**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.1019 OF 2014

1. Rajkumar s/o Sudamrao Damdhere,
Age: 50 years, Occu: Business,
R/o: 'Shrinath', Tirupati Park,
N-4, Cidco, Aurangabad

2. Vikarm s/o Babanrao Pachpute,
Age: Major, Occu: Business,
R/o: 35, Safalya Sandesh Nagar,
Market Yard, Pune – 41 037

3. Sadashiv s/o Bhikaji Pachpute,
Age: Major, Occu: Business,
R/o: Kashti, Shrigonda,
Taluka Shrigonda,
District Ahmednagar

4. Shahadu s/o Dagadu Satav,
Age: Major, Occu: Business,
R/o: 163, AAA, Rangagaon Dumala,
Taluka Shrigonda,
District Ahmednagar

5. Nitin s/o Mithulal Munot,
Age: Major, Occu: Business,
R/o: 393, Village Kashti,
Taluka Shrigonda,
District Ahmednagar

6. Kranti Rajkumar Dhamdhere,
Age: Major, Occu: Business,
R/o: 'Shrinath', Tirupati Park,
N-4, Cidco, Aurangabad

7. Shivaji s/o Marutirao Anbhule,
Age: Major, Occu: Business,
R/o: 2, Trilok Chamber, Lal Taki Road,
Ahmednagar

8. Babanrao s/o Bhikaji Pachpute,
Age: Major, Occu: Business,
R/o: A/p Kashti, Taluka Shrigonda,
District Ahmednagar ..PETITIONERS

VERSUS

Orient Poly Pack Pvt. Ltd. Jalna,
Through its Director,
Govind s/o Rajkumar Chechani,
Age: 34 years, Occu: Business,
R/o: Sambhaji Nagar, New Jalna,
Taluka and District Jalna ..RESPONDENT

Mr R. R. Karpe, Advocate for petitioners;
Mr S. S. Bora, Advocate for respondent

CORAM : N.W. SAMBRE, J.

DATE : 25th April, 2016

ORAL JUDGMENT :

Rule. Rule made returnable forthwith and with the consent of the parties, the petition is heard finally.

2. By way of present petition, the petitioners-accused have questioned legality, validity and sustainability of the complaint case initiated for an offence punishable under section 138 of the Negotiable Instruments Act (for short "Act"), vide S.T.C. No.846 of 2014, pending on the file of 5th Judicial Magistrate First Class, Jalna.

3. The petitioners claim to be directors of Shri Sai Krupa Sugar & Allied Industries Ltd. It is claimed that three cheques for Rs.58,15,264/- came to be issued in favour of the respondent which were dishonoured, resulting into initiation of the proceedings in question.

4. In the said proceedings, it is claimed that original accused no.1 is the Chief Executive Officer and Managing Director of the company. It is claimed that in all three cheques were issued and total amount as was outstanding was Rs.58,15,264/-, for which the cheques were issued, but were dishonoured.

5. It is claimed by the petitioners that even if the pleadings in the complaint are taken to be true at its face value, still the same would not satisfy the ingredients of offence punishable under section 138 of the Act. The second limb of submission is that though the cheque is issued for and on behalf of the company as is apparent from the cheque placed on record, the said company is not added as a party – accused to the complaint, being a juristic person, as such complaint itself is not maintainable as same is filed ignoring the scheme of section 141 of the Negotiable Instruments Act.

6. Mr Karpe, learned Counsel appearing on behalf of the petitioners, has invited my attention to the judgment of the Apex Court, in the matter of **Anil Gupta vs. Star India Pvt. Ltd. & anr**., reported in **2014 AIR SCW 4210**, so as to submit that the company is a necessary party to the proceedings and in absence thereof, the prosecution under section 138 of the Act is not sustainable. He would also rely upon the judgment of the Apex Court, in the matter of **Sharad Kumar Sanghi vs. Sangita Rane**, reported in **2015 ALL MR (Cri) 2405 (S.C.)**, so as to substantiate the above referred contentions.

