

[\[S.138 NI Act\] Person In Charge Of Trust Can't Be Arraigned As Accused Without Impleading The Trust Itself: Orissa High Court](#)

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IN THE HIGH COURT OF ORISSA AT CUTTACK

G. SATAPATHY; J.

CRLMC NO.1392 of 2016; 01.12.2022

Bijaya Manjari Satpathy versus State of Orissa and others

For Petitioner: M. Agarwal, Advocate;

For Opposite Parties: S.S. Pradhan, AGA, A.P. Bose, Advocate.

J U D G M E N T

1. The petitioner in this CRLMC seeks the indulgence of the Court U/S.482 of Cr.P.C. to quash the complaint in 1.C.C. Case No.60 of 2014 of the Court of learned S.D.J.M., Angul in an application U/S.482 of Cr.P.C. for not arraigning the trust as an accused in terms of Section 141 of Negotiable Instruments Act, 1881 (for short the N.I. Act).

2. Facts in precise are opposite party No.2-Kanheilal Choudhury instituted the complaint in 1.C.C. Case No.60 of 2014 against the petitioner as General Secretary, M/s. Bijay Laxmi Trust and opposite party No.3- Dinabandhu Mishra in the Court of learned S.D.J.M., Angul for commission of offences U/S.138 of N.I. Act on account of dishonour of cheque bearing No.083955 dated 31.12.2013 issued by opposite party No.3 as President of M/s. Bijay Laxmi Trust for an amount of Rs.7,30,550/- (Rupees Seven Lakh Thirty Thousand and Five Hundred Fifty) as the cheque on presentation returned back to opposite party No.2 as unpaid with endorsement from Bank of Baroda, Angul Branch on 18.02.2014 "account closed". Opposite party No.2 accordingly issued Demand notice to petitioner and opposite party No.3 within the prescribed period and when they did not respond, opposite party No.2 instituted the aforesaid complaint. On perusal of complaint and initial statement of complainant filed in the shape of affidavit together with documents annexed with the affidavit, learned S.D.J.M., Angul by the impugned order took cognizance of offence U/S.138 of N.I. Act and issued process in the form of summons to the petitioner and opposite party No.3. On receipt of summon, the petitioner approach this Court by way of this CRLMC petition U/S.482 of Cr.P.C.

3. In the course of hearing of the CRLMC, Mr. Mohit Agarwal, learned counsel for the petitioner has raised a preliminary objection at the threshold on the maintainability of the complaint for want of trust arraigned as an accused in pursuance to the provision of Section 141 of N.I. Act. In raising such objection, learned counsel for the petitioner has submitted that the cheque in question was neither issued by the petitioner in individual capacity nor in the capacity of a General Secretary of the Trust, but the cheque was issued by the opposite party No.3 as the President of Trust and thereby, primarily the criminal liability cannot be fastened on the petitioner. It is further submitted by him that Section 141 of N.I. Act mandates implemation of the trust as a party since the cheque in question was issued by a person for/on behalf of the trust and when the mandatory provision has not been complied, the complaint itself is not maintainable. Learned counsel for the petitioner by submitting inter alia above issue of maintainability of the complaint prays to quash it by relying upon the decisions in *Dillip Hariramani v. Bank of Baroda; AIR 2022 SC 2258* and *Aparna A. Saha v. Self Developers Pvt. Ltd and others; AIR 2013 SC 3210*.

4. In reply, Mr. Amit Prasad Bose, learned counsel for opposite party No.2 has submitted that although the trust has not been made as an accused in the complaint, but that *per se* would not absolve the petitioner from the liability arising out of cheque issued for the trust

and she, accordingly, is vicariously liable as a General Secretary of the Trust with her husband-opposite party No.3 who had issued the cheque for the trust and the provisions of Section 141 of N.I. Act would not stand on the way of discharge of the liability of the petitioner and her husband arising out of the cheque which was dishonored and thereby, the complaint is squarely maintainable. It is, therefore, contended by the learned counsel for the opposite party No.2 that not only the complaint is maintainable but also the order passed by the learned S.D.J.M., Angul taking cognizance of offence is valid and the present CRLMC being unmerited is liable to be dismissed. He accordingly has prayed to dismiss the CRLMC.

5. Aforesaid rival submissions make it very clear that the singular question required to be decided here is the maintainability of the complaint in absence of trust as an accused person by taking into consideration the provision of Section 141 of N.I. Act which primarily lays down the criminal liability for commission of offence U/S.138 of N.I. Act by Companies and the same is extracted under:

“141. Offences by companies.-

(1) If the person committing an offence under section 138 is a company, every person who, at the time of offence was committed, was incharge 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:

[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 purpose 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.”

5.1. A comparative reference of Section 138 and Section 141 of N.I. Act makes it apparently clear that Section 138 of N.I. Act prescribes criminal liability on a individual person who issues a cheque towards discharge of a debt or liability in whole or in part when such cheque is dishonoured by the bank on presentation, whereas Section 141 of N.I. Act refers about criminal liability for commission of offence of Section 138 of N.I. Act by the companies in case the cheque was issued for the company and such criminal liability extends to 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 who shall be liable to be proceeded against and if found guilty, be punished accordingly. The explanation appended to Section 141 of N.I. Act indicates that for the purpose of this Section; (a) “Company” means anybody corporate and includes a firm or other association of individuals; and (b) “Director” in relation to a firm, means a partner in the firm.

