IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.905 of 2018

Arising Out of PS.Case No. -160 Year- 2012 Thana -PATLIPUTRA District- PATNA

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1. Hemant Kumar Das, S/o Late Sri Awadhesh Kumar Das, Managing Director, Natural Dairy Pvt. Ltd., having its registered office at Rajeev Nagar, Industrial Area, Patna-800013.

2. Mamta Agrawal W/o Hemant Kumar Das, Director, Natural Dairy Pvt. Ltd., having its registered office at Rajeev Nagar, Industrial Area, Patna-800013.

Both R/o of Flat No. 504, White House Apartment, Budh Marg, P.S.- Kotwali, District- Patna.

.... Petitioners

Versus

The State of Bihar. .... Opposite Parties

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Appearance :

For the Petitioner/s : Mr. Nikhil Kumar Agrawal, Advocate
Ms. Aditi Hansaria, Advocate
Ms. Deepika Sharma, Advocate

For the Opposite Party/s : Mr. Jharkhandi Upadhyay, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 21-08-2018

Heard Mr. Nikhil Kumar Agrawal, learned advocate for the petitioners and Mr. Jharkhandi Upadhyay, learned Additional Public Prosecutor for the State.

2. This application under Section 482 of the Code of Criminal Procedure (for short 'CrPC') has been filed by the petitioners for quashing the order dated 25.08.2017 passed by the

learned Judicial Magistrate-1st Class, Patna in Trial No.2413 of 2013 in connection with Patliputra P.S. Case No.160 of 2012 whereby the petition filed by the petitioners under Section 239 of the Cr.P.C. for discharge from the case has been rejected.

3. First Information Report (for short 'FIR') of Patliputra P.S. Case No.160 of 2012 was registered on 19.07.2012 under Sections 406 and 420 of the Indian Penal Code, 1860 (for short 'IPC') and Section 138 of the Negotiable Instruments Act, 1881 (for short 'NI Act') on the basis of a written report submitted by one Akhilesh Kumar to the Officer-in-Charge of the Patliputra Police Station on 19.07.2012. The facts stated by the informant in his written report are as under:-

(a) That on 28.07.2009, he was appointed by the petitioner no.1, the Managing Director of the Natural Dairy Pvt. Ltd. as a Supervisor of the company. After his appointment, he collected milk from various villages in Jandaha in the district of Vaishali and the various villages in the district of Samastipur with the help of milk suppliers and supplied the same to the milk collection centre of the company from 28.07.2009 to 03.11.2011 vide vehicles bearing Registration No.BR 06/445 and BR 9D/7368.

(b) That the company did not make appropriate payment of the milk to the milk suppliers and slowly siphoned off huge sums of money, i.e. an amount of Rs. 30,00,000/- due to farmers, Rs. 80,000/- due to milk van, Rs. 55000/- due to him on account of his salary and an amount of Rs.10,000/- due to the labour at the milk van.

(c) That some milk suppliers were paid by cheque, more particularly Cheque No.000365 dated 25.04.2011 for an amount of Rs. 45,000/- to Shashi Bhushan Rai and Cheque No.000366 dated 25.05.2011 for an amount of Rs.45,000/- to Shashi Bhushan Rai. However, both the cheques were dishonoured by the bank.

(d) That a compromise was entered into with certain milk suppliers for payment of their outstanding amount in installments. However, the said amounts were also not paid on time. Subsequently, some milk suppliers were paid through cheques which were called back by the company and the company never issued any other cheque in lieu thereof.

(e) That in the manner specified above, the Directors of the company, i.e. the petitioner nos. 1 and 2 have committed fraud against the informant and others resulting in financial loss to the farmers.

(f) That the company is not making payment of the outstanding amount despite repeated requests and reminders and the milk suppliers have been pressurizing him to ensure that their payment is released by the company.

4. On the basis of the allegations made above, the Officer-in-Charge of the Patliputra Police Station after registering the FIR entrusted investigation of the case to an assistant sub-inspector of police.

5. After completion of investigation, the investigating officer of the case submitted charge-sheet vide Charge-sheet No.19 of 2013 dated 28.02.2013.

6. On perusal of the FIR, the materials collected during investigation and the charge-sheet submitted by the police, the learned Chief Judicial Magistrate, Patna vide order dated 01.04.2013 took cognizance of the offences punishable under Sections 406, 420 of the IPC and Section 138 of the NI Act and summoned the petitioners to face trial and transferred the case to the court of Judicial Magistrate-1st Class, Patna for disposal.

