IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

FRIDAY, THE 6TH DAY OF MARCH 2015/15TH PHALGUNA, 1936

CRL.REV.PET.NO. 2061 OF 2006 ( )

CRL.A 823/2005 OF SESSIONS COURT, ERNAKULAM

CC 597/2002 OF J.F.C.M.COURT-I, ERNAKULAM
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REVISION PETITIONER(S)/APPELLANTS/ACCUSERS:
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1. SIBI ALEXANDER, MANAGING PARTNER,
   SHOPE'N SAVE, MARGIN FREE SUPER SHOPPE,
   CARMEL BUILDING, BANERJI ROAD.

2. P.V.VARGHESE, PARTNER,
   SHOPE'N SAVE, MARGIN FREE SUPER SHOPPE,
   CARMEL BUILDING, BANERJI ROAD.

   BY ADV. SRI.BIJU ABRAHAM

RESPONDENT(S)/RESPONDENTS/COMPLAINANT AND STATE:
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1. FRANKLIN GEORGE NEDUNGADAN,
   S/O.GEORGE NEDUNGADAN, NEDUNGADAN & CO.,
   GENERAL MERCHANT & COMMISSION AGENT,
   NORTH BASIN ROAD, ERNAKULAM.

2. STATE OF KERALA, REP.BY PUBLIC
   PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

   R2 BY PUBLIC PROSECUTOR SRI.K.K.SAIDALAVI
   R1 BY ADV. SRI.TOMSON T.EMMANUEL

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 06-03-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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K.HARILAL, J.

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Crl.R.P. No.2061 of 2006

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Dated this the 6th day of March, 2015

O R D E R

The revision petitioners are the accused in C.C.No.597/2002 on the files of the Judicial First Class Magistrate's Court-I, Ernakulam as well as the appellants in Crl.A. No.823/2005 on the files of the Court of Sessions Judge, Ernakulam. The above calendar case was filed by the respondents herein against the petitioners alleging offence under Section 138 of the Negotiable Instruments Act. After considering the evidence on record the learned Magistrate found the revision petitioners guilty of the offence under Section 138 of the N.I. Act and convicted thereunder. They were sentenced to undergo simple imprisonment for one month and to pay a sum of Rs.75,000/- to the complainant as compensation under Section 357(3) of the Cr.P.C. and in default, to undergo simple imprisonment for three months. Though the petitioners had preferred the above appeal challenging the conviction and sentence, the appellate court also after reappreciating the evidence on record confirmed the findings of conviction, but modified the sentence. The compensation was enhanced to Rs.1 lakh to which both accused are jointly and severally liable. This revision petition is filed challenging the concurrent findings of conviction and modified sentence imposed on the revision petitioners by the court below.

2. It is the case of the respondent in the complaint that the complainant is the proprietor of M/s.Nedungadan and Co., carrying on wholesale business of provisions at North Basin Road, Ernakulam and the first and second accused are the partners of M/s.Shope'n Save Margin Free Super Shoppe at Banerji Road, Ernakulam. They had purchased goods from the complainant on credit basis and in discharge of that liability the first accused issued Ext.P1 cheque for Rs.53,563/- in favour of the complainant. When the said cheque was presented for encashment, the same was got dishonoured and returned for want of sufficient funds. Though the complainant caused to issue a lawyer's notice demanding the cheque amount and the accused received the same, they did not pay the cheque amount nor did they send a reply denying the liability under the cheque.

3. Though this revision petition is filed on various grounds, the learned counsel for the revision petitioners mainly canvassed the point that the complaint itself was not maintainable in so far as the firm was not made an accused in the complaint. According to

the learned counsel, the cheque had been drawn and issued by a firm; but the said firm by name M/s.Shope'n Save Margin Free Super Shoppe was not made a party in the complaint. To fortify the said argument the learned counsel cited **Aneeta Hada v. Godfather Travels and Tours Private Ltd. [2012 KHC 4244]**, which was relied on by this Court in **Fakrudhin V.P. v. State of Kerala and Another [2014 (4) KHC 815]**.

