

**(2017) 06 KL CK 0015**  
**In the High Court Of Kerala**  
**Case No : 497 of 2015**

INDIRA GANDHI MEMORIAL

APPELLANT

Vs

ROYS ABRAHAM & Ors.

RESPONDENT

**Date of Decision :** 15-06-2017

**Acts Referred:**

[Code of Criminal Procedure, 1973](#), [Section 482](#), [Section 319](#), [Section 177](#), [Section 184](#), [Section 309](#), [Section 220](#)

**Citation :** (2017) 06 KL CK 0015

**Hon'ble Judges :** Alexander Thomas

**Bench :** SINGLE BENCH

**Advocate :** M.J.THOMAS, JOSEPH ABRAHAM, MA-NU TOM, JESTIN MATHEW

**Final Decision :** Dismissed

## Judgement

1. The petitioner herein is the complainant in Annexure-1 in S.T.No.216 of 2009 on the file of the Judicial First Class Magistrate Court-I, Kottayam, which has been instituted alleging offence punishable under Section 138 of the Negotiable Instruments Act. The first respondent herein is the accused in that complaint.

2. The cheque amount involved in Annexure-1 complaint is Rs.3,21,375/-. The petitioner has also filed another complaint as S.T.No.129 of 2010 (Annexure-2) alleging the same offence against the first respondent herein due to dishonour of a cheque for an amount of Rs.6,75,800/-. It is not in dispute that in Annexure-1 (S.T.No.216 of 2009) R-1 is the sole accused. Whereas in Annexure-2 (S.T.No.129 of 2010), R-1 and M/s.Abraham Varghese & Company (Additional R-3 herein) are the two accused persons. Now both the complaints have been transferred to the Judicial First Class Magistrate Court-IV, Kottayam. It is averred that the application for joint trial of the abovesaid two cases has been allowed and the present complaint in S.T.No.216 of 2009 has been taken as the leading case. Annexure-1 is the copy of the impugned complaint in S.T.No.216 of 2009.

In Annexure-1 complaint (S.T.No.216 of 2009), the first respondent herein has been arrayed as the sole accused and the partnership firm has not been arrayed as accused, whereas in Annexure-2 complaint (S.T.No.129 of 2010), the first respondent herein as well as the partnership firm concerned (Additional R-3 herein) have been made as accused. It is the case of the petitioner that as on the date of filing of Annexure-1 complaint in S.T.No. 216 of 2009, the legal position settled by the judgment dated 26.11.1999 of the two Judge Bench of the Apex Court in the case in Anil Hada v. Indian Acrylic Ltd. reported in (2000) 1 SCC 1 = 2001 SCC (Cri.) 174, had governed the field. As per the said legal position settled by the two Judge Bench of the Apex Court in Anil Hada's case (supra), it has been held that it is not mandatory that the Company or partnership firm concerned (from whose account dishonoured cheque has been drawn) should be made an accused and that a complaint either against the Managing Director/Director of the Company or the managing partner or partner of the partnership firm, as the case may be, is maintainable even if the Company/partnership firm is not made as accused. So it is contended that as on the date of Annexure-1 complaint, there was no legal infirmity in the institution of the above complaint in not arraying the partnership firm as the principal accused, even though the dishonoured cheque has been drawn from an account maintained by that firm. It is pointed out that, by the subsequent judgment dated 27.4.2012 of the Apex Court in the case in Aneeta Hada v. Godfather Travels & Tours Pvt. Ltd. reported in (2012) 5 SCC 661, it has been held by the three Judge Bench of the Apex Court that prosecution for an offence under Section 138 of the Negotiable Instruments Act is not maintainable solely against the Managing Director or Director of the Company in respect of a dishonoured cheque, which has been drawn from the account of such a Company, unless the Company/ partnership firm from whose account the dishonoured cheque has been drawn, is arrayed as an accused, etc. and that the persons responsible for and in charge of the affairs of the Company/partnership firm could also be arrayed as accused in such a complaint, in view of the concept of vicarious liability as envisaged in Section 141 of the Negotiable Instruments Act.

3. It is stated that it has come out in evidence in this case that the cheque involved in the present complaint is issued by the first respondent for and on behalf of additional respondent No.3, M/s.Abraham Varghese & Company, which is a partnership firm and that the rubber sheets were purchased for M/s.Abraham Varghese & Company and that the dishonoured cheque was issued in this case for the sale consideration of the rubber sheets purchased by the said firm.

