRR No. 668 of 2003 which was disposed of on 15.12.2005 allowing that petition and there was a direction for re-examination of such witnesses within three months from communication of the said order. I find from the record that prosecution case was closed and 2nd April, 2007 was fixed for evidence of defense witness, if any, and for argument and at this stage this revision application has been filed which I find to be not maintainable. In [Amar Chand Agarwalla Vs. Shanti Bose and Another, etc.,](#) , it has been held that when two prosecution witnesses and a Court witness remained only to be examined the proper course at this stage to be adopted by the High Court was to allow the proceeding to go on and to come to its logical conclusion, one way or other and declined to interfere with those proceedings. In *Zoom Vision v. P. Manickam and Co.* 2001 DCR 392, the same principle was reached relying upon *Amarchand* (supra).

15. This is not a case for quashing of a proceeding. Having regard to guidelines in *State of Haryana v. Bhajan Lal* and *RD Kapur v. State of Punjab*, I do not find that this is a case, which requires intervention from this Court u/s 482 of the Cr. PC more particularly when the trial has almost come to close.

16. Accordingly, I dismiss the revisional application. A copy of the order be sent to the learned Metropolitan Magistrate, 8th Court, Calcutta with reference to Case No. C-296 of 1996 for information and necessary action.

Urgent xerox certified copy shall be provided if applied for.