

Form No. J(1)

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:

Hon'ble Justice R. K. Bag.

CRR 1341 of 2015

Davinder Kaur

V.

The State of West Bengal & Anr.

For the Petitioner : **Mr. Sabyasachi Banerjee,**
Mr. Anirban Dutta,
Mr. Arindam Chatterjee,
Mr. Amritam Mandal,

For the Opposite : **Mr. Ayan Bhattacharjee,**
Parties No.2

Heard on : **19.06.2015, 01.07.2015**

Judgement on : **22.07.2015**

R. K. Bag, J.

The petitioner has preferred this revision under Section 401 read with Section 482 of the Code of Criminal Procedure, 1973 praying for quashing the proceeding of Complaint Case No.C-30220 of 2011

pending before the Court of Learned Metropolitan Magistrate, 8th Court, Calcutta.

2. The backdrop of the revisional application, in brief, is as follows: The opposite party no.2 filed a petition of complaint before the Court of Learned Magistrate against M/s Gee Pee Infotech Pvt. Ltd. and three others including the petitioner on the allegation of committing offence under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (hereinafter N. I. Act). It is alleged that M/s Gee Pee Infotech Pvt. Ltd. (hereinafter referred to as accused company) and its two Directors – Bijay Kumar Agarwal and Kalpana Agarwal and the present petitioner being company secretary of the accused company approached opposite party no.2 for providing short term loan to the tune of Rs.50,00,000/- with an undertaking to refund the same within the stipulated period of time. The opposite party no.2 agreed to the proposal of the accused company and credited a sum of Rs.50,00,000/- in the account of the accused company through RTGS on September 10, 2011. The accused company in discharge of legal liability towards refund of the amount of loan issued an account payee cheque of Rs.50,00,000/- drawn on ICICI Bank in favour of the opposite party no.2. The cheque was

dishonoured on presentation at Allahabad Bank, Red Cross Place Branch, Calcutta on October 31, 2011. The notice was issued under Section 138(b) of the N. I. Act calling upon the accused company to make payment of the amount of Rs.50,00,000/-. The accused company paid Rs.15,00,000/- in response to the notice, but the balance amount of Rs.35,00,000/- was not paid by the accused company. As a result, opposite party no.2 filed the petition of complaint before the Court of Learned Magistrate against the accused company, its two Directors and the petitioner who were in charge of and responsible for the day-to-day business of the accused company and they also enjoyed the overall control over the regular affairs of the accused company during the transaction of the opposite party no.2 with the accused company.

3. The petitioner and the other accused persons appeared before the Court of Learned Magistrate in response to the summons issued by Learned Magistrate. The plea of the accused persons was recorded by Learned Magistrate and the evidence of one prosecution witness has already been recorded, but the cross-examination of second prosecution witness has not yet been completed before the trial court.

The petitioner has challenged the above criminal proceeding in the instant revisional application.

4. Mr. Sabyasachi Banerjee, Learned Counsel appearing on behalf of the petitioner contends that the petitioner is the company secretary of the accused company. By referring to the provisions of Section 2(45) of the Companies Act, 1956 and Section 2(24) of the Companies Act, 2013 Mr. Banerjee submits that the term “company secretary” is introduced for the first time in the Companies Act of 2013 and that the Company Secretary is entrusted with the duty to perform administrative and ministerial functions of the company. He further submits that the averments in the petition of complaint to the effect that the Directors were in charge of and were responsible to the company for the conduct of the business of the company may be sufficient for issuance of summons to those Directors of the company to face the charge under Section 138 and under Section 141(1) of the N. I. Act. According to Mr. Banerjee, there is need of specific averments in the petition of complaint for issuance of summons against the company secretary of the company to the effect that there was specific role of the company secretary in the commission of the offence under Section 138 of the N. I. Act and the offence was

committed with his consent or connivance or negligence as laid down under Section 141(2) of the N. I. Act. The specific contention of Mr. Banerjee is that the petitioner was not at the helm of affairs of the accused company and she did not play any role in the transaction between the accused company and the opposite party no.2 as she is not entrusted with the duty to perform any financial function of the accused company. The last submission of Mr. Banerjee is that the proceeding may be quashed against the petitioner though the trial has commenced and some of the prosecution witnesses have already been examined by the trial court. Mr. Banerjee has relied on “K. K. Ahuja V. V. K. Vora” reported in (2009) 10 SCC 48 and “Udai Shankar Awasthi V. State of Uttar Pradesh” reported in (2013) 2 SCC 435 in support of his above contentions.

