

DILIP HARIRAMANI

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v.

BANK OF BARODA

(Criminal Appeal No. 767 of 2022)

MAY 09, 2022

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**[AJAY RASTOGI AND SANJIV KHANNA, JJ.]**

*Negotiable Instruments Act, 1881: s. 138 r/w s.141 – Dishonour of cheque – Vicarious liability of partner – On facts, cheque issued by authorised signatory of the partnership firm to the Bank for part payment of loan - Dishonour of cheque due to insufficient funds – Complaint u/s. 138 r/w 141 against appellant and other, being partner of firm – Firm not made an accused – Conviction by trial court and High Court – On appeal, held : s. 141 impose vicarious liability by deeming fiction which presupposes and requires the commission of the offence by the company or firm as a principal accused, to make them liable and convicted as vicariously liable – Appellant did not issue any cheque, which had been dishonoured, in his personal capacity or otherwise as a partner – In the absence of any evidence led by the prosecution to show and establish that the appellant was in charge of and responsible for the conduct of the affairs of the firm, the conviction of the appellant has to be set aside – Appellant cannot be convicted merely because he was a partner of the firm which had taken the loan or that he stood as a guarantor for such a loan – Thus, the appellant’s conviction u/s. 138 r/w 141 set aside.*

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**Allowing the appeal, the Court**

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**HELD: 1.1 Sub-section (1) to Section 141 of the Negotiable Instruments Act, 1881 states that where a company commits an offence, 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, as well as the company itself, shall be deemed to be guilty of the offence. The expression ‘every person’ is wide and comprehensive enough to include a director, partner or other officers or persons. At the same time, it follows that a person who does not bear out the requirements of ‘in charge of and responsible to the company for the conduct of its business’**

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- A is not vicariously liable under Section 141 of the NI Act. The burden is on the prosecution to show that the person prosecuted was in charge of and responsible to the company for conduct of its business. The proviso, which is in the nature of an exception, states that a person liable under sub- section (1) shall not be punished 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. The onus to satisfy the requirements and take benefit of the proviso is on the accused. Still, it does not displace or extricate the initial onus and burden on the prosecution to first establish the requirements of sub- section (1) to Section 141 of the NI Act. The proviso gives immunity to a person who is otherwise vicariously liable under sub-section (1) to Section 141 of the NI Act. [Para 7][624-B-F]

- 1.2 Sub-section (2) to Section 141 of the NI Act states that notwithstanding anything contained in sub-section (1), where a company has committed any offence under the Act, and it is proved that such an 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 officers of the company, then such director, manager, secretary or other officers of the company shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Sub-section (2) to Section 141 of the NI Act does not state that the persons enumerated, which can include an officer of the company, can be prosecuted and punished merely because of their status or position as a director, manager, secretary or any other officer, unless the offence in question was committed with their consent or connivance or is attributable to any neglect on their part. The onus under sub-section (2) to Section 141 of the NI Act is on the prosecution and not on the person being prosecuted. [Para 8][624-F-H; 625-A-B]

- G 1.3 It is an admitted case of the respondent Bank that the appellant had not issued any of the three cheques, which had been dishonoured, in his personal capacity or otherwise as a partner. In the absence of any evidence led by the prosecution to show and establish that the appellant was in charge of and

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responsible for the conduct of the affairs of the firm, the conviction of the appellant has to be set aside. The appellant cannot be convicted merely because he was a partner of the firm which had taken the loan or that he stood as a guarantor for such a loan. The Partnership Act, 1932 creates civil liability. Further, the guarantor's liability under the Contract Act, 1872 is a civil liability. The appellant may have civil liability and may also be liable under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. However, vicarious liability in the criminal law in terms of Section 141 of the NI Act cannot be fastened because of the civil liability. Vicarious liability under sub-section (1) to Section 141 of the NI Act can be pinned when the person is in overall control of the day- to-day business of the company or firm. Vicarious liability under sub-section (2) to Section 141 of the NI Act can arise because of the director, manager, secretary, or other officer's personal conduct, functional or transactional role, notwithstanding that the person was not in overall control of the day-to-day business of the company when the offence was committed. Vicarious liability under sub-section (2) is attracted when the offence is committed with the consent, connivance, or is attributable to the neglect on the part of a director, manager, secretary, or other officer of the company. [Para 11][627-B-G]