4. It is also stated that witnesses were examined on the side of the petitioner/complainant and the first respondent/accused and documents were also marked on both sides and thus it has come out in evidence that the dishonoured cheque in question was issued for and on behalf of the third respondent Company/partnership firm for Rs.6,75,800/-. Annexure-3 application is filed under Section 309 of the Code of Criminal Procedure by the petitioner so as to implead the said partnership firm as additional accused. Annexure-4 is the objection thereto filed

by the first respondent/accused. After hearing both sides, learned Magistrate has passed Annexure-5 order dated 14.1.2015 whereby the abovesaid application filed by the petitioner as per Annexure-3 has been dismissed. The order under challenge in Crl.Miscellaneous Case is the said Annexure-5 order dated 14.1.2015.

5. Heard Sri.M.J.Thomas, learned counsel appearing for the petitioner/accused, Sri.Joseph Abraham, learned Advocate appearing for the contesting respondent and Sri.Jestin Mathew, learned prosecutor appearing for R2/State.

6. As noted herein above in the judgment dated 26.11.1999 of the Apex Court in Anil Hada v. Indian Acrylic Ltd. reported in (2000) 1 SCC 1 = 2001 SCC (Cri.) 174, it has been clearly held by a two Judge Bench of the Supreme Court that a prosecution under Section 138 of the Negotiable Instruments Act would lie solely against an individual Director of the Company even if the Company has not been arrayed as accused therein in a case where the dishonoured cheque in question has been drawn from an account maintained by such Company/partnership firm. It is not in dispute that the dishonoured cheque in question has been issued from an account maintained by additional respondent No.3, M/s.Abraham Varghese & Company. The petitioner/complainant had submitted Annexure-3 application for impleading the partnership firm as accused in the impugned Annexure-1 complaint proceedings by citing the powers referred to in Section 319 of the Cr.P.C. and the same has been rejected by the impugned Annexure-5 order. The main contention advanced by Sri.M.J.Thomas, learned counsel appearing for the petitioner/complainant, is that as on the date of institution of the impugned Annexure-1 complaint the law that governed the field was the one based on the judgment dated 26.11.1999 rendered by the two Judge Bench of the Apex Court in Anil Hada's case and that the fairness and justice demand that the petitioner who only adhered to the legal position enunciated by the Apex Court in the said two Judge Bench judgment should not be penalized and that a direction should be given, so that the partnership firm is arrayed as an accused. It is also not in dispute that the instant Annexure-1 complaint dated November 2008 was instituted at a time when the legal position laid down by the said two Judge Bench of the Apex Court in Anil Hada's case (supra) had governed the field. There were conflicting views on this point in view of divergent two Judge Bench decisions of the Apex Court and therefore, the matter was referred to a Larger Bench of three Judges. The three-Judge Bench of the Apex Court in the judgment dated 27.4.2012 in the case in Aneeta Hada v. Godfather Travels & Tours (P) Ltd. reported in (2012) 5 SCC 661 has categorically held that in a case where the dishonoured cheque in question has been drawn from the account maintained by a Company/partnership firm or any other body corporate as envisaged in Section 141 of the Negotiable Instruments Act, then the drawer of such a dishonoured cheque is the Company/partnership firm/corporate body as the case may be and that as the offence punishable under Section 138 of the Negotiable Instruments Act is committed essentially by the drawer of such a cheque, Company/partnership firm, corporate body, who as the drawer of such a dishonoured

cheque should necessarily be arrayed as accused in such complaint proceedings, as the said body is the principal offender in such offences. The abovesaid plea made by the petitioner, so as to impugn Annexure-5 order, cannot be countenanced for reasons more than one.

7. Section 141 of the Negotiable Instrument Act reads as follows :

"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."

8. Firstly, a mere perusal of the three-Judge Bench judgment dated 27.4.2012 in Aneeta Hada's case (supra) would reveal that their Lordships of the Supreme Court have not invoked the doctrine of prospective overruling in that case. Unless the Apex Court invokes the special powers available for applying the doctrine of prospective overruling in cases like this, the law laid down by a later Bench overruling its earlier view, will apply not only on a prospective basis, but also in respect of all pending causes. Though High Courts are also Constitutional Courts in our scheme of the Constitution, the High Courts do not have the power to invoke the doctrine of prospective overruling and in the case of declaration of law

