

THE HIGH COURT OF MADHYA PRADESH
PRINCIPAL SEAT AT JABALPUR

Bench : HON'BLE SHRI JUSTICE RAJENDRA KUMAR SRIVASTAVA

M.Cr.C No.735/2020

Bhupendra Suryawanshi

VS.

Sai Traders

Shri Ankit Saxena, learned counsel for the petitioner.
Ms. Sonali Paroche, learned counsel for the respondent.

ORDER
(09.06.2020)

This petition under Section 482 Cr.P.C. has been filed by the petitioner being aggrieved by the order dated 20.05.2019 in case No. SC NIA 158/2018 passed by learned JMFC Narsinghpur whereby the learned JMFC has framed the charge under Section 138 N.I. Act against the petitioner.

2. According to case, respondent is a trade firm and filed a complaint through its proprietor against the petitioner who is the chairman of company namely 'Well Built Industry India Ltd., Kalyan Pura, Ashta, District-Sehore'. It is mentioned in the complaint that on account of business relation between the parties, the petitioner borrowed money of Rs. 2,00,000/- from the respondent on 14.08.2016. He assured the respondent to return the same within a period of four months. But, after expiry of stipulated period, when the respondent demanded his money, the petitioner started procrastinating and after insisting, the petitioner has given a cheque

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No. 000051 dated 25.11.2017 amounting to Rs. 2,00,000/- to the respondent. On 18.01.2018, when the respondent submitted the said cheque before the bank, same was dishonoured due to “stop payment” by the petitioner. Thereafter, the respondent sent a legal notice to the petitioner, even then he did not make payment, hence, the respondent filed a complaint before JMFC, Narsinghpur.

3. Learned counsel for the petitioner submits that according to complaint, the respondent has given the amount in question to the petitioner for business purpose and the petitioner has given the said cheque under the capacity of chairman of company namely ‘Well Built Industry India Ltd.’ but the respondent has not impleaded the company as a party in the complaint case. The respondent/complainant also failed to specify the role of present petitioner on behalf of the company. Hence, in view of the provision of Section 141 N.I. Act, the proceedings under Section 138 N.I. Act are bad in law and deserves to be quashed. With the aforesaid, he prays to allow this petition. In support of his contention, he has relied on the order passed by this Court in **M.Cr. C No. 50567/2018 (Brij Mohan Sharma Vs. M/s Sanfield (India) Ltd. Dated 05.02.2019.**

4. On the other hand, learned counsel for respondent opposes the petition submitting that since, the petitioner has borrowed the money from the respondent for his own business purpose, there was no need to implead the company as an accused. He further submits that even though the petitioner is responsible to return the money but if the law intends to implead the company as party, the

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respondent may prefer an application before the trial court, in this regard. With the aforesaid, he prays for dismissal of this petition. In support of his contention he has relied the judgment of Hon'ble Apex Court in the case of **Saroj Kumar Poddar Vs. State NCT of Delhi and another** passed in Appeal (Crl.) 70/2007.

5. Heard both the parties and perused the case.

6. On perusal of case, it appears that the petitioner is a chairman of company namely 'Well Built Industry India Ltd. Kalyanpur, Astha' which is registered under the companies Act, 2013. It is an admitted fact that the disputed cheque has been issued on behalf of the company. Therefore, before examining the facts of the case, it would be appropriate to consider the legal aspect first.

7. Section 138 of N.I Act speaks about the offence for dishonouring of cheques, which is quoted as under:-

“138 Dishonour of cheque for insufficiency, etc., of funds in the account. — Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

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(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.— *For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.]”*

8. Further, if such offence is committed by the companies,

Section 141 of the Act provides 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 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,—*

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- (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.]”

9. On reading of the above said provisions, it is apparent that Section 141 of N.I. Act deals with the offences committed by the companies and say that if an offence is committed by a company under Section 138 of the Act, every person, at the time, the offence was committed, was in-charge and responsible to the company in the conduct of the business of the company, is liable along with the company to be proceeded against and punished accordingly. Further, it is provided that no person shall liable to be punished if he proved that an offence was not committed under his knowledge or he has exercised all due diligence to prevent the commission of such offence.

