In the Supreme Court of Bangladesh

High Court Division

(Criminal Miscellaneous Jurisdiction)

Criminal Misc. Case No. 63389 of 2018

In the matter of:

An application under section 561A of the Code of Criminal Procedure

-And-

In the matter of:

Mrs. Fahmida Mizan and others

..... Accused-petitioners

-Versus-

The State and another

.....Opposite Parties

Mr. Syed Ahmed Raza with
Mr. Md. Mohinul Islam, Advocates
.....for the Accused-Petitioners
Mr. Khaled Hamid Chowdhury with
Mr. Md. Ibrahim Khalil, Advocates
.....for the opposite parties
Mr. Dr. Md. Bashir Ullah, D.A.G with
Mr. Mizanur Rahman Khan Shaheen, A.A.G
Mr. Md. Shafayet Zamil, A.A.G
Mr. Ashikuzzaman Bablu, A.A.G and
Ms. Syeda Jahida Sultana (Ratna), A.A.G
.....for the State

Present:
Mr. Justice Jahangir Hossain
And
Mr. Justice Md. Badruzzaman

Judgment delivered on 18.03.2021

Jahangir Hossain, J:

This Rule was issued by a Division Bench of the High Court Division on 11.11.2018 following an application filed under section 561A of the Code of Criminal Procedure calling upon the opposite party to show cause as to why the proceeding of Metro. Sessions Case No. 4731 of 2018 arising out of C.R. Case No. 1317 of 2017 under sections 138 & 140 of the Negotiable Instruments Act, 1881 now pending in the 1st Court of Additional Metropolitan Sessions Judge, Dhaka should not be quashed.

The prosecution case is briefly described as under:

Opposite party No. 02, National Finance Limited filed petition of complaint against the accused petitioners and two others in the Court of Chief Metropolitan Magistrate, Dhaka for allegedly committing offence under sections 138/140 of the Negotiable Instruments Act, 1881 [briefly as Act] stating that accused No.01 [Ibrahim Raihana Industries Limited] is the borrower who availed credit facilities from complainant-opposite party No.02, National Finance Limited. Accused No.02 is the Managing Director while accused Nos. 03-06 in the complaint are directors of the said company. They failed to repay the loan money within the stipulated time. Accordingly, they became defaulter-borrowers to opposite party No.02. For repayment of the dues, accused No.02 issued a Cheque being No. CDA 0207405 dated 29.05.2017 for an amount of BDT 15,00,00,000/- [Taka fifteen crore] only on behalf of the company in favour of the complainant drawn on the account of the accused, maintained with the Mutual Trust Bank Limited. The complainant presented the cheque in the concerned branch of the Bank for encashment on 31.05.2017 which was returned unpaid on the same day with remarks "Insufficient Fund & Dormant Account". Thereafter, opposite party No. 02 informed the accused persons about the dishonor and requested to pay the debt amount in cash but they failed. Then the accused urged opposite party No. 02 to present the cheque again for encashment and then opposite party No. 02, again placed the cheque on 05.07.2017 for encashment but the Cheque was again dishonored with remarks "Insufficient found & Dormant Account".

Despite repeated persuasion and all out co-operation by the complainant, the accused did not pay the amount mentioned in the cheque. Thereafter, the complainant sent legal notices on 11.07.2017 through registered post with acknowledge due [AD] to their respective office and home addresses requesting them to pay the cheque amount within 30 [thirty] days from the date of receipt of the notices which were received by them. On receipt of notices they did not make payment within the stipulated period and accordingly, the complaint

was made for prosecution under sections 138/140 of the Act. Thereafter, the learned Magistrate on examination of the authorized person of the complainant issued process against the accused-petitioners and others under sections 138/140 of the Act, and after compliance of all formalities, transmitted the case records to the learned Metropolitan Sessions Judge, Dhaka who, thereafter, sent the case records to learned Additional Metropolitan Sessions Judge, 1st Court, Dhaka for trial, and framed charge against the accused-petitioners and another in their presence under sections 138/140 of the Act, to which they pleaded not guilty and claimed to be tried.

