

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

CRIMINAL WRIT PETITION NO. 53 OF 2023

PETITIONERS : 1. M/s. Srushti Developers, through
Partner Shri Girish S/o. Shankarrao
Deshpande, Registered Office at 278,
Bajaj Nagar, Nagpur – 440010.

2. Shri Girish S/o. Shankarrao
Deshpande, Age 66 yrs., Occu.
Retired, R/o. 278, Anand Mangal,
Bajaj Nagar, Nagpur.

//VERSUS//

RESPONDENT : Shri Ramesh S/o. Rambhau Bidkar,
Age 66 yrs., Occu. Business, R/o. Plot
No.47, Bahusaheb Survey Nagar,
Jaitala Rd. Nagpur.

Mr. Parth Lalit Sagdeo, Advocate for the Petitioners.

Mr. P.S. Sadavarte, Advocate for the Respondent.

CORAM : G. A. SANAP, J.

RESERVED ON : 17th APRIL, 2023.

PRONOUNCED ON : 28th APRIL, 2023.

JUDGMENT

Heard.

02] **Rule.** Rule made returnable forthwith. The petition is heard finally by consent of the learned advocates for the parties at the admission stage.

03] In this criminal writ petition, challenge is to the judgment and order dated 15th November, 2022, passed by the learned Additional Sessions Judge, Nagpur, whereby the learned Additional Sessions Judge allowed the revision application filed by the respondent/original complainant against the order of rejection of his application for amendment of the complaint and allowed the amendment application. The learned Judicial Magistrate First Class, Nagpur, by his order dated 19th October, 2016, was pleased to reject the application at Exh.182 made by the respondent/original complainant for amendment of the complaint.

04] The facts relevant for deciding this petition are as follows:

Petitioner No.2 is the original accused. Petitioner No.1- Partnership Firm is the newly added accused No.1. Respondent is the complainant. In this judgment, parties would be referred by their nomenclature in the complaint. The complainant and accused initially were the partners of M/s. Srushti Developers. The complainant and his family members retired from the said Partnership Firm. The said Firm was reconstituted by executing a deed of retirement and reconstitution of the Firm dated 31st March, 1994. The accused with his other family members continued to be

the partners of the reconstituted Firm. It is stated that as per the Memorandum of Understanding executed between the complainant and the accused, the accused had to pay Rs.3,50,000/- towards full and final settlement of the Partnership's account. The accused (partner), after reconstitution of the Firm, issued a cheque to the complainant bearing No.73748 for a sum of Rs.3,50,000/- drawn on the account of the Partnership Firm maintained with the Bank of Maharashtra, Dharampeth Branch, Nagpur. On presentation of the cheque for encashment, it was dishonoured on account of insufficient funds in the account to honour the cheque. The complainant on 15th September, 1996 issued a notice to the accused (partner) of the Firm. The notice was not issued to the Partnership Firm. The accused (partner) replied the said notice. The complainant filed a complaint against the accused (partner). The learned Magistrate took cognizance of the offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the N.I. Act" for short) against the accused (partner) and issued the process.

05] The complainant made an application at Exh.182 in a complaint filed in the year 1996 for addition of the Partnership Firm as an accused No.1 with a consequential amendment. It is

stated in the application for amendment that on the date of the filing of the complaint, as per the prevailing law, the Partnership Firm was not necessary party as accused. The legal position has now been changed. It is, therefore, stated that in order to bring the complaint in consonance with the existing law, the amendment was necessary.

06] The accused (partner) opposed the application. According to him, the application was not maintainable. The Partnership Firm was a necessary party as a principal accused at the stage of taking cognizance. The amendment to add the Partnership Firm at this stage is not permissible. The application for amendment was made after 19 years of filing of the complaint.