7. Mr Karpe then would urge that even if the petitioners claim to be the Directors of the company, they cannot be implicated in the complaint as accused, as there is hardly any role played by them in the matter of issuance of or dishonour of the cheque *qua* operation of the company. He would invite my attention to paragraphs 43, 51, 56, 58 and 59 of the judgment of the Apex Court, in the matter of **Aneeta Hada vs. Godfather Travels & Tours Pvt. Ltd.** and other connected matters, reported in **(2012) 5 SCC 661**.

8. While opposing the claim, Mr Bora, learned Counsel appearing on behalf of the respondent – complainant would submit that even if in the complaint the company is not impleaded as accused or no notice under section 138 of the Act was issued to it, still the present proceedings will be tenable against the petitioners – accused, who are directors of the company, for and on whose behalf the cheques were issued. So as to substantiate his contentions, Mr Bora would invite my attention to certain pleadings in paragraph 7 of the complaint, wherein it is averred that accused nos.1 to 8 are jointly and severally liable for payment of the cheques which were dishonoured in the present case. It is also brought to my notice that a legal notice was served on accused no.1 on 3rd March, 2014 and as such even if it is assumed that accused nos.2 to 8 are not responsible for the vicarious liability, however, it is accused no.1 who is signatory to the cheques, against whom the complainant can proceed.

9. After considering rival submissions of the parties, from the record it depicts that the case that is sought to be put-forth by the respondent-complainant is that Shri Sai Krupa Sugar & Allies Industries Ltd. of which the accused were the directors, used to purchase P.P. Bags from the complainant. It is then claimed that against the orders placed, the supplies were made to Shri Sai Krupa Sugar & Allies Industries Ltd. on various dates of which purchase bills are mentioned in the complaint.

10. In paragraph 4 of the complaint, it is stated that an amount of Rs.58,15,264/- remained due and accused no.1 – Chief Executive Officer and Managing Director of Shri Sai Krupa Sugar & Allies Industries Ltd. issued three cheques for an amount of Rs.18,24,000/-, dated 20th December, 2013, Rs.20,00,000/- dated 20th December, 2013 and Rs.20,00,000/- dated 20th December, 2013, which were dishonoured. According to the complainant, the cheques were returned by the bankers on the ground of insufficiency of funds, resulting into issuance of a notice to accused no.1 under section 138 of the Act on 3rd March, 2014.

11. Apart from above, there are hardly any pleadings in the complaint as against the petitioners – accused. It is then required to be noted that the company, i.e. Shri Sai Krupa Sugar & Allies Industries Ltd., with which the transaction was entered into, was also not served with any notice under section 138 of the Act.

12. In the above background, what is required to be appreciated is to find out the vicarious liability of each of the petitioners - accused.

13. Assuming that the petitioners - accused are the directors of Shri Sai Krupa Sugar & Allies Industries Ltd., which is not impleaded as party and no individual role is attributed to each of the petitioners but for accused no.1, who is signatory to cheques, once it is brought to my notice that no pleadings are raised as against the accused persons qua their individual role in issuance of cheques and decision of the same in the matter, they cannot be held vicariously liable for criminal liability as is sought to be fastened through the proceedings in question. It will be appropriate, in my opinion, to reproduce paragraphs 39, 41 and 42 of the judgment in the matter of Aneeta Hada (supra), which read thus :-

> *"39. The word "deemed" used in Section 141 of the Act applies to the company and the persons responsible for the acts of the company. It crystallizes the corporate criminal liability and vicarious liability of a person who is in charge of the company. What averments should be required to make a person vicariously liable has been dealt with in SMS Pharmaceuticals Ltd. In the said case, it has been opined that the criminal liability on account of dishonour of cheque primarily falls on the drawee (sic drawer) company and is extended to the officers of the company and as there is a specific provision extending the liability to the officers, the conditions incorporated in Section 141 are to be satisfied.*
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> *41. After so stating, it has been further held that while*

analyzing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. In paragraph 18 of the judgment, it has been clearly held as follows: (S.M.S. Pharmaceuticals Ltd. case)

"18.....there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability."

42. Presently, we shall deal with the ratio laid down in C.V. Parekh. In the said case, a three-Judge Bench was interpreting Section 10 of the 1955 Act. The respondents in C.V. Parekh, were active participants in the management of the company. The trial court had convicted them on the ground the goods were disposed of at a price higher than the control price by Vallabhadas Thacker with the aid of Kamdar and the same could not have taken place without the knowledge of the partners of the firm. The High Court set aside the order of conviction on the ground that there was no material on the basis of which a finding could be recorded that the respondents knew about the disposal by Kamdar and Vallabhadas Thacker."

