202 **IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH**

CRM-M-25044-2016
Decided on : 15.11.2023

Bhuvanesh Subarayan ...... Petitioner

Versus

Ravi Garhwal ...... Respondent

CORAM : HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL

Present : Mr. Sudhanshu Makkar, Advocate
for the petitioner.

Mr. Vishal Gupta, Advocate
for the respondent.

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Manjari Nehru Kaul, J.(Oral)

Instant petition has been filed under Section 482 Cr.PC for quashing the summoning order dated 14.03.2016(Annexure P-2) as well as complaint dated 24.12.2015 (Annexure P-1) registered against the petitioner for offences punishable under Section 138 of Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act') before JMIC, Gurgaon.

2. Learned counsel for the petitioner *inter alia* contends that the impugned order (Annexure P-2) as well as complaint (Annexure P-1) are patently erroneous and in the teeth of settled law. While drawing the attention of this Court to the complaint, it has been submitted that as per the allegations levelled therein the complainant had entered into Memorandum of Understanding (hereinafter referred to as 'MOU') dated 01.10.2014 with the accused and paid a sum of Rs.71,42,857/-, which were invested as optionally

convertible debentures. Furthermore, the MOU had been entered into by the accused being the Director of the Company. Learned counsel submits that even the cheque in question had been signed by the petitioner only in his professional capacity. Learned counsel has further asserted that the company being a juristic person would have a separate identity and it is a matter of record that neither the company had been arrayed as an accused in the complaint in question nor had it been summoned under Section 138 of the Act; once the company itself on whose behalf the cheque in question had been issued by the petitioner had not been called upon to face trial, the petitioner-Director could not be held vicariously liable under Section 141 of the Act.

3. Learned counsel has vehemently argued that the Court below erred in over-looking a crucial fact i.e. the petitioner's liability, if any, would stem solely from Section 141 of the Act; additionally, as per the provisions of Section 141 of the Act, petitioner as a Director would be vicariously liable only if the Company was found liable under Section 138 of the Act. Learned counsel has placed reliance upon the judgment of Hon'ble the Supreme Court in ***Aneeta Hada vs. M/s Godfather Travels and Tours Pvt. Ltd., 2012(5) SCC 661*** and submitted that the precedent set out in Anneta Hada's case(supra) unambiguously lays down that individuals, like the petitioner here, who hold positions such as Director could only face vicarious liability when the company itself was prosecuted. Hence, it has been argued that the petitioner in the circumstances could not have been summoned to face trial sans the company.

4. Per contra, learned counsel for the respondent while opposing the prayer made by the counsel opposite has contended that the petitioner did not

just cheat them but also other persons by inducing them to invest in his company through an MOU dated 01.10.2014 from which loans had been obtained. As per learned counsel for the respondent, the liability of the petitioner would arise at the first instance itself being a signatory to the cheque in question. It has been argued that as per the provisions of the Companies Act, 2013, Directors are personally accountable for their actions on behalf of the Company, and they cannot evade liability under Section 138 of the Act simply because the Company has not been made a party. It has been further submitted that the petitioner being an active Director of the Company and also a signatory to the MOU would be deemed to be personally liable. Additionally, it has also been urged that the issue raised by the petitioner cannot be delved into at this stage as it would be a matter of trial. Furthermore, it has been submitted that non-arraying of the Company as a party in the complaint was a curable defect for which an application had already been moved by the complainant to amend the complaint in order to implead the company as an accused. In support of his submissions, learned counsel has placed reliance upon the judgment of Hon'ble the Supreme Court in ***S.R.Sukumar vs. S.Sunaad Raghuram, 2015(9) SCC 609*** to contend that even in the absence of specific provisions under the Cr.PC, an amendment can be made in the complaint by way of an application.

