Anil Gupta vs Star India Pvt.Ltd.& Anr on 7 July, 2014

Equivalent citations: AIR 2014 SUPREME COURT 3078, 2014 (10) SCC 373, 2014 AIR SCW 4210, 2014 ACD 793 (SC), 2014 (5) ADR 414, (2015) 2 MH LJ (CRI) 1, (2015) 2 MPLJ 208, 2014 CRILR(SC MAH GUJ) 791, (2014) 142 ALLINDCAS 262 (SC), 2015 CALCRILR 2 655, (2015) 1 CIVLJ 664, 2015 (1) SCC (CRI) 124, (2015) 2 MPHT 365, 2014 ALLMR(CRI) 2726, (2014) 4 PAT LJR 7, (2014) 4 DLT(CRL) 912, 2014 (3) ABR (CRI) 527, (2014) 87 ALLCRIC 347, 2014 CRILR(SC&MP) 791, (2014) 4 CRIMES 149, (2014) 4 ALLCRILR 232, (2014) 2 NIJ 393, 2014 (8) SCALE 480, (2014) 3 CRILR(RAJ) 791, (2014) 2 UC 1519, 2014 (3) KER LT 16 SN, (2014) 3 CIVILCOURTC 706, (2014) 1 MAD LJ 347, (2014) 59 OCR 43, (2014) 4 PUN LR 138, (2014) 3 PUN LR 787, (2014) 3 RECCRIR 587, (2014) 3 CURCRIR 378, (2014) 3 BANKCAS 599, (2014) 3 RECCIVR 642, (2014) 3 ALLCRIR 2577, (2014) 8 SCALE 480, (2014) 3 BOMCR(CRI) 408, (2014) 3 CRIMES 447, (2014) 3 CURCC 141, (2014) 2 ALD(CRL) 751, 2014 AAC 2159 (MAD), (2014) 135 ALLINDCAS 505 (MAD)

Bench: V. Gopala Gowda, Sudhansu Jyoti Mukhopadhaya

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1364 OF 2014
(arising out of SLP(Crl.) No.7039 of 2007)

Anil Gupta … APPELLANT

VERSUS

Star India Pvt. Ltd. & Anr. … RESPONDENTS

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA,J.

Leave granted.

2. This appeal is directed against the judgment dated 13th August, 2007 passed by the High Court of Delhi at New Delhi in Criminal Miscellaneous Case No.2380 of 2004. By the impugned judgment,

the High Court held that the complaint under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the, 'Act') was barred by limitation and quashed the summon order against respondent no.2-Visionaries Media Network (hereinafter referred to as the, 'Company'). It further held that the dispute qua the appellant (petitioner no.2 before High Court) is within limitation and affirmed the summon order against the appellant.

3. The factual matrix of the case is as follows:

> A subscription agreement was entered into between respondent nos.1 and 2 whereby respondent no.2-Company was appointed as distributor of Star Channels and collecting subscription fee for the same. On 27.12.2003, respondent no.2-Company issued three cheques bearing nos.790913, 790912 and 790911 for Rs.6,00,000/-, Rs.5,00,000/- and Rs.5,00,000/- respectively drawn on the Indian Overseas Bank, Gandhi Nagar, Jammu. The aforesaid three cheques were presented before the Indian Overseas Bank, Gandhi Nagar, Jammu and were dishonoured on 6.01.2004. Respondent No.1 served notice on respondent no.2-Company with a demand notice separately for all the three cheques. Respondent no.2-Company replied to the said notice on 20.01.2004 informed respondent no.1 that payments were stopped because of their inability to stop the piracy due to which the cable operators did not make payments.
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> Thereafter, respondent no.1 issued second notice dated 28.01.2004 on the appellant based on the same facts and based on the same memo of dishonor in respect of the aforesaid three cheques. Respondent no.1 also issued a corrigendum of the same date to the said notice. The appellant submitted reply to the said notice on 3.02.2004.

4. Respondent no.1 filed a Criminal Complaint under Sections 138 and 141 of the Act on 17.03.2004. According to appellant, respondent no,1 concealed the material fact of having earlier issued notice dated 14.1.2004 with regard to the aforesaid three cheques and by misleading the Court got summons issued by Metropolitan Magistrate in Complaint No.698 of 2001 to the appellant and respondent no.2-Company.