7. On receipt of the record from the court of Chief Judicial Magistrate, the learned Magistrate supplied to the accused the copy of police report and other documents, as provided under Section 207 of the CrPC and, thereafter, fixed the case for framing of charges against the petitioners.

8. At the stage of framing of charge, an application

under Section 239 of the CrPC was filed by the petitioners seeking discharge from the case on the ground that upon considering the police report and the documents sent with it under Section 173 of the CrPC, it would be apparent that the charge against the petitioners was groundless.

9. After hearing the parties on the application preferred under Section 239 of the CrPC, the learned Magistrate rejected the same vide impugned order dated 25.08.2017 holding therein that the witnesses examined in course of investigation have supported the allegations made in the FIR.

10. Mr. Nikhil Kumar Agarwal, learned Advocate appearing for the petitioners submitted that the FIR has been registered against the directors of the Natural Dairy Pvt. Ltd., a company, by an employee of the company claiming defaults in payment made by the company to certain milk suppliers and other persons but the company has not been made an accused in the instant proceeding. He submitted that in absence of the company being made an accused, the petitioners cannot be prosecuted for the offences either under the IPC or under the NI Act.

11. Mr. Agrawal further contended that the informant was appointed in the company on a temporary basis for a period of three months on a salary of Rs. 6,000/- per month. Since

his service was not found satisfactory by the company after completion of the probation period of three months, his service was not confirmed. He has drawn my attention towards the appointment letter of the informant, which is annexed to the FIR. He submitted that being an estranged employee, the informant has maliciously filed the present FIR on behalf of the milk suppliers. The alleged aggrieved persons have not filed any FIR against the company, as they have no grievance either against the company or its directors. He pleaded that all the allegations made by the informant are baseless and concocted, as the company has made full payments of all the milk suppliers and other persons engaged by the company during the course of its business.

12. Mr. Agrawal further argued that there is nothing in the FIR to show that the essential ingredients of the offences punishable under Sections 406 and 420 of the IPC and/or Section 138 of the NI Act are attracted.

13. *Per contra,* Mr. Jharkhandi Upadhyay, learned Additional Public Prosecutor appearing for the State submitted that the instant application filed under Section 482 of the CrPC lacks merit. He submitted that the FIR do attract the ingredients of the cognizable offences under the IPC as well as the NI Act and, thus, no error can be found with the order impugned passed by the

learned Magistrate whereby she has refused to discharge the petitioners from the case. He submitted that since the offence alleged was committed by the petitioners in their individual capacity, there was no necessity to implead the company also as an accused. He further contended that the guilt for an offence under Section 138 of the NI Act will be deemed to be against a person connected with the company in view of Section 141 of the NI Act.

14. I have heard learned counsel for the parties and carefully perused the record.

15. In proceedings instituted on an FIR, exercise of inherent powers to quash the proceedings would arise only in case where the allegations do not disclose any offence or are frivolous. Similarly, a person can be discharged from a criminal proceeding only if the charges are groundless.

16. Having noticed the allegations made in the FIR, which were supported during investigation, let me examine now whether the allegations made in the FIR when taken on their face value would constitute the offences punishable under Sections 406 and 420 of the IPC.

17. Section 406 prescribes punishment for 'criminal breach of trust' as defined in Section 405 of the IPC.

18. Admittedly, the company has not been made an

accused in the instant case.

19. Section 405 IPC, which defines the offence of 'criminal breach of trust' reads as under:-

> **"405. Criminal breach of trust** —Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "**criminal breach of trust**"."

20. From a reading of Section 405 of the IPC, it would be manifest that the ingredients of the offence are as under:-

> (a) a person should have been entrusted with property or with any dominion over property;
> (b) that person should dishonestly misappropriate or convert that property to his own use; or dishonestly uses or disposes of that property or willfully suffers any other person so to do;
> (c) that such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or any of legal contract which person has made touching the discharge of such

trust.

21. Thus, in order to attract punishment under Section 406 IPC for ‘criminal breach of trust’, as defined in Section 405 IPC, the prosecution must prove (i) that the accused was entrusted with that property or with dominion over property; and, (ii) he:- (a) dishonestly misappropriated or converted it to his own use; or (b) dishonestly used or disposed of it.

