

(2017) 02 GUJ CK 0170
In the Gujarat High Court
Case No : 11911 of 2015

MURJIBHAI VISHRAM VARSANI

APPELLANT

Vs

ADAM ALIMAMAD KUMBHAR & ANR.

RESPONDENT

Date of Decision : 02-02-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 482](#) - Saving of inherent powers of High Court
[Negotiable Instruments Act, 1881](#), [Section 138](#), [Section 141](#) - Dishonour of cheque for insufficiency, etc., of funds in the account - Offences by Companies

Citation : (2017) 02 GUJ CK 0170

Hon'ble Judges : J.B.Pardiwala

Bench : Single Bench

Advocate : AR GUPTA, ADITYA A GUPTA, DARSHAN M VARANDANI, SHRUTI PATHAK

Judgement

1. RULE returnable forthwith. Ms.Pathak, the learned APP waives service of notice of rule for and on behalf of the respondent - State of Gujarat. Mr.Darshan Varandani, the learned counsel waives service of notice of rule for and on behalf of the respondent - original complainant.

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.1834 of 2014 pending before the learned Chief Judicial Magistrate at Bhuj, for the offence punishable under Section 138 of the Negotiable Instruments Act.

3. The applicant herein is one of the partners of a partnership firm running in the name of Varsani Construction Company. One another partner of the firm and an authorized signatory, namely, Rajeshbhai Varsani, issued a cheque of the amount of Rs.1 lac dated 20th August 2014 in favour of the complainant drawn on the HDFC Bank. The said cheque came to be dishonoured. In such circumstances, the complaint came to be lodged in the court of the learned Chief Judicial

Magistrate, Bhuj-Kachchh, registered as Criminal Case No.1834 of 2014. The learned counsel appearing for the applicant accused has too fold submissions to canvass. He submits that the applicant indisputably has not signed the cheque. At best, vicarious liability can be fastened by virtue of Section 141 of the Negotiable Instruments Act, and his second submission is that the complaint itself should fail because the partnership firm as a legal entity has not been arraigned as an accused. On the other hand, this application is opposed by Mr.Varandani, the learned counsel appearing for the complainant. He submitted that it is always open for him to either implead the partnership firm as an accused or even file a fresh complaint impleading the partnership firm as a legal entity and the authorized signatory.

4. Having heard the learned counsel appearing for the parties and having considered the materials on record, the only question that falls for my consideration is, whether the proceedings of the Criminal Case should be quashed against the applicant herein.

5. I am of the view that this application should succeed on the ground that in the absence of the legal entity not being arraigned as an accused, a partner or the authorized signatory cannot be prosecuted for the offence under Section 138 of the Negotiable Instruments Act. The law in this regard is wellsettled.

6. In the case of Aneeta Hada v. Godfather Travels & Tours Private Limited [(2012) 5 SCC 661], the question that arose for disposal of the Supreme Court was whether an authorized signatory of a company would be liable for prosecution under Section 138 of the Negotiable Act without the company being arraigned as an accused. As initially there was difference of opinion between the two learned Judges regarding the interpretation of Section 138 of the Negotiable Instruments Act, a Reference was made to the Larger Bench of three Judges. While deciding the said Reference and interpreting Sections 138 and 141 of the Negotiable Instruments 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.

7. 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 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 (supra) which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal (supra) does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada (supra) is overruled with the qualifier as stated in paragraph 37. The decision in Modi Distilleries (supra) has to be treated to be restricted to its own facts as has been explained by us hereinabove." Thus, it has been laid down in unequivocal words in the aforesaid decision that for maintaining the prosecution against the director under Section 141 of the Negotiable Instruments Act, arraigning of a company as an accused is imperative. In view of explanation to Section 141 of the Negotiable Instruments Act referred to above, this legal position needs to be automatically made applicable in case of prosecution against a partnership firm also. Therefore, it has to be held that for maintaining prosecution against a partner under Section 141 of the Negotiable Instruments Act, arraigning of partnership firm as an accused is imperative.

