

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR
BEFORE
HON'BLE SHRI JUSTICE DINESH KUMAR PALIWAL
ON THE 29th OF NOVEMBER, 2022
MISC. CRIMINAL CASE No.33390/2018

Between:-

ANIL KUMAR LOHADIYA, S/O SHRI MOOLCHAND LOHADIYA, AGED ABOUT 50 YEARS, OCCUPATION: PROPRIETOR NAVBHARAT BUILDCON PVT. LTD. 1/37, NEW MILAN COLONY, RAISEN ROAD, BHOPAL, DISTRICT BHOPAL (MADHYA PRADESH)

.....APPLICANT

(BY SHRI AMAN DAWARA AND SHRI SANKALP KOCHAR – ADVOCATE FOR THE PETITIONER)

AND

RAMLAL GUPTA (DECEASED), THROUGH LRS:

- 1. MITHILA GUPTA, WIDOW OF LATE RAMLAL GUPTA, AGED ABOUT 54 YEARS, OCCUPATION: AGRICULTURIST,**
- 2. AMRATA GUPTA, D/O LATE RAMLAL GUPTA, AGED ABOUT 27 YEARS, OCCUPATION: ADVOCATE,**
- 3. ANAMIKA GUPTA, D/O LATE RAMLAL GUPTA, AGED ABOUT 25 YEARS, OCCUPATION: STUDENT**

4. ANURADHA GUPTA, D/O LATE RAMLAL GUPTA, AGED ABOUT 24 YEARS, OCCUPATION: STUDENT,

5. ANJALI GUPTA, D/O LATE RAMLAL GUPTA, AGED ABOUT 18 YEARS, OCCUPATION: STUDENT,

6. RITURAJ GUPTA, S/O LATE RAMLAL GUPTA, AGED ABOUT 13 YEARS, OCCUPATION: STUDENT, MINOR THROUGH NATURAL GUARDIAN MOTHER SMT. MITHILAL GUPTA,

ALL R/O HOUSE NO.32, NIRMAL EMPIRE SAMAN, P.S. SAMAN, DISTRICT REWA (M.P.)

...RESPONDENTS

(NONE FOR THE RESPONDENTS, DESPITE SERVICE OF NOTICE)

This petition coming on for final hearing this day, Justice Dinesh Kumar Paliwal, passed the following:

ORDER

This petition under Section 482 of the Cr.P.C has been filed by the petitioner/accused for quashment of the criminal complaint bearing Case No.1952/2014 (Ramlal Gupta (deceased through Lrs) Vs. Anil Kumar Lohadiya under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the “NI Act”), pending before the Chief Judicial Magistrate, Rewa.

2. According to the facts of the case, Ramlal Gupta filed a

complaint in his lifetime before the CJM, Rewa alleging that complainant and accused knew each other personally for the last 10 years. Complainant had worked with the Navbharat Buildcon Private Limited Construction Company and for that work petitioner/accused had issued Cheque No.560033 dated 10.01.2014 of an amount of Rs.3,40,000/- of State Bank of India, Bhopal in favour of complainant. When he deposited that cheque in his bank account of Canara Bank, Rewa on 12.02.2014 and 03.04.2014, same stood dishonored due to insufficient fund in the account of accused. Thereafter, a statutory notice was given to the accused on 09.04.2014 which was served on him on 23.04.2014. Despite service of notice accused did not made the payment of Rs.3,40,000/- to him. Hence, the deceased respondent Ramlal Gupta filed a complaint before CJM, Narsinghpur against petitioner/accused for commission of offence under Section 138 of the NI Act.

3. Learned counsel for the petitioner has submitted that as per the averments made in the complaint, petitioner/accused had given the cheque in question to the petitioner/accused for his work with Navbharat Buildcon Private Limited Construction Company under the capacity of Chairman of the company namely Navbharat Buildcon Private Limited Construction Company but the deceased respondent did not implead the company as a party in the complaint case. The respondent complainant has clearly averred that cheque was given for his work in the company. Hence, in view of the provisions of Section

141 of the NI act the proceedings under Section 138 of the NI act are not maintainable and deserves to be quashed and has prayed for the quashment of the complaint pending on the case file of the Chief Judicial Magistrate, Rewa.

4. Despite service of notice, none has appeared for the respondents.

5. Heard learned counsel for the petitioner and perused the material available with the petition.

6. On a perusal of the Annexure A/2, it is apparent that Navbharat Buildcon Private Limited is a company registered under the companies Act, 1956. On a perusal of the Cheque No.560033, it is explicit that the disputed cheque had been issued on behalf of the company by the petitioner. Therefore, the core issue which emerges is whether the company could have been made liable for prosecution without being impleaded as an accused and whether the chairman could have been prosecuted for offence punishable under Section 138 of the NI Act without the company being arraigned as an accused. To appreciate the controversy, it is necessary to consider the relevant provisions of law. Section 138 of the Negotiable Instruments Act which deals with the ingredients of offence for dishonor of cheque and consequent non-payment of the amount due thereon, read as follows:

“138. Dishonour of cheque for insufficiency, etc., of funds in the account. —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 for the discharge, in whole or in part, of any debt or other liability, 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 with imprisonment for 19 [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.— For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.”