Thereafter, the accused-petitioners moved this Court with an application under section 561A of the Code of Criminal Procedure for quashing the entire proceeding of the case and obtained the present Rule with an order of stay. The Rule is opposed by opposite party No.02 by filing counter-affidavit.

In support of the Rule, Mr. Syed Ahmed Raja, learned Advocate appearing for the accused petitioners mainly contends as follows:

(i) that the primary responsibility is on the complainant to make specific averments as required under the law in the complaint as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every director knows about the transaction and the accused-petitioners, who are mere directors of the company, are not liable to be prosecuted under sections 138/140 of the Act.

(ii) that is settled principle of law that the implication of the persons, who are not signatory of the cheque in question is illegal and not sustainable in the eye of law. Since there is no allegation in the complaint against the accused Nos.03-06 [petitioners] under sections 138/140 of the Act, 1881 and they are not in any way connected with alleged cheque and they are not signatories to the cheque in question, they cannot be prosecuted under sections 140 of the Act.

(iii) that vicarious liability can be inferred against a director or manager of the company registered or incorporated under the Companies Act only if the requisite statements are made in the petition of complaint 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 proceed with. Vicarious liability on the part of a person must be pleaded and proved and not inferred and since no such standing was made in the petition of complaint, the proceeding of the case is liable to be quashed.

On the contrary, Mr. Khaled Hamid Chowdhury, learned Advocate appearing with Mr. Md. Ibrahim Khalil, learned Advocate for opposite party No. 02 submits as follows:

(i) that the company is a separate legal personality and all the directors along with the Managing Director are equally liable for company's day to day affairs/activities. Without prior permission or by way of resolution being approved by the Board of Directors, important decisions, dealings, transactions, taking loans or giving cheques are not possible. One single director, let alone the Managing Director, cannot take such important decision without raising the issue to the Board of Directors. If a cheque is signed by the Managing Director of the company for repayment of the dues of defaulted loan, it is to be deemed that by default all the directors gave consent to do so and as such, dishonor of such cheque issued on behalf of the company for insufficiency of fund, all directors shall be prosecuted under sections 138 read with section 140 of the Act;

(ii) that as per section 140(1) of the Act, if the person committing an offence under section 138 of the Act is a company, every person who, at the time of committing the offence, was in-charge of, and was responsible to, the

company for the conduct of the business of the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly;

(iii) that the director(s) of a company by virtue of his position under the Companies Act, 1994 is deemed to be responsible for the conduct of the business or was in-charge of the affairs of the company and such person cannot be allowed to deny the liability for the acts or omissions of the company or he cannot be exonerated from liability if he cannot prove by evidence that the offence has been committed without his knowledge or he had exercised all due diligence to prevent the commission of offence and such burden lies upon him to prove such defense during trial by adducing evidence before the trial Court and accordingly, the present proceeding cannot be quashed under section 561A of the Code of Criminal Procedure and as such, the Rule is liable to be discharged.

We have heard the submissions of the learned Advocates of both the parties, perused the application, supplementary affidavits, counter-affidavit filed by the complainant-opposite party and other connected documents available on record wherefrom it transpires that the petitioners' company, availed loan facilities from the complainant, financial institution and defaulted to pay the installments and other dues as per sanction letter dated 1.4.2015 and for repayment of outstanding dues accused No.2, as the Managing Director, issued a cheque on behalf of the company on 29.5.2017 for an amount of Tk. 15,00,00,000/-[fifteen crore] in favour of the complainant. But the cheque was dishonored on 31.5.2017 and 05.07.2017 for 'insufficiency of fund and dormant account' when it was presented before the Bank for encashment. The accused-petitioners' claim is that they are mere directors and were not responsible for the issuance or

dishonor of the cheque and they are not liable for the offence committed by the company.