made by judgments of the High Courts overruling its earlier views, the ratio laid down in such judgments will be applicable not only on a prospective basis, but also in respect of all pending causes. Of course, in respect of the matters which are barred by delay and laches, acquiescence or limitation or by *res judicata*, etc., the new legal position cannot affect such situations. So, the law laid down by the High Courts overruling the legal position settled by it in earlier occasions, will govern not only prospectively, but also in all pending causes. The only exception is for the Supreme Court where the doctrine of prospective overruling could be invoked. But, where the Apex Court does not invoke the doctrine of prospective overruling in a given case, then as indicated hereinabove, the legal position settled by it overruling the earlier views, would apply not only on a prospective basis, but also to all pending causes. Therefore, notwithstanding the fact that the petitioner had instituted the impugned Annexure-1 complaint at a time when the two Judge Bench decision in Anil Hada's case (*supra*) had governed the field and at a time long prior to the date of rendering of the judgment in the subsequent three Judge Bench decision in Aneeta Hada's case (*supra*), this Court is constrained to hold that the legal position subsequently laid down by the Apex Court in the three Judge Bench decision in Aneeta Hada's case (*supra*) will govern the facts of the instant case as well.

9. Secondly, it may also be noted that two of the cases covered by the three Judge Bench decision in Aneeta Hada's case were in respect of Crl.Appeal Nos.1483 and 1484 of 2009 which pertain to the interpretation of Section 85 of the Information Technology Act, 2000, which is in *pari materia* in Section 141 of the Negotiable Instruments Act. Therein, the Director of the said Company was prosecuted under Section 292 of the Indian Penal Code and Section 67 of the Information Technology Act, 2000, without impleading the Company as an accused. The initiation of the prosecution was challenged under Section 482 of the Cr.P.C. before the Delhi High Court and the said High Court held that offences are made out by the appellant Company along with the Directors under Section 67 read with Section 85 of the Information Technology Act, 2000 and on that basis, the Delhi High Court had declined to quash the impugned proceedings therein. Reference could be made to paragraph 2 of Aneeta Hada's case (*Supra*). Paragraphs 61 to 64 of Aneeta Hada's case, which deals with the resolution of the issues concerned in the said Crl.Appeal Nos.1483 and 1489 of 2009, read as follows :

"61. Presently, we shall advert to the other two appeals i.e. Criminal Appeals Nos.1483 and 1484 of 2009 wherein the offence is under Section 67 read with Section 85 of the 2000 Act. In Criminal Appeal No. 1483 of 2009, the Director of the Company is the appellant and in Criminal Appeal No.1484 of 2009, the Company. Both of them have called in question the legal substantiality of the same order passed by the High Court.

62. In the said case, the High Court followed the decision in Sheoratan Agarwal and, while dealing with the application under Section 482 of the Code of Criminal

Procedure at the instance of Avnish Bajaj, the Managing Director of the Company, quashed the charges under Sections 292 and 294 of the Penal Code and directed the offences under Section 67 read with Section 85 of the 2000 Act to continue. It is apt to note that the learned Single Judge has observed that a prima facie case for the offence under Sections 292(2)(a) and 292(2)(b) of the Penal Code is also made out against the Company.

63. Section 85 of the 2000 Act is as under:

"85. Offences by companies.-(1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be guilty of the contravention and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place 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 the contravention and shall be liable to be proceeded against and punished accordingly."

64. Keeping in view the anatomy of the aforesaid provision, our analysis pertaining to Section 141 of the Act would squarely apply to the 2000 enactment. Thus adjudged, the Director could not have been held liable for the offence under Section 85 of the 2000 Act. Resultantly, Criminal Appeal No. 1483 of 2009 is allowed and the proceeding against the appellant is quashed. As far as the Company is concerned, it was not arraigned as an accused. Ergo, the proceeding as initiated in the existing incarnation is not maintainable either against the company or against the Director. As a logical sequitur, the appeals are allowed and the proceedings initiated against Avnish Bajaj as well as the Company in the present form are quashed."

Wherein the Apex Court in the said three-Judge Bench decision has clearly applied the new legal position even to that pending case and held that the accused Director therein could not have been liable for the offence under Section 85 of the Information Technology Act, 2000 as the provision contained in Section 85 of the Information Technology Act, 2000 is *pari materia* to the provisions contained in Section 141 of the Negotiable Instrument Act. Accordingly, it was ordered that the said Crl.Appeal No.1483 of 2009 stands allowed and the

proceedings against the appellant therein was quashed. More crucially, it was also held that as far as the Company is concerned, it was not arrayed as an accused and the proceedings as initiated in the existing incarnation is not maintainable either against the Company or against the Director and that as a logical sequitur, the appeals were allowed and the proceedings initiated against the individual Director as well as the Company were quashed. It may be noted that in view of explanation to Section 141 of the Negotiable Instruments Act, the legal principles laid down by the Apex Court in relation to the Company and its Directors would apply with equal force in the case of a partnership firm or other body corporate and its partners/officials concerned.