8. The conclusions drawn by the Supreme Court in the case of Aneeta Hada (supra) are not based merely on the fact that the company is a separate legal entity and juristic person, but these conclusions are drawn on the basis of the fact that Section 141 of the Negotiable Instruments Act deals with the vicarious liability. In paras 58 and 59 of the said judgment, referred above, the Supreme Court has referred to the wordings in Section 141 of the Negotiable Instruments Act and observed that commission of offence by a company is an express condition precedent to attract the vicarious liability of others. It was further held that the words "as well as the company" appearing in the section make it unmistakably clear that when a company is 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. It was further observed that the other categories of offenders like directors or partners of the firm can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. Thus, the Supreme Court has arrived at an irresistible conclusion that for maintaining the prosecution under Section 141 of the Negotiable Instruments Act, arraigning of the company as an accused is imperative, mainly on the basis of the vicarious liability of the directors of the company and not necessarily because the company is a juristic person and it has its own respectability. That was an additional circumstance considered by the Apex Court while holding that arraigning of a company as an accused is imperative, but the main basis for arriving at its conclusion was the vicarious liability which the directors or partners of the firm can have towards the

company and hence without joining the company on the touchstone of vicarious liability they cannot be prosecuted.

9. Therefore, the ratio laid down in the case of Aneeta Hada (supra) can be made equally applicable in the case of a partnership firm also. The partners are liable and sued in their vicarious liability. Whether the partnership firm is a juristic person or not is a different aspect. What is important is that a partner of the firm is arraigned as an accused in the dragnet on the touchstone of vicarious liability, as is done in the case of directors of the company. Therefore, there is no reason at all to draw any distinction in respect of the law to be made applicable to a partnership firm and the company.

10. Moreover, the Legislature has already made it clear that the company includes any body corporate which includes a firm or other association of individuals and director in relation to a firm means a partner in the firm. On this count also, when Section 141 of the Negotiable Instruments Act and explanation thereto does not make any distinction between the company and the partnership firm, there is absolutely no reason to draw such distinction while making applicable the law laid down by the Apex Court in Aneeta Hada (supra) to the partnership firm merely because in that judgment the Apex Court was considering the eventuality of non-joining of the company. The basic premise of holding either the director or the partner liable for prosecution being the same that of the vicarious liability. Therefore, once the company is held to be an essential party and that arraigning of a company as an accused is imperative for prosecution under Section 141 of the Negotiable Instruments Act, it necessarily follows that arraigning of a partnership firm is also imperative for prosecution against the partners under Section 141 of the Negotiable Instruments Act. The prosecution launched against only one of the partners of the partnership firm, without joining the partnership firm, cannot be maintainable.

11. In view of the specific provisions of the Act itself, it is very difficult for the Court to take a view that a partnership firm for the purpose of Section 138 read with Section 141 of the Act is not a legal entity, and therefore, it need not be made an accused in the complaint. The decisions relied upon by the learned counsel appearing for the petitioner are of no avail in any manner. Thus, the first question is answered accordingly.

12. The argument of the learned counsel appearing for the complainant as regards impleading the partnership firm as a legal entity at this stage should also fail in view of the decision of this Court in the case of Oanali Ismailji Sadikot v. State of Gujarat and others, (2016)3 GLR 1991. I may quote the relevant observations as under : "9 Before I proceed to answer the first question, let me look into the decisions relied upon by the learned counsel in that regard. In Munshi Ram (supra), the appellants before the Supreme Court were partners of a firm, Bharat Industries, Chheharta. By a Notification, 15th May, 1946, the Chheharta Municipal Committee levied a profession tax under Section 61(1)(b) of the Punjab Municipal Act, 1911. The appellants filed a suit for permanent

injunction restraining the defendant committee from realizing the profession tax demanded by it. The appellants challenged the validity of the assessment contending that construed in light of the definition given in Section 2(40) of the Punjab General Clauses Act, the term person occurring in Section 61(1)(b) of the Punjab Municipal Act, 1911, included a firm and since the trade carried on by the firm was one, the tax could be levied on the firm, and not on the partners individually. On such premises, it was pleaded that the Municipal Committee in levying the tax on the individual partners had exceeded its statutory powers under Section 61 (1)(b) of the Municipal Act.