The main issue before us as to whether for the offence committed by the company, the petitioners being Directors of the company can be prosecuted and punished under sections 138/140 of the Act.

It has pleaded in the petition of complaint, that the company, accused No.01 took credit facilities from the complainant and accused No.02 is the Managing Director and accused Nos.3-6 [the present petitioners] are directors of accused No.01and after default of payment of installments and outstanding dues, the complainant by several letters urged the accused petitioners and others to pay the installments and other dues and they issued the cheque on 29.05.2017 on behalf of the company under the signature of accused No.2 for payment of outstanding dues and after dishonor of the cheque for insufficiency of fund on 31.05.2017 and 05.07.2017, the complainant sent legal notices on 11.07.2017 through registered post with A/D to them and they received those notices but failed to pay the amount mentioned in the cheque in stipulated time.

Under Company Law, a company is a juristic person comprised of its members/share holders, governed by its own Article of Association through the Board of Directors selected/appointed by the Members for taking decisions in the formal meeting in accordance with the Article of Association as well as in accordance with law. It is run through the Board of Directors. A company cannot be run alone or by one Director.

Before deciding the points raised at the bar, it is necessary to reproduce sections 138 and 140 of Act, 1881 as under:

> "138. Dishonour of cheque for insufficiency, etc. of funds in the account. – (1) 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 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 provisions of this Act, be punished.

Provided that nothing contained in this section shall apply unless ;

(a).....

(b).....

(c).....

140. Offences of 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 and 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.

(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:"

In the case of Eusof Babu (Md) and others vs. State and another, reported in 68 DLR (AD) 298 two questions were raised before the Appellate Division. The first question was whether if a company incorporated under the Companies Act committed an offence punishable under section 138 of the Act, is excluded from prosecution, can a director, manager, secretary or other officer of the company be prosecuted for that offence, and secondly, whether if more than one cheques issued by the same drawer can be prosecuted in a single case. In deciding the first issue the Apex Court, elaborately discussed the provisions under sections 138 and 140 of the Act, 1881, as quoted above, and in paragraph Nos.6-12 fixed the criteria of liabilities of directors and other persons when the offence is committed by the company under section 138 of the Act as follows:

> "6. Chapter XVII under the heading 'Notaries Public' was substituted by Act No.XIX of 1994 by chapter XVII with the heading 'On penalties in case of dishonour of certain cheques for insufficiency of funds in the account'. Sections 138 and 139 were newly inserted in the chapter and sections 140 and 141 were added by the said amendment. Sub-section (1A) was inserted in section 138 by Act No. III of 2006 providing the manner of service of notice upon the drawer of the cheque if the cheque is dishonoured. Section 138A was also inserted by Act III of 2006 restricting appeal against conviction unless the drawer deposits fifty percent of the amount of the dishonoured cheque. Section 139 was repealed in July, 2000 which provides 'presumption in favour of holder.
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> 7. Section 138 is a special law which was inserted with the intention to preventing the drawee from being defrauded of a negotiable instrument by a drawer of the same. The object is to inculcate faith in the efficacy of banking operations and credibility in transacting business

on negotiable instruments. A plain reading of section will show that once a cheque is drawn and handed over to the drawee and the latter has presented it in his account for encashment and thereafter, if the cheque is returned to him with an endorsement that the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid for that account or that it was dishonoured because of 'stop payment' instructed by the Bank, an offence punishable under the said section would constitute provided that if the drawee fulfills the conditions provided in the proviso to sub-section (1). If the drawer of the cheque is a company, firm or an association of individuals would also be prosecuted for commission of offence under section 138 subject to the fulfillment of the conditions.