4. Per contra, the learned counsel for the 1st respondent contends that since the transaction was with a partnership firm and the cheque was issued for and on behalf of the firm, all the partners of the said firm are liable to be prosecuted under Section 138 of the N.I. Act. Further, the learned counsel drew my attention to the address shown in the cause title, which reads as follows:

> "Sibi Alexander, Aged 39 years, Managing Partner,
> Shope'n Save Margin Free Super Shoppe,
> Carmel Building, Banerji Road."

Pointing out the address shown in the cause title the learned counsel alternatively advanced an argument that the said address shown in the cause title represents the firm also.

5. In view of the rival contentions advanced at the Bar, the question to be considered is whether a complaint under Section

138 of the N.I. Act filed by the managing partner of the firm is maintainable in prosecution of a cheque drawn and issued by the firm unless the firm is made a party in the complaint?

6. Going by **Aneeta Hada**'s case (supra), it could be seen that on reference, a three-Judge Bench of the Apex Court considered the question whether the Managing Director of the company alone can be prosecuted on a complaint under Section 138 of the N.I. Act unless the company is made an accused in the complaint. The Apex Court held that the prosecution against the company is imperative to maintain prosecution against the Managing Director or other officers under the company. In this case, the Apex Court analysed the nature and extent of the liability of the company as well as its persons working in different categories of the company in this way, which is extracted below:

> "53. It is to be borne in mind that Section 141 of the Act is concerned with the offences by the company. It makes the other persons vicariously liable for commission of an offence on the part of the company. As has been stated by us earlier, the vicarious liability gets attracted when the condition precedent laid down in Section 141 of the Act stands satisfied. There can be no dispute that as the liability is penal in nature, a strict construction of the provision would be necessitous and, in a way, the warrant.

58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words “as well as the company” appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil

> Hada is overruled with the qualifier as stated in para 51. the decision in Modi Distillery has to be treated to be restricted to its own facts as has been explained by us hereinabove."

Following this decision, this Court in **Fakrudhin**'s case (supra) held as follows:

> "No separate notice is required to be sent to all the directors and other persons responsible to the company for the conduct of the business of the company if the drawer of the cheque is the company. If the cheque is issued from the account maintained by the company, indisputably, the company itself will be the drawer of the cheque, as the company has its own legal entity and responsibility. It follows, there cannot be a prosecution under S.138 of the N.I. Act, without the drawer of the cheque in the array of the accused and where the company is the drawer, no prosecution will lie against the Managing Director or persons employed in different categories of the company, unless the prosecution against the company is maintainable."

7. In view of the above decisions, undoubtedly, it can be held that the point raised by the learned counsel for the appellants is covered by the decision of the Apex Court in **Aneeta Hada**'s case (supra) wherein the Apex Court held that a complaint under Section 138 of the N.I. Act against the Managing Director or other persons or other functionaries working in different categories of the company and who are responsible to the company for the conduct of the business of the company is not maintainable unless

the company is made an accused in the complaint, as the prosecution against the company is imperative. Without applying the above proposition, it is seen that one Sibi Alexander and P.J. Varghese who are respectively the managing partner and partner of the firm are the accused in the prosecution under Section 138 of the N.I. Act and the firm is not made a party in the complaint. According to Section 141(2)(a) of the N.I. Act, a 'company' means a body corporate and includes a firm or other association of individuals. Therefore, the issue involved in the instant case is squarely covered by the decision in **Aneeta Hada**'s case (supra); i.e., the complaint that gave rise to this revision petition was not maintainable and the courts below ought to have dismissed the complaint at the threshold itself.

8. The learned counsel drew my attention to the cause title of the complaint and contended that the accused Nos.1 and 2 are arraigned in the complaint to represent the firm also. But I am inclined to reject the said argument in limine on a finding that "Sibi Alexander, Aged 39 years, Managing Partner, Shope'n Save Margin Free Super Shoppe, Carmel Building, Banerji Road" shows his status and address only and he is not made to represent the company. Similarly, in the case of the second accused also, the

name of the partnership firm is shown as the address of the person. That does not mean that an accused represents the firm. In this analysis, the impugned judgments under challenge will stand quashed. The revision petitioners are acquitted of the offence under Section 138 of the N.I. Act.

In the result, this revision petition is allowed.

Sd/-
(K.HARILAL, JUDGE)

okb.