07] The learned Judicial Magistrate First Class, Nagpur rejected the said application. The complainant challenged the said order by filing a revision application in the Sessions Court, Nagpur. The learned Additional and Sessions Judge allowed the said revision application and set aside the order passed by the learned Magistrate and allowed the application for amendment. The accused being aggrieved by this order is before this Court.

08] I have heard Mr. Parth Lalit Sagdeo, learned advocate for the petitioners/accused and Mr. P.S. Sadavarte, learned advocate for the respondent/complainant. Perused the record and proceedings.

09] Learned advocate for the complainant submitted that when the complaint was filed in the year 1996, the law did not require the addition of the Firm or Company as an accused in a complaint filed under Section 138 of the N.I. Act. Learned advocate further submitted that the learned Additional Sessions Judge has taken all these facts into consideration and more particularly the decision in the case of *Charanjit Pal Jindal Vs. L.N. Metalics [2015 ALL MR (Cri) 4072 (S.C.)]*. Learned advocate submitted that now in view of the recent judgment delivered by the Hon'ble Supreme Court, it is imperative and necessary to array the Company or Firm as an accused. Learned advocate submitted that the amendment sought for to the complaint, was just to rectify the procedural infirmity or defect. Learned advocate further submitted that no prejudice would be caused to the accused (partner) by granting the amendment. In support of his submission, he has relied upon following decisions:

1. *Charanjit Pal Jindal Vs. M/s. L.N. Metalics [2015 ALL MR (Cri) 4072 (S.C.)]*.

2. *Mainuddin Abdul Sattar Shaikh Vs. Vijay D. Salvi [(2015) 9 SCC 622].*
3. *S.R. Sukumar Vs. S. Dunaad Raghuram [(2015) 9 SCC 609].*
4. *Manish Kalani & Anr. Vs. Housing and Urban Development Corporation Ltd. (HUDCO) & Anr. [2019 ALL MR (Cri) Journal 15].*
5. *Usher Agro Ltd. Vs. State of U.P. & Anr. [2019 ALL MR (Cri) Journal 48].*
6. *T. Vasanthakumar Vs. Vijayakumari [2015 ALL MR (Cri) 3667 (S.C.).*
7. *Saravanan Vs. G. Sampath [1999 CRI. L.J. 934].*
8. *Ashok Logani Vs. M/s. P. C. Jain Textile Pvt. Ltd. & Anr. [2021 ALL MR (Cri) Journal 129].*
9. *Tamil Nadu News Print & Papers Ltd. Vs. D. Karunakar & Ors. [2015 ALL MR (Cri) 3689 (S.C.).*
10. *Anil Hada Vs. Indian Acrylic Ltd. [2000 CRI. L.J. 373].*
11. *A. Sakthivel Vs. K. R. Navaneetha Krishnan [2012 ALL MR (Cri) Journal 50].*
12. *U.P. Pollution Control Board Vs. M/s. Modi Distillery and Others [AIR 1988 SC 1128].*
13. *Sheoratan Agarwal and Anr. Vs. State of M.P. [AIR 1984 SC 1824].*
14. *M/s. Bilakchand Gyanchand Co. Vs. A. Chinnaswami [1999 CRI. L.J. 3498].*
15. *Surya Dev Rai Vs. Ramchander Rai and Others [2004(1) Mh.L.J. 633].*

10] Learned advocate for the accused submitted that the amendment application was not at all maintainable. Learned advocate submitted that Section 141 is a part of Chapter XVII of the N.I. Act, inserted by Act No.66 of 1988 w.e.f. 1st April, 1989. Learned advocate submitted that when this complaint was filed in the year 1996, the provisions of Section 141 of the N.I. Act were applicable to the complaint as it is. Learned advocate, therefore, submitted that the basic ground of the complainant that as per the prevailing law, there was no need to join the Company or Partnership Firm as a principal accused, is without any substance.

