

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 2909 OF 2013
WITH
CRIMINAL WRIT PETITION NO. 2910 OF 2013
WITH
CRIMINAL WRIT PETITION NO. 2914 OF 2013
WITH
CRIMINAL WRIT PETITION NO. 2915 OF 2013

Philip J. .. Petitioner
V/s
1. Ashapura Minechem Ltd.
2. The State of Maharashtra .. Respondents

Mr. P.H. Naik i/b Mr. Sachin R. Pawar for the petitioner.
Mr. Mr. Amrut Joshi with Mr. Rushabh Seth i/b M.S. Bodhanwalla & Co. for respondent no.1.
Mr. Deepak Thakare, A.P.P. for respondent no.2 – State.

CORAM: DR. SHALINI PHANSALKAR-JOSHI, J.
DATE OF RESERVING JUDGMENT : 20 JANUARY 2016
DATE OF PRONOUNCING JUDGMENT: 29 JANUARY 2016

JUDGMENT:

In all these four writ petitions, the parties are one and same and they raise a common question of law as to whether a prosecution launched under section 138 of the Negotiable Instruments Act (“NI Act” for short) against a partner alone without joining the partnership firm can be maintainable. Hence, they are being decided by this common judgment.

2. By these petitions, the original accused is challenging the order dated 23rd July 2013 in Criminal Revision Petition No.7 of 2012 passed by the learned Additional Sessions Judge, Mangaon, Dist. Raigad, thereby confirming the order of issue of process dated 3rd January 2012 in Summary Case No. 312 of 2011 passed by the learned Judicial Magistrate, First Class, Shrivardhan under section 138 of the NI Act.

3. Brief facts, relevant for deciding the question of law involved in these petitions, are stated as follows:

The partnership firm of the petitioner by name M/s Alamgiris and respondent no.1 – a company registered under the Companies Act, 1956 had entered into an Agreement dated 7th February 2011 to sell iron ore fines by the petitioner to respondent no.1. The final contract was entered into between these two parties on 8th April 2011. As per the Agreement, 1,65,000 MT of iron ore was to be purchased by respondent no.1. The petitioner was to supply iron ore together with trucks and barges for loading the iron ore on board the ship. Under the contract, respondent no.1 paid Rs.11.75 crores to the petitioner towards the purchase price. However, on 25th April 2011 the petitioner informed respondent no.1 company that his partnership firm is unable to provide iron ore. As a consequence of petitioner's failure, respondent no.1 has to pay

Rs.3.60 crores as damages of the vessel and Rs.1.50 crores as advance payment made to the petitioner. The petitioner promised to pay Rs.20 crores by way of damages and advance which the petitioner's firm had received. To satisfy this amount, the petitioner's firm issued four cheques of Rs.5 crores each drawn on Bank of India, Tisgaon Branch, Goa. However, when the cheques were presented to the bank, they came to be dishonoured on 24th August 2011 for want of sufficient funds. Hence, after issuing the requisite mandatory notice, respondent no.1 filed four private criminal cases against the petitioner in respect of the four dishonoured cheques.

The learned Magistrate, after being satisfied, issued process against the petitioner for the offence under section 138 of the NI Act. The petitioner challenged the said order of issue of process by filing criminal revisions in the Court of Additional Sessions Judge, Raigad. However, as the revisions came to be dismissed, the petitioner is constrained to approach this Court under Article 227 of the Constitution of India and section 482 of the Code of Criminal Procedure for quashing the order of issue of process.

4. At this stage, it may be stated that though several grounds are raised in the petition challenging the order of issue of process, at the time of advancing the submissions before this Court, learned counsel for the petitioner has fairly conceded that he is challenging the order only on one count, i.e. not joining the

partnership firm of the petitioner in the proceedings launched against the petitioner. It is submitted that undisputedly the transaction was entered into by respondent no.1 company with the petitioner's firm. However, the petitioner's firm is not joined as party to the complaint. The petitioner alone is sued in his capacity as a partner, without joining even the other partners of the partnership firm. According to learned counsel for the petitioner, therefore, the very complaint filed before the Trial Court is not at all maintainable in view of the settled position of law that the company is an essential party to the proceedings initiated under section 138 read with section 141 of the NI Act.

