

(2017) 03 GUJ CK 0197
In the Gujarat High Court
Case No : 11909 of 2015

MULJIBHAI VISHRAM VARSANI

APPELLANT

Vs

ISHWARBHAI R JOSHI & ANR.

RESPONDENT

Date of Decision : 28-03-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 482](#) - Saving of inherent powers of High Court
[Negotiable Instruments Act, 1881](#), [Section 138](#) - Dishonour of cheque for insufficiency, etc., of funds in the account

Citation : (2017) 03 GUJ CK 0197

Hon'ble Judges : J.B.Pardiwala

Bench : Single Bench

Advocate : ADITYA A GUPTA, AR GUPTA, DEEP D VYAS, MITESH AMIN

Judgement

1. Rule returnable forthwith. Mr. Mitesh Amin, the learned P.P., waives service of notice of rule for and on behalf of the respondent No.2. Mr. Deep D. Vyas, the learned counsel, waives service of notice of rule for and on behalf of the respondent No.1.

2. By this application under section 482 of the Code of Criminal Procedure, 1973, the applicant-original accused seeks to invoke the inherent powers of this Court praying for quashing of the proceedings of the Criminal Case No.1037 of 2014 pending in the court of the learned Chief Judicial Magistrate at Bhuj-Kutch. The proceedings are relating to the dishonour of the cheque punishable under section 138 of the N.I. Act.

3. The applicant before me is a partner of a partnership firm running in the name of Vasani Constructions Company. The cheque, which is at page-15, indicates that the partner had drawn the cheque in favour of the complainant for M/s. Vasani Construction Co. I take notice of the fact that the partnership firm, being a legal entity, has not been arraigned as an accused. In such circumstances, the complaint filed by the complainant under section 138 of the N.I. Act should fail.

The point raised is squarely covered by my judgment and order dated 27th January, 2016 in the case of Ankit Pradipbhai Kapadia vs. State of Gujarat, Criminal Misc. Application No.1071 of 2016. I quote the relevant observations as under; "Section 141 of the Negotiable Instruments Act reads as under:-

141. Offences by companies :

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence :

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

(2) Notwithstanding anything contained in subsection (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.

The Section clarifies that for the purpose of Section 141 Company means any Body Corporate and includes a firm or other association of individuals; and Director, in relation to a firm, means a partner in the firm. This issue has been exhaustively answered by the Supreme Court in the case of Aneeta Hada v. M/s. Godfather Travels and Tours Pvt. Ltd., 2012(5) SCC 661 . I may quote the observations made by the Supreme Court from paragraph No.39 to 59 as under:-

39. The word deemed used in Section 141 of the Act applies to the company and the persons responsible for the acts of the company. It crystallizes the corporate criminal liability and vicarious liability of a person who is in-charge of the company. What averments should be required to make a person vicariously liable has been dealt with in SMS Pharmaceuticals Ltd., (AIR 2005 SC 3512 : 2005 AIR SCW 4740) (supra). In the said case, it has been opined that the criminal liability on account of dishonour of cheque primarily falls on the drawee company and is extended to the officers of the company and as there is a specific provision extending the liability to the officers, the conditions incorporated in Section 141

are to be satisfied.

40. It has been ruled as follow:-

"It primarily falls on the drawer company and is extended to officers of the company. The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in the Statutes extending liability to others. Section 141 of the Act is an instance of specific provision which in case an offence under Section 138 is committed by a company, extends criminal liability for dishonour of a cheque to officers of the company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable.

41. After so stating, it has been further held that while analyzing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. In paragraph 19 of the judgment, it has been clearly held as follows:-

"There is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability."

42. Presently, we shall deal with the ratio laid down in the case of C.V. Parekh, (AIR 1971 SC 447) (supra). In the said case, a three-Judge Bench was interpreting Section 10 of the 1955 Act. The respondents, C.V. Parekh and another, were active participants in the management of the company. The trial court had convicted them on the ground the goods were disposed of at a price higher than the control price by Vallabhadas Thacker with the aid of Kamdar and the same could not have taken place without the knowledge of the partners of the firm. The High Court set aside the order of conviction on the ground that there was no material on the basis of which a finding could be recorded that the respondents knew about the disposal by Kamdar and Vallabhadas Thacker.