5.2. For better appreciation to analyze the contentions raised by the parties, the description of accused as appended in Column No.2 of the complaint is exactly reproduced as under:

Name, Address of the accused persons	1. Bijaya Manjari Satpathy, aged about 32 years, General Secretary, M/s. Bijaya Laxmi Trust, W/O. Dinabandhu Mishra. 2. Mr. Dinabandhu Mishra, aged about 37 years, S/O. Late Bansidhar Mishra, both are of Qtr. No. T.A/123, Nalco Nahar, P.O/P.S. Nalco Nagar, Dist. Angul-759145.
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5.3. For clarity of understanding, the paragraphs-(i) and (ii) as stated in Column-7 of the complaint are also exactly extracted as under:

“(i) That, the accused persons are namely Bijaya Manjari Satpathy, General Secretary, M/s. Bijaya Laxmi Trust, W/O. Dinabandhu Mishra and Mr. Dinabandhu Mishra, President of M/s. Bijaya Laxmi Trust, S/O. Late Bansidhar Mishra, both are residing at Qtr. No. T.A/123, Nalco Nahar, P.O/P.S. Nalco Nagar, Dist. Angul.

“(ii) That, in order to clear up the outstanding dues of the vacant premises of the complainant at Panchmahala, a post dated cheque bearing No.083955, Dt.31.12.2013 amounting of Rs.7,30,550/- (Rupees Seven Lakh Thirty Thousand and Five Hundred Fifty) only was issued by the accused persons to the complainant along with an affidavit made by the accused persons on Dt.30.09.2013.”

6. A bare perusal of the averments made in the complaint would unambiguously disclose that there are no averments in the complaint who, at the time when offence was committed, was in charge of, and was responsible to the trust for the conduct of its business. Besides, the petitioner is admittedly neither the signatory of the cheque nor is there any averment made by the complainant in the complaint that the petitioner was in-charge of and was responsible to the trust for the conduct of its business. Undeniably the trust has not been made or implicated as an accused in the complaint.

7. There appears no hesitation in the mind of the Court that the complaint suffers from the above infirmity as noted, but whether such infirmity would go to the root of the maintainability of the complaint so as to make it incurable may also be required to be answered in this case inasmuch as the petitioner prays for quashing of the complaint, whereas the opposite party No.2 has alternatively prayed not to quash the complaint against opposite party No.3. In order to answer the same, this Court falls back to the law laid down in *Pawan Kumar Goel v. State of Uttar Pradesh and another*; 2022 SCC Online SC 1598, wherein at paragraph-25, the apex Court has observed thus:

“This Court has been firm with the stand that if the complainant fails to make specific averments against the company in the complaint for the commission of an offence under Section 138 of NI Act, the same cannot be rectified by taking recourse to general principles of criminal jurisprudence. Needless to say, the provisions of Section 141 impose vicarious liability by deeming fiction which pre-supposes and requires the commission of the offence by the company or firm. Therefore, unless the company or firm has committed the offence as a principal accused, the persons mentioned in sub-Section (1) and (2) would not be liable to be convicted on the basis of the principles of vicarious liability.”

8. In *Dillip Hariramani*(supra) as relied on by the petitioner the Apex Court in paragraph-16 of the decision has observed thus:-

“Such vicarious liability arises only when the company or firm commits the offence as the primary offender.”

In laying down the aforesaid principle in the above case, the Apex Court has referred the principle summarized on Section 141 of N.I. Act lays down earlier by it in

National Small Industries Corporation Limited Vrs. Harmeet Singh Paintal; (2010) 3 SCC 330 wherein the Apex Court at paragraph-39 has laid down the principle as follows:-

“(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 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 the 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.”

9. In *Aparna(supra)* the Apex Court in paragraph-28 has held that:-

“Under Section 138 of N.I. Act, in case of issuance of cheque from joint accounts, a joint account holder cannot be prosecuted unless the cheque has been signed by each and every person who is a joint account holder. The said principle is an exception of Section 141 of N.I. Act.”

10. In the ultimate appraisal of totality of facts and law involved in this case, there appears hardly any dispute about petitioner not to be a signatory of the cheque and her implication in this case as General Secretary of the Trust is without arraigning the “Trust” as an accused in the complaint, but Section 141 of NI Act makes it obligatory for the complainant-OP No.2 in this case to arraign the Trust as an accused to make the person in charge of and responsible to such Trust for the conduct of its business as vicariously liable for dishonor of cheque issued for the Trust, which was not done in this case, nonetheless there is no averment in the complaint as to who, at the time of the commission of offence, was in charge of and was responsible to the Trust and further, such inherent defect remains incurable in view of the law laid down in *Pawan(supra)* which lacuna under law gets further widened when the complainant fails to discharge his primary responsibility to make specific averment as required under Section 141 of NI Act so as to make either the petitioner as the Secretary or OP No. 3 as the President of Trust vicariously liable for dishonor of cheque. Hence, the mandate of Section 141 of NI Act having not pleaded and established remotely in this case together with admittedly the incurable and inherent defect of non-impletion of the Trust as an accused in the complaint makes it very clear that the complaint is not maintainable in the eye of law and therefore, the further proceeding in the complaint is nothing but an abuse of process of Court and to secure the ends of justice, the complaint as a whole being unsustainable in the eye of law needs to be quashed and accordingly, the complaint in 1.C.C. Case No.60 of 2014 of the Court of learned S.D.J.M., Angul is hereby quashed.

11. Resultantly, the CRLMC is accordingly allowed to the extent indicated above on contest, but in the circumstance, there is no order as to costs.