22. So far as the present case is concerned, there is no allegation of entrustment with property and misappropriation done in dishonest manner.

23. The allegation so far as the present case is concerned is that the company did not make appropriate payment of milk to the milk suppliers and others and it also failed to make payment of salary to the informant.

24. In the opinion of this Court, simply because the company withheld payment either to the milk suppliers or it failed to make payment due to the milk van and salary to the informant, the same would not constitute an offence punishable under Section 406 of the IPC.

25. In order to make out a case of criminal breach of trust, it is not sufficient to show that the money has been retained by the company but also that the company dishonestly disposed of the

same or dishonestly retained the same. The mere fact that the accused persons did not pay the amount due would not amount to criminal breach of trust.

26. As far as the offence punishable under Section 420 IPC is concerned, the same prescribes punishment for the offence of 'cheating', which is defined under Section 415 of the IPC.

27. Section 415 of the IPC reads as under:-

> **"415. Cheating** — Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "**cheat**"."
>
> **<u>Illustrations</u>**
>
> (a) *A,* by falsely pretending to be in the Civil Service, intentionally deceives *Z,* and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. *A* cheats.
>
> (b) *A,* by putting a counterfeit mark on an article, intentionally deceives *Z* into a belief that this article was made by a certain celebrated manufacturer, and

thus dishonestly induces *Z* to buy and pay for the article. *A* cheats.

(c) *A*, by exhibiting to *Z* a false sample of an article, intentionally deceives *Z* into believing that the article corresponds with the sample, and thereby dishonestly induces *Z* to buy and pay for the articles. *A* cheats.

(d) *A*, by tendering in payment for an article a bill on a house with which *A* keeps no money, and by which *A* expects that the bill will be dishonoured, intentionally deceives *Z*, and thereby dishonestly induces *Z* to deliver the article, intending not to pay for it. *A* cheats.

(e) A, by pledging as diamonds article which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money. A not intending to repay it. A cheats.

(g) **A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats;**

> **but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract**.
>
> (h) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.
>
> (i) A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z, without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats. (emphasis mine)

28. For the offence of cheating and dishonestly inducing delivery of property, punishment is prescribed under Section 420 of the IPC, which reads as under:-

> "**420. Cheating and dishonestly inducing delivery of property.**- Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also

be liable to fine".

29. The aforestated Section 420 of the IPC consists of two distinct parts of cheating. The first part contemplates where by deception practiced upon a person the accused dishonestly or fraudulently induces that person to deliver a property to any person or to consent that any person shall retain any property. The second part envisages where by deception practiced upon a person the accused intentionally induces that person to do or omit to do so, if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

30. It would also be evident from combined reading of Sections 415 and 420 of the IPC that one of the essential ingredients of Section 420 IPC is *mens rea* of the accused at the time of making the inducement.

31. It is well settled position in law that in order to attract the provisions of Section 420 IPC, the guilty intent at the time of making the promise is a prerequisite and an essential ingredient thereto, and subsequent failure to fulfil the promise by itself would not attract the provisions of Section 420 IPC.

32. As a matter of fact illustration (g) of Section 415 makes the position clear enough to indicate that mere failure to

deliver in breach of an agreement would not amount to cheating but is liable only to a civil action for breach of contract.

33. In **Dalip Kaur & Ors. Vs. Jagnar Singh & Anr. [(2009) 14 SCC 696]**, the question for determination before the Supreme Court was whether breach of contract of an agreement for sale would constitute an offence under Section 406 or Section 420 of the IPC. After examining the fact of the case and relevant Sections of the IPC, the Supreme Court held that an offence of '**cheating**' would be constituted when the accused has fraudulent or dishonest intention at the time of making of promise or representation. A pure and simple breach of contract does not constitute the offence of '**cheating**'. It further held that if the dispute between the parties was essentially a civil dispute resulting from a breach of contract on the part of the appellants for non-refunding the amount of advance, the same would not constitute an offence of '**cheating**' or '**criminal breach of trust**'.