5. Mr. Ayan Bhattacharjee, Learned Counsel appearing on behalf of the opposite party no.2 contends that the inordinate delay in praying for quashing the proceeding cannot be entertained by the court, because the trial has proceeded to a considerable extent and some of the prosecution witnesses have already been examined before the trial court. Mr. Bhattacharjee submits that there is no need of specific averments in the petition of complaint for issuance of summons

against the petitioner who performs the duty of the secretary. He argues that the averments in the petition of complaint to the effect that the petitioner was in charge of and responsible for the day-to-day business of the accused company is sufficient for issuance of summons under Section 141 of the N. I. Act. Mr. Bhattacharjee relied on the decisions reported in (1973) 4 SCC 10, 2007 (4) JCC 3083, 2004 (3) RLW 1632, (2005) 8 SCC 89, (2015) 1 SCC 103, 2010(1)E Cr. N. (CAL) 38 and also unreported decision of CRR 2977 of 2012 in support of his above contentions.

6. The petitioner has prayed for quashing the criminal proceeding on the ground that specific averments have not been made in the petition of complaint pointing out the role played by the petitioner as company secretary of the accused company in the transaction of issuing cheque in favour of the opposite party no.2 and non-payment of the amount of money when the cheque was dishonoured. Section 141 of the N. I. Act lays down the criteria how the Director, Manager, Secretary and other Officers of the company will be guilty of the offence under Section 141 of the N. I. Act, when the company is prosecuted for committing offence under Section 138 of the N. I. Act.

It is, therefore, necessary to quote Section 141 of the N. I. Act, which is as follows:

“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 the 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.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.- For the purposes of this section,-

- (a) “company” means any body corporate and includes a firm or other association of individuals; and
- (b) “director”, in relation to a firm, means a partner in the firm.”

7. The three-Judge Bench of the Supreme Court has laid down in “S.M.S. Pharmaceuticals Ltd. V. Neeta Bhalla” reported in (2005) 8 SCC 89 what specific averments are required to be made in the petition of complaint for issuance of process against the Directors and Officers of the company to face the criminal charge under Section 138 read with Section 141 of the N. I. Act. It is relevant to quote the proposition of law laid down in paragraph 19 of “S.M.S. Pharmaceuticals Ltd.” (supra), which is as follows:

“19. In view of the above discussion, our answers to the questions posed in the reference are as under:

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a director of a company is not sufficient to make the person liable

under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that 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.

(c) The answer to question (c) has to be in the affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141.”

8. In “K. K. Ahuja V. V. K. Vora and another” reported in (2009) 10 SCC 48 two-Judge Bench of the Supreme Court has summarised the proposition of law with regard to specific averments to be made in the petition of complaint for issuing process against the Director and other Officers of the company to face the charge under Section 138 read with Section 141 of the N. I. Act. The Supreme Court has laid down in paragraph 27 of “K. K. Ahuja” (supra) as follows:

“27. The position under Section 141 of the Act can be summarised thus:

(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix “Managing” to the word “Director” makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii) In the case of a Director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141.

(iii) In the case of a Director, secretary or manager [as defined in Section 2(24) of the Companies Act] or a person referred to in clauses (e) and (f) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 141(1) of the Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141(2) by making necessary averments relating to consent and connivance or negligence, in

the complaint, to bring the matter under that sub-section.

(iv) Other officers of a company cannot be made liable under sub-section (1) of Section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence.”

9. In “Gunmala Sales Pvt. Ltd. V. Anu Mehta” reported in (2015) 1 SCC 103 the Supreme Court has summarised in paragraph 34 the criteria for quashing the criminal proceeding started against the company and its Directors and Officers for commission of the offence under Section 138 read with Section 141 of the N. I. Act, which is as follows:

“34. We may summarise our conclusions as follows:

34.1. Once in a complaint filed under Section 138 read with Section 141 of the N.I. Act the basic averment is made that the Director was in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, the Magistrate can issue process against such Director.