9.1 The trial Court dismissed the suit, on appeal by the plaintiffs, the Additional District Judge, Amritsar, reversed the judgment of the trial Court and decreed the suit. The Municipal Committee carried a further appeal to the High Court. The learned Single Judge, who heard the appeal, affirmed the judgment and decree of the first appellate Court. The matter reached upto the Supreme Court. The Supreme Court in para 14 quoted Section 61(1)(b) of the Municipal Act material for the purpose of deciding the case which reads as under:

Subject to any general or special orders which the State Government may make in this behalf, and the rules, any committee may, from time to time for the purposes of this Act, and in the manner directed by this Act, impose in the whole or any part of the municipality any of the following taxes, namely:-

(1) (a)

(i) to (iii)

(b) a tax on persons practising any profession or art or carrying on any trade or calling in the municipality.

Explanation. - A person in the service or person holding an office under the State Government or the Central Government or a local or other public authority shall be deemed to be practicing a profession within the meaning of this sub-section."

9.2 The Supreme Court proceeded to observe in paras 15, 16 and 18 as under:

15. From a plain reading of the extracted provision, it is clear that a tax leviable under clause (b) is, in terms, a tax on "persons". The expression "persons" undoubtedly includes natural persons. The class of such taxable persons has been indicated by the Legislature with reference to their occupational activity. Thus, in order to be authorised, a tax under clause (b) of Section 61 (1) must satisfy two conditions: First, it must be a tax on "persons". Second, such persons must be practicing any profession or art or carrying on any trade or calling in the municipality. 16. There can be no dispute that the appellants are "person" and, as such, satisfy the first condition. Even the learned counsel for the appellants has candidly conceded that the individual partners are also "persons" within the meaning of the said clause (b). Controversy thus becomes narrowed down into the issue: Whether persons collectively doing business in partnership in the municipality, fulfill the second condition? That is to say, do such persons "carry

on any trade or calling in the municipality" within the contemplation of clause (b)?

18. "Partnership" as defined in Section 4 of the Indian Partnership Act, 1932, is the relation between persons who have agreed to share the profits of a business carried on by all or any of them for the benefit of all. The section further makes it clear that a firm or partnership is not a legal entity separate and distinct from the partners. Firm is only a compendious description of the individuals who compose the firm. The crucial words in the definition of "partnership" are those that have been underlined. They hold the key to the question posed above. They show that the business is carried on by all or any of the partners. In the instant case, admittedly, all the plaintiff-appellants are carrying on the business in partnership. All the six partners are sharing the profits and losses. All the partners are jointly and severally responsible for the liabilities incurred or obligations incurred in the course of the business. Each partner is considered an agent of the other. This being the position, it is not possible to hold that each of the six partners is not carrying on a trade or calling within the purview of clause (b) of Section 61 (1) of the Municipal Act. At the most, it can be said that each of these six persons is severally as well as collectively carrying on a trade in the Municipality. There is nothing in the language of Section 61 or the scheme of the Municipal Act which warrants the construction that persons who are carrying on a trade in association or partnership with each other cannot be individually taxed under clause (b) of Section 61 (1). On the contrary, definite indication is available in the language and the scheme of this statute that such partners can be taxed as persons in their individual capacity. As noticed already, clause (b) makes it clear in no uncertain terms that this is a tax on "persons". Its incidence falls on individuals, who belong to a class practicing any profession or art; or carrying on a trade or calling in the municipality. To hold that persons who are collectively carrying on a trade in the municipality cannot be taxed individually, would be to read into the statute words which are not there. There are no words in clause (b) or elsewhere in the statute which, expressly or by necessary implication, exclude or exempt persons carrying on a trade collectively in the municipality from being taxed as individuals. To attract liability to a tax under this clause, it is sufficient that the person concerned is carrying on a trade in the municipality, irrespective of whether such trade is being carried on by him individually or in partnership with others. Thus, both the conditions necessary for levying a tax under clause (b) of sub-section (1) of Section 61 of the Municipal Act existed in this case. The appellants are "persons" and they are carrying on a trade in Chheharta Municipality.

