

HIMANSHU

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v.

B. SHIVAMURTHY & ANR.

(Criminal Appeal No. 1465 of 2009)

JANUARY 17, 2019

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**[DR. DHANANJAYA Y CHANDRACHUD
AND HEMANT GUPTA, JJ.]**

Negotiable Instruments Act, 1881 – s.141 and Proviso to s.138

– *Maintainability of Complaint – When cheque was drawn by a person as a director of a Company – Appellant borrowed a sum of money from respondent and issued a cheque – When cheque was presented in the bank for encashment, it was returned with the endorsement that funds were insufficient – Respondent issued notice to the appellant – Upon the failure of the appellant to pay the amount due under the cheque, a complaint was instituted – Appellant filed petition u/s. 482 of the Cr.P.C. to quash the complaint – Appellant contended that cheque was issued by one of the directors of the company and that was not a cheque issued by any person in his individual capacity – Submission of appellant was rejected by the High Court and it held that company could be arraigned as an accused, and the petition was dismissed – On appeal, held: In the instant case, the record before the Court indicated that the cheque was drawn by the appellant for 'L' Company, as its Director – Notice of demand was served only on the appellant – Complaint was lodged only against the appellant without arraigning the company as an accused – In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable – 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 s.138, the High Court was in error in holding that the company could now be arraigned as an accused – High Court erred in rejecting the petition u/s. 482 of the Cr.P.C – Code of Criminal Procedure, 1973 – s.482.*

Complainant-respondent instituted a complaint u/s.138 of the Negotiable Instruments Act, 1881 against the appellant. According to the complainant, the appellant had borrowed a sum

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- A of Rs. 4,15,000/- “for his business development” and on the same day, the appellant issued a cheque for an equivalent amount. When the cheque was presented for encashment to the Bank, it was returned with an endorsement that funds were insufficient. The complainant issued a notice to the appellant, upon the failure of the appellant to pay the amount due under the cheque, a complaint was instituted. Appellant instituted a petition u/s.482 of Cr.P.C. before the High Court, which was dismissed. Hence, the present criminal appeal.

Disposing of the appeal, the Court

- C HELD: 1. The judgment of the High Court has been questioned on two grounds. The appellant submits that firstly, the appellant could not be prosecuted without the company being named as an accused. The cheque was issued by the company and was signed by the appellant as its Director. Secondly, it was urged that the observation of the High Court that the company can now be proceeded against in the complaint is misconceived. Appellant also submitted that the offence under Section 138 is complete only upon the issuance of a notice of demand and the failure of payment within the prescribed period. In absence of compliance with the requirements of Section 138, it is asserted, the direction of the High Court that the company could be impleaded/arraigned at this stage is erroneous. [Para 7][996-C-D]
- F 2. The first submission on behalf of the appellant is no longer *res integra*. A decision of a three Judge Bench of this Court in *Aneeta Hada v. Godfather Travels and Tours Private Limited* governs the area of dispute. The issue which fell for consideration was whether an authorized signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 without the company being arraigned as an accused. The three Judge Bench held that applying the doctrine of strict construction, the considered opinion was 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. Further, the Court held that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. [Para 8][996-E-H; 997-A-B]

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Aneeta Hada v. Godfather Travels and Tours Private Limited (2012) 5 SCC 661 : [2012] 5 SCR 503 – relied on.

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3. 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 pre-conditions 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 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. [Para 9][997-D-E]

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Charanjit Pal Jindal v. L.N. Metalics (2015) 5 SCALE 16; *MSR Leathers v. S. Palaniappan* (2013) 1 SCC 177 : [2012] 9 SCR 165 – referred to.

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4. In the present case, the record before the Court indicates that the cheque was drawn by the appellant for ‘L’ Ltd. company, 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. [Para 12][998-G]

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5. 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. [Para 13][998-G-H; 999-A]

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- A 6. 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.[Para 14][999-B]
- B [2017] 9 SCR 324– referred to.

C	<u>Case Law Reference</u>		
	[2012] 5 SCR 503	relied on	Para 8
	(2015) 5 SCALE 16	referred to	Para 9
	[2012] 9 SCR 165	referred to	Para 10
D	[2017] 9 SCR 324	referred to	Para 11

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1465 of 2009.

E From the Judgment and Order dated 24.01.2006 of the High Court of Karnataka at Bangalore in Criminal Petition No. 4467 of 2005.

Rohan Thawani, Prashant Kumar, Dhawesh Pahuja, Joseph Pookkatt, Advs. for the appellant.

V. N. Raghupathy, Parikshit P. Angadi, Md. Apzal Ansari, Advs. for the respondents.

F The Judgment of the Court was delivered by

G **DR. DHANANJAYA Y CHANDRACHUD, J.** 1.A complaint under Section 138 of the Negotiable Instruments Act, 1881 was instituted by the respondent against the appellant. According to the complainant, the appellant had borrowed a sum of Rs. 4,15,000/- “for his business development” and on the same day, the appellant issued a cheque drawn on Karnataka Bank, Hosadurga for an equivalent amount. When the cheque was presented on 26 December 2003 for encashment to the State Bank of Mysore, Beligere Branch, the bank returned the cheque with an endorsement on 29 December 2003 stating that funds were

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insufficient. The complainant issued a notice to the appellant on 19 January A 2004 which was served on 28 January 2004.