8. A combined reading of sub-sections (1) and (2) of section 140 would discern three categories of persons to be brought within the ambit of section 138, through legal fiction envisaged therein. The first category is the Company which committed the offence; the second category is every person who was in-charge of and was responsible for the business of the company at the time of commission of offence; and the third category is, any other person who is a Director, Manager, Secretary or officer of the company, with whose connivance or neglect, the company has committed the offence. Though sub-section (1) of section 138 speaks of a drawer of the cheque who would alone have been the offender of the offence, because of section 140, penal liability has been cast on other persons connected with the company. The difference between sections 138 and 140 is that in respect of section 138 the offence is committed by human

being that is to say, natural person and in section 140 though the expression "the person" is used which is qualified by a company which means "anybody corporate and includes a firm or other association of individuals" which is a juristic person or not. It can be prosecuted for the offence under section 138.

9. In sub-section (1) of section 140 the use of the phrase 'as well as' necessarily involve in a discord the persons mentioned in the second category within the umbrella of the offence on a par with the offending company. Again, by reason of the use of the expression 'shall also' in sub-section (2) of section 140 bring the third category of persons additionally within the drag chain of the offence. Thus, the effect of a literal meaning of section 140 is that when a cheque is issued by the company and the same is dishonoured, there is no doubt that the company is the principal offender under section 138 but that alone does not mean that it is solely liable for the offence. The other two categories of persons are also similarly liable for the same offence by fiction of law. If a case is instituted against the company alone, excluding the person who was responsible to the affair of the company it can be prosecuted and punished.

10. But, when such offence was committed by the company alone, the other two categories of persons can also be prosecuted and punished if arraigned in the category as accused. Neither sub-section (1) nor sub-section (2) puts an embargo for the prosecution of the said two categories of persons excluding the company. If the drawee opts to prosecute against the second or the third categories of persons, the case will not fail in the absence of the company if he can show that though the offence was committed by the company, they were

responsible for the conduct of the business of the company or that the offence was committed with their consent or that due to their neglect the company has committed the offence. Section 140 does not contain that the prosecution of company is indisputable for the prosecution of the other categories of persons. If the company is not prosecuted, the other two categories of persons cannot, on that ground alone, escape from criminal liability.

11. The proviso to sub-section (1) of section 140 exonerates the second category of a person if he can show that the company has committed the offence without his knowledge or that he could not prevent the commission of the offence despite his endeavour to prevent the same. This will be deducible from the facts and circumstances of the case and it can only be shown and proved by evidence. Similarly, the third category of the persons can be exonerated from being prosecuted if the drawee of the chaque fails to prove that the offence has been committed with their consent or connivance or neglect. The onus on the part of the drawee is primary being based on the maxim e.i: '*incumbit probatio qui dicit, non qui negat*' this is because the liability envisaged in sub-section (1) is on the person in-charge of, and was responsible to the business of the company is fixed by the legislature because he is directly responsible for the offence.

12. If for any reason the company is not prosecuted, the other persons who are in-charge of the affairs of the company or in the management of the company or have knowledge about the affairs of the company cannot escape from criminal liability if they are served with the notice. <u>These persons need not have done any specific overt act or omitted to do anything to be fastened with liability. The very fact that the company has committed</u>

> the offence is sufficient to make them liable. No company transacts business without the help of human agency. When the Court presumes the existence of a fact, the burden of proving its non existence is on the party that asserts its non existence."
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> [underlined by us to give emphasis]

Review petitions were filed against the judgment reported in 68 DLR (AD) 298 and the Appellate Division vide judgment dated 13.2.2017 [reported in 11 ALR (AD) 111] dismissed those petitions by endorsing its earlier view and holding that '*for proper and effective adjudication of cases, the complainant(s)/drawee(s) may add the company as one of the accused in the case but for not impleading the company, the case will not fail*'.

In Yusuf Babu (*supra*) the Apex Court divided three categories of persons to be brought within the ambit of section 138 of the Negotiable Instruments Act, 1881 when the offence is committed by a company. The first category is the Company which committed the offence; the second category is every person who was in-charge of and was responsible for the conduct of the business of the company at the time of commission of offence; and the third category is, any other person who is a director, manager, secretary or other officer of the company with whose connivance or negligence, the company committed the offence.