34.2. If a petition is filed under Section 482 of the Code for quashing of such a complaint by the Director, the High Court may, in the facts of a particular case, on an overall reading of the complaint, refuse to quash the complaint because the complaint contains the basic averment which is sufficient to make out a case against the Director.

34.3. In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about the role of the Director in the complaint. It may do so having come across some unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of process of court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an arm-twisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out. In the absence of such evidence or circumstances, complaint cannot be quashed.

34.4. No restriction can be placed on the High Court's powers under Section 482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of the court. There are no fixed formulae to be followed by the High Court in this regard and the exercise of this power depends upon the facts and circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but nothing prevents it from taking

unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director.”

10. With the above proposition of law laid down by the Apex Court, I have to consider what should be the specific averments in the petition of complaint against the petitioner for issuance of process to face the charge under Section 138 read with Section 141 of the N. I. Act. Admittedly, the petitioner is the company secretary of the accused company. It is true that the term “company secretary” was not defined in the Companies Act, 1956. However, Section 2(45) of the Companies Act, 1956 lays down that “secretary” means a Company Secretary within the meaning of clause (c) of sub-section (1) of Section 2 of the Company Secretaries Act, 1980, and includes any other individual possessing the prescribed qualifications and appointed to perform the duties which may be performed by a secretary under this Act and any other ministerial or administrative duties. Similarly, Section 2(24) of the Companies Act, 2013 lays down that “company secretary” or “secretary” means a company secretary as defined in clause (c) of sub-section (1) of Section 2 of the Company Secretaries Act, 1980 who is appointed by a company to

perform the functions of a company secretary under this Act. The term “company secretary” and the term “secretary” have the same meaning under the Companies Act, 2013. The Companies Act, 1956 also defined “secretary” as “company secretary” under Section 2(45) of the said Act. Since there is no difference in the meaning of “secretary” and “company secretary” in the Companies Act, 1956 and the Companies Act, 2013, I am of the view that “company secretary” appointed by the company will fall within the category of “secretary” appearing in Section 141(2) of the N. I. Act. It is immaterial what duty is performed by the company secretary or what role is played by the company secretary in a particular company for the purpose of impleading the company secretary as accused for facing vicarious liability of the company for commission of the offence under Section 138 of the N. I. Act.

11. The proposition of law laid down in “S.M.S. Pharmaceuticals Ltd.” (supra) is that the managing director or joint managing director of the company and the person who signed the cheque on behalf of the company will be liable under Section 141 of the N. I. Act, but specific averments must be made in the petition of complaint to prosecute the Director of the company to the effect that he was in charge of and

responsible to the company for conduct of the business in order to make him liable under Section 141 of the N. I. Act. The law laid down in “K. K. Ahuja” (supra) is that the Director of the company or an Officer of the company who signed the cheque on behalf of the company can be prosecuted under Section 141(2) of the N. I. Act without making specific averments in the complaint that he was in charge of and was responsible for the conduct of the business of the company or that there was consent, connivance or negligence on the part of the said Director or Officer of the company. It is made clear in “K. K. Ahuja” (supra) that in order to prosecute the director, secretary or manager or a person referred to in clause (e) and (f) of Section 5 of the Companies Act it is sufficient if an averment is made in the petition of complaint that he was in charge of and was responsible to the company for the conduct of the business of the company to bring the case within the ambit of Section 141(1) of the N. I. Act. It is also held in “K. K. Ahuja” (supra) that any of the above persons including the secretary or company secretary of the company can also be made liable under Section 141(2) of the N. I. Act by making necessary averments in the petition of complaint with regard to the consent or connivance or negligence of the said secretary or company secretary.

In the instant case, there is specific averment in the petition of complaint that the present petitioner being the accused no.4 was in charge of and responsible for the day-to-day business of the company and she enjoyed the overall control over the regular affairs of the company during all material time and that she jointly and severally transacted with the opposite party no.2 on behalf of the accused company. So, the averments made in the petition of complaint are sufficient for issuance of process against the petitioner in her capacity as Company Secretary of the accused company for facing the charge under Section 138 read with Section 141 of the N. I. Act.