5. Thereafter, respondent no.2-Company and appellant jointly filed Criminal Miscellaneous Petition No.2380 of 2004 under Section 482 of the Criminal Procedure Code, 1973 before the High Court of Delhi at New Delhi for quashing the aforesaid criminal complaint filed by respondent no.1. In its reply, respondent no.1 taken the plea that first notice dated 14.01.2004 was not a notice under Section 138 of the Act. It was contended on behalf of the appellant that he was only vicariously liable on behalf of respondent no.2-Company. Learned counsel for the appellant placed reliance on decisions of this Court in support of his claim.

6. The High Court by impugned judgment while recording the stand taken by respondent no.1 that letter dated 14.01.2004 constituted a valid notice under Section 138 of the Act and hence the complaint based on second notice against respondent no.2-Company was not maintainable and quashed the summon issued by the Trial Court against respondent no.2-Company. However, so far

as appellant is concerned, the High Court relying on decision of this Court in Anil Hada v. Indian Acrylic Ltd., (2000) 1 SCC 1, held that the proceeding against the Director can be issued even in absence of the Company being impleaded, The High Court further held that the summoning order was valid since the first notice was not addressed to the appellant and the second notice which was also addressed to the appellant was issued within time and. therefore, criminal complaint filed by respondent no.1 against the appellant on the basis of the said notice is maintainable.

7. Learned counsel appearing on behalf of the appellant contended that the order of the High Court is contrary to the law in as much as this is not a case where proceedings were initiated against the Managing Director alone. On the contrary, the proceedings are instituted against the company/accused and its Managing Director. In the event of the company/accused being let off, the same cannot continue against the Managing Director who admittedly is only vicariously liable.

8. It is further submitted that even as per law laid down in Anil Handa's case, the Director of a company/accused is only liable vicariously and upon his showing that the principal accused is not liable he cannot be held guilty.

9. On the other hand, according to counsel for the respondents, the issue is no longer res integra as held by the High Court.

10. Section 138 of the Act deals with dishonor of cheque for insufficiency etc. as follows:

> "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 arrangement 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 extend 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—
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> (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 [pic]

> (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." From the aforesaid provision, it is clear that only the drawer of the cheque falls within the ambit of Section 138 of the Act whether human being or a body corporate or even a firm.

11. The guilt for offence under Section 138 will be deemed to be upon other persons connected with the Company in view of Section 141 of the Act, which reads as follows:

> "141. Offences by companies.—(1) If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:
>
> Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed [pic]without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.
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> (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."

12. Similar question was raised and considered by two Judge Bench of this Court in Anil Hada v. India Acrylic Ltd. (2000) 1 SCC 1. This Court held:

> "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 [pic]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." "21. 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 sub- sections (1) and (2) of Section 141 of the Act. In the light of the aforesaid view we do not consider it necessary to deal with the remaining question whether winding-up order of a company would render the company non-existent."

13. In Aneeta Hada v. Godfather Travels and Tours Pvt. Ltd., (2008) 13 SCC 703, taking note of the maxim lex non cogit ad impossibilia, two Judge Bench of this Court observed:

> "54. True interpretation, in my opinion, of the said provision would be that a company has to be made an accused but applying the principle of lex non cogit ad impossibilia i.e. if for some legal snag, the company cannot be proceeded against without obtaining sanction of a court of law or other authority, the trial as against the other accused may be proceeded against if the ingredients of Section 138 as also Section 141 are otherwise fulfilled. In such an event, it would not be a case where the company had not been made an accused but would be one where the company cannot be proceeded against due to existence of a legal bar. A distinction must be borne in mind between cases where a company had not been made an accused and the one where despite making it an accused, it cannot be proceeded against because of a legal bar."

14. Again the same question was considered by three Judge Bench of this Court in Aneeta Hada v. Godfather Travels and Tours Pvt. Ltd. (2012) 5 SCC

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

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

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh17 which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada is overruled with the qualifier as stated in para 51. The decision in Modi Distillery has to be treated to be restricted to its own facts as has been explained by us hereinabove."

15. In the present case, the High Court by impugned judgment dated 13th August, 2007 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 (supra) has been overruled by three Judge Bench of this Court in Aneeta Hada (supra), 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 13th August, 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.

16. The appeal is allowed with aforesaid observation.

... ... J. (SUDHANSU JYOTI MUKHOPADHAYA)
.....J. (V. GOPALA GOWDA) NEW DELHI, JULY 07, 2014.