

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO.209 OF 2004

Madan Amlokchand Mutha,]
Aged about 49 years, A Partner of]
Jaihind Constructions Corporation,]
201, Raghuwanshi Apartment,]
Ganeshwadi, 917/7, Shivajinagar,]
Pune – 411 004.]

“Khushboo Bungalow” Plot No.6,]
Shivaji Park, Kolhapur – 416 001] ...Petitioner

Versus

1. Arvind Ambalal Shah,]
Aged about 45 years,]
Occupation Business,]
Residing at : 303, Raghuwansh,]
Apartment, Ganeshwadi, 917/7,]
Shivajinagar, Pune – 411 004]

2. State of Maharashtra] ...Respondents

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Mr.Pranjal Khatavkar I/b. Mr.Shriram S. Kulkarni for the Petitioner.

Ms.Gauri Velankar I/b. Mr.M.V.Limaye for Respondent No.1.

Mrs.G.P.Mulekar, APP for Respondent No.2-State.

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**CORAM : S.S.SHINDE J.
RESERVED ON : 20 JUNE, 2019
PRONOUNCED ON: 31 JULY 2019**

JUDGMENT

1. This Petition takes an exception to the judgment and order dated

12.12.2003 passed by the learned Addl. Sessions Judge, Pune in Criminal Revision Application No. 499 of 2003 arising out of judgment and order dated 23.07.2003 passed by the learned Judicial Magistrate First Class, Pune below exhibit 51 in Criminal Case No. 1566 of 1993.

2. The facts giving rise to filing of the present Writ Petition can, in brief, be stated thus:-

3. It is the case of the petitioner that the present respondent No.1 is original complainant, who had filed Criminal Case No. 1566 of 1993 on 22.04.1993 before the learned Judicial Magistrate First Class, Pune under Section 138 read with 142 of the Negotiable Instruments Act, 1981 (for short "N.I.Act") against the present petitioner for dishonour of the cheques. Respondent No.1 and the present petitioner are working in a building contract. It is alleged by respondent No.1 that he completed various constructions of the petitioner since 1980 and an amount of Rs.12,00,000/- was outstanding. It is further alleged that the petitioner agreed to pay the same towards discharge of the said liability. Thereafter, the petitioner had issued two cheques of Rs. 7,00,000/- and Rs.4,00,000/- dated 15.02.1992 and 06.09.1992 respectively, which were dishonoured with

a remark "funds insufficient". It is further alleged that an intimation received by respondent No.1 on 15.03.2003. Thereafter, respondent No.1 issued notice to the petitioner on 20.03.1993, and the same was received by the petitioner on 23.03.1993. The petitioner had not paid the money, therefore cause of action under Section 138 of the N.I.Act accrued and consequently, respondent No.1 filed the aforesaid complaint. It appears from the record that the complaint was verified on 28.04.1993 and after verification, the learned Judge issued the process on 28.04.1993 against the petitioner under Section 138 of the N.I.Act.

4. It is the further case of the petitioner that pursuant to summons, the petitioner appeared and thereafter, the matter was adjourned from time to time on various occasions. On 13.08.2001, the particulars of the offence came to be read over and explained to the petitioner, at exhibit 48. Thereafter, the petitioner preferred Criminal Revision Application No. 482 of 2001 challenging the order of recording the plea. The learned Sessions Judge dismissed the said revision application holding that the revision is not maintainable on the ground

that the petitioner has not challenged the order of issuance of process dated 28.04.1993.

5. It is the further case of the petitioner that on 31.10.2002, the petitioner preferred an application below exhibit 51 and brought to the notice of the learned Judge that no offence with regard to any of the cheque can be averred against him under Section 138 of the N.I.Act and the Court cannot take cognizance of the same. The petitioner has further contended in the said application that cheques in question neither negotiated by the partnership of M/s. Jaihind Construction Corporation nor by the petitioner. No notice is issued to M/s. Jaihind Construction Corporation and there are no allegations against the said firm in the complaint. Similarly, M/s.Jaihind Construction is not arrayed as an accused in the complaint. Therefore, mandatory provisions of Section 141 of the N.I.Act are neither pleaded, averred and complied with and, therefore, in absence of the said compliance of the mandatory provisions, no liability of criminal proceedings can be imposed upon the petitioner. Similarly, there is no averment in the verification as well as in the complaint that the cheque is issued by the partnership firm or no notice is given under Section 138 r/w. 141 of the

N.I.Act to the said firm. Therefore, the complaint in the present form is not maintainable in the eyes of law against the present petitioner and the same is without jurisdiction. Similarly, the plea below exhibit 48 is without jurisdiction and devoid of merits on these and amongst other grounds, the petitioner requested the learned Judge of the trial Court to recall the order of process below exhibit 51. The learned Judicial Magistrate First Class, Pune vide its judgment and order dated 23.07.2003 rejected the application below exhibit 51.

6. Being aggrieved and dissatisfied by the judgment and order dated 23.07.2003, the petitioner preferred Criminal Revision Application No. 499 of 2003 along with application for stay on 28.07.2003. The learned Additional Sessions Judge, Pune vide its impugned judgment and order dated 12.12.2003 was pleased to dismiss the Criminal Revision Application of the petitioner. Hence, this Writ Petition.