10. In the present case, it is argued by the learned counsel for the petitioner that the respondent did not make the company as an accused and also there is no specific pleadings regarding role of the petitioner on behalf of the company. In this regard, in the case of **Aneeta Hada Vs. Godfather Travels and Tours Private Ltd**, reported in **2012 (5) SCC 661**, it has been held that when the company would be prosecuted then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments made in the complaint. To summarize, there cannot be any vicarious liability unless there is prosecution against the company. Further, in the case of **Anil Gupta Vs Star India Pvt. Ltd.**

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reported in **(2014) 10 SCC 373** after following the Aneeta Hada's case, the Hon'ble Apex Court has held as under :-

"13. In the present case, the High Court by impugned judgment dated 13.08.2017 held that the complaint against respondent no.2-Company was not maintainable and quashed the summon issued by the Trial Court against respondent no.2-Company. Thereby, the Company being not a party to the proceedings under Section 138 read with Section 141 of the Act and in view of the fact that part of the judgment referred to by the High Court in Anil Hada Vs. Indian Acrylic Ltd, (2000) 1 SCC 1 has been overruled by three Judge Bench of this Court in Aneeta Hada V. godfather Travels and Tours (p) Ltd, (2012) 5 SCC 661, we have no other option but to set aside the rest part of the impugned judgment whereby the High Court held that the proceedings against the appellant can be continued even in absence of the Company. We, accordingly, set aside that part of the impugned judgment dated 13.08.2007 passed by the High Court so far it relates to appellant and quash the summon and proceeding pursuant to complaint case No.698 of 2001 qua the appellant."

11. Further, looking to the trend set up by the complainants to implead all the Directors, company secretaries, etc., of the accused company, irrespective of whether they were actually involved in the commission of alleged offence or not, the Hon'ble Apex Court has issued several pronouncements to settle the issues. In one of the landmark case, **S.M.S. Pharmaceuticals Lts. Vs. Neeta Bhalla and Another**, reported in **(2005) 8 SCC 89**, the Hon'ble Apex Court has observed as under: -

"9. In view of the above discussion, our answers to the questions posed in the reference are as under:-

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of

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business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b).....Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c).....the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under Sub-section (2) of Section 141."

12. Further, in the case of **K.K. Ahuja Vs. V.K.Vora** reported in **2009 (10) SCC 48**, in para 27, the Hon'ble Apex Court has held as under:

"27. The position under Section 141 of the Act can be summarized thus:-

(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix 'Managing' to the word 'Director' makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

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(ii) In the case of a Director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141.

(iii) In the case of a Director, Secretary or Manager (as defined in Sec. 2(24) of the Companies Act) or a person referred to in clauses (e) and (f) of Section 5 of Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 141(1). No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.

(iv) Other Officers of a company can not be made liable under sub-section (1) of Section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence.”

13. Further, in the case of **National Small Industries Corpn. Ltd. Vs Harmeed Singh Paintal** reported in **(2010) 3 SCC 330**, the Hon'ble Apex Court has explained its earlier judgment passed in the case of **K.K. Ahuja (Supra)** and settled the principle of vicarious liability of the Director/Managing Director/Joint Director of company as well as principle regarding necessity of specific averment in the complaint.

