(2024) 12 SHI CK 0045

In the High Court Of Himachal Pradesh

Case No : Cr.MMO No. 1015 f 2024

Devender Sharma & Others APPELLANT

Vs

Mahender Paul RESPONDENT

Date of Decision : 23-12-2024

Acts Referred:
Bharatiya Nagarik Suraksha Sanhita, 2023 — Section 528
Indian Penal Code, 1860 — Section 420
Negotiable Instruments Act, 1881 — Section 138, 141, 142

Citation : (2024) 12 SHI CK 0045

Hon'ble Judges : Virender Singh, J

Bench : Single Bench

Advocate : Hemant Kumar Thakur, Romesh Verma, Sumit Sharma

Final Decision : Disposed Of

Judgement

Virender Singh, J

1. Petitioners have filed the present petition, under Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as 'BNSS'), read with Section 142 of the Negotiable Instruments Act (hereinafter referred to as the 'NI Act'), with a prayer to quash the proceedings pending against them, before the Court of learned Judicial Magistrate First Class, Anni, District Kullu (hereinafter referred to as 'the trial Court'), in case No.61-3 of 2019, titled as Mahender Paul versus Managing Director and others, filed under Section 138 of the NI Act.

2. For the sake of convenience, the parties to the lis are hereinafter referred to in the same manner, in which, they were referred to, by the learned trial Court.

3. The factual position, in brief, which had given the occasion to the petitioners to file the present petition, before this Court, may be summed up as under:-

3.1. Complainant-Mahender Paul has filed a complaint under Section 138 of the Negotiable Instruments Act, before the learned trial Court, against the accused. Accused No.1 to 5 are being referred as Managing Directors/Directors, whereas, accused No.6 has been referred to as the cashier of the Company, namely Himudayath Producer Company Limited, having its registered office at Negi Building, Upper Khalini, Shimla-2.

3.2. The said complaint has been filed on the ground that the accused persons are Managing Directors/ Directors/Cashier of registered Company working in the name and style of Himdyuath Producer Company Ltd., and they were running their business collectively in Nirmand Tehsil.

3.3. According to the complainant, the accused persons, were carrying out the business of collecting milk, as well as, daily RD by collecting Rs.200/- per day. When, the said amount was required to be returned to the complainant, at that time, the accused persons were not having cash, in hand, as such, they had issued cheque No.341490, dated 30.09.2018, for a sum of Rs.1,49,170/-, drawn at H.P. Gramin Bank Branch Shimla-8941, where the accused persons were having their Bank Account bearing No.89412100000925, and assured the complainant that they will get the said amount, when, the said cheque would be presented. However, when the said cheque was presented with the Gramin Bank Branch Arsu, the same could not be encashed and was returned to the complainant, with memo dated 07.12.2018. The reason for non-encashment had been mentioned 'insufficient funds'.

3.4. Thereafter, the requisite legal notice was issued to the accused persons, which was duly replied by them, in which, they have sought three months' time for making the payment. But, despite the said period, payment was not made. The cheque, in question, was issued by the accused persons, despite having the knowledge that they were not having the sufficient funds to honour the said cheque.

4. On the basis of the above facts, a prayer has been made to take action against the accused persons, for commission of the offence punishable under Section 138 of the NI Act, as well as, Section 420 of the IPC.

5. Thereafter, the learned trial Court has recorded the preliminary evidence and issued process, under Section 138 of the NI Act.

6. Against the said process, as well as, against the filing of complaint against them, out of six accused, three are before this Court. They have sought the relief of quashing, mainly, on the ground that the complaint, before the learned trial Court, is not maintainable, as, the cheque, in question, was issued on behalf of M/s Himudayath Producer Company Limited and not by the accused, in their individual capacity.

7. According to the petitioners-accused, account No.89412100000925, was opened in the name of Himudayath Producer Company Ltd., and not in the name of an individual.

8. As per the case of the petitioners-accused, the learned trial Court has wrongly issued the process, under Section 138 of the NI Act, ignoring the fact that the

Company has not been impleaded, as accused, in this case. As such, according to them, the proceedings cannot be initiated and allowed to be continued against them.

9. It is the further case of the accused persons that they are not liable for the dishonouring of the cheque, as, they were not responsible for dishonouring the same.

10. On the basis of the above facts, Shri Hemant Kumar Thakur, Advocate, has prayed that the present petition may kindly be allowed, by quashing the summoning order, as well as, the complaint.

11. Per contra, Shri Romesh Verma, learned Senior Advocate assisted by Mr. Sumit Sharma, Advocate has argued that there is no substance in the present petition as the cheque, in question, has been issued, by the Company and the petitioners being Managing Directors/Directors/ Cashier are liable for the act of the Company.

12. Perusal of the record shows that the complaint, under Section 138 of the NI Act, read with Section 420 IPC, was initiated, on account of the fact that the cheque No.341490, which was issued in this case, had not been encashed, when, the same was presented for encashment. The cheque, against account No.89412100000925, was issued by the Directors of Himudayath Producer Company Ltd.