9.3 By placing reliance on the observations made in para 18, the learned counsel submitted that a firm or partnership is not a legal entity separate and distinct from the partners.

10 In Mahabir Cold Storage (supra), the appeal before the Supreme Court was filed by the appellant assessee against the judgment of the Division Bench, Patna made in the Tax Case answering in favour of the Revenue and against the

Assessee. In the said case, the assessee was a registered partnership firm. In para 11, the Court observed as under:

11. The crucial question, therefore, is whether the appellant is the owner of the machinery and plant in the relevant assessment year 1962-63. Acquisition of ownership is a condition precedent to avail of the development rebate under S. 33(1) of the Act. It is now fairly clear from the statement of facts that the old and the new partnership firms are separately registered under the Act and the old one was doing its business at Calcutta and the new one at Purnea. They have been separately being assessed as independent assessable entities. Only the new firm alone was reconstituted consisting of the two partners of the old firm M/s. Prayagchand Hanumanmal and Periwal and Co. (P.) Ltd. Prayagchand and Hanumanmal individually are entitled to 25 per cent shares each for the profits in the appellant firm and Periwal and Co. (P.) Ltd. has 50 per cent shares of profit. Under the Indian Partnership Act, "1932 the partnership firm registered thereunder is neither a person nor a legal entity. It is merely a collective name for the individual members of the partnership. A firm as such cannot be a partner in another firm though its partners may be partners in another firm in their individual capacity. Either under the repealed Act or the Act, a firm is liable to be separately assessed to tax as well as all its partners in their capacity as individuals if they have taxable income. The appellant is separately registered under S. 26A of the Act and assessed to tax from the assessment year 1960-61 and onwards. There is no reconstitution of the original firm Prayagechand Hanumanmal inducting Periwal, and Co. (P.) Ltd. as its partner. Thus it is clear that the appellant assessee is a new identity under the Act. It is not a successor in interest of the old firm as per the provisions of the Act. The question then is whether the assessee is entitled to development rebate under S. 33(1) of the Act. (Under S. 10(1)(vib) of the repealed Act). Section 33(1) gives right to development rebate only to the owner who has acquired the ship or installed the machinery or plant. The necessary implication is that the assessee who claims development rebate should continue to remain to be the owner of the ship or plant or machinery during the relevant previous assessment year/ years and the owner alone is entitled to the development rebate till it becomes nil in the relevant previous assessment year or the succeeding assessment years carried forward up to 8 years and not thereafter.

11 In Comptroller and Auditor General (supra), the issue before the Supreme Court was whether the respondent being a proprietary concern was eligible for being brought on the panel for audit work of government companies and concerns. The audit work of the government and public undertakings was assigned to only those Chartered Accountant firms which were enrolled on the panel maintained by the appellant. The appellant through an advertisement invited applications from the firms of the Chartered Accountants for the purpose of empanelment for audit of the government companies. The respondent therein had submitted an application for enrollment on the panel, but the same was rejected on account of the fact that his firm was not a partnership firm, but a

proprietary concern. Aggrieved, the respondent filed a writ application under Article 226 of the Constitution of India challenging the exclusion of the proprietary concerns from their empanelment as being discriminatory, arbitrary and violative of Article 14 of the Constitution. The learned Single Judge of this High Court allowed the writ petition. The Letters Patent Appeal before the Division Bench was also dismissed. The Comptroller and Auditor General preferred an appeal before the Supreme Court. The Supreme Court, while dismissing the appeal, observed in para 9 as under:

9. The appellant insists that it is only a smaller group of Chartered Accountants firms that would be eligible for being brought on the panel for audit of public sector undertakings or Government concerns. The audit work of public sector undertaking, no doubt, is to be done by the qualified and efficient Chartered Accountants. Once a person is qualified, experienced and efficient, it is difficult to understand how he could be discriminated against only for the reason that he has chosen to act alone in the professional career and has not been able to form a partnership firm. The efficiency, as pointed out by the High Court, springs from the personal experience, proficiency and personal capacities. It is, therefore, not possible to link these characteristics and professional acumen to a person or persons in a firm alone. A single individual as an auditor in a proprietary concern can have such characteristics and professional acumen by himself and also through the assistance of experienced auditor who could be in his services as efficient as any partnership firm. It is often seen in many cases that some of the partners of the partnership firm are sleeping partners with no professional duties to discharge. A partnership concern is not a legal entity like company; it is a group of individual partners. In a partnership firm, it is the partner who will be assisted in carrying out the work but quite remains the eligible Chartered Accountant. It is the same situation as in a proprietary concern where a Chartered Accountant would be carrying on audit work all-in-one. Merely because some of the Chartered Accountants have formed a partnership firm, it cannot be assumed that they become more efficient for carrying out audit work than the individual Chartered Accountant who forms proprietary concern. It is, therefore, evident that the appellant himself erroneously assumed that the partnership firms are more efficient than the proprietary concern in the matter of audit of accounts of the public sector undertakings or of the Government concerns.

12 In *Bacha F. Guzdar* (supra), the argument before the Supreme Court was that the possession of the shareholders in a company was analogous to that of partners inter se. While holding the analogy is wholly inaccurate, the Supreme Court observed, in para 9, as under:

9. It was argued that the position of shareholders in a company is analogous to that of partners "inter se." This analogy is wholly inaccurate. Partnership is merely an association of persons for carrying on the business of partnership and in law the firm's name is a compendious method of describing the partners. Such is, however, not the case of a company which stands as a separate juristic

entity distinct from the shareholders. In Halsbury's Laws of England, Vol. 6 (3rd Ed), page 234, the law regarding the attributes of shares is thus stated : "A share is a right to a specified amount of the share capital of a company carrying with it certain rights and liabilities while the company is a going concern and in its winding up. The shares or other interest of any member in a company are personal estate transferable in the manner provided by its articles, and are not of the nature of real estate".

13. In *V. Subramaniam* (supra), the appeal before the Supreme Court arose of a suit filed before the Bombay City Civil Court instituted by the appellant praying for dissolution of an unregistered partnership firm between the appellant and the respondent. In that suit, a defence was taken that the suit was not maintainable in view of Sub-section (2A) of Section 69 of the Indian Partnership Act, 1932. The Bombay City Civil Court took the view that Sub-section (2A), which was introduced by the Maharashtra Amendment to Section 69 of the Act, was unconstitutional being violative of Articles 14 and 19(1) (g) of the Constitution of India. The Bombay City Civil Court made a reference in that regard to the High Court under Section 113 of the Code of Civil Procedure. The High Court, held that Sub-section (2A) of Section 69 was not unconstitutional. The appeal came up before the Supreme Court. After noticing Section 69(1) and (2) of the Partnership Act as well as Sub-section (2A) introduced by the Maharashtra Amendment 1984, the Court observed in paras 14 and 17 as under:

14. It may be mentioned that a partnership firm, unlike a company registered under the Indian Companies Act, is not a distinct legal entity, and is only a compendium of its partners. Even the registration of a firm does not mean that it becomes a distinct legal entity like a company. Hence the partners of a firm are co-owners of the property of the firm, unlike shareholders in a company who are not co-owners of the property of the company.

17. It has already been mentioned above that a partnership firm, whether registered or unregistered, is not a distinct legal entity, and hence the property of the firm really belongs to the partners of the firm. Subsection (2A) virtually deprives a partner in an unregistered firm from recovery of his share in the property of the firm or from seeking dissolution of the firm.