7. The learned Counsel appearing for the petitioner submits that respondent No.1 has not invoked the provision of Section 141 of the N.I.Act which is the mandatory requirement. Respondent No.1 has

accused the petitioner in the individual capacity. He further submits that respondent No.1 does not show or have any averment in the complaint that the petitioner is acting on behalf of the firm. Respondent No.1 has not in the complaint averred about the liability of the partnership firm or the offence being committed by the partnership firm from which the cheques were being issued. He further submits that the Supreme Court judgment in the case of **Anil Hada Vs. Indian Acrylic Ltd¹**. was cited by the petitioner, and also referred in the impugned judgment, but the Hon'ble Sessions Court has not considered the findings in paragraph Nos. 13 and 17 in the case of **Anil Hada** (*supra*). In paragraph No. 13, it is observed as under :

"13. If the offence was committed by a Company it can be punished only if the company is prosecuted. But instead of prosecuting the company if a payee opts to prosecute only the persons falling within the second or third category the payee can succeed in the case only if he succeeds in showing that the offence was actually committed by the Company. In such a prosecution the accused can show that the company has not committed the offence, though such company is not made an accused, and hence the prosecuted accused is not liable to be punished.....".

1 2000 (1) ALL MR 722

8. He further submits that on more than one occasion, it has been held by the Hon'ble Supreme Court that an averment of a person being incharge, and responsible to the company in conduct of its offence, i.e., averment in the nature of verbatim of reproduction of Section 141 of the N.I.Act will not suffice. An averment must state that a person is vicariously liable for the offence, both was in-charge and was responsible for the conduct for the business of the company. The requirement must be laid down therein and must be laid down conjointly and not disjunctively. Learned Counsel further submits that, Section 141 of the N.I.Act contemplates a constructive liability. It postulates that a person, incharge of and responsible to the company for the conduct of the business of company, shall also be deemed to be guilty of the offence. In case of the offence by company to bring its Directors within the scope of Section 138 of the N.I.Act, it shall be necessary to allege that they were incharge and responsible to the conduct of the company, and it is necessary ingredient to proceed against the directors.

9. Learned Counsel further submits that, in the present case the complainant alleges in paragraph No. 1 of the complaint that the

accused is a partner of firm and in paragraph No. 2, the complainant alleges that the accused has engaged the complainant (not by the firm). It is further alleged in the complaint on account of dishonour, notice was given to the accused for dishonour of cheques. Notices were returned back. He further submits that the entire allegations are against the accused whereas the cheques were issued by the partnership firm. He further submits that since in the complaint, there is no whisper of that the firm has committed an offence, therefore unless offence is pleaded against the firm, no partner can be prosecuted.

10. The learned Counsel appearing for respondent No.1 submits that, two cheques were issued in favour of respondent No.1 by the petitioner as a partner of the firm amounting to Rs. 7,00,000/- and Rs. 4,70,000/- dated 15.02.1992 and 06.09.1992 respectively. She further submits that the said cheques were dishonoured. Thereafter, respondent No.1 issued a demand notice dated 09.03.1992 to the petitioner. She further submits that the petitioner had not given any reply to the said demand notice issued by respondent No.1 hence, he filed a complaint on 22.04.1993. Thereafter, on 28.04.1993, the

learned Judicial Magistrate First Class issued process against the petitioner. The order of issuance of process was never challenged by the petitioner. The plea was recorded and the petitioner challenge the order of recording the plea by way of revision which was held to be not maintainable. She further submits that petitioner filed an application below exhibit 51 in Criminal Case No. 1566 of 1993, for recalling the order of issuance of process passed by the learned Magistrate on 31.10.2002 i.e., after a period of 9 years from the date of issuance of process. The application preferred by the petitioner itself was not maintainable in view of decision of ***Adalat Prasad versus Rooplal Jindal and others***² wherein it has been held that, the Court, who has issued process, has no power of review its order of issuance of process, and hence order of issuing process cannot be recalled. In the present case, petitioner preferred an application for recalling the order of issuance of process passed by the learned Magistrate, which was not tenable in view of ***Adalat Prasad*** (*supra*). Hence, the application preferred by the petitioner below exhibit 51 is not maintainable.

2 (2004) 7 SCC 338

11. She further submits that the application preferred by the petitioner also suffers from delay and latches as order of issuance of process was passed on 28.04.1993 by the learned Magistrate, and plea was also recorded on 13.08.2001 and the petitioner preferred an application for recalling the order of issuance of process on 31.10.2002 i.e., after 9 years of filing of original complaint. She further submits that on this ground itself the application preferred by the petitioner could not have been entertained, and has been rightly dismissed by the trial Court and said order is rightly confirmed by revisional Court. She further submits that the Hon'ble Supreme Court has held that in ***Balikchand Gyanchand and Co. v/s. A.Chinnaswami***³ that, even if notice is issued to managing director of company, who has signed the cheques, the complaint cannot be quashed on the ground that notice was not addressed to company itself. In the present case, the petitioner is a partner of Jaihind Construction Corporation, who has issued cheques to respondent No.1, and the said cheques were signed by the petitioner himself as he is a partner of the said firm. She further submits that both the learned Magistrate and learned Sessions Judge have come to a

3 1993 (3) ALL MR 413

conclusion that the complaint is maintainable in view judgment passed by the Apex Court in the case of **Balikchand Gyanchand and Co.** (*supra*).