10. Thirdly, there is yet another important aspect of the matter. It is true that in view of the legal position laid down subsequently by the Apex Court in the judgment dated 1.8.2014 in *Dashrath Rupsingh Rathod v. State of Maharashtra* and another reported in (2014) 9 SCC 129, it has been held that an offence under Section 138 of the Negotiable Instruments Act is committed at the time of the dishonour of the cheque in question. But it has also been held that the complaint can be validly instituted only if the other mandatory conditions are fulfilled. Reference may be made to paragraphs 57 and 58 of the judgment of the Apex Court in *Dashrath Rupsingh Rathod*'s case (*supra*), which read as follows :

"57. The High Court of Kerala has, in our view, correctly interpreted Section 138 of the Act in *Kairali Mktg. & Processing Co-op. Society Ltd. v. Pullengadi Service Co-op Society Ltd.* when it said : (KLT pp. 293 & 295-96, paras 18 & 23)

"18. It is evident from the language of Section 138 of the N.I. Act that the drawer is deemed to have committed the offence when a cheque issued by him of the variety contemplated under Section 138 is dishonoured for the reasons contemplated in the section. The crucial words are "is returned by the bank unpaid". When that happens, such person shall be deemed to have committed the offence. With the deeming in the body of Section 138, the offence is already committed or deemed to have been committed. A careful reading of the body of Section 138 cannot lead to any other conclusion. Proviso to Section 138 according to me only insists on certain conditions precedent which have to be satisfied if the person who is deemed to have committed the offence were to be prosecuted successfully. The offence is already committed when the cheque is returned by the bank. But the cause of action for prosecution will be available to the complainant not when the offence is committed but only after the conditions precedent enumerated in the proviso are satisfied. After the offence is committed, only if the option given to avoid the prosecution under the proviso is not availed of by the offender, can the aggrieved person get a right or course of action to prosecute the offender. The offence is already deemed and declared but the offender can be prosecuted only when the requirements of the proviso are satisfied. The cause of action for prosecution will arise only when the period stipulated in the proviso elapses without payment. Ingredients of the offence have got to be distinguished from the conditions precedent for valid initiation of

prosecution.

23. ... The stipulations in the proviso must also be proved certainly before the offender can be successfully prosecuted. But in the strict sense they are not ingredients of the deemed offence under the body of Section 138 of the NI Act, though the said stipulations must also be proved to ensure and claim conviction. It is in this sense that it is said that the proviso does not make or unmake the offence under Section 138 of the NI Act. That is already done by the body of the sections. This dispute as to whether the stipulations of the proviso are conditions precedent or ingredients/components of the offence under Section 138 of the NI Act may only be academic in most cases. Undoubtedly the ingredients *stricto sensu* as also the conditions precedent will have to be established satisfactorily in all cases. Of course in an appropriate case it may have to be considered whether substantial compliance with the conditions precedent can be reckoned to be sufficient to justify a conviction. Be that as it may, the distinction between the ingredients and conditions precedent is certainly real and existent. That distinction is certainly vital while ascertaining complicity of an inditee who faces indictment in a prosecution under Section 138 with the aid of Section 141 of the NI Act. That is how the question assumes such crucial significance here."

(emphasis in original)

58. To sum up:

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58.7 The general rule stipulated under Section 177 Cr.PC applies to cases under Section 138 of the Negotiable Instruments Act. Prosecution in such cases can, therefore, be launched against the drawer of the cheque only before the court within whose jurisdiction the dishonour takes place except in situations where the offence of dishonour of the cheque punishable under Section 138 is committed along with other offences in a single transaction within the meaning of Section 220(1) read with Section 184 of the Code of Criminal Procedure or is covered by the provisions of Section 182(1) read with Sections 184 and 220 thereof."