34. In **Alpic Finance Ltd. vs. P. Sadasivan and Anr.**, **[(2001) 10 SCC 228]**, the Supreme Court highlighted the grounds on which criminal proceedings are to be quashed under Section 482 of the CrPC and noted the ingredients of Section 420 of the IPC. In that case, the appellant was a registered company having its head office at Mumbai. It was carrying business, inter alia, of

leasing and hire purchase. The first respondent therein was the chairman and founder-trustee of a trust. The second respondent was also a trustee. The trust was running a dental college in the name and style of Rajiv Gandhi Dental College. The respondents therein entered into agreement with the appellant company therein whereby the appellant had agreed to finance the purchase of 100 hydraulically-operated dental chairs of which cost was around Rs.92,50,000/-. The appellant company agreed to finance the respondents for the purchase of chairs through a lease agreement and as per the agreement. The respondents were liable to pay rentals. The respondents agreed to pay quarterly the sum of Rs.7,50,000/- for the first year, Rs.12,50,000/- for the second year, Rs.8,00,000/- for the third year and Rs.6,25,000/- for the fourth year. In accordance with the agreement, the appellant made payments to M/s United Medico Dental Equipments and they delivered the dental chairs to the respondents. The appellant company alleged that the respondents were not regular in making payments and committed default in payment of the installments and that the bank had dishonoured certain cheques issued by the respondents. The appellant company also alleged that on physical verification, certain chairs were found missing from the premises of the respondents and thus they committed cheating and caused misappropriation of the property belonging to the appellant. The appellant company filed a complaint under Section 200 of the CrPC before the Chief Metropolitan Magistrate, Bangalore alleging that the respondents had committed offences under Sections 420, 406 and 423 read with Section 120-B of the IPC. The Magistrate took cognizance of the alleged offence under Section 190 of the CrPC and issued summons to the respondents. The order taking cognizance was challenged by the respondents by filing an application under Section 482 of the CrPC before the Karnataka High Court. The High Court quashed the entire proceedings. Being aggrieved, the appellant company preferred an appeal before the Supreme Court. It was contended on behalf of the appellant in that case that the High Court had seriously erred in quashing the proceedings under Section 482 of the CrPC. It was also contended that allegation in the complaint clearly made out offences punishable under Sections 420, 406, 423, 424 read with Section 120-B of the IPC. It was contended on behalf of the respondents that the complaint was filed only to harass the respondents and it was motivated by mala fide intention. It was argued that the entire transaction was of civil nature and that the respondents have made a substantial payment as per the hire-purchase agreement and the default, if any, was not willful and there was no element of misappropriation or cheating.

35. After considering the powers under Section 482 of the CrPC and the facts and law involved in the case, the Supreme Court dismissed the appeal and concluded that the learned Judge of the High Court was perfectly justified in quashing the proceedings. It held in para 10 as under :-

> "10. … The injury alleged may form basis of civil claim and may also constitute the ingredients of some crime punishable under criminal law. When there is dispute between the parties arising out of a transaction involving passing of valuable properties between them, the aggrieved person may have right to sue for damages or compensation and at the same time, law permits the victim to proceed against the wrongdoer for having committed an offence of criminal breach of trust or cheating. Here the main offence alleged by the appellant is that respondents committed the offence under Section 420 I.P.C. and the case of the appellant is that respondents have cheated him and thereby dishonestly induced him to deliver property. **To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. It must also be shown that there existed a fraudulent and dishonest intention at the time of commission of the**

offence. There is no allegation that the respondents made any willful misrepresentation. Even according to the appellant, parties entered into a valid lease agreement and the grievance of the appellant is that the respondents failed to discharge their contractual obligations. In the complaint, there is no allegation that there was fraud or dishonest inducement on the part of the respondents and thereby the respondents parted with the property. It is trite law and common sense that an honest man entering into a contract is deemed to represent that he has the present intention of carrying it out but if, having accepted the pecuniary advantage involved in the transaction, he fails to pay his debt, he does not necessarily evade the debt by deception". (emphasis mine)

36. In **Anil Mahajan vs. Bhor Industries Ltd. and Anr**. **[(2005) 10 SCC 228]**, a three-Judge Bench of the Supreme Court considered a case relating to the issuance of process for the offence punishable under Sections 415, 418 and 420 of the IPC. In that case also, the Bench analyzed the difference between '**breach of contract**' and '**cheating'**. The appellant therein was the accused in complaint filed against him by the respondent company for the offence punishable under Sections 418 and 420 of the IPC. On the

basis of the allegations made in the complaint, the Magistrate issued the process against the accused. The order of Magistrate would demonstrate that the complainant had filed documents on record to show that the accused promised to pay the amount, but he did not pay the same with the intent to deceive the complainant. Therefore, the Magistrate held that the complainant had been able to make out a case to issue process against the accused under Sections 415, 418 and 420 of the IPC.