12. She further submits that, revisional Court has held on the basis of observation made in the judgment of **Anil Hada** (*supra*) that if a company is not prosecuted due to any snag or otherwise other prosecuted person cannot on that ground escape from penal liability created through legal fiction envisaged under Section 141 of the N.I.Act. Assuming without admitting that firm is not prosecuted in terms of judgment delivered by Apex Court in the case of **Anil Hada** (*supra*), it becomes clear that even if company is not prosecuted, its other person cannot escape from liability which created through legal fiction envisaged under Section 141 of the N.I.Act. She further submits that the contention of the petitioner is that, Jaihind Construction Corporation firm was not prosecuted and demand notice was not issued to firm and in original complaint, Jaihind Construction Corporation was not joined as a party accused and in view thereof, the complaint is not maintainable. The said contention is completely misconceived and cannot be justified. She further submits that the

petitioner is vicariously liable for the acts done by the firm being partner and thus he is arrayed in capacity of partner of the firm.

13. She further submits that the petitioner has contended that there is no averment in the complaint that petitioner is acting on behalf of firm and also about the offence being committed by the partnership firm. She further submits that if a complaint is perused, paragraph No. 3 of the complaint clearly shows that the notice is issued to firm through partner and thus the contention raised by the petitioner is unacceptable. Therefore, the present Writ Petition shall be dismissed on the ground that, application below exhibit 51 preferred by the petitioner in C.C. No. 1566 of 1993 is untenable and not maintainable in view of ***Adalat Prasad*** (*supra*). In the above circumstances, learned Counsel submits that the Writ Petition deserves to be dismissed.

14. Heard learned Counsel appearing for respective parties at length.

15. With their able assistance, I have perused the pleadings and grounds taken in the Petition and annexures thereto, and also written

notes of arguments. It appears that the learned Magistrate passed the order of issuance of process against the petitioner on 28.04.1993. Admittedly, the said order was never challenged by the petitioner. However, the petitioner challenged the order of recording the plea passed by the learned Magistrate. However, an application preferred by the petitioner challenging the order of recording the plea was rejected by the learned Magistrate. It appears that being aggrieved, the petitioner filed revision before the Sessions Court, Pune. However, it has been rightly observed by the Sessions Court that revision was not maintainable, and accordingly the said revision was rejected. It appears that in the year 2002, the petitioner filed an application for recalling the order of issuance of process passed by the learned Magistrate on 28.04.1993. Therefore, there was delay of more than 9 years for filing application for recalling the order of issuance of process. The said delay has not been explained by the petitioner.

16. In view of the judgment of the Supreme Court in the case of ***Adalat Prasad*** (*supra*), the application filed by the petitioner for recalling the order of issuance of process has been rightly held by the learned Magistrate, as not maintainable. In paragraph No. 15 of the

said judgment, the Supreme Court has held as under:

"15. It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provisions of Sections 200 and 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking Section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of the Code".

Thus, the application filed by the petitioner for recalling the order of issuance of process was not maintainable and, therefore, further proceedings, arising out of the said order, initiated by the petitioner are rightly held to be not maintainable by the Sessions Court.

17. The contentions of the learned Counsel appearing for the petitioner that since a firm/ company is not made a party to the complaint and, therefore, the petitioner cannot be prosecuted, has been considered in detailed by the Additional Sessions Judge, Pune in the impugned order. The said Court made reference to the judgment of the Supreme Court in the case of **Anil Hada** (*supra*) and

the Sessions Court recorded that, even if the company is not prosecuted, its other persons cannot escape liability which is created through the legal fiction envisaged under section 141 of the N.I.Act. The Sessions Court also observed in paragraph No.11 that, in the body of the complaint itself, it is clearly mentioned that accused Madan Mutha is a partner of Jaihind Construction Corporation and in the first paragraph of the complaint, it is clearly recited that accused is a working partner of the said firm. Therefore, the learned Additional Sessions Judge found that the complaint filed against the accused is perfectly maintainable and cannot be said to be incompetent.

18. Upon an independent scrutiny of the documents placed on record and also the judgments in the cases of **Adalat Prasad** (*supra*) and **Anil Hada** (*supra*), this Court is of the opinion that the learned Magistrate has rightly concluded that the order of issuance of process cannot be recalled. Secondly, the Sessions Court has rightly concluded that even in absence of firm/company as a party to the complaint, keeping in averments made in the complaint, the petitioner can be prosecuted. Admittedly, there was delay of more than 9 years in filing the application for recalling the order of issuance of process.

Thirdly, such application was not maintainable as already observed herein above. Thus, there is no substance in the Petition. Hence, the Petition is devoid of any merits and the same stands rejected. Rule stands discharged.

(S.S.SHINDE, J.)