The proviso to sub-section (1) of section 140 of the Act exonerates the second category of a person if he can show that the company has committed the offence without his knowledge or that he could not prevent the commission of the offence despite his endeavour to prevent the same. This will be deductible from the facts and circumstances of the case and it can only be shown and proved by evidence. The liability envisaged in sub-section (1) of section 140 of the Act is on the person who was in-charge of, and was responsible to the company for the conduct of the business of the company is fixed by the legislature because he is directly responsible for the offence. This category of persons need not have done any specific overt act or

omitted to do anything to be fastened with liability. The very fact that the company has committed the offence is sufficient to make them liable. Accordingly, no averment is required to be made in the petition of complaint specifying their overt act in the commission of the offence by them.

Similarly, as per sub-section (2) of section 140 of the Act, 1881, the third category of the persons can be exonerated from being prosecuted if the drawee of the cheque fails to prove that the offence has been committed with their consent or connivance or negligence. Thus the onus is primarily upon the drawee of the cheque. This is also deducible from the facts and circumstances of the case and it can only be shown and proved by evidence during trial.

The effect of a literal meaning of section 140 of the Act is that when a cheque is issued by the company and the same is dishonoured, there is no doubt that the company is the principal offender under section 138 of the Act but that alone does not mean that it is solely liable for the offence. The other two categories of persons are also similarly liable for the same offence by fiction of law.

Moreover, section 2(m) of the Companies Act, 1994 clearly narrates that the Managing Director of a company, although he has been given substantial power of management, must act under the superintendent and control of the Board of Directors. In the case of Alhaj Md. Harun and others –Vs- the State and others, reported in 36 BLD 200 = 68 DLR 535, a Division Bench of this Court observed as follows:

> "We have also taken into consideration the submission of the learned Advocate appearing for the accused-petitioners that, no specific averment has been made as to who of the accused was in charge of running or managing the affairs of the company. On this ground, our considered view is that, it need not be emphasized that a company cannot work without the board of directors. The accused petitioners are, respectively, the Managing Director, Chairman and the Director. Their presence is

> necessary to form the quorum of the meetings of the board of directors as well as for adopting any resolution by the board of directors, for operating the accounts of the company, for entering into any deal with any other party as well as for running day to day business of the company, subject to their supervision. As such, apparently they are active party in managing the affairs of and operation of the business of the company. Companies Act, section 95, requires that the Board must sit at least 4 (four) times in each year. This also proves the active participation of accused, as required by law, in running the affairs of the company. The board decides the date of and hold the AGM and EGM etc. too. The accused persons being the MD. Chairman and Director their participation in running and managing the affairs of the company hardly needs any further proof, although the accused-petitioners one entitled to adduce evidence at the time of hearing of the case, before the Trial Court, on this issues."

We are in respectful agreement with the above view of the Division Bench.

In the petition of complaint, it has stated that opposite party No. 02 granted a loan to the company [accused No. 01], which is run by the Board of Directors [accused Nos. 02-06]. The company availed loan facilities and the cheque was issued in the name of the company which was dishonoured for 'insufficiency of fund and dormant account'. The company falls under the first category of offender. The question whether at the time of committing the offence by the company the accused-petitioners, being directors of the company, were in charge of or were responsible to the company for the conduct of the business of the company or whether the offence has been committed without their knowledge or they had exercised all due diligence to prevent the

commission of offence are questions of facts which can only be decided upon taking evidence during trial of the case.

In the light of discussions made above, we find no substance in the submissions of the learned Advocate for the accused-petitioners.

Accordingly, we find no merit in the Rule.

Thus, the Rule, issued by this Court earlier, is discharged without any order as to cost.

The order of stay granted earlier shall stand vacated.

The trial Court is directed to proceed with the case in accordance with law and in view of the observations made above.

Let a copy of this judgment be communicated to the concerned Court below at once.

Md. Badruzzaman, J

I agree

Liton/B.O