1.4 The provisions of Section 141 impose vicarious liability by deeming fiction which presupposes and requires the commission of the offence by the company or firm. Therefore, unless the company or firm has committed the offence as a principal accused, the persons mentioned in sub-section (1) or (2) would not be liable and convicted as vicariously liable. Section 141 extends vicarious criminal liability to officers associated with the company or firm when one of the twin requirements of Section 141 has been satisfied, which person(s) then, by deeming fiction, is made vicariously liable and punished. However, such vicarious liability arises only when the company or firm commits the offence as the primary offender. [Para 14][630-A-C]

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- A **1.5 The appellant's conviction u/s. 138/141 of the NI Act is set aside. The impugned judgment of the High Court confirming the conviction and order of sentence passed by the Sessions Court, and the Judicial Magistrate are set aside.[Para 15][631-B]**
- B *Monaben Ketanbhai Shah and Another v. State of Gujarat and Others* (2004) 7 SCC 15 : [2004] 3 Suppl. SCR 411; *Aneeta Hada v. Godfather Travels and Tours Private Ltd.* (2012) 5 SCC 661 : [2012] 5 SCR 503; *State of Karnataka v. Pratap Chand and Others* (1981) 2 SCC 335 : [1981] 3 SCR 200; *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Another* (2005) 8 SCC 89 : [2005] 3 Suppl. SCR 371; *National Small Industries Corporation Limited v. Harmeet Singh Paintal and Another* (2010) 3 SCC 330 : [2010] 2 SCR 805; *Girdhari Lal Gupta v. D. H. Mehta and Another* (1971) 3 SCC 189 : [1971] 3 SCR 748; *State of Karnataka v. Pratap Chand and Others* (1981) 2 SCC 335 : [1981] 3 SCR 200; *Dayle De'souza v. Government of India through Deputy Chief Labour Commissioner (C) and Another* (2021) SCC OnLine SC 1012; *State of Madras v. C.V. Parekh and Another* (1970) 3 SCC 491;
- E *Sheoratan Agarwal and Another v. State of Madhya Pradesh* (1984) 4 SCC 352 : [1985] 1 SCR 719; *Anil Hada v. Indian Acrylic Ltd.* (2000) 1 SCC 1 : [1999] 5 Suppl. SCR 6; *Sharad Kumar Sanghi v. Sangita Rane* (2015) 12 SCC 781 : [2015] 2 SCR 145; *Himanshu v. B. Shivamurthy and Another* (2019) 3 SCC 797 : [2019] 1 SCR 991; *Hindustan Unilever Limited v. State of Madhya Pradesh* (2020) 10 SCC 751 - referred to.
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#### Case Law Reference

- |   |                         |             |                |
|---|-------------------------|-------------|----------------|
| G | [2004] 3 Suppl. SCR 411 | referred to | Para 6         |
|   | [2012] 5 SCR 503        | referred to | Paras 7 and 14 |
|   | [1981] 3 SCR 200        | referred to | Para 7         |
|   | [2005] 3 Suppl. SCR 371 | referred to | Para 7         |
| H | [2010] 2 SCR 805        | referred to | Para 10        |

[1971] 3 SCR 748	referred to	Para 11	A
[1981] 3 SCR 200	referred to	Para 11	
(1970) 3 SCC 491	referred to	Para 13	
[1985] 1 SCR 719	referred to	Para 13	
[1999] 5 Suppl. SCR 6	referred to	Para 13	B
[2015] 2 SCR 145	referred to	Para 14	
[2019] 1 SCR 991	referred to	Para 14	
(2020) 10 SCC 751	referred to	Para 14	

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 767 of 2022. C

From the Judgment and Order dated 12.10.2020 of the High Court of Judicature at Chhattisgarh at Bilaspur in Criminal Revision Petition No. 1512 of 2019.

Pramod Kumar Dubey, Sr. Adv., Ravi Sharma, Anjani Kumar Rai, T. Prashar, Prince Kumar, Deep Narayan Sarkar, Advs. for the Appellant. D

Ms. Praveena Gautam, Pawan Shukla, Raja Ram, Aman S. Sharma, Aman Rastogi, Advs. for the Respondent.

The Judgment of the Court was delivered by E

**SANJIV KHANNA, J.**

Leave granted.

2. The issues raised in this appeal by the appellant, Dilip Hariramani, challenging his conviction under Section 138<sup>1</sup> read with Section 141 of F

<sup>1</sup> 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 provision 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: G

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<sup>2</sup> from the date on which it is drawn or within the period of its validity, whichever is earlier; H

A the Negotiable Instruments Act, 1881,<sup>2</sup> are covered by the decisions of this Court on the aspects of (i) vicarious criminal liability of a partner; and (ii) whether a partner can be convicted and held to be vicariously liable when the partnership firm is not an accused tried for the primary/substantive offence.