14 What is discernible from a conspectus of the authorities referred to above is that a partnership firm, unlike a company registered under the Indian Companies Act, is not a distinct legal entity or a juristic person, but is only a compendium of its partners. Even the registration of a firm would not make it a distinct legal entity like a company. The partners of a firm are co-owners of the proprietary firm, unlike the shareholders in a company who are not co-owners of the property of the company.

15 However, the position of a partnership firm so far as Section 138 read with Section 141 of the Negotiable Instruments Act is concerned appears to be altogether different. Section 141 of the 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.

Explanation. - For the purposes of this section.- (a) "company" means any body corporation and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

16 Sub-section (1) of Section 141 of the Act provides that if a person committing an offence under the section is a company, every person who, at the time 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. The offender in section 138 of the Act is the drawer of the cheque. He alone would have been the offender thereunder if the Act did not contain other provisions. It is because of section 141 of the Act that penal liability under section 138 is cast on other persons connected with the company. Three categories of persons can be discerned from the said provision who are brought within the purview of the penal liability through the legal fiction envisaged in the section. They are: (1) The company the principal offender which committed the offence, (2) Every one who was in charge of and was responsible for the business of the company, (3) Any other person who is a director or a manager or a secretary or officer of the company, with whose connivance or due to whose neglect the company has committed the offence. However, if a person proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence, he shall

not be liable to punishment under this section. Sub-section (2) further provides that where any offence under this Act has been committed by a company and it is provided 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 Explanation to the section defines company as 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.

17 It is only the drawer of the cheque, who can be held responsible for an offence under Section 138 of the Act. Section 141 provides for the constructive liability. It postulates that a person, in charge of and responsible to the company, in the context of the business of the company, shall also be deemed guilty of the offence. The drawer can be a company, a firm or an association of individuals, but only those directors, partners, or officers can be held responsible for the offence punishable under Section 138 of the Act, who are responsible to the company firm for the conduct of its business.

18 The Legislature has thought fit to provide an explanation in Section 141 of the Act and the plain reading of the expression company as used in Sub-clause (a) of the explanation appended to Section 141 of the Act shows that it is an inclusive of any body corporate or other association of individuals. Though the heading of Section 141 of the Act reads offences by companies; according to the explanation to that Section, 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. The term other association of individuals should not be understood to refer even to informal understanding between the individuals. It has to be understood in the context of body corporate and partnership firms. The principal of ejusdem generis gets attracted in such a case. Therefore, a sole proprietary concern is not a company within the meaning of company as defined under the explanation to Section 141 of the Act.

19 The Explanation to Section 141 makes it clear that wherever there is a reference under Section 141 to a company it has to be substituted by the word firm where the accused is a partnership firm and the provision has to be read as if it refers to the firm. What this means is that a complaint can be filed for the offence under Section 138 Negotiable Instruments Act not only against the partnership firm on whose behalf the cheque was issued but also against an individual partner or person who, at the time of the commission of the offence, was in charge of the affairs of the firm or responsible to it for the conduct of its business. There is nothing in the provision which indicates that in every complaint involving the dishonour of a cheque issued by a firm both the firm as well as its partners have to be compulsorily impleaded. In other words a complaint in which only the firm is made an accused and the partners are not would not be bad in law for that reason. Clearly that is not the intention of the

Parliament.

20 A partnership firm is a separate legal entity in terms of the Indian Partnership Act 1932 and it is answerable in law in that capacity. That is how under various statutes like the Income Tax Act 1961, the Central Excises Act 1944, the Sales Tax Laws and Section 141 Negotiable Instruments Act, a firm can be proceeded against as such. It is perfectly possible for a complainant, aggrieved by the dishonour of a cheque issued by or behalf of a firm, to file a complaint for the offence under Section 138 Negotiable Instruments Act only against the firm. The complainant may choose not to proceed against the individual partners as accused either because he is not aware as to who are the partners or is not interested in proceeding against the partners apart from the firm.