43. A contention was raised before this Court on behalf of the State of Madras that the conviction could be made on the basis of Section 10 of the 1955 Act. The three-Judge Bench repelled the contention by stating thus:-

Learned counsel for the appellant, however, sought conviction of the two respondents on the basis of Section 10 of the Essential Commodities Act under

which, if the person contravening an order made under Section 3 (which covers an order under the Iron and Steel Control Order, 1956), 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 the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. It was urged that the two respondents were in-charge of, and were responsible to, the Company for the conduct of the business of the Company and, consequently, they must be held responsible for the sale and for thus contravening the provisions of clause (5) of the Iron and Steel Control Order. This argument cannot be accepted, because it ignores the first condition for the applicability of Section 10 to the effect that the person contravening the order must be a company itself. In the present case, there is no finding either by the Magistrate or by the High Court that the sale in contravention of clause (5) of the Iron and Steel Control Order was made by the Company. In fact, the Company was not charged with the offence at all. The liability of the persons in-charge of the Company only arises when the contravention is by the Company itself. Since, in this case, there is no evidence and no finding that the Company contravened clause (5) of the Iron and Steel Control Order, the two respondents could not be held responsible. The actual contravention was by Kamdar and Vallabhadas Thacker and any contravention by them would not fasten responsibility on the respondents." The aforesaid paragraph clearly lays down that the first condition is that the company should be held to be liable; a charge has to be framed; a finding has to be recorded, and the liability of the persons in-charge of the company only arises when the contravention is by the company itself.

44. The said decision has been distinguished in the case of Sheoratan Agarwal and another, (AIR 1984 SC 1824) (*supra*). The two-Judge Bench in the said case referred to Section 10 of the 1955 Act and opined that the company alone may be prosecuted or the person in-charge only may be prosecuted since there is no statutory compulsion that the person in-charge or an officer of the company may not be prosecuted unless he be ranged alongside the company itself. The two-Judge Bench further laid down that Section 10 of the 1955 Act indicates the persons who may be prosecuted where the contravention is made by the company but it does not lay down any condition that the person in-charge or an officer of the company may not be separately prosecuted if the company itself is not prosecuted.

45. The two-Judge Bench referred to the paragraph from C.V. Parekh, (AIR 1971 SC 447) (*supra*), which we have reproduced hereinabove, and emphasised on certain sentences therein and came to hold as follows:-

"The sentences underscored by us clearly show that what was sought to be emphasised was that there should be a finding that the contravention was by the company before the accused could be convicted and not that the company itself should have been prosecuted along with the accused. We are therefore clearly of

the view that the prosecutions are maintainable and that there is nothing in Section 10 of the Essential Commodities Act which bars such prosecutions."

46. For the sake of completeness, we think it apposite to refer to the sentences which have been underscored by the two-Judge Bench:- "because it ignores the first condition for the applicability of Section 10 to the effect that the person contravening the order must be a company itself. In the present case, there is no finding either by the Magistrate or by the High Court that the sale in contravention of clause (5) of the Iron and Steel Control Order was made by the Company and there is no evidence and no finding that the Company contravened clause (5) of the Iron and Steel Control Order, the two respondents could not be held responsible."

47. With greatest respect to the learned Judges in Sheoratan Agarwal (*supra*), the authoritative pronouncement in C.V. Parekh (*supra*) has not been appositely appreciated. The decision has been distinguished despite the clear dictum that the first condition for the applicability of Section 10 of the 1955 Act is that there has to be a contravention by the company itself. In our humblest view, the said analysis of the verdict is not correct. Quite apart, the decision in C.V. Parekh (*supra*) was under Section 10(a) of the 1955 Act and rendered by a three-Judge Bench and if such a view was going to be expressed, it would have been appropriate to refer the matter to a larger Bench. However, the two-Judge Bench chose it appropriate to distinguish the same on the rationale which we have reproduced herein above. We repeat with the deepest respect that we are unable to agree with the aforesaid view.

48. In the case of Anil Hada, the two-Judge Bench posed the question: when a company, which committed the offence under Section 138 of the Act eludes from being prosecuted thereof, can the directors of that company be prosecuted for that offence. The Bench referred to Section 141 of the Act and expressed the view as follows:-

"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 then 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 within 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."