13. Admittedly, the said Company has neither been impleaded, as, accused in the complaint, under Section

138 of the NI Act, nor in the legal notice issued against the Company, before filing the complaint.

14. The complaint, as well as, legal notice was issued against the Managing Directors, Directors and Cashier, by giving the following description of the accused:-

1. Managing Director Shri Devender Sharma;

2. Managing Director Shri Devender Kumar;

3. Director Shri Aman Kumar;

4. Director Smt. Veena Sharma;

5. Director Smt. Reena Sharma; and

6. Yog Raj Kharadi S/o Shri Ganga Ram (Cashier).

15. Non-impleading of the Company, in the present case, as accused, is fatal to the case of the complainant. While holding so, the view of this Court is being guided by the decision of the Hon’ble Supreme Court in Aneeta Hada versus M/s. Godfather Travels and Tours Pvt. Ltd., (2012) 5 SCC 661., Relevant paragraphs 1,

53, 58 and 59 of the judgment, are reproduced, as under:-

[1] In Criminal Appeal Nos. 838 of 2008 and 842 of 2008, the common proposition of law that has emerged for consideration is 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. Be it noted, these two appeals were initially heard by a two-Judge Bench and there was difference of opinion between the two learned Judges in the interpretation of Sections 138 and 141 of the Act and, therefore, the matter has been placed before us.

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[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.

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[58] Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.

[59] In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh [(1970) 3 SCC 491] which is a three- Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal [(1984) 4 SCC 352], does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada [(2000) 1 SCC 1] is overruled with the qualifier as stated in paragraph 37. The decision in Modi Distilleries [AIR 1988 Supreme Court 1128] has to be treated to be restricted to its own facts as has been explained by us hereinabove.

16. Similar view has again been taken by the two judge Bench of Hon’ble Supreme Court in Himanshu v. B. Shivamurthy & Another, (2019) 3 SCC 797.

Relevant paragraphs 11 to 14 of the judgment, are reproduced, 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, 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.

[14] We, accordingly, are of the view that the High Court was in error in rejecting the petition under section 482 of the CrPC, 1973.”

17. Although, the cheque has been issued by a body corporate, but, the same can be prosecuted, under Section 138 of the NI Act. While holding so, the view of this Court, is being guided, by the decision of Hon’ble Supreme Court, in Anil Hada versus Indian Acrylic Ltd, (2000) 1 Supreme Court Cases 1. Relevant paragraphs 12 and 13 of the judgment, are reproduced, as under:-

“12. Thus when the drawer of the cheque who falls within the ambit of Section 138 of the Act is a human being or a body corporate or even firm, prosecution proceedings can be initiated against such drawer. In this context the phrase "as well as" used in sub-section (1) of Section 141 of the Act has some importance. The said phrase would embroil the persons mentioned in the first category within the tentacles of the offence on a par with the offending company. Similarly the words "shall also" in sub- section (2) are capable of bringing the third category persons additionally within the dragnet of the offence on an equal par. The effect of reading Section 141 is that when the company is the drawer of the cheque such company is the principal offender under Section 138 of the Act and the remaining persons are made offenders by virtue of the legal fiction created by the legislature as per the section. Hence the actual offence should have been committed by the company, and men alone the other two categories of persons can also become liable for the offence.

13. If the offence was committed by a company it can be punished only if the company is prosecuted. But instead of prosecuting the company if a payee opts

to prosecute only the persons falling within the second or third category the payee can succeed in the case only if he succeeds in showing that the offence was actually committed by the company. In such a prosecution the accused can show that the company has not committed the offence, though such company is not made an accused, and hence the prosecuted accused is not liable to be punished The provisions do not contain a condition that prosecution of the company is sine qua non for prosecution of the other persons who fall with in the second and the third categories mentioned above. No doubt a finding that the offence was committed by the company is sine qua non for convicting those other persons. But if a company is not prosecuted due to any legal snag or otherwise, the other prosecuted persons cannot, on that score alone, escape from the penal liability created through the legal fiction envisaged in Section 141 of the Act."

18. Similar view has again been taken by the Hon'ble Supreme Court in Anil Gupta versus Star India Pvt. Ltd., 2014(10) Supreme Court Cases 373. Relevant paragraph 12 of the judgment, is reproduced, as under:-

12. Again the same question was considered by three Judge Bench of this Court in Aneeta Hada v. Godfather Travels and Tours Pvt. Ltd. (2012) 5 SCC 661. The Court noticed the decisions in Anil Hada (supra) case and Aneeta Hada (supra) case. The three Judge Bench while partly overruled the finding of Anil Hada (supra) affirmed the decision of Aneeta Hada (supra).

This Court held:

"51. We have already opined that the decision in Sheoratan Agarwal runs counter to the ratio laid down in C.V. Parekh which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the decision in Anil Hada has to be treated as not laying down the correct law as far as it states that the Director or any other officer can be prosecuted without impleadment of the company. Needless to emphasise, the matter would stand on a different footing where there is some legal impediment and the doctrine of lex non cogit ad impossibilia gets attracted."

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"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."