7. Section 7 of the NI Act defines a “drawer” to mean the maker of a bill of exchange or a cheque. An authorized signatory of the company becomes a “drawer” as he has been authorized to do so in respect of the account maintained by the company.

8. At this juncture, it is necessary to refer Section 141 which deals with the offences by the company. Section 141 of the NI Act is reproduced below:

“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 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 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.”

9. On a reading of the said provisions, it is clear that Section 141 of the NI Act deals with the offences committed by the companies and provides that if an offence is committed by the company under Section 138 of the NI Act, the company as well as every person who was in charge of a responsibility of the company for the conduct of business of the company at the time of commission of offence is deemed to be guilty of the offence. It is provided under what circumstances the criminal liability would not be facile. Further, it provided that no person shall be liable to be punished if it proved that an offence is not

committed under his knowledge or he has exercised all due diligence to prevent the commission of such offence.

10. Section 139 of the NI Act creates a presumption in favour of the holder. The said presumption has to be read with Section 118 A of the Act. Thus, there is a deemed fiction and relation to criminal liability, presumption in favour of the holder and denial of the offence in respect of certain aspects.

11. In the case in hand, learned counsel for the petitioner has submitted that deceased/respondent did not impleaded the company as an accused and also there is no specific pleading regarding role of the petitioner on behalf of the company.

12. Learned counsel has submitted that in case of *Aneeta Hada Vs. Godfather Travels and Tours Private Limited, reported in (2012) 5 SCC 661* and in case of *Bhupendra Suryavanshi Vs. Sai Traders, 2020 SCC OnLine MP 1277*, it has been held that maintaining the prosecution under Section 141 of the act, arraigning of the company as an accused is imperative and there cannot be any vicarious liability against the other persons mentioned in the other categories unless there is prosecution against the company. In the case of *Bhupendra Suryavanshi Vs. Sai Traders, (supra)* a co-ordinate bench observed as under:

“12. Further, looking to the trend set up by the complainants to implead all the Directors, company secretaries, etc., of the accused company, irrespective of whether they were actually involved in the

commission of alleged offence or not, the Hon'ble Apex Court has issued several pronouncements to settle the issues. In one of the landmark case, S.M.S. Pharmaceuticals Lts. Vs. Neeta Bhalla and Another, reported in (2005) 8 SCC 89, the Hon'ble Apex Court has observed as under: -

"9. 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).....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 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 Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for 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 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."

13. Further, in the case of K.K. Ahuja Vs. V.K.Vora, reported in 2009 (10) SCC 48, in para 27, the Hon'ble Apex Court has held as under:

"27. The position under Section 141 of the Act can be summarized 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 Sec. 2(24) of the Companies Act) or a person referred to in clauses (e) and (f) of Section 5 of 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). 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 can not 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.”

14. Further, in the case of National Small Industries Corpn. Ltd. Vs Harmeed Singh Paintal reported in (2010) 3 SCC 330, the Hon'ble Apex Court has explained its earlier judgment passed in the case of K.K. Ahuja (Supra) and settled the principle of vicarious liability of the Director/Managing Director/Joint Director of company as well as principle regarding necessity of specific averment in the complaint.

15. Therefore, from the above discussion, it is clear that the person (Director/Managing Director/Joint Director/other officers and employees) of company can not be prosecuted under Section 138 of N.I. Act unless the company is impleaded as an accused and subject to following the principle laid down by the Hon'ble Apex Court in the cases of S.M.S. Pharmaceuticals Lts.(Supra), K.K.Ahuja(Supra) and National Small Industries Corpn. Ltd. (Supra).”

13. In the case of *Anil Gupta Vs. Star India Pvt.Ltd., reported in (2014) 10 SCC 373* following the *Anita Hada (supra)* case the Hon'ble Apex Court has held as under:

“13. In the present case, the High Court by the impugned judgment dated 13.08.2007 held that the complaint against respondent No.2 company was not maintainable and quashed the summon issued by the Trial Court against respondent no.2-Company. Thereby, the Company being not a party to the proceedings under Section 138 with Section 141 of the Act and in view of the fact that part of the judgment referred to by the High Court in Anil Hada (supra) has been overruled by three Judge Bench of this Court in Aneeta Hada (supra), we have no other option but to set aside the rest part of the impugned judgment whereby the High Court held that the proceedings against the appellant can be continued even in absence of the Company. We, accordingly, set aside that part of the impugned judgment dated 13th August, 2007 passed by the High Court so far it relates to appellant and quash the summon and proceeding pursuant to complaint case No.698 of 2001 qua the appellant.”