5. Heard learned counsel for the parties and perused the relevant material available on record.

6. As per the settled law, when a company is the drawer of the cheque in question, as in the case at hand, then it would be the company, which would be the principal offender under Section 138 of the Act. The natural person

would be liable only under Section 141 of the Act by virtue of the principle of vicarious liability. In case, the principal offender i.e. the company has not been called upon to face trial, the question of prosecuting and convicting the natural persons of an offence under Section 138 of the Act by holding them vicariously liable under Section 141 of the Act would not arise. Hon'ble the Supreme Court in *Aneeta Handa's case(supra)* has held as under:

> *"42. We have referred to the aforesaid passages only to highlight that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the company. The learned counsel for the respondents have vehemently urged that the use of the term "as well as" in the Section is of immense significance and, in its tentacle, it brings in the company as well as the director and/or other officers who are responsible for the acts of the company and, therefore, a prosecution against the directors or other officers is tenable even if the company is not arraigned as an accused. The words "as well as" have to be understood in the context. In Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others[44] it has been laid down that the entire statute must be first read as a whole, then section by section, clause by clause, phrase by phrase and word by word. The same principle has been reiterated in Deewan Singh and others v. Rajendra Prasad Ardevi and others[45] and Sarabjit Rick Singh v. Union of India[46].*

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.

43. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh (supra) which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal (supra) does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada (supra) is overruled with the qualifier as stated in paragraph 37. The decision in Modi Distilleries (supra) has to be treated to be restricted to its own facts as has been explained by us hereinabove."

7. Adverting to the case in hand, perusal of the complaint in question reveals that the complainant has levelled allegations against the petitioner, who

is a Director of the Company. Furthermore, even as per the memo of parties in the complaint in question it stands reflected that the petitioner has been arrayed as an accused only in his professional capacity, however, the company itself has not been arrayed as an accused. Therefore, without the company being made an accused, prosecuting the Director in his professional capacity would be untenable.

8. No doubt, it has been contended that an application seeking amendment in the complaint in question has been moved before the Court below, however, the respondent other than his bald submissions has not even placed on record any such application before this Court. Learned counsel has placed reliance upon *S.R.Sukumar's case(supra)* to contend that amendment in the complaint can be made to cure even a substantial defect. It would, therefore, be relevant to refer to the observations of Hon'ble the Supreme Court in this case, which are as under:

> *"19. In the instant case, the amendment application was filed on 24.05.2007 to carry out the amendment by adding paras 11(a) and 11 (b). Though, the proposed amendment was not a formal amendment, but a substantial one, the Magistrate allowed the amendment application mainly on the ground that no cognizance was taken of the complaint before the disposal of amendment application. Firstly, Magistrate was yet to apply the judicial mind to the contents of the complaint and had not taken cognizance of the matter. Secondly, since summons was yet to be ordered to be issued to the accused, no prejudice would be caused to the accused. Thirdly, the amendment did not change the original nature of the complaint being one for defamation. Fourthly,*

> *the publication of poem 'Khalnayakaru' being in the nature of subsequent event created a new cause of action in favour of the respondent which could have been prosecuted by the respondent by filing a separate complaint and therefore to avoid multiplicity of proceedings, the trial court allowed the amendment application. Considering these factors which weighed in the mind of the courts below, in our view, the High Court rightly declined to interfere with the order passed by the Magistrate allowing the amendment application and the impugned order does not suffer from any serious infirmity warranting interference in exercise of jurisdiction under Article 136 of the Constitution of India."*

9. Thus, what flows from the above observations of Hon'ble the Supreme Court is that the amendment had been allowed in view of the fact that the Magistrate was yet to apply his judicial mind to the contents of the complaint as no cognizance had been taken by it till that time. However, the instant case is clearly distinguishable as it is a matter of record that no such application had been moved for amendment of the complaint in question prior to the Court taking cognizance and summoning the accused vide the impugned order.

10. As a sequel to the above, the present petition is allowed and summoning order dated 14.03.2016 (Annexure P-2) as well as complaint dated 24.12.2015 registered under Section 138 of the Act are quashed qua the petitioner.

15.11.2023 **(MANJARI NEHRU KAUL)**
sonia **JUDGE**

Whether speaking/reasoned: Yes/No
Whether reportable : Yes/No