B 3. We are not required to refer to the facts extensively. Suffice it is to notice that the respondent before us – Bank of Baroda, had granted term loans and cash credit facility to a partnership firm – M/s. Global Packaging<sup>3</sup> on 04<sup>th</sup> October 2012 for Rs. 6,73,80,000/-. It is alleged that in part repayment of the loan, the Firm, through its authorised signatory, Simaiya Hariramani, had issued three cheques of Rs. 25,00,000/- each  
C on 17<sup>th</sup> October 2015, 27<sup>th</sup> October 2015 and 31<sup>st</sup> October 2015. However, the cheques were dishonoured on presentation due to insufficient funds. On 04<sup>th</sup> November 2015, the Bank, through its Branch Manager, issued a demand notice to Simaiya Hariramani under Section 138 of the NI Act. On 07<sup>th</sup> December 2015, the respondent Bank, through its Branch  
D Manager, filed a complaint under Section 138 of the NI Act before the Court of Judicial Magistrate, Balodabazar, Chhattisgarh, against Simaiya Hariramani and the appellant. The Firm was not made an accused. Simaiya Hariramani and the appellant, as per the cause title, were shown as partners of the Firm. Paragraph 8 of the complaint, which relates to the vicarious culpability, states:

E “8. That, both accused No. 1 and accused No. 2 are partners of the indebted firm. Accused No. 1, as a partner of the debtor firm, issued a under the obligation of the debtor firm. Thus, under Section 20 of the Partnership Act 1932, accused No. 2 is equally responsible for the underlying authority and liability of the deemed partners.”  
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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

G (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.

<sup>2</sup> Hereinafter referred to as the ‘NI Act’.

<sup>3</sup> Hereinafter referred to as ‘the Firm’.

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Other than the paragraph mentioned above, no other assertion or statement is made to establish the vicarious liability of the appellant. A

4. The respondent Bank had produced as witness - Prashant Kumar Gartia (PW-1), who was posted as the Branch Manager of the respondent and had deposed that the Firm was a partnership firm with Simaiya Hariramani as its partner. The Firm had availed term loans and cash credit and gave three cheques of Rs. 25,00,000/- each, which were dishonoured due to 'insufficient funds'. Even after the demand notice (Exhibit P-04), the accused had not deposited the amount. Thereby, a complaint under Section 138 of the NI Act was filed. In his cross-examination, PW-1 admitted that the demand notice had not been issued to the Firm and that no loan had been obtained by Dilip Hariramani and Simaiya Hariramani in their individual capacity. B C

5. By judgment dated 19<sup>th</sup> February 2019, the appellant and Simaiya Hariramani were convicted by the Judicial Magistrate First Class, Balodabazar, Chhattisgarh, under Section 138 of the NI Act and sentenced to imprisonment for six months. They were also asked to pay Rs. 97,50,000/- as compensation under Section 357(3)<sup>4</sup> of the Code of Criminal Procedure, 1973 and, in default, suffer additional imprisonment for one month. An appeal preferred by the appellant and Simaiya Hariramani challenging their conviction was dismissed by the Sessions Judge, Balodabazar, Chhattisgarh, *vide* judgment dated 21<sup>st</sup> November 2019, *albeit* the appellate court modified the sentence awarded to imprisonment till the rising of the court and at the same time, enhanced the compensation amount under Section 357(3) from Rs. 97,50,000/- to Rs. 1,20,00,000/- with the stipulation that the appellant and Simaiya Hariramani shall suffer additional imprisonment for three months in case of failure to pay. D E F

6. The appellant and Simaiya Hariramani challenged the judgment before the High Court of Chhattisgarh, which has been dismissed by the impugned judgment dated 12<sup>th</sup> October 2020. The impugned judgment primarily relies upon the decision of this Court in *Monaben Ketanbhai Shah and Another v. State of Gujarat and Others*<sup>5</sup> and observes that G

<sup>4</sup> 357(3): When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced

<sup>5</sup> (2004) 7 SCC 15

A the liability under the NI Act is only upon the partners who are responsible for the firm for conduct of its business. In the present case, both the appellant and Simaiya Hariramani had furnished guarantees of the amount borrowed by the Firm from the Bank. The exact reasoning given by the High Court reads as under:

B “15. The only question raised in this revision petition is that the prosecution of the applicants in personal capacity, was not maintainable, appears to be out of place in view of the discussions, which has been made hereinabove. It is liability of a person as a partner of a firm, that has to be given emphasis. Lapse to make a proper mention in the cause title of the complaint would not by itself dis-entitle, the complainant, who has a claim to make and who has entitlement to file a complaint against the partners of the firm. The cause title of the complaint of course does not mention other description of the applicant, but the body of the plaint clearly mentions that the applicants are the partners of M/s. Global Packaging.