5. In support of his submissions, learned counsel for the petitioner has relied upon the legal position as laid down by the Apex Court in the case of *Aneeta Hada vs. Godfather Travels & Tours Private Limited, (2012) 5 SCC 661*, wherein the Supreme Court has categorically held that for maintaining the prosecution under section 141 of the NI Act, arraigning of a company as an accused is imperative. According to learned counsel for the petitioner, in view of explanation to section 141 of the NI Act, the word “company” means any body corporate which includes firm or other association of individuals and director in relation to a firm means a partner in the firm. Hence, according to learned counsel for the petitioner, the law laid down by the Apex Court in the case of *Aneeta Hada* (supra) that arraigning of a company as an accused is

imperative in a prosecution under section 141 of the NI Act, is equally applicable when the prosecution is launched against a partnership firm. The learned counsel, therefore, submitted that in the instant case, as the partnership firm is not made an accused and one of the partner alone is sued, the prosecution itself is not tenable and on this count the process issued against the petitioner is required to be quashed and set aside.

6. Per contra, learned counsel for respondent no.1 has submitted that legally speaking a partnership firm and a company registered under the Companies Act stand on two different footings. A partnership firm is not a juristic person. It is not a separate and distinct legal entity. As against it, a company is a separate juristic person. Hence, the law laid down in the case of *Aneeta Hada* (supra), which was in the context of a company, which is a separate juristic person, cannot be made applicable in the case of a partnership firm which is not a separate juristic person. Further, according to learned counsel for respondent no.1, a decision is only an authority for what it actually decides. What is the essence of the decision is the ratio and every judgment must be read as applicable to the particular facts. He has further submitted that the very basis for the Apex Court in laying down the law in the case of *Aneeta Hada* (supra) holding that arraigning of a company as an accused is imperative, is that the company is an independent separate juristic person; as the same is not the case in respect of a partnership firm,

according to him, the law laid down by the Apex Court in the case of *Aneeta Hada* (supra) needs to be distinguished and cannot be made applicable in the case of a partnership firm.

7. In my considered view, in order to appreciate the rival submissions of the petitioner and respondent no.1, it would be useful to reproduce section 141 of the NI Act.

“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.

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.

Thus, explanation (a) to section 141 of the NI Act abundantly makes it clear that the word “company” used in the said section is not confined in its application only to the company registered under the Companies Act, but also to the body corporate and specifically includes a firm or other association of individuals. Explanation (b) further clarifies the position that the director in relation to a firm means a partner in the firm. The point, therefore, to be noted and taken into consideration is that the Legislature is not leaving it to the imagination or discretion of either the litigating parties or to the court to decide whether the partnership firm is included in the word “company” and whether the word “director” can be used in relation to a partner in the firm. As per the explanation, section 141 of the NI Act clearly applies not only to the company, but also to the partnership firm when the offences are committed by a company or a partnership firm as may be the case.

8. In the case of *Aneeta Hada* (supra), the question that arose for determination of the Apex Court was whether an authorised signatory of a company would be liable for prosecution under section 138 of the NI Act without the company being arraigned as an accused. As initially there was difference of opinion between the two learned Judges regarding interpretation of section 138 of the NI Act, reference was made to the Larger Bench of three

Judges. While deciding the said reference and interpreting sections 138 and 141 of the NI Act, the Supreme Court observed as under:

“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 (supra) which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal (supra) does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada (supra) is overruled with the qualifier as stated in paragraph 37. The decision in Modi Distilleries (supra) has to be treated to be restricted to its own facts as has been explained by us hereinabove.”

9. Thus, it has been laid down in unequivocal words in the abovesaid decision that for maintaining the prosecution against the director under section 141 of the NI Act, arraigning of a company as an accused is imperative. In view of explanation to section 141 of the NI Act referred to above, this legal position needs to be automatically made applicable in case of prosecution against a partnership firm also. Therefore, it has to be held that for maintaining prosecution against a partner under section 141 of the NI Act, arraigning of partnership firm as an accused is imperative.

10. However, as referred to above, according to learned counsel for the petitioner, a distinction has to be made between the partnership firm, which is not a separate juristic and legal entity, and the company which is a juristic entity. To substantiate his contention, learned counsel for respondent no.1 has relied upon a landmark judgment of the Apex Court in the case of ***Dulichand Laxminarayan vs. CIT, AIR 1956 SC 354***, which has laid down that a partnership firm cannot be equated with a company as it is not a corporate entity nor a separate juristic person. Hence, according to learned counsel for the petitioner, the law which was made applicable to the company by the Apex Court in the case of ***Aneeta Hada*** (supra) cannot be made equally applicable to the partnership firm.