2. Upon the failure of the appellant to pay the amount due under the cheque, a complaint was instituted.

3. The Civil Judge, Junior Division, Tiptur took cognizance on 6 July 2004 and issued summons to the appellant. B

4. The appellant instituted a petition under Section 482 of the Code of Criminal Procedure, 1973 (“CrPC”) before the High Court of Karnataka. Paragraph 6 of the petition states the ground on which the jurisdiction of the High Court was invoked.

“6. The cheque was issued by one of the directors of M/s Lakshmi Cement and

Industries Ltd., i.e., on behalf of said company. The said company was public limited company and in order to demonstrate the said fact, the accused herewith produces copies of the memorandum and articles of association of the company alongwith the certification of incorporation of the company and which are marked as ANNEXURE C1, C2 AND C3 respectively.”

In paragraph 7, the appellant averred thus:-

“7. ...

The complainant approached the learned Magistrate with a request to take cognizance against the accused stating that the accused on 23.12.2003 had issued a cheque in his favour and the said cheque was bounced on 26.12.2003 on meticulously going through the cheque dated 23.12.2005 it discloses that the cheque was issued by one of the directors of the company and that was not a cheque issued by any person in his individual capacity. If that is accepted the complaint should have been against the company and its Directors and not against the Accused.”

5. The appellant submitted that the cheque was issued by a Director of Lakshmi Cement and Ceramics Industries Ltd., a public limited company. In other words, the cheque was not issued by the signatory in his personal capacity. Hence, it was urged that the complaint ought to have been instituted against the company and its Directors and not against the appellant.

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A 6. The High Court by its order dated 24 January 2006 dismissed the petition. The High Court rejected the submissions urged on behalf of the appellant on the ground that the complainant had pleaded ignorance about the existence of the company. Moreover, in the view of the High Court, it would not be difficult for the complainant to take steps to proceed against the company as well as against other persons who are responsible for the affairs of the company.

B 7. The judgment of the High Court has been questioned on two grounds. Learned counsel appearing on behalf of the appellant submits that firstly, the appellant could not be prosecuted without the company being named as an accused. The cheque was issued by the company and was signed by the appellant as its Director. Secondly, it was urged that the observation of the High Court that the company can now be proceeded against in the complaint is misconceived. Learned counsel submitted that the offence under Section 138 is complete only upon the issuance of a notice of demand and the failure of payment within the prescribed period. In absence of compliance with the requirements of Section 138, it is asserted, the direction of the High Court that the company could be impleaded/arraigned at this stage is erroneous.

C 8. The first submission on behalf of the appellant is no longer *res integra*. A decision of a three Judge Bench of this Court in *Aneeta Hada vs. Godfather Travels and Tours Private Limited*¹ governs the area of dispute. The issue which fell for consideration was whether an authorized signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 without the company being arraigned as an accused. The three Judge Bench held thus:-

D F “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

G H ¹(2012) 5 SCC 661

when the corporate reputation is affected when a director is A indicted.”

In similar terms, the Court further held:

“59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution underSection 141of the Act, arraigning of a company as an accused is imperative. B 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.... “

9. The judgment of the three Judge Bench has since been followed C by a two Judge Bench of this Court in *Charanjit Pal Jindal vs. L.N. Metalics*². 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 pre-conditions which must be fulfilled before an offence D 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 E of a notice in writing to the drawer of the 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.

10. In *MSR Leathers vs. S. Palaniappan*³, this Court held thus :-

“12. The proviso to Section 138, however, is all important and F 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 G 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

²(2015) 15 SCC 768

³(2013) 1 SCC 177

- A 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.*"
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- C *11. 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 vs. J. Thomas⁴.*

Adverting to the ingredients of Section 138, the Court observed as follows:

- D "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 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..."
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- G 12. 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.

13. 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

H ⁴ (2018) 13 SC 663

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.

14. 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.

15. We, accordingly, are of the view that the High Court was in error in rejecting the petition under Section 482 of the CrPC.

16. We hence allow the appeal and set aside the judgment of the High Court. In consequence, the complaint, being C.R.P No. 27/2004 shall stand quashed.

17. During the pendency of these proceedings, this Court on 28 November 2008 recorded the statement of the appellant that he was willing to deposit the entire cheque, and hence issued the following directions:

“Learned counsel appearing for the petitioner submits that petitioner is willing to deposit the entire cheque amount which was dishonoured in this Court.

Let the amount be deposited in this Court within four weeks from today and on deposit of the amount within the aforesaid period, Registry to issue fresh notice to the respondent as respondent is not represented till date. The amount, so deposited, shall be invested in a fixed deposit in a nationalised bank initially for a period of six months and may be kept renewed from time to time until further orders.”

18. In pursuance of the aforesaid directions, the appellant deposited an amount of Rs. 4,15,000/- on 23 February 2009. The amount has been invested in a fixed deposit which has been renewed periodically.

19. In our view, having regard to the intent of the order which was passed by this Court on 28 November 2008, it would be appropriate and proper if the amount deposited in this Court, together with accrued interest, is paid over to the respondent-complainant.

A 20. The Registry shall, accordingly, issue a communication to the respondent intimating a copy of the present order (since the respondent has not appeared despite service of notice. The amount shall be disbursed to the respondent against proof of identity.

21. The criminal appeal is, accordingly, disposed of.

B Pending application(s), if any, shall also stand disposed of.

Ankit Gyan

Appeal disposed of.