D 16. Section 141 of the Act of 1881 provides as to who shall be deemed as guilty and it mentions the person concerned not a company or the firm. Therefore, the complaint filed against the applicants was not against the provisions of law or against the provision under Section 141 of the Act of 1881.”

E 7. Before we refer to the pertinent legal ratio in the case of *Aneeta Hada v. Godfather Travels and Tours Private Ltd.*,<sup>6</sup> we would like to refer to an earlier apposite judgment of this Court in *State of Karnataka v. Pratap Chand and Others*,<sup>7</sup> in which case prosecution had been initiated under the Drugs and Cosmetics Act, 1940 against a partnership firm and its partners. Reference was made to Section 34<sup>8</sup> of the Drugs

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<sup>6</sup> (2012) 5 SCC 661

<sup>7</sup> (1981) 2 SCC 335

G <sup>8</sup> 34. Offences by companies.—(1) Where an offence under this Act has been committed by 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:

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



and Cosmetics Act, which is *pari materia* to Section 141 of the NI Act. A  
Therefore, for the sake of convenience and for deciding the present  
appeal, we will reproduce Section 141 of the NI Act:

“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 B  
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 C  
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 D  
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 E  
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 F  
also be deemed to be guilty of that offence and shall be liable to  
be proceeded against and punished accordingly.

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(2) Notwithstanding anything contained in sub-section (1), where an 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 G  
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 a 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.

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- A        *Explanation.*—For the purposes of this section,—
- (a) “company” means any body corporate and includes a firm or other association of individuals; and
- (b) “director”, in relation to a firm, means a partner in the firm.”
- B        Sub-section (1) to Section 141 of the NI Act states that where a company commits an offence, 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, as well as the company itself, shall be deemed to be guilty of the offence. The expression ‘every person’ is
- C        wide and comprehensive enough to include a director, partner or other officers or persons. At the same time, it follows that a person who does not bear out the requirements of ‘in charge of and responsible to the company for the conduct of its business’ is not vicariously liable under Section 141 of the NI Act. The burden is on the prosecution to show that the person prosecuted was in charge of and responsible to the company
- D        for conduct of its business. The proviso, which is in the nature of an exception, states that a person liable under sub-section (1) shall not be punished 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. The onus to satisfy the requirements and take benefit of the proviso is on the accused. Still, it does not displace or
- E        extricate the initial onus and burden on the prosecution to first establish the requirements of sub-section (1) to Section 141 of the NI Act. The proviso gives immunity to a person who is otherwise vicariously liable under sub-section (1) to Section 141 of the NI Act.<sup>9</sup>
8. Sub-section (2) to Section 141 of the NI Act states that
- F        notwithstanding anything contained in sub-section (1), where a company has committed any offence under the Act, and it is proved that such an 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 officers of the company, then such director, manager, secretary
- G        or other officers of the company shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Sub-section (2) to Section 141 of the NI Act does not state that the persons enumerated, which can include an officer of the company, can be prosecuted and punished merely because of their status or position
- H        <sup>9</sup> S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Another, (2005) 8 SCC 89, para 4 and 9.

as a director, manager, secretary or any other officer, unless the offence in question was committed with their consent or connivance or is attributable to any neglect on their part. The onus under sub-section (2) to Section 141 of the NI Act is on the prosecution and not on the person being prosecuted. A

9. In *Pratap Chand* (supra), specific reference was made to the Explanation to Section 34 of the Drugs and Cosmetics Act, which states that for Section 34, a ‘company’ means a body corporate and includes a firm or association of individuals, and a ‘director’ in relation to a firm means a partner in the firm. Thereafter, the conviction of the second respondent, one of the partners in the firm therein, was quashed on the ground that he cannot be convicted merely because he has the right to participate in the firm’s business in terms of the partnership deed. Thus, notwithstanding the legal position that a firm is not a juristic person, a partner is not vicariously liable for an offence committed by the firm, unless one of the twin requirements are satisfied and established by the prosecution. This Court gave the following reasoning: B C D