37. The said order of the Magistrate was challenged before the court of sessions. The learned Additional Sessions Judge, who heard the matter, set aside the order of Magistrate issuing process. The order of the learned Additional Sessions Judge was set aside by the High Court.

38. The order of the High Court was challenged by the appellant before the Supreme Court. After analyzing the provisions of the IPC under which the complaint was filed and the allegation made in the complaint, the Court observed that it was a simple case of civil dispute between the parties. It held that requisite averments so as to make out a case of '**cheating**' are absolutely absent. It further held that the principles laid down in **Alpic Finance Ltd. vs. P. Sadasivan and Anr.**, (supra) were rightly applied by learned Additional Sessions Judge while setting aside the

order of the Magistrate issuing process to the appellant.

39. In **S. W. Palanitkar and Ors. vs. State of Bihar and Anr. [(2002) 1 SCC 241]**, it has been held by the Supreme Court in para 21 as under :-

> "21. … In order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating".

40. In **State of Kerala vs. A. Pareed Pillai and Anr. [(1972) 3 SCC 661],** the Supreme Court held in para 16 as under :-

> "16. … To hold a person guilty of the offence of cheating, it has to be shown that his intention was dishonest at the time of making the promise. Such a dishonest intention cannot be inferred from the mere fact that he could not subsequently fulfil the promise".

41. In the present case, what has been alleged by the informant in his written report is that the company did not make appropriate payment to the milk suppliers. It also failed to make

payment due to the milk van and salary of the informant as also wages due to the labour of the milk van. Apart from the allegation of non-payment of dues to various persons, as discussed above, there is no iota of allegation they had dishonest intention in misappropriation of property. There is no allegation that the company or the petitioners made any willful misrepresentation. There is also no allegation that the petitioners induced the informant to believe anything to be true which was false and which the petitioners knew or believed to be false.

42. The informant has also alleged that certain compromise was arrived at between the milk suppliers and the company for settlement of their dues, which has not been fulfilled by the company.

43. In view of the allegation made by the informant, the agreement, if any, was between the milk suppliers and the company and the informant had got no concern with such agreement. In the event, the company failed to fulfill its liability under the agreement, the aggrieved persons would have been the milk suppliers.

44. In view of the ratio laid down by the Supreme Court in the cases discussed above, as also the allegation made by the informant in the FIR, I have no hesitation in holding that even if

the entire allegations are believed to be true at their face value, the ingredients of the offences punishable under Sections 406 and 420 IPC are not attracted in the present case.

45. Apart from the fact that the allegations made in the FIR lacks necessary ingredients of sections 406 and 420 of the IPC, concept of vicarious liability is unknown to criminal law. The IPC does not provide for vicarious liability upon the directors of the comapny for any offences alleged to be committed by a company.

46. In **S.K. Alagh vs. State of U.P. and Ors.[(2008) 5 SCC 662]**, the Supreme Court observed:-

> "Indian Penal Code, save and except some provisions specifically providing therefor, does not contemplate any vicarious liability on the part of a party who is not charged directly for commission of an offence".

47. In **Maksud Saiyed vs. State of Gujarat [(2008) 5 SCC 668]**, the Supreme Court held as under:-

> "Indian Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety,

would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability".

48. In **R. Kalyani v. Janak C. Mehta [(2009) SCC (Cri) 567]**, the Supreme Court observed as under:-

"32. Allegations contained in the FIR are for commission of offences under a general statute. A vicarious liability can be fastened only by reason of a provision of a statute and not otherwise. For the said purpose, a legal fiction has to be created. Even under a special statute when the vicarious criminal liability is fastened on a person on the premise that he was in charge of the affairs of the company and responsible to it, all the ingredients laid down under the statute must be fulfilled. A legal fiction must be confined to the object and purport for which it has been created".

49. As seen above, the dues, if any, was against the company namely, Natural Dairy Pvt. Ltd. According to the informant himself, his appointment was in the company for collection of milk and milk had been procured from the milk suppliers in the district of Vaishali and Samastipur for and on behalf of the company.