21 It is now well settled that an Explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning of the word itself shows it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision. Sarathi in "Interpretation of Statutes" while dwelling on the various aspect of an Explanation observes as follows:

"(a) The object of an explanation is to understand the Act in the light of the explanation.

(b) It does not ordinarily enlarge the scope of the original section which it explains, but only makes the meaning clear beyond dispute."

22 Swarup in "Legislation and Interpretation" very aptly sums up the scope and effect of an Explanation thus : "Sometimes an explanation is appended to stress upon a particular thing which ordinarily would not appear clearly from the provisions of the section. The proper function of an explanation is to make plain or elucidate what is enacted in the substantive provision and not to add or subtract from it. Thus an explanation does not either restrict or extend the enacting part; it does not enlarge or narrow down the scope of the original section that it is supposed to explain..... The Explanation must be interpreted according to its own tenor; that it is meant to explain and not vice versa ."

23 Bindra in "Interpretation of Statutes" (5th Edn.) at page 67 states thus :

"An explanation does not enlarge the scope of the original section that it is supposed to explain. It is axiomatic that an explanation only explains and does not expand or add to the scope of the original section.... The purpose of an explanation is, however, not to limit the scope of the main provision.... The construction of the explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. An "explanation" must be interpreted according to its own tenor."

24 The principles laid down by the aforesaid authors are fully supported by various authorities of the Supreme Court. In *Burmah Shell Oil Storage and Distributing Co. of India Ltd. v. Commercial Tax Officer* [(1961) 1 SCR 902 : (AIR

1961 SC 315)], a Constitution Bench decision of the Supreme Court observed thus : "Now, the Explanation must be interpreted according to its own tenor, and it is meant to explain cl. (1)(a) of the Article and not vice versa . It is an error to explain the Explanation with the aid of the Article, because this reverses their roles."

25 In Bihar Co-operative Development Cane Marketing Union Ltd. v. Bank of Bihar (1967) 1 SCR 848 : (AIR 1967 SC 389) the Supreme Court observed thus :

"The Explanation must be read so as to harmonise with and clear up any ambiguity in the main section. It should not be so construed as to widen the ambit of the section."

26 In Hiralal Rattanlal etc. v. State of U.P. [(AIR 1973 SC 1034)], the Supreme Court observed thus : "On the basis, of the language of the Explanation this Court held that it did not widen the scope of clause (c). But from what has been said in the case, it is clear that if on a true reading of an Explanation it appears that it has widened the scope of the main section, effect be given to legislative intent notwithstanding the fact that the legislature named that provision as an Explanation. "

27 In Dattatraya Govind Mahajan v. State of Maharashtra [(1977) 2 SCR 790: (AIR 1977 SC 915), the Supreme Court observed thus :

"It is true that the orthodox function of an explanation is to explain the meaning and effect of the main provision to which it is an explanation and to clear up any doubt or ambiguity in it..... Therefore, even though the provision in question has been called an Explanation, we must construe it according to its plain language and not on any a priori considerations."

28 Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is -

(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming

an hindrance in the interpretation of the same.

13. The first question is answered accordingly in the affirmative." At this stage, Mr.Varandani, the learned counsel appearing for the complainant invited my attention to a decision of the Supreme Court in the case of Charanjit Pal Jindal v. L.N.Metalics, (2015)15 SCC 768, wherein the Court observed in para 13 as under : "13. However, it will be open for the complainant to move before the court of competent jurisdiction for appropriate relief and may file a petition under Section 14 of the Limitation Act, 1963 seeking exclusion of the period on the ground that the respondent was seeking remedy before the other forum."

Mr.Varandani submitted that this Court may also pass the very same order as the one passed by the Supreme Court referred to above.

14. I find it difficult to accept such submission. I may only say that if there is any other legal remedy available in law, then the complainant may take recourse of the same. With the above, this application is allowed. The proceedings of the Criminal Case No.1834 of 2014 pending before the learned Chief Judicial Magistrate at Bhuj are hereby quashed. Rule made absolute to the aforesaid extent. Direct service is permitted.