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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

***RESERVED ON – 18.04.2023
PRONOUNCED ON -11.05.2023***

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+ CRL.M.C. 1965/2022, CRL.M.A. 8359/2022
M/S. H G RETAIL SOLUTIONS PVT. LTD. Petitioner

versus

RAJIV KUMAR SAXENA Respondent

21

+ CRL.M.C. 1966/2022, CRL.M.A. 8365/2022
KARAN TOMAR Petitioner

versus

RAJIV KUMAR SAXENA Respondent

22

+ CRL.M.C. 1967/2022, CRL.M.A. 8370/2022
KUSUM TANWAR Petitioner

versus

RAJIV KUMAR SAXENA Respondent

Present: Mr.Asuthosh Lohia, Ms.Shraddha Bhargava and Mr.Rohit
Saraswat, Advocates for the petitioners.
Mr.Aseem Mehrotra and Ms.Deeksha, Advocates for the
respondent.

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA,J :

Overview

1. Present petitions have been moved under section 482 Cr.P.C.on behalf of the petitioners, M/s HG Retail Solutions Pvt. Ltd. (company), Karan Tomar and Kusum Tanwar (directors of the erstwhile company namely M/s HG Retail Solutions Pvt. Ltd) seeking to set aside the order dated 01.04.2021 passed by the learned ASJ-5, South East, Saket Courts, New Delhi in Rev. Pet. Nos. 366/2017, 355/2017 and 365/2017. Vide the impugned order, the learned ASJ has dismissed the aforesaid revision petitions of the petitioner assailing the summoning order dated 23.02.2015 passed under Section 138 of NI Act, 1881, by the learned MM in CC No. 612890/2016.
2. The present case concerns a complaint under 138 NI Act pertaining to dishonour of a cheque for an amount of Rs. 40,00,000/-.The cheque was allegedly taken by the petitioners as a friendly loan from the respondent. The petitioners were summoned in the said case, against which they preferred the aforesaid revision petitions before the Sessions Court, which came to be dismissed vide the impugned order dated 01.04.2021.
3. The grievance of the Petitioners is threefold. Firstly, no demand notice was served to the company M/s HG Retail Solutions Pvt. Ltd and only to the directors of the erstwhile company. Secondly, the

complaint u/s 138, NI Act dated 21.11.2014 is time barred and beyond limitation as prescribed u/s 138 of NI Act. Moreover, since no application seeking condonation of delay was filed by the respondent along with the complaint, the complaint fails in terms of the judgement in *Ashwani Kumar Julka v. Parthojit Choudhary* , 2007 (93) DRJ 185. Thirdly, no specific averment or role has been attributed to the petitioner/co-accused Smt. Kusum Tanwar [petitioner in Crl. MC 1967/2022], except mere mechanical reproduction of the statutory provisions of S. 141, NI Act as required by the law for a non-executive, non-managerial director. It is the contention of the petitioners that Smt. Kusum Tanwar, who is the mother of the petitioner/co-accused Karan Tomar and also director of the company M/s HG Retail Solutions Pvt. Ltd neither signed the Cheque bearing number 002572 dated 18.07.2014 (cheque in question), nor the Loan Agreement dated 17.06.2014.

4. The petitioners contend that the Ld. MM in a routine and mechanical manner issued summons on the complaint filed by the Respondent without duly considering the aspect that no demand notice was ever sent to the company and that the complaint under section 138 NI Act was beyond the period of limitation. Petitioners contend that these aspects have not been appreciated by the Ld. Sessions Court in its revisional jurisdiction which is under challenge herein. It has been contended that in terms of section 141 NI Act if the offence has been committed by a company, then without serving any demand notice to the company the ingredients of section 138 NI Act do not stand complied. It is also the contention of the petitioners that the learned

MM as well as the learned Sessions Court fell into an error while computing the limitation under Sections 138 N.I. Act. The Petitioners submit that the law on this issue is well settled, and in such cases where the notice has been returned unclaimed with a postal endorsement “refused” or “not available in the house” or “house locked” or “shop closed” or “addressee not in station,” due service has to be presumed. Thus, due service of legal notice dated 01.10.2014, was done on 04.10.2014, when the petitioners refused to take service of the notice. It has been contended that the Ld. Trial Court and the Ld. Sessions Court have been misled by the Respondent with respect to particulars of the complaint, material at the time of issuance of summons.