50. Thus, in view of the ratio laid down by the Supreme Court in **S.K. Alagh (supra), Maksud Saiyed (supra) and R. Kalyani (supra)**, in absence of the company having been impleaded as accused, the petitioners cannot be charged and put on trial for the offences punishable under the IPC.

51. As far as the offence punishable under Section 138 of the NI Act is concerned, I am of the opinion that the petitioners cannot be charged for the said offence due to various legal flaws. However, before highlighting those legal flaws, firstly, I would like to extract the provisions prescribed under Sections 138, 141 and 142 of the NI Act hereunder:-

> **"138. Dishonor 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 provision of this Act, be punished with imprisonment for 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.

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.

(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 relating to a firm, means a partner in the firm.

142. Cognizance of offences.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138."

52. From perusal of Section 138 of the NI Act, it would be evident that the same mandates for filing a complaint case after issuance of a statutory notice.

53. In the present case, no cause of action had arisen, as no statutory notice as mentioned under the provisions of Section 138 of the NI Act was served upon the petitioners or the company by the aggrieved persons.

54. Further, the informant is not an aggrieved person within the meaning of provisions of Section 138 of the NI Act.

55. Furthermore, the cognizance of an offence under Section 138 of the NI Act is forbidden under Section 142 of the NI Act except upon a complaint in writing by the payee or the holder of the cheque in due course within a period of one month from the date the cause of the cheque.

56. I further find that the alleged cheques dated 25.04.2011 and 25.05.2011 for an amount of Rs.45,000/- each drawn on Bank of India, Rajiv Nagar, Patna issued in favour of Shashi Bhushan Rai, which were dishonoured, are part of the FIR.

57. From perusal of the cheques, it would be apparent that the alleged cheques were issued under the signature of

petitioner no. 1 on behalf of Natural Dairy Pvt. Ltd. Thus, the liability to pay, if any, was of the company of which the petitioner no.1 was the authorized signatory.

58. It is settled position in law that when a cheque, which is drawn by the company, is dishonoured, the company will have to be made a party to the proceedings under Section 138 of the NI Act and failure to do so will vitiate the prosecution.

59. In **Aneeta Hada v. Godfather Travels and Tours Private Limited [(2008) 13 SCC 703]**, an appeal had initially came up before a two Judge Bench of the Supreme Court, which due to divergence of opinion by its order referred the question to a three-Judge Bench. The question before the three-Judge Bench of the Supreme Court in **Aneeta Hada Vs. Godfather Travels and Tours Private Limited [(2012) 5 SCC 661]** was whether a complaint under Section 138 of the NI Act read with Section 141 thereof against a Director or authorized signatory of a cheque but without joining the company as an accused was maintainable.

60. Answering in negative and allowing the appeal, after analyzing the provisions of NI Act in detail, the three-Judge Bench held as under:-

> "In view of our aforesaid analysis, we arrive at 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".

61. In **N. Harihara Krishnan v. J. Thomas [2017 SCC Online SC 1017]**, it was clarified by the Supreme Court that the general concept under CrPC that cognizance is taken against the offence and not against the offender was not appropriate in prosecution under the NI Act.

62. In that case, the complainant was issued a cheque, which was signed by one Harihara Krishnan. The cheque was drawn allegedly in discharge of balance sale consideration by M/s Norton Granites and Spinners Pvt. Ltd. However, the cheque was in fact drawn on account of another private limited company, M/s Dakshin Granites Pvt. Ltd. in which also Harihara Krishnan was a director. The cheque got dishonoured for insufficiency of funds. The complaint was filed only against Harihara Krishnan as an accused. Later on, the prosecution sought to summon Dakshin Granites Pvt. Ltd. as an accused invoking powers under Section 319

of the CrPC. The court of Magistrate allowed the application under Section 319 CrPC. The challenge to the order before the High Court in revision also failed. The reasoning of the High Court was that cognizance is taken of the offence and not the offender and, thus, there was no impediment in adding an additional accused once the cognizance was already taken. However, the Supreme Court held that the reasoning was erroneous. While relying on **Aneeta Hada vs. Godfather Travels and Tours Private Limited (2012) 5 SCC 661]**, the Supreme Court held that complaint against a director was not maintainable without arraying the company as an accused. It was further stated that the offence under Section 138 of the NI Act unlike other offences under IPC was person specific. It held as under:-