12. Now, I would like to deal with other authorities cited from the Bar in support of the contentions made by Learned Counsel representing both the parties. In “Udai Shankar Awasthi V. State of U.P.” reported in (2013) 2 SCC 435 the Supreme Court has held in paragraph 43 that approaching the Court at a belated stage for a rightful cause, or even for the violation of the fundamental rights, has always been considered as a good ground for its rejection at the threshold.
13. In “Amar Chand Agarwalla V. Shanti Bose” reported in (1973) 4 SCC 10 the Supreme Court has laid down that when the trial court has framed charge against the accused person and the major part of the

evidence of the prosecution is recorded by the trial court, the High Court should not interfere with the proceedings of the trial court on appraisal of evidence for quashing the said proceedings by invoking inherent power under Section 482 of the Code of Criminal Procedure.

14. In “Krishna Dwivedi V. Surender Kumar” reported in 2007(4) JCC 3083 it is held by Learned Single Judge of the Delhi High Court that in the absence of any explanation for the delay of more than two years in challenging the summoning order, the court would refuse to invoke the inherent power under Section 482 of the Code of Criminal Procedure for quashing the proceedings under Section 452/323/506/427/34 of the Indian Penal Code.
15. In “Kanoria Chemicals & Industries Ltd. V. State of Rajasthan” reported in 2004(3)RLW 1632 Learned Single Judge of the Rajasthan High Court declined to invoke the inherent power under Section 482 of the Code of Criminal Procedure to quash the criminal proceedings when the accused person approached the High Court after unexplained delay of more than three years of filing the case before the trial court.
16. In “Manoj Jalan V. State of West Bengal” reported in 2010(1)E Cr. N (Cal) 38 Learned Single Judge of our High Court held that the plea

raised by the accused Director of the company that he resigned from the post of Director by way of submitting Form 32 before the transaction of dishonour of the cheque is a matter for consideration by the trial court after recording of evidence and as such the High Court declined to exercise jurisdiction under Section 482 of the Code of Criminal Procedure. The facts of the reported case are clearly distinguishable from the facts of the present case where the question of resignation of the Director by way of submitting Form 32 is not an issue and as such this decision is not relevant for the purpose of this revision. In the unreported case of “Hanuman Mal Tater V. M/s Pilot Consultants Pvt. Ltd.” (CRR No.2977 of 2012 decided on January 18, 2013) Learned Single Judge of this Court refused to quash the criminal proceeding under Section 482 of the Code of Criminal Procedure as the complainant made averments in the petition of complaint to the effect that the Director and Additional Director of the accused company were in charge of and/or responsible to the accused company for its day-to-day business and enjoyed the overall control when the offence was committed and personally made the transactions with the company of the complainant.

17. I have already observed that the present petitioner and two Directors of the accused company were in charge of and responsible for the day-to-day business of the accused company and they also enjoyed the overall control of the regular affairs of the accused company during the transaction between the opposite party no.2 and the accused company. I have also observed that the petitioner being the company secretary of the accused company will fall within the category of persons enumerated in Section 141(1) of the N. I. Act for the purpose of facing charge under Section 138 of the N. I. Act. The materials on record do not suggest any unimpeachable and incontrovertible evidence that the petitioner as the company secretary of the accused company was not at all concerned with the issuance of cheque or the transaction of dishonour of the said cheque and non-payment of money after receiving the notice under Section 138(b) of the N. I. Act and as such the question of quashing the criminal proceeding against the petitioner does not arise, particularly when the evidence of one prosecution witness has already been recorded by the trial court and the cross-examination of another prosecution witness is deferred at the instance of the accused persons including the petitioner. There is also inordinate delay of about four years to

move the revisional application by the petitioner before this court for quashing the proceeding which is also a ground for not invoking inherent power under Section 482 of the Code of Criminal Procedure. The above findings lead me to hold that the petitioner has failed to make out a case for interference by this court by invoking inherent power under Section 482 of the Code of Criminal Procedure. I would like to make it clear that the trial court will proceed with the hearing of the case without being influenced by the observations made in the body of the judgment, as I have not gone into the domain of facts. As a result, the criminal revision is dismissed. There will be no order as to costs.

The department is directed to send down a copy of this order to the Learned Court below for favour of information and necessary action.

The urgent photostat certified copy of the judgement and order, if applied for, be given to the parties on priority basis after compliance with all necessary formalities.

(R. K. Bag, J.)