“7. It is seen that the partner of a firm is also liable to be convicted for an offence committed by the firm if he was in charge of, and was responsible to, the firm for the conduct of the business of the firm or if it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of the partner concerned. In the present case the second respondent was sought to be made liable on the ground that he along with the first respondent was in charge of the conduct of the business of the firm. Section 23-C of the Foreign Exchange Regulation Act, 1947 which was identically the same as Section 34 of the Drugs and Cosmetics Act came up for interpretation in *G.L. Gupta v. D.H. Mehta*, (1971) 3 SCC 189 where it was observed as follows: E F

“What then does the expression ‘a person in-charge and responsible for the conduct of the affair of a company’ means? It will be noticed that the word ‘company’ includes a firm or other association, and the same test must apply to a director in-charge and a partner of a firm in-charge of a business. It seems to us that in the context a person ‘in-charge’ must mean that the person should be in overall control of the day to day business of the company or firm. This inference follows from G H

A the wording of Section 23-C(2). It mentions director, who may be a party to the policy being followed by a company and yet not be in-charge of the business of the company. Further it mentions manager, who usually is in charge of the business but not in overall charge. Similarly the other officers may be in charge of only some part of business.”

B 10. We would also refer to the summarisation of law on Section 141 by this Court in *National Small Industries Corporation Limited v. Harmeet Singh Paintal and Another*,<sup>10</sup> to the following effect:

“39. From the above discussion, the following principles emerge:

C (i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

D (ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

E (iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

F (iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

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(vii) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at

H <sup>10</sup> (2010) 3 SCC 330: The case dealt with challenge to a summoning order. Withal, interference by the courts at the stage of summoning order is restricted/limited.

the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases.” A

11. In the present case, we have reproduced the contents of the complaint and the deposition of PW-1. It is an admitted case of the respondent Bank that the appellant had not issued any of the three cheques, which had been dishonoured, in his personal capacity or otherwise as a partner. In the absence of any evidence led by the prosecution to show and establish that the appellant was in charge of and responsible for the conduct of the affairs of the firm, an expression interpreted by this Court in *Girdhari Lal Gupta v. D.H. Mehta and Another*<sup>11</sup> to mean ‘a person in overall control of the day-to-day business of the company or the firm’, the conviction of the appellant has to be set aside.<sup>12</sup> The appellant cannot be convicted merely because he was a partner of the firm which had taken the loan or that he stood as a guarantor for such a loan. The Partnership Act, 1932 creates civil liability. Further, the guarantor’s liability under the Indian Contract Act, 1872 is a civil liability. The appellant may have civil liability and may also be liable under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. However, vicarious liability in the criminal law in terms of Section 141 of the NI Act cannot be fastened because of the civil liability. Vicarious liability under sub-section (1) to Section 141 of the NI Act can be pinned when the person is in overall control of the day-to-day business of the company or firm. Vicarious liability under sub-section (2) to Section 141 of the NI Act can arise because of the director, manager, secretary, or other officer’s personal conduct, functional or transactional role, notwithstanding that the person was not in overall control of the day-to-day business of the company when the offence was committed. Vicarious liability under sub-section (2) is attracted when the offence is committed with the consent, connivance, or is attributable to the neglect on the part of a director, manager, secretary, or other officer of the company. B C D E F

12. The demand notice issued on 04<sup>th</sup> November 2015 by the Bank, through its Branch Manager, was served solely to Simaiya Hariramani, the authorised signatory of the Firm. The complaint dated 07<sup>th</sup> December 2015 under Section 138 of the NI Act before the Court G

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<sup>11</sup> (1971) 3 SCC 189

<sup>12</sup> State of Karnataka v. Pratap Chand and Others, (1981) 2 SCC 335.

A of Judicial Magistrate, Balodabazar, Chhattisgarh, was made against Simaiya Hariramani and the appellant. Thus, in the present case, the Firm has not been made an accused or even summoned to be tried for the offence.

B 13. The judgment in *Dayle De'souza v. Government of India through Deputy Chief Labour Commissioner (C) and Another*,<sup>13</sup> answered the question of whether a director or a partner can be prosecuted without the company being prosecuted. Reference in this regard was made to the views expressed by this Court in *State of Madras v. C.V. Parekh and Another*<sup>14</sup> on the one hand and the divergent view expressed in *Sheoratan Agarwal and Another v. State of Madhya Pradesh*<sup>15</sup> and *Anil Hada v. Indian Acrylic Ltd.*<sup>16</sup> This controversy was settled by a three Judge Bench of this Court in *Aneeta Hada* (supra),

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<sup>13</sup> 2021 SCC OnLine SC 1012

D <sup>14</sup> (1970) 3 SCC 491: "3. 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 Vallabhdas Thacker and any contravention by them would not fasten responsibility on the respondents. The acquittal of the respondents is, therefore, fully justified. The appeal fails and is dismissed."