11. On the issue of rules relating to binding precedents,

learned counsel for respondent no.1 has relied upon two judgments of the Apex Court in the cases of *Union of India vs. Dhanwanti Devi*, (1996) 6 SCC 44 and *Oriental Insurance Co. Ltd. vs. Raj Kumari & Ors.*, AIR 2008 SC 403, which elaborate the circumstances when a judgment can be said to be a binding precedent.

12. There can hardly be any two opinions that every judgment must be read as applicable to particular facts provided and secondly circumstantial flexibility, i.e. one additional or different fact, can make a world of difference between the conclusions in two cases. It is also equally true that the judgment in *Aneeta Hada* (supra) does not consider the legal realm of the partnership firm which does not have independent legal existence.

13. However, in my considered opinion, the conclusions drawn by the Apex Court in the case of *Aneeta Hada* (supra) are not based merely on the fact that the company is a separate legal entity and juristic person, but these conclusions are drawn on the basis of the fact that section 141 of the NI Act deals with vicarious liability. In paras 58 and 59 of the said judgment, referred above, the Apex Court has referred to the wording in section 141 of the NI Act and observed that commission of offence by a company is an express condition precedent to attract vicarious liability of others. It was further held that the words “as well as the company” appearing in

the section make it absolutely unmistakably clear that when a company is 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. It was further observed that the other categories of offenders like directors or partners of the firm can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself.

14. Thus, the Apex Court has arrived at an irresistible conclusion that for maintaining the prosecution under section 141 of the NI Act, arraigning of the company as an accused is imperative, mainly and mostly on the basis of the vicarious liability of the directors of the company and not necessarily because the company is a juristic person and it has its own respectibility. That was an additional circumstance considered by the Apex Court while holding that arraigning of a company as an accused is imperative, but the main basis for arriving at its conclusion was the vicarious liability which the directors or partners of the firm can have towards the company and hence without joining the company on the touch-stone of vicarious liability they cannot be prosecuted.

15. Therefore, the ratio laid down in the case of *Aneeta Hada* (supra) can be made equally applicable in the case of partnership firm also. The partners are liable and sued in their

vicarious liability. Whether the partnership firm is a juristic person or not is a different aspect. What is important is that a partner of the firm is arraigned as an accused in the dragnet on the touchstone of vicarious liability, as is done in the case of directors of the company. Therefore, there is no reason at all to make any distinction in respect of the law to be made applicable to partnership firm and the company.

16. Moreover, the Legislature has already made it clear that the company includes any body corporate which includes firm or other association of individuals and director in relation to a firm means a partner in the firm. On this count also, when section 141 of the NI Act and explanation thereto does not make any distinction between the company and the partnership firm, there is absolutely no reason to make such distinction while making applicable the law laid down by the Apex Court in *Aneeta Hada* (supra) to the partnership firm merely because in that judgment the Apex Court was considering the eventuality of non-joining of the company. The basic premise of holding either the director or the partner liable for prosecution being the same that of the vicarious liability. Therefore, once the company is held to be essential party and that arraigning of a company as an accused is imperative for prosecution under section 141 of the NI Act, it necessarily follows that arraigning of a partnership firm is also imperative for prosecution against the partners under section 141 of the NI Act. The prosecution launched

against only one of the partners of the partnership firm, without joining the partnership firm, cannot be maintainable and on this very ground, the process issued against the petitioner is liable to be quashed and set aside.

17. In this view of the matter, I am also supported by the judgment of the Delhi High Court in *Vijay Power Generators Ltd. vs. Sumit Seth*, 2014 All M.R. (Cri.) Journal 305, wherein also it has been held that unless the partnership firm is prosecuted and convicted, the partner thereof cannot be convicted with the aid of section 141 of the NI Act.

18. Considering that by allowing this writ petition, this Court is quashing the process issued against the petitioner for not joining the partnership firm, the interests of justice require that liberty be given to the respondent no.1 to move before the Court of competent jurisdiction for appropriate relief with a petition under section 14 of the Limitation Act seeking exclusion of the period during which he was prosecuting this case.

19. As a result, all the four writ petitions are allowed. The process issued against the petitioner alone for the offence under section 138 read with section 141 of the NI Act without joining the partnership firm stands quashed and set aside. However, it will be open for the respondent no.1 to move the Court of competent

jurisdiction for appropriate relief with a petition under section 14 of the Limitation Act seeking exclusion of the period during which he was prosecuting this case.

20. The writ petitions are disposed of in the aforesaid terms.

(DR. SHALINI PHANSALKAR-JOSHI, J.)