14. Therefore, from the above discussion, it is clear that the person (Director/Managing Director/Joint Director/other officers and employees) of company can not be prosecuted under Section 138 of

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N.I. Act unless the company is impleaded as an accused and subject to following the principle laid down by the Hon'ble Apex Court in the cases of **S.M.S. Pharmaceuticals Ltd.(Supra), K.K.Ahuja(Supra)** and **National Small Industries Corpn. Ltd. (Supra).**

15. In the present case, although, the respondent stated that the petitioner borrowed money from him on account of personal need of his business but looking to the fact that the respondent has accepted his business relation with the petitioner and the disputed cheque was given by the petitioner on behalf of the Company. A demand notice was served only on the petitioner/accused, there was no demand notice against company, therefore, without arraying the company as an accused in complaint case, the petitioner can not be prosecuted for the offence of Section 138 N.I. Act. In this regard in the case of **Himanshu Vs. B. Shivamurthy and another** reported in **(2019) 3 SCC 797**, the Hon'ble Supreme Court has clarified the necessary condition to make out offence under Section 138 of NI Act, the relevant paras are quoted as under:-

8. The judgment of the three-Judge Bench has since been followed by a two-Judge Bench of this Court in Charanjit Pal Jindal v. L.N. Metalics [Charanjit Pal Jindal v. L.N. Metalics, (2015) 15 SCC 768 : (2016) 3 SCC (Civ) 447 : (2016) 3 SCC (Cri) 400] . There is merit in the second submission which has been urged on behalf of the appellant as well. The proviso to Section 138 contains the preconditions which must be fulfilled before an offence under the provision is made out. These conditions are: (i) presentation of the cheque to the bank within six months from the date on which it is drawn or within the period of its validity, whichever is earlier; (ii) a demand being made in writing by the payee or holder in due course by the issuance of a notice in writing to the drawer of the

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cheque within thirty days of the receipt of information from the bank of the return of the cheques; and (iii) the failure of the drawer to make payment of the amount of money to the payee or the holder in due course within fifteen days of the receipt of the notice.

9. In *MSR Leathers v. S. Palaniappan* [*MSR Leathers v. S. Palaniappan*, (2013) 1 SCC 177 : (2013) 1 SCC (Civ) 424 : (2013) 2 SCC (Cri) 458] , this Court held thus: (SCC p. 188, para 12)

“12. The proviso to Section 138, however, is all important and stipulates three distinct conditions precedent, which must be satisfied before the dishonour of a cheque can constitute an offence and become punishable. The first condition is that the cheque ought to have been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. The second condition is that the payee or the holder in due course of the cheque, as the case may be, ought to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. The third condition is that the drawer of such a cheque should have failed to make payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice. It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to Section 138 as clauses (a), (b) and (c) thereof that an offence under Section 138 can be said to have been committed by the person issuing the cheque.”

(emphasis supplied)

10. The importance of fulfilling these conditions has been adverted to in a recent judgment of a two-Judge Bench of this Court in *N. Harihara Krishnan v. J. Thomas* [*N. Harihara Krishnan v. J. Thomas*, (2018) 13 SCC 663 : (2018) 4 SCC (Civ) 440 : (2018) 3 SCC (Cri) 826] . Adverting to the ingredients of Section 138, the Court observed as follows:

“26. ... Obviously such complaints must contain the factual allegations constituting each of the ingredients of the offence under Section 138. Those ingredients are: (1) that a person drew a cheque on an account maintained by him with the banker; (2) that such a cheque when presented to the bank is returned by the bank unpaid; (3) that such a cheque was presented to the bank within a period of six months from the date it was drawn or within the period of its validity whichever is earlier; (4) that the payee demanded in

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writing from the drawer of the cheque the payment of the amount of money due under the cheque to payee; and (5) such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid.”

11. In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. The complaint was lodged only against the appellant without arraigning the company as an accused.

12. The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.

13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.

Emphasis supplied

14. We, accordingly, are of the view that the High Court was in error in rejecting the petition under Section 482 CrPC. We hence allow the appeal and set aside the judgment of the High Court. In consequence, the complaint, being CRP No. 27 of 2004 shall stand quashed.

16. Hence, this petition is **allowed**. Consequently, the impugned order dated 20.05.2019 in case No. SC NIA 1582018 passed by learned JMFC Narsinghpur is hereby set aside. However, petitioner is free to avail any other remedy available in this regard.

(Rajendra Kumar Srivastava)
Judge