14. In view of the above discussion, it is explicit that for maintaining the prosecution under Section 141 of the NI Act, arraigning of a company as an accused is imperative. The other categories of the offender can only be brought in drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. In the case in hand, respondent complainant has clearly averred that he had worked with Navbharat Buildcon Private Limited Company and cheque was given to him for his work. As disputed cheque was given by the petitioner/accused on behalf of the company, a demand notice was served only on the petitioner/accused, no demand notice was issued against the company. Therefore, before arraying company as an

accused in complaint case, the petitioner cannot be prosecuted for the offence under Section 138 of the NI Act. Hon'ble Apex Court in the case of *Dilip Hari Ramani Vs. Bank of Baroda*, reported in 2022 *CRI.L.J. 2595* placing reliance upon the case of *Anita Hada (supra)*, *Himanshu Vs. B. Shivamurthy and Another*, reported in (2019) 3 *SCC 797* & *Hindustan Uniliver Limited Vs. State of M.P.* (2020) 10 *SCC 751* has held as under:

“14. The provisions of Section 141 impose vicarious liability by deeming fiction which presupposes 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) or (2) would not be liable and convicted as vicariously liable. Section 141 of the NI Act extends vicarious criminal liability to officers associated with the company or firm when one of the twin requirements of Section 141 has been satisfied, which person(s) then, by deeming fiction, is made vicariously liable and punished. However, such vicarious liability arises only when the company or firm commits the offence as the primary offender. This view has been subsequently followed in Sharad Kumar Sanghi Vs. Sangita Rane, Himanshu v. Shivamurthy and Another, and Hindustan Uniliver Limited v. State of Madhya Pradesh.

17. (2015) 12 SCC 781:“11. In the case at hand as the complainant's initial statement would reflect, the allegations are against the Company, the Company has not been made a party and, therefore, the allegations are restricted to the Managing Director. As we have noted earlier, allegations are vague and in fact, principally the allegations are against the Company. There is no specific allegation against the Managing Director. When a company has not been arrayed as a party, no proceeding can be initiated against it even where vicarious liability is fastened under certain statutes. It has been so held by a three-Judge Bench in Aneeta Hada Vs. Godfather Travels and Tours (P) Ltd. in the context of the Negotiable Instruments Act, 1881.”

18. (2019) 3 SCC 797:“13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the

company could now be arraigned as an accused.”

19. (2020) 10 SCC 751: “23. Clause (a) of sub-section (1) of Section 17 the Act makes the person nominated to be in charge of and responsible to the company for the conduct of business and the company shall be guilty of the offences under clause (b) of sub-section (1) of Section 17 of the Act.

The exception carved out in Aneeta Hada (supra), which applies when there is a legal bar for prosecuting a company or a firm, is not felicitous for the present case. No such plea or assertion is made by the respondent.”

15. In the present case, the averments made in the complaint indicates that the cheque was drawn by the petitioner/accused for Navbharat Buildcon Private Limited which is a company registered under Companies Act, 1956. In complaint, it has not been made clear whether petitioner is its Director, Managing Director or in what capacity he had issued the cheque. A notice of demand was served only on the petitioner Anil Kumar Lohadiya and not on the company. The complaint has been filed only against the petitioner without arraying Navbharat Buildcon Private Limited construction company as an accused. The provisions of Section 141 of the NI Act specifically provides that if the person committing an offence under Section 138 is a company every person who at the time of commission of offence was in charge of or was responsible to the company for conduct of 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.

16. In this case company has not been made an accused or have been summoned to be tried for the offence. Therefore, in the absence of

company being arraigned as an accused, a complaint against the petitioner is not maintainable, as for maintaining prosecution under Section 141 of the NI Act arraigning of the company as an accused is imperative. It is not not clear as to in what capacity the petitioner had signed the cheque on behalf of the company. Moreover, in absence of notice of demand being served on the company and without complying with the provisions of Section 138, I am of the view that complaint is not maintainable against the present petitioner in absence of company being arraigned as an accused.

17. Hence, this petition is allowed. Criminal Case No.1952/2014 (Ramlal Gupta (deceased through Lrs) Vs. Anil Kumar Lohadiya under Section 138 of the Negotiable Instruments Act pending before the Chief Judicial Magistrate, Rewa being not maintainable is quashed. However, respondents shall be at liberty to avail any other remedy available in law.

(DINESH KUMAR PALIWAL)
JUDGE