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"58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh 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 Hada 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."

19. In Criminal Appeal No.5556 of 2024, titled as Bijoy Kumar Moni versus Paresh Manna & Another, {2024 INSC 1024} Hon'ble Supreme Court has again taken the similar view. Relevant paragraphs 45 to 47 and 57 of the judgment, are reproduced, as under:-

45. It is of vital importance to understand the import of the expression "on an account maintained by him with a banker" used in Section 138 of the NI Act. The expression, in our considered opinion, describes the relationship between the account holder and the banker. This relationship is fundamental to the application of Section 138. The act of maintaining an account is exclusively tied to the account holder and does not extend to any third party whom the account holder may authorize to manage the account on its behalf. Therefore, any delegation of authority to manage the account does not alter the intrinsic relationship existing between the account holder and the banker as envisaged under the NI Act. Corporate persons like companies, which are mere legal entities and have no soul, mind or limb to work physically, discharge their functions through some human agency recognised under the law to work. Therefore, if some function is discharged by such human agency for and on behalf of the company it would be an act of the company and not attributable to such human agent. One such instance of discharge of functions could be the authority to manage the bank accounts of the company, issue and sign cheques on its behalf, etc. which may be delegated to an authorised signatory. However, such authorisation would not render the authorised signatory as the maker of those cheques. It is the company alone which would continue to be the maker of these cheques, and thus also the drawer within the meaning of Section 7 of the NI Act.

46. The authorised signatory is merely the physical limb that signs and makes

the cheque on behalf of the company's incorporeal personality. The company, for all purposes, continues to remain the drawer of the cheques. If the interpretation as being canvassed by the complainant is accepted then even an employee of the Company, who on account of his being an authorized signatory signs a cheque issued by the Company towards discharge of the debt or other liability of the Company, would be liable to prosecution and conviction under Section 138 of NI Act even after he resigns from the company and is no more in its employment. This certainly could not have been the intention of the legislature. Even the vicarious liability created under Section 138 of NI Act would not be attracted in respect of a Director or an employee of the Company who resigns and severs his connections with the company, unless the complainant is able to bring his case within the purview of sub-Section 2 of Section 141, by proving that the offence had been committed with his consent or connivance or was otherwise attributable to any neglect on his part.

47. We would hasten to add that the above interpretation should not in any manner be misconstrued to affix liability upon the joint account holder of an account unless the cheque is shown to have been made/drawn jointly by such joint account holder. A company vis-à-vis its authorised signatory stands on a completely different footing as compared to account holders of a joint account. In the former, it is only the company which holds an account with the banker, whereas in the latter, each joint account holder can be said to hold an account with the banker. Thus, while in the case of a cheque drawn on the account of the company the authorised signatory cannot be held to be the drawer, in the case of a cheque drawn upon a joint account, each account holder affixing his signature to the cheque may be said to have drawn such a cheque. The position of law on this issue has been settled by this Court in the case of Aparna A. Shah v. Sheth Developers (P) Ltd. reported in (2013) 8 SCC 71, wherein it was observed thus:

"28. We also hold that under Section 138 of the NI Act, in case of issuance of cheque from joint accounts, a joint account¬holder cannot be prosecuted unless the cheque has been signed by each and every person who is a joint account¬holder. The said principle is an exception to Section 141 of the NI Act which would have no application in the case on hand. The proceedings filed under Section 138 cannot be used as arm¬twisting tactics to recover the amount allegedly due from the appellant. It cannot be said that the complainant has no remedy against the appellant but certainly not under Section 138. The culpability attached to the dishonour of a cheque can, in no case "except in case of Section 141 of the NI Act" be extended to those on whose behalf the cheque is issued. This Court reiterates that it is only the drawer of the cheque who can be made an accused in any proceeding under Section 138 of the Act. [...]"

(Emphasis supplied)

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57. In Himanshu v. B. Shivamurthy (supra), the Court was examining the legality and validity of the order quashing a complaint passed by the High Court in exercise of its inherent powers under Section 482 of the CrPC in a case where the Director of the company was arraigned as the sole accused for the dishonour of a cheque drawn upon the bank account held in the name of the company. Reiterating the principles laid down in Aneeta Hada (supra), this Court upheld the decision of the High Court in quashing the complaint case.

20. Even otherwise, the Company cannot now be impleaded as accused, in this case, as before filing the complaint under Section 138 NI Act, certain legal formalities have to be completed by the complainant, i.e., issuance of legal notice, demanding the money, within the stipulated period.

21. The non-prosecution of the company, from whose account the cheque was issued and dishonored, is fatal, non-curable illegality and shall lead to the dismissal of the complaint, being legally defective and not properly constituted.

22. In the entirety of facts and circumstances, the petition is allowed and the order of the learned trial Court, taking cognizance and all consequential proceedings are quashed and set aside. It is clarified that the dismissal of the petition shall not come in any way, in case the complainant/holder of the cheque, wants to take any other legal remedy, including filing of civil suit, for recovery of cheque amount etc.

23. Pending application(s), if any, shall also stand disposed of.