> "By the nature of the offence under Section 138 of the Act, the first ingredient constituting the offence is the fact that a person drew a cheque. The identity of the drawer of the cheque is necessarily required to be known to the complainant (payee) and needs investigation and would not normally be in dispute unless the person who is alleged to have drawn a cheque disputes that very fact. The other facts required to be proved for securing the punishment of the person who drew a cheque that eventually got dishonoured is that the payee of the cheque did in

fact comply with each one of the steps contemplated under Section 138 of the Act before initiating prosecution. Because it is already held by this Court that failure to comply with any one of the steps contemplated under Section 138 would not provide "cause of action for prosecution". Therefore, in the context of a prosecution under Section 138, the concept of taking cognizance of the offence but not the offender is not appropriate. Unless the complaint contains all the necessary factual allegations constituting each of the ingredients of the offence under Section 138, the Court cannot take cognizance of the offence. Disclosure of the name of the person drawing the cheque is one of the factual allegations which a complaint is required to contain. Otherwise in the absence of any authority of law to investigate the offence under Section 138, there would be no person against whom a Court can proceed. There cannot be a prosecution without an accused. The offence under Section 138 is person specific. Therefore, the Parliament declared under Section 142 that the provisions dealing with taking cognizance contained in the CrPC should give way to the procedure prescribed under Section 142. Hence the opening of non-obstante clause under Section 142. It must also be remembered that Section 142 does not either contemplate a report to the police or authorise the Court taking cognizance to direct the police to investigate into the complaint".

63. Thus, in absence of the company having been made an accused, by no stretch of imagination, the petitioners can be tried for the offence punishable under Section 138 of the NI Act.

64. Apart from the ground on which prosecution of the petitioners would be bad, as stated above, there is yet another reason as to why the petitioners can not be tried for the offence under Section 138 of the NI Act.

65. The present case is based on an FIR whereas Section 142(a) provides that notwithstanding anything contained in the Code of Criminal Procedure, no court shall take cognizance of any offence punishable under Section 138 except upon a complaint in writing made by the payee or, as the case may be, the holder in due course of the cheque.

66. Though, the word 'complaint' has not been defined under the NI Act, the NI Act states that after dishonour of cheque a notice within thirty days of information received from the banker complaint be instituted before Magistrate of the first clas having jurisdiction to try the case.

67. However, Section 2(d) of the CrPC defines

'complaint' as under:-

> "2(d) 'Complaint' means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report".
>
> **Explanation-** A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant.

68. From the definition of the term 'complaint', as noted above, it would be apparent that it does not include a police report. As per explanation to Section 2(d) of the CrPC report of police officer after investigation disclosing commission of non-cognizable offence shall be deemed to be a complaint. Clause (a) of Section 142 of the NI Act contemplates filing of a complaint only. Section 142 of the NI Act does not provide for filing a complaint by the payee or holder in due course to the police for investigation under Section 156 of the CrPC. Hence, no cognizance could have been taken by the court of Magistrate under Section 138 of the NI Act on the basis of an FIR instituted in the police station which

culminated in filing of a chargesheet under Sections 406 and 420 of the IPC and Section 138 of the NI Act.

69. In **N. Harihara v. J. Thomas (supra)**, the Supreme Court has held that the scheme of the prosecution under Section 138 of the NI Act is different from the scheme of the CrPC. Section 138 of the NI Act creates an offence and prescribes punishment. No procedure for investigation is contemplated. The prosecution is initiated on the basis of complaint made by the payee of a cheque.

70. In view of the foregoing discussion, this Court is of the opinion that the criminal proceedings initiated against the petitioners in the present case, is an abuse of the process of law and, as such, the criminal proceedings as well as the impugned order cannot be sustained. The Court is also of the opinion that the learned Judicial Magistrate-1^{st} Class, Patna without appreciating the facts and considering the settled provisions of law rejected the application filed by the petitioners under Section 239 of the CrPC in the most mechanical manner.

71. Resultantly, the criminal proceedings of Trial No.2413 of 2013 arising out of Patliputra P.S. Case No.160 of 2012 as well as the impugned order dated 25.08.2017 passed by the

learned Judicial Magistrate-1st Class, Patna rejecting the discharge petition is set aside.

72. The application stands allowed.

(Ashwani Kumar Singh, J.)

Sanjeet/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	22.08.2018
Transmission Date	22.08.2018