49. On a reading of both the paragraphs, it is evincible that the two-Judge Bench expressed the view that the actual offence should have been committed by the company and then alone the other two categories of persons can also become liable for the offence and, thereafter, proceeded to state that if the company is not prosecuted due to legal snag or otherwise, the prosecuted person cannot, on that score alone, escape from the penal liability created through the legal fiction and this is envisaged in Section 141 of the Act. If both the paragraphs are appreciated in a studied manner, it can safely be stated that the conclusions have been arrived at regard being had to the obtaining factual matrix therein.

50. However, it is noticeable that the Bench thereafter referred to the dictum in Sheoratan Agarwal (supra) and eventually held as follows:-

"We, therefore, hold that even if the prosecution proceedings against the Company were not taken or could not be continued, it is no bar for proceeding against the other persons falling within the purview of subsections (1) and (2) of Section 141 of the Act."

51. We have already opined that the decision in Sheoratan Agarwal (supra) runs counter to the ratio laid down in the case of C.V. Parekh (supra) which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the decision in Anil Hada (supra) 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 emphasize, 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.

52. At this juncture, we may usefully refer to the decision in U.P. Pollution Control Board v. M/s. Modi Distillery and others⁴³. In the said case, the company was not arraigned as an accused and, on that score, the High Court quashed the proceeding against the others. A two-Judge Bench of this Court observed as

follows:-

"Although as a pure proposition of law in the abstract the learned single Judge's view that there can be no vicarious liability of the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors under sub-sec. (1) or (2) of S.47 of the Act unless there was a prosecution against Messers Modi Industries Limited, the Company owning the industrial unit, can be termed as correct, the objection raised by the petitioners before the High Court ought to have been viewed not in isolation but in the conspectus of facts and events and not in vacuum. We have already pointed out that the technical flaw in the complaint is attributable to the failure of the industrial unit to furnish the requisite information called for by the Board. Furthermore, the legal infirmity is of such a nature which could be easily cured. Another circumstance which brings out the narrow perspective of the learned single Judge is his failure to appreciate the fact that the averment in paragraph 2 has to be construed in the light of the averments contained in paragraphs 17, 18 and 19 which are to the effect that the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors were also liable for the alleged offence committed by the Company." Be it noted, the two-Judge Bench has correctly stated that there can be no vicarious liability unless there is a prosecution against the company owning the industrial unit but, regard being had to the factual matrix, namely, the technical fault on the part of the company to furnish the requisite information called for by the Board, directed for making a formal amendment by the applicant and substitute the name of the owning industrial unit. It is worth noting that in the said case, M/s. Modi distilleries was arrayed as a party instead of M/s. Modi Industries Limited. Thus, it was a defective complaint which was curable but, a pregnant one, the law laid down as regards the primary liability of the company without which no vicarious liability can be imposed has been appositely stated.

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.

54. In this context, we may usefully refer to Section 263 of Francis Bennion Statutory Interpretation where it is stated as follows:

The principle of statutory interpretation embodies the policy of the law, which is in turn based on public policy. The court presumes, unless the contrary intention appears, that the legislator intended to conform to this legal policy. A principle of statutory interpretation can therefore be described as a principle of legal policy formulated as a guide to legislative intention.

55. It will be seemly to quote a passage from Maxwell on The Interpretation of

Statutes :-

The strict construction of penal Statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfillment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction."

56. We have referred to the aforesaid passages only to highlight that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the company. The learned counsel for the respondents have vehemently urged that the use of the term as well as in the Section is of immense significance and, in its tentacle, it brings in the company as well as the director and/or other officers who are responsible for the acts of the company and, therefore, a prosecution against the directors or other officers is tenable even if the company is not arraigned as an accused. The words as well as have to be understood in the context.

57. In *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others*⁴⁴ it has been laid down that the entire Statute must be first read as a whole, then section by section, clause by clause, phrase by phrase and word by word. The same principle has been reiterated in *Deewan Singh and others v. Rajendra Prasad Ardevi and others* and *Sarabjit Rick Singh v. Union of India* 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 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*, (AIR 1971 SC 447) (supra) which is a three-Judge Bench decision. Thus, the view expressed in *Sheoratan Agarwal*, (AIR 1984 SC 1824) (supra) does not correctly lay down the law and, accordingly, is hereby

overruled. The decision in Anil Hada, (AIR 2000 SC 145 : 1999 AIR SCW 4228) (supra) is overruled with the qualifier as stated in paragraph 51. The decision in Modi Distilleries, (AIR 1988 SC 1128) (supra) has to be treated to be restricted to its own facts as has been explained by us herein above.