5. Aggrieved, thus the present petitions have been preferred impugning the order of the learned ASJ dated 01.04.2021.

Background Facts

6. The complainant respondent Rajiv Kumar Saxena is a Proprietor of Proprietorship concern namely M/s India Export Pvt. Ltd. The petitioner, H.G. Retail Solutions (P) Ltd., through its Director Mr. Karan Tomar approached the Respondent with the Board resolution dated 10.06.2014, authorizing the Directors to avail a friendly loan from the Respondent.
7. Subsequently, a loan agreement was entered into between petitioner company i.e. H.G. Retail Solutions (P) Ltd., represented by its Director Mr. Karan Tomar and the respondent on 17.06.2014. An amended loan agreement was also executed on 18.06.2014. Pursuant

to these agreements the petitioner company represented by Mr. Karan Tomar, in need of money, availed a friendly loan of Rs. 40 lakhs from the respondent. According to the terms of agreement, the loan amount was to be repaid within one month from the disbursement date i.e. by 17.04.2014 along with interest @ 5% p.m. In the event of non-payment within thirty days, an additional penal cost of Rs. 200/- per day was imposed over the interest amount.

8. Accordingly, the respondent released a sum of Rs. 40,00,000/- through RTGS Cheque 840125 dated 19.06.2014 from his bank.
9. In terms of the agreement dated 17.06.2014 and 18.06.2014, the Director of the petitioner company issued two post-dated cheques, one for Rs. 40,00,000/- towards re-payment of the loan amount and the other for Rs. 2,50,000/- towards interest payable to the respondent. However, both cheques were returned unpaid due to insufficient funds. The complainant apprised the petitioner telephonically about the dishonoured cheques and the petitioner requested him to re-deposit them for fresh clearance. However, the cheques were again dishonoured due to insufficient funds.
10. Consequently, the respondent sent a demand notice dated 01.10.2014 to Karan Tomar and Kusum Tanwar (directors of the Company and petitioners herein) as well as two other witnesses to the loan agreement. However, no demand notice was served on the company H.G. Retail Solutions (P) Ltd.
11. The Notice was sent to the petitioners at their addresses at Vasant Vihar and Chhatarpur. The respondent alleges that the notice was served on 07.10.2014, as per the tracking report annexed with the

complaint u/s 138 NI Act. On the contrary, the petitioners contend that the notice should be deemed served on 04.10.2014, at Vasant Vihar when the notice was undelivered due to the door being locked, and at Chhatarpur when the notice was refused, as per the tracking report.

12. It has been alleged that despite the service of legal notice, the petitioners failed to make the payment of the cheques within the prescribed period of 15 days from receipt of the notice.
13. Based on the above allegations, the respondent filed a complaint under section 138 NI Act before the Ld. MM registered as CC No. 612890/2016, whereby vide order dated 23.02.2015 the Ld. MM after taking cognizance of offence u/s 138 NI Act, summoned the petitioners. The company H.G. Retail Solutions (P) Ltd was also arrayed as an accused in the complaint u/s 138 NIA along with its directors namely Karan Tomar and Kusum Tanwar. The petitioners namely Karan Tomar and Kusum Tanwar preferred a discharge application which was dismissed by the Ld. MM, South East, Saket Court vide order dated 24.05.2017.
14. Thereafter, the petitioner sought revision petitions assailing the summoning order dated 23.02.2015 which also came to be dismissed by the Ld. Sessions Court vide order dated 01.04.2021, which order has been challenged by way of the present petitions.
15. It has been submitted that suit for Recovery bearing C.S. No. 608/2017 against the Petitioners under the provisions of Order XXXVII, C.P.C, on the basis of the cheques issued by the Petitioners. It has been submitted that the Ld. ADJ-03, Saket Courts vide order

dated 26.02.2019 held the respondent to be entitled to recover a sum of Rs.42,50,000/- and interest @ 6% p.a. on the principal amount of Rs. 40 lakhs from 17.07.2014 till its realization along with granting cost of the suit. It has been submitted that the said order has attained finality.

