

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

CRIMINAL APPLICATION NO. 538 OF 2018

Hemant Mohan Agarwal,	]	
Aged 49 years, Occu. Business	]	
Residing at Flat No. 2003,	]	
Raheja Empress	]	
Opp Siddhivinayak Temple,	]	
Prabhadevi, Mumbai – 400025	]	...Applicant

Versus

1.	Housing Development Finance Corporation Ltd. Having its Registered Office at Ramon House H.T. Parekh Marg, 169, Backbay Reclamation, Churchgate, Mumbai – 400 020.	]	
		]	
		]	
		]	
		]	
		]	
		]	
2.	State of Maharashtra Through Public Prosecutor High Court, Bombay.	]	...Respondents

Mr. Satyavrat Joshi for Applicant.
Mrs. M.R. Tidke, APP for Respondent – State.
Mr. Ramakant Yadav i/by RHY Juris Law Asso for Respondent No. 1.

CORAM	:	S.S. SHINDE, J.
RESERVED ON	:	27 th SEPTEMBER 2019
PRONOUNCED ON	:	04 th OCTOBER 2019

JUDGMENT

1. Rule. Rule made returnable forthwith, with the consent of counsel appearing for parties application is heard and disposed of finally at the stage of admission.

2. This Criminal Application is filed with following substantive prayers:

(a) this Hon'ble Court by exercising its Power under Section 482 of the Cr.P.C be pleased to quash and set aside the Order of issuance of process dated 15/2/2018 passed by the Ld. Magistrate, 33rd Court, Ballard Pier, Mumbai in CC No. 11312/SS/2017;

(b) That this Hon'ble Court may be pleased to quash and set aside the order of Bailable Warrant dated 06.04.2018 issued by the Ld. Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai against the Applicant in CC No. 11312/SS/2017;

3. It is the case of the applicant that, the Applicant has been named in connection with CC No. 11312/SS/2017 which is pending on the files of learned Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai. The Respondent No. 1 herein has filed the aforementioned complaint against the Applicant herein under Section 138 of the Negotiable Instruments Act, 1881 (for the sake of brevity hereinafter will be referred as "said Act") for dishonour of two cheques bearing nos. 000015 for an amount of Rs. 40,00,000/- (Rupees Forty lacs only) and cheque bearing no. 000016 for an amount of Rs. 47,00,000 (Rupees Forty Seven Lacs only) both drawn on HDFC Bank,

Prabhadevi Mumbai. That, the learned Metropolitan Magistrate was pleased to record the verification of the authorized representative of the complainant on 15th February 2018.

4. It is further the case of the applicant that, on 15th February 2018 learned Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai issued process against the applicant for the offence punishable under Section 138 of the said Act. That, the order of issuance of process was made returnable on 6th April 2018. Applicant has received the summons on about 28th March 2018 thereby directing him to appear before the learned Metropolitan Magistrate, 33rd Court, Ballard Pier to answer a charge under Section 138 r.w. Section 141 of the said Act. It is pertinent to mention here that, the applicant did not receive the copy of the complaint along with the summons as stipulated under law.

5. It is the case of the applicant that, pursuant to the receipt of the summons, the applicant appeared before the learned Magistrate on 6th April 2018 through his advocate. That, on the said date scheduled for appearance the applicant preferred two applications through his advocate. The applicant preferred the first application for seeking exemption of the applicant under Section 205 of the Cr.P.C and the second application was for seeking an adjournment wherein the applicant specifically averred that the copy of the

complaint was not accompanied along with the summons received by him and hence the summons has not been served as prescribed by law. It is the case of the applicant that, the learned Metropolitan Magistrate was pleased to allow the exemption application and the second application seeking adjournment was rejected.

6. It is further the case of the applicant that, the complainant i.e. Respondent No. 1 herein, thereafter preferred an application for seeking bailable warrant against the applicant which was allowed by the learned Metropolitan Magistrate, and accordingly bailable warrant has been issued as against the applicant. Applicant being aggrieved and dissatisfied by the order of issuance of process dated 15.02.2018 and also the order of issuance of bailable warrant dated 06.04.2018 has preferred this Criminal Application.

7. Learned counsel appearing for the applicant submits that, the learned Magistrate did not appreciate that, demand notice issued by the first Respondent as regards to the dishonour of the subject cheques based on which the aforesaid complaint is filed was never issued to the drawer of the subject cheques. A bare perusal of the subject cheques filed by the first Respondent along with the said complaint would indicate that the same have been drawn by NHA investment Consultancy Pvt. Ltd and whereas the demand notice was never issued to the said Company i.e. the drawer of the subject cheques in

the present case. It is submitted that, even going by the averments in the demand notice issued by the first Respondent under Section 138 of the N.I. Act, it doesn't seem to be any intention on the part of the first Respondent herein to joint the said company as a necessary party and it is in this circumstance that the demand notice under Section 138 of the N.I. Act itself is suffered from material defect and the order of issuance of process passed pursuant to the filing of the criminal complaint based on the demand notice is bad in law and deserves to be quashed and set aside.

8. It is submitted that, bare perusal of the complaint which is filed before the learned Magistrate would reveal that the company has not been made an accused nor the court has issued process against the company being the drawer of the said cheques, and it is in these circumstances the prosecution would fail on this ground itself. It is further submitted that, the complainant has not satisfied the basic provisions of Section 138 of the N.I. Act while taking the cognizance of the complaint against the applicant. Learned counsel invites attention of this Court to Section 138 of the N.I. Act and submits that, in case the cheque is issued to the complaint, the company is necessary party to the complaint. A plain reading of the complaint and a perusal of the said cheques clearly did not disclose the commission of offence under Section 138 of the N.I. Act by the accused. In absence of company being made party to the

criminal complaint, the prosecution against the applicant would fail on this ground itself as Section 138 of N.I. Act fastens the primary responsibility upon the drawer of the cheque and unless and until the drawer of the cheque is arraigned as accused being the principal accused before the Court, the others cannot be tried and prosecuted by the Court under Section 138 of the N.I. Act. In support of aforesaid contention learned counsel placed reliance upon a ratio laid down in the case of *Aneeta Hada Versus Godfather Travels and Trous (Pvt.) Ltd*¹. It is submitted that, the aforesaid ruling was also followed by the Bombay High Court (Coram : Dr. Shalini Phansalkar-Joshi,J.) in the case of *Philip J. V/s. Ashapura Minechem Ltd and Ors.*²

9. It is submitted that, the order of issuance of process which is passed by the learned Metropolitan Magistrate is only under the provisions of Section 138 of the N.I. Act and the same has not been issued under Section 141 of the N.I. Act since the role of the applicant is attempted to shown to be that of a drawer / signatory by the first Respondent herein. It is further submitted that, the first Respondent herein has deliberately suppressed from the Trial Court that the subject cheque were never signed by the applicant in his individual capacity and the same is evident from the bare perusal of aforesaid two said cheques. It is submitted that, it is in this circumstance that

¹ (2012) 5 SCC 661

² Criminal Writ Petition No. 2909 of 2013 decided on 29th January 2016.

unless and until the drawer of the cheques was sought to be prosecuted, the applicant could not have been prosecuted even with the aid and assistance of Section 141 of the N.I. Act.

10. It is further submitted that, the applicant had received the summons on 28.03.2018 for his appearance before the Court on 06/04.2018. It is submitted that, on the date scheduled for appearance on 6th April 2018 i.e. the very first date of hearing itself the applicant appeared before the Court through his lawyer and filed two applications i.e. one for seeking adjournment and second for the purpose of seeking exemption. In the said application for adjournment he had specifically mentioned that the summons was not served upon him in accordance with law since the summons which he received was without a copy of the complaint. Therefore, the application which was filed for adjournment by the applicant however, the complainant filed the application for issuance of bailable warrant and accordingly bailable warrant was issued to secure the presence of the applicant, which was absolutely unwarranted. Therefore, the relying upon the pleading in the application, grounds taken therein and annexure thereto learned counsel submits that application deserves to be allowed.

11. On the other hand, learned counsel appearing for the first Respondent submits that, applicant has signed the cheques and he is working

in the capacity of managing director and therefore, merely because company is not made party to the complaint, the contention of the complainant accused that no cognizance of the said complaint can be taken, deserves to be rejected. Learned counsel in support of aforesaid contention placed reliance upon the judgment of the Delhi High Court in the case of DSC Ltd. Versus Dada Jeetu Buildcon Pvt. Ltd³. Learned counsel invites attention of this Court to the averments in the complaint and submits that, application may be rejected.

12. Heard learned counsel appearing for the Applicant and learned counsel appearing for first Respondent at length. With their able assistance perused the pleading in the application, grounds taken therein and annexures thereto, so also the averments made in the complaint. The issue raised in the present application is no more *res integra*. This Court (Coram : Dr. Shalini Phansalkar-Joshi,J.) in the case of Philip J. V/s. Ashapura Minechem Ltd and Ors (Supra) has taken a view that 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 applicant is liable to be quashed and set aside. In the said judgment this Court (Coram : Dr. Shalini Phansalkar-Joshi,J.) has relied upon the exposition of law in the case of Aneeta Hada (Supra). Paragraph nos. 13 to 17 of the said judgment reads as under:-

3 Crl.M.C.4227/2014 & Crl.M.A. 14611/2014 decided on 16th November, 2018.

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 is absolutely unmistakably clear that when a company is prosecuted, then only the prsons 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 of 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 respectability. 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*, 2914 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.

13. In the present case, the applicant tried to place reliance on the ratio laid down by the Delhi High Court in the case of DSC Ltd. (supra) however, in that case the company was arraigned as party Respondent and Managing Director was not made separate party. In the fact of that case the Delhi High Court held that, on said technical defect complaint cannot be

quashed. It is true that in the present case the subject cheque is signed by the applicant, however in the capacity of a Managing Director of the NHA Investment Consultancy Pvt. Ltd. Therefore, it is imperative on the part of the complainant to implead the Company as party Respondent. 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.

14. In that view of the matter, unless the company is arraigned as an accused the order of issuance of process against the applicant cannot legally sustain in view of the requirement of Section 138 of the NI Act.

Considering that by allowing the present application, this Court is quashing the process issued against the present applicant for not joining the company, the interests of justice require that liberty be given to the first Respondent to move before the Court of competent jurisdiction for appropriate relief with a application under Section 14 of the Limitation Act seeking exclusion of the period during which he was prosecuting this case.

15. As a result, the Criminal Application is allowed. The process issued against the present applicant alone by order dated 15.02.2018 passed by the Learned Magistrate, 33rd Court, Ballard Pier, Mumbai in CC No. 11312/SS/2017 for the offence under Section 138 read with Section 141 of the

NI Act without joining the company stands quashed and set aside. However, it will be open for the first Respondent to move the Court of competent jurisdiction for appropriate relief with a application under Section 14 of the Limitation Act seeking exclusion of the period during which he was prosecuting this case. Rule made absolute on above terms.

16. The Criminal Application stands disposed of on the aforesaid terms.

(S.S. SHINDE, J.)