I may also quote with profit the observations made by the Supreme Court in the case of Raghubhai Lakshminarayan v. M/s Fine Tube, AIR 2007 SC 1634. I may quote the observations made in paragraph No.9 to 14 as under:-

9. The description of the accused in the complaint petition is absolutely vague. A juristic person can be a Company within the meaning of the provisions of the Companies Act, 1956 or a partnership within the meaning of the provisions of the Indian Partnership Act, 1932 or an association of persons which ordinarily would mean a body of persons which is not incorporated under any statute. A proprietary concern, however, stands absolutely on a different footing. A person may carry on business in the name of a business concern, but he being proprietor thereof, would be solely responsible for conduct of its affairs. A proprietary concern is not a Company. Company in terms of the explanation appended to Section 141 of the Negotiable Instruments Act, means any body-corporate and includes a firm or other association of individuals. Director has been defined to mean in relation to a firm, a partner in the firm. Thus, whereas in relation to a Company, incorporated and registered under the Companies Act, 1956 or any other statute, a person as a Director must come within the purview of the said description, so far as a firm is concerned, the same would carry the same meaning as contained in the Indian Partnership Act.

10. It is interesting to note that the term "Director" has been defined. It is of some significance to note that in view of the said description of "Director", other than a person who comes within the purview thereof, nobody else can be prosecuted by way of his vicarious liability in such a capacity. If the offence has not been committed by a Company, the question of there being a Director or his being vicariously liable, therefore, would not arise.

11. Appellant herein categorically contended that accused No. 1 was a proprietary concern of the accused No. 2 and he was merely an employee thereof.

12. If accused No. 1 was not a Company within the meaning of Section 141 of the Negotiable Instruments Act, the question of an employee being preceded against in terms thereof would not arise. Respondent was aware of the difference between a "partnership firm" and a "business concern" as would be evident from the fact that it described itself as a partnership firm and the accused No.1, as a business concern. Significantly, Respondent deliberately or otherwise did not state as to in which capacity the appellant had been serving the said business concern. It, as noticed hereinbefore, described him as in-charge, Manager and Director of the accused No. 1. A person ordinarily cannot serve both in the capacity of a Manager and a Director of a Company.

13. The distinction between partnership firm and a proprietary concern is well

known. It is evident from Order XXX, Rule 1 and Order XXX Rule 10 of the Code of Civil Procedure. The question came up for consideration also before this Court in *M/s. Ashok Transport Agency v. Awadhesh Kumar and another* (1998 5 SCC 5671) wherein this Court stated the law in the following terms:-

6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person but Order XXX, Rule 1, CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 of Order XXX, which make applicable the provisions of Order XXX to a proprietary concern enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order XXX have no application to such a suit as by virtue of Order XXX, Rule 10 the other provisions of Order XXX are applicable to a suit against the proprietor of proprietary business in so far as the nature of such case permits. This means that only those provisions of Order XXX can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case.

14. We keeping in view the allegations made in the complaint petition, need not dilate in regard to the definition of a Company or a partnership firm as envisaged under Section 34 of the Companies Act, 1956 and Section 4 of the Indian Partnership Act, 1932 respectively, but, we may only note that it is trite that a proprietary concern would not answer the description of either a Company incorporated under the Indian Companies Act or a firm within the meaning of the provisions of the section 4 of the Indian Partnership Act.

The argument of the learned counsel is fully fortified by the decision of the Supreme Court in *Raghubhai* (supra). Thus in the absence of the partnership firm being a juristic person or a legal entity, the applicant, in his capacity as one of the partners, cannot be proceeded for the offence alleged, by virtue of Section 141 of the Negotiable Instruments Act."

4. In the result, this application is allowed. The proceedings of the Criminal Case No. 1037 of 2014 pending in the court of the learned Chief Judicial Magistrate at Bhuj-Kutch are hereby quashed. Rule is made absolute to the aforesaid extent. Direct service is permitted.