16.The following salient legal propositions have been raised before this Court:

I. On the issue: Legal Notice not served upon the Company

Contentions on behalf of the Petitioners

- a. Ld. Counsel for the petitioners submit that the proviso to Section 138, NI Act, lays down the prerequisites for establishing an offense under the provision. It is mandatory to serve a notice upon the drawer of the cheque, which, in this case, is the Company - H.G. Retail Solutions. The statutory provisions clearly outline the procedural steps for initiating a complaint, without compliance of which, the complaint cannot be deemed maintainable. Ld. Counsel submits that thus, the present complaint is not maintainable as the demand notice was never served on the Company.
- b. Ld. Counsel has placed reliance upon the judgement in *Himanshu v. B. Shivamurthy* AIR 2019 SC 3052, whereby, the Hon'ble Supreme Court, 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 High Court was

in error in holding that the company could now be arraigned as an Accused.

Contentions on behalf of the Respondent/Complainant

- a. Ld. Counsel for the respondent argues that the legal notice was indeed served on both the Directors of the company, calling upon them, to make the payment in lieu of dishonour of the cheque. It has been further submitted that the demand notice addressed to the directors was also sent at the address of the company.
- b. Ld. Counsel submits that in *Bilakchand Gyanchand Co. v. A. Chinnaswami* (1999) 5 SCC 693 the Hon'ble Supreme Court held that a complaint under Section 138 of the Act was not liable to be quashed on the ground that the notice as per by Section 138 NI Act was addressed to the Director of the company at its office address and not to the company itself.
- c. Ld. Counsel submits that this Court in *DSC Ltd. vs. Dada Jeet Buildcon Pvt. Ltd.*, 2018 SCC OnLine Delhi 12383, has held knowledge of working Director of the company would tantamount to knowledge of the company and filing of complaint without service of notice in the name of the company is not fatal to prosecution launched against the company.

II. On the issue: The Complaint is time barred

Contentions on behalf of the Petitioners

- a. Ld. Counsel for the petitioner submits that both the learned MM and Sessions Court made an error while calculating the

limitation period under Sections 138 of the N.I. Act. Ld. Counsel argues that the demand notice should be deemed to be delivered on 04.10.2014 when the petitioner refused delivery of the notice and, not 07.10.2014 as claimed by the respondent.

- b. Ld. Counsel asserts that prior to filing the complaint under Section 138 of the NI Act, the respondent served a demand notice on Shri Karan Tomar, Smt. Kusum Tanwar (the Directors of H.G. Retails), and two witnesses to the loan agreement, but failed to serve a legal demand notice on the company itself, H.G. Retails.
- c. Ld. Counsel maintains that the said notice was first delivered to Shri Karan Tomar at the company's office address on 04.10.2014, whereupon a refusal report was recorded. Ld. Counsel contends that the refusal report recorded on 04.10.2014 should be considered as deemed service as per Section 27 of General Clauses Act, in light of the various judicial pronouncements in *C.C. Alavi Haji Vs. Palapetty Muhammed and Ors.*(2007) 6 SCC 555; *Ashwani Kumar Julka v. Parthojit Choudhary*, 2007 (93) DRJ 185 and *Datta S. Nadkarni Vs. Salvador Fernandes and Ors.*, CrI. A 46/2013 decided on 16.07.2015. Additionally on 04.10.2014, the notices were also served at the residential addresses of the petitioner directors but were undelivered and returned with the postal endorsement “Door Locked.” However, the postal department preferred to serve the notice again on 07.10.2014 - when it was received by the petitioners. Ld. Counsel submits that in terms

of *C.C. Alavi Haji* (supra) the date of refusal or non-claim of the envelope should be considered as deemed service i.e. on 04.10.2014.

- d. In *C.C. Alavi Haji* (supra), a Three Judge Bench of the Hon'ble Supreme Court held that when a notice sent by registered post is returned with a postal endorsement indicating refusal or unavailability, due service should be presumed. Thus, the petitioner contends that in the present case, the legal notice dated 01.10.2014 was duly served on 04.10.2014 when the petitioner refused to accept the notice.
- e. Ld. Counsel has placed reliance on the judgement in *Ashwani Kumar Julka* (supra), which held that the date of refusal or non-claim of the envelope should be considered as deemed service and not its intimation to the payee. In the said case, the registered envelope was taken by the postman at the residential address of the drawer on 28/11/1996 and to the business address on 29/11/1996, those dates were considered as the dates of deemed service. A notice served on 09.12.1996 to the Accused by the Complainant was not considered for the purpose of limitation. The Court held that the limitation if counted from 28.11.1996 or 29.11.1996, the complaint ought to have been filed by 13th or 14th January, 1997. The complaint, which was filed on 16/01/1997, was found to be beyond the period of limitation although by two days only. This Court on the facts of the said case held that although the complaint was barred by one or two days, the only result was that the action

initiated was beyond the period prescribed and the complaint was dismissed.

- f. Ld. Counsel submits that the complaint in the instant case has been filed beyond the prescribed period of limitation. The petitioner has referred to the following table in support of this contention.

Service (deemed) of legal notice dated	04.10.2014
<u>Expiry of 15 days for making payment</u>	<u>18.10.2014</u>
<u>Case of Action (including date of reckoning)</u>	<u>19.10.2014</u>
<u>Expiry of 30 days limitation period</u>	<u>18.11.2014</u>
<u>Complaint Case No. 612890/2016 filed on</u>	<u>21.11.2014</u>

- g. Ld. Counsel argues that the Respondent wrongly submitted that 15 days should be counted only from 07.10.2014, the date when the other legal notices sent by registered post were received, and thus the cause of action would have (allegedly) arisen only on 21.11.2014 and the complaint dated 21.11.2014 was wrongly construed to be within time. Ld. Counsel submits that as per Clause (c) of the proviso to Section 138 of the N.I. Act, the liability of the drawer and the period of one month for filing the complaint under Section 142 should be reckoned accordingly. It is emphasized that a combined reading of the aforementioned sections of the Act leaves no room for doubt that the cause of action, within the meaning of Section 142(c), can arise only when the notice was first served upon the drawer of the cheque, which in the present case is 04.10.2014. Reliance

has been placed on *Sil Import, USA Vs. Exim Aides Silk Exporters, Bangalore* AIR 1999 SC 16091 to support this contention.

- h. Ld. Counsel submits that the issue of limitation goes to the roots of the matter and has to be adjudicated first. However, the Revision Court, in the impugned order, considered it to be a mixed question of fact and law that should be addressed during trial.

Contentions on behalf of the Respondent/Complainant

- a. Ld. Counsel submits that the legal notice dated 01.10.2014 were sent to Karan Tomar and Kusum Tanwar, clearly stating their positions as directors of the company and were sent to their respective addresses at 218, SFS Flats, Basant Enclave, Vasant Vihar, New Delhi, and Chhatarpur. Ld. Counsel submits that the legal notice was dispatched on the same day. On 4.10.2014, the notice was attempted to be delivered, but the house was found locked and/or the notice was refused. According to the tracking report, the notice was eventually delivered on 07.10.2014. Therefore, the respondent argues that this date should be considered for the purpose of limitation in filing the complaint under section 138 of NI Act. The complaint was filed on 21.11.2014. The respondent has also relied on *Ashwani Kumar Julka vs Lt. Col. Parthojit Choudhary*, 2007 (93) DRJ 185, which deliberated on the issue of determining the date for limitation, i.e., whether it should be counted from the date of receipt by the

drawer of the cheque or when the sender of the notice receives intimation of receipt. This Court held that if the notice is actually received by the addressee (drawer of the cheque), the 15-day period should be reckoned from that date.

- b. Ld. Counsel thus submits that the present case is squarely covered by the judgment in *Ashwani Kumar Julka vs Lt. Col. Partholit Choudhary* (supra).

III. On the issue: No specific averment or role attributed to petitioner Smt. Kusum Tanwar in the Complaint

Contentions on behalf of the Petitioners

- a. Ld. Counsel submits that the complaint fails to ascribe any specific role to Smt. Kusum Tanwar, the petitioner/accused. The complaint merely contains bald averments and mechanical reproduction of the statutory language of Section 141 of NI Act. In absence of specific allegations the complaint lacks to fulfil the requirements of Section 141 NI Act.
- b. Ld. Counsel submits that the cheque in question, bearing number 002572 dated 18.07.2014, was not signed by Smt. Kusum Tanwar, the petitioner/accused. It is further submitted that even the loan agreement dated 17.06.2014 was not signed by Smt. Kusum Tanwar.
- c. Ld. Counsel contends that the Revisional Court summarily rejected these contentions without properly appreciating the questions of law which ought to be decided at the very threshold. It is argued that in cases where a person is a non-signatory to the cheque, non-signatory to the loan agreement,

not responsible for the day-to-day conduct of the company's affairs, and no specific role has been attributed to them, they should not be proceeded against and should be discharged at the threshold.

- d. Reliance has been placed on the judgment of the Hon'ble Supreme Court in *Sunita Palita&Ors. v. M/s Panchami Stone Quarry* (AIR 2022 SC 3548) whereby the proceedings against non-executive director, who was not even signatory to the cheque and in the absence of specific averment except bald endorsement of the language of Section 141 of NI Act was quashed. Learned counsel submits that in light of the same, the proceedings against the Petitioner/ accused Smt. Kusum Tanwar ought to be quashed

Contentions on behalf of the Respondent/Complainant

- a. Ld. Counsel for the respondent submits that the complaint contained specific averments regarding the role of the petitioners. Ld. Counsel points out that in the complaint u/s 138 NIA the description of the parties, i.e. Karan Tomar (Accused No.1), Kusum Tanwar (Accused No.2) and H.G. Retail Solutions (P) Ltd. (Accused No.3) have been properly mentioned. It is averred in the complaint that both directors were and are jointly and severally responsible for the day-to-day affairs of the company.
- b. It is stated that the petitioners approached the respondent with the board resolution dated 10.06.2014, authorizing the

Directors to avail a friendly loan from the Respondent and signed a loan agreement. Ld. Counsel asserts that Kusum Tanwar, being a Director of the company, as on the date of the commission of the offence is liable to be prosecuted for the affairs of the company.

- c. Learned Counsel submits that the learned court upon due consideration of facts held that a case was made out against the petitioners and thus summoned the petitioners. Thereafter, the Ld. revision court after threadbare examining the material on record affirmed this order.

Findings & Analysis

17. Before proceeding further, it is imperative to advert to the statutory provisions contained under sections 138 and 141 of NI Act.

18. Section 138, NI Act reads as under:

*“138. Dishonour 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.”

19. Section 141, NI Act reads as under:

“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:

[Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(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 relation to a firm, means a partner in the firm.”

20.A meticulous examination of the statutory framework elucidated under sections 138 and 141 of NI Act reflects the intricate interplay of essential elements required to establish an offense thereunder. In essence, the realization of a penal offense under section 138 of the NI Act necessitates the confluence of certain indispensable prerequisites. Firstly, a cheque has to be drawn by the drawer on an account maintained by him in lieu of his discharge of liability towards payment either in whole or part. Secondly, such cheque has to be 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. Thirdly, such cheque when presented to the bank is returned by the bank unpaid. Fourthly, issuance of a written demand notice by the payee to the drawer of the cheque demanding payment 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. Fifthly, failure of the drawer to make such payment within a period of 15 days from the date of the receipt of the demand notice.

21.It is noteworthy that noncompliance with any of the aforementioned imperative steps shall vitiate the very substratum of a prosecutorial ‘cause of action’, rendering it not maintainable and bad in law. Thus, compliance of the necessary ingredients is mandatory, in order to constitute an offence under section 138 NI Act.

22.In *Himanshu v. B. Shivamurthy* AIR 2019 SC 3052, the Supreme Court while quashing the complaint and order of the High Court held that in the absence of the company being arraigned as an accused, a complaint against the appellant who was a Director of the said company was not maintainable. In the said case, the appellant had signed the cheque as a director of the company and for and on its behalf. It was held that section 141 postulates that if a person committing an offence u/s 138 is a company, then 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 will be deemed guilty of the offence. In the absence of the company being arraigned as an accused, a complaint against the appellant who was a Director of the said company was not maintainable. It was 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 High Court was in error in holding that the company could now be arraigned as an Accused.

23.Recently, the Hon’ble Supreme Court in *Pawan Kumar Goel vs. State of UP &Anr.*, 2022 SCC Online SC 1598 while referring to *Himanshu v. B. Shivamurthy* (supra) *inter alia* held as under:

“26. Reference in this connection may also be made to another judgment of the two-Judge Bench of this Court in Himanshu v. B. Shivamurthy (Supra), the facts wherein have a stark similarity to the facts of the present case, considering the issue where the complaint was lodged only against the director without arraigning the company as an accused and whether the company could be subsequently arraigned as an accused, it was observed as under:—

“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, 4 (2018) 13 SCC 663 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.”

24. It is pivotal to highlight that as per section 141 NI Act, the principal accused is the company and vicarious liability will only extend to those responsible, once the principal accused i.e. the company is also proceeded against. Thus if an offence under section 138 NI Act has

been committed by a company, then the company ought to be sent the demand notice, in order to comply with the statutory steps contained in section 138 NI Act. Section 138 NI Act mandates that demand notice be sent to the drawer of the cheque. In the present case the cheque was drawn by the director Karan Tomar for and on behalf of the company HG Retail. Thus the company ought to have been served the demand notice, as in the absence of serving any demand notice to the company, the essential and mandatory step of serving a demand notice to the drawer of the cheque fails.

25. In the present case, admittedly no demand notice was ever sent to the company i.e. the principal accused. There cannot be a prosecution without prosecuting the principal accused. The demand notice was only sent to the directors of the company. The company was made a party in the complaint u/s 138 NI Act, however the ingredient of section 138 NI Act which postulates that a demand notice be sent to the drawer of the cheque, stands unfulfilled. The loan agreement was also between the petitioner company HG Retail and the respondent. The director was merely acting on behalf of the company. Thus if the default or non-payment is done at the behest of the company, the company ought to have been sent a demand notice. Even though the company was arrayed as an accused in the complaint under 138, however, without demand notice being served to the company the complaint itself fails and cannot be maintainable in terms of the provisions contained in section 138 NI Act. It is only when the company is prosecuted and proceeded against in compliance of section 138 NI Act, that vicarious liability in terms of section 141 NI

Act will extend to its directors or others responsible for the commission of the offence.

26. It is imperative that all the elements of Section 138 of the NI Act be duly satisfied prior to taking cognizance of such a complaint. In the absence of demand notice being served upon the company, which serves as the drawer of the cheque, the complaint itself fails to meet the requirements stipulated by Section 138 of the NI Act, as one of the essential elements remains unsatisfied.
27. Given the absence of a demand notice served upon the company HG Retail, which constitutes the drawer of the cheque as the principal accused, the mandatory steps outlined in Section 138 of the NI Act have not been duly adhered to. Consequently, the complaint under section 138 NI Act is not maintainable and is bad in law. Since the complaint itself is held to be bad in law in absence of service of demand notice on the company is liable to fail. Therefore, this Court has not gone into the two remaining questions of limitation and specific averment against Kusum Tanwar.
28. In view of the above, the entire proceedings including the summoning order dated 23.02.2015 the order of the Ld. ASJ-5, South East, Saket Courts, New Delhi dated 01.04.2021 dismissing the revision petitions of the petitioners are set aside. The present petitions are thus allowed.

DINESH KUMAR SHARMA, J

MAY 11, 2023