Furthermore, it is required to be noted that the transaction is admittedly claimed to have been entered into between Shri Sai Krupa Sugar & Allied Industries Ltd. and the complainant. Shri Sai Krupa Sugar & Allied Industries Ltd. is a registered company, having independent identity in law and can sue and be sued in its name being a juristic person. Since the transaction was with the company, the least that was expected of the present respondent-complainant is to proceed against the company along with the directors, who were responsible for the decision in the matter of issuance of the cheques. What is noticed is, neither the company is party – accused nor any notice under section 138 of the Act was served on it. It is then required to be noted that the prosecution, independent of the company against the directors, is not maintainable particularly in view of the doctrine of strict construction as is applied in the present case. The fact remains that under the Act, it is a vicarious liability of the company for which the directors could also be held responsible, provided the company and directors are impleaded as parties. Paragraphs 51, 52, 56, 58 and 59 of the judgment in the matter of Aneeta Hada are worth referring, which read thus :-

> "51. We have already opined that the decision in Sheoratan Agarwal runs counter to the ratio laid down in the case of C.V. Parekh (supra) which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the decision in Anil Hada has to be treated as not laying down the correct law as far as it states that the director or any other officer can be prosecuted without impleadment of the company. Needless to emphasize, the matter would stand on a different footing where there is some legal impediment and the doctrine of lex non cogit ad impossibilia gets attracted.
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> 52. At this juncture, we may usefully refer to the decision in U.P. Pollution Control Board v. Modi Distillery. In the said case, the company was not arraigned as an accused and, on that score, the High Court quashed the proceeding

against the others. A two-Judge Bench of this Court observed as follows:-

“6.....Although as a pure proposition of law in the abstract the learned single Judge’s view that there can be no vicarious liability of the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors under sub-s.(1) or (2) of S.47 of the Act unless there was a prosecution against Modi Industries Limited, the Company owning the industrial unit, can be termed as correct, the objection raised by the petitioners before the High Court ought to have been viewed not in isolation but in the conspectus of facts and events and not in vacuum. We have already pointed out that the technical flaw in the complaint is attributable to the failure of the industrial unit to furnish the requisite information called for by the Board.

Furthermore, the legal infirmity is of such a nature which could be easily cured. Another circumstance which brings out the narrow perspective of the learned Single Judge is his failure to appreciate the fact that the averment in paragraph 2 has to be construed in the light of the averments contained in paras 17, 18 and 19 which are to the effect that the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors were also liable for the alleged offence committed by the Company.”
Be it noted, the two-Judge Bench has correctly stated that there can be no vicarious liability unless there is a prosecution against the company owning the industrial unit but, regard being had to the factual matrix, namely, the technical fault on the part of the company to furnish the requisite information called for by the Board, directed for making a formal amendment by the applicant and substitute the name of the owning industrial unit. It is worth

noting that in the said case, M/s. Modi distilleries was arrayed as a party instead of M/s Modi Industries Limited. Thus, it was a defective complaint which was curable but, a pregnant one, the law laid down as regards the primary liability of the company without which no vicarious liability can be imposed has been appositely stated.

56. We have referred to the aforesaid passages only to highlight that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons, whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the company. The learned counsel for the respondents have vehemently urged that the use of the term “as well as” in the Section is of immense significance and, in its tentacle, it brings in the company as well as the director and/or other officers who are responsible for the acts of the company and, therefore, a prosecution against the directors or other officers is tenable even if the company is not arraigned as an accused. The words “as well as” have to be understood in the context.

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 Distilleries has to be treated to be restricted to its own facts as has been explained by us hereinabove."

14. Learned Counsel appearing on behalf of the petitioners has rightly invited my attention to the law laid down by the Apex Court in the matters of Anil Gupta and Sharad Kumar Sanghi (supra), which are also on the aspect of proceeding against the directors, in absence of the company being added as a party.

15. In this view of the matter, the petition deserves to be allowed. Rule made absolute in terms of prayer clause (B).

(N.W. SAMBRE, J.)

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