

(2017) 10 BOM CK 0150
In the Bombay High Court
Case No : 464 of 2016

A.C.Narayanan

APPELLANT

Vs

The State of Maharashtra & Anr.

RESPONDENT

Date of Decision : 13-10-2017

Acts Referred:

Constitution of India, Article 21, Article 20 - Amendment of the Schedule - Protection in respect of conviction for offences
Code of Criminal Procedure, 1973, <a href=386

Citation : (2017) 10 BOM CK 0150

Hon'ble Judges : Prakash D. Naik

Bench : SINGLE BENCH

Advocate : Mihir D. Gheewala, Ishan Jain, Santosh Pawar, Mahendra Swar, Tanvir A.H.Shaikh, S.A.Jabar, Y.M.Nakhwa

Judgement

1. The applicant in all these applications has been impleaded as an accused in the complaint filed by respondent no.2 for offence punishable under Section 138 of Negotiable Instruments Act, 1881 ("N.I.Act" for short). The applicant has invoked the inherent powers of this Court under Section 482 of Code of Criminal Procedure, 1973 ("Cr.P.C." for short) and challenged the proceedings in the said complaints filed by respondent no.2 and the order dated 7th October 2015 passed by learned Metropolitan Magistrate, 58th Court, at Bandra, Mumbai. The complaints which are subject matter of present applications, were numbered as CC No.502/SS/2002, CC No.503/SS/2002 and CC No.524/SS/2002. The facts in all the complaints are identical.

2. Brief facts, as alleged in one of the complaint, viz CC No.502/SS/2002, are as follows : (a) The accused is the Vice Chairman and Managing Director of the company known as M/s.Harvest Financials Limited registered under the Companies Act, 1956. The accused under the scheme of investments collected various amounts from various persons in the form of loans and in consideration of collecting such amounts, has given post dated cheques either in personal

capacity or in the capacity as signatory of M/s.Harvest Financials Limited;

(b) The complainant gave personal loan of Rs.1.80 lakh to the accused and in consideration, the accused gave post dated cheque dated 20th October 1997 drawn on Oman International Bank;

(c) The said cheque was deposited by the complainant with his bank which was returned with remark "account closed" vide memo dated 28th October 1997. In spite of request and reminders, the accused failed to repay the money of the complainant. The complainant issued notice to the accused demanding the said amount which was received by the accused. The accused through his advocate replied the said notice and tried to disown the liability. The complainant, therefore, filed a complaint before the Court of Metropolitan Magistrate, at Bandra, Mumbai, on 18th December 1997.

3. Learned Magistrate recorded verification statement of the complainant. In the said statement, it was stated that the accused is the Vice Chairman and Managing Director of M/s.Harvest Financials Limited. He is responsible for conduct of the business of M/s.Harvest Financials Limited. In the ordinary course of the business, the accused issued cheque, which was dishonoured. It was also stated that the accused was at the material time incharge of and responsible for the conduct of business of M/s.Harvest Financials Limited and, thus, committed an offence under Section 138 r/w Section 142 of N.I.Act. On recording verification statement, the learned Magistrate vide order 3rd April 1998 issued process against the applicant.

4. The applicant preferred applications in all the aforesaid complaints for recall of the process on 20th November 1999. In the said applications, it was contended that the cheque was issued for M/s.Harvest Financials Limited by its authorized signatory. Therefore, the drawer of the cheque is M/s.Harvest Financials Limited. The cheque was not signed by the applicant in his individual capacity. The drawer of the cheque being M/s.Harvest Financials Limited, the notice ought to have been issued to the company. In support of the said applications, reliance was placed on the judgment of this Court in the case of Shri A. Chinnaswami Vs. M/s.Bilakchand Gyanchand Company reported in 1997ALL MR (Cri)1309. However, during pendency of the said applications, the aforesaid decision of this Court was set aside by Hon''ble Supreme Court of India. In view of that, the said applications for recall of process were not pressed.

5. The Official Liquidator was appointed vide order 16th March 1999 of this Court in respect of the company M/s.Harvest Financials Limited. In the light of the decision of Hon''ble Supreme Court in Aneeta Hada Vs. Godfather Travels and Tours Private Limited and group of matters (2012) 5 SCC 661, the applicant preferred applications for quashing the proceedings under Section 482 of Cr.P.C on the ground that the company ought to have been impleaded as an accused in the complaint. The said applications were numbered as Criminal Application No.312 of 2015, Criminal Application No.313 of 2015 and Criminal Application

No.314 of 2015.

6. Respondent no.2 preferred applications before the Trial Court under Section 319 of Cr.P.C to implead the company as an accused. The said applications were opposed by the applicant by filing reply. This Court had granted interim stay of the proceedings before the Trial Court vide order dated 20th April 2015 in Criminal Application Nos.312 of 2015, 313 of 2015 and 314 of 2015. In view of the applications preferred by Respondent no.2 in these applications under Section 319 of Cr.P.C; the respondent no.2 had submitted before this Court during the hearing of said applications, that the respondent no.2 had preferred an application under Section 319 of Cr.P.C which was pending before the Trial Court and the same cannot be decided in view of interim stay granted by this Court. This Court by order dated 8th June 2015 relaxed the order of stay to the extent that learned Magistrate was directed to decide the applications preferred by respondent no.2 under Section 319 of Cr.P.C. Learned Magistrate vide order dated 7th October 2015 allowed the applications under Section 319 of Cr.P.C and permitted the complainant to implead the company viz. M/s.Harvest Financials Limited as accused no.1 and to carry out necessary amendment in the complaint. In view of the aforesaid circumstances, the applications preferred by the applicant before this Court, were withdrawn with liberty to prefer fresh applications challenging the complaint as well as order dated 7th October 2015 passed by the Trial Court under Section 319 of Cr.P.C. By order dated 5th April 2016, the applications were disposed off as withdrawn with leave and liberty as prayed for by the applicants.