Thus it can be seen that though the time of commission of the offence under Section 138 of the Negotiable Instruments Act is at the time of the dishonour of the cheque, it has also been equally held by the Apex Court that the cause of action to file a complaint accrues to a complainant only if the other conditions stipulated in the proviso to Section 138 of the Negotiable Instruments Act are fulfilled and one of the mandatory conditions to be fulfilled is the issuance of the statutory demand notice to the drawer of the cheque within the stipulated time. The Apex Court in *Kirshna Texport & Capital Markets Ltd. v. Ila A. Agrawal*, reported in (2015) 8 SCC 28 has held that though Section 141 of the Negotiable Instruments Act stipulates that not only the Company/ partnership firm, but also the officials of the Company/partnership firm who were responsible for and in charge of the affairs of the Company/partnership firm at the time of the



commission of the offence under Section 138 of the N.I. Act could also be proceeded against, Section 141 of the Act does not lay down any requirement that in such eventuality the Directors must necessarily be issued separate notices under Section 138 of the Negotiable Instruments Act and that persons who are in charge of the affairs of the Company and running its affairs must be deemed to be aware of the notice of demand under Section 138 of the Negotiable Instruments Act issued to such Company and that no notice is additionally contemplated to be given to such Directors and that notice to the drawer Company is considered full enough of those who are in charge of affairs of the Company, etc. In other words, the legal position is that notice to the drawer of the dishonoured cheque in question is mandatory and where the drawer of the cheque is a Company or partnership firm or a corporate body, then also notice to the drawer of the cheque (Company/partnership firm as the case may be) is mandatory without which the complaint cannot be validly instituted, but additional demand notices need not necessarily be given to the Directors/officials of the Company/partnership firm who are in charge of and responsible for the affairs or the conduct of the business of the corporate body. Therefore, it is crystal clear from a reading of the above said judgments of the Apex Court as in Aneeta Hada's case, Dashrath Rupsingh Rathod's case (supra) and Kirshna Texport & Capital Markets Ltd.'s case (supra) where the drawer of the dishonoured cheque in question is Company/ partnership firm, that it is mandatory that statutory demand notice under Section 138 proviso (b) should be issued to the company/partnership firm, but additional notice to the Directors/officials of the Corporate body is not mandatory, etc. In the instant case, the petitioner does not have a case in the impugned Annexure-1 complaint that statutory demand notice has been duly served on additional respondent No.3 partnership firm who is the drawer of the instant cheque in question. There are no averments either in the impugned Annexure-1 complaint in S.T.No.216 of 2009 or in the present memorandum of CrI.Miscellaneous Case that the petitioner had issued the prior statutory demand notice in terms of Section 138 proviso (b) to additional respondent No.3 partnership firm. The only averment in Annexure-1 complaint is that the statutory demand notice has been issued to the sole accused therein, respondent No.1, who is the Managing partner of the firm concerned. Therefore, it would be illegal if the trial court or this Court directs that additional respondent No.3 be arrayed as an additional accused, so as to face the prosecution under Section 138 of the Negotiable Instruments Act.

11. Fourthly, it is to be noted that the main plea made by the petitioner is on the basis of Section 319 of the Cr.P.C. included under Chapter XXIV (dealing with General Provisions as to Inquiries and Trials of the Cr.P.C.) and the said provision reads as follows :

"319. Power to proceed against other persons appearing to be guilty of offence. - (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court

may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then -

(a) the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

12. In the view that is proposed to be taken by this Court in this case, this Court is not expressing any final opinion as regards the applicability or otherwise of Section 319 of the Cr.P.C. to the facts of this case. Since the issuance of the statutory demand notice to the drawer Company/firm who is the principal offender, is mandatory and since the said mandatory condition has not been complied with, there is no question of prosecuting such a person to whom the statutory and mandatory demand notice has not been issued, to be subsequently arrayed as an accused by taking resort to the invocation of Section 319 of the Cr.P.C. Such a course of action would go against the clear and manifest mandate of Section 138 of the Negotiable Instruments Act in its mandate of legislative policy enunciated by the Parliament that prior statutory demand notice should necessarily be served on the drawer of the cheque before the valid institution of a complaint in that regard. Where there is a threshold bar in the institution of a complaint under Section 138 of the Negotiable Instruments Act due to the non issuance of the prior statutory demand notice to the drawer of the cheque, such a bar cannot be indirectly got over through the course of action now sought to be projected by the petitioner by resort to Section 319 of the Cr.P.C. But that would amount to an action which is ultravires, illegal and would amount to grave abuse of process of law. For these reasons, this Court is not inclined to accept the plea of the petitioner for quashing the impugned Annexure-5 order passed by the trial court. Accordingly, it is held that the petition is bereft of any merit and the same stands dismissed.