G <sup>15</sup> (1984) 4 SCC 352: The court held that anyone among : the company itself; every person in-charge of and responsible to the company for the conduct of the business; or any director, manager, secretary or other officer of the company with whose consent or connivance or because of whose neglect offence had been committed, could be prosecuted alone.

H <sup>16</sup> (2000) 1 SCC 1:"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

in which, interpreting and expounding the difference between the primary/  
substantial liability and vicarious liability under Section 141 of the NI  
Act, it has 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.

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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* 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.”

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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.”

- A 14. The provisions of Section 141 impose vicarious liability by  
deeming fiction which presupposes and requires the commission of the  
offence by the company or firm. Therefore, unless the company or firm  
has committed the offence as a principal accused, the persons mentioned  
in sub-section (1) or (2) would not be liable and convicted as vicariously  
liable. Section 141 of the NI Act extends vicarious criminal liability to  
B officers associated with the company or firm when one of the twin  
requirements of Section 141 has been satisfied, which person(s) then,  
by deeming fiction, is made vicariously liable and punished. However,  
such vicarious liability arises only when the company or firm commits  
the offence as the primary offender. This view has been subsequently  
C followed in *Sharad Kumar Sanghi v. Sangita Rane*,<sup>17</sup> *Himanshu v.*  
*B. Shivamurthy and Another*,<sup>18</sup> and *Hindustan Unilever Limited v.*  
*State of Madhya Pradesh*.<sup>19</sup> The exception carved out in *Aneeta Hada*

- D <sup>17</sup> (2015) 12 SCC 781: "11. In the case at hand as the complainant's initial statement  
would reflect, the allegations are against the Company, the Company has not been  
made a party and, therefore, the allegations are restricted to the Managing Director. As  
we have noted earlier, allegations are vague and in fact, principally the allegations are  
against the Company. There is no specific allegation against the Managing Director.  
When a company has not been arrayed as a party, no proceeding can be initiated against  
it even where vicarious liability is fastened under certain statutes. It has been so held by  
a three-Judge Bench in *Aneeta Hada v. Godfather Travels and Tours (P) Ltd.* in the  
E context of the Negotiable Instruments Act, 1881."

- F <sup>18</sup> (2019) 3 SCC 797: "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."

- G <sup>19</sup> (2020) 10 SCC 751: "23. Clause (a) of sub-section (1) of Section 17 of the Act makes  
the person nominated to be in charge of and responsible to the company for the conduct  
of business and the company shall be guilty of the offences under clause (b) of sub-  
section (1) of Section 17 of the Act. Therefore, there is no material distinction between  
Section 141 of the NI Act and Section 17 of the Act which makes the company as well  
as the nominated person to be held guilty of the offences and/or liable to be proceeded  
and punished accordingly. Clauses (a) and (b) are not in the alternative but conjoint.  
H Therefore, in the absence of the company, the nominated person cannot be convicted or  
vice versa. Since the Company was not convicted by the trial court, we find that the  
finding of the High Court to revisit the judgment will be unfair to the appellant-  
nominated person who has been facing trial for more than last 30 years. Therefore, the  
order of remand to the trial court to fill up the lacuna is not a fair option exercised by  
the High Court as the failure of the trial court to convict the Company renders the  
entire conviction of the nominated person as unsustainable."



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(supra),<sup>20</sup> which applies when there is a legal bar for prosecuting a company or a firm, is not felicitous for the present case. No such plea or assertion is made by the respondent. A

15. Given the discussion above, we allow the present appeal and set aside the appellant's conviction under Section 138 read with Section 141 of the NI Act. The impugned judgment of the High Court confirming the conviction and order of sentence passed by the Sessions Court, and the order of conviction passed by the Judicial Magistrate First Class are set aside. Bail bonds, if any, executed by the appellant shall be cancelled. The appellant is acquitted.<sup>21</sup> However, there would be no order as to costs. B  
C

Nidhi Jain  
(Assisted by : Tamana, LCRA)

Appeal allowed.

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<sup>20</sup> The exception would be when the company itself has ceased to exist or cannot be prosecuted due to a statutory bar.

<sup>21</sup> However, as Simaiya Hariramani has preferred no appeal, we express no opinion in his case.