7. The applicant, therefore, preferred present applications challenging the order dated 7th October 2015 as well as complaint proceedings on various grounds. The applications were admitted by this Court vide order dated 21st June 2016 with interim relief of stay of the proceedings before the Trial Court. The respondent no.2 challenged the aforesaid order before Hon"ble Supreme Court by preferring special leave petition. The Hon"ble Supreme Court vide order dated 16th December 2016 permitted the respondent no.2 to file application before High Court for modification of the interim order granted by order dated 21st June 2016 within three weeks. It was further directed that if such an application is filed within stipulated time, the High Court shall deal with the application or decide the matter within two months. The respondent no.2 thereafter filed Criminal Application Nos.1070/2016, 1071/2016 and 1072/2016. In view of the above, main applications under Section 482 of Cr.P.C being Criminal Application Nos.464/2016, 465/2016 and 466/2016 were heard finally.

8. Learned advocate for the applicant submitted that the order dated 7th October 2015 passed by learned Magistrate is contrary to law and deserves to be quashed and set aside. The Court has erroneously exercised the powers under Section 319 of Cr.P.C permitting the complainant to implead the company as accused no.1 in the complaint. At the time of filing of the complaint, there was no legal impediment whatsoever for making the company as an accused. It is

submitted that in the light of the decision of Hon''ble Supreme Court in case of Aneeta Hada (supra), the prosecution in the complaints under challenge, was not maintainable. It is submitted that it was imperative for the complainant to arraign M/s.Harvest Financials Limited being the drawer of the cheque as an accused in the complaint. Even demand notice was issued and served only in the name of applicant and it was never issued and served on the company. The applicant had ceased to be the director and managing director of the company with effect from 1st January 1997, since the company in the annual general meeting had not ratified the appointment made by the board earlier, since there was no annual general meeting called for within the stipulated period as per Companies Act, 1956. The application preferred by respondent no.2 is bad in law and the Trial Court has committed error in allowing the same. It is submitted that the issue which fall for determination before the Court was whether a company at such a belated stage can be impleaded as an accused without fulfilling relevant conditions of prosecution under Section 138 of N.I.Act by invoking Section 319 of Cr.P.C. Without fulfilling the mandatory requirements of law, to initiate prosecution under Section 138 of N.I.Act, the Trial Court ought not to have permitted the complainant to implead the company as an accused. It is submitted that the said application was made in view of the decision of Hon''ble Supreme Court in case of Aneeta Hada (supra) at a belated stage, which ought not to have been entertained by the Trial Court. It is submitted that the Trial Court has misdirected itself in appreciating the scope of Section 319 of Cr.P.C; more particularly in the facts of the present case. It is submitted that to initiate prosecution under Section 138 of the N.I.Act, there are conditions precedent to be fulfilled viz a notice to be served on the drawer of the cheque and thereafter in the event the drawer fails to make payment as called upon vide the notice, the complaint against the drawer can be instituted within the stipulated period. Failing to comply with aforesaid condition would not permit the complainant to file a complaint against the drawer. In the present case, the complainant even before preferring an application under Section 319 of the Cr.P.C in its affidavit of examination in chief has stated that the drawer of the cheque is company. The complainant was aware as to who was the drawer of the cheque and despite that chose not to file a complaint against the drawer of the cheque. The said company was the drawer of the cheque. Section 319 of Cr.P.C could be invoked when in the course of inquiry or trial, the evidence or material suggest that the person over and above the accused, who is already impleaded in the complaint, has committed an offence and thereby such person could be arraigned as an accused by invoking Section 319 of Cr.P.C. It is further submitted that although the trial had proceeded and the evidence was being recorded, in view of the decision in the case of Aneeta Hada (supra), the prosecution cannot proceed further in view of the fact that the company, who is the drawer of the cheque, was not impleaded as an accused. It is further submitted that cognizance of the offence under Section 138 of N.I.Act is always qua the drawer of cheque. The cognizance of such an offence can be taken within the time frame prescribed under the N.I.Act.

9. Learned counsel for applicant has placed reliance upon following decisions : (i) The judgment of Hon''ble Supreme Court of India in case of N.Harihara Krishnan Vs. J.Thomas²;

(ii) The judgment of Hon''ble Supreme Court of India in case of K.Satyanarayan Vs. Madhur and another³;

(iii) Aneeta Hada Vs. Godfather Travels & Tours Pvt.Ltd, (2012) 5 SCC 661.

(iv) A judgment of this Court in case of Bharat Mathur, ExVice President (Corp.) Services M/ s.Data Access India Ltd. Vs Bharat Sanchar Nigam Limited and another⁴.