11] Learned advocate for the accused submitted that in this case the notice was not issued to the Firm. It is pointed out that in the fact situation, the Firm was a principal accused and therefore, the failure on the part of the complainant to join the principal accused, could not be said to be a procedural infirmity or a curable defect. Learned advocate submitted that the general principle of criminal law that the Court takes cognizance of the offence and not of the offender cannot be made applicable to the complaint filed under Section 138 of the N.I. Act. Learned advocate submitted that, therefore, the application was not at all maintainable. Learned advocate submitted that the learned Additional Sessions Judge has

committed a patent illegality by allowing the amendment application. Learned advocate, in support of his submission, has relied upon the following decisions:

1. *Charanjit Pal Jindal Vs. L.N. Metalics [(2015) 15 SCC 768]*.
2. *Jugesh Sehgal Vs. Shamsher Singh Gogi [(2009) 14 SCC 683]*.
3. *S.R. Sukumar Vs. S. Sunaad Raghuram [(2015) 9 SCC 609]*.
4. *Bharuka Trading Company, Risod, Through its Proprietor Durgabai Kachrulal Agrawal Vs. M/s. Hanuman Dal Industries Pvt. Ltd. [Writ Petition No.613/2020, decided on 21st June, 2021]*.
5. *Pawan Kumar Goel Vs. State of U.P. & Another [2022 SCC OnLine SC 1598]*.
6. *Somesh Sarjivan Jain Vs. State of Gujarat & Anr. [Special Criminal Application No.1790/2009, decided on 24th January, 2012]*.
7. *Sanjay Gambhir Vs. State & Another with connected matters [2017 SCC OnLine Del. 8331]*

It is to be noted that in the case of *Pawan Kumar Goel* (supra), all the earlier decisions have been considered.

12] In the backdrop of the question involved in this case, the decision in the case of *Aneeta Hada Vs. Godfather Travels and Tours Pvt. Ltd. [(2012) 5 SCC 661]* would be required to be

considered. Paragraphs 58 and 59 of the report would be relevant.

The same are extracted below:

“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 drag-net 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 [(1970) 3 SCC 491)] which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal [(1984) 4 SCC 352) does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada [(2000)1 SCC 1] is overruled with the qualifier as stated in paragraph 51. The decision in Modi Distilleries [(1987) 3 SCC 684]has to be treated to be restricted to its own facts as has been explained by us hereinabove.”

13] It is to be noted that in the case of ***Aneeta Hada*** (supra), the earlier decision of the Hon'ble Apex Court in the case of ***Anil Hada*** (supra) has been overruled. Learned advocate for the complainant has mainly relied upon the decision in the case of ***Anil Hada*** (supra) to substantiate his submission. The decision in the case of ***Anil Hada*** (supra) is overruled and therefore, the learned advocate cannot rely on the same.

14] The decision in the case of ***Aneeta Hada*** (supra) has been considered by the Hon'ble Apex Court in the case of ***Himanshu Vs. B. Shivamurthy and Anr. [(2019) 3 SCC 797]***. Paragraphs 11, 12 and 13 of this report would be relevant. The same are extracted below:

“11. In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. The complaint was lodged only against the appellant without arraigning the company as an accused.

12. The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or 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.

13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.”

15] At this stage, it would be necessary to consider the law laid down in the case of ***N. Harihara Krishnan Vs. J. Thomas [(2018) 13 SCC 663]***. In this case the Hon’ble Apex Court has considered the concept of taking cognizance of the offence and not of the offender, has been dealt with in the context of Section 138 of the N.I. Act. Paragraphs 26 and 27 of the report would be relevant. The same are extracted below:

“26. The scheme of the prosecution in punishing under Section 138 of the Act is different from the scheme of the CrPC. Section 138 creates an offence and prescribes punishment. No procedure for the investigation of the offence is contemplated. The prosecution is initiated on the basis of a written complaint made by the payee of a cheque. Obviously such complaints must contain the factual allegations constituting each of the ingredients of the offence under Section 138. Those ingredients are: (1) that a person drew a cheque on an account maintained by him with the banker; (2) that such a cheque when presented to the bank is returned by the bank unpaid; (3) that such a cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity whichever is earlier; (4) that the payee demanded in writing from the drawer of the cheque the payment of the

amount of money due under the cheque to payee; and (5) such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid. It is obvious from the scheme of Section 138 that each one of the ingredients flows from a document which evidences the existence of such an ingredient. The only other ingredient which is required to be proved to establish the commission of an offence under Section 138 is that in spite of the demand notice referred to above, the drawer of the cheque failed to make the payment within a period of 15 days from the date of the receipt of the demand. A fact which the complainant can only assert but not prove, the burden would essentially be on the drawer of the cheque to prove that he had in fact made the payment pursuant to the demand.

27. 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.”

16] All the above three decisions, namely ***Aneeta Hada*** (supra), ***Himanshu Vs. B. Shivamurthy and Anr.*** (supra) and ***N. Harihara Krishnan*** (supra) have been considered by the Hon’ble Apex Court in the case of ***Pawan Kumar Goel*** (supra). In this case, it is held by the Hon’ble Supreme Court that if the complainant fails to make a specific averments against the Company in the complaint for commission of an offence under Section 138 of the N.I. Act, the same cannot be rectified by taking recourse to general principles of criminal jurisprudence. It is held that since the provisions of Section 141 of the N.I. Act imposes vicarious liability by deeming fiction, which pre-supposes and requires the commission of the offence by Company or Firm and therefore, unless the Company or Firm has committed the offence as a principal accused, the persons mentioned in sub-section (1) and sub-section (2) of Section 141 of the N.I. Act would not be liable

to be convicted on the basis of the principles of vicarious liability.

17] The Hon'ble Apex Court in the case ***Himanshu Vs. B. Shivamurthy and Anr.*** (supra), relying upon a decision in the case of ***Aneeta Hada*** (supra), has held that in the absence of a notice of demand being served on the Company and without compliance with the proviso to Section 138, the Company cannot be arraigned as an accused at a subsequent stage.

18] It is to be noted that in view of the law laid down by the Hon'ble Apex Court in the above decisions, the reliance placed on all the decisions by the learned advocate for the complainant, is totally misplaced. The controversy involved in this case has to be addressed keeping in mind the settled legal position culled out from the above decisions of the Hon'ble Apex Court.

19] It would be necessary to advert to the facts of this case in brief. The notice in this case was not issued to the Firm. The Firm was not arrayed as an accused, when the complaint was filed. The Firm, being a principal offender, was a necessary party. Even on the date of the filing of the complaint as per Section 141 of the N.I. Act, the Firm was necessary party as a principal offender.

Therefore, the submissions advanced by the learned advocate for the complainant that the amendment was intended to rectify the curable infirmity or defect, are not acceptable. It is submitted that there was no legal flaw or lacuna in the case and therefore, the contention of the accused that it is an attempt to fill up the lacuna is not tenable.

20] In my view, in this case, the ground put-forth to seek the amendment in the complaint is not at all tenable. On such a ground, the application for amendment cannot be allowed. The failure on the part of the complainant to issue notice to the Partnership Firm before filing the complaint and to array the Partnership Firm, being a principal accused in the complaint, is a legal flaw in this case. In view of the settled legal position in the catena of decisions, this lacuna or illegality cannot be allowed to be rectified.

21] In the facts and circumstances, I am of the view that the judgment and order passed by the learned Additional Sessions Judge, Nagpur cannot be sustained. The impugned judgment and order is not in accordance with law. The writ petition, therefore, deserves to be allowed.

22] The writ petition is **allowed**. The judgment and order dated 15th November, 2022, passed by the learned Additional Sessions Judge, Nagpur in Criminal Revision Application No.268/2016, is quashed and set aside.

23] Rule is made absolute in above terms. Writ petition is disposed of.

(G. A. SANAP, J.)

Vijay