10. The learned advocate for respondent no.2 submitted that trial had commenced and the application for quashing the proceedings preferred by the applicant, ought not to be entertained at this belated stage. The applicant has no locus to challenge the order dated 7th October 2015 passed by learned Magistrate under Section 319 of Cr.P.C. As per the said order, the company has been impleaded as accused no.1 and it is for the said company to challenge the said order. It is submitted that no prejudice is caused to the applicant by order passed by the Trial Court under Section 319 of Cr.P.C. The Trial Court has assigned cogent reasons for invoking the powers under Section 319 of Cr.P.C and hence, the said order does not call for interference. It is submitted that the contention of the applicant that he is ceased to be the director of the company, cannot be accepted on a bald statement and it can be at the most agitated during trial. It is submitted that the complaint was filed against the applicant being the Vice Chairman and Managing Director of the company. In the affidavit in evidence filed by the complainant it is stated that towards discharge of the legal debt and liability, the accused on behalf of the company handed over an account payee post dated cheque. The cheque bears the stamp of Harvest Financials Limited. The statement made in the affidavit in evidence is that the drawer of the cheque is M/s.Harvest Financials Limited and therefore the said company has committed the offence and is the principal accused under Section 141 of N.I.Act. It is submitted that the affidavit in evidence further states that the accused as a Vice Chairman and Managing Director of the company acknowledged the liability on behalf of the company by issuing receipt on behalf of the company and agreed to repay the said sum along with interest. The company has gone into liquidation by virtue of the order passed by this High Court in Company Petition and that the Official Liquidator has been appointed. As per Section 449 of Companies act, 1956, on windingup order being made in respect of company, the Official Liquidator shall, by virtue of his office, becomes liquidator of the company and as per Section 457 of the said Act, the liquidator in a winding up has power to institute or defend, suit, prosecution or legal proceedings; civil or criminal, on behalf of company. It is further submitted that the complaint has been amended in pursuant to the order dated 7th October 2015 and the company is made party in the complaint on 23rd October 2015. it is submitted that on harmonious construction of Sections 443, 449 and 457(19)

of the Companies Act, 1956, the conclusion will be that on appointment of Official Liquidator vide order dated 16th march 1990, only the Official Liquidator could challenge the impugned order being made accused and not the applicant as he has no locus standi. The applicant cannot preempt the defence of the Official Liquidator. Section 319(4)(a) of Cr.P.C contemplates denovo trial against newly added accused. Therefore, all defenses are open to the newly added accused being the Official Liquidator, which assuming the applicant being the coaccused, cannot preempt. It is submitted that the applicant is deliberately insisting on applicability of Aneeta Hada's case (supra) to avoid the Official Liquidator being impleaded in the complaint. The reason for not allowing the Official Liquidator to come on record is in defiance of order passed by this Court on 16th March 1999 in Company Petition No.183 of 1997 ordering winding up of the company. The applicant is being prosecuted in his capacity as officer incharge and responsible for the conduct of the business of the company being working Vice Chairman and Managing Director of the company and also being the signatory of the cheque. It is submitted that the Trial Court has exercised the powers within the purview of Section 319 of Cr.P.C. The applicant cannot take contrary stand. When the company was not a party the grievance was that the matter could not be proceeded on that ground, and now when the company is a party, the contention of the applicant is that the company cannot now be made a party. The ratio in Aneeta Hada's case (supra) is that the company should be made a party. Even assuming that the said decision is applicable in this case, the same is complied with. The decision in Aneeta Hada's case (supra) in any case is not applicable in the present case.

11. Learned counsel for respondent no.2 has relied upon following decisions : (i) Hardeep Singh Vs. State of Punjab and others and group of matters (2014)3-SCC-92;

(ii) Gyanendra Singh Vs. State of U.P. And others 2005-CRI.LJ.-2322;

(iii) Satish Chand Singhal Vs. The State of Gujarat & ors 2008(1)-DCR-440;

(iv) Pankajbhai Nagjibhai Patel Vs. State of Gujarat and another AIR-2001-SC-567.

12. I have perused the documents on record. The complaint was filed by respondent no.2 alleging offence under Section 138 of N.I.act impleading the applicant as the only accused in all the complaints which are under challenge in these applications. The applicant was impleaded as an accused being working Vice Chairman and Managing Director of M/s.Harvest Financials Limited. Prior to filing of the complaint, notice was issued to the applicant in pursuant to dishonour of cheque. The said notice was replied by the applicant wherein it was stated that the notice was bad in law as the same is not in conformity with the provisions of N.I.Act, since the same is not addressed to the drawer of the cheque. The verification statement was recorded in which it is stated that the applicant is the Vice Chairman and Managing Director of M/s.Harvest Financials

Limited and he is responsible for the conduct of business of said company. In the ordinary course of business he issued the cheque in discharge of its debt and liability and that at all material time he was incharge of and responsible for the conduct of business of M/s.Harvest Financials Limited and thus the accused have committed offence under Section 138 r/w Section 142 of N.I.Act and hence suitable process be issued against the accused. The Trial Court issued the process against the accused on being prima facie satisfied that a case for issue of process is made out.

13. In pursuant to the decision of Hon''ble Supreme Court in Aneeta Hada (supra), the applicant preferred applications under Section 482 of Cr.P.C challenging the impugned proceedings on the ground that same are not maintainable, as the drawer of cheque viz the company was not impleaded as an accused. It is pertinent to note that earlier decisions of Supreme Court relating to the said issue was overruled by Supreme Court. Hence, the applicant sought to challenge the prosecution against him at that stage.

14. The complainant realized that it would be imperative to add the company as an accused. The complainant had already tendered an affidavitinevidence. On the basis of the contents of the affidavitinevidence, it was pleaded that the company could be impleaded as accused no.1. The prayer to implead the company as an accused was sought by taking recourse to Section 319 of Cr.P.C. It is pertinent to note that at the time of filing of complaint, there was no impediment in impleading the company as an accused. In the application under Section 319, it is the case of the complainant that the company is the drawer of cheque and therefore, in view of the averments in the affidavitinevidence, the Trial Court may exercise powers under Section 319 of Cr.P.C. It was contended by the complainant that the fact that the company is the drawer of the cheque and that the transaction was on behalf of company, is brought on record by affidavitinevidence and, therefore, the application under Section 319 of Cr.P.C is required to be allowed. The Trial Court while allowing the application has observed that the complainant has examined and filed affidavit in lieu of examination in chief and that the record further discloses that the accused has examined himself who was duly cross examined. The cheque bears the rubber stamp of M/s.Harvest Financials Ltd. and receipt produced by the complainant shows that the same was issued for M/s.Harvest Financials Limited. Thus, prima facie, both the documents show that those are issued for M/s.Harvest Financials Ltd. It is pertinent to note that the cheque was in possession of the complainant, the receipt was also produced by the complainant and the complainant was very well aware that cheque was issued on behalf of M/s.Harvest Financials Limited. It is also necessary to note that in the verification statement also, it has been categorically stated that the applicant is being impleaded as an accused being incharge and responsible for the conduct of the business of M/s.Harvest Financials Limited. Thus, the complainant was fully aware that the liability was that of the company and the drawer of the cheque was company. Therefore, it is not a revelation in the proceedings during the trial that the company is involved

in the transaction and therefore is required to be added as an accused. It is apparent that to overcome the infirmity which relates to the maintainability of the complaint for not impleading the drawer of the cheque as an accused in the complaint, the complainant chose to prefer an application under Section 319 of Cr.P.C to implead the company as accused. The Trial Court has relied upon the decision of Kerala High Court in the case of *M/s.Plywood House vs. M/s.Wood Craft Products Ltd. and others* (1994Cri. L.J.543), wherein it was observed that so far as application filed under Section 319 of Cr.P.C for impleadment of the new accused in the complaint u/s 138 of N.I.Act is concerned, Section 319(4) empowers the Court to proceed against any other person who appears to have committed any offence for which such person could be tried together with the accused already arraigned in the case. The Trial Court relied upon subsection 4 of Section 319 of Cr.P.C which states that the case may proceed as if such person had been an accused when the Court took cognizance of the offence upon which the inquiry or trial was commenced. Hence, the stage at which the new accused is brought in the array of accused, has no legal impact on the legal proceedings. The Court took cognizance only of the offence and not the offender. Thus, when once cognizance of an offence is taken, subsequent impleadment of any other person as accused, would not affect the judicial process adopted in taking cognizance of the offence. The Trial Court, however, overlooked the requirement of invoking Section 319 of Cr.P.C. The Court failed to appreciate that in the present cases, involvement of company was not disclosed for the first time during the course of trial and that the documents produced by the complainant which were in possession of the complainant, disclosed that the company was the drawer of the cheque.

15. The Hon"ble Supreme Court in the case of *Aneeta Hada* (supra) has considered the issue relating to maintainability of prosecution against the directors of the company without impleading the company, who is the drawer of the cheque, as an accused. In the said case, the question that arose for determination of the Supreme Court was that whether the authorized signatory of the company would be liable for prosecution under Section 138 of N.I.Act, when the company being arraigned as an accused. As initially there was difference of opinion with regard to interpretation of Section 138 of N.I.Act, a reference was made to a larger bench of three Judges. While deciding the said reference and interpreting Sections 138 and 141 of N.I.Act, the Supreme Court observed as under : "53. It is to be borne in mind that Section 141 of the Act is concerned with the offences by the company. It makes the other persons vicariously liable for commission of an offence on the part of the company. As has been stated by us earlier, the vicarious liability gets attracted when the condition precedent laid down in Section 141 of the Act stands satisfied. There can be no dispute that as the liability is penal in nature, a strict construction of the provision would be necessitous and, in a way, the warrant.

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 with 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 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 which is a three Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil HHada is overruled with the qualifier as stated in para 51. The decision in Modi Distillery has to be treated to be restricted to its own facts as has been explained by us hereinabove."

16. Thus, the Supreme Court had laid down in the above said decision that for maintaining prosecution against a director under Section 141 of N.I.Act, arraigning the company as an accused, is imperative. In paragraphs 58 and 59 of the said decision, the Supreme Court has referred to the wording of Section 141 of N.I.Act and observed that commission of offence by company is an express condition precedent to attract vicarious liability of others. It was further observed that the words "as well as company" appearing in the section make it absolutely clear that when a company is prosecuted, then the persons mentioned in the other categories could be vicariously liable for the offence. Thus, the Supreme Court has arrived at a conclusion that for maintaining a prosecution under Section 141 of N.I.Act, arraigning of the company as an accused is imperative mostly on the basis of vicarious liability of the directors of the company and not necessarily because company is juristic person and it has its own respectability.

17. The most apt decision which is applicable in the present case is decided by the Apex Court recently in the case of N.Harihara Krishnan (supra). The facts in the said case were that the appellant was a director of a company known as M/s.Dakshin Granites Pvt.Ltd. A complaint was filed for an offence under Section 138 of N.I.Act. The appellant drew the subject cheque towards discharge of liability which was dishonoured. A notice was issued to the said appellantaccused and thereafter complaint was filed. Subsequently an application was filed under Section 319 of Cr.P.C and it was prayed that the company Dakshin Granites Pvt.Ltd. be impleaded as accused in the said complaint. It was the case of the complainant that during the course of examination of the appellant in the said trial, it came to the notice of the complainant that the cheque was drawn on account of Dakshin Granites and that the appellant is only a signatory in his

capacity as a director of the said company. It was also contended that the complainant failed to lodge the complaint against Dakshin Granites by inadvertence. The said application was allowed by the Trial Court, which order was challenged before the High Court wherein the said order was confirmed. The Supreme Court observed that from the copy of cheque, it appears that it was drawn on account of Dakshin Granites by person who claimed to be the director of the said company. It was argued at the instance of accused before the Supreme Court that since the cheque in question was drawn on account of Dakshin Granites, the person primarily liable for punishment under Section 138 of N.I.Act would be Dakshin Granites and the appellantaccused would only vicariously liable. In view of the law laid down in Aneeta Hada (supra), the prosecution against the appellantaccused could not be successfully maintained without prosecuting Dakshin Granites. The complainant resorted to devise of filing application under Section 319 of Cr.P.C to implead the company as an accused since originally the complaint was lodged only against appellantaccused. The Supreme Court referred to Section 142(1)(a) of the Act and it was observed that application under Section 319 of Cr.P.C is filed three years after expiry of limitation and therefore it is barred by stipulation contained in Section 141(1)(b) of the Act. It was also argued on behalf of the appellantaccused that Section 138 stipulates that payee of the cheque must give a notice in writing to the drawer of the cheque within stipulated time. On behalf of the complainant it was submitted that proviso to clause (b) of Section 142 of the Act enables the Court to take cognizance of the offence even beyond the prescribed period of limitation, if the complainant satisfies the Court that he had sufficient cause for not making the complaint within the period of limitation. The Supreme Court, however, observed that the order of Trial Court was absolutely silent with regard to the contention of the delay. The offence under Section 138 of N.I.Act is capable of being committed by the drawer of the cheque. Section 141 stipulates liability for the offence punishable u/s 138 of N.I.Act when the person committing such an offence happens to be a company. In other words, the drawer of the cheque happens to be a company, it would be necessary to advert to Section 141 of N.I.Act. The Supreme Court then referred to the decision in Aneeta Hada (supra) and observed that the High Court failed to appreciate that the liability of the appellant is only statutory because of his legal status as a director of Dakshin Granites.

18. It would be pertinent to quote paragraphs 21 to 25 of the said decision, which are vital and important to determine the issues involved in the present case. Paragraphs 21 to 25 reads as follows : "21. This Court in Aneeta Hada, had an occasion to examine the question "whether an authorised signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 (for brevity "the Act") without the company being arraigned as an accused" and held as follows:

"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 dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. ..."

Yet the High Court reached a conclusion that the revision filed by the petitioner is not maintainable because DAKSHIN did not choose to challenge the trial court's order.

The High Court failed to appreciate that the liability of the appellant (if any in the context of the facts of the present case) is only statutory because of his legal status as the DIRECTOR of DAKSHIN. Every person signing a cheque on behalf of a company on whose account a cheque is drawn does not become the drawer of the cheque. Such a signatory is only a person duly authorised to sign the cheque on behalf of the company/drawer of the cheque. If DAKSHIN/drawer of the cheque is sought to be summoned for being tried for an offence under Section 138 of THE ACT beyond the period of limitation prescribed under THE ACT, the appellant cannot be told in view of the law declared by this Court in Aneeta Hada that he can make no grievance of that fact on the ground that DAKSHIN did not make any grievance of such summoning. It is always open to DAKSHIN to raise the defense that the initiation of prosecution against it is barred by limitation. DAKSHIN need not necessarily challenge the summoning order. It can raise such a defense in the course of trial.

Coming to the view of the High Court that only the offence is taken cognizance of and there is no need to take cognizance of an offence accusedwise is an erroneous view in the context of a prosecution under THE ACT. Most probably the High Court recorded such conclusion (though not expressly stated) on the basis of the judgment of this Court in Raghubans Dubey v. State of Bihar, AIR 1967 SC 1167, where it was stated:

"Para 9. ... In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. ..."

Such a statement of law was made by this Court in the background of the scheme of the CrPC.

22. The CrPC is an enactment which is designed to regulate the procedures governing the investigation of crimes in order to get the perpetrators of the crime punished. A crime is an act or omission prohibited by law attracting certain legal consequences like imprisonment, fine etc. Obviously, acts or omissions constituting offences/crimes are capable of being committed only by persons either natural or juridical.

The CrPC imposes a duty on the investigating agencies to gather evidence necessary to establish the occurrence of a crime and to trace out the

perpetrators of the crime in order to get them punished. Punishment can be inflicted only by a competent Court but not by the investigating agency. Courts are authorised to inflict punishment if only they are satisfied that the evidence gathered by the investigating agency is sufficient to establish that (1) a crime had been committed; and (2) the persons charged with the offence (accused) and brought before the Court by the investigating agency for trial are the perpetrators of the crime.

Under the Scheme of the CrPC, any investigating agency (normally the police) is bound to investigate by following the procedure prescribed therein once it receives either information regarding the commission of a cognizable offence or an order from a Magistrate to investigate into the allegation of the occurrence of a noncognizable offence and submit a report under Section 173. Section 173(2)(i) (d) inter alia stipulates that the report should contain a statement:

"Whether any offence appears to have been committed and if so by whom?"

The conclusions reached by the police after investigation into the above two questions are required to be scrutinized by a competent Court. It is only after the Court is satisfied that the evidence collected by the investigating agency is sufficient in law to punish the accused, such accused can be punished. Taking cognizance of an offence by the Court is one of the initial steps in the process. Thereafter, the investigating agency is required to collect evidence (investigate) and place the same before the Court under Section 173 CrPC.

23. 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 inspite 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.

24. 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 nonobstante 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.

25. The question whether the respondent had sufficient cause for not filing the complaint against DAKSHIN within the period prescribed under THE ACT is not examined by either of the courts below. As rightly pointed out, the application, which is the subject matter of the instant appeal purportedly filed invoking Section 319 CrPC, is only a device by which the respondent seeks to initiate prosecution against DAKSHIN beyond the period of limitation stipulated under the Act."

19. It is also pertinent to note that in the aforesaid decision the Supreme Court also refused to condone the delay. It was observed that justification advanced by the complainant that it is during the course of trial, the respondent realized that the cheque in question was drawn on account of Dakshin Granites, is manifestly false statement. On the face of the cheque it is clear that it was drawn on account of Dakshin Granites. It was also observed that the impugned judgment was contrary to the language of the Act as expounded by Supreme Court Aneeta Hada (supra) and, therefore, cannot be sustained. Applying the ratio laid down in the aforesaid decision which is categorically applicable in the present cases, it is

clear that it was imperative upon the complainant to implead the company as an accused and exercise of the powers under Section 319 of Cr.P.C to implead the company at the belated stage, was erroneous.

20. In the case of K.Satyanarayan Vs. Madhur and another (supra), relied upon by learned counsel for applicant, it was observed that Courts in the ordinary circumstances may exercise their jurisdiction in terms of Section 319 of Cr.P.C to summon any person as an additional accused. However, the proviso appended to Section 138 of N.I.Act mandates that before a complaint petition thereunder becomes mandatory, the conditions precedent specified therein must be satisfied. No notice was served on the appellant by the complainant in terms of proviso (b) appended to Section 138 of N.I.Act and in that view of the matter, the complaint petition being not maintainable against him.

21. In the decision of this Court in Bharat Mathur, ExVice President (Corp.) Sevices M/ s.Data Access India Ltd. (Criminal Writ Petition No.4419 of 2014) (supra), this Court had considered whether a director or an employee of the company can be prosecuted for the offence punishable under Section 138 of N.I.Act with the help of Section 141 of the Act, when the offence is allegedly committed by the company, without impleading the company as an accused. Reliance was placed on the decision of Supreme Court in the case of Aneeta Hada (supra). Learned counsel for complainant had contended that the decision in the case of Aneeta Hada (supra) cannot have a retrospective effect. The Court has observed that the case pending against the petitioner therein filed by the complainant, did not reach finality and, therefore, the question of applicability of the said decision cited by the counsel for complainant in support of his arguments does not arise. The case before the Trial Court is governed by the principles laid down by Supreme Court in the case of Aneeta Hada (supra).

22. The scope of powers embodied under Section 319 of Cr.P.C was elaborately considered by Supreme Court in case of Hardip Singh Vs. State of Punjab and others (supra). Strong reliance was placed on the said decision by learned counsel for respondent no.2. The Supreme Court in the said decision had considered the question as to what is the stage at which power under Section 319 of Cr.P.C can be exercised, whether the word "evidence" used in Section 319(1) of Cr.P.C could only mean evidence adduced by cross-examination or the Court can exercise the power under the said provision even on the basis of statement made in the examination-in-chief of the concerned witnesses, whether the word "evidence" used in Section 319 has been used in comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial, what is the nature of satisfaction required to invoke the power under Section 319 of Cr.P.C to arraign an accused ? Whether the power can be exercised only if the Court is satisfied that the accused will in all likelihood be convicted, or whether the power under the said provision extends to persons not named in the FIR or named in the FIR but not charged or who have been discharged. The Supreme Court held that the

constitutional mandate under Articles 20 and 21 of the Constitution of India provides a protective umbrella for the smooth administration of justice making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence. But the same also gave equal protection to victims and society at large to ensure that the guilty does not get away from the clutches of law. Where the investigation agency does not arraign a real culprit as an accused, the Court is not powerless in calling the accused to face trial. The word "inquiry" in Section 319 is not inquiry in relation to investigation of the case by the investigating agency, but is an inquiry after the case is brought to the notice of the Court on filing of the charge sheet. The stage of inquiry by the Court does not contemplate any evidence in the strict legal sense, nor the legislature have contemplated this inasmuch as stage for evidence has not yet arrived. The circumstances that lead to the inference being drawn by the Court for summoning a person under Section 319 arise out of the availability of the facts and material that come up before the Court. The material should disclose the complicity of the person in the commission of offence which has to be the material that appears from the evidence during course of any inquiry into or trial of offence. The word "evidence" therefore, needs to be understood in its wider sense, both at the stage of trial and even at the stage of inquiry as used in Section 319 of Cr.P.C. The Court need not wait till the evidence is tested upon cross-examination for exercise of power under Section 319 of Cr.P.C. Once examination in chief is conducted, the statement becomes part of the record. It is evidence as per law and in the true sense, for at best, it may be rebuttable. All that is required for the exercise of the power under Section 319 of Cr.P.C is that it must appear to the Court that some other person who is not facing the trial, may also have been involved in the offence. The prerequisite for the exercise of this power is similar to the prima facie view which the Magistrate must come to in order to take cognizance of the offence. Therefore, no straitjacket formula can and should be laid with respect to conditions precedent for arriving at such an opinion, and if the Magistrate/Court is convinced even on the basis of evidence appearing in examination in chief to do so, it can exercise the power under Section 319 of Cr.P.C and can proceed against such other person. Section 319 uses the words "such person could be tried" instead of should be tried. What is required is not to have a mini trial at the Section 319 stage by having examination and cross-examination and thereafter rendering a decision on the overt act of such person sought to be added. U/s 319 of Cr.P.C, though test of prima facie case is same, the degree of satisfaction that is required is much stricter. The power under Section 319 of Cr.P.C is discretionary and is extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant.

23. In the present case, the complainant did not arraign the company as an accused when there was no legal impediment in impleading the company as accused. The drawer of the cheque was company which was evident from the

cheque. The complainant had knowledge that the accused was impleaded by filing complaint, he was incharge and responsible for conduct of the business of the said company. Therefore, the complainant ought to have impleaded the company as an accused. Therefore, the present case cannot be equated with the case where during trial it is disclosed that some other accused is required to be impleaded as an accused, or that the evidence on record which may be in the form of examination in chief disclosed the involvement of the accused, who is not arraigned as accused in the complaint. Apart from that, as laid down by the Supreme Court in the case of N.Harihara Krishnan, the drawer cannot be impleaded as an accused without satisfying the requirements of Section 142 of N.I.Act. It is apparent that the complainant resorted to Section 319 only on account of the decision in Aneeta Hada (supra). The complainant had tried to contend that in the examination in chief, the involvement of accused no.1 company has been disclosed. However, as stated hereinabove, it was clear that the company was the drawer of cheque which was to the knowledge of complainant. In N.Harihara Krishnan's case (supra), the Supreme Court has observed that the scheme of the prosecution for punishment under Section 138 of N.I.Act is different from the scheme of Cr.P.C. Section 138 creates an offence and prescribes punishment. No procedure for investigation of the offence is contemplated. The prosecution is initiated on the basis of written complaint made by the payee of a cheque. It is obvious that from the scheme of Section 138 that each of the ingredients flows from the document which evidences the existence of such an ingredient. The failure to comply the steps under Section 138 would not provide cause of action for prosecution. Hence, the concept of taking cognizance of the offence and not the offender is not appropriate.

24. In the case of Gyanendra Singh (supra) decided by Allahabad High Court, it was held that the person earlier named in the FIR as an accused but not charge sheeted, could be arraigned as an accused by invoking provisions of Section 319 of Cr.P.C. The said decision is not applicable in the facts of present case. In another decision relied upon by learned counsel for respondent no.2 is in case of Satish Chand Singhal (supra) of Gujarat High Court. The issue was relating to invoking Section 319 of Cr.P.C. It was observed that before exercising the powers of Section 319, it is not necessary that the evidence must have been adduced in the case and the documents which may be produced after the application is filed u/s 319, also constitute evidence within the meaning of said section. It was observed in the said decision that on presentation of the complaint, the learned Magistrate recorded evidence of the complainant and issued summons to the accused. The complainant presented an application u/s 319 of Cr.P.C stating that at the time of issuance of cheque, the petitioner accused was also a director of the company and was responsible for the conduct of business of company. It was, therefore, prayed that he should also be proceeded against for commission of offence. The Trial Court, therefore, issued the notice to the said petitioner to show cause why he should not be joined as a coaccused. In spite of service, he did not remain present and the Trial Court allowed the application and the

petitioner there was impleaded as one of the accused. Thereafter the petitioner challenged the said order before the same Court and prayed for recalling of the said order. He raised several defenses with which we are not concerned that the said transaction and that the cheque was not signed by him as a director of company. The Court has observed that the Trial Court has not committed an error while passing the impugned order. It was observed that there was sufficient material to implead him as an accused in exercise of powers u/s 319 of Cr.P.C. It was not necessary that evidence must have been adduced in the case and documents produced with the application constitute evidence within the meaning of the said section. The Court, however, did not consider the issue about limitation in impleading the accused in the complaint and about the compliance of the safeguards enshrined u/s 142 of N.I.Act. Apart from that, in view of the decision of Hon''ble Supreme Court in the case of N.Harihara Krishnan Vs. J.Thomas (supra), no reliance can be placed on the said decision to deal with the issue in the present case which is also distinct in nature than that was considered by Gujarat High Court.

25. In the case of Pankajbhai Nagjibhai Patel (supra) relied upon by learned counsel for respondent no.2, the Hon''ble Supreme Court has observed tat nonobstante expression embodied u/s 142 of N.I.Act is intended to operate only in respect of three aspects and nothing more. The first is, under the Code of Criminal Procedure, a Magistrate can take cognizance of an offence either upon receiving a complaint or upon police report or upon receiving information from any person or upon his own knowledge, except in the cases differently indicated in ChapterXIV of the Code. Section 142 of the N.I.Act states that insofar as offence u/s 138 of N.I.Act is concerned, no Court shall take cognizance except upon a complaint made by the payee or the holder in due course of cheque. The said decision does not pertain to the issues involved in the present complaint.

26. In view of the decision of Hon''ble Supreme Court in Aneeta Hada (supra), the proceedings will not be maintainable. The question of applicant having no locus to challenge the order impleading the company as an accused, does not arise. It is an admitted position that the drawer of the cheque is the company. At the time of filing of the complaint, there was no embargo in impleading the company as an accused. The fact that transaction was on behalf of the company and that the cheque was issued by the company being drawer is fortified by the complainant in the application under Section 319 of Cr.P.C and the affidavitinevidence. It was, therefore, imperative to implead the company as a party in the light of observations made by Hon''ble Supreme Court in Aneeta Hada's judgment (supra). Hence, although trial had proceeded, the evidence was recorded, in view of the aforesaid decision which was delivered after filing of the complaint, there is no point in continuing the proceedings which are not maintainable in law. It is also pertinent to note that the complainant has pleaded that in view of Section 319(4) of Cr.P.C, where a Court proceeds against any person under subsection (1), then, the proceedings in respect of such person shall be commenced afresh and the witnesses reheard. It was, therefore,

contended that the complaint would have retrospective effect as the proceedings will start *donovo*. The said submission is devoid of merits. Subsection 4 of Section 319 would be attracted only if there is compliance with subsection 1 of Section 319 of Cr.P.C. Apart from that, there is legal impediment in impleading the company as an accused at the belated stage in view of the safeguards of Section 142 of N.I.Act.

27. To initiate proceedings u/s 138 of N.I.Act, there are conditions precedent to be fulfilled viz, notice be served on the drawer of the cheque and thereafter in the event the drawer of the cheque fails to make payment as called upon vide the notice, a complaint against the drawer can thereafter be instituted within the stipulated time. In the present case, prior to preferring application u/s 319 of Cr.P.C; the complainant in his affidavit in chief has stated that the drawer of the cheque is the company. Thus, it is no where in dispute as to who is the drawer of cheque and thus it is an admitted position that the drawer of the cheque was company. The complainant despite being conscious of the fact had chosen to arraign the applicant only as an accused and not the company. The purpose of Section 319 of Cr.P.C is to arraign other person as an accused, when in the course of inquiry or trial the fact surfaces that other person has committed the offence. Section 319 could be invoked when in the course of inquiry or trial, the evidence or material suggest that person over and above the said accused who are impleaded in the proceedings, has committed the offence, then, such person could be arraigned as an accused. The complainant was aware as to who was the drawer of the cheque and despite chose not to file a complaint impleading the company. In criminal proceedings, many a times, the prosecution agency files a challan/charge sheet against one or more accused and it is only when evidence is led, that the Court realizes the culpability of an individual other than the one arraigned as an accused. It will in these circumstances and based on the evidence, that has come on record, that the Trial Court can invoke this remedy u/s 319 of Cr.P.C. The circumstances in the present case are distinct. From the face of cheque, statement in the complaint, evidence of the complainant, it was manifestly clear that the drawer of the cheque was company. The respondent no.2 filed the application u/s 319 only when she knew that as per Aneeta Hada's decision (*supra*), the complaint would become void and untenable in law. The Trial Court failed to appreciate that powers could have been exercised where it is difficult to ascertain as to who exactly committed the offence. In a technical offence like Section 138 of N.I.act, the offender is known to the complainant but is not arraigned as an accused, then in such eventuality, the company cannot be arraigned as an accused at a later stage to circumvent the decision of Supreme Court. It is pertinent to note that offence u/s 138 of N.I.Act is qua the drawer of the cheque. The cognizance can be taken within the time limit prescribed under the Act. The order passed by the Trial Court is against the settled principles of law. The cases relied upon by learned advocate for respondent no.2 were delivered in distinct facts and are not applicable in the present case. Apart from that, the same are contrary to the recent decision of Hon"ble Supreme Court in

case of N.Harihara Krishnan Vs. J.Thomas (supra). In the said decision it has been observed that failing to comply with the steps contemplated u/s 138 of N.I.Act, would not provide cause of action for prosecution and, therefore, in the context of prosecution u/s 138, the concept of taking cognizance of the offence but not an offender, is not appropriate. Unless a complaint of necessary factual allegations constituting each of the ingredients of the offence u/s 138 of N.I. Act is made out, the Court cannot take cognizance of the offence.

28. In view of the factual aspects involved in the present case and the circumstances referred to hereinabove and in the light of the decisions of Hon"ble Supreme Court discussed hereinabove, I find that there is no substance in the contentions of respondent no.2 respectively in these applications and the same are devoid of merit. The prosecution in all these applications which are subject matter of challenge under these applications as well as the orders passed by the learned Magistrate u/s 319 of Cr.P.C deserves to be quashed and set aside.

29. Hence, I pass following order : (i) Criminal Application No.464/2016, Criminal Application No.465/2016 and Criminal Application No.466/2016 are allowed in terms of prayer clause (a) respectively, thereby the impugned criminal proceedings pending before the Metropolitan Magistrate, 58th Court, at Bandra, Mumbai being CC No.502/SS/2002, CC No.503/SS/2002 and CC No.524/SS/2002 and the impugned order dated 7th October 2015 passed by learned Metropolitan Magistrate, 58th Court, at Bandra, Mumbai in CC No.502/SS/2002, CC No.503/SS/2002 and CC No.524/SS/2002 are quashed and set aside;

(ii) Criminal Application No.1071/2016, Criminal Application No.1072/2016 and Criminal Application